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With this thought, we hereby present to you

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AN ANNEXTURE OF FOREIGN TERRITORY & CONSTITUTIONAL LIMITATIONS STUDY ON INDIA, AUSTRALIA, FRANCE & UNITED STATES OF AMERICA

- MINESH A PARMAR

INTRODUCTION

This article examines the scope of the territories power and the extent to which it is qualified by express or implied constitutional limitations. Legal arrangements and states typically, and perhaps inevitably, have a partial geographical scope territorial issues uncommonly become the emphasis of constitutional inspection, and then usually in the outlying instances of disputed territorial claims and separation. Portrayal on a compiled instance of India, Australia, France and USA state constitutional provisions about annexure of foreign territories, where in we will come to know about what power of parliament or congress, commonwealth has in respective countries.

Nevertheless, an accession of territory power is not exercised by the sovereign power of the nation as a whole, but has been delegated to a branch of the government by which it is exercised in a illustrative capacity, the treaty making power there, although it arises from sovereignty, rests in endowment, and it can be exercised only to the extent of and in accord with term determined by the grant.

The aim of the research paper titled, Annexure of Foreign Territories and Constitution Limitations in India, Australia, France and United Nations tries to analyse the procedure laid and practice followed by the above- mentioned countries for reorganisation of the states. The research methodology to be adopted for the paper is Doctrinal method. Wherein, the issue under observation is studied through a historical or evolutionary perspective so as to establish the present nature and state of the issue. The use of Analytical method is further made in order to understand and discuss the intricacies of the issue. The use of both Primary sources of literature such as the Bare acts,

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Constitution etc. as well as the Secondary sources of literature such as articles, books, journals, etc. has been read upon.

PROVISIONS IN RELATION TO ANNEXURE IN INDIA

Article 2 provides-

Parliament may be law admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Art.2 Which enabled parliament by law to admit with the union, or establish new states showed the foreign territories, which an acquisition known part of the territory of India Art.1(3)(c) could be by law be admitted with union. The acquisition of foreign territory of India in exercise of its inherent right as sovereign state automatically makes the said territory a part of the territory of India. After such territory is thus acquired and factually made a part of territory of India the process of law may assimilate it either under Art.2 or under Art.3(a) or (b),[1]Art. 2 involves the exercise of constitutional power where significance & importance of political components of decision deemed fit by parliament cannot be put out of constitution. Acquisition of a territory is a sovereign Act Acquired territory may be amalgamated in any existing state or may be formed into a state or a union territory. There is however vital difference between the initial acquisition of additional territory & admission of the acquire territory as full-fledged state of union of India similar to other state. Power to acquire & cede territory vest in the union, consent of state is not necessary for existing this power. It is legislative power advised by entries 13 and 14 of list I and also entry 97.

Somewhat territory which may, at any time be acquired by India by purchase, treaty, cession or conquest, will noticeably form part of part of the territory of India. These will be managed by the Government of India subject to legislation by Parliament. Art. 246(4) which says parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a state) notwithstanding that such matter is matter enumerated in the State list. On power of Judicial Review, it was held that it is open to the Court to examine whether the terms and conditions as provided in the law enacted by Parliament under Art. 2 is not wider in ambit than the amending power under Art. 368.

[1] Durga Das Basu, Commentory On The Constitution Of India, (Wadhva's Legal Classics 8th Edn.2012) P 457-458

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In Re: Berubari Union case was decided on 14th March 1960. It was decided by a seven-judge bench of the Honorable Supreme Court.

An erroneous depiction of the maps by the Radcliff Award. Radcliffe had separated the district of Jalpaigudi among India and Pakistan by presenting some thanas to one country and others to the other country. The boundary line was resolute on the basis of the boundaries of the thanas. In describing this boundary, Radcliffe misplaced to mention one Thana. Berubari Union 12 lies within Jalpaigudi thana which was given to India. Though, the oversight of the Thana Boda and the mistaken description on the map enabled Pakistan to claim that a part of Berubari belonged to it.[2] In this case various directives issued by both county's Commonwealth secretary, Ministry of External Affairs, Government of India, and the Foreign Secretary, Ministry of Foreign Affairs and Commonwealth, Government of Pakistan, discussed 10 items of dispute and signed one agreement which was involving the 'Berubari union' problem.

In signed agreement between India and Pakistan. This will be so divided as to give half the area to Pakistan, the other half adjacent to India. The Division of Berubari Union.12 will be horizontal, starting from the north east corner of Debiganj Thana, The divison should be made in such manner that the Cooch-Behar between Pachagar Thana of East Pakistan and Berubari Union 12 of Jalpaiguri Thana of West Bengal will remain connected as at present with Indian territory and will remain with India. It gives the impression that subsequently doubt has arisen whether the implementation of the Agreement relating to Berubari Union requires any legislative action either by way of a suitable amendment of the constitution or both; and that a similar doubt arisen about the implementation of the Agreement relating to the exchange of Enclaves or is an amendment of the Constitution in accordance with Art.368 of the Constitution.

On behalf of the Union Of India the learned Attorney- General has contended that no legislative action is necessary for the implementation of the agreement relating to the Berubari union as well as the exchange of enclaves. The motive of this agreement is to determine or delineate the exact boundary because which dispute has been occurred among the countries, and this agreement was

[2] Admin, "Home" (*[Case Brief] In Re: Berubari Union Case, 1960*July 7, 2017) <https://lawbriefs.in/in-re-berubari-union-case-1960-legislative-action-is-necessary-for-the-implementation-of-agreement-relating-to-berubari-union/> accessed October 1, 2019

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just an ascertainment & recognition of the boundary of the boundary which has been already fixed and there was no change in territory[3].

PROVISIONS IN RELATION TO ANNEXURE IN AUSTRALIA

Section 121 provides-

"The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament as it thinks fit."

So, the Commonwealth Parliament has plenary powers in this respect and there is no condition as regards equality of the new State as in the American Constitution. The admitted State would be bound by whatever condition may be imposed by Parliament, including the extent of its representation in Parliament.

The word 'admit' refers to the admission of a duly organised political community which might be called a 'State' from before such admission: while 'establish' refers to the creation of a state where none existed before.

Section 122 provides-

The parliament make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory place by the Queen under the authority of and accepted by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.[4]

The legislative power given under s 122 has been delineated as "a disparate and non-federal matter" In contrast the other commonwealth legislative power, the power given under s 122 is not verbalized to be "subject to this Constitution". Initial years of the federation, several High Court decisions guided that the territories power was detached from and unobstructed by other provision in the Constitution. Though, while continuing to recognise the comprehensive nature of the territories power, consequent decisions have recognised that s 122 may be subject to some of the

[3] Berubari Union (Re;), Air 1960 Sc 845: (1960) 3 Scr 250; R.C.; *Poudyal V Union Of India*, Air 1996 Sc 1804: 1994 Supp (1) Ssc 324 , Venkatachalam J Quoting From Constitutional Law Of India, Edited By Hidyatullha. J And Published By The Bar Council Of India Trust
[4] Pylee MV, *Select Constitutions of the World* (Universal Law Co 2006), pp.53

confines which apply to the exercise of the Commonwealth's general powers to make laws for the whole county. Mostly High Court said in it's a contemporary decision. "There may be some qualifications to the power to make laws under s 122 according to constitution buy which is yet remain unidentified". The trouble is in recognising which limitations restrict the territories power and which do not, and finding some principle for the difference between among the both. Interesting question is that whether the territories power is subject to the implied freedom of political communication recently discovered by the High Court.

The power and extent to which its qualified by constitutional limitations either implied or expressed. There are certain issues in connections with the consistent laws to the s 122 and territorial powers conferred under s 51. Whether the common law generally apply to the throughout territories to be supported by s 122 or s 51 itself as head power. While laws relating consistent s 51 on territories made by parliament may be unrestricted by constitutional limitations.[5]

The balance of authority favours the view that s 51 can apply to the territories and that consequently a general law under s 51 may extend to the territories without any assistance from s 122. There have, however, been occasional judicial suggestions to the contrary. For instance, in a dissenting judgment in Porter v The King; ex parte Yee, Knox CJ and Gavan Duffy J asserted that:

In legislating for the territories, the Parliament must rely wholly upon the powers contained in s 122, and cannot have recourse to legislative powers contained in Chapter I, Pt V of the Constitution, which have reference only to laws for the peace order and good government of the Commonwealth. [6]A similar approach was adopted by Kitto J in Spratt v Hermes,6 who took the view that the Post and Telegraph Act 1901 (Cth) "operates in the territory by force of s 122 as a law for the government of the territory, whereas it operates in the Commonwealth proper by force of s 51(v) as a law for the peace, order and good government of the Commonwealth".

Section 80 provide-

The trail on the indictment of the any offence against any law of the commonwealth shall be by jury, and every such trail shall be held in the State where the offence was committed, and if the

[5]Christopher Horan, "Section 122 Of The Constitution: A "Disparate And Non-Federal" Power?, Federal Law Review Vol.25,1997

[6] Porter v The King; Ex parte Yee [1926] HCA 9; 37 CLR 432 (https://jade.io/article/63291)

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offence was not committed within any State the trail shall be held at such place or places as parliamentary prescribes.[7]

There was one interesting case regarding this is of *R v Bernasconi* the court had maintain that according to s 80 of the Constitution that (there is an requirement of trail in the incident of any offence against the law of the Commonwealth to be the jury) does not apply to offence created while exercising the legislative powers given under s 122. The defendant had been convicted of assaulting bodily harm, chargeable offence in the central court in the territory of Papua. The pertinent ordinances provided that, except few exception there is no any relevance in this case, all trails should be held without a jury, Hence an appeal for conviction as per s 80 gave defendant right to trial by jury not granted by high court.

Griffith CJ remarked that Chapter III of the Constitution of Australia dealt with the judicial power of the Commonwealth and was not applicable to the territories, and further that laws legislated under that territorial powers were not "laws of the Commonwealth" in context of s 80 of constitution.[8]

It is to be established that territories form the part of "the Commonwealth" and consequently may be the subject to the general laws enacted for the whole of the Commonwealth. Likewise, laws made by commonwealth for its government territories should not be d*isjoined* from the constitution of the nation. It seem that the territories power interpreted as not restricted by any limitation which otherwise apply while exercising the general legislative power of commonwealth. Thus, the power given under s 122 is might not be a "disparate" power, fundamentally it is a "non-federal" power. There should be comparison among commonwealth's power in relation to its territories as well states power to its jurisdiction. It doesn't mean that territories power is exclusively free from any constitutional limitation whether it may be expressed or implied, but it will generally be made subject to such restrictions only where they also apply to the States.[9]

[7] Pylee MV, *Select Constitutions of the World* (Universal Law Co 2006), pp.47
[8] Lesli Zine, "Laws For The Government Of Any Country" : Section 122 Of The Constitution, Terratory Power, June 1996
[9]Christopher Horan, "Section 122 Of The Constitution: A "Disparate And Non-Federal" Power? Federal Law Review Vol.25,1997

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PROVISIONS IN RELATION TO ANNEXURE IN FRANCE

Article 53 provides-

Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.[10]

Article 74 provides-

The Overseas territorial communities to which this article applies shall have a status reflecting their respective local interests within the Republic. This status shall be determined by an Institutional Act, passed after consultation of the Deliberative Assembly, which shall specify:

• the conditions in which statutes and regulations shall apply there;

• the powers of the territorial community; subject to those already exercised by said community the transfer of central government powers may not involve any of the matters listed in paragraph four of article 73, as specified and completed, if need be, by an Institutional Act;

• the rules governing the organization and operation of the institutions of the territorial community and the electoral system for its Deliberative Assembly;

• the conditions in which its institutions are consulted on Government or Private Members' Bills and draft Ordinances or draft Decrees containing provisions relating specifically to the community and to the ratification or approval of international undertakings entered into in matters within its powers.

The Institutional Act may also, for such territorial communities as are self-governing, determine the conditions in which:

• the Conseil d'état shall exercise specific judicial review of certain categories of decisions taken by the Deliberative Assembly in matters which are within the powers vested in it by statute;

• Establishment of administrative courts

[10] Pylee MV, *Select Constitutions of the World* (Universal Law Co 2006), pp.180

• the Deliberative Assembly may amend a statute promulgated after the coming into effect of the new status of said territorial community where the Constitutional Council, acting in particular on a referral from the authorities of the territorial community, has found that statute law has intervened in a field within the powers of said Assembly;

• measures justified by local needs may be taken by the territorial community in favour of its population as regards access to employment, the right of establishment for the exercise of a professional activity or the protection of land;

• the community may, subject to review by the central government, participate in the exercise of the powers vested in it while showing due respect for the guaranties given throughout national territory for the exercising of civil liberties.

The other rules governing the specific organization of the territorial communities to which this article applies shall be determined and amended by statute after consultation with their Deliberative Assembly.[11] Apparent disparity among overseas former colonies by France and fall of their empires by countries like Britain, Dutch and Americans. Non-European France territories known as France overseas territories.

People live in overseas France territory can vote in French election and can have representation in French parliament which makes it different than other countries like UK AND USA. Another important thing about France is that it is a single country which happens to be scattered throughout the world. And important thing about French is that the term 'department' and territories overseas whereas the team 'territory' is used differently at world level and term 'regions' is used instead 'province'.

French Southern and Antarctic Lands in the conventional sense of world known as French territory. These areas consist of mostly islands and no population seen there. While French Guiana is overseas territory that is not island which is being jointly shared by France, Brazil and Suriname.

There is one famous incident of France territory being acquired by USA under:

[11] Pylee MV, *Select Constitutions of the World* (Universal Law Co 2006), pp.172

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The Louisiana Purchase (French: Vente de la Louisiana 'Sale of Louisiana') was the acquisition of the territory of Louisiana by the United States from France in 1803. In return for fifteen million dollars, or approximately eighteen dollars per square mile, the United States nominally acquired a total of 828,000 sq mi (2,140,000 km2; 530,000,000 acres). However, France only controlled a small fraction of this area, with most of it settled by Native Americans; for the majority of the area, what the United States bought was the "pre-emptive" right to obtain Native American lands by treaty or by conquest, to the exclusion of other colonial powers. The total cost of all subsequent treaties and financial settlements over the land has been estimated to be around 2.6 billion dollars.

The Kingdom of France had controlled the Louisiana territory from 1699 until it was ceded to Spain in 1762. In 1800, Napoleon, then the First Consul of the French Republic, regained ownership of Louisiana as part of a broader project to re-establish a French colonial empire in North America. However, France's failure to put down a revolt in Saint-Domingue, coupled with the prospect of renewed warfare with the United Kingdom, prompted Napoleon to consider selling Louisiana to the United States. Acquisition of Louisiana was a long-term goal of President Thomas Jefferson, who was especially eager to gain control of the crucial Mississippi River port of New Orleans. Jefferson tasked James Monroe and Robert R. Livingston with purchasing New Orleans. Negotiating with French Treasury Minister François Barbé-Marbois (who was acting on behalf of Napoleon), the American representatives quickly agreed to purchase the entire territory of Louisiana after it was offered. Overcoming the opposition of the Federalist Party, Jefferson and Secretary of State James Madison convinced Congress to ratify and fund the Louisiana Purchase.

Provisions in Relation to Annexure in United States of America

Article IV, S 3 (1) of the American Constitution provides-

> ***"…****but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislature of the States concerned, as well as of the congress"*

This is one of the provisions by which the integrity of the States in the federal system is maintained. It means that it will not be open to one of the parties (viz. the National Government or the Union) to redraw the map of the United States. It prevents the merger or partition of States without their

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consent. The plenary power of Congress to admit new States into the Union is subject to this limitation.[12]

There was one case regarding this situation know as 'insular case' is of *Downes v. Bidwell 182 U.S. 244 (1901)* in which US Supreme Court decided whether US territories were subject to the provisions and protections of the US Constitution. This is sometimes stated as whether the constitution follows the flag. The resulting decision narrowly held that the constitution did not necessarily apply to territories. Instead, the US Congress had jurisdiction to create law within territories in certain circumstances, particularly in those dealing with revenue, which would not be allowed by the Constitution for proper states within the Union.

The case specifically concerned a merchant, Samuel Downes, who owned S. B. Downes & Company. His company had imported oranges into the port of New York from the newly acquired territory of Puerto Rico and had been forced to pay import duties on them. He sued George R. Bidwell, United States customs inspector for the port of New York.

The Supreme Court, in Delima v. Bidwell, had decided that ever since Puerto Rico had been acquired by the United States from Spain in the Treaty of Paris (1898), normal customs levied on imports from foreign countries did not apply to imports from Puerto Rico since Puerto Rico had ceased to be a foreign country.

Though, the Foraker Act now levied customs specifically on imports from Puerto Rico. Downes disputed its constitutionality on the grounds that such duties were under the jurisdiction of Article I, Section 8 of the US Constitution, which provides that "all duties, imposts, and excises shall be uniform throughout the United States." Since the duty on oranges did not exist for other parts of the United States, he argued that it should not exist for Puerto Rico.

The Supreme Court decided 5-4 that the newly annexed territories were not properly part of the United States for purposes of the Constitution in the matter of revenues, administrative matters, and the like. However, the court was careful to note that the constitutional guarantees of a citizen's rights of liberty and property were applicable to all: such guarantees "cannot be under any circumstances transcended," said Justice Edward Douglass White, in his concurring opinion.

[12] Basu DD and Subbramani SS, *Commentary on the Constitution of India*, vol 1 (8th edn LexisNexis 2014)

Territories were due the full protections of the Constitution only when Congress had incorporated them as an "integral part" of the United States.

The dissent written by Justice John Marshall Harlan held that Congress was always bound to enact laws within the jurisdiction of the Constitution: "This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place." He held that the Congress had no existence and therefore had no authority, outside of the Constitution[13]

CONCLUSION

Admission of new states has been expressly provided under the four above mentioned constitutions namely India, Australia, France and United States. Under the India Constitution, the procedure is not expressly laid down but through judicial decisions the judiciary have developed the procedure. The procedure in India is a flexible and by a constitutional amendment the accession of foreign territory. In comparison to the France procedure, the consent of the concerned population is required which in a way makes the accession a rigid in comparison to India. It can be further concluded that, the accession or cession of territory of or by the state does not lead in dilatation of the sovereign status of the country. Similar provision has been enumerated in the United States Constitution were the concern of the state legislature is required. The Constitution makes provision for the establishment and admission of new States (sections 121 and 124). No new States have been established or admitted since federation. Under section 121, a new State can be created by an Act of the Commonwealth Parliament. The process differs in each country from rigid to flexible in the four countries.

[13] *Downes v Bidwell*

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CRITICAL ANALYSIS OF EUTHANASIA IN INDIA

- APOORVA AGARWAL & AMAN DURGA

ABSTRACT

Every person has a Right to live according to Article 21 of Indian Constitution but as Justice Chandrachud has said "There is no antithesis between life and death. Death represents the culmination, dying is the process." Which conclude the fact death is also a part of life, hence the question arises is that "whether death with dignity is a part of meaningful existence or whether a person has the right to end his life or not"

It discusses in detail the landmark case which changed the history of euthanasia in India and its forward approach. The Paper also analyses critically the historical and religious background of euthanasia stating it as an ancient concept and not a new one.

This paper seek to discuss what euthanasia is and its implementation & classification and how it is different from suicide and murder. This paper will also talk about whether "right to death" is included in Right to live or not. It also describes the topic in terms of report given by law commission of India and concludes by providing the relevance and implementation of euthanasia worldwide.

INTRODUCTION

Life is precious. Every human being desires to live and enjoy his life to its fullest. But sometimes life gives such a challenge to a person that he wishes to end his life. But the process of ending life is mostly chosen by the person himself. When a person tends to end his life by his own act, we term it as 'suicide' but to end the person's life on his request by others is what has been called as 'mercy killing' or 'euthanasia'. The term euthanasia comes from the Greece words "eu"and "thanatos"which means "good death "or "easy death[14] ". Euthanasia literally means putting a

[14]Lewy G. 1. Assisted suicide in US and Europe. New York: Oxford University Press, Inc; 2011

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person to painless death especially in case of incurable suffering or when life becomes purposeless as a result of mental or physical handicap[15] . Euthanasia or mercy killing is the practice of killing a person for giving relief from incurable pain or suffering or allowing or causing painless death when life has become meaningless and disagreeable.[16]

According to Black's Law Dictionary (8th edition) euthanasia means the act or practice of killing or bringing about the death of a person who suffers from an incurable disease or condition, esp. a painful one, for reasons of mercy. Encyclopedia of 'Crime and Justice', explains euthanasia as an act of death which will provide a relief from a distressing or intolerable condition of living. Today the topic is highly popular as well as controversial. In modern context, euthanasia is performed by doctors at the request of the patient which is anyway going to die from prolonged illness. Now the legal aspect comes into play when the patient is not in a state to decide for himself and it is the court which has to intervene to look into the matter and decide in the best interest of the patient. In Netherlands, Belgium, Colombia and Luxembourg euthanasia is legal. Switzerland, Germany, Japan and some states in the United States of America permit assisted suicide while in nations like Mexico and Thailand it is illegal. In India passive euthanasia is legal, while debate goes on about legalizing active euthanasia.

HISTORICAL AND RELEGIOUS BACKGROUND

The authors find it pertinent to trace the historical and religious story of euthanasia before coming to its current position. This concept is not a new concept rather it is existing since the evolution of human civilization. Euthanasia was practiced in Ancient Greece and Rome: on the island of Kea, hemlock a poisonous plant was in use as a means for quickening death, a technique also followed in Marseilles. Euthanasia is not accepted in Judaism and Christian traditions. While criticizing the practice Thomas Aquinas says that it is against man's survival instinct. The Greek philosophers Socrates and Plato supported euthanasia while Hippocrates disapproved it. One argument against euthanasia or physician-assisted suicide is the Hippocratic

[15] Dr. Parikh, C.K. (2006). Parikh's Textbook of Medical Jurisprudences, Forensic Medicine and Toxicology. 6th Edition, Page 1.55. Ne Delhi, CBS Publishers & Distributors.
[16]Nandy, Apurba. (1995). Principles of Forensic Medicine, 1st Edition, Page 38.Kolkata, New Central Book Agency (P) Ltd.

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Oath, dating back some 2,500 years. All doctors take this oath.The original oath included, among other things, the following words:

"I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect."

There are variations of the modern oath. One states:

"*If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty."*

As the world has changed since the time of Hippocrates, some feel that the original oath is outdated. In some countries, an updated version is used, while in others, for example, Pakistan, doctors still adhere to the original[17].Religions like Hinduism, Jainism and Buddhism recognize willful death. The concept has philosophical background. It talks about an endless circle of life and death and attaining salvation. The notion of ending the life after the purpose of the birth is fulfilled was accepted by these schools of thought. Hindu saint Dnyaneshwar concluded his mortal life after his work was over. Thus, trace of right to die existed in earlier times. Hindu mythology describes the suicide by Lord Rama as Jal Samadhi. In the times of Lord Buddha it was called Maharparinirvaan. Similar was the case of Lord Mahaveer. SwatantraveerSavarkar and Acharya VinobaBhave renounced their lives resorting to Prayopavesa. It literally means resolving to die through fasting. Mahatma Gandhi also supported the idea of willful death. Scholars like these approved death by peaceful means. Govardhana and Kulluka, while writing commentaries on Manu, observed that a man may undertake the Mahaprastha (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[18].

CLASSIFICATION OF EUTHANASIA

[17]www.medicalnewstoday.com/articles/182951.php Last updated Mon 17 December 2018
[18]Laws of Manu, translated by George Buhler, Sacred books of the East by F Max. Muller (1967 reprint) Vol 25, Page 206

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Euthanasia require critical analysis for its classification .Talking regarding procedural distinctions euthanasia is classified in two categories: Active Euthanasia and Passive Euthanasia.

Active euthanasia is hasten the death of person by an act by oneself or with the aid of an doctor when the condition of person can't be made any better. An act is required (use of lethal substance) in active Euthanasia to deliberately cause the death of person.

In Passive euthanasiadeath is caused by omission of an act i.e. by removing the source on which the person life is dependent. It can be done by withdrawing or withholding treatment.

Example of withdrawing and withholding treatment are :

- switch off life-support machines , disconnect a feeding tube (withdrawing treatment)
- don't carry out a life-extending operation ,don't give life-extending drugs *(Withholding treatment)*

The conventional doctrine is that there moral difference between the two that, passive euthanasia is sometimes permissible but active euthanasia is always forbidden as in passive euthanasia the doctors are not actively killing anyone, they are not simply saving the patient. The doctrine rests on the distinction between killing and letting die. The moral distinction is that passive euthanasia is permissible because it is acceptable to withdraw or withhold treatment and allow a patient to die but it is not acceptable to kill a patient by a deliberate act even though the act was as per the consent of patient.

On the basis of consent, Euthanasia is classified into 3 types : Voluntary euthanasia , Involuntary euthanasia and Non voluntary euthanasia

*Voluntary Euthanasia means when the consent of Euthanasia is given by the patient. In this the person consent can also be determined by his living will.a living will is a directive to physicians and is a written document that allows patient to stateexplicit advance instructions about their end of term medical care.*In a living will, a person can outline whether or not he want life sustaining artificial treatment or not.

In Involuntary euthanasia the consent of Euthanasia is conducted without the consent of patient and also against their will. Involuntary Euthanasia will clearly amount to murder as in this the

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patient's life is bought to an end against his wishes. In Involuntary Euthanasia a patient is killed without an expressed wish.

In Non Voluntary Euthanasia the consent of Euthanasia is not given by the patient as he is not in a position to give consent but the consent is given by near relative of patient. It occurs when a person is not in position to give consent (for example, a very young baby or a person of extremely low intelligence) to make a meaningful choice between living and dying, then in this case the decision is taken by the near relative of the patient.

LEGAL ASPECTS OF EUTHANASIA IN INDIA

As we proceed further, it is quite obvious that the concept of euthanasia is highly controversial as it involves killing of someone, even if it is for his own benefit. In modern context, it is for the welfare state to decide and implement what is crucial for its citizens by weighing the pros and cons of a particular decision. This is a basic, grass root issue in approving euthanasia and its legality. One cannot go on suggesting what the State or legislature must do about it. The issue of legalizing euthanasia is quite bold and must be considered critically. India is a country of vast population and a large fraction of the population is still illiterate and unaware about their basic rights. Our country is still fighting with issues like domestic violence, surrogacy laws which are not just legal issues but also medical issues. A concept like euthanasia is unknown to many.

The situation is India has been changing with regard to this concept. Article 21 of our constitution is one such provision which can be interpreted to its widest sense. Article 21 reads as under –

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

Analyzing the concept of mercy killing, in cases of euthanasia or mercy killing there is an intention on the part of the doctor to end the life of the patient, such cases would clearly fall under clause first of Section 300 of the Indian Penal Code, 1860. However, as in such cases there is a valid consent of the deceased i.e. Exception 5 to the said Section would be attracted and the doctor or the medical professional would be punishable under Section 304 for culpable homicide not amounting to murder. But it is only cases of voluntary euthanasia (where the patient consents to death) that would attract Exception 5 to Section 300. Cases of non-voluntary and involuntary euthanasia would be struck down by proviso one to Section 92 of the IPC and thus be rendered

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illegal. The law in India is also very clear on the aspect of assisted suicide. Right to suicide is not a "right" available in India – it is punishable under the India Penal Code, 68 1860. Provision of punishing suicide is contained in sections 305 (Abetment of suicide of child or insane person), 306 (Abetment of suicide) and 309 (Attempt to commit suicide) of the said Code. Section 309, IPC has been brought under the scanner with regard to its constitutionality. Right to life is an important right enshrined in Constitution of India. Article 21 guarantees the right to life in India. It is argued that the right to life under Article 21 includes the right to die. Therefore the mercy killing is the legal right of a person. After the decision of a five judge bench of the Supreme Court in ***Gian Kaur v. State of Punjab***[19] it is well settled that the "right to life" guaranteed by Article 21 of the Constitution does not include the "right to die". The Court held that Article 21 is a provision guaranteeing "protection of life and personal liberty" and by no stretch of the imagination can extinction of life be read into it.

In existing regime under the Indian Medical Council Act, 1956 also incidentally deals with the issue at hand. Under section 20A read with section 33(m) of the said Act, the Medical Council of India may prescribe the standards of professional conduct and etiquette and a code of ethics for medical practitioners. Exercising these powers, the Medical Council of India has amended the code of medical ethics for medical practitioners. There under the act of euthanasia has been classified as unethical except in cases where the life support system is used only to continue the cardio-pulmonary actions of the body. In such cases, subject to the certification by the term of doctors, life support system may be removed. A person attempts suicide in a depression, and hence he needs help, rather than punishment.

The Bombay High Court in ***Maruti Shripati Dubal v. State of Maharashtra***[20]examined the constitutional validity of section 309 and held that the section is violative of Article 14 as well as Article 21 of the Constitution. The Section was held to be discriminatory in nature and also arbitrary and violated equality guaranteed by Article 14. Article 21 was interpreted to include the right to die or to take away one's life. Consequently it was held to be violative of Article 21. The High Court of Bombay in Maruti Shripati Dubal's case[21] held Section 309 (punishment for attempted suicide) of the Indian Penal Code (IPC) as violative of Articles 14 (Right to Equality)

[19]1996 (2) SCC 648 : AIR 1996 SC 946
[20]1987 Cri.L.J 743 (Bom.)
[21]MarutiShripatiDubal v. State of Maharashtra; 1987 Cri.L.J 743 (Bomb)

and 21 (Right to Life) of the Constitution. The Court held section 309 of the IPC as invalid and stated that Article 21 to be construed to include right t o die. In ***P. Rathinam's case***[22], the Supreme Court held that section 309 of the IPC is violative of Article 21 of the Constitution as the latter includes right to death.

The question again came up in Gian Kaur v. State of Punjab case. In this case a five judge Constitutional bench of the Supreme Court overruled the P. Rathinam's case and held that right to life under Article 21 does not include right to die or right to be killed and there is no ground to hold section 309, IPC constitutionally invalid. The true meaning of life enshrined in Article 21 is life with human dignity. Any aspect of life which makes a life dignified may be included in it but not that which extinguishes it.

THE LANDMARK CASE OF ARUNA SHANBAUG

This is a case which gave new legal dimension to the concept of euthanasia in India. It is pertinent to mention the horrifying facts of this case. The facts were that the petitioner ArunaRamachandraShanbaug was a staff Nurse working in King Edward Memorial Hospital, Parel, Mumbai. She was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and held her back with it on the evening of 27th November, 1973. He sodomized her finding that she was menstruating he could not rape her. He twisted the chain around her neck. A cleaner found her in an unconscious condition lying on the floor with blood all over on the next day. Due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged.

Around Thirty six years had lapsed since the said incident. Since then Aruna had been surviving on mashed food and couldn't move her hands or legs. It was alleged that there is no possibility of any improvement in the condition and that she was entirely dependent on KEM Hospital, Mumbai. She was in a permanent vegetative state (PVS) and a virtually living corpse. It was prayed by the petitioner to stop feeding her and let her die in peace. The respondents i.e. KEM Hospital responded by a counter petition stating that she is not brain dead, she has senses and she reacts to

[22]P. Rathinam vs. Union of India and Anr., 1994 SCC 394 70

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certain situations like devotional music, light etc. The respondents claimed that euthanasia was nit necessary in the present case.

On 7 March 2011, The Hon'ble Division Bench of the Supreme Court of India, comprising Justice MarkandeyKatju and Justice GyanSudha Mishra, delivered this historic judgment. The Court opined that she was not brain dead based on the doctors' report and the definition of brain death under the Transplantation of Human Organs Act, 1994. The Court examined it the following way quoting *"A person's most important organ is his / her brain. This organ cannot be replaced. Other body parts can be replaced e.g. if a person's hand or leg is amputed, he can get an artificial limb. Similarly, we can transplant a kidney, a heart or a liver when the original one has failed. However, we cannot transplant a brain. If someone else's brain is transplanted into one's body, then in fact, it will be that other person living in one's body..... This is probably because brain cells are too highly specialized to multiply. Hence if the brain cells die, they usually cannot be replaced (though sometimes one part of the brain can take over the function of another part in certain situations where the other part has been irreversibly damaged). Brain cells require regular supply of oxygen which comes through the red cells in the blood. If oxygen supply is cut off for more than six minutes, the brain cells die and this condition is known as anoxia. Hence, if the brain is dead a person is said to be dead*[23]."

Though the fact was she was in a PVS but terminating her life on this behalf was unjustified. The Court further stated that the Indian law would no where advocate that to deny food to a person to let him die. There is a difference between removal of ventilators and non continuation of food. If euthanasia would be allowed in this case, then it would reverse the efforts done by the hospital for so many years.

The Court also reaffirmed the parenspatriae principle to prevent the misuse of this process and recognized passive euthanasia in certain conditions subject to prior approval by the High Court. The crux of the guidelines are that whenever an application for passive euthanasia is filed in the High Court, the Chief Justice of the High Court should constitute a bench of at least two judges. The Bench must seek the opinion of a committee of three reputed doctors after consulting the

[23]2011 (4) SCC 454 : AIR 2011 SC 1290

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medical authorities as it may deem fit. The High Court shall issue notice to the close relatives of the patient and supply a copy of the doctor's report to them as soon as possible.

Aruna Shanbaug was denied euthanasia in this case and she died on 18th May 2015 due to pneumonia after staying in a vegetative state for nearly 42 years.

In yet another case of ***Common Cause (A registered Society) Vs. Union of India***,[24] the question was raised in the Supreme Court in 2005 as to whether individuals have right to die with dignity. The Court answered this is affirmative. The Court in this case also laid down the principles relating to the procedure for execution of Advance Directive and provided the guidelines to give effect to passive euthanasia in both circumstances, namely, where there are advance directives and where there are none, in exercise of the power under Article 142 of the Constitution and the law stated in Vishaka and Others v. State of Rajasthan and Others[25]. The judgment has been delivered by a Bench comprising of Chief Justice of India Dipak Misra, Justice A.K. Sikri, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud and Justice Ashok Bhushan and the relevant excerpt is -

"The directive and guidelines laid down by the court shall remain in force till the Parliament brings legislation in the field. This ruling thus permits the removal of life-support systems for the terminally ill or those in incurable comas. The court also permitted individuals to decide against artificial life support, should the need arise by creating a living will. Right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum of Article 21 to include within it the 190 right to live with dignity as component of right to life and liberty. It has to be stated without any trace of doubt that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery[26]".

EUTHANASIA, SUICIDE AND MURDER – ARE THEY SYNONYMS?

Suicide and euthanasia are two different thing and also there is a thin line between euthanasia and murder. The main issue behind concept of euthanasia in India is that whether Right to death is

[24] Writ Petition (Civil) of 2015
[25] (1997) 6 SCC 241
[26] Supra note 11

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included in Right to life or not and in Common cause vs. Union of India (2018), Supreme Court in five judge Constitutional Bench has declared that death with dignity is a part of meaningful existence. with the passage of time euthanasia has emerged and is also legalized by many countries as it gives relief from an intolerable condition of living where a patient is alive only because of life supporting machine, hence the patient's life is artificially maintained and in this condition the patient's body has reached a point where, without such support, life would end naturally but not necessarily without pain. Though euthanasia is legalized in some countries, but strict guidelines and procedures should be followed while conducting euthanasia else it would amount to murder.

"There is no antithesis between life and death. Death represents the culmination, dying is the process."- Justice Chandrachud[27].

According to Oxford dictionary suicide is an act of killing yourself deliberately. In India, intention is the basis for Penal liability. An act is not an criminal act if it is done without any intention and this is based on famous roman maxim, "Actus non facit reum nisi men sit rea". Now in euthanasia victim has given the consent, hence accused is not liable for any offense. But law relating to consent as contained in Indian penal code is very exhaustive and leaves no ambiguity to explain it. Section 87 of Indian penal code clearly lays down that consent cannot be pleaded as defense inn case where consent is given to cause death or grievous hurt.

Therefore, suicide could be termed as intentional termination of one's life by self-induced means for various reasons such as frustration, depression etc.

The Bombay high court in ***Maruti Shripati Dubal Case***[28] has attempted to make a distinction between suicide and euthanasia. According to the court the suicide by its very nature is an act of self-killing or termination of one's own life by one's act without any assistance from others. But euthanasia means the intervention of their human agency to end the life. Mercy killing therefore cannot be considered in the same footing as on suicide.

[27] https://timesofindia.indiatimes.com/blogs/voices/welcoming-the-decison-legalising-passive-euthanasia/ Visited on May 2,2018 4:51 PM IST
[28] Supra note 7

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CONCLUSION

A close analysis of the arguments against euthanasia that have been summarized above tend to indicate that all the talk about sanctity of life notwithstanding, the opposition to euthanasia breeds from the fear of misuse of the right if it is permitted. It is feared that placing the discretion in the hands of the doctor would be placing too much power in his hands and he may misuse it. This fear stems largely from the fact that the discretionary power is placed in the hands of non judicial personnel (a doctor in this case). This is so because we do not shirk from placing the same kind of power in the hands of a judge (for example, when we give the judge the power to decide whether to award a death sentence or a sentence of imprisonment for life). But what is surprising is that the fear is of the very person (the doctor) in who's hands we would otherwise not be afraid of placing our lives. A doctor with a scalpel in his hands is acceptable but not a doctor with a fatal injection. What is even more surprising is that ordinarily the law does not readily accept negligence on the part of a doctor.

The Courts tread with great caution when examining the decision of a doctor and yet his decision in the cases of euthanasia is not considered reliable. It is felt that a terminally ill patient who suffers from unbearable pain should be allowed to die. Indeed, spending valuable time, money, and facilities on a person who has neither the desire nor the hope of recovery is nothing but a waste of the same. At this juncture it would not be out of place to mention that the "liberty to die", if not right in strict sense, may be read as part of the right to life guaranteed by Article 21 of the Constitution of India. Recently the judgment of our Supreme Court in Aruna Ramchandra Shanbaug v. Union of India legalized the passive euthanasia and observed that passive euthanasia is permissible under supervision of law in exceptional circumstances but active euthanasia is not permitted under the law. Here it is sought only to agree for the legalization of voluntary (both active and passive) euthanasia. This is because though there may be some cases of non-voluntary or involuntary euthanasia where one may sympathize with the patient and in which one may agree that letting the patient die was the best possible option, yet it is believed that it would be very difficult to separate each cases from the other cases of non-voluntary or involuntary euthanasia.

Thus, it is believed that the potential of misuse of provisions allowing non-voluntary and involuntary euthanasia is far greater than that of the misuse of provisions seeking to permit voluntary euthanasia. It is submitted that in the present scheme of criminal law it is not possible to

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construe the provisions so as to include voluntary euthanasia without including the non-voluntary and involuntary euthanasia while expressly prohibiting non-voluntary and involuntary euthanasia. Coming back to the argument of the opponents of euthanasia that any legislation legalizing voluntary euthanasia would lead to a misuse of the provisions, the risk and fear of misuse and abuse could be done away with proper safeguards and specific guidelines.

Though in this regard the 196th Law Commission Report[29] and the guidelines given in the Aruna's case are there and guidelines will continue to be the law until Parliament makes a law on this point. As it has been already stated, the issue of legalizing euthanasia is not a simple task. Whatever the parliament, the executive and the judiciary face regarding its handling is not possible to describe. India is a diverse country with diverse culture and traditional norms. It is not an urgently required legislation in India, when other grave matters require government's attention and dealing. Demand for euthanasia legislation is not inappropriate or untimely. There are many medical problems and unethical practices in India which are prone to violate moral, ethical and humane sides of practice of euthanasia. A consideration can be given for enacting a law for carrying out euthanasia. But it poses practical problems.

Euthanasia is a process which cannot be applied generally. Every case is different and thus requires different standards. The conditions and requirements for carrying out euthanasia are not watertight compartments. Hence, it should not become an emotional matter. The judiciary in India is quite in its senses, which studies the issue on case to case basis. No constitutional body can be rushed or pressurized to legalize euthanasia. The scholars advocating euthanasia suggest that India can make legislation on the basis of models of the countries with such legislation. These laws can give us guidelines as what can be done and what must be avoided. Such laws provide best practices and ethical norms for the medical field. The argument is valid and it is not impossible to legalize euthanasia in India. The problem is about the conditions which prevail in India and in such states are not identical. It would be appropriate to say that ours is a totally different case. The countries which have legalized euthanasia, are pretty small in case its territory. The population therein is more literate and is aware about their rights and dangers of euthanasia. Additionally, the machinery in play is sophisticated. Indian population has a larger portion of illiterates than the literates. The literate population is not much liberal about euthanasia and might not approve its legalization. Our

[29] http://lawcommissionofindia.nic.in/reports/rep196.pdf

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country tends to deal with such issues with sentiments and which cannot override our reasoned decisions. It is better to left the issue with the judiciary, until we prepare ourselves emotionally and practically to accept it as part of our life.

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BALWANT SINGH VS STATE OF PUNJAB

AIR 1976 SC 230

- **KUSHAGRA KHETAN**

INTRODUCTION

This case basically talks about the change in law effected by the new code. It puts light on retrospective use of law.

This case is a landmark judgement in the formation of sec 354 (3) Code of Criminal Procedure. This judgement made it compulsory to record special reasons for the award of death sentence in preference to life imprisonment. Application of rule of absence of extenuating circumstances evolved under the old code is held improper in this case.

Sec 354 (3) of Code of Criminal Procedure states that:

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

FACTS

Balwant Singh, the sole appellant in this appeal was convicted under Section 302[30] of the Penal Code and sentenced to death by the Trial Court. His conviction and sentence have been confirmed by the High Court of Punjab and Haryana. Special leave to appeal was granted by this Court limited to the question of sentence only. We have, therefore, to see whether on the facts of this case the High Court was right in confirming the death sentence imposed upon the appellant or was it a case where the lessor sentence of life imprisonment ought to have been awarded.

[30] Section 302 - Punishment for murder. —Whoever commits murder shall be punished with death, or [imprisonment for life], and shall also be liable to fine.

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The appellant was aged about 60 years at the lime of the occurrence. He was working as a Granthi of a Gurudwara in village Salihna District Faridkot. Mohan Singh the deceased was a member of the Managing Committee of the Gurudwara. He made certain complaints against the appellant to the President of the Managing Committee and asked, for the removal from the post of the Granthi. The appellant, therefore, bore a grudge against the deceased. In the early hours of April 13, 1974 the appellant gave Karan Parshad of Granthi Sahib to Mohan Singh mixing opium in it. As soon as Mohan Singh took the Parshad he felt sick and his heart began to sink. Inspite of the medical aid he could not survive and died about 4 hours after the administering of the poison to him by the appellant. On the facts found by the learned Sessions Judge and as affirmed by the High Court, the appellant was convicted under Section 302 of the Penal Cole. The question for consideration is whether the sentence of death was rightly passed. It may be noticed that the occurrence took place on April 13, 1974 after coming into force of the Criminal Procedure Code, 1973 on and from April 1, 1974. Provisions of Section 354(3) of the new Code, as noticed by the High Court, governed this case. Yet the High Court confirmed the sentence of death relying upon two decisions of this Court which were not concerned with the application of law engrafted in Section 354(3) of the CrPC, 1973 but were given with reference to the CrPC Code, 1898 as it stood at the relevant time.

ISSUE RAISED

Whether the sentence of death was rightly passed by the court?

JUDGEMENT

The supreme Court held that The High Court has referred to the two decisions of this Court namely in Mangal Singh v. State of U.P. 1975 Cri LJ 36 and in Perumal v. The State of Kerala AIR 1975 SC 95 and has then said "There are no extenuating circumstances in this case and the death sentence awarded to Balwant Singh appellant by the Sessions Judge is confirmed...." As we have said above, even after noticing the provisions of Section 354(3) of the new Criminal Procedure Code the High Court committed an error in relying upon the two decisions of this Court in which the trials were held under the old Code. It wrongly relied upon

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the principle of extenuating circumstances a principle which was applicable after the amendment of the old Code from January 1, 1956 until the Coming into force of the new Code from April 1, 1974. In our judgment there is no special reason nor any has been recorded by the High Court for confirming the death sentence in this case. We accordingly allow the appeal on the question of sentence and commute the death sentence imposed upon the appellant to one for imprisonment for life.

CONCLUSION

In my opinion, this case is a very important case and a law establishing one in the history of Code of Criminal Procedure. This case helped in the formation and interpretation of Sec 354(3) of Code of Criminal procedure.

In this case, the intention to kill was present and the conviction of the accused under S302 of the Indian Penal Code was justified but the facts were not such as to enable the court to say that there were special reasons for passing the sentence of death or death penalty or imprisonment for life.

This case also established that under S. 354 (3) of the new Criminal Procedure code, the court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. Awarding of the sentence other that the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence.

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STATE'S OBLIGATION TO REGULATE PRIVATE HEALTH CARE FACILITIES

- **SRUTHI KANNAN**

ABSTRACT

India is a country with a population of 133.92 crores and counting. Even after 72 years of independence the county is facing adverse lack in health care facilities provided by the government thus leading to a growth in the private health care providing sectors. The pace with which the private health care sector is leading marginalises the reach of health care facilities to the bordered group of people (adivasis, dalits etc). Health in India still remains a luxury which only the elite class can afford. The paper makes an attempt to throw light on the role of government in regulating the private healthcare facilities and critically analyses the reasons for the rise in private sector from past years, the factors leading to a less effective administration from the part of the government regulatory organisation, the organisations acting behind the private sector which is continuing to provide facilities to only a group of people. The paper will further discuss the steps taken by the government to regulate this sector and why the private sectors continue to attract the patients leaving behind the public medical facilities providers even after repeated attempts. The paper will compare the system in India (with respect to health care facilities) to the system in China which has similar population trends. The characteristics of private sectors – such as methods of working, expenditures and infrastructures will be examined. Towards the end, the paper will discuss the measures which should be applied to regulate the proper surveyance and checks in the private healthcare sector which will assist the country in maximising the reach of its healthcare facilities to people and constantly improvising in the health sector.

INTRODUCTION

Health Care system in India is known as Universal - it means the reach and the coverage of the sector is widespread and accessible to everyone.

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Basically there are two major divisions of the medical sector.

1. Public Health Care Sector (governmental)
2. Private Health Care Sector (non governmental)

The healthcare care sector is primarily administered by the government. And then comes the private Health care sector owned by individuals or groups of people/ companies. There is a huge difference between both the sectors. Public health care services fails to provide adequate care and facilities to the patients, the shortage of physicians and lack of medicine centres in rural area marks as a failure of government to provide service to people, thus making way for the Private Health sector to take a lead and establish itself firmly in the business , as it provides large number of facilities and high standards of service and treatment to the people who can afford it .

India is said to be one of the popular destinations for medical tourism. India also is a top destination for medical tourists seeking treatments, such as ayurvedic medicine. India has its strong roots in Ayurveda largely marketed by Private companies. With the strengthening of the Private sector the government has faced several criticisms and loss in the area of healthcare and slowly the healthcare sector is profitably shifting towards privatization. The role of state in regulating the rules and limitations is questionable.

'HUMAN RIGHTS IN PATIENT CARE'

We have all heard human rights as a topic but have we ever understood the meaning of human rights in healthcare? The human right to healthcare means everyone has the right to get the highest attainable standards of physical and mental health. It includes access to all medical services, sanitization, adequate food, decent housing, healthy working conditions etc. Basically human right guarantees - health protection for all in medical means .eg - availability of hospitals ,clinics ,medicines ,doctors etc to be available at accessible, acceptable and of a good quality for everyone. Human right in patient care refers to the principles involved in the prevention, treatment, management of illness and preservation of physical and mental well-being of every citizen subjected to health problems does health providers are equally accountable to the people .

Let us discuss some important articles:

- Article 21- of the constitution guarantees the protection of life and Liberty to all its citizens the supreme court held that the right to live with dignity is highlighted in article 21 which

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device from one of our directive principles of State policy therefore it includes protection of health care the directive principle was converted into a constitutional obligation to provide healthcare facilities

- PIL's have been filed under article 21 for the same which is the violation of right to health they have been provided for special treatment to children in jail pollution drugs with various hazardous drugs conditions in tuberculosis hospitals occupational hazard regulation of blood bank and availability of blood products also appeal filed by person in HIV on rights of HIV and AIDS patients.
- The Indian Constitution has responsibility of the state in insurance basic nutrition standard of living public Health introduction of workers and even disable people and other living and health standards described under article 39 47 4241 of the directive principles of State policy.

CHARACTERISTICS OF PRIVATE HEALTHCARE SECTOR AND PUBLIC HEALTHCARE SECTOR

There are some characteristics which play the role of distinguishing the public sector from the private sector. They are:

1. Accessibility and responsiveness

Accessibility and responsiveness is one of the major characteristics which lead the way for private healthcare facilities as they are available and are well responsive to its patients , taking into account the public Healthcare facilities there are still many villages in India healthcare facilities are not available to the rural population .

2. Quality of healthcare.

Comparatively public sector takes a back seat when it comes to quality of healthcare provided by them compared to private healthcare sector where private healthcare sector serve the patients with high quality of service and maximum facilities within its framework and strive to give the best to the patients

3. Accountability, transparency and regulation

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When we talk about accountability, transparency and regulation in the public and private healthcare sector the private healthcare sector seems to take a back leap as they are not accountable and are evidently not transparent and the regulations are also loose compared to the public health care facility providers.

4 . Fairness and equity

Both the public sector and private sector fail to provide fairness as it is not universal and is divided into States and central thus maintenance equity and fairness is not checked timely. Fairness in service means providing all kind of facilities to people without a question of Creed which is not followed anywhere in the healthcare sector and the people with money are only provided with facilities the poor people are out skirted from the facilities of the healthcare providers which leads to many problems in health sector thus, acting as a major corn in the public health indicators of the country as a whole.

FACTORS CAUSING LESS EFFECTIVE ADMINISTRATION OF GOVERNMENT IN PRIVATE SECTOR

1. Health is considered to be a subject of state and then a subject of the country as a whole it has been different in different states of India the implementation and regulations of health Care facilities there has been many rules and regulations for providing applicability of certain regulations for the same.(For example Consumer Protection Act)
2. The response of medical profession to develop rules norms in various mechanism has proved to be poor (Medical Council Act)
3. Many regulations have not been updated and therefore they have lost their relevance in the present time (Nursing Home Act)
4. The ministry of Health and other responsible organisations do not considered the growth of private healthcare sector as a threat to the public healthcare sector and the reach of healthcare facilities to the public indivisible implementation and enforcement of the rules and regulations given by government of the guidelines laid by the government of India has weak enforceability on the sector.
5. The legislations are very poor and weak in application when compared to the problems faced by India. India needs a strong and effective health legislation for the same which

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will bring effects to the conditions of the health sector in India. A change can be observed only when the regulations will be followed sincerely by the doctors , patient's and other staff

Thus all the above given are the reasons for the less effective administration of the private sector from the part of the government.

COMPARISON OF INDIA & CHINA - Health care sector.

India and China are considered to be the countries who have similarities in many socio economic factors . In terms of population and other factors these countries go hand in hand.
but when we talk about the healthcare sector China takes a lead here . China has a better health condition than India and it spends more of it's in the health sector than India does. Which leads to China being a more independent and efficient country than India in terms of management of Health and other allied factors .
Even though, India's health system was ranked higher than China's by WHO in 2000, Indian health is far poorer. India should adopt mainly two policies followed by China to improve its healthcare sector

(1) increased spending on health

(2) better control of communicable diseases and improvements in maternal and infant health.

When we compare India with China with respect to its facilities for example infrastructure health and basic necessities India Life are behind and China
This is because India's spends too little amount for it's health sector..eg hospital's , clinic's etc
China outperforms India in many department - for example birds control , maternal health and prevention of communicable diseases
India's government should be more attentive towards the health sector from the roots of the population eradication of poverty, improvisation in water quality, providing nutrition to children and improving hygiene should be considered as the first break towards the development of the healthcare sector in India.

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REGULATIONS BY GOVERNMENT

The below given are some of the major regulations directed by the government for safeguarding and protecting the health sector and providing a much better experience in the field of health.

The Consumer Protection Act

The Consumer Protection Act was brought in 1986 for the protection of the interest of consumers through the establishment of consumer councils.
The objectives of this act are:
(a) to promote and protect the rights of consumers
(b) to provide right to information and to protect the consumer against unfair trade practices; and
(c) to ensure that consumers' interests will receive due consideration at appropriate forums .

ROLE OF MCI's and SMC's

When it was observed that there was a lack of education and proper administration in the sector of medical facilities back in 1910s Government of India took a step to regulate medical medical sector in multiple vs The Indian medical degree act was passed to keep a check on the titles which was held by people who had Western medical degrees just making sure that they are qualified for the same later after years the medicine Indian medical act 1956 was passed to regulate and reconstruct a medical council and the act was amended in 1964 then in 1967 to implement the practical consequences and problems faced by the providers and also to amend and grant specified rights to the MCI for checks and regulations in the sector

- Composition of MCI - and when we talk about the composition of the MCI which is the medical council of India composition - one nominated members from each state, one elected member from member from each university ,one one elected member from each state having a medical registration seven members elected themselves by people enrolled

in any of the state medical registration and finally 8 nominated members from the central government of India

- Functions: The main functions of MCI is recognition of medical qualification by medical institutions defining professional code and conduct and also maintaining the Indian medical registration . the MC I cannot order capital punishment to any medical negligence and also they cannot provide compensation to the aggrieved party in case of any medical negligence.

MEDICAL ETHICS

Medical ethics is a system of moral principles that apply values to the practice of clinical medicine and in scientific research. Medical ethics is based on a set of values that professionals can refer to in the case of any confusion or conflict. Another major function of MCI (medical council of India I)is maintaining and keeping checks on medical ethics practiced by doctors.

There is a long list of medical ethics given by the MCI but with each case happening we can observe many more misconducts and offences related to medical negligence in the field with the passage of time. The list keeps on going. If the records are checked -we can observe that there are only few cases where the conduct have been checked for medical ethics and punishments have been provided or deregistration have happened in the field of medical negligence the city indicates implication of the act. For medical negligence complaints we can see that consumer courts are receiving no complaints and we also understand that the MCI is less active compared to the consumer courts.

POLICY IMPLEMENTATION

There are many governmental policies as suggested by the government of India for the smooth running of the medical sector in India one of the major revolutions was the COPRA which means Consumer Protection Act- which has to be made strong and more efficient in the private healthcare sector which will make sure that the patients gets the right what they deserve or they have the right to information with regard to the medicines and treatment they are undergoing.

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Even after establishing many policies by the government, implication of these policies are not seen in the field because of the corruption and delay in the bureaucratic proceedings. Many policies with respect the government in health care facilities provided but when it comes to private healthcare providers is subjectively only one redressal that is consumer protection act which questions the authority and the right of each patient to information. There is a need for more redressal forums to solve the problems at a bigger platform.

REDRESSAL MECHANISM

The redressal mechanism addresses the speedy and fast disposal of the suits filed .There are three forums for the same, which are set up in district state and then in the national level.

The complaint can be filed by an individual or by a group of people or registered consumer association for any deficiency in the services rendered, quality of service or negligence from the part of the provider or any dissatisfaction which is considered to be a right of citizens from the constitution of India.

The redressal forums act as a relief for many complainants as they can achieve compensation even without going through the link process of filing a case in a normal Court and waiting for years for the disposal of the same case.

MEDICAL NEGLIGENCE

Section 304A , Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both.

There are still many people in India who blindly follow the medical providers and don't even know the name of the medicines they have been taking since years. This is surely negligence from the part of the patient as we need to know the importance of knowing the medicines we are having. In this case even if something wrong happens, for filing a suit the patients are not sufficient with the evidence as they are not informed about the treatment .

STATE'S OBLIGATION IN REGULATION OF HEALTHCARE SECTOR

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Whenever the word healthcare comes, the first thing that runs through our mind is that the government provides Health Care facilities to the citizens. But there is a different scenario in India that is different - According to the National Family Health Survey-3, the private medical sector remains the primary source of health care for 70% of households in urban areas and 63% of households in rural areas. This makes it evident that the Private sector of the medical providers holds more control over the health sector in India than the governmental organisations. Most healthcare expenses are paid out of pocket by patients and their families, rather than through insurance.

National Health Assurance Mission, which would provide all citizens with free drugs, diagnostic treatments, and insurance for serious ailments. In 2015, implementation of a universal health care system was delayed due to budgetary concerns. In April 2018 the government announced the Ayushman Bharat scheme that aims to cover up to Rs. 5 lakh to 100,000,000 vulnerable families (approximately 500,000,000 persons – 40% of the country's population). This will cost around $1.7 billion each year. Provision would be partly through private providers.

All these information undoubtedly depict the importance of governmental organisations to keep a check on the private sector.

SUGGESTIONS

1. Health legislation is very few as compared to problems in the healthcare sector there is a need for having the Health Care act framed to cover the whole of the healthcare sector. And if these rules are followed sincerely that's it shows the success of a community as a whole.
2. We can also see that the basic structure and financing of the medical council of India has to be strengthened for a much more effective organisation. The role of MCI and CMS as regulator are less imperative in India. They have really felt the need to regulate the medical field to decide standards to safeguard public interest and in the area of medical practice.
3. To regulate it may be however just another opportunity for a bureaucrats delay in functioning and corruption by the public officials.

A better solution might be a greater social accountability on private providers making a certain proportion of private services available to the poor. The first priority must be to increase the public expenditure on health care.

CONCLUSION

By the presented paper we need to understand the importance of a body to regulate the private healthcare sector in India because this will affect the country in a long run as we can see we can observe that private healthcare sector is leading day by day and is comparatively more successful and a profitable business than public health care sector. Moreover a humanitarian service providing healthcare is considered to be a business where only the fittest of the fit firms survive

And for the survival many institutions ,firms hospitals, clinics include malpractice in their functioning by providing cheap medicines expired medicines to the patients of describing the same treatment for n number of patients without even looking into the diagnosis conducting operations and making patients by unnecessary medicines for the profit of their medical stores. People are forced into our pocket expenses for the treatment and other allied facilities in the hospital.

A large number of educated people like doctors and managing directors of big hospitals are involved in scam related to maltreatment extortion of money from poor people.

If you take the example of India - everyday newspaper and news channels report cancer related to medical facilities especially by the private sector and inadequate service centres from the part of the government sector are reported and the news flashes in the news channels for 2-3 days and then the news vanishes or you can say it gets lost between many other news headlines considered more eye-catching.

Conditions in India will only improve if the regulations are tightened, strengthened and made accountable to the people because a sector like health cannot be noted towards the development of the country and well-being of the citizens.

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DEVELOPMENT OF GREEN IP

- **ABHISHEK MISHRA**

1. INTRODUCTION

"We won't have a society if we destroy the environment"

In the present scenario the most desirable and important efforts required from the human beings is towards the protection of the environment. With the advancement of technologies in the present era one should be very careful in respect of the degradation of the environment. The conservation of natural resources plays a very important role in the protection of the environment as " if conservation of natural resources goes wrong , nothing else will go right"- M.S Swaminathan.

The study looks forward to what effect does green technologies have on intellectual property and the position of developing countries to use and develop green technologies. The question arises whether the IP system hinder or help the parties in the developing countries to use and develop the green technologies. The development of "GREEN IP" in today's world is the need of the society. The study further sees the relationship of the IP system to the technological transfers.

The term "Green Technologies" may not be defined clearly anywhere but the organizations such as AIPPI (International association for the protection of intellectual property), UNFCCC (United Nations framework convention on climate change), and EPA (Environmental protection agency) has laid emphasis on describing what green technologies mean.

One may understand the meaning of the green technologies through the term "green inventions" , green inventions refers to the environmental friendly inventions which includes energy efficacy, carbon generation, recycling, renewable resources, water purification, alternatives to fossil fuels etc.

Green IP can be understood through the basic understanding of the technologies which are granted IP protection and at the same time these technologies are protecting the environment or the

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technologies using the more sustainable manner, or technologies aiming at the recycling of waste by various methods like purification process etc.

2. HISTORICAL DEVELOPMENT OF GREEN IP

The emergence of green technology as an alternative to traditional technology has been a gradual one and it is only in the recent years that green technology has gain more importance. Increasing problems of global warming and climate change prompted for the need of new inventions and technologies which did not have to rely on traditional sources of energy and which are much more eco-friendly. An interest in renewable energy resources developed in the 1970's due to a scarcity of natural resources. The 'Salter's Duck' is one of the first key inventions that arose primarily because of the surge in oil prices. It was one of the earliest generator designs, that was used to convert wave power into electricity. The period from the 1970's to the 2000's saw a gradual rise in green technology. From 1978 up till 2006 a growth was observed for certain green energy technologies, with Solar PV, Wind and Carbon Capture experiencing the most intensive growth.

This rise in alternative energy technology also meant that the intellectual know how that goes into the creation of such technology also had to be protected. Such technology can be protected through different forms of intellectual property rights. They may be protected under Patents or as Trade Secrets or Undisclosed Information or Trademarks. The primary form of intellectual property protection sought for technology is usually Patents which prevents others from infringing the technology. International organizations like the WTO and WIPO have also played a considerable role in the protection and development of intellectual property in green technology. They have adopted several respective bilateral agreements and treaties to help in the further strengthening and protecting of intellectual property, for example, The Berne Convention, TRIPS, the Patent Cooperation Treaty (PCT) to name a few.

The rate of Patents in clean energy technologies have seen a growth of about roughly 20 percent per annum since 1997 and have further increased since then, outpacing traditional energy resources like nuclear energy and fossil fuels. It is important to note that while there were only about 25,4119 applications under the Patent Cooperation Treaty overseen by WIPO, it reached a total of 182,120

applications in 2011[31]. Countries like the United States of America, United Kingdom, Germany, France and Japan account for almost 80 percent of all patent applications in clean energy technologies.[32]

3. RELATIONSHIP BETWEEN GREEN TECHNOLOGY AND INTELLECTUAL PROPERTY

3.1 MEANING OF GREEN IP

Intellectual property plays a key role in the growth and commercialization of technologies for the alleviation of an adaptation to climate change. They help in enabling innovation of technology and its deployment in the market. IPR's such as patents, trade secrets, trademarks, industrial designs and copyright secures the value of a green technology product. At almost every stage of technology development i.e. from its initial R&D right up to its market introduction, IPR's have an importance. Taking an example of the a wind turbine technology which is used for generating electricity through wind power, we can see how different IP's afford protection to this technology-

a. Patents- A patent would allow the inventor or assigned owner of the technology to protect his invention from infringement and prevent other from using such patented technology. In this case if a company has a patent over the wind turbine transmission system which means that this system is protected by law and any unauthorized use by any other person or company would lead to infringement of the patent.

b. Industrial Designs- A design of an invention can be protected if it possess certain distinctive features which are appealing aesthetically, and are original and distinct. Here the overall design of the wind turbine can be protected not taking into account its functionality.

[31] Ahmed Abdel Latif, Intellectual Property Rights and Green Technologies from Rio to Rio: An Impossible Dialogue?, 14th July 2012, ICTSD Programme on Innovation, Technology and Intellectual Property, Pg no 3. http://www.greengrowthknowledge.org/sites/default/files/downloads/resource/Intellectual_property_rights_and_green_technologies_from_Rio_to_Rio_ICTSD.pdf

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c. Trade Secrets- This protects non disclosed information and or information which are commercially valuable. Here a company can protect its methods of production or any other information which is only known to them, which enables them to compete in the market with other technologies.

d. Trademark- It protects the word or symbol which denotes the origin of a good or its manufacturing company. A company can register its company mark which would enable consumers to recognize its products through such mark. In this regard the depiction of this mark in the wind turbine would denote that such company has produced such product and would prevent confusion from other producers.

e. Copyright- Through copyright protection a company protect its software which it uses in the operation of the wind turbine machine. This could be the control software which the company uses or which was written on behalf of the company can be protected through copyright.

These forms of patent protection are available for innovations in technology pertaining to eco-friendly and green technology. Out of all of these it is of no doubt that Patent is the most often sought after form of IP protection. Companies which are involved in the production of green technologies usually have patents over their technologies. Patents are a useful source of information about IPR strategy and trends in technology developments, technology diffusion and future standardisation. However, the propensity of patenting varies in different technologies and the complexity of patents needs to be better understood at the micro to macro levels of patent regime.[33]

3.2 MEANING OF GREEN TECHNOLOGY

[33] Report on 'Assessment of Intellectual Property Rights for Promoting Renewable Energy', IRENA Workshop, 25 October 2012, Bonn.

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Green technology primarily refers to technologies which are eco-friendly in nature i.e. they are not detrimental to the environment. Presently, there is an ongoing debate on what the term "Green Technology" entails. Agenda 2 l of the UNFCCC refers to Environmentally Sound Technologies (EST's), which are intended to include the following technologies-

i. technologies protecting the environment, less polluting technologies,
ii. technologies using resources in a more sustainable manner,
iii. technologies aiming at recycling of waste and products, and
iv. Technologies handling residual wastes, e. g. by purification processes.

However, the Intergovernmental Panel for Climate Change (IPCC) makes a distinction between "Climate Change Mitigation Technology" and "Climate Change Adaptation Technology", wherein the former covers technological change and substitution that curb energy resource inputs and emissions, whereas the latter includes technologies intended to curb the harmful effects arising from expected climate change.

It can be seen that there is no clear and accepted definition of what the term "Green Technology" means. It can be understood to mean those technologies which allow us to reduce climate change and global warming, which allows us to save energy i.e. by using alternative sources of energy like wind or solar, or technologies which seek to reduce and harness emissions of Carbon. Another term which is often used is "Green technologies" which also refers to environmentally friendly technologies. Hence, it can be seen that 'Green Technology' involves and includes an evolving group of methods, materials and techniques which are non toxic and are environmentally safe.

4. GREEN IP AND DIFFERENT ECONOMIES

The situation in the developed and developing countries is quite different in respect of the new green technologies. On one hand where the developed countries are having efficient and effective R&D and big enterprises to carry on the new inventions which are compatible with the environment on the other hand the still developing countries are lacking in such big R&D's and private or governmental enterprises to carry out the new inventions which are adhering to the protection of the environment. In developing countries, governments are the main suppliers of

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funding, with R&D mainly focused on basic and applied research. This situation is reversed in developed countries.

Developing countries have repeatedly questioned the relationship of the IP system to technology transfer. In the context of climate change technologies, this discussion has insisted that the IP system, in particular patents, must serve as tool for transferring critical technologies that will help developing countries mitigate and adapt to climate change realities such as rising water levels, desertification, water shortages, extreme weather, and ocean acidification.[34]

From the beginning of 2009 a great emphasis has been paid towards the schemes to speed up the green patent applications and especially in the industrialized countries through the patent offices. The UK IP office, the Korean Patent office, the Japan patent office, the United States patent and trademark office, the Japan patent office and Canadian patent office has played a very vital role with respect to this. The Brazilian National Institute of Industrial Property declared in 2012 a programme to encourage the green patent applications. The countries are aiming to encourage the new inventions and to bring new products to the market with relation to the green technology more quickly.

Since a long time it was considered that renewable energy power is a luxury which can only be afforded by rich countries. There was development of the wind energy and solar energy by the Germany and other western European countries, whereas the developing countries lacked such policy resources. The recent emerging trend of investment in the solar energy and wind energy by the developing countries in 2015 has exceeded that of the developed countries for the first time.
In Latin America, Chile, Mexico and Brazil are among the countries that have witnessed the fastest growth worldwide in investment of renewable energy generation since 2013.[35]

[34] Intellectual property and green IP , AIPPI special committee Q198 report, https://www.aippi.org/enews/2014/edition38/images/reports.pdf
[35] Yuan jian, Thoughts on Green Energy Industry Growth in Developing Countries,2016

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Hence since last few years it has been noticed that the developing countries are also adding to the growth of the renewable energy. In 2015**,** the growth rate of the world's renewable energy reached a new high, with solar power capacity growing by 26 percent and wind power by 17 percent.[36]
China is having four wind power companies out of the top ten wind power countries which are Sinovel, Goldwind, Dongfang Electric and United Power and India is having one among them i.e. Suzlon.[37]
The top ten solar energy producers from worldwide involves seven from china i.e. LDK solar, Suntech, JA solar, Trina solar, Yingli green energy, jinko solar and Hanude solar.
Six OECD countries i.e. Japan, US, Germany, France, the republic of Korea, UK , account to the 80% of patents in the field of green technologies.
The Indian government has proposed an ambitious solar power development plan to increase its solar power generation capacity to 100 GW by 2022, 20 times the existing installed capacity.

5. GREEN TECHNOLOGY AND COMPULSORY LICENSING

As the developed countries have edge over the developing countries when we talk about the green inventions because of the difference between the resources and the R&D there is a need of transfer of the green technologies. The basic fundamental idea of the TRIPS also provides for the trade free barriers of the intellectual property hence it is the need of the society that the technologies should be transferred to the countries which are not able to attain such inventions themselves.
In the present scenario it is very much clear that patent itself is not the barrier to the technological transfer. It has been seen since a long time that the inventions in the green technology is very difficult to get patented in the developing countries and mostly in the least developed countries.
Hence if we consider the transfer of green technology to the developing countries the most effective way is through the grant of the package technology license which confers the right to avail the patent or the inventions.

[36] *The Economist,* April **16, 2016,** data quoted from an annual report of International Renewable Energy Agency, April 2016
[37] Ahmed Abdel Latif, Intellectual Property Rights and Green Technologies from Rio to Rio: An Impossible Dialogue?, 14. JULY 2012, http://www.greengrowthknowledge.org/sites/default/files/downloads/resource/Intellectual_property_rights_and_green_technologies_from_Rio_to_Rio_ICTSD.pdf

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In the real life this practice of licensing is not used in respect of the green technology the reasons being, weak infrastructure, favorable market conditions, limited experience, inadequate capital etc. So special compulsory licensing laws, with respect to the green technology can be proposed. But the other side of this issue is that voluntary licensing is can be sufficient for the transfer of green technologies in the developing countries.

It can be considered that licensing of green technologies to the developing countries can be an important channel for technology transfer. The first global licensing survey related to clan energy technologies which was conducted by the UNEP-EPO (Unite Nations Environment Program-European patent office) and ICTSD (International Centre for trade and sustainable development) ascertained an unexploited potential of licensing towards developing countries.

Many other initiatives were also taken in this respect one of which is the WIPO green , this refers to a market place which was set up by WIPO whose main aim was to facilitate the accelerated adaptation, adoption and development of environmental technology basically in the developing countries.

One of the objective or aim behind granting the compulsory license is to make available the technologies to the countries which are not capable of inventing themselves, and as because of the climate change and the declination of resources there is a need that resources should be protected and used in a sustainable manner. As the human needs are unlimited and the resources are limited there is a need for sustainable development. The developing countries or the least developed countries are not capable of performing inventions at the rate which are being performed by the developed countries and hence there is a need that the green inventions or the technologies must be transferred to these developing countries as it is in the common interest of the countries and people to save the resources and invent products which does not degrade the environment.

6. CONCLUSION

In the present era where IP is playing an important role we can find IP in every aspect of our life. At the same time where IP is on its peak of emerging and fulfilling the needs of the society one should not forget that it should be compatible with the environment also and we should see that IP and environment goes hand in hand.

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IP is not limited to inventions and expressions now days it should also conform with the needs of the society with respect to clean and healthy environment. There is no such clear definition of green technologies given but we can understand it by referring it to the inventions which are eco friendly and which are not harming the environment or the inventions which are helping in maintaining clean and healthy environment. As the resources are limited and human wants are unlimited we should take care of it that we are using the resources in a sustainable manner.

The other side of the green IP is that the developing countries are still facing the problem of getting their inventions in adherence to the environment hence there is a need of technology transfer which is also provided by the TRIPS, as the basic idea of TRIPS is to make trade free barriers in respect to intellectual property. Therefore keeping in mind the interest of the developing or least developing countries and the public interest in the environment there is need of the technology transfer.

The inventions in the renewable resources, energy, fuel efficiency techniques and pollution control are the need of the society. Therefore one should focus on developing or inventing such things which increases the usefulness of the environment and natural resources or even if it's not contributing to the clean environment then it should not be degrading the environment. I think environment should be put in the category of national security otherwise what else is there to defend?

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COPYRIGHT PIRACY- AN OVERVIEW

- **SWATHI ASHOK NAIR**

ABSTRACT

Copyright piracy is one of the major threats which is now prevailing widely in almost every part of the world. Worldwide, copyright piracy is a serious crime, which causes economic losses to all those who invested money in bringing out copyrighted materials in various forms for use by end users. Piracy of copyrighted products is a problem as old as copyright itself. The main reason behind copyright piracy are poor enforcement and lack of awareness on copyright matters. The main step to tackle the issue of copyright piracy is to spread out the public awareness, to establish the organisation/ have a start-up to check upon the piracy levels at both national and international levels, making of the appropriate legislations in desired countries are also a favourable measure. My paper mainly includes the what is copyright piracy, copyright piracy at international level, copyright piracy at national level, it's effects and related measure to tackle the piracy.

INTRODUCTION

Copyright is a legal right created by the law of a nation which grants a creator of an original work exclusive rights for its use and distribution. It is a form of intellectual property, applicable to certain forms of creative work. The main goals of a copyright are;

- To boost the development of culture, science and innovation
- To provide a financial benefit to copyright holders for their works
- To facilitate access to the knowledge and entertainment for the public.

Copyrights are considered as territorial rights, which means that they do not extend beyond the territory of a specific jurisdiction. While many aspects of the national copyright laws have been standardized through the international copyright agreements, copyright laws vary by country. Typically, the duration of a copyright spans from the author's life plus 50 to 100 years (that is, copyright typically expires 50 to 100 years after an author dies, depending on the jurisdiction).

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Some countries require certain copyright formalities to establish the copyright, but most recognize copyright in any completed work, without formal registration. Generally, copyright is enforced as civil matter, though some of the jurisdictions do apply criminal sanctions.

Origin of the copyright had a link with the invention of printing press by Gutenberg in the fifteenth century. With the easy multiplying facility made possible by the printing press, there was voluminous increase in the printing and distribution of books which in turn, led to the adoption of unfair practices such as unauthorised printing by competing printers.

COPYRIGHT PROTECTION-NATIONAL AND INTERNATIONAL LAWS

2.1 International Copyright Act Of 1891

The International Copyright Act of 1891 is the first U.S. congressional act that had extended limited protection to foreign copyright holders from select nations. It is more commonly referred to as the "Chace Act", named after Aaen. Jonathan Chance of Rhode Island..

It mainly focused on protection of foreign works. [38]This act was passed on March 3, 1891, by the 51st Congress. The Act went into effect on July 1, 1891. On July 3, 1891, the first foreign work was a play called 'Saints and Sinners' by British author Henry Arthur Jones and it was registered under the act.

The International Copyright Act of 1891 instituted some important changes in copyright matters. One of the most extensive changes was that from the date the Act went into effect, all books were required to be manufactured in US in order to obtain American copyright. However, foreign authors had some better chances of protecting their works than before. This Act became the first step that the United States took towards an international copyright that could benefit foreign authors as well as domestic. Throughout the time, the United States has become somewhat of a copyright outcast since they had not joined many international treaties or conventions. However, as the United States became the major exporter of copyrighted materials this changed. Even if there's still no such thing as an "international copyright" that will automatically protect an author's rights throughout the world, The International Copyright Act of 1891 was the initial step to a

[38] The International Copyright Act, 1891, (U.S).

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number of international copyright treaties and conventions that the United States is now a part of (e.g. Berne Convention, Universal Copyright Convention, WIPO).

2.2 Copyright Act, 1957

The **Copyright Act, 1957** (later was amended as Copyright Amendment Act 2012) governs the subject of copyright law in India. The Act became applicable from 21 January 1958.The history of copyright law in India could be traced back to its colonial era under the British Empire. The Copyright Act 1957 was the first post-independence copyright legislation in India and the law has been amended six times since 1957.[39] The most recent amendment was in 2012, through the Copyright (Amendment) Act 2012. The Indian copyright law protects literary works, dramatic works, musical works, artistic works, cinematograph films and sound recordings.[40]

Copyrights of works of the countries which was mentioned in the International Copyright Order are protected in India, as if they are Indian works. The term of copyright in a work shall not exceed that which is enjoyed by it in its country of origin.[41] The author of a work is generally considered as the first owner of the copyright under the Copyright Act 1957. [42]However, for works made in the course of an author's employment under a "contract of service" or apprenticeship, the employer is considered as the first owner of copyright, in the absence of any agreement to the contrary[43]

The Copyright Act 1957 provides three kinds of remedies; they are administrative remedies, civil remedies and criminal remedies. The administrative remedies provided under the statute include detention of the infringing goods by the customs authorities[44] .The civil remedies are provided under Chapter XII of the Copyright Act 1957 and the remedies provided include injunctions, damages and account of profits[45]. The criminal remedies are provided under Chapter XIII of the statute and the remedies provided against copyright infringement include imprisonment (up to 3 years) along with a fine (up to 200,000 Rupees) [46].

[39] Jatindra Kumar Das, Law of Copyright 88-106, PHI Learning Private Ltd.(2015).
[40] The Copyright Act, 1957 § 2(y).
[41] The International Copyright Order, 1991 (U.S).
[42] The Copyright Act, 1957 § 17.
[43] The Copyright Act, 1957 § 17(c).
[44] The Copyright Act, 1957 § 53.
[45] The Copyright Act, 1957 § 55.
[46] The Copyright Act, 1957 § 63.

COPYRIGHT PIRACY- CONCEPT AND MEANING

Piracy is the activity which is carried out by the pirates. In its original sense, a pirate is a criminal who dealt with vessels on the high seas to stay with their riches. Today, the notion of piracy and what we mean by pirate has changed. In simple words, we can define copyright piracy as an unauthorised use or sale of any qualified work. A qualified work can be a literary work, musical composition, film, software programme, a painting, or any other expressions of our creative work.

Pirating other's work in the same sense means infringing one's right to express their ideas. It shall be thus called a copyright infringement. Copyright infringement is defined as the use of works protected by copyright law without permission, infringing specific exclusive rights granted to the copyright holder, such as , right to reproduce, distribute, display or perform the protected work, or to make derivative works. Copyright piracy can be thus considered like any other theft which leads to loss to the owners of the property. Besides economic loss, piracy can also adversely affect the creative potential of a society as it denies creative people such as authors and artists their legitimate dues.

TYPES OF COPYRIGHT PIRACY

There are different ways through which piracy takes place.

Piracy of literary works means illegal reproduction of books and other printed materials and distribution/selling of these for profit. In India, the journals/magazines and other periodicals are not pirated much. The piracy of literary works takes place mainly through the wholesale reprinting of text and trade books, through unauthorised translations and commercial photocopying of books/ journals. Piracy of literary works leads the way to loss of revenue to publishers (in terms of the less sales), authors (non-payment of the royalty) and the national exchequer (non-payment of the income tax and other levies payable by publishers/authors).

The sound recording piracy plays a major role in piracy. There is a simple way by which songs from different legitimate cassettes/CDs (and thus the different right holders) are copied and put in a single cassette/CD, and they are packaged to look different from the original products and sold in the market. Counterfeiting happens, when songs are copied in to and packaged to look as close to the original as possible using the same label, logos etc. Bootlegging happens, where the unauthorised recordings of performance by the artists are made and subsequently reproduced and

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then sold in the market. All these happen without the knowledge of the performers, composer or the recording company.

Piracy of cinematographic works takes places in two principal forms, namely `video piracy' and `cable piracy'. However, piracy in one form could spill over and affect the revenues of the other one. Video piracy takes place when a film is produced in the form of a video cassette without taking proper authorisation from the right holder i.e. producer. Many times, the producers of films sell video rights to another party (generally after six weeks or more depending on release in theatres] who makes video cassettes for selling or lending. The video cassettes which are kept for sale are meant for home viewing only. Any commercial use of such cassettes like in video parlours or in other cable networks amounts to copyright violation. Cable piracy is an unauthorised transmission of films through the cable network.

Copying and distribution of the computer programmes without the copyright holder's permission or authorisation is what we call computer software piracy. The software industry, generally, consists of the creation and distribution of computer programmes.

COPYRIGHT PIRACY- INTERNATIONAL LAWS

Copyright is a creation of law in every country, and therefore **there is no such thing as an international copyright law.** Nevertheless, nearly about 180 countries have ratified a treaty – the Berne Convention, administered by the World Intellectual Property Organization (WIPO) – which sets a minimum set of standards for the protection of the rights of the creators of copyrighted works around the world.

In addition, there have been many efforts to harmonize copyright law in Europe and other regions. The differences in the national copyright laws, however, can lay a challenge for global organizations with the employees working in different countries and sharing content across the boundaries.

Several international treaties encourage sensibly the coherent protection of copyright from country to country. They set a minimum standards of protection which each signatory country then implements within the bounds of its own copyright law.

5.1 Berne Convention For The Protection Of Literary And Artistic Works [1886][47]

The Berne Convention focused on the protection of works and the rights of their authors. It is based on **three major basic principles** and contains a series of provisions determining the **minimum protection** to be granted, and the special provisions available to **developing countries** that want to make use of them. The Convention covers Important aspects to protect the literary and artistic works. Works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "national treatment").[48] It also states that the Protection must not be conditional upon compliance with any formality (principle of "automatic" protection.[49] Protection is independent of the existence of protection in the country of origin of the work (principle of "independence" of protection). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.[50]

The Convention would also provides for **"moral rights",** that means, the right to claim authorship of the work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honour or reputation.

The general rule is that protection must be granted until the expiration of the 50th year after the author's death. However, there are exceptions to this general rule. In a case of anonymous or pseudonymous works, the term of protection expires 50 years after the work have been lawfully made available to the public, except if the anonymous leaves no doubt as to the author's identity or if the author discloses his or her identity during such period; in the latter case, the general rule applies. In the case of audio visual (cinematographic) works, the minimum term of protection is 50 years after making available of the work to the public ("release") or – failing such an event – from the creation of the work. In the case of works of applied art and photographic works, the

[47] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, 828U.N.T.S 221.
[48] The General Agreement on Tariffs and Trade,October 30,1947, Art.3.
[49] Id.
[50] Id.

minimum term is 25 years from the creation of the work.[51](3)The Berne Convention allows certain limitations and exceptions on economic rights, that is, cases in which protected works may be used without the authorization of the owner of the copyright, and without payment of compensation. These limitations are most commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10*bis* (reproduction of newspaper or similar articles and use of the works for the purpose of reporting current events) and 11*bis*(3) (ephemeral recordings for broadcasting purposes).

The Berne Convention was concluded in 1886 and was revised at Paris in 1896 and at Berlin in 1908, completed the Berne in 1914, revised at Rome in 1928 and at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and it was amended in 1979.The Convention is open to all the States. Instruments of ratification or accession must be deposited with the Director General of WIPO.[52]

5.2 WIPO Copyright Treaty [1996]

The WIPO Copyright Treaty (WCT) is a special agreement under the Berne Convention which deals with the protection of works and the rights of their authors in the digital environment. Any Contracting Party (even if it is not bound by the Berne Convention) must comply with the substantive provisions of the 1971 (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works (1886). Furthermore, the WCT mentions two important subject matters to be protected by copyright**:** (i) computer programs or whatever the mode or form of their expression; and (ii) compilations of data or some other material ("databases"), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. As to the rights granted to authors, apart from the rights recognized by the Berne Convention, the Treaty also grants: **(i)** the right of distribution; **(ii)** the right of rental; and **(iii)** a broader right of communication to the public.

As to limitations and exceptions, Article 10 of the WCT incorporates the so-called "three step" test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention,

[51] Id. Under the TRIPS Agreement, any term of protection that is calculated on a basis other than the life of a natural person must be at least 50 years from the first authorised publication of the work, or- failing such an event - 50 years from the making of the work. However, this rule does not apply to photographic work or to works of applied art.

[52] It is to be noted that WTO members, even those party to the Berne convention, must comply with the substantive law provisions of the Berne convention, except that WTO members not party to the Convention are not bound by the moral rights provisions of the convention.

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extending its application to all rights. The Agreed Statement accompanying the WCT provides that such limitations and exceptions, as established in national law in compliance with the Berne Convention, may be extended to the digital environment. Contracting States may devise new exceptions and limitations appropriate to the digital environment. The extension of existing or the creation of new limitations and exceptions is allowed if the conditions of the "three-step" test are met.

As to duration, the term of protection must be at least 50 years for any kind of work.

The enjoyment and exercise of the rights provided for in the Treaty cannot be subject to any formality. The Treaty obliges Contracting Parties to provide legal remedies against the circumvention of technological measures (e.g., encryption) used by authors in connection with the exercise of their rights, and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management (e.g., licensing, collecting and distribution of royalties) of their rights ("rights management information").

The Treaty obliges each Contracting Party to adopt, in accordance with its legal system, the measures necessary to ensure the application of the Treaty. In particular, each Contracting Party must ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights covered by the Treaty. Such action must include expeditious remedies to prevent infringement as well as remedies that constitute a deterrent to further infringement. The Treaty is open to States members of WIPO and to the European Community. The Treaty was concluded in 1996 and entered into force in 2002.

5.3 TRIPS-[Agreement Related To Trade Aspects Of Intellectual Property Rights][53]

It was signed on 1996 and administered by the World Trade Organisation. The Intellectual Property Convention that the TRIPS agreement refers to are, the Paris Conventions, Berne convention, Rome convention and Treaty on integrated circuits. The TRIPS council consists of all WTO members. The TRIPS council also conduct the special sessions during their meeting. These are for negotiations on a multilateral system for notifying and registering geographical indicators for wine and spirits under Doha development agenda. Disputes arising from the obligations under the TRIPS agreement is a subject to the WTO dispute settlement procedures.

[53] Id § 14.

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The treaty says that the national laws have to make the effective enforcement of IP rights possible and describe in detail how enforcement should be advanced.

COPYRIGHT PIRACY IN INDIA

Copyright piracy has been increasing in alarming level in India. n influential Congressional caucus in a latest report has expressed concern over alarming level of copyright piracy in four countries China, Russia, Switzerland and India.

It has added India to the 2014 Watch List. The report "2014 International Piracy Watch List," by International Creativity and Theft-Prevention Caucus highlights the high levels of piracy and the lack of legal protections for copyright in China, Russia, Switzerland and India.

India continues to present a seriously flawed environment for the promotion of copyright and Intellectual Property, says the recent reports. Despite a large domestic creative industry in film, music, and other copyright intensive industries, India continues to lag badly in both the legal framework for protection of IP and enforcement priorities.

The Continuing issues in India are extremely high rates of camcording piracy, high levels of unlicensed software use by enterprises and the lack of effective notice-and-takedown procedures for online piracy. Book piracy, in India, primarily depends on two factors, namely, the price of the book and its popularity. These two factors positively contribute to piracy. Piracy is generally confined to foreign and good indigenous books. Because these books are demanded in large quantities and are also priced high. The types of books pirated mostly are medical, engineering and other professional books, encyclopaedia and popular fictions. In fact, where student community and the photocopy operators gain, the publishers lose a huge revenue. Unfortunately, the institutions turn a blind eye to this.

Cassette piracy in India is as old as the cassette industry itself. Govt. policy put music industry in the small scale category and volume of a record company's cassette production was restricted to 300,000 units per annum. This led to a wide gap in the demand supply front which was ultimately bridged by the pirates. India is the world's sixth largest pirate market in value terms but third in volume terms. However in contrast to many developed countries piracy of CDs is low in India. At

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present CD piracy is below 10% level. The popularity of Indian music has gone beyond the national boundaries. There is large demand for Indian music in the neighbouring countries such as Pakistan, West Asia as well as far off countries like USA, Canada and the UK. Indian music is also pirated in some of these foreign countries, the notable among these being Pakistan and the West Asia. Similarly, foreign audio products are also subject to piracy in Indian soil. As per IIPA's estimate the trade losses due piracy of American audio products alone in India was to the tune of US $ 10 million in 1995. In India, film sound tracks account for almost 80% of the total music market.

COPYRIGHT PIRACY-INDIAN LAWS

Copyright Act 1957 currently governs the laws to tackle the copyright piracy in India. It confers the protection in following 2 terms :Economic rights of the author and Moral rights of the author.
Economic Rights:
The copyright subsists in original literary, dramatic, musical and artistic works; cinematographs films and sound recordings. The authors of copyright in the aforesaid works enjoy economic rights u/s 14 of the Act. The rights are mainly, in respect of literary, dramatic and musical, other than computer program, to reproduce the work in any material form including the storing of it in any medium by electronic means, to issue copies of the work to the public, to perform the work in public or communicating it to the public, to make any cinematograph film or sound recording in respect of the work, and to make any translation or adaptation of the work. In the case of computer program, the author enjoys in addition to the aforesaid rights, the right to sell or give on hire, or offer for sale or hire any copy of the computer program regardless whether such copy has been sold or given on hire on earlier occasions. In the case of an artistic work, the rights available to an author include the right to reproduce the work in any material form, including depiction in three dimensions of a two- dimensional work or in two dimensions of a three- dimensional work, to communicate or issues copies of the work to the public, to include the work in any cinematograph work, and to make any adaptation of the work. In the case of cinematograph film, the author enjoys the right to make a copy of the film including a photograph of any image forming part thereof, to sell or give on hire or offer for sale or hire, any copy of the film, and to communicate the film to the public. These rights are similarly available to the author of sound recording. Moral Rights:

Section 57 of the Act defines the two basic "moral rights" of an author. These are Right to paternity and Right to Integrity. The right of paternity refers to a right of an author to claim authorship of work and a right to prevent all others from claiming authorship of his work. Right of integrity empowers the author to prevent distortion, mutilation or other alterations of his work, or any other action in relation to said work, which would be prejudicial to his honour or reputation. The proviso to section 57(1) provides that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer program to which section 52 (1) (aa) applies (i.e. reverse engineering of the same). It must be noted that failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section. The legal representatives of the author may exercise the rights conferred upon an author of a work by section 57(1), other than the right to claim authorship of the work.

There are some exceptions to this law. The Copyright Act 1957 exempts certain acts from the ambit of copyright infringement. While many people tend to use the term fair use to denote copyright exceptions in India, it is a factually wrong usage. While the US and certain other countries follow the broad fair use exception India follows a hybrid approach towards copyright exceptions that allows-

- fair dealing with any copyrighted work for certain specifically mentioned purposes[54]
- certain specific activities enumerated in the statute[55].

fair dealing approach followed in India is clearly limited towards the purposes of

1. private or personal use, including research[56], and education
2. criticism or review[57],
3. reporting of current events and current affairs, including the reporting of a lecture delivered in public[58].

[54] The Copyright Act 1957 § 52(1)(a).
[55] The Copyright Act 1957 § 52 (aa) to (zc).
[56] The Copyright law 1957 § 51(a)(1).
[57] Sec.51[a][2] of The Copyright Act 1957 § 51 (a)(2).
[58] Sec.51[a][3] of The Copyright Act 1957 § 51 (a)(3).

While the term fair dealing has not been defined anywhere in the Copyright Act 1957, the concept of 'fair dealing' has been discussed in different judgments, including the decision of the Supreme Court of India in Academy of General Education v. B. Malini Mallya (2009)[59] and the decision of the High Court of Kerala in Civic Chandran v. Ammini Amma.[60]

REASONS AND MEASURES TO TACKLE COPYRIGHT PIRACY

Piracy of copyrighted products is a problem as old as the copyright itself. Only in recent years it has received prominence, especially in the academic and policy circles.

The main reasons behind copyright piracy are poor enforcement and lack of awareness on copyright matters. The copyright laws of India are as good as those of many advanced countries in Europe and America, where concern for copyright is at a high level. Punishments prescribed for violators are stringent and comparable to those of many countries in the world. But laws alone can do little justice unless implemented properly. The enforcement mechanism is weak in the country. Even police personnel, who can play a major role in combating piracy, are not fully aware of various provisions of the law. There is also lack of adequate number of personnel who can fully devote to copyright crimes alone. The police is more concerned with usual law and order problems and copyright related crimes are attached least priority.

The copyright piracy comes from social, economic and legal backgrounds;

- level of public awareness
- High consumer demand for cultural products
- Inefficient intellectual property protection and weak enforcement of rights
- High cost of cultural goods
- Difficulty of access to legitimate works
- Considerable business profits for pirates

A massive publicity campaign regarding the ills of copyright violation mentioning its being criminal offence, consequences, etc. could be launched. This is however, a gigantic task. Everybody involved in this, like the Government, local authorities, right holders, associations,

[59] General Education v. B. Malini Mallya, AIR 2009 SC 1982.
[60] Civic Chandran v. Ammini Amma, 1996[16]. PTC 1027.

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copyright societies, law enforcing authorities have to join hands together. To start with, the campaign could be launched through mass media like newspapers, journals, electronic media such as TV, Cinema halls, etc. The campaign should also highlight how to identify the pirated products as opposed to genuine products.

Education campaign can also be launched at the school and college levels since students are the major consumers of the goods produced by copyright industry. However, piracy is not a phenomenon that can be tackled through any short cut in the short term. This should be a long term effort to educate students of schools and colleges. Piracy related matters could be part of school or college curriculum especially for the students of electronics who may be exposed to implications and methods of software piracy. Simultaneously, lectures, demonstrations may be organised in various parts of the country with the principals of colleges/schools who in turn may teach their students. If this is to be successful, everybody involved in the copyright related works has to join hands together. The police personals including the constables have to be properly trained. Phased programmes have to be developed with the help of associations, prominent lawyers including prominent industries and right holders. Besides all these, a proper legislation and its strict implementation should be there.

CONCLUSION

The piracy takes away certain portion of revenue from the legal owner of the copyrights. The commercial exploitation of copyrights also yields income to the creative persons in the form of royalties.

Copyright piracy is the most disastrous method of depriving the rights of the owner's work. It drains out one's hard work and sweat that they made while producing their own works. By making the legislations against the copyright piracy is not only an effective measure, but to put it in force by implementing it with some stringent measures is also important. To those who violate the rules, the punishment given must be harsh [such as like imposing hefty fines, a year imprisonment, etc] is also necessary. Small kinds of piracies must not be encouraged. Remember, the big crimes start from the minute crimes.

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LEGALISING PROSTITUTION

- **NAYAN THARA**

1. INTRODUCTION:

The idea of legalising prostitution devolves from the understanding of a same component from different perspectives. In a society like India, the support for the legalisation of the same is considerably very small. But taking into consideration the wider armpit of the subject, the researcher seeks to establish the fundamental need to legalise prostitution.

Firstly, the paper shall be looking at the socio-legal justifications for prostitution in Indian context which shall include the following:

- Article 19(1) (g) of The Indian Constitution as an argument for legalising prostitution.
- Is prostitution illegal in India? (Judicial stand)
- legislations for governing prostitution activities in India if any (Legislative stand)

Secondly, the paper tries to understand the merits of legalising prostitution such as:

- Reduce in the number of rape
- Reduce in the quantum of sexual violence against sex workers as now they can approach law.
- Considerable reduce in trafficking for prostitution purposes
- The society will begin to embrace sex workers as professing a trade that has legal validly which in turn will change the way the general public treats them.
- Reducing number of pimps and the harassment that the pimps subject them to.
- Increase awareness on sexually transmitted diseases.
-

Thirdly, the paper seeks to familiarise with the impediments in the way of legalization of prostitution:

- Affects marital and family relationship
- Legalising prostitution shall help the pimps and the mediators and not the victims.
- With being the process of abortion still illegal in this Nation,
- Legalising prostitution would be meaningless
- Definition of rape
- Legalising the same would not facilitate complete spread of sexually transmitted diseases

1. SOCIO-LEGAL JUSTIFICTION FOR LEGALISING PROSTITUTION:

1.1. Professing profession/occupation of one's own interest :

As stated under Article 19 (1) (g) of the Indian Constitution- "All citizens shall have right to practise any profession, or to carry on any occupation, trade or business". Profession means "any type of work that needs special training or a particular skill, often one that is respected because it involves a high level of education" Occupation means "a person's job". And trade means "the activity of buying and selling, or exchanging, goods and/or services between people or countries5"

Sex workers cannot come under the term professional nor be under the term occupation. But prostitution can be considered as a trade practise

whereby individuals provide services in exchange of money. Thus, prostitution comes under the term "trade". Thus, illegalising prostitution would be a clear violation of their fundamental right as it would go against Article 19(1) (g) of their fundamental rights.

1.. 1.2. Is prostitution illegal in India? Prostitution is not illegal or legal in India. It is just not regulated in the state. In various landmark case laws in relation with prostitution, it can be found that none of them deem prostitution to be illegal act. Nor do they recognise them as a legal profession.

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For example, in the case of Shri A. C. Aggarwal V Mst. Ram Kali,1967 it was held that prostitution in a public place is punishable and that the owner of the respective area of the same shall be punished with an imprisonment term which shall not extend over a period of 6 months and/or a fine of Rs.2000. As for in the case of Gauri Shankar And Ors. vs State Of Tamil Nadu,1994 even though the affected parties were all sex workers, as the primary issue was murder much concern was not given to their socio- economic living condition nor their mistreatment.

Another case that has preceded on prostitution is State Of Maharashtra & Ors vs Indian Hotel & Restaurants, 2013 it was held that in sex workers, there ought to be two categories- one that is a public nuisance to the society at large and one that is not. A sex worker who carries her business in remote or less frequent visited area of town is held to be not dangerous to public morality or their health. But on the other hand, a sex worker who does the same trade activity in a busy and frequently visited area of the town which are mainly nearer to religious and other institutions, is a threat to public morality and health. The above are the cases that depict the stances that the Indian Judiciary has taken over time. In the change of time, there needs to be a change in the way judiciary considers sex workers as a neglected part of society and classifies them on the basis of where they execute their trade.

2. Legislations for governing prostitution Activities in India, if any:

There are no fixed regulatory acts for governing the prostitution nor the works and conduct of sex workers in India. There are no statues per say for governing their trade and practices. But there is an act that intends to safeguard their safety. Even then, the same is not implemented because of its flaws as it fails to depict the clear cut idea of how to regulate what is passed in the act.

IMMORAL TRAFFIC (PREVENTION) ACT, 19569:

In the Act, section 3 to section 8 talks about prostitution, brothels and pimps. But the whole of this act talks from the perspective of them being trafficked. It is not a guiding conduct nor the dos and don’ts of what is permitted under law or what shall be punished as a result of the conduct of clients and sorts. The act talks about punishment to pimps and brother owners but the sanctions are very

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petty. The fine for living from the money earned by a sex worker without her consent is Rs.2000. Furthermore, it considers prostitution in public places as a crime. And turns a blinds a blind eye over and above "prostitution" as to giving it a legal validity or not. Thus, after assimilating both the judicial as well as the legislative stand in India, the researcher's feels that there is need for new well defined laws for prostitution per se and exclusively for the code and conduct of the sex workers.

2. MERITS OF LEGALISING PROSTITUTION:

2.1. Reduce in the number of rape:

Rape is one of the most gruesome offenses that is being committed against individuals and notably women in this Country. The main reason for the predators raping individuals is to satisfy their sexual impulse. When the law itself recognises prostitution as a trade and thereby empowers the sex workers, the men can approach them with certain conduct and thereby not making others who are not interested in having a physical relationship with them, their preys. This hypothesis is not 100% right as people with serious physiological issues shall still rape others for their satisfaction. But for the other majority of men that exists, this is very much helpful as they need not hide or go to a brothel in secret.

2.2. Reduce the quantum of sexual violence against sex workers:

When there shall exist a law that governs the conduct of the clients and their limitations, the sexual violence against them shall come down. As of now, we do not have any laws governing prostitution as such. Thus, the sex workers are forced to do bound labour under the pimps and forced into brothels. If prostitution is completely legalised and all the third parties to the trade are governed with specific strict laws, then there shall be a considerable reduce in the number of sexual offences against sex workers as they can approach with the support of law.

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2.3. Reduce in trafficking:

Even though the laws regarding trafficking of humans are mentioned in the immoral traffic prevention act, there still exists the same social evil because the punishments mentioned for the same are pity as when compared to the quantum of the crime that has been committed. Plus, the steps that have been established to prove the same are complex that the victims have a tough time fighting for their justice.

2.4. Change in public's way of thinking:

When prostitution becomes a legally validated trade practise, the workers who are employed in this field shall not be looked down or discriminated against in the society. They shall have a social recognition. They need not hide or feel guilty for being a sex worker. As any legal trade that exists, prostitution shall also come to this recognition with advancement in time if legalised.

2.5. Reducing harassment from pimps and brothels:

When prostitution is legalised, then there needs to be restrictions imposed upon the pimps so that they do not misuse the sex works. In many instances, the consent from a sex worker is obtained by the pimp by fraud. There are numerous brothels that function in India. There needs to be a licencing system for the same whereby, there should be a profile for every sex worker who joins the brothel along with the details of his/her pimp. There should also be proof and evidence showing that the sex worker has not been illegally trafficked nor that the consent is valid

2.6. Awareness:

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India is estimated to have over 3 million sex workers as let out by the Ministry of women and child development and over 70% of this community have sexually transmitted diseases and 40% of the same enter this trade before age of 18. Majority of them do not know the spread of sexually transmittable diseases. If there is a statue for prostitution, then there needs to be licence for brothels and pimps. There should also be frequent visits from the local police department to ensure the safety and security of the sex workers in an initial stage of passing of the statues. The sex workers should be acknowledged on different sexual transmitted diseases and other venereal diseases that they are exposed to. They should also undergo the prescribed tests by experts once in a fixed tenure so that they shall not continue to spread the disease to others by infecting them.

3. IMPEDIMENTS IN LEGALIZATION OF PROSTITUTION:

The state regulates and formulates policies for the harmonious existence and maintenance of social institutions like family. Legalizing prostitution shall question the existence of such institutions. Marital life of individuals shall also be affected with prostitution being legalized. That is, when one partner goes in to seek a service offered by sex worker, that amounts to adultery. Moreover, legalizing strains social institutions. It would be tough for the legislation to make a balance between the both and both are inter conflictory. If prostitution is legalized, it shall help the pimps and the brothels if not clearly defined. For example, there exists laws for trafficking of individuals but still the same has not came to an end with the statue being existent for the past 63 years due to its loop holes. In the same way, if the law regarding prostitution is made legal and then not clearly defined, then it shall do more harm than it ought to do good to the sex workers community. In many parts of India, women are kept as Sex Workers not by their choice but as bonded labour. Legalizing won't help them from the same if not drafted properly.

In India, we have strict abortion laws. Then there is little use of legalizing prostitution as sex workers are also not allowed to get abortion after a certain time of their pregnancy thereby doing them injustice to their profession and also straining the lives of the affected parties. Finding of the natural father shall be a great task and later the custody of the child shall not be desired by both the parents unless in rare circumstances. Section 375 of the Indian Penal Code talks about Rape

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and its definition. But the drawback is that when in accordance with its definition, rape is a term restricted to females only. But after the amendment of Section 377, where there is no concept of unnatural sex and that homosexuality is widely accepted. The probability is that a sex worker can be a male/female/other. Just because the majority of sex workers are females doesn't mean that other genders are not prevalent. So the government will have to re consider the definition of rape before further legalizing prostitution.

4. CONCLUSION:

Even though there are considerable drawbacks, legalising of prostitution shall help all the sex workers in the nation to curb violence against them. Moreover, awareness can be spread across the community by making them aware of their rights as a sex worker and also about various health issues and others sexually transmitted diseases that they might have.

Awareness can be given about symptoms of AIDS, etc. and also about healthy sex. Moreover, it is assimilated that if prostitution is legalised and sex workers are coming into the field by their own consent, then the number of immoral trafficking would come down. Furthermore, the number of sex workers in India is estimated to be over 3 million as of the reports published by the Ministry for Women and Child Development in 2000. There are no statistical information available after that. When prostitution is legalised and sex workers be given social recognition and protection under law, more and more of them shall turn up and recognise themselves as sex workers, thereby making it easy for the government to have a clear idea of how many sex workers are there. It also facilitates as a platform for understanding and researching various sexually transmitted diseases that they have. It is true that there needs to be considerable amendments regarding various subject matters such as rape, adultery, abortion, etc. But it is high time that Indian Government looks into the same as it is arising problem in India as a developing country these days. It is concluded by the researcher that even though there are demerits, the merits overweigh them and thus it is high time that India takes a stance in legalising of prostitution rather than turning a blind eye on the same.

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THE PRACTICE OF MANUAL SCAVENGING IN INDIA

- **JAI GOVIND M. J.**

INTRODUCTION

A country like India which still holds on to its socio cultural and deep rooted practices have seen many challenges to livelihood. Nearly seven decades into its independence, it is a tragedy that a section of its population still earn their living by cleaning human faeces. The excreta are piled into baskets which scavengers carry on their heads to locations that are several kilometres away from the latrines. Even today, manual scavenging continues in parts of India where there is no proper sewage systems or safe faecal sludge management practices. It is painful to even imagine the exploitation and humiliation they are subjected to. Manual scavenging is one among the most undesirable, high-risk jobs typically subcontracted to temporary, informal workers based on their caste; the group or slot of people who are neither socially accepted nor given an opportunity to decent livelihood for survival.

To understand the content, it is important to know what actually Manual scavenging is, it is a term used mainly in India for manually cleaning, carrying, disposing of, or otherwise handling, human excreta in an insanitary latrine or in an open drain or pit. Manual scavengers usually use hand tools such as buckets, brooms and shovels for their work. The 2011 Census of India found 794,000 cases of manual scavenging across India. The state of Maharashtra, with 63,713, tops the list with the largest number of households working as manual scavengers, followed by the states of Madhya Pradesh, Uttar Pradesh, Tripura and Karnataka.

The Constitution of India bans the practice of untouchability and the Protection of Civil Rights Act, 1955, prohibits compelling anyone to practice manual scavenging, but still the occupation is being practiced. According to a report in The Indian Express, the inter-ministerial task force in 2018 accounted for a whopping number of 53,000 manual scavengers in India; this was four times greater than the last survey conducted in 2017. Moreover, this number accounts for only 121 districts out of the total 600 plus in the country. There is no clarity as to what constitutes to being

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considered a manual scavenger in the eyes of the government. This makes the problem even more complex. The biggest violator of the law is the Indian Railways which dumps human excreta directly on railway tracks every day and employs scavengers to clean it. India is listed among the nine countries where sanitation workers face the worst working conditions. Others included in the list are Bangladesh, Bolivia, Burkina Faso, Haiti, Kenya, Senegal, South Africa and Uganda.

The right to be free from manual scavenging is an economic, social, and cultural right. Over the years, various movements and organisations have been established to abolish this despicable practice, including an Act. What is shocking, however, is that there is no proper data available on the issue and whatever official statistics is available contradict each other.

ISSUES FACED BY MANUAL SCAVENGERS IN INDIA

There are many social and economic issues faced by the people employed under manual scavenging in India. Some of the major issues includes the following:

1. There are many health related issues associated with the term scavenging, as all these labour are exposed to gases such as hydrogen disulphide, carbon (IV) oxide, ammonia, methane etc. These result in severe health issues in them- which includes respiratory and many other hygiene disorders.
2. Another major issue is acceptance in society, they are often side-lined in the name of the profession they carry out and are often given space to reside on the outskirts of the city. The Structural violence against them are the concern of the hour as lives of the workers gets difficult.
3. Caste Discrimination- One of the major reasons that pulled down this class of people is the tag ‘lower caste’. It is often seen in India that the people belonging to lower caste are seen as untouchable and are expected to carry out certain practices which the other people in the society won’t even think of doing, one of them is manual Scavenging. Dalits face the worst form of caste-based discrimination even after 70 years of independence in the largest democracy of the world. The prevalence of caste dominance and traditional practices is a prominent reason that this illegal occupation is still carried out by the people in India.

4. Social discrimination - In another words a life different from the others in the society. People involved in Manual scavenging is often not accepted in society and they life and habitat in their own communities, they are not welcomed to the society because of the occupation they hold.
5. Uncounted deaths - more than 400 people from marginalised communities have lost their lives cleaning sewers without sophisticated equipment or safety gear since 2014 but governments and police across the country have not been able to send a single person to jail under a law that prohibits engaging people for such work.

REASON FOR THE PRESENT SITUATION

The sole reason for the act is the cost effectiveness in the practice manual scavenging. Whereas if we employ mechanized tools and assistance the cost will shoot and there will be a comparatively higher cost of work. Thus the cheap labour and cost efficiency is the attraction of contractors towards Manual Scavenging. The workers are paid less than a minimum wage, manual scavengers are often forced to borrow money from their higher-caste employers, leading to debt bondage.

Predominance of caste and class is also one the reasons, for the current situation.

Dalit communities continue to face threats of violence, eviction and withholding of wages if they try to give up the practice. They stigmatized by the community due to the nature of their job. They are regarded as untouchable and they are forced to accept their condition. This problem is much deeper as their children are also discriminated and forced to occupy the same work as their parents.

There is no gender separation as such in the field, women are often seeing cleaning bathrooms and portholes, whereas men are employed in a variety of such work. But women are paid less for the work compared to men in the same occupation.

This is because here also women are side-lined on the basis of gender identity and work efficiency.

There are no proper strategies put forward to liberate manual scavengers psychologically. This pushes those in the practice to get even deeper and deeper into the practice of manual scavenging. In the words of Dr B.R. Ambedkar, “In India, a man is not a scavenger because of his work. He is a scavenger because of his birth irrespective of the question of whether he does scavenging or not.”

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All the above discussed are the major reason why this class of people are pushed to the dark side of the society.

LEGAL ASPECT TO COMBAT THE PRACTICE OF MANUAL SCAVENGING

The dark truth is the fact that the practice of Manual scavenging is illegal in India and has been since years. The employment of manual scavengers to empty a certain type of dry toilet that requires manual daily emptying was prohibited in India in 1993. The law was extended and clarified to include insanitary latrines, ditches and pits in 2013.The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013 - it defines manual scavenger as "a person engaged in or employed for manually carrying human excreta." Manual scavenging may not be prevalent in the same form today. It has only worsened. Sanitation workers have to now risk their lives by physically entering the septic tanks and sewers that have not been deluded for years together to clean them manually – mostly without even the basic safety gear.

It was made compulsory that the process should be entirely mechanised due to the dangers of the sewer environment in which manual scavengers work and without adequate measurement tools, numerous other gases present in the sewer might cause real harm to the workers' health. India, has also banned caste-based discrimination in 1955, has passed several laws to end manual scavenging with government pledges to modernize sanitation and criminalize those who employ manual scavengers. The biggest violator of this law in India is the Indian Railways where many train carriages have toilets dropping the excreta from trains on the tracks and who employ scavengers to clean the tracks manually.

The major issue regarding the practice is the loopholes in the law applicability. There is no authority or body appointed to regulate or take a look into this sector particularly, thus the wrongdoers never come to light.

People who are engaged in the act of manual scavenging are mostly poor backward and uneducated class of people, thus they do the act the practice for their survival and livelihood. If we look into the laws made in India, we can clearly find that India probably has more laws specifically related to sanitation workers and labour protection than other. But still the life and working conditions of the workers are all though the same.

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GOVERNMENTAL ACTIONS

There were several steps taken by the government to combat the present situation - laying down the rules and procedure for the rehabilitation of manual scavengers through training in alternate employment, financial help and help with purchasing property

As per Section 33 of the MS Act, it is the duty of every local authority and other agency to use appropriate technological appliances for cleaning of sewers, septic tanks and other spaces within their control with a view to eliminating the need for manual handling of excreta in the process of cleaning. The Act also stipulates a jail term of up to one year with a fine of Rs 50,000 who engages manual scavengers that would rise to up to two years and Rs One lakh for a repeat offenders.

The central government enacts laws, state representatives in panchayats, elected village councils, and municipal corporations too often not only fail to implement prohibitions on manual scavenging by private households, but also tend to ignore the present situations and living conditions of the people involved in the act of Manual Scavenging.

REASON FOR INADEQUATE LEGAL REDREESAL

There are possibly two major reasons, for one, the inadequacy in legal redress and addressing of the labours or work force involved in these manual acts. Records were placed before Parliament by Ministry of Social Justice and Empowerment categorically states that there has been "no reported conviction" under the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 (MS Act) since its enactment. This clearly indicates the failure of the administrative system

Secondly, the history of caste and organised resistance among people. In Indian context caste and prevalence of some deep rooted beliefs in people played an important role in the determination of "who is supposed to what in the society ", which is considered to be the seed behind the age old tradition of Manual scavenging in India. Despite legislation that prohibits manual scavenging, it is estimated that a significant proportion of the country’s 2.6 million dry latrines are cleaned manually.

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GOVERNMENT STRATEGY TO ELIMINATE MANUAL SCAVENGING

The government of India has adopted a two-pronged strategy of eliminating insanitary latrines through demolition and conversion into sanitary latrines, and developing a comprehensive rehabilitation package. Some of its major features were as the following-

1. Prohibits the construction or maintenance of insanitary toilets
2. Prohibits the engagement or employment of anyone as a manual scavenger
3. Violations could result in a years' imprisonment or a fine of INR 50,000 or both
4. Prohibits a person from being engaged or employed for hazardous cleaning of a sewer or a septic tank
5. Offences under the Act are cognizable and non-bailabless

Human Rights groups also found some instances in which women and men from the Valmiki caste are engaged by urban municipal corporations, both directly by the government and through contractors, to manually clean excrement. Even after all these strict laws and regulations in the country.

A large majority of the manual scavengers surveyed for the 2019 study reported limited access to government schemes. They missed out on benefits related to rehabilitation, alternative employment, and education of children, because their names were not included in government surveys.

All these are the proofs that they are not even addressed well in the country.

GENDER ASPECT ATTACHED TO THE PRACTICE OF MANUAL SCAVENGING

Women are subjected to exploitation and abuse in mostly all the labour sector in India. According to sources, all those engaged in manually removing human excreta, 95 per cent are women. While men are paid in cash, women are mostly paid in kind. The women get paid as little as between ten and fifty rupees every month per household, and sometimes as a bonus they are given stale leftover

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food and worn-out clothes. This is far less than men who earn up to Rs 300 to clean septic tanks and sewer lines on any given day.

Some women said they faced threats of violence when they refused to practice manual scavenging. Such threats have been particularly effective in binding communities to manual scavenging because the affected communities face extreme difficulty in securing police protection.

One of the key reasons why the number of women cleaning dry toilets is higher is the ancient Jajmani system. Jajmani loosely translates to ownership over the rights to clean a select number of dry toilets. The system prevailed in select Dalit communities so that the right to clean a certain number of toilets remained in the family, passing on from one woman to another. Mother-in-laws transferred their jajmani to daughter-in-laws. Even marriages took place on the basis of jajmanis a family held so that the woman would have food security. According to India Exclusion Report 2016, 'These rights are equivalent to property rights and can be bought and sold, always in connection to the women of the family. In times of crisis, these jajmani documents are also pawned to borrow money.'

These system prevails even today, now the situations have changed, times have changed, people have got modernised, but still the trimmers of the ugly system of caste discrimination and slavery expected from the lower class of people still exists.

This is also a reason that doesn't let go the tag of being a manual Scavenger even though they try to choose a different a reputed livelihood. The tag that will never be detached from the people.

MEASURES/ SUGGESTIONS TO REDUCE THE RISK OF MANUAL SCAVENGING

1. One of the primary and most necessary measure is of practice of personal hygiene and for the workers, as this will help in the prevention of diseases and give them a healthy environment to work. Some of them include - using of waterproof gloves while handling human waste and others, wearing of rubber boots at the worksite and during transport of human waste or sewage, regular washing and sanitizing of hands after work.

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2. Personal Protection Equipment- it is recommended and is held must for the workers handling human waste and sewage, so that they are protected and disinfected from diseases. PPE includes-Goggles, Protective face mask or splash-proof face shield, Liquid repellent cover all's, Waterproof gloves, Rubber boots.
3. There should be proper training given for workers to personal hygiene and disease prevention. As majority of the workers belong to unprivileged and uneducated backgrounds. Thus awareness and education among them is a necessary element for minimizing the risk of manual Scavenging.
4. Proper human waste management equipment- In order to free the scavengers from the shackles of this practice, the government should invest in pieces of machinery that can be used to clean ditches and septic tanks. The machineries can be either made in India or can be exported from its dealers. A country who invested millions on monument can very well invest on needy and underprivileged people.
5. As it is clear that these slot of people are socially and economically backward, it is important to give those sufficient opportunities and social acceptance. So that they can led a decent life. Social upliftment of the class of people is the need of the hour.#
6. It is required that there should be creation a rehabilitation scheme in consultation with communities engaged in manual scavenging and civil society organizations that corresponds with the rehabilitative provisions under the 2013 Act. In particular, this scheme should provide for both immediate and long-term access to sustainable livelihoods.

CONCLUSION

Towards the end of paper, it would like to highlight the fact that government has created certain laws and provisions regarding the practice of Manual scavenging, but still practice is being carried out in the country it is only because of the lack of awareness and unemployment in country. Movements like Swachh Bharat Abhiyan have repeatedly tried to revolutionise the image of sanitation in the country. Despite these campaigns, manual scavengers continue to work putting their lives at risk, but their existence is denied by many states. "One of the striking challenges that the sanitation workers face in the country, in addition to the various vulnerabilities and hazards

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that they face in their day-to-day work, is the fact that various levels of governments are not even counting them.

As a society, people should not increase such acts as now every house is equipped with modern toilets and facilities, mostly everyone is aware of the hygiene issues regarded to these practices. These worker are not even protected by adequate health and safety measures risk injury, infection, disease, mental health issues, and death. Our country's economic and social development, it is now pertinent that manual scavengers are liberated from these demeaning jobs and are provided appropriate rehabilitation.

It is the social as well as the moral responsibility of the people to discourage the act of manual scavenging and encourage the people involved in manual scavenging to shift from the occupation, educate themselves and lead decent life. Because at the end of the day no country can truly progress until we bring to the forefront the ones often unheard and unseen.

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RAJNEESH KUMAR PANDEY VERSUS UNION OF INDIA: THE UNEQUAL BARTER FOR EDUCATION

- VAGMI SHARMA

ABSTRACT:

The essay critically analyses the interim order passed in November 2017 in the Supreme Court Public Interest Litigation case of *Rajneesh Kumar Pandey Versus Union of India*[61]. The instant case law concerns itself with the shortage of special education teachers for students with disability in Uttar Pradesh. It is the rather ableist order that I express my discontentment against in the following paragraphs.

Patriotism does not require us to consent to the destruction of liberty, unthinkingly. Rather, it necessitates us to question and criticize our government. Thus, it becomes imperative to disapprove of the interim order[62] passed by the Supreme Court in the caselaw of *Rajneesh Kumar Pandey Versus Union of India*.

By professing that children with disability are incapable of studying in a mainstream school, the Apex Court aims at providing education at the unprecedented price of loss of self-determination and exclusion[63]. It treats these children not as active agents with legal rights but as mere objects of welfare and charity schemes[64]. It depicts its savior complex by granting sympathy rather than acknowledging the already-existing rights of these subjects.

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[61] *Rajneesh Kumar Pandey Versus Union of India,* Writ Petition (Civil) No.132/2016

[62] "It is impossible to think that the children who are disabled or suffer from any kind of disability or who are mentally challenged can be included in the mainstream schools for getting education. … The students who suffer from blindness, deafness and autism or such types of disorder may be required to have separate schools with distinctly trained teachers."

[63] Sandra Fredman. 2005. *Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?* in Anna Lawson and Caroline Gooding [Eds.] Disability Rights in Europe: From Theory to Practice. Hart Publishing. Pg. 199-218.

[64] Supra Note 1.

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Instead, the Court should embrace a model of substantive equality, which focuses on three central aims[65]. Firstly, it should ensure that the children with disability are not subjected to any disadvantage. Conversely, the scheme of segregation will prejudicially limit the life events that are crucial for their holistic development. Secondly, the model should promote respect for equal dignity. However, it is only evident that the interim order is based on an assumption that the children do not profess any social coping skills. Lastly, the model should emphasize on the value of full and active participation of children with disability in society. Full participation is a form of affirmative action that will include inclusion in educational institutions, encompassing its decision-making mechanisms. This representation of children with disability will increase the effectiveness of governmental policies and lead to the democratization of the means of attaining equality.

Inspiration can be taken from the Canadian case-law of *Eldridge versus British Columbia*[66] that dealt with the principles of social rights in regard to the issue of disability. Social rights are exercised by children with disability as individuals and not as a part of the disabled group[67]. Accordingly, the claim for necessitating inclusive education is not an assertion for special treatment, but only for equal access to education that is available to all citizens. Additionally, the service is essential to help persons with disability get the same quality of education as accessible by body-abled citizens[68].

It is also imperative to take note of the Right of Children to Free and Compulsory Education, Act that makes education a fundamental right under Article 21. Hence, education is a service provided generally by the Indian state. The special pedagogical support required in mainstream schools is not an unnecessary and luxurious service[69]. Indeed, it is only a means by which the children with disability can have meaningful and equal access to general education[70]. Thus, the claim for

[65] Supra Note 1.
[66] Eldridge v British Columbia (Attorney General) (1997) 151 DLR (4th) 577 (Supreme Court of Canada.)
[67] Supra Note 1.
[68] Supra Note 4.
[69] Moore v. British Columbia (Education), 2012 SCC 61, [2012] 3 S.C.R. 360 (Supreme Court of Canada.)
[70] Supra Note 7.

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inclusive schooling is essential and not ancillary to the affirmation of the choices and consent of the disabled. It prioritizes their experiences over the privileged state expertise[71].

The interim order characterizes the Indian state's failure to treat children with disability equally rather than the demand being one to tackle a trivial burden, which isn't faced by the mainstream-body abled population[72]. Thus, the denial of providing equal access to inclusive education will be prima-facie discriminatory against children with disability.

It would be appropriate to apply the Canadian judicially interpreted Meiorin test[73] to inspect whether the provision of segregated schooling has a bona-fide and reasonable justification. Here, the Indian State is the duty-holder and the children with disability are the rights-holder.

The standard of providing segregated schooling is rationally connected to the general purpose of the Indian state to provide education[74]. Thus, the first step is satisfied since separate schooling is minimally equipped to provide individualized attention to children with disability. The second step is also satisfied since the strategy was recommended in good faith[75]. However, the third step is not satisfied since providing separate schooling is not reasonably necessary to accomplish the State purpose[76]. The standard will instead have a detriment effect on these children due to the risks of labeling and misclassification leading to stigma[77]. Additionally, separate educational apparatus

[71] Mike Oliver. 1996. 'The Social Model in Context' in Understanding Disability.

[72] Supra Note 4.
[72] Supra Note 7.

[73] British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (1999), 36 C.H.R.R. D/129 (Supreme Court of Canada.)

[74] Supra Note 11.
[75] Supra Note 11.
[76] Supra Note 11.

[77] Martha Minow. 1991. *Dilemmas of Difference* in making all the Difference: Inclusion, Exclusion and American Law, Cornell University Press.

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can also be used to perpetuate discrimination against children with disability[78]. Lastly, the standard is prone to making children suffer from low-self esteem images that will in turn, decrease their motivation to learn[79].

The organizational and practical arrangements for providing special pedagogical support will not constitute an undue hardship for the Indian State. The Indian Government provides various services to its body-abled citizens that are quite expensive, too[80]. Thus, the mere increase in costs borne by the Government cannot alone be a satisfactory justification for not accommodating the rights of the children with disability[81]. The value put on accommodating the disabled children shouldn't be superficial[82]. Indeed, accommodating the inclusive needs will prevent discrimination that is also in the public interest[83]. Thus, it's important to prioritize the interests of children with disability by taking a proactive approach to budgeting and programming[84].

Therefore, I hope that the Supreme Court will acknowledge these criticisms for every institution should evolve and become a safe-space that thrives on the value of inclusivity.

[78] Supra Note 15.
[79] Supra Note 15.

[80] Supra Note 11.
[81] Supra Note 11.
[82] Supra Note 11.
[83] Supra Note 11.

[84] Supra Note 7.

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SECTION 64: THE PATRIARCHAL MISSION

- **VAGMI SHARMA**

The essay aims at exploring the discriminatory nature of Section 64[85] of the Code of Criminal Procedure, 1973 that deals with the serving of summons.

Accordingly, it only lets an adult male member accept the summon in case of the absence of the defendant from the house and therefore, excludes women.

The exclusion of women from receiving the summons shows the patriarchal nature of the provision. When I think of the reasons about why this provision exists, I wonder if it is because we, women are not responsible enough to handle a judicial order? However, that seems unlikely because women are burdened with the responsibility of managing the entire household while their trauma for the same is given absolutely zero consideration. I believe that the reason for this provision is the addictive patriarchal need to have an illusion of control over the women[86] where even the most mundane of tasks like collecting a summon gets infected by masculine insecurity.

The masculinity of the provision has indeed, been thought about before too. One such occasion was the Madras High Court judgement of *G.Kavitha vs. Union Of India*[87]. The counsel for petitioners argued, and correctly so that the provision would only lead to difficulty for a male defendant living in a nuclear family with just his wife.[88] Here, she would only be treated invisible

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[85] The Code Of Criminal Procedure, 1973, Section 64:

Service when persons summoned cannot be found. Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate. Explanation.- A servant is not a member of the family within the meaning of this section.

[86] Wilson, A. (2000). Patriarchy: Feminist Theory. Routledge International Encyclopaedia of Women: Global Women's Issues and Knowledge, p.2.

[87] G.Kavitha vs. Union Of India [2006] Writ Petition (MD) No.2949 of 2004 (Madras High Court)

[88] See **supra** note 3.

by the police authorities. The Section leads to the Indian women feeling like a human and ghost, all at once. While she knows that she exists, her invisibilization by the state machinery negates her existence as if she was never on her residential property, in time and space.

It is also important to consider the hetero-normative and cis-gendered structure of the provision that does not take into account a lesbian-homosexual relationship or an individual who identifies with gender-neutral pronouns.

Another facet that I took into consideration was the application of safety as a social construct for the paternalistic negation of women from the provision. The *parens patriae* intent of the legislature to shield women from any outside-dangerous influences[89] blatantly disregards the fact that women do exist in the public sphere and know how to be self-sustainable in regard to their own security. Indeed, it remains unclear to me after much consideration as to the probable harassment that could take place when a women attempted to receive a summon. If the Indian state is nevertheless so concerned about our safety and the uninterrupted harassment we face, I wonder why they still have not considered the rapes that take place inside our bedrooms by our husbands, on different nights.

The obvious inadequacy of Section 64 disappoints me, however, it does not shock me. It is so because Indian women anyway do not need a *Ram* to rescue them but only prefer a sincere ally to their feminist movement, or may I have the liberty to say, feminist lifestyle. The Indian state, however failed to be an ally. The Indian state is masculine[90]. The law has been shaped by the elite, *savarna*, heterosexual, cis- gendered and body-abled masculine identity, who finds themselves entitled to the maximum sum of privilege that the society has to offer. While constructing the laws, Section 64 to be specific, this oppressive identity has defined and interpreted the Section according to their imaginary perspective of the society where no gender-based exploitation exists[91]. The Indian women are treated as inanimate objects where their capabilities are looked at from the

[89] See **supra** note 3.
[90] MacKinnon, C. (1989). Towards a feminist theory of the state: The Liberal State. Harvard University Press.

[91] See **supra** note 6.

masculine lens. Chances are that the masculine state was under the impression that the women would be so overburdened with the domestic chores that they would find no time, not even a single second to answer the door-bell. If I have not made it apparent, the lack of shared responsibility to distribute the domestic labour comes from the addictive engagement of the patriarchal legislature to make toxic laws and negate their share of domestic chores.

Furthermore, it is imperative to note that fourteen years have passed since the judicial decision in *G.Kavitha vs. UOI* advised the legislature to re-consider the concerned Section over the gender bias. However, it is worrisome that no constructive change has been witnessed yet on behalf of the judiciary or the legislature. While the judgement acknowledged the masculine nature of Section 64, it was devoid of any substantial directions that could be seen as a legitimate attempt at challenging the patriarchal crisis. It put the burden on the individual capacity of the petitioner for its inaction. It held that it would be unfair to determine the constitutional validity of the concerned section by ignoring the views of the entire women of the country. Thus, the judiciary maintained its passive virtues. Indeed, this reasoning ignores the constitutional assurance of protecting fundamental rights. An issue of fundamental rights cannot be resolved by a societal referendum. The excuse of consulting stakeholders should only be held permissible when an overriding public interest can prima facie be shown[92]. However, the judgment showed no overriding public interest. Constitutional morality was subjugated by societal morality. Using *G.Kavitha vs. UOI* as an ideological tool, the de jure relations contributed to stabilizing the de facto relations.[93] The judiciary became a crystal-clear mirror that reflected back the patriarchal relations in the society, back on the women.

Additionally, the legal paralysis of the Indian legislative despite the suggestion of the judiciary signifies the legislature's unwillingness to review the provision since the masculine perspective in this provision is the only perspective qualified enough to be considered rational. The masculine

[92] Tyagi C. (2017). Does 'He' Include 'She'?: Some Thoughts on Section 64 of CrPC. Economic and Political Weekly.

[93] See **supra** note 6.

Indian law does not have to worry about the seemingly subjective and emotional dissenting voices of the women. The voice of the Indian women is considered to be anything but objective, sensible and logical[94]. I also believe that the legislature finds itself involved in a dilemma of justice where even though on one hand it enshrines Article 14 as the fundamental right that upholds equality before law, it also provides with a discriminative statue in the form of Section 64. Consequently, it violates Article 14.

I will now present a rather awaited section of this essay. I shall apply a rigorous standard of review[95] (RSR) to the seemingly disappointing Section 64. We shall together embark on a thoughtful journey to see if Section 64 discriminates against women on the specified ground of sex (read: gender) under Article 15. Traditionally, the judiciary has provided the Articles 15 and 14 with the same test: inspecting whether the concerned classification satisfies the reasonableness review[96].

Indeed, it is the use of the word *only* in Article 15 that secures the patriarchal interests of the *savarna* state. For historically, there anyway exists a low standard of justice that our legislature is expected to fulfil, all it is required to showcase is that the specified ground (sex) is not the only ground on which the legislation (Section 64) exists[97]. Thus, this essay will not be providing an easy passage for Section 64 where any limiting state interest is considered legitimate without analysing if it is sufficiently vital enough to indeed curtail application of Article 15. Consequently, the mere existence of a suitable nexus between the measure and the state interest will also not satisfy my feminist heart.

[94] Finley, L. (1989). Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning. Yale Law School Legal Scholarship Repository, 64:886.
[95] Khaitan, T. (2008). Beyond Reasonableness- A Rigorous Standard of Review for Article 15 Infringement. Journal of the Indian Law Institute.
[96] See **supra** note 11.
[97] See **supra** note 11.

The first part of RSR would require us to embark on an interest analysis[98]. The state interest for Section 64 was declared by the Assistant Solicitor General in *G. Kavitha v UOI*. Here, it was advocated that the section ensures that the state interest of maintaining privacy of women is achieved. Additionally, the interest of respecting *paradanashin* women was also highlighted. The last state interest advocated was the presence of police required in delivering of summons and the subsequent need of having a male member interact with police for the police authority can be predatory.

As justly put by Tarunabh Khaitan, it is pertinent to highlight the real state interest that Section 64 is seeking to achieve[99], instead of prima-facie believing the arguments advanced by Assistant Solicitor General. Thus, I do not believe that this state interest of maintaining privacy is completely true. Do not get me wrong, I do believe that the interest of maintaining privacy is constitutionally legitimate. However, a supplementary effect of this interest needs to be highlighted. What is being protected in the name of privacy is honour. Section 64 represents the *savarna* interest of re-creating an ideal society, similar to one that exists in the collective *hindu* memory: *The Ram rajya*. Consequently, it becomes imperative for all women to not step outside the house, and this becomes the modern equivalent of *lakshman rekha*. Every time a summon is undelivered for the male patriarch is not inside home, the *hindu* state ensures that the mistake that Sita committed is not repeated and *brahmin* honour is protected. Thus, the particular state interest becomes illegitimate when it attempts to achieve the *savarna* interest.

As for the second state interest, I consider the aim of respecting *paradanashin* women a legitimate interest provided that it is the women themselves who have taken such decision. However, for the *paradanashin* women who courageously dedicate their experiences to annihilating the demons of casteist honour, this state interest becomes illegitimate because it only helps further the patriarchal dream of treating women as fragile objects who cannot be shared with anyone.

[98] See **supra** note 11.
[99] See **supra** note 11.

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Lastly, the third interest of providing security from the predatory police is a legitimate state interest according to me.

I do believe that the selected legitimate state interests of maintaining privacy (when it is not trying to achieve brahmanical honour), respecting wishes of *paradanashin* women and providing security are compelling state purposes.

I will now embark on a nexus analysis. Thus, I will assess whether the means of not allowing women to receive summons is suitable and necessary.

I do not believe that the means employed to further the initial two state interests of providing privacy and respecting the wishes of *paradanashin* women are suitable. I understand if this observation seems too radical, however, our thoughts are a product of us. The instant means of not allowing women to receive summons abolishes the very interest it is trying to achieve. Forcing a women to be confined within the four walls built by patriarchy does not preserve her privacy or autonomy. The right to privacy should be accompanied by the right to enthusiastically consent. Privacy doesn't comprise of merely physically isolating oneself but also comprises of respecting the autonomous choices a women makes. Thus, an alternatively suitable means of achieving the state interest of preserving privacy and respecting the wishes of *paradanashin* women would be by respecting women who act as the sole active agents in deciding whether they would like to receive a summon or not.

As for the third state interest of providing security, the means adopted of confining women inside their residences in order to ensure that no police violence occurs is not suitable. As observed by Tarunabh Khaitan[100], personal autonomy is the thread which runs through Article 15. However, not letting women accept summons restricts their right to autonomy and self-determination. As held in *Anuj Garg* v. *Hotel Association of India*[101], the state should not shrink its responsibilities.

[100] See **supra** note 11.
[101] Anuj Garg & Ors vs Hotel Association of India & Ors. (2007) Civil Appeal No. 5657 of 2007 (Supreme Court of India)

The state response to the presence of an exploitative police authority should not be victim blaming women and expecting them to confine themselves. It is also imperative to note that Section 64 instructs the adult man to receive the summon and put himself exposed to any potential police threat. However, the legislative imagination never took note of the subordinate masculinities in India. A Muslim, Dalit or transman could indeed become vulnerable to violence and danger. The Indian state has no authority to trade masculine lives only for getting pleasure from patriarchal legislations. Instead, the state should engage in training police agencies based on feminist ethics. Thus, a suitable means to achieve the interest of providing security would require the Indian state to respect the choices of women.

For the interests of clarity, since I do not find the state means of confining women to be suitable, I definitely do not find it to be necessary.

Thus, Section 64 does violate Article 15 for it discriminates against women on the specified ground of sex (read: gender.)

Hence, it is imperative that the legislature amends Section 64 and creates a safe-space for women where paramount importance is given to personal autonomy.

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AN IN-DEPTH STUDY ON THE INDIAN SEDITION LAW

- **YASHNA WALIA**

INTRODUCTION

The law of sedition in India is one of the most debated topics recently. It is defined under Section 124A of the Indian Penal Code, 1860. The provision states,

‘ Whoever, by words, either spoken or written, or by visible representation, or otherwise brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or may extend to three years, to which fine may be added, or with fine.’

While some demand its abrogation on account of violation of democratic values, others feel that it is pertinent to further national interests. While some feel that this particular provision keeps anti-national activities at bay, there are others who cite the examples of our brave freedom fighters who were incarcerated using this very provision. It is argued that the Indian Penal Code itself needs an overhaul, keeping in mind that it was originally drafted by the Britishers to further their colonial interests.

A SHORT HISTORY OF SEDITION

In order to study this issue as a whole, it is extremely important to trace its historical antecedents.

It is said to trace its origins to the England of the 13th century, then ruled by the Crown. An offence recognised as directly hitting at the State was ‘Treason’. Though, to be convicted of Treason, there had to be an overt act as a necessary condition. The law gradually evolved during the 14th century to include speech as well. As this resulted in ambiguity, the Star Chamber took it upon itself to evolve a new offence known as ‘seditious libel’. This was done in the decision in *de Libellis Famosis*[102]. Libel was an offence formerly seen only as a right used by private individuals to seek damages. ‘Seditious Libel’ incorporated in itself any speech inculcating disrespect towards the

[102] 77 Eng. Rep. 250 (K.B. 1606) (Coke).

government. 'Truth' of the statement thereof was no defence. This judgement cited no precedent as indeed, there was none.

Section 124A was not present in the original IPC of 1860. It was incorporated in 1870. This section is in agreement with the Treason Felony Act 1848 of Britain as it also penalised Seditious expressions. However, English lawmakers opined that Section 124A was a far clearer law when compared to the complexity of Sedition Law in United Kingdom.

The first recorded state trial for sedition was that of Queen Empress v. Jogendra Chunder Bose[103]. The court underlined the difference between 'Disaffection' and 'Disapprobation'. Disaffection was defined as a feeling contrary to affection, like dislike or hatred and disapprobation as merely disapproval[104]. The court in Queen Empress v. Amba Prasad[105] stressed on the literal interpretation of this Section. The court categorically held that it is not necessary that an actual rebellion or mutiny or forcible interpretation to the government or any sort of actual disturbance was caused by the act in question.[106]

It was the Federal Court of India's decision in Niharendu Dutt Majumdar v. King Emperor[107] which led to a conflict. Sir Maurice Gwyer, Chief Justice of Federal Court at the time, held that the mere presence of violent words does not make a speech or publication seditious. Instead, he was of the belief that in order to be brought under the ambit of sedition, the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their tendency. [108] However, this interpretation was rejected by the Privy Council in the case of King Emperor v. Sadashiv Narayan Bhalerao[109] which rather preferred the literal interpretation of this section.

After the country got independence, one of the first major challenges was to draft the Constitution. As stated before, the sedition law had been used against great Countrymen like M.K. Gandhi, Annie Beasant and Bal Gangadhar Tilak. The Constituent Assembly understood the importance of

[103] (1892) ILR 19 Cal 35.
[104] Nivedita Saksena, Siddhartha Srivastava, "An analysis of the modern offence of sedition" 7 *NUJS LAW REVIEW* 127 (2014).
[105] (1898) ILR 20 All 55.
[106] Law Commission of India, "Consultation Paper on Sedition" 13 (August, 2018).
[107] AIR 1939 Cal 703.
[108] *Supra* note 3 at 129.
[109] AIR 1947 PC 82.

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the Freedom of Speech and Expression and the necessity to include it in the Constitution. The freedom of speech and expression was stated in Article 13 of the draft Constitution. It was proposed that limitations be brought upon this freedom, one of them being sedition. However, the people had experienced curtailing of dissent at the hands of the sedition law. Therefore, the proposal of using the term 'sedition' as a limitation was dropped and thus, in the present constitution, the term does not find mention in the limitations imposed on Article 19(1)(a).

Courts in India struck down Section 124A as unconstitutional in the cases of Romesh Thappar v. State of Madras[110], Ram Nandan v. State[111] and Tara Singh v. State[112]. Pandit Jawaharlal Nehru was allegedly criticised for curbs on speech and expression under his regime. It was in this light, that he went for the First Amendment to the Constitution. Pandit Jawaharlal Nehru termed the sedition section as 'objectionable' and 'obnoxious'. In the amendment, the word 'reasonable' was added before 'restrictions' and additional grounds of 'public order' and 'relations with friendly states' were added in the list of permissible restrictions under Article 19(2).

And then came the judgement which is a major judicial precedent in today's sedition cases. It is instrumental in defining the criteria as to what qualifies as sedition and what does not. Five appeals to the Supreme Court against Section 124 were clubbed together in what came out as the Supreme Court's decision of Kedar Nath v. State of Bihar[113]. The SC reiterated the judgment of the Federal Court in Niharendu Majumdar. It stated that not using the word 'sedition' as a restriction to Article 19(1)(a) indicated the legislative intent of guarding the Freedom of Speech and Expression. The Supreme Court felt that this provision could be interpreted in more than one way. But it cited the precedent as in RMD Chamarbaugwalla v. Union of India[114], that the Supreme Court must consider that interpretation which makes the provision *intra vires* the Constitution.

The court stated that sedition could only fall within the purview of constitutional validity if it could be read into any of the six grounds listed in Article 19(2) of the Constitution. Out of the six grounds in Article 19(2), the court considered the 'security of the state' as a possible ground to support the

[110] 1950 AIR 124.
[111] AIR 1959 All 101.
[112] 1951 AIR 441.
[113] 1962 AIR 955.
[114] 1957 AIR 628.

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constitutionality of Section 124A of IPC. In the Court's interpretation the incitement to violence was considered an essential ingredient of the offence of Sedition.

Despite this landmark judgement, the sedition law is still surrounded with ambiguity and lack of clarity and is criticised of being used to curb lawful dissent by selfish governments.

WHAT THE NUMBERS SAY

The National Crime Records Bureau (NCRB) is the agency responsible for collecting and publishing statistics of crimes taking place in India. In 2014, it created a separate chapter for 'Offences against the State' in its annual report. Mentioned as Chapter 21 in 2014 and 2015, it then became Chapter 10A from 2016-2018. 2018 is the latest year for which data is available.

The numbers of sedition offences as reported each year are as follows:

- In 2014, 47 sedition offences were reported
- In 2015, 30 sedition offences were reported
- In 2016, 35 sedition offences were reported.
- In 2017, 51 sedition offences were reported.
- In 2018, 70 sedition offences were reported.

What is being seen as a major loophole in our legal system is the delay in police disposal and conviction in courts of such cases. The pendency rate of Police disposal has been consistently high from 2016-2018. The Pendency rates (as reported by NCRB) are as follows:

- In 2016, 72.1% Pendency Rate was observed.
- In 2017, 75.6% Pendency Rate was observed.
- In 2018, 71.1% Pendency Rate was observed.
- In 2016, 16 cases were sent for trail to courts.
- In 2017, 27 cases were sent for trial to courts.
- In 2018, 38 cases were sent for trial to courts.

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Out of the 16 cases of 2016, only 1 case saw conviction. Similarly, out of the 38 cases of 2018, only 2 cases saw conviction. Out of the 27 cases of 2017, none of the cases saw conviction.

The Pendency Percentage in Courts has also been consistently high.

- The Pendency Percentage was 91.2% in 2016
- The Pendency Percentage was 89.7% in 2017
- The Pendency Percentage was 85.6% in 2018

This is evident from the number of cases in which trial was completed.

- In 2016, 3 cases saw completion of trial
- In 2017, 6 cases saw completion of trial
- In 2018, 13 cases saw completion of trial

The year 2017 saw the highest number of people arrested for the offence – 228. Out of all these people, only 7 people saw acquittal and 4 saw conviction. Similarity is seen in data of other years.

In most cases, the sedition law becomes a tool of oppression, where the police don't even file a chargesheet and people just spend time in prison. People, on whom frivolous charges of sedition have been applied, are punished with jail for a long period without trial.[115]

India's slow moving judicial system ensures prolonged delays in disposing cases. Meanwhile, people charged with sedition have to surrender their passports, are not eligible for government jobs, must produce themselves in the court as and when required, and spend money on legal fees. 'The charges have rarely stuck in most of the cases, but the process itself becomes the punishment,' says Jayshree Bajoria, co-writer of Human Rights Watch report of 'stifling dissent' in India.[116]

ANALYSING INSTANCES OF ALLEGED VIOLATIONS

A wide range of activities have been considered as seditious by the prosecutors in recent years. From simply sharing a Facebook post to possessing material which is so-called 'seditious', we've

[115] Sumyesh Srivastava, "Abuse of Sedition law: Colonial hangover", *Deccan Herald,* March 01,2019, *available at* https://www.deccanherald.com/opinion/main-article/abuse-sedition-law-721081.html (last visited on April 02, 2020)
[116] Soutik Biswas, "Why India needs to get rid of its sedition law", *BBC News ,*August 29,2016, *available at* https://www.bbc.com/news/world-asia-india-37182206 (last visited on April 02,2020)

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had it all. Many people contend that a lot of people face sedition charges just because they irked somebody in power. It is important to remind you here that sedition charges cannot be levied unless they have permission from the government.

Recently, five minors of Rohtak District in Bihar faced sedition charges because they allegedly danced to a song considered 'Pro-Pakistan'/'Anti-India'. The song was related to 'Mujahids' responsible for threatening India's unity. A video of their dance started doing rounds on social media. Their parents stated that the DJ was playing songs from his mobile phone, and the controversial song played inadvertently in continuation and that the boys did not even understand and realise what the lyrics were about. Their parents wondered if the minors even knew the meaning of 'Mujahid'. Nobody even realised that something wrong had taken place and realised it only after police action.[117]

Criticising anybody in power using Twitter can also land you in jail. A district lawyer in Kanpur was arrested for re-tweeting a video of Yogi Adityanath, CM of UP and calling him a 'terrorist'. Similarly, Journalist Prashant Kanojia was arrested for a tweet featuring a woman who claimed to be Adityanath's lover. The Supreme Court criticised the police for the disproportionate punishment rendered. Similar is the scenario for other social media platforms like Facebook. Recently, Rapper Hard Kaur was charged with sedition for multiple posts mainly directed against Yogi Adityanath and RSS Chief Mohan Bhagwat. An 83 year old Jesuit priest, Stan Swamy, who has documented police abuse in tribal areas across the country, was charged with sedition in 2018 for his Facebook posts. One of his posts was a statement by the then Home Minister calling for dialogue. This move has been highly criticised by Jharkhand activists.[118] Journalist Kamal Shukla was incarcerated for sedition because he hit the share button on a cartoon criticising the SC's decision to reject petitions demanding an independent investigation into the death of Special CBI Judge Brijpal Loya.

There are also certain cases where the levying of sedition charges does come as unexpected surprises. Divya Spandana, former Indian National Congress MP, faced sedition charges just because she said that 'Pakistan is not hell'. In October 2019, as many as 50 celebrities were charged

[117] Santosh Singh, "Five minors face sedition charge for dancing to 'anti-India song'", *The Indian Express,* June 20,2018, *available at* https://indianexpress.com/article/india/five-minors-face-sedition-charge-for-dancing-to-anti-india-song-5224928/ (last visited on April 02, 2020)
[118] NH Web Desk, "Jharkhand activists slam attachment of Stan Swamy's belongings by state police", *National Herald,* October 22,2019, *available at* https://www.nationalheraldindia.com/india/jharkhand-activists-slam-attachment-of-stan-swamys-belongings-by-state-police (last visited on April 02, 2020)

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with sedition because they had signed an open letter to Prime Minister Narendra Modi seeing his intervention into mob lynching incidents across the country. Thankfully, the case was closed later by the Bihar Police.

The most prominent argument made in favour of abrogating the sedition law is that it is used to curb dissent. In 2018, more than 10,000 tribal farmers in the mineral-rich Jharkhand state were accused of sedition in 19 police cases for opposing acquisition of lands for so-called developmental projects. [119] This incident stands as a bleak reminder of similar action by the Tamil Nadu Police between 2011 and 2013. 9,000 people living in Tirunelveli District were booked for sedition for participating in peaceful protests against establishing a nuclear power plant in Kudankulam. [120]

The recent protests against the Citizenship Amendment Act have apparently raised the number of people facing sedition cases. In December 2019, about 600 anti-CAA protestors were accused of Sedition in U.P. but later police dropped the charge. Also, in the first week of 2020 in Jharkhand, a criminal complaint having sedition amongst the charges was lodged against 3,000 people for protesting against the CAA. However, the NCRB records for 2019 are yet to be published which shall provide the authentic numbers.

THE PATH FORWARD

Looking at the ambiguities which the sedition law creates, it is certain that some action must be taken in this regard.

The Law Commission of India has reviewed this issue quite a number of times. It is pertinent to mention that the Law Commission cannot enforce its recommendation, but is rather a body which gives suggestions which the legislature and executive can implement.

In its 39th report (1986) it did suggest that a lot of provisions of the Indian Penal Code are anomalous and that the punishments given are severe in nature. However, in its 42nd report (1971) it made three crucial suggestions to be incorporated in Section 124A, which were:

[119] Anumesha Yadav, "In Jharkhand, a tribal assertion met with fierce police crackdown", *Al Jazeera,* September 30,2018, *available at* https://www.aljazeera.com/indepth/features/jharkhand-tribal-assertion-met-fierce-police-crackdown-180929223820429.html (last visited on April 02, 2020)
[120] Megha Kaveri, "Seven years later: The lives of 9,000 people booked for sedition in TN's Kudankulam", *The NEWS Minute,* November 21, 2019, *available at* https://www.thenewsminute.com/article/seven-years-later-lives-9000-people-booked-sedition-tn-s-kudankulam-112670 (last visited on April 02, 2020)

- Incorporation of *mens rea* in this section.
- The scope of sedition be widened , incorporating Constitution of India, Legislatures and the administration of justice (judiciary), along with the executive government, against whom disaffection would not be tolerated, and
- Bridging the 'odd' gap between 'Imprisonment for Life' and 'Imprisonment which may extend to three years', or fine, by fixing the maximum punishment for sedition at 'seven years rigorous imprisonment and fine'.[121]

The 43rd Report of the Law Commission on 'Offences Against the National Security' (1971) also dealt with sedition and was merely a reiteration of the previous report.

It is very important to analyse the above recommendations of the Law Commission. They shall be dealt point-wise :

- Incorporation of *mens rea* : If not abrogation of this section, then the addition of 'mens rea' at least shall be a way forward. When it comes to the incident of the five minors of Rohtas District who were charged with sedition for dancing at a song, the incorporation of *mens rea* would have helped a lot in ascertaining whether these minors really intended to create public disorder.
- Widening of Scope : I believe that this suggestion shall prove to be a further deterrent to the way this section is implemented. Such an amendment/ widening of scope of the said provision would create discontent in the minds of the people. Further, this exercise shall prove to be futile. When it comes to the judiciary, we do know about the fact that the Supreme Court as well as the High Courts are 'Courts of Record'. They have the power to punish for the contempt of court. Also, the Legislature and Executive are accountable to people in the sense that they are comprised of their direct and indirect representatives. In what may be an exercise to demand lawful explanation, the authorities may see seditious elements just to curb dissent. Thus such an exercise may be seen as contrary to our democratic values.

[121] *Supra* note 5 at 2.

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- Bridging the gap in terms of level of Punishment : This suggestion is in line with the demand of reconsidering the allegedly severe punishments prescribed in the Indian Penal Code. It has been argued that the offences and their severity was prescribed from the colonial mindset of the British. A complete overhaul of the Indian Penal Code has been argued for by lot of people.

The strongest argument which is made in favour of abrogating Section 124A is that the United Kingdom has itself abrogated Sedition from their own law. Seditious libel was deleted by Section 73 of the Coroners and Justice Act, 2009. They believe that such a law has a chilling effect *en masse.* They also thought that their step would have a positive effect on other common law countries where this provision is used by governments to curb dissent in their own countries.

It has also been argued that there are already other existing provisions in the Indian Penal Code and other acts which render the use of Section 124A avoidable. Thus, Section 124A does not have a very unique role to play in itself and those acts which may constitute sedition can also be covered under other provisions of the law.

Chapter VI of the IPC already includes various offences against the State, like, waging or attempting to wage war (Section 121), Collecting arms etcetera with the intention of waging war against India (Section 122), concealing with intent designed to wage war (Section 123), covering a wide range of malicious intentions against the State. Chapter VII covers provisions relating to abetting mutiny (Section 131 and 132). Further, Chapter VIII, titled 'of offences against the public tranquility' covers actions which, if allowed, would disturb the peace of the society. Section 141 defines the unlawful assembly and Section 143 provides for punishment for the same; Section 153A prohibits the actions 'promoting enmity between different groups of religion, race, place of birth, residence, language etcetera and acts prejudicial to maintenance of harmony'; so on and so forth. These provisions take care of any activity which might be indulged into for the purpose of waging war against India or causing disruption of public order. The Unlawful Activities Prevention Act, 1967 deals with the demands/ assertions of 'cession of a part of territory of India from the Union' { Section 2 (i)}. Section 2 of the Prevention of Insults to National Honour Act , 1971, makes an insult to the National Flag and the Constitution in the manner set out therein, a punishable

offence. The Criminal Law Amendment Act of 1961 was enacted with the purpose of curbing activities that are 'likely to jeopardise the security of the country and its frontiers point'. [122]

The Freedom of Speech and Expression has a wide ambit and is quintessential for a vibrant democracy. It was observed by Alexander Meiklejohn that, in a democracy, people have the 'right to hear'. It is only after getting access to differing opinions and voices that a well-informed judgement can be formed. Our right of free speech does have the 'right to offend'. When we give out our opinions and thoughts, it is imminent that some people shall get 'offended'. However, none shall be persecuted simply because of the fact that he/she voiced his/her opinions.

Thus, it is important to call for a review of Section 124A in light of its misuse and ensure that it does not act as a deterrent to free speech.

[122] *Supra* note 5 at 28.

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A COMPARATIVE STUDY OF ALTERNATIVE DISPUTE RESOLUTION IN INDIA

- **HARSHIT KIRAN, ASHISH CHOUDHARY & SAUMYA ADITI**

ABSTRACT

Alternative Dispute Resolution[123], otherwise called ADR when all is said, is made of three words for example Alternative, which implies one of at least two accessible prospects, Dispute, which implies a contradiction or contention and Resolution, which implies a firm choice to do or not. In this way, in layman's language, Alternative Dispute Resolution intends to discover one of the at least two accessible prospects of contention or debate and take a firm choice which is for the improvement of both the gatherings.

In the event that we take a gander at ADR, at that point we will find that it is created from an old idea, where, when there was a debate in the family, senior individuals from the family used to sit together and tune in to the contention and afterwards make a choice, which was for the advancement of all the relatives. What's more, this shows ADR is a structure which has been done in our general public from the antiquated period and now, it has recently been adjusted and acquainted with a few different fields like that of trade, business, and so forth. Right now, have managed, what ADR is, its sorts, its significance, its favourable circumstances and drawbacks, its modes and highlights and we have additionally attempted to think about the methodology and strategies for different nations with that of India.

Researchers describe the number of kinds of ADR, favourable circumstances and detriments of ADR and additionally given a few models and attempted to compare Alternative Dispute Resolution in different countries. In the wake of perusing this paper, researcher comprehends, what ADR is, the manner by which it is led, what are its sorts and modes, its preferences and weaknesses

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[123] "What is Alternative dispute resolution (ADR)? - Which.uk." https://www.which.co.uk/consumer-rights/advice/what-is-an-adr-scheme. Accessed 2 Apr. 2020.

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and numerous other such focuses which is identified with the essential idea of ADR in such a clear way, that you would have the option to see all the variables which are straightforwardly or even in a roundabout way identified with ADR.

INTRODUCTION

Alternative Dispute Resolution, otherwise called ADR by and large is made of three words, for example, Alternative, which implies one of at least two accessible prospects, Dispute, which implies a difference or contention and Resolution, which implies a firm choice to do or not. In this way, in layman's language, Alternative Dispute Resolution intends to discover one of the at least two accessible prospects of contention or debate and take a firm choice which is for the advancement of both the gatherings.

According to the language of the law, Alternative Dispute Resolution (ADR) alludes to an assortment of procedures and strategies intended to help differing parties go to an understanding, a shy of prosecution. These procedures can incorporate everything from encouraging settlement exchange, in which different parties are urged to counsel straightforwardly with one another preceding some other legitimate procedure, to intervention, which can look and feel especially like a standard preliminary. The most regularly utilized ADR frameworks are arrangement, intercession, community law, and assertion. Legal counsellors frequently assume a significant job in ADR forms, either by prompting customers on and speaking to them in procedures, or by filling in as adjudicators, judges, conciliators, and additionally middle people.

On the off chance that we take a gander at ADR, at that point we will find that it is created from an old idea, where, when there was a question in the family, senior individuals from the family used to sit together and tune in to the contention and afterwards make a choice, which was for the advancement of all the relatives. Furthermore, this shows ADR is a structure which has been done in our general public from the old period and now, it has quite recently been changed and acquainted with a few different fields like that of trade, business, and so on.

Since, we realize that Indian legal executive is one of the most established legal frameworks, a widely acclaimed truth however these days it is additionally verifiable truth that Indian legal executive is getting wasteful to manage pending cases, Indian courts are stopped up with since quite a while ago with agitated cases. The situation is that significantly in the wake of setting up

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in excess of a thousand quick track Courts that previously settled a large number of cases, the issue is a long way from being explained as pending cases are as yet accumulating.

To manage such a circumstance Alternative Dispute Resolution (ADR) can be a useful component, it settles strife in a serene way where the result is acknowledged by both the gatherings.

Things being what they are, presently how about we move further to know, what really Alternate Dispute Resolution implies?

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative Dispute Resolution incorporates question goals, procedures and strategies that go about as a method for differing gatherings to go to an understanding shy of the suit. It is an aggregate term for the manners in which those gatherings can settle debates, with the assistance of an outsider.

Contest goals are, just, the way toward settling a debate between parties. Question goals are likewise frequently alluded to as "compromise." There are various procedures that can be utilized to determine clashes, claims, and debates. Alternative Dispute Resolution, or ADR, alludes to methods for tending to and settling questions outside of court and its customary, ill-disposed climate. These procedures can be utilized to tackle any kind of debate, including yet not restricted to[124] :

- **Family Law Disputes**: This incorporates youngster care, separate from procedures, and kid support

- **Neighbour Disputes:** This incorporates visit commotion, statute infringement and issues with Homeowners' Associations

- **Workplace Disputes:** Some instances of work environment or business questions, incorporate compensation and hour debates, and working environment badgering

- **Business Disputes:** Examples incorporate agreement questions and business obligation

[124] https://www.legalmatch.com/law-library/article/types-of-alternative-dispute-resolution-adr.html (accessed on 20-04-2019)

- **Housing Disputes:** Examples incorporate a proprietor neglecting to keep up a livable living arrangement and lodging separation
- **Personal Injury Disputes:** Examples incorporate clinical misbehaviour cases and engine vehicle crash cases
- **Consumer Contract Disputes:** This can incorporate item obligation and guarantee claims
- **Environmental Disputes:** Examples incorporate lethal waste dumping and air contamination.

In this way, we can say that Alternative Dispute Resolution (ADR) is the strategy for settling questions without a case, for example, discretion, intercession, or exchange. ADR methods are typically not so much expensive but rather quicker. They are progressively being used in debates that would some way or another outcome in suit, including high-issue work questions, separate from activities, and individual injury claims.

One of the essential reasons' gatherings may lean toward ADR procedures is that, dissimilar to ill-disposed prosecution, ADR methodology are regularly community-oriented and permit the gatherings to see each other's positions. ADR likewise permits the gatherings to concoct progressively imaginative arrangements that a court may not be legitimately permitted to force.

ADVANTAGES OF ADR:

In some cases, individuals become engaged with questions which, albeit significant and stressing to those concerned, are better settled outside the nearly costly court framework. A few debates don't have a lawful arrangement, while others might be exacerbated by court activity.[125] There are various focal points of Alternative Dispute Resolution when all is said in done (and intercession specifically) over suit[126] :

- it is normally quicker and less exorbitant
- people get an opportunity to recount to their story through their eyes

[125] "Advantages of alternative dispute resolution - Law Handbook." 31 Jul. 2014, https://lawhandbook.sa.gov.au/ch27s10s01.php. Accessed 2 Apr. 2020.
[126] https://lawhandbook.sa.gov.au/ch27s10s01.php (accessed on 20-04-2019)

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- it is increasingly adaptable and receptive to the needs of the individuals in question
- it is progressively casual
- the gatherings' inclusion in the process makes a more noteworthy pledge to the outcome with the goal that consistency is almost certain
- the private nature of the procedure
- Alternative Dispute Resolution is bound to protect generosity or possibly not raise the contention, which is particularly significant in circumstances where there is a proceeding with the relationship.[127]
- Suitable for multi-party debates
- Likelihood and speed of settlements
- Flexibility of procedure
- Parties' control of the procedure
- Parties' decision to gathering
- Practical arrangements
- Wider scope of issues can be considered
- Shared future interests might be secured
- Confidentiality
- Risk the board
- Generally, no requirement for attorneys
- Less tedious: individuals settle their debate in a brief period when contrasted with courts
- Cost compelling strategy: it sets aside part of cash on the off chance that one experiences in the prosecution process.

[127] "Benefits of alternative dispute resolution - Local Court." 20 Feb. 2015, http://www.localcourt.justice.nsw.gov.au/Pages/adr/benefits_adr.aspx. Accessed 2 Apr. 2020.

- It is liberated from details of courts here casual ways are applied in settling the debate.
- People are allowed to communicate with no dread of the official courtroom. They can uncover the substantiates realities without unveiling it to any court.
- Efficient way: there are consistently odds of reestablishing relationship back as gatherings examine their issues together on a similar stage.
- It forestalls further clash and keeps up a great connection between the gatherings.
- It jellies the wellbeing of the gatherings.
- Reduced time in debate It requires some investment to arrive at an ultimate choice.
- Reduced costs in identifying with the question goals It requires less cash, for example, it is modest.
- Flexibility-Parties have greater adaptability in picking what rules will be applied to the contest. They have the opportunity to do as such.
- Produce great outcomes settlement paces of up to 85 per cent.
- Improved fulfilment with the result or way in which the question is settled among disputants.
- Increased consistency with concurred arrangements.
- A single procedure–Parties can consent to determine in a solitary system a contest including licensed innovation.

- Party independence Because of its private nature, ADR manages parties the chance to practice more noteworthy command over the manner in which their question is settled than would be the situation in court case. As opposed to court prosecution, the gatherings themselves may choose the most fitting leaders for their contest. What's more, they may pick the material law, spot and language of the procedures. Expanded gathering independence can likewise bring about a quicker procedure, as gatherings are allowed to devise the most productive methods for their debate. This can bring about material cost reserve funds.

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- Neutrality–ADR is unbiased to the law, language and institutional culture of the gatherings, along these lines maintaining a strategic distance from any home-court advantage that one of the gatherings may appreciate in court-based case.

- Confidentiality-ADR procedures are private. In this way, the gatherings can consent to keep the activities classified. This permits them to concentrate on the benefits of the debate without worry about its open effect.

- Finality of Awards-Unlike court choices, which can for the most part be challenged through at least one rounds of suit, arbitral honors are not ordinarily liable to offer.

- Enforceability of Awards-The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958,[128] known as the New York Convention,[129] for the most part, accommodates the acknowledgement of arbitral honours comparable to local court decisions without audit on the benefits. This incredibly encourages the implementation of grants across outskirts.

- Preserves relationship- Helps individuals collaborate as opposed to making one victor or one failure.[130]

DISADVANTAGES OF ADR:

A few impediments of Alternative Dispute Resolution are:

- It can be utilized as a slowing down strategy.

- Parties are not constrained to proceed with dealings or intercession.

- Does not produce legitimate points of reference.

- Exclusion of relevant gatherings debilitates last understanding.

- Parties may have constrained bartering power. Gatherings don't have a lot of a state.

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[128] "New York Convention - United Nations Commission On ...." https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf. Accessed 2 Apr. 2020.
[129] "United Nations Convention on the Recognition and Enforcement." http://www.newyorkconvention.org/english. Accessed 2 Apr. 2020.
[130] http://www.wipo.int/amc/en/center/advantages.html (accessed on 21-04-2019)

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- Little or no keep an eye on power awkward nature between parties.
- May not ensure gatherings' lawful rights. The privileges of the gatherings may not be secured by elective question goals.
- Your case probably won't be a solid match Alternative debate goals settle just issues of cash or common questions. Elective contest goals procedures won't bring about injunctive requests. They can't bring about a request requiring one of the gatherings to do or stop doing a specific certifiable act.[131]
- There are cutoff points to the disclosure procedure You ought to likewise know that you are commonly going before without the insurances offered parties in the case, for example, those guidelines overseeing revelation. Courts by and large permit a lot of scopes in the disclosure procedure, which you won't have in an elective question goals.
- There are no ensured goals. Except for assertion, elective question goals forms don't generally prompt goals.
- Arbitration choices are conclusive. With not many special cases, the choice of an unbiased referee can't be claimed. Choices of a court, then again, generally can be engaged a higher court.
- Participation could be seen as a shortcoming. While the choice of making the procedure private tends to a portion of this worry, a few gatherings despite everything need to go to court "just on a guideline."

- The case probably won't be a solid match Alternative contest goals, for the most part, settle just issues of cash or common debates.
- There are cutoff points to the disclosure procedure One ought to likewise know that he is by and large continuing without the insurances offered parties in suit, for example, those guidelines administering revelation[132].
- A requirement for point of reference

[131] "The Advantages And Disadvantages Of ADR." 21 Sep. 2012, https://albrightstoddard.com/advantages-disadvantages-adr/. Accessed 2 Apr. 2020.
[132] http://www.justice.govt.nz/publications/global-publications/a/alternative-dispute-resolution-general-civil-cases/4-advantages-and-disadvantages-of-adr (accessed on 21-04-2019)

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- A requirement for court orders
- A requirement for between time orders
- A requirement for evidential standards
- A requirement for implementation
- Power unevenness between parties
- Quasi-criminal claims
- Complexity for the situation
- The requirement for live proof or examination of complex proof
- The requirement for master proof

IMPORTANCE OF ADR IN INDIA

To manage the circumstance of pendency of cases in courts of India, ADR assumes a noteworthy job in India by its differing systems. Alternative Dispute Resolution component gives logically created strategies to Indian legal executive which helps in decreasing the weight on the courts. ADR gives different methods of settlement including, assertion, pacification, intervention, exchange and Lok Adalat. Here, arrangement implies self-guiding between the gatherings to determine their debate however it doesn't have any statutory acknowledgement in India.

ADR is likewise established on such principal rights, Article 14[133] and Article 21[134] which manages correspondence under the watchful eye of law and right to life and individual freedom[135] separately.[136] ADR's thought process is to give social financial and political equity and keep up honesty in the general public revered in the prelude.

ADR additionally endeavour to accomplish equivalent equity and the free lawful guide[137] gave under article 39-An identifying with the Directive Principle of State Policy (DPSP).

[133] Constitution of India, 1950
[134] Constitution of India, 1950
[135] Article 21, Constitution of India, 1950
[136] "Constitutional Jurisprudence and The Growth of Alternative ...." http://www.legalserviceindia.com/legal/article-706-constitutional-jurisprudence-and-the-growth-of-alternative-dispute-resolution.html. Accessed 2 Apr. 2020.
[137] Article 39-A, Constitution of India, 1950

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SOME IMPORTANT LEGAL PROVISIONS RELATED TO ADR IN INDIA

- Section 89[138] gives that chance to the individuals, in the event that it seems to court there exist components of settlement outside the court at that point court detail the provisions of the conceivable settlement and allude the equivalent for Arbitration, Conciliation, Mediation or Lok Adalat.
- The Acts which manages Alternative Dispute Resolution are Arbitration and Conciliation Act, 1996 and The Legal Services Authority Act, 1987

MODES OF ALTERNATIVE DISPUTE RESOLUTION

1. **Arbitration:** Arbitration uses the assistance of a nonpartisan outsider, and is like a casual preliminary. In the wake of hearing each side, the outsider issues a choice that the questioning gatherings may have consented to be authoritative or non-official. When authoritative, the choice can be upheld by a court and is viewed as last. In spite of the fact that the judge is a functioning facilitator and will articulate a choice, the discretion procedure is still less formal than a by and large preliminary because of a considerable lot of the standards of proof not making a difference.

2. **Mediation:** right away, intervention and discretion are staggeringly comparable. One of the fundamental contrasts is that a go-between, or fair outsider, can't drive the gatherings to concur and can't to choose the result of the debate. The middle person works with the gatherings to go to an answer that is made commonly, and the understandings are by and large non-authoritative. Courts can command that intercession be required, however, the procedure itself is as yet intentional, in this way permitting the gatherings to decline to go to an understanding. While in intervention, the gatherings keep up huge authority over the procedure. Intercession is totally private and, since it is non-authoritative, parties hold the option to seek after case following the intervention procedure.

[138]Civil Procedure Code, 1908

3. **Med-Arb[139]:** This type of ADR in one in which the judge begins as a go-between, in any case, should the intervention come up short, the authority will force a coupling choice. Medications arb is a blend of intercession and assertion that pulls from the advantages of the two.

4. **Mini Trial:** A small scale preliminary can't a lot of a preliminary as it is a settlement procedure. Each gathering presents its exceptionally condensed case. Toward the finish of the smaller than normal preliminary, the delegates endeavour to settle the issue. In the event that they can't, an unbiased counsellor can go about as an arbiter, or pronounce a nonbinding assessment with respect to the reasonable result of the issue going to preliminary. Smaller than usual preliminary is a novel ADR technique, as it frequently comes after conventional case, instead of previously.

5. **Summary Jury Trial (SJT):** A SJT is like a little preliminary. Notwithstanding, the case is introduced to a false jury. The false jury creates a warning decision. Also, it is a structure by the court as opposed to the gatherings. After the conference the decision, the court generally requires the gatherings to in any event endeavour to settle before prosecution.[140]

6. **Negotiation[141]:** This type of ADR is regularly neglected in light of how clear it is. In exchange, there is no unprejudiced outsider to help the gatherings in their arrangement, so the gatherings cooperate to go to a tradeoff. The gatherings may decide to be spoken to by their lawyers during arrangements.

MODES OF ALTERNATIVE DISPUTE RESOLUTION IN INDIA

[139] "What is Med-Arb? - PON - Program on Negotiation at Harvard ...." https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/. Accessed 2 Apr. 2020.
[140] See the evolution of SJT here- "Evolution of the Summary Jury Trial." https://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/1-3-Evolution-of-the-Summary-Jury-Trial.aspx. Accessed 2 Apr. 2020.
[141] "Negotiation - Wikipedia." https://en.wikipedia.org/wiki/Negotiation. Accessed 2 Apr. 2020.

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ARBITRATION

The procedure of Arbitration can't exist without substantial mediation understanding preceding the development of the contest. Right now goals parties allude their question to at least one people called referees. Choice of authority is bound on parties and their choice is called 'Grant'. The object of Arbitration is to acquire a reasonable settlement of contest outside of court immediately and cost.

Any gathering to an agreement where discretion condition is there can summon assertion statement either himself or through their approved operator which allude the question straightforwardly to the mediation according to the Arbitration proviso. Here, assertion condition implies a provision that notices the course of activities, language, number of mediators, seat or a lawful spot of the intervention to have occurred in case of contest emerging out between the gatherings.

- Initially, the candidate starts an intervention by recording an announcement of guarantee that determines the important realities and cures. The application must incorporate the guaranteed duplicate of assertion understanding.

- Statement of the case is a composed record documented in the court or council for legal assurance and an is duplicate likewise sent to the litigant in which petitioner depicted the realities on the side of his case and the help he looks for from the respondent.

- The respondent answers to the intervention by recording an answer against the mediation guarantee of inquirer that determines the pertinent realities and accessible protections to the announcement of guarantee.

- Arbitrators determination is the procedure where the gatherings get arrangements of potential judges and select the board to hear their case.

- Then there is the trading of archives and data in anticipation of the consultation called 'Revelation'.

- The parties meet in people to lead the conference in which the gatherings present the contentions and confirmations on the side of their particular cases.

- After the observers inspect and confirm are introduced, at that point there in end authority gives a 'Grant' which is authoritative on the gatherings.

Presently the complexities of the procedures differ with the discretion understanding.

Section 8[142] gives that, if any gathering slights the arbitral understanding and as opposed to moving to discretion, moves that suit to common court, other gatherings can apply the court for alluding the issue to intervention council according to the understanding yet not later the accommodation of the primary proclamation. The application must incorporate an ensured duplicate of discretion understanding and if courts fulfil with it, the issue will be alluded to assertion.

MEDIATION

Mediation is an Alternative Dispute goal where a third unbiased gathering means to help at least two disputants in agreeing.[143] It is a simple and uncomplicated gathering focused arrangement process where outsider goes about as an arbiter to determine contest agreeably by utilizing fitting correspondence and exchange strategies. This procedure is completely constrained by the

[142] *Arbitration and Conciliation Act, 1996*

[143] "What are the Three Basic Types of Dispute Resolution? What ...." 3 Oct. 2019, https://www.pon.harvard.edu/daily/dispute-resolution/what-are-the-three-basic-types-of-dispute-resolution-what-to-know-about-mediation-arbitration-and-litigation/. Accessed 2 Apr. 2020.

gatherings. Go between work is simply to encourage the gatherings to arrive at settlement of their debate. Middle person doesn't force his perspectives and settle on no choice about what a reasonable settlement ought to be.

- Opening proclamation
- Joint meeting
- Separate meeting and,
- Closing

At the beginning of the intervention process, the middle person will guarantee the gatherings and their advice ought to be available.

- Initially in the initial proclamation, he outfits all the data about his arrangement and announces he doesn't have any association with both gatherings and has no enthusiasm for the debate.

- In the joint meeting, he accumulates all the data, comprehends the reality and issues about the contest by welcoming both the gatherings to introduce their case and set forward their point of view with no interference.

- In this meeting, arbiter attempts to support and advance correspondence and oversee interference and upheavals by the gatherings.

- Next is an independent meeting, where he attempts to comprehend the question at a more profound level, assembles explicit data by taking both the gatherings in certainty independently.

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- Mediator poses visit inquiries on realities and examines qualities and shortcomings to the gatherings of their individual cases.

- After hearing both the sides, arbiter begins defining issues for goals and making choices for settlement.

- In the instance of inability to agree through an arrangement in intercession, the middle person utilizes distinctive Reality check strategy.

CONCILIATION

Conciliation is a type of mediation yet it is less formal in nature. It is the way toward encouraging a neighbourly goal between the gatherings, whereby the gatherings to the debate use conciliator who meets with the gatherings independently to settle their contest. Conciliator meets independently to bring down the pressure between parties, improving correspondence, deciphering issue to achieve an arranged settlement There is no need of earlier understanding and can't be constrained on a party who can't for mollification. It is not the same as an intervention in that manner.

All things considered, it can't for the gatherings to go into pacification understanding before the debate has emerged. It is clear in Section 62[144] which gives,

- The party-starting assuagement will send to the next gathering a composed greeting to mollify under this part, quickly distinguishing the subject of the debate.

[144] The Arbitration and Conciliation Act, 1996

- Conciliation procedures will initiate when the other party acknowledges recorded as a hard copy of the challenge to placate.

- If different rejects the greeting, there will be no appeasement procedures.

Above arrangement unmistakably states appeasement understanding ought to be an extemporary understanding gone into after the contest has however not previously. Gatherings are likewise allowed to participate in the mollification process even while the arbitral procedures are on[145].

LOK ADALAT [146]

Lok Adalat is called 'Individuals' Court' directed by a sitting or resigned legal official, social activists or individuals from Legal calling as the administrator. National Legal Service Authority (NALSA) alongside other Legal Services Institutions conducts Lok Adalat[147] on customary interims for practising such ward. Any case pending in customary court or any contest which has not been brought under the watchful eye of any official courtroom can allude to Lok Adalat. There is no court expenses and unbending system followed, which makes the procedure quicker. In the event that any issue pending in court of alluded to the Lok Adalat and is settled along these lines, the court expense initially paid in the court when the appeal recorded is additionally discounted back to the gatherings.

Gatherings are in direct collaboration with the adjudicator, which can't in customary courts. It relies upon the gatherings if both the gatherings concur on the case long pending in customary court can be moved to Lok Adalat. The people choosing the cases have the job of statutory conciliators no one but, they can just convince the gatherings to arrive at a resolution for settling

[145] Section 30, The Arbitration and Conciliation Act, 1996
[146] "Lok Adalat - National Legal Services Authority! - NaLSA." https://nalsa.gov.in/lok-adalat. Accessed 2 Apr. 2020.
[147] "National Lok Adalat - National Legal Services Authority! - NaLSA." https://nalsa.gov.in/lok-adalat/national-lok-adalat. Accessed 2 Apr. 2020.

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the question outside the normal court in the Lok Adalat. Legitimate Services Authorities (State or District) as the case might be on receipt of an application from one of the gatherings at a prelitigation stage may allude such issue to the Lok Adalat for which notice would then be given to the next gathering. Lok Adalat doesn't have any locale to manage instances of non-compoundable offences.

COUNTRY-SPECIFIC EXAMPLES AND APPROACHES

Somalia

Somalia has a cultural and historic mediation and justice system known as ADR (Alternative Dispute resolution), which is an informal justice system. It is a kind of justice system in which the arbiter listens to both sides of disputes and then concludes a solution that both sides will accept.

Roman Empire

Latin has a number of terms for a mediator that predates the Roman Empire. Any time there are formal adjudicative processes it appears that there are informal ones as well. It is probably fruitless to attempt to determine which group had mediation first.

Iceland

Njáls saga is an Icelandic story of a mediator who was so successful that he eventually threatened the local power structure. It ends in tragedy with the unlawful burning of Njal alive in his home, the escape of a friend of the family, a mini-war and the eventual ending of the dispute by the intermarriage of the two strongest survivors. It illustrates that mediation was a powerful process in Iceland.

India

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Alternative dispute resolution in India is not new and it was in existence even under the previous Arbitration Act, 1940. The Arbitration and Conciliation Act, 1996 has been enacted to accommodate the harmonization mandates of UNCITRAL Model. To streamline the Indian legal system the traditional civil law known as Code of Civil Procedure, (CPC) 1908 has also been amended and section 89 has been introduced. Section 89 (1) of CPC provides an option for the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement. Due to the extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under the National Legal Services Authority Act, 1987 is a uniquely Indian approach. A study on commercial dispute resolution in south India[148] has been done by a think tank organization based in Kochi, Centre for Public Policy Research. The study reveals that the Court-annexed Mediation Centre in Bangalore has a success rate of 64%, and its counterpart in Kerala has an average success rate of 27.7%. Further, amongst the three southern states[149]. Tamil Nadu is said to have the highest adoption of dispute resolution, Kerala the least[150].

Pakistan

The relevant laws (or parlour provisions) dealing with the ADR are summarized as under:

1. S.89-A of the Civil Procedure Code, 1908 (Indian but amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution methods).
2. The Small Claims and Minor Offences Courts Ordinance, 2002.
3. Sections 102–106 of the Local Government Ordinance, 2001.

[148] (http://www.sundayguardianlive.com/business/10161-experts-seek-legislative-framework-address-cases-commercial-disputes)
[149] Karnataka, Tamil Nadu, and Kerala
[150] "See You in Court or See You out of Court? A Burdened Judicial System: Can ADR system be an answer?" Archived from the original on 10th April 2019

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4. Sections 10 and 12 of the Family Courts Act, 1964.
5. Chapter XXII of the Code of Criminal Procedure, 1898 (summary trial provisions).
6. The Arbitration Act, 1940 (Indian).
7. Articles 153–154 of the Constitution of Pakistan, 1973 (Council of Common Interest)
8. Article 156 of the Constitution of Pakistan, 1973 (National Economic Council)
9. Article 160 of the Constitution of Pakistan, 1973 (National Finance Commission)
10. Article 184 of the Constitution of Pakistan, 1973 (Original Jurisdiction when federal or provincial governments are at dispute with one another)
11. Arbitration (International Investment Disputes) Act, 2011
12. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011
13. Alternative Dispute Resolution Act. 2017

Sub-Saharan Africa

Before modern state law was introduced under colonialism, African customary legal systems mainly relied on mediation and conciliation. In many countries, these traditional mechanisms have been integrated into the official legal system. In Benin, specialized *tribunaux de conciliation* hears cases on a broad range of civil law matters. Results are then transmitted to the court of the first instance where either a successful conciliation is confirmed or jurisdiction is assumed by the higher court. Similar tribunals also operate, in varying modes, in other francophone African countries[151].

United Kingdom

[151] Dominik Kohlhagen, ADR and Mediation: the Experience of French-Speaking Countries, Addis Abada, 2007 (on ADR in Africa).

In the United Kingdom, ADR is encouraged as a mean of resolving taxpayers' disputes with Her Majesty's Revenue and Customs[152].

In the regulated sectors, finance, telecoms and energy ADR providers exist. Outside of the regulated areas, there are schemes in many sectors which provide schemes for voluntary membership. Two sets of regulations, in March and June 2015, were laid in Parliament to implement the European Directive on Alternative Dispute Resolution in the UK.

Alternative Dispute Resolution is now widely used in the UK across many sectors. In the communications, energy, Finance and Legal sectors, it is compulsory for traders to signpost to approved ADR schemes when they are unable to resolve disputes with consumers. In the aviation sector, there is a quasi-compulsory ADR landscape, where airlines have an obligation to signpost to either an approved ADR scheme or PACT - which is operated by the Civil Aviation Authority[153].

Bangladesh[154]

In Bangladesh, the current law of arbitration is included mainly in the Arbitration Act, 1940, there being different Acts dealing with the enforcement of foreign awards. There are also stray provisions as to arbitration, scattered in special Acts. Three types of arbitration are that are looked carefully by the Arbitration Act of 1940, especially (i) Arbitration in the course of a suit, (ii) Arbitration with the intervention of the court, and (iii) Arbitration otherwise than in the course of a suit and without the intervention of the court. In reality, the last category attracts the maximum number of cases.

Under the Act of 1940, an arbitration agreement must be written in pen and paper, though it is not required to be registered. The agreement might make a reference for recent or future differences. The arbitrator's name might be included in the agreement or left to be designated later, either by the consent of the parties or in some other manner specified in the agreement. Very often, the rules of prestigious commercial bodies lay down that a person who becomes a member of the association

[152] HMRC "Tax Disputes: Alternative Dispute Resolution (ADR)
[153] "Alternative Dispute Resolution I UK Civil Aviation Authority" *www.caa.co.uk*
[154] Arbitration Law in Bangladesh /http://www.vakilno1.com/saarclaw/bangladesh/arbitrationlaw/arbitration_law_in_bangladesh.htm accessed on 22-04-2019

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must accept the machinery of arbitration created or recognized by the rules of the association. This also amounts to an "arbitration agreement" for the purposes of the Arbitration Act, 1940.

Once an arbitration agreement has entered in for submitting future differences to arbitration, it is not, necessary important to obtain the fresh consent of all the parties for a reference to arbitration at the time when the dispute actually arises.

CONCLUSION

The systems and strategies talked about above are the most regularly utilized techniques for ADR. Arrangement assumes a significant job in every strategy, either fundamentally or optionally. Be that as it may, there are endless other ADR techniques, a significant number of which adjust or consolidate the above strategies. For instance, it can't for disputants to start exchanges with early unbiased assessment and afterwards move to nonbinding intercession. On the off chance that intercession fizzles, the gatherings may continue with restricting assertion. The objective with each kind of ADR is for the gatherings to locate the best method for settling their question without depending on the prosecution. The procedure has been condemned as an exercise in futility by some legitimate onlookers who accept that a similar time could be spent seeking after the cases in common court, where arrangement likewise assumes a noticeable job and prosecutors are ensured by a panoply of formal rights, strategies, and rules. However, numerous members in ineffective ADR procedures trust it is helpful to discover that their questions are not manageable to an arranged settlement under the watchful eye of starting a claim.

In spite of its prosperity in the course of recent decades, ADR can't suitable decision for all disputants or every single lawful question. Numerous people elements despite everything oppose ADR in light of the fact that it does not have the substantive, procedural, and evidentiary insurances accessible informal common suit. For instance, gatherings to ADR commonly defer their privileges to question proof that may be considered prohibited under the guidelines of the court. Gossip proof is a typical case of proof that is considered by the gatherings and middle people in ADR discussions however that is, for the most part, avoided from common preliminaries. In the event that a disputant accepts that the person would forfeit such a large number of rights and insurances by deferring the customs of common prosecution, ADR won't be the proper strategy for contest goals.

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While, on the off chance that we see on the opposite side, at that point we can likewise presume that, ADR is the best and best answer for decrease the pendency of cases in different courts of our nation. We should not overlook that the ADR is increasingly compelling as it achieves agreeable connection between both the gatherings not at all like in the ordinary courts, along these lines it is the lasting answer for any contest, as it doesn't prompt intrigue or modification, and consequently lessening the weight of redrafting courts too and furthermore it spares significant time and vitality of the courts which can be used past in different issues pending under the steady gaze of court and it renders equity on schedule (Justice postponed is equity denied, however, ADR spares time and convenient judgment is conceivable). In spite of numerous focal points of utilizing Alternative contest goals instruments, our general public has been hesitant to give it its due acknowledgement. The ADR specialist hence acts as a healer of contentions as opposed to a soldier, which are especially like the Panchayat framework we have in our towns. The goals of debates through ADR is so viable and broadly acknowledged that Courts have all the more regularly remembered them. It maintains a strategic distance from the extended case and depends on the ground real factors confirmed face to face by the adjudicators and the honour is a reasonable and legit settlement of dubious cases dependent on legitimate and moral grounds.

Thus, by and large, we might want to end this paper by saying that, With the appearance of the other debate goals, there is a new road for the individuals to settle their questions. The settlement of debates in Lok Adalat rapidly has procured great prevalence among the general population and this has truly offered ascend to another power to ADR and this will no uncertainty lessen the pendency in law Courts. There is a critical requirement for equity regulation through ADR components.

The ADR development should be conveyed forward with more noteworthy speed. This will extensively diminish the heap on the courts separated from giving moment equity at the entryway step, without significant expense being included. In the event that they are effectively given impact, at that point it will truly accomplish the objective of rendering social equity to the gatherings to the question.

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WILDLIFE (PROTECTION) ACT, 1972

- **YASHWANTH A S**

INTRODUCTION:

There is a dramatic increase in the illegal wildlife trade in India. It is due to the demand of the wildlife products have the international market. Except for minor domestic use, there is no major market for the wildlife products within India. All the trade is destined for countries outside our boundaries. The expansion of our trade is directly related to a precious increase in the value of the products in the international market.

The Indian Law in wildlife, The Indian Wildlife (Protection) Act, 1972 was passed on requests from the States. The Act makes it possible to constitute a Wildlife Board with powers of regulation in every State and in the Union Territories. For the purpose of protecting, propagating or developing wildlife and its environment, the power is conferred on the State Governments and Central Government to proclaim wildlife sanctuaries and national parks.

Wildlife Trade:

All over the world, the commercial activities related to wildlife are classified under the following categories:

- Trade for Food and Medicine.
- Trade for Derivatives and Artic rafts.
- Trade for Pets or Private Collections.
- Trade for Souvenirs.
- Trade for Zoos, Gardens, Museums, etc.

The trade in wildlife could be in the form of whole animal and plants or its part, product or derivatives. There are two main forms in which the Trade takes place:

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A) Live Trade:

- Exhibits and Captive Breeding.
- Food, Pet.
- Bio-medical and Scientific Research.
- Ornamental, Display, etc.

B) Dead Trade: (whole, parts, products or derivatives)

- Food and Medicine.
- Decoration, Handicrafts, Curio.
- Clothing and Raw Material for Industry.
- Museums, Specimens, etc.

Section 17 of the WPA Act, 1972 prohibits picking, uprooting, etc. of specified plants. No person shall:

- Wilfully pick, uproot, damage, destroy, acquire or collect may specified plants from any forest land or any area specified by notification by the Central Government.
- Possess, sell, offer for sale, or transfer by way of gift or otherwise, or transport any specified plant, whether alive or dead or part or derivative thereof.

SALIENT FEATURES OF THE WPA:

- The Act has 7 Chapters, 66 Sections and 6 Schedules as of today.
- Any amendment to this act can be done on the recommendation of an expert committee that has been put together by the Indian Board of Wildlife. The Act has been amended in 1982, 1986, 1991 and 1993.
- The 6 Schedules of the Act specify the level of protection for different species. Schedule I and II are for endangered species, that deserve rigorous protection and the breach of these

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rules results in serious punishment. A famous case where this was applied was when Salman Khan was sentenced to 5 years in prison for hunting a black buck. Schedule III and IV is for species that are not endangered, but the protection and punishments are equally rigorous. Schedule V delineates the animal species that can be hunted, like deer or ducks, and the rules pertaining to their hunting. Schedule VI covers the protection and trade of medicinal plants as well as agricultural species of plants.

- Chapter IV of this act spells out the rules for the different types of protected areas that will be marked out for the protection of wildlife.
- Chapter V concerns with the trade and commerce involving wild animals, as well as prohibition of the hunting of trophy animals. **It states that every wild animal is the property of the Indian Government.** A license is maintained by the government for the regulation of hunting as well as possession of wildlife parts.
- Chapter VI spells out the punishments for different offences.

DUTIES OF WILDLIFE ADVISORY BOARD:

- In the sanction of areas to be declared as Sanctuaries, National Parks and Closed areas and administration thereof.
- In the formulation of the policy for the protection and conservation of wildlife and specified plants.
- In any matter relating to the Amendment of any Schedule.
- In relation to the measure to be taken for harmonising the needs of the tribes and other dwellers of the forests with the protection and conservation of wildlife.
- In any other matter connected with the protection of wildlife which may be referred to it by the State Government.

In the Case of Chief Forest Conservator (Wildlife) v. Nisar Khan [AIR 2003 SCW 1333] the Supreme Court held that:

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- "A conjoint reading of the provisions of the Act and Rules leaves no manner of doubt that although grant of licence in respect of birds in captivity is not altogether prohibited but before grant of license the Licensing Authority is under a statutory obligating to ensure that hereby inter alia the Provisions of the WPA Act, 1973 as also the provisions of the Rules are not violated……."

PROTECTED AREAS:

The Act talks about the setting up of three types of Protected Areas for the protection of wildlife. These are-

- **Wildlife Sanctuaries-** A state government can declare any area as a wildlife sanctuary if it feels that the area has the necessary ecological importance. The setting up of the sanctuary is then taken up by the concerned District Collector. This includes the resettlement of people, if required, and the land acquisition process. Once the sanctuary is functional, the Chief Wildlife Warden is the highest authority for the sanctuary. She/he can provide permits for people to enter and utilize the resources within the sanctuary. It is not strictly off-limits.
- **National Parks-** The state governments are again responsible for taking initiative in declaring a site as National Park. National Parks are more strictly regulated than Wildlife Sanctuaries, with absolutely no other activity taking place within its premises. The boundary of a National Park is fixed and clearly specified, unlike a sanctuary. If this boundary needs to be changed for any purpose, a motion has to be passed in favour of it in the Legislative Assembly of the state.
- **Closed Areas-** These are areas that are temporarily off limits for a particular duration of time. Oftentimes, this for regulation of hunting of animals.
- **Zoos-** Under Chapter IV-A, zoos have been recognized to help in ex-situ conservation, when protection in-situ is not possible or impractical.

Trade or Commerce in the Animals, Animal Articles and Trophies:

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Section 39 of the Act declares that every wild animal other than Vermin, which is hunted and kept for bred in captivity or found dead or killed by mistake, shall be the property of the State Government. Some Ex:

- Animal Article; Trophy or Uncured Trophy.
- Meat derived from any Wild Animal.
- Ivory imported to India and Articles made from such Ivory.
- Vehicle, Vessel, Weapon, Trap or tool that has been commuting an offence and has been seized.

PREVENTION AND DETENTION OF OFFENCES:

Section 50 of the Act confers Powers of entry, search, arrest and detention on the Director or any other Officer authorised by him or Chief Wildlife Warden or Officer authorised by him or any Police Officer not below the rank of Sub Inspector.

Such Officers shall have the Powers:

- To issue a search warrant.
- To enforce the attendance of witnesses.
- To compel the discovery and production of documents and material objects.
- To receive and record any evidence.

The Citation related this one is Moti Lal V. CBI and Others, JT 2002(4) SC 31 was held that:

- The short question involved in this appeal was weather the CBI was authorised to investigate an offence, which is punishable under the Wildlife (Protection) Act, 1972 as it was contended in the present case that the Wild Life Act is self-contained code?
- The order passed by the Central Government transferring the investigation to Delhi Special Police Establishment was challenged by filing Criminal Misc. Writ Petition No. 6830 of 2000 before the High Court of Allahabad with the prayer that the appellant be released

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forthwith. The High Court, by the impugned judgment and order dated 7th February, 2001, rejected the said petition.

- The Final Judgement is as follows:

Admittedly, in exercise of the powers conferred by Section 3 of the Act, notification dated 24.1.1996 was issued by the Central Government specifying that offences punishable under Section 51 of the Wild Life Act could be investigated by the Delhi Special Police Establishment. Thereafter, the State of U.P. has issued the Notification, as required under Section 6 of the Act wherein it has been stated that the State of Uttar Pradesh is pleased to accord the consent to the extension of powers and jurisdiction of the members of the Delhi Special Police Establishment in the investigation of the Offence(s) punishable relating to the seizure of skin of Tiger and Leopard under Schedule 1 of the Wild Life Act, namely, case Crime No. 915/99 under Sections 9/39(3), 44, 48, 49, 50, 51, 57, 58 of the Wild Life Act and also case Crime No. 11/2000 under Section 429/379/411 IPC and Section 49B/51 of the Wild Life Act and also under Section 10/15 of the Animal Cruelty Act. Subsequently, the Central Government had issued a Notification, as contemplated under Section 5 of the Act empowering members of Delhi Special Police Establishment for investigating the aforesaid cases. In view of the Notifications issued by the Central Government under Section 5 of the Act and the Notification issued by the State of U.P. according consent to the extension of powers and jurisdiction of the members of the Delhi Special Police Establishment to investigate the offences, the contention raised by the learned counsel for the appellant that the CBI does not have jurisdiction to investigate the matter is without any substance.

COGNIZABLE OF OFFENCE:

No Court shall take Cognizable of any offence against the Wild Life (Protection) Act, 1972 except on a Complaint made by:

- The Director of Wildlife Preservation or any other Officer authorised on this behalf by the Central Government.
- The Chief Wildlife Warden or any other Officer authorised by the State Government.

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- Any person who has given notice of not less than 60 days, in the manner Prescribed Officer and his intention to make a complaint to the Central Government or the State Government or the Officer authorised aforesaid.

Citation: In the State of Bihar V. Murad Ali Khan, (1998) 4 SCC655:

- The issue before the Court was, whether the First Class Magistrate before whom, a Range Officer makes a complaint could take Cognizable of the Offence while an investigation by the Police is pending with regard to the same case.
- The Allegation was that the respondents shot and skinned as elephant and removed the tusks.
- The Supreme Court held that the Magistrate can proceed with the Case even while the Police Investigation is pending, as the Law allows the Magistrate to take the Cognizable of a case on Complaint by the Forest Officials.

The Amendments for the Wild Life (Protection) Act, 1972:

- 1991 Amendment:

The Amendment in 1991 introduced many small changes into the original Act. The most significant change was the introduction of a Chapter titled "PROTECTION OF SPECIFIED PLANTS". This Chapter prohibits the extraction and sale of "specified plants" (mainly medicinal) from reserve forests and other protected areas, except for education, scientific research, etc. with the permission of the Chief Wildlife Warden. License will be issued if private individuals or entities want to cultivate "specified plants".

The Amendment also introduces the "CENTRAL ZOO AUTHORITY", explaining its constituting members, powers and functions.

The Act jointly refers to national parks, wildlife sanctuaries and closed areas as "Protected Areas".

- 2002 Amendment:

The Amendment in 2002 modified the purpose statement of the original Act to read-

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- "An Act to provide for the protection of wild animals, birds and for the matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country."
- Further, the Act sets up the National Board for Wild Life and State Board for Wild Life, describing its members, powers and functions.
- 2006 Amendment:
- An amendment to this Act was passed in 2006, known as Wildlife (Protection) Amendment Act, 2006. This amendment was introduced with a view to increase the protection of tigers by introducing a chapter called "NATIONAL TIGER CONSERVATION AUTHORITY".

THE WILD LIFE PROTECTION (AMENDMENT) BILL, 2013:

- According to the government, India is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and amendments to the Act are necessary for India to fulfil its obligations under the CITES. The key amendments made by the Bill are:
- The manufacture, sale, transport or use of animal traps except for educational and scientific purposes (with permission) is prohibited.
- Under the Act, destruction, exploitation or removal of any wildlife including forest produce from a sanctuary is not permitted, except with a permit. The amendment allows certain activities such as grazing or movement of livestock, bona fide use of drinking and household water by local communities, and hunting under a permit.
- Provisions to regulate international trade in endangered species of wild fauna and flora as per the CITES have been inserted. A schedule listing out flora and fauna for purposes of regulation of international trade under CITES has been added.
- The Tiger and Other Endangered Species Crime Control Bureau has been changed to the Wild life Crime Control Bureau.
- The term of punishment and fines for commission of offences under the Act have been increased.

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- The Bill protects the hunting rights of Scheduled Tribes in the Andaman and Nicobar Islands.

PENALTY:

Where a person exhibits or trains any performing animal without being registered, or such exhibition or training is accompanied by unnecessary pain or suffering, or exhibits or trains animals prohibited by the Central Government, he shall be punished with up to Rs. 500/- or with the imprisonment which may extend to 3 Months or with both. (S.26 of the WPA, 1976)

The Court also deprive such a person of an animal who has been convicted of an offence under the WPA. But the Court must be of the opinion that the animal is likely to expose to further cruelty.

CONCLUSION OR SUGGESTIVE MEASURES FOR THE PROTECTION OF WILDLIFE:

The statutory framework on wildlife protection is governed by the Wild Life Protection Act. It has been seen that it is the difference in the basic conflicts. The fact that the definitions under the Act, which has resulted in several conflicts. The fact that the definition of 'wildlife' includes its habitat, or 'wild animal' also includes any animal specified in the schedules wherever found 'hunting' includes every attempt to do so, and what are 'specified plants', 'vermin's' or who are the nodal authorities to enforce the Wild Life Act is still unclear to many minds including the wildlife managers. What constitutes a 'sanctuary' or 'national park', what are the guidelines for 'settlement of rights' within a protected area and how other laws such as the Foreign Trade act or the Panchayat Extension Act impact wildlife areas is not very clear to many people who manage these areas.

Some steps in the direction of wildlife conservation could be like:

- To survey and collect all the information about wildlife, especially, their number and growth and to protect habitat by protecting forests.
- To delimit the areas of their natural habitat and to protect wildlife from pollution and from natural hazards.
- To impose complete restriction on hunting and capturing of wildlife and to develop game sanctuaries for specific wild animals or for general world life.

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- To impose restrictions on export and import of wildlife products and severe punishment to be given to those who indulge in this activity.

India is a good example where several steps have been taken for wildlife conservation. It is a country of varied wildlife, where more than 500 types of wild animals, 2,100 types of birds and about 20,000 types of reptiles and fishes have been found. According to an estimate, in India, about 200 species of wild animals and birds have already become extinct and another 2,500 are on the verge of extinction.

As many as 165 game sanctuaries and 21 national parks have been developed to protect the natural habitat and wild animals. Apart from this, a Wild Life Conservation Week is also celebrated from 7th of October every year. But still there is a long way to go in this direction.

The Central Government may, by notification, make rules for all or any of the matters mentioned under Section 63 of WPA, 1973. Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

The State Government may, by notification, make rules for carrying out the provisions of this Act in respect of matters, which do not fall within the purview of section 63, i.e., for which the Central government has the power to make rules. In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of matters prescribed under section 64.

The wildlife tourism has a great significance to developing countries. It is growing up every year at a faster pace. The tourists and travellers from foreign countries arrive in this country in large numbers. At present 6.5 million tourists arrive in Indian cities from the Western and South East Asian countries. Most of the tourists arrive at Delhi, Bombay, Calcutta and Bangalore airports. Besides this, the local airports are receiving the foreign tourists at the larger numbers. The tourists who arrive in India, a large numbers of them come to see wildlife and natural areas. This number can be increased up to 10 million tourists every year. A great emphasis should be given on the development of infrastructure and proper management of wildlife.

The wildlife protection can help in encouraging tourism in large scale. When there is mass awareness in wildlife conservation activities, the National Parks receive a large numbers of tourists. The awareness helps in maintaining wildlife parks in developing countries. The writers,

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journalists, poets, botanists and environmentalists visit these places and create a mass awareness campaign through mass media and workshops on wildlife protection and nature conservation activities.

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PROPERTY RIGHTS OF INDIAN WOMEN

- **DR. AVANI M. MISTRY**

INTRODUCTION

This article intends to analyse Women's Property Rights from an Indian perspective and examines various nuances present in the laws of India and give the reader an overview of the current state of THE POLICIES CONCERNING WOMEN'S RIGHTS.

GLOBAL OUTLOOK

Women's lack of income during marriage influences their economic prospect. As women are more likely to perform amateur activities that benefit the household such as taking care of all family member, they typically have tinier monetized contributions than men and, therefore, acquire fewer assets during marriage. Recognition of these non-income contributions is important during the termination of marriage as it can grant women access to a share of marital property.

Great strides have been made in closing the legal gender gap on property rights. Still, there is much more to be done where laws restricting women's access to inheritance, land ownership and other assets are considered. Legal framework that provide women equal property rights is a crucial start in order to empower women, socially and economically.[155]

Women in half of the countries in the world cannot assert equal land and property rights in spite of legal protections. Welfare institutes like The World Bank and The Human Rights Commission have tried to close this persistent gap between laws and practice worldwide, so that millions of women can realize these rights in their lives.

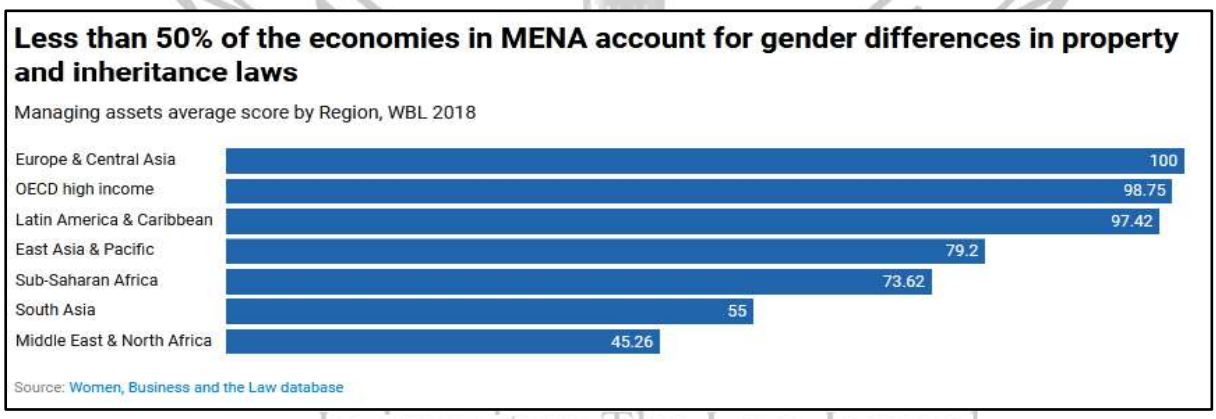
"*For men and women alike, land is the foundation for security, shelter, and livelihood, supports women's dignity and creates pathways to empowerment and economic opportunity…*" said by the Stand for Her Land campaign group and also observed "*For women, land truly is a gateway right*

[155] https://issuu.com/world.bank.publications

– without it, efforts to improve the basic rights and well-being of all women will continue to be hampered."

Persistent inequitable social norms and practices is one of the strongest barriers that exist between women and their land and property rights. Poor implementation of policies, insufficient capacity to enforce laws, and a lack of political will additionally compound the problem. And poor access to legal services and a lack of understanding of laws within communities and households – and by women in particular – build an invisible but near impenetrable wall for women who are willing to realize land and property rights in rural as well as urban areas.[156]

As per a World Bank survey, Middle East and North Africa and South Asia are the regions with the most restrictive laws, particularly in inheritance. Data suggests that gaining greater access to property for women through inheritance can change the outcome of children, especially girls.[157]



AN INDIAN PERSPECTIVE

Similar to the property rights of women around the globe, property rights of Indian women too are unequal and unfair. Property rights of Indian women have evolved out as a continuing struggle between the traditional and the progressive forces. Even though other countries have come a long way ahead in the last century, Indian women still continue to get fewer property rights than men, both qualitatively and quantitatively.

[156] https://www.un.org/press/en
[157] https://www.worldbank.org/en/news/press-release/2019/03/25/women-in-half-the-world-still-denied-land-property-rights-despite-laws

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In 1994, two Indian states reformed the Hindu Succession Act to allow women to have the same ability to inherit joint family property as men. This changed family property management and increased parents' investment in daughters. It was observed that mothers who benefited from the reform spent twice as much on their daughters' education. Women were more likely to have bank accounts and toiletries where the reform occurred. Eventually, this reform was ratified across India.[158]

All the religions practiced in India are governed by their respective personal laws – which includes property rights as well. However, the repeated and strong Constitutional Guarantees of Equality to Women, under the certain changes in law women get various rights & Privileges for living with dignity under Article 21 of the Indian Constitution along with that Articles 14 and 15[159]. Not that much in fact with a few exceptions, the Indian courts have refused to test the personal laws on the criterion of Constitution to strike down those that are clearly unconstitutional and have left it to the wisdom of legislature to choose the time to frame the uniform civil code as per the mandate of a Directive Principle in Article 44 of the Constitution.

Even though many inequalities have been ironed out in courts, the property rights of Indian women are nowhere near being gender-just. The property rights of Indian women, interposed with certain ground-breaking judgments have contributed to making them less gender unjust.[160]

Property Rights for Hindu Women

The applicability of the Act is not extended towards Muslim, Christian, Parsi & Jew. However, this Act is applicable to any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhist, Jains or Sikh by religion.[161]

The Hindu Succession (Amendment) Act, 2005 (39 of 2005) was ratified to eliminate gender discriminatory provisions in the Hindu Succession Act, 1956. Under the amendment, the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son. The daughter and the son now have the same rights in the co-parcener property (ancestral

[158] http://wbl.worldbank.org/en/data/exploreeconomies/india/2018
[159] http://www.yourarticlelibrary.com/indian-constitution/article-21-of-the-constitution-of-india-discussed/5497
[160] https://www.globalfundforwomen.org/womens-human-rights/
[161] https://www.thehinducentre.com/publications/issue-brief/article29796731.ece

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property of the Hindu undivided family). [162]This amendment also revokes Sec. 23 of the Hindu Succession Act which deprived a female heir the right to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs choose to divide their respective shares. Sec.24 of the Act which did not give rights to a widow to inherit her husband's property upon her re-marriage has been revoked. The Act introduced a central amendment that would apply to all state governments and with specifically mentioned that has a prospective effect & not retrospective effect. [163]

Notable Case Studies

- Vaishali Satish Ganorkar v. Satish Keshaorao Ganorkar [164]

In this case Bombay High Court held that the Hindu Succession amendment will not apply unless the daughter is born after 2005. But later, a different view has been taken on this point - the larger Bench Judgment is specifically focused on the aspect that requires the daughter to be alive & her father also be alive on the date of the amendment.

- Income Tax v. G. S. Mills [165]

In this case, The Hon'ble Supreme Court considered whether Women can become *Karta* of a family. So, Court held that a widow could not be *Karta* of the family this does not mean that women cannot be the *Karta* of the joint family.

Property Rights for Muslim Women

Indian Muslim women have always had fewer property rights than men. Muslims in the country are broadly governed by either of the two schools of the Muslim personal law – the Hanafi and the Shia as they do not have codified property rights. Neither the Shias nor the Sunnis have codified their property rights of Muslim women.

The Muslim women (Protection of right on divorce) Act was passed in 1986. Statement of Objects and Reasons of this Act states that when a Muslim divorced woman cannot support herself after the iddah period that she must observe after the death of her spouse or after a divorce, during which

[162] https://www.webindia123.com/law/family_law/hindu_law
[163] https://www.idrc.ca/sites/default/files/openebooks/051-3/index.html
[164] AIR 2012, Bom 101
[165] AIR 1966

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she may not marry another man, the magistrate is authorised to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law. However, if she has no such relatives, and does not have enough means to pay the maintenance, the magistrate would order the State Waqf Board to pay the same. The 'liability' of husband to pay the maintenance was thus constrained to the period of the iddah only. [166]

Women granted the right of inheritance is one of the most important changes that Islam has made on the society. A woman's share of inheritance might be more, less, or equal to a man's share, depends on a number of factors such as the case and the number of the survived relatives and their relation to the decedent. The response of the judiciary on the status on women under the Muslim personal law has been hesitant. However, many cases give the perception that the role of our judiciary has been healthy and satisfactory. It is interesting to note that, there have been important judgments favourable to Muslim women even though they were not landmark judgements.[167]

NOTABLE CASE STUDIES

- Mohd. Ahmad Khan v. Shah Bano Begum [168]

In this case the issue was what the extent of Muslin husband's liability was to maintain his divorced wife under Section 125 of the Cr.P.C 1973 The court went into the details of various authorities and translation of the verses of the holy Quran that supported the view that a Muslim Woman who has been divorced has right to be maintained even after the period of *Iddat*. The court also upheld that the provision of maintenance under section 125 of the Cr.P.C is not dependent on the religion of the spouses. [169]It is a secular law that is applicable to everyone irrespective of their religion. Therefore, the judgment created unprecedented debate and controversy on the Muslim woman's rights to claim maintenance from the husband after divorce. It eventually led to the enactment of the Muslim women (Protection of rights on Divorce) Act 1986.

Property Rights for Christian Women

[166] https://www.makaan.com/iq/legal-taxes-laws/examining-a-muslim-womans-right-to-property
[167] https://wiki2.org/en/The_Muslim_Women_(Protection_of_Rights_on_Divorce)_Act_1986
[168] AIR 1985 SC 945
[169] https://bhandarilawfirm.com/property-rights-of-women-in-india-the-current-scenario-and-evolution/

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Property rights of Christians in India are governed by the Indian Succession Act, 1925. The Indian Christian widow's rights are not exclusive as they lessen as other heirs step in. In other words, the entire property would belong to the widow only if the unwilled has no heirs. Where the unwilled has left behind a widow and any lineal descendants, one third of his property is transferred to his widow and the remaining two thirds go to his lineal descendants.[170]

Another anomaly is a peculiar feature that the widow of a pre-deceased son gets no share, but the children whether born or in the womb at the time of the death would be entitled to equal shares. Where there are no lineal descendants, after having deducted the widow's share, the remaining property devolves to the father of the intestate in the first instance. Only in case the father of the intestate is dead but mother and brothers and sisters are alive, they all would share equally.[171]

Notable Case Studies

- Mary Roy v. State of Kerala & others[172]

The decision of the bench resulted that Christian women became entitled to equal share in intestate succession as men with retrospective effect from 1951[173]. Earlier they don't have right to entitled to succeed to the property of intestate Along with that explode the patriarchal family system. The orthodoxy community was not ready to accept the equal shares rights to women. These provisions were challenged as unconstitutional and void on account of discrimination and being violative of right to equality under Article 14 of the Constitution.[174]

PROPERTY RIGHTS FOR PARSI WOMEN

Prima facie the property rights of the Parsi are gender just. Basically, a Parsi widow and all her children, both sons and daughters, irrespective of their marital status, receive equal shares in the property of the intestate while each parent, both father and mother, get half of the share of each child. However, on a closer look there are anomalies: for example,

- A widow of a predeceased son who died issueless, gets no share at all.

[170] https://indiankanoon.org/doc
[171] https://blog.ipleaders.in/cases-on-maintenance-rights
[172] 1986 AIR 1011, 1986 SCR (1) 371
[173] https://www.mylawman.co.in/2019/12/womens-land-ownership-right-Empowerment-by-Shruti-Chauhan.html
[174] https://www.academia.edu/39207597/PROPERTY_RIGHTS_OF_INDIAN_WOMEN

- Parsi women who marries non parsi man have to renunciate her rights as a parsi person and further religious rights, property rights as well. It makes it clear that equality is not maintained i.e. partiality.

Conclusion

After certain recent amendment were made for the protection of women's rights & for ensuring equality between male & female, it didn't serve the purpose since there was a failure to incorporate the proper implementation of laws. Hindu succession Act was amended but women are still not perceived as natural inheritors of property because of the lack of awareness of their rights, financial resources, illiteracy and knowledge regarding her rights which are provided by state as well as constitution.

It is clear from the foregoing that though the property rights of Indian women have improved with time, they are far from being equal and fair. There is much that remains in Indian women's property rights that can be struck down as unconstitutional.[175]

The response of the judiciary has been ambivalent. The Supreme Court of India has in a number of cases held that personal laws of parties are not susceptible to fundamental rights under the Constitution and therefore they cannot be challenged on the ground that they are in violation of fundamental rights especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India. On the other hand, in a number of other cases the Supreme Court has tested personal laws on the touchstone of fundamental rights and read down the laws or interpreted them so as to make them consistent with fundamental rights. Though in these decisions the personal laws under challenge may not have been struck down, but the fact that the decisions were on merits indicate that though enactment of a uniform civil code may require legislative intervention but the discriminatory aspects of personal laws can definitely be challenged as being violative of the fundamental rights of women under Articles 14 and 15 and can be struck down. In fact, in one case the Supreme Court has held that the personal laws, to the extent that they are in violation of the fundamental rights, are void. In some judgments the Supreme Court has expressly recommended to the State to carry out its obligation under Article 44 of the Constitution and

[175] https://wizard-legal25.blogspot.com/2012/10/property-laws-of-indian-women.html

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formulate a uniform civil code. There is a definite swing towards a uniform civil code and one can see that the courts are going to play a significant role to usher it in.

Another heartening trend is that the Indian courts are increasingly relying on international standards, derived from various international declarations and conventions. Specifically, CEDAW has been referred to and relied upon by the Supreme Court of India in some judgments. These line of judgments give a firm basis for the women of India to demand gender justice and equal rights on par with international standards.

The Indian male dominant society is still the same and is not at all willing to give the women their rights. They want all the rights to be in favor of them only. They consider that it's their property only and it's their "Janmasidhh Adhikar". Even though personal laws have been amended to give equal rights and justice to women, a glass ceiling still exists which need to be broken. During the formation of the Indian Constitution Dr. Ambedkar had mentioned property rights in the Hindu code bill. However, the bill was not passed. It was only in 2005 i.e. 55 years after the formation of Constitution, an amendment came into effect which gave property rights to women but there is cut of date in the said amendment which gives rights to daughter / women if on the said date daughter and father should be alive .

Final Outcome is that, even though Indian laws and the judiciary system there are still scope of improvements which needs to be consider in respect of rights of women irrespective of their religion which they profess.

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SEXUAL RIGHTS OF PRISONERS

- **PRITHIVI RAJ**

ABSTRACT

This article examines the sexual rights of the prisoners by justifying loneliness, sexual satisfaction, and quality of life among prison inmates having heterosexual romantic relationship with a fellow prisoner, inmates with a partner outside the prison, and inmates without a partner. After controlling for age, nationality, total time in prison, actual sentence time served, and estimated time to parole, the results showed a lower level of romantic loneliness, and a higher level of sexual satisfaction and global, psychological, and environment quality of life. A right of the prisoners raises a question as to what extent it can incorporate conjugal rights to the prisoners in the jail premises. This article is intended to discuss whether conjugal rights are a privilege or a right. In India, conjugal visit is not permitted. A conjugal visit is a private meeting between sexual partners with an inmate of jail. The original purpose for marital visit is to urge detainees to keep up family ties. The Consultation suggested that to achieve sexual health, sexuality and sexual relationships should be approached positively and respectfully. Apart from conjugal rights the author also examines the sexual autonomy of the prisoners and there right to it. Further, the sexual rights of every person must be protected the laws and policies which must reflect a positive and respectful approach to sexuality and sexual relationships of prisoners.

STATEMENT OF THE PROBLEM

Homosexuality is the emerging social problem in society. The most enabling environment to involve in same sex activity is prison centres. Consequently, there might be consensual or non-consensual sex among inmates which ultimately violates the right to physical integrity of a person because of instances of an act of rape of same sex.

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Prison conjugal visits were used as an incentive to motivate working prisoners to be more productive. It can also be seen in the point of rehabilitation. States believe that preserving the bond of the family unit makes the chances of the inmates rehabilitation greater. They were scheduled visits that allowed the prison inmate to spend one-on-one time with his or her legal spouse. Prisoners were lured by the idea of having the opportunity to have sexual contact with their spouses. Today, the main purpose of these visits is to preserve the family unit. It allows them the chance to interact privately with each other. Permitting prisoners to have a conjugal visit is also respecting the right of the spouse of the inmate because a spouse who hasn't committed a crime shouldn't be punished.

INTRODUCTION

It is not disputed that sexuality is a central aspect of being human. Sexuality is experienced and expressed in diverse ways in relationships to the self or others, in solitude or in communion. Sexuality is therefore part and parcel of all cultures, including prison cultures. Various factors influence the expression of sexuality, including biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors. These interrelated factors also influence prison conditions, and how society treats prisoners. The experience and expression of sexuality in prison is inevitably shaped by prison conditions which are influenced by the above-mentioned factors. In prison, men (and women) spend long periods of time together and in close proximity. This increases the likelihood of sexual activity amongst them. Persons who do not identify as homosexual may nevertheless be involved in sex with other men simply because there are no women in prison. Although prisons have the power to shape sexual expression, it would be illusory to suppose that prisons have control over the sexuality of prisoners. Prison systems can only shape the expression and experience of sexuality. This is crucial because prisons contribute towards the sexual health of prisoners, positively or negatively.[176]

Prisoners are human and sexual beings. They will therefore always express themselves sexually in one way or another, and this may include physical sexual activity. The prison system cannot

[176] Godfrey D Kangaude, A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi, African Human Rights Law Journal, P.4

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control or repress the expression of sexuality, although it can play a role in shaping such expression. Indeed, Haney notes that prisons generally have a powerful influence on the expression of sexuality: "These inverted sexual dynamics in which hypermasculinity is performed through forced homosexual behaviour are a testament to the power of prison to fundamentally change people, to distort and disturb their sexual identities as well as other core aspects of their pre-existing 'self'."[177]

The technical consultation defined sexual health as follows:[178] "Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence."

Sexual health in prisons is not merely the absence of disease or dysfunction. It is not merely the absence of HIV in prison. Indeed, neither is it the mere absence of sexual violence or abuse. Sexual health involves the whole person; the physical, the emotional, the mental and social aspects of the person. Advancing sexual health in prisons means paying attention to all these aspects, and addressing the needs of the prisoner holistically rather than piecemeal. Sexual health is related to life's basic necessities, such as food, clothing, bedding, leisure activities, the personal security of the person, and adequate living space. General living conditions are not dissociated from sexual health. Separating these from sexuality and sexual health is perhaps another illusion of prison systems. A crucial step to advancing sexual health in prison is to foster a positive and respectful approach to sexuality and sexual relationships. Prison systems must imagine the possibility for healthy sexual experiences among prisoners. This, however, is one of the greatest challenges and involves a shift of social attitudes about sexuality and gender relations. The technical consultation also stated that, in order to achieve sexual health, sexual rights must be respected, protected and fulfilled. Sexual rights were defined as follows:[179] "Sexual rights embrace human rights that are

[177] Godfrey D Kangaude, A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi, African Human Rights Law Journal, P.4; C Haney 'Perversions of prison: On the origins of hypermasculinity and sexual violence in confinement' (2011) 48 American Criminal Law Review 127.
[178] World Health Organisation (WHO) Defining sexual health: Report of a Technical Consultation on Sexual Health 28-31 January 2002 (2006) 5.
[179] World Health Organisation (WHO) Defining sexual health: Report of a Technical Consultation on Sexual Health 28-31 January 2002 (2006) 5.

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already recognized in national laws, international human rights documents and other consensus documents. They include the right of all persons, free of coercion, discrimination and violence, to … respect for bodily integrity … consensual sexual relations … pursue a satisfying, safe and pleasurable sexual life." The concept of sexual rights is still a contested one and there is no consensus at the global level. However, the technical consultation appeals to the fact that sexual rights are not new rights but the very same human rights already recognised in national laws and international human rights documents. Freedom from violence, respect for bodily integrity, and the right to choose one's sexual partner and to pursue sexual intimacy that enriches one's life are founded upon the fundamental and basic rights already articulated in various human rights documents. Human rights are sexual rights when the basic fundamental rights are applied to sexuality and sexual relationships. Sexual rights are therefore a conceptual tool for advocating for sexual health, because without the realisation of these rights, sexual health cannot be attained.[180] Prisoners also have the right to the highest attainable standard of physical and mental health, including sexual health.[181]

Sexual health and rights are about creating conditions for respectful gender and sexual relations which are the bases for persons to engage in sexual relationships and activity without coercion and discrimination, and based on mutuality and equality rather than power and subjugation. The concept of sexual rights is a useful tool to guide the transformation of hegemonic masculinities into positive and gender-equal relationships among men in prison.[182]

ASPECTS OF SEXUAL RIGHTS

Sexual Rights can be divided into Conjugal Rights & Sexual Autonomy of the prisoners.

CONJUGAL RIGHTS OF PRISONERS

Prisoners' Right to Conjugal Visit is the most controversial and not as such widely researched theme of right at National and International level. Some scholars and peoples believe that the right

[180] Supra. Note.1
[181] Art 25 Universal Declaration; art 12 ICESCR.
[182] Supra Note 1

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to conjugal visit is the extended family visit which gives a chance for spouses to spend some private time. Even if, this right is not widely acknowledged by many states, still there are countries in which the right to conjugal visit is expressly recognized under their law and the enjoyment of this right is fully respected. In India, the jurisprudence on the concept of conjugal rights is still in its infancy. There is no statutory law that discusses or confers conjugal rights to prisoners. In the absence of the same, the prisoners knock the doors of courts under Article 21 of the Constitution. This is because the facility will be made available only to those prisoners who are married and have their marriage intact. Such visits cannot be allowed to unmarried prisoners or prisoners with broken marriage. That is, such visits cannot be made available on the basis resembling "equal opportunity" for all prisoners.[183] Thus, conjugal visitations can be enjoyed only by those prisoners who have their marriages intact whereas parole or furlough does not require this as a pre-condition for release.

Psychology behind Conjugal Rights

A marriage is a natural bond guided by natural laws taught by motivation conscience, nature and custom. Marriage is defined as: The contract made by a man and a woman to live as husband and wife.[184] It can also be described as culturally or legally sanctioned union. So, marriage is supposed to be a relationship that joins a man and a woman together through an implied binding contract or a spiritual belief; as is applicable and accepted in different societies. It legalizes sexual activities, makes couples feel relaxed; builds compatibility in tune with each other, and smoothes the overall relationship. The ancient and basic idea behind marriage is to legalize sexual intercourse meeting the sexual urge and to bring virtuous child and to build a good society. Thus the word marriage itself suggests that sex is permitted between the couples which strengthens the emotional bonds and drives the stress away between them. Sex is accepted as a sign of loving the partner alternative to verbal expression of showing of care and emotion.[185]

A conjugal visit can be defined as in which an inmate's has a right to meet his or her spouse, during which the couple is allowed to engage in sexual relations. Mostly visits are meant to associate with

[183] Donald R. Johns, "Alternatives to Conjugal Visiting", Federal Probation, Vol.35, 1971, pp.47-51, at p. 47
[184] Dictionary.reference.com
[185] International Journal of Pure & Applied Mathematics, Vol.119 No.15 2018,P. 3019-3035

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sexual activity. Physical intimacy in conjugal visits includes any personal activity which they desire such as holding hands, hugging, kissing, romantic touching and sexual activity. The ideas behind allowing conjugal visits were to bind the family ties from being broken. It was thought that if inmates are allowed to meet their family once in a while then there will be moral reform in the prisoner's and social adjustment will be there. The general biological characteristics of men are not good in expressing their concerns to other living partners, so making love is a way of their expression. To women, sex is an act. They need to be caressed, kissed and loved. Thus both help to deepen the couple's wife and to build a strong bonding and to also help to drive the stress away. Physical intimacy when welcomed by our bodies by hug or a touch or other experiences, then it releases various chemicals: serotonin oxytocin and dopamine. Oxytocin increases our desire to bond, Dopamine improves our mood and serotonin helps us to fight against depression and left with a very pleasurable feeling on the couples.[186]

The psychological impact upon the inmate is even more profound. Virtually all contacts with the opposite sex are cut off. The denial of conjugal visiting rights deprives the inmate of an important source of emotional support.[187] Perhaps the most significant psychological effect of the deprivation of heterosexual relations, however, is the impact upon the prisoner's self-image.[188] The sexual frustration felt by a male inmate deprived of heterosexual relationships can cause him anxiety concerning his status as a male.[189] Where the inmate's adjustment to the sexual deprivation of prison evokes latent homo- sexual tendencies and behavior the result is likely to be an acute psychological onslaught upon the inmate's "ego image."[190] Even where homosexual tendencies do not develop into behavior, they will "arouse strong guilt feelings at either the conscious or unconscious level."[191] Moreover, especially in the case of adolescent inmates, life-time patterns of sexual behavior may be shaped by homosexual experiences in prisons.[192] Finally, conflicts arising from relationships may lead to physical violence.[193] The fact that the prisoner's right of marital

[186] Ibid.
[187] C.Hopper, Sex in Prison 5-6 (1969) P.147; H.Klare, People in Prison 64-66 (1973)
[188] G. SYKES, THE SOCIETY OF CAPTIVES 71 (1958)
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 510-11 (3d 1959)
[193] P. BUFFUM, HOMOSEXUALITY IN PRISONS 28 (1972)

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privacy is shared by a non-prisoner spouse provides another reason for according this right great weight.

In Jasvir Singh and Another Vs State of Punjab and Other[194] Punjab and Haryana High Court has given a very novel judgment recognising conjugal rights of the prisoners within the jail premises considering it as part and parcel of right to life under Article 21. The petitioners thereafter sought enforcement of their perceived right to have conjugal life and procreate within the jail premises. They sought a command to the Jail authorities to allow them to stay together and resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. Amicus curiae was appointed by the court keeping in view the vital issues of public importance. Various observations made by him are reproduced below:

"The husband claimed to be the only son of his parents and eight months into their marriage they got caught in the criminal case. The petitioners claimed that their demand is not for personal sexual gratification. The petitioners were also open to artificial insemination. The petitioners' fundamental focus was on Article 21 of the Constitution. They insisted that the right to life has two essential ingredients, namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital part."

The following, amongst other issues emerged for determination before the Court:

i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

iv. If question number (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

[194] CWP No.5429 of 2010 Date of Decision: 29 May 2014

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JUDGEMENT

i. The State of Punjab was directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. The Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. The said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. The Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. The Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. The Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. The Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. The Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;

ix. The Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

x. The Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

The decision in State of Andhra Pradesh Vs ChalaramKrishna Reddy[195]was relied upon to urge that a prisoner whether convict, under trial or a detenue, continues to enjoy the Fundamental Rights including right to life which is one of the basic Human rights. The petitioners also referred to well regulated concept of conjugal visitations successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc. The State of Punjab opposed the petitioners' prayer essentially on the plea that the Prisons Act, 1894 contains no provision to permit conjugal visitation; its section 27 rather mandates proper segregation of male and female prisoners. Para 498 of the Punjab Jail Manual, lays down the method for separation of male and female prisoners. Even artificial insemination as a viable and alternative solution suggested by the petitioners, was not acceptable to the State of Punjab as according to its affidavit "there is no such provision in the Prisons Act, 1894 and Punjab jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convicts…". The father of the minor victim, who was murdered for ransom by the petitioners, also joined these proceedings to oppose the petitioners' prayer.

The following, amongst other issues emerged for determination:

I. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our constitutional framework?

[195] (2000) 5 SCC 712

II. Whether pen logical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

III. Whether 'right to life' and 'personal liberty' guaranteed under article 21of the constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

IV. If question number (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?(either the convicts or the under-trials)

JUDGMENT

The writ petition was disposed of with the following directions:

The Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

The Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

The Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child.

The impact of the judgment was;

The court observed that the learned amicus curiae canvassed that the right to life includes right to 'create life' and 'procreate' and this fundamental right does not get suspended when a person is sentenced and awarded punishment thereby limiting him to stay in the jail. In Lawrence v. Texas, [196] the court noted that "after Griswold, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." Also Planned Parenthood v.

[196]539 U.S. 558, 565 (2003),

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Casey[197] recognized the right to "bear or beget a child" as fundamental. In Skinner v. Oklahoma[198] held that the right to procreate is a fundamental right guaranteed by the Constitution. A person does not lose his human rights merely because he has committed some offence as he also has some dignity which must be protected.[199]

COMPARATIVE ANALYSIS OF CONJUGAL RIGHT

Canada

The Private Family Visit (PFV) was established by the Correctional Service of Canada (CSC) to encourage inmates to develop and maintain family and community ties in preparation for their return to the community. If they meet certain criteria identified in their correctional plan, inmates have the opportunity to use special units within the confine of a correctional institution. Most units are simple two –bedroom structures with combination of kitchen and living area. Inmates are eligible for private family visits unless they are at risk for family violence, participating in unescorted temporary absences for family contact purposes, in a special handling unit, or recommended or approved for transfer to special handling unit or in disciplinary segregation at the time of the scheduled private family visit. Under the Canadian rule the immediate family members are the first group of persons entitled to private family visit which ultimately incorporated the inmate's spouse or common-law partner.[200]

Michigan

The Supreme Court also adopted the balancing ap- proach in Pell v. Procunier[201] In that case inmates challenged under the first and fourteenth amendments a California prison regulation prohibiting press interviews with specific inmates. Assuming without deciding that first

[197] 505 U.S. 833, 851 (1992)
[198] 316 U.S. 535, 542-543 (1942)
[199] JUDICIAL INTROSPECTION OF CONJUGAL RIGHTS VIS-A-VIS HUMAN RIGHTS OF THE PRISONERS by Dr.Sunaina
[200] http://www.csc-scc.gc.ca/family/003004-1000-eng.shtml,
[201] 417 U.S. 817 (1974)

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amendment rights were at stake, the Court characterized *Pell* as a case "where 'we are called upon to balance First Amendment rights against legitimate governmental interests.'[202] An important factor in the balancing process was the Court's recognition that the prisoner's right to communicate by mail or through visits provided alternative means of communication with the outside world. Moreover, permitting the press interviews would have created security and administrative problems. The combination of these factors led the Court to hold the regulation valid. Such a balancing technique is not necessarily inconsistent with the established constitutional doctrine that deprivations of fundamental rights must be justified by compelling state interests. The state, through criminal convictions comporting with due process of law, has presumably shown compelling reasons for incarcerating prisoners. The state thus has already shown a compelling interest in depriving convicted persons of those rights that are inconsistent with incarceration. The sole issue presented when a prisoner challenges a particular deprivation, therefore, is whether the exercise of the right is inconsistent with incarceration. In *Pell* the Supreme Court seemed to base its use of balancing with regard to first amendment rights on a similar analysis, stating: "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law".[203] The Court apparently viewed balancing as the appropriate means of reconciling the asserted first amendment rights with the legitimate policies and goals of the correctional system. Balancing seems equally appropriate where other fundamental interests are at stake.[204]

In Procunier v. Martinez[205] the Supreme relied upon the non-prisoner rights infringed by censorship of to invalidate prison censorship regulations. Because non-prisoners'rights were at stake, the Court employed a strict standard of review,[206] holding that the prison officials' discretion to censor "statements that 'unduly complain' or 'magnify grievances,' expressions of 'inflammatory political, racial, or religious, or other views,' and matter deemed 'defamatory' or 'otherwise

[202] Ibid.; Kleindienst v. Mandel 408 US 753, 765 (1972)
[203] 417 US 822
[204] Ibid.
[205] 416 US 396 (1974)
[206] 416 US 396 at 413-414

inappropriate' was "far broader than any legitimate interest of penal administration."[207]The Court found it unnecessary to decide whether the first amendment rights of prisoners alone would invalidate the censorship. Finally, the prisoner's right of marital privacy is entitled to great weight because the deprivation is total: Prisoners have no privacy in their marital relations when conjugal visitation is prohibited. The situation is thus fundamentally different *Pell*, where the Court relied upon the availability to inmates of alternative for achieving means of communication to uphold a prison regulation prohibiting press interviews. A prisoner's only alternative for achieving marital privacy is the home furlough, which is frequently available.[208]

EuropE

In Europe, conjugal rights of visitation and artificial insemination are claimed on the basis of European Convention on Human Rights. The Convention guarantees right to respect for privacy or family life as well as the right to marriage. Article 8 of the Convention provides that everyone has a right to respect for his private life, his family life and his home and that there shall be no interference by a public authority with the exercise of that right, save in accordance with law or as necessary in a democracy for certain named purposes (which include public safety, health or morals). Article 12 of the Convention provides that a prisoner of marriageable age has a right to marry and to found a family according to national laws governing the exercise of the right. All parties of Council of Europe are member to this Convention and are under an obligation to make provisions in accordance with the Convention. In accordance with it, many states in Europe allow conjugal visits of prisoners. For example, conjugal visits are allowed in Spain, France, Sweden and Denmark to name a few.[209] The Spanish prison system gives prisoners access to conjugal visits on a monthly basis and prisoners can invite members of their families as well as close friends.[210] Swedish prisons allow inmates to have visits with family members that can last for up to nine

[207] Ibid.
[208] Supra Note.17; An Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions, 47 TEMP. L.Q. 288 (1974
[209] Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer", Case Western Reserve Journal of International Law, Vol. 37, Issue 2, 2006, pp. 579-614, at p.602.
[210] Dirk Van Zyl Smit, Frieder Dunker (eds.), Imprisonment Today and Tomorrow: International Perspective on Prison Rights and Prison Conditions, Kluwer Law International, Hague, 2001, at p. 612

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hours.[211] It is pertinent to note that the European Court of Human Rights has not yet interpreted the Convention as requiring Contracting States to make provisions for such visits.[212] And this is an area in which the Contracting states enjoy wide margin and it is for the states to see that what steps are taken to ensure compliance with the convention. The European Court of Human Rights in the case of Dickson v. the United Kingdom[213] has denied permission of artificial insemination to prisoners. The petitioners in this case were husband and wife and both were incarcerated. They sought permission for access to artificial insemination and relied on Article 8 and 12 of European Convention on Human Rights. Their application was turned down by the Secretary of State as well as by the High Court. The European Court of Human Rights also turned down their application and observed that more than half of the states have provisions for conjugal visits. In such a scenario, there was no need of obviating the authorities to provide additional facilities for artificial insemination. The Supreme Court of Judicature in United Kingdom in the case of R v. Secretary of State for Home Department[214] also denied the claim of a prisoner for artificial insemination. The Court held that the refusal to permit the appellant the facilities to provide semen for artificial insemination of his wife was neither in breach of the Convention nor unlawful or irrational. The Court culled out three reasons for sustenance of the policy that restricts the provision of facilities for artificial insemination. Firstly, it is an explicit consequence of incarceration that prisoners should not have the opportunity to beget children while serving their sentences except when they are allowed to take temporary leave; secondly, there is likelihood of a serious and justified public concern if prisoners continue to have the opportunity to conceive children while serving sentences; and thirdly, there are disadvantages of single parent families.

United States of America

There are 195 prison facilities operated by the Federal Bureau of Prisons; the facilities house approximately 211,000 prisoners.[215] In relation to Conjugal visit currently, only six U.S. states

[211] Ibid, at p. 635.
[212] Jasvir Singh vs. State of Punjab 2015 Cri LJ 2282 (2293)
[213] Application No. 44362/04 decided on 4th December, 2007 by European Court of Human Rights
[214] [2001] EWCA Civ 472
[215] American Prison culture in an International Context ;an examination of Prisons in America ,Netherlands and Israel ,Lucian E.Dervan,p.415

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allow prison conjugal visits within their prison systems; California, Connecticut, Mississippi, New Mexico, New York and Washington. All of these states have their own regulations and policies on the management of conjugal visits. For the purpose of this topic let us have a look on Mississippi Prison.[216] The Conjugal visit at Mississippi state penitentiary for example should not be viewed as an isolated phenomenon; it is only a part of the general visitation and leave program which has been in operation in the prison since 1944 and which is the most liberal in the United States. Under the Mississippi program, called the Holiday suspension program, each year from December 1 until March 1, inmates who have been in the penitentiary at least three years in good behavior records may go home for a period of ten days. As evaluated by Mississippi prison and state officials, this program has proved a success and an important element in the rehabilitation and morale of the inmates.[217] Apparently, much of the success of conjugal visits depends on the adequacy of the facilities provided for the privacy of the inmate and his wife. For this effect the Mississippi prison made considerable change building the so called Red Houses, which are private rooms .But the red houses are still unsatisfactory in terms of absolute privacy. Another important element in the Mississippi prison, conjugal visiting appears to be the small community camp arrangement. This arrangement seems to be amenable to the conjugal visit. It affords more freedom of visitation in general since each camp is somewhat isolated. The visitors go directly to the camp they wish to visit, where the sergeant searches the male visitors and the sergeant's wife searches the female visitors. Since all inmates are not married one and because of the arranged schedule the number of inmates wishing to visit to use the red house is never large. The small numbers add a more respectable atmosphere and provide a more informal situation.[218] One unified policy that all six states agree on is that Extended Family visits are "not a right, but a privilege". Prisoners must earn the opportunity to participate in this program. They must be low-to-medium security level prisoners, with no history of disciplinary problems within the prison system. They cannot be incarcerated for violent offences or have a history of child abuse or domestic violence.[219]

In USA, federal prisons do not allow conjugal visitations. However, many states allow conjugal visitation programs. These visitations are subject to a variety of restrictions which are provided by

[216] Nahom Duba, The Status of Prisoners' Right to Conjugal visit in Ethiopia, 2016
[217] Ibid.
[218] Journal of Criminal law and criminology, the conjugal visit in Mississippi State Penitentiary, Columbus B.Hopper,vol.53.Issue 3 Sept. p 342-343
[219]http://crime-punishment.yoexpert.com/prison-system/2-what-us-states-allow-prison-conjugal-visits-3543.html

the concerned state. The oldest conjugal visiting program for inmates is at the Mississippi State Penitentiary in Parchman. Conjugal visitation privileges in this institution date back to 1918, although many penitentiary employees believe the program has been in existence since the institution was first opened in 1900.[220] Earlier, the program was open only for black inmates only but later on it was extended to all prisoners. The conjugal visitation program in the Mississippi got evolved with time and was never formally established by law. The visits take place every two weeks and can last for up to three days. Prisoners and their families are taken to the cottages located on the prison grounds, which are equipped with beds and tables.[221] In addition to conjugal visitation, the prison authorities also use the program of home furloughs. Various other states in USA also have programs for conjugal visitations.[222] For example, in the state of California the first conjugal visit program was instituted in 1968 and has been expanded since then. The inmates in California are allowed to have visits with their children, spouses, siblings and parents in modular homes located on the prison grounds.[223] Similarly, conjugal visitation programs are also available in New York,[224] New Mexico, Washington and Connecticut. However, the programs in New Mexico[225] and Mississippi have been closed.[226] The United States Court of Appeal, Ninth Circuit, in the case of *William Gerber v. Rodney Hickmen*[227] denied the claim of petitioner for allowing him to provide a sperm to his wife for artificial insemination. In this case the husband was imprisoned for a sentence to a hundred years to life plus 11 years. He wanted a baby and no date was set for his parole due to long sentence. Therefore, he claimed that he should be allowed for providing a sperm to his wife for artificial insemination and denial of such a claim would amount to violation of his constitutional right.[228] The Court of Appeals with a majority of 6-5 held that (i)

[220] Michael Braswell and Donald A. Cabana, "Conjugal Visitation and Furlough Programs for Offenders in Mississippi", New England Journal of Prison Law, Vol. 67, No. 2, 1975, pp. 67-72, at p. 67.
[221] Christopher Hensley et al, Conjugal Visitation Programs: The Logical Conclusion: From Prison Sex: Practice and Policy, 2002, pp. 143- 156, at p.144.
[222] Carolyn Simpson, "Conjugal Visiting in United States Prisons", Columbia Human Rights Law Review, Vol. 10, 978-79, pp. 643-671, at p. 662.
[223] Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer", Case Western Reserve Journal of International Law, Vol. 37, Issue 2, 2006, pp. 579-614, at p. 600.
[224] Bonnie E. Carlson, "Inmates and their Families: Conjugal Visits, Family Contact and Family Functioning", Criminal Justice and Behavior, Vol. 18, No. 3, 1991, pp. 318-331, at p. 319.
[225] New Mexico to eliminate conjugal visits for prisoners, 16 April 2014 available at http://www.reuters.com/article/us-usa-prisons-newmexico-idUSBREA3F21220140416.
[226] Ibid.
[227] 291 F. 3d 617 (2002)
[228] Brenda V. Smith, "Analyzing Prison Sex: Reconciling Self-Expression with Safety", Human Rights Brief, Vol. 13, Issue 3, 2006, pp. 17-22, at p. 18.

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many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement and (ii) prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits. The Court further observed that keeping in view the nature and goals of a prison system, it would be a wholly unprecedented reading of the Constitution to command the warden to accommodate Gerber's request to artificially inseminate his wife as a matter of right.

RIGHT TO SEXUAL AUTONOMY IN PRISON

…the body implies mortality, vulnerability, agency: the skin and the flesh expose us to the gaze of others but also to touch and to violence. The body can be the agency and instrument of all these as well, or the site where "doing" and "being done to" become equivocal. Although we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension; constituted as a social phenomenon in the public sphere, my body is mine is not mine. (Butler, 2004, p. 21).

In the passage above, Butler writes of a body that is both "mine and not mine." Indeed, my experience as a free world body in carceral spaces is an exaggerated but apt example of exactly this truth: under white supremacy and capitalism, bodies are not only not-free, but also contingent, limited, and conditional. As sexual beings, then, different bodies are granted different access to humanizing interaction, whether they are sexual or not. As previously discussed, being forbidden to touch inmates was always already about a presumed sexual deviance—despite the fact that touch in yoga is non-sexual.[229]

In *Turner v. Safley*,[230] the Supreme Court articulated the standard of review for constitutional challenges of prison regulations. The Court attempted to strike a balance between ensuring that prisoners retain the right to seek redress of constitu-tional grievances and making sure that courts accord appropriate deference to the expertise of prison administrators. The Court recognized that

[229] RAECHEL TIFFE, Toward a Decarceral Sexual Autonomy: Biopolitics and the Compounds of Projected Deviance in Carceral Space, Journal of Prison Education and Reentry, Vol. 4 No. 2, December 2017
[230] 482 U.S. 78, 89 (1987).

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"[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution" and that the "expertise, planning, and the commitment of resour- ces" that go into running a prison are "peculiarly within the province of the legis-lative and executive branches of government." Ultimately, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regula-tion is valid if it is reasonably related to legitimate penological interests." Courts consider four factors to determine whether a prison regulation is reasonably related to a legitimate penological interest: (1) whether there is a "'valid, rational connec-tion' between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) whether there are alternative means available for exer-cising the asserted right; (3) how the accommodation of the asserted right will impact guards, other incarcerated persons, and the allocation of prison resources; and (4) that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation" and vice versa.[231]

First, Supreme Court precedents arguably support a general constitutional right to masturbate. While the Supreme Court has never directly addressed this question, *Griswold v. Connecticut* and *Lawrence v. Texas* imply a constitutional right to masturbate. The right to masturbate may be the correctional context by applying the four *Turner* factors. The Supreme Court has not directly addressed whether the Fourteenth Amendment includes a constitutional right to masturbate. One reason for this might be the sheer un-administrability of a masturbation ban outside of the prison context.[232] The right itself may also be so obvious that states simply would not seek to prevent the practice in the first place.[233] Whatever the reason, the fact that the right to masturbate has not been specifically upheld by the Court does not make that right any weaker or less fundamental.[234] Indeed, Supreme Court precedent strongly implies a fundamental right to masturbate in private.[235] The strongest sup-port for this right derives from the Court's decision in *Lawrence v. Texas*.[236] Before discussing *Lawrence*, it is instructive to consider the decisions undergirding the Court's holding in that case.

[231] Ibid.
[232] David Oshinsky, *Strange Justice: The Story of* Lawrence v. Texas *Book Review*, N.Y. TIMES (March 16, 2012), https://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter. html
[233] Williams v. Pryor, 220 F. Supp. 2d 1257, 1296
[234] Lawrence v. Texas, 539 U.S. 558, 565 (2003)
[235] Ibid.
[236] Ibid.

At the root of the Supreme Court's jurisprudence surrounding sexual privacy rights is its decision in *Griswold v. Connecticut*.[237] In *Griswold*, the Court found that a state law prohibiting the use of contraceptives and any consultation regard-ing contraceptives violated a fundamental right to privacy.[238] The Court held that the "sacred precincts of marital bedrooms" were protected by a right to privacy that was "older than the Bill of Rights" itself.[239]

In Eisenstadt v. Baird,[240] Seven years after the decision in *Griswold*, the Court extended the right to make decisions regarding contraception and sexual conduct beyond the marriage rela-tionship. In *Eisenstadt v. Baird*, the Court recognized that the right of privacy articulated in *Griswold* was dependent on the marital relationship, and extended it to unmarried couples as well.[241] The Court also recognized that the marital couple is made up of two individual people. It ultimately held that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion" into family planning decisions.[242] The Court's strongest proclamation in favor of sexual autonomy and the consti-tutionally protected privacy interest in private sexual conduct came in *Lawrence*.[243] In *Lawrence*, the Court overruled *Bowers v. Hardwick* and invalidated a Texas statute prohibiting sodomy. In doing so, the Court reaffirmed the "promise of the Constitution that there is a realm of personal liberty which the government may not enter." Most significantly for present purposes, the Court held that the right to be free from governmental intrusion into "the most private human conduct, sexual behavior" is a liberty protected by the Constitution. Finding no legitimate state interest in prohibiting homosexual sex, the Court proclaimed that the government is not permitted to "demean [the] existence or control [the] destiny" of anyone who chooses to engage in homosexual conduct in the privacy of their homes. Although the Court did not explicitly address masturbation in *Lawrence*, it is difficult to imagine how a masturbation ban would pass constitutional muster in the wake of the Court's holding. After *Lawrence*, it is clear that individuals are entitled to "respect for their private lives" and that "private sexual conduct" between two consenting adults falls under the penumbra of the constitutionally protected private life. If private sexual conduct between two consenting adults is

[237] 381 U.S. 479 (1965)
[238] Ibid.
[239] Ibid.
[240] 405 U.S. 438, 447 (1972)
[241] Ibid.
[242] Eisenstadt, 405 U.S. at 453
[243] 539 U.S. at 579

constitutionally protected under the Due Process Clause, then it can be inferred *a fortiori* that private sexual conduct between an individual *and no one else* is also constitutionally protected under the Due Process Clause. Indeed, Justice Scalia explicitly worried that *Lawrence* would implicitly include a constitutional right to masturbate. Detailing a parade of horribles, Justice Scalia laments that "laws against . . . same-sex marriage, . . . prostitution, *mastur-bation*, adultery, fornication, . . . and obscenity" are only sustainable in light of *Bowers*. Justice Scalia understood that private masturbation could not be regu-lated once *Lawrence* overruled *Bowers* and granted "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Although lower courts are split as to the precise scope of the holding in *Lawrence*,[244] the Fifth Circuit has held that, in the wake of *Lawrence*, individuals enjoy a constitutional right to "to engage in private intimate conduct" without in-terference from the government.[245] In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit relied on *Lawrence* to invalidate a Texas statute that criminalized "the selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation." The court held that the Texas statute heavily burdens the constitutional right of an individual who "wants to legally use a safe sexual device during private intimate moments alone or with another" and that the state's interest in public morality "cannot constitutionally sustain the statute."[246]

When inmates enter prison, they begin to adapt to the prison lifestyle and the subcultures that are present. According to Einat and Einat (2000), they are participating in the concept of "prisonization." Multiple researchers have attempted to provide theoretical explanations of the adjustment and behavior of prison inmates (Clemmer, 1940; Irwin and Cressey, 1962; Sykes, 1958; Toch, 1977), with two main theories receiving the most support. The deprivation model asserts that deprivations (or losses of liberties) experienced in prison are the main influence on an individual's response to incarceration. According to Sykes (1958), five main pains (or losses) result from imprisonment:

1. Liberty and freedoms available to those not incarcerated.

2. Goods and services, ranging from choosing a grocery store to picking a mechanic.

[244] Compare Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1236–37 (11th Cir. 2004)
[245] Reliable Consultants, Inc., 517 F.3d at 744
[246] Ibid.

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3. Heterosexual relationships with men and women of an individual's choice.

4. Autonomy and self-sufficiency.

5. Security and protection from harm.

As a mechanism for coping with the loss of these freedoms and liberties, the inmates form a new set of values and norms, some of which lead to inappropriate behavior during incarceration (Marcum, Hilinski, and Freiburger, forthcoming). For example, individuals on the outside have the freedom to participate in heterosexual relationships at their leisure. As incarceration only allows the cohabitation of others of the same sex, many inmates choose to participate in homosexual relationships, an activity that is banned in prison.[247]

Participating in autoerotism is often a behavior inmates will choose to relieve sexual tension. Of the few studies done on this behavior, it appears to be acceptable among the inmate population. Wooden and Parker (1982) found that every inmate in their study reported masturbating while incarcerated, with 46 percent masturbating three to five times per week and 14 percent masturbating daily. Furthermore, Hensley, Tewksbury, and Koscheski (2001) found that 99.3 percent of their male inmate sample reported masturbating while incarcerated. Interestingly enough, the more educated inmates were more likely to be frequent masturbators. Although Hensley, Tewksbury, and Wright (2001) found that less female inmates admitted to the behavior, a large portion (66.5 percent) of female inmates in a southern facility participated in regular masturbation. Inmates know this behavior is normally forbidden during incarceration.

However, research has indicated that male inmates will rationalize this behavior in order to continue to participate in masturbation. Worley and Worley (2013) tested this behavior with Sykes and Matza's neutralization theory, which has been used to explain many types of criminal behavior, such as shoplifting (Cromwell and Thurman, 2003), digital piracy (Morris and Higgins, 2009), and sex trafficking (Antonopoulos and Winterdyk, 2005).[248]

While the majority of correctional facilities have rules against public autoerotism, this behavior still occurs in prison, sometimes to the point of creating an adverse environment for inmates and correctional staff. In *Beckford v. Department of Corrections* (2010), a federal appellate court ruled

[247] Catherine D. Marcum and Tammy L. Castle, Sex in Prison: Myths and Realities, 2014
[248] Catherine D. Marcum and Tammy L. Castle, Sex in Prison: Myths and Realities, 2014

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that the Florida Department of Corrections failed to fix a hostile work environment for female health-care workers and correctional staff. Male inmates in maximum security continuously masturbated in the presence of fourteen female employees over the course of three years. They would participate in "gunning," where the inmates openly masturbated in the presence of the employees by standing on toilets or mattresses to ensure the victims could see the behavior. They would ejaculate through the food slot on their doors. The staff resorted to wearing sunglasses and headphones to avoid the harassment, as the Department of Corrections refused to attempt to amend the inmates' behavior.[249]

COMPARATIVE ANALYSIS OF SEXUAL AUTONOMY

Prison rules and regulations are essential to combating threats to safety and security and to maintaining order within the institution. An appeal to the "orderly operation of the institution" often undergirds the justification for a ban on sexual activity and masturbation while in custody.[250] However, the experience of correctional facilities in the rest of the English-speaking world suggests that institutional order can be maintained without a draconian ban on masturbation.

Prison regulations in Queensland, Australia, do not contain categorical prohibitions on masturbation or other consensual sexual activity.[251]

In the State of Western Australia, condoms are made available to incarcerated persons of all genders.[252] Far from encouraging an over-sexualized and dangerous institutional environment, Australia's relatively liberal attitude towards sex in prison is correlated with institutional order. A recent study from the University of South Wales found that sex in prison was a relatively rare phenomenon and when it did happen between two prisoners, it was overwhelmingly consensual.[253]

[249] Ibid.
[250] Ohio Admin. Code 5120-9-06(A) (2014).
[251] *Corrective Services Regulation 2017* (Qld), sub-div 2(i) (Austl.) (prohibiting indecent or offensive acts only in someone else's presence).
[252] Adult Custodial Rules 2002 (WA) AC 9, Prioision of Condoms and Dental Dams to Prisoners (Austl.), http://www.correctiveservices.wa.gov.au/files/prisons/adult-custodial-rules/ac-rules/ac-rule-09.pdf.
[253] Univ. Of New South Wales, Sex In Australian Prisons: The Facts (Apr. 13, 2011), https:// newsroom.unsw.edu.au/news/health/sex-australian-prisons-facts.

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Canadian prisons also recognize significantly more sexual rights than American prisons. In Ontario, the Ministry of Correctional Services Act authorizes the promulgation of regulations "respecting the ……. discipline, control, grievances, and privileges of inmates."[254] The regulations do not include any prohibition on sexual activity or masturbation.[255] Other Canadian provinces go even further than Ontario; prisons in Nova Scotia provide condoms and dental dams to facilitate safe sex while incarcerated.[256] The lack of prohibitions on sexual activity, ready availability of condoms and dental dams, and a generous conjugal visit policy[257] all suggest that Canadian corrections officials recognize that an opportunity to establish healthy sexual practices is important for rehabilitation and consistent with maintaining institutional order.

CONCLUSION & SUGGESTION

Sex is a physiological need that strengthens the bond between couples thus the plea from some prisoners to be allowed to satisfy their sexual needs in a move to cut down on sodomy in prisons is reasonably justified. Sexual health in prisons cannot be attained unless these misconceptions and misunderstandings about gender and sexuality based on hegemonic masculinities ideals are quashed. It requires transforming laws and policies to accommodate sexual and gender diversity and to protect every person from sexual violence, and to allow every person the freedom to pursue sexual relationships safely and freely without discrimination, coercion and violence. The protections of the Constitution do not end at the prison walls. It is incumbent upon our criminal justice system to respect and protect the rights of the accused and of the convicted. Those rights include the right to sexual autonomy. A system that can punish a natural, private activity like masturbation with solitary confinement is an extraordinarily flawed system. If prisons refuse to lift these draconian restrictions on a fundamental right, courts must step in to protect those whose constitutional rights are being trampled. The right to procreate through artificial insemination as a

[254] Ministry of Correctional Services Act, R.S.O. 1980, c 275, s 47(d) (Can.).
[255] MINISTRY OF COMMUNITY SAFETY & CORR. SERVS., Inmate Information Guide for Adult Institutions30(S.O.)(Sep.2015)(Can.),https://www.mcscs.jus.gov.on.ca/english/corr_serv/PoliciesandGuidelines/CS_Inmate_ guide.html.
[256] NOVA SCOTIA CORR. SERVS., Offender Handbook 29 (S.N.S.) (2016) (Can.), https://novascotia.ca/just/Corrections/_docs/Adult_Offender_Handbook_EN.pdf.
[257] CORR. SERV. OF CAN., PRIVATE FAMILY VISITS WITH OFFENDERS (Mar. 27, 2018) (Can.), www.csc-scc.gc.ca/family/003004-1000-eng.shtml

supplement should be viewed as an alternative. However, in view of limited resources available with the state the state shall initially focus on developing facilities for conjugal visitation in jails and this method must be a part of long term planning. There should be provisions of parole and furlough should be used liberally by the state so as to ensure that prisoners can establish relations with their families. The state should allocate resources for construction of facilities for conjugal visitations. Although there are weighty interests on both sides of the issue, a strong argument can be made that a court must find that married prisoners and their spouses have a constitutional right to participate in a program of conjugal visitation. If rehabilitation remains the favoured goal, as it now seems to be, the benefits of conjugal visiting should tip the scales in the prisoner's favour. Prisons will remain unpleasant places even if conjugal visiting is allowed several times a month. Imprisonment will confer no less of a social stigma because of the presence of such a program. If a prisoner is not allowed to meet his spouse in the prison, than the spouse of prisoner equally faces similar torture for no offence. Imprisonment is a legal punishment imposed upon the offender by the state for the commission of a wrongdoing or defying the rule. The State is under a commitment for securing the human rights of its citizens and also to ensure the society everywhere, and is approved to do so. To shield the nationals from any conceivable mishandle of this authority, they ought to be given certain fundamental benefits which are perceived by the Constitution of India as of Rights. That it would offer potential psychological benefits to the prisoner, reduce prison homosexuality, and allow the inmate to preserve or her marital ties.

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RIGHT TO PRIVACY VIS-À-VIS CCTV IN EDUCATIONAL INSTITUTIONS - A CRITICAL ANALYSIS

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ABSTRACT

A persistent challenge has been the changing meaning of privacy from one social context to the next, not least in the eye of the law. Ironically, to date, contributions of sociology, a discipline concerned with social contexts of meaning-constitution, have been marginal. Despite valuable analyses of privacy from social-psychological, institutional, or network perspectives, we are yet to account for the multiplicity of meaning and contingent legal determination 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; (Article 19(2) of the Constitution of India, 1950). It is a serious threat to the safety and security of young girls as also the female teachers and shall directly give rise to the incidents of stalking and voyeurism furthermore it is a gross violation of right to privacy and freedom of speech and expression of the students and teachers as well. It shall be noteworthy that there are no legislations or policies in place for regulating the installations of CCTV or devices used for surveillance for safety and security in public spaces. The authors will also analysis the above in light of Right to privacy and legality of the same. The authors shall try and present a picture on the ground reality and some landmarks in law and its existence in Right to Privacy to satisfy the object and rational behind the research.

INTRODUCTION

Privacy as a 'right to be let alone', they perhaps provide the first conception of privacy as a communicative right: a right to selective self-presentation; to control how, when, where, and to whom particular aspects of one's life and personality are communicated.[258] Since then, a persistent

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challenge has been to find this principle of selection, explain its variation from one social context to the next, and find a legal ground for its control by the individual. This article seeks the answer in structural transformations of modern social communications and legal recognitions thereof.[259] In Peck (2003), the ECtHR decided for privacy against freedom of expression when CCTV footage of Peck's attempted suicide on a public street was broadcast without adequate masking of his identity. The Court reasoned that, though the applicant 'was in a public street ... he was not there for the purposes of participating in any public event and he was not a public figure'. Public broadcast of his image 'far exceeded any expo- sure to a passer-by or to security observation ... [he] could possibly have foreseen'.[260] Thus, without his consent, the media should not have disclosed his identity pursuant to their legitimate purpose of reporting alleged efficiency of CCTV in crime prevention.[261] Privacy also won the day in Von Hannover (2004)[262] when unauthorized photos of a member of Monaco's royal family were publicized. Since the photographed events had no relevance to her public function, "The Court Held; the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded despite the fact that she is well known to the public.[263]

Freedom of expression came out ahead, however, in White (2006) when a report, 'balanced' and in 'good faith', about the illegal activities of Palme's alleged assassin was published. This time, since the applicant was already well known and the matter was of serious public interest and concern', the Court saw 'little scope for restricting the communication of information'.[264]

In each of the latter three cases 'the decisive factor in balancing privacy against freedom of expression', was contribution of publicity to a 'debate of general interest', in a democratic society. Here the Court made an important distinction between two functions of the media:

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[258] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit
[259] Privacy As A Human Right: Sociological Theory Author(S): Katayoun Baghai Source: Sociology, Vol. 46, No. 5, Special Issue: The Sociology Of Human Rights (October 2012), Pp. 951-965 Published By: Sage Publications, Ltd. Stable Url: Https://Www.Jstor.Org/Stable/43497327 Accessed: 19-11-2019 13:58 Utc
[260] 19 Peck V. The United Kingdom, No. 44647/98, § 62, Echr 2003.
[261] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit
[262] Ibid.
[263] Von Hannover V. Germany, No. 59320/00, § 77, Echr 2004.
[264] White V. Sweden, No. 42435/02, § 29, Echr 2006.

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a) 'watchdog' of democratic society; and

b) source of 'entertainment' or 'curiosity' satisfaction for 'a particular readership'.[265]

While the first function could trump privacy, the Court held, privacy outweighed the second. Privacy jurisprudence is still in its infancy. Yet, a gravitational axis may be emerging in rendering justice, i.e. treating like cases alike, at least at some highest courts of appeal. Functional relevance seems a universal, albeit implicit, emergent standard in judicial account-giving across diverse privacy conflicts. Of course, neither better privacy protections nor sound and consistent adjudication can permanently fix the boundaries of social systems. Structural drifts of social communications constantly alter system boundaries and generate new tensions between them; new privacy conflicts emerge; the line between legal and illegal is muddled; and, once again, the courts are called upon to determine what is public and private in the eye of the law.[266] That is how, over the last century, new privacy rights have emerged alongside new 'intrusions' into zones previously considered private. Until the 1970s, e.g. domestic violence against women was shielded by the law in the name of privacy of the family and harmony of domestic life (Siegel, 1996). Today, however, in many western countries privacy of intimate relations is recognized alongside the action ability of marital rape, domestic violence, and child abuse. While privacy protections in certain decisions concerning one's body and mind have expanded beyond white, heterosexual, sound-minded males of the upper classes, elites seem to have lost to the media some of their earlier control over communication of personal information. Legal distinctions between multiple functions of the media as well as differentiation of function- ally relevant and irrelevant aspects of public figures' lives may restore some of that control.[267] Finally, like other laws, legal protections of privacy can structure normative expectations; they cannot determine behaviour. The degree to which such expectations fail is indicated by proliferation of privacy conflicts and the sporadic character of legal responses to them. Yet, confidence in the possibility of legal redress absorbs much of the risk of factual privacy violations. As long as generalized normative expectations of privacy persist, blatant privacy violations or inconsistencies in adjudication can be endured.[268] That may explain

[265] Supra At 20, §§76, 63, 65. 23 In 1968 The Us Allowed Wiretapping For 26 Crimes.
[266] Ibid.
[267] Ibid.
[268] In 1996 The Number Was 95 (Rosen, 2000:37), And Likely More Today. Initially The Us Post 9/11 Data-Mining Programs Were Seen To Violate Eu Privacy Standards. The 2010 Privacy & Human Rights Report, Funded By The European Commission, However, Shows Alarming Privacy Violations Such As General Surveil- Lance, Unwarranted

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the apparently widespread blasé attitude toward unforeseeable consequences of cyberspace transactions and public surveillance, alongside heightened sensitivity to protection of privacy.[269]

Cases of surveillance by the state in India and its effect on peoples

In times of national crisis, citizens are often asked to trade liberty and privacy for security. And why not, it is argued, if we can obtain a fair amount of security for just a little privacy?[270] The surveillance that enhances security need not be overly intrusive or life altering. It is not as if government agents need to physically search each and every suspect or those connected to a suspect. Advances in digital technology have made such surveillance relatively unobtrusive.[271] Video monitoring, global positioning systems, airport body scanners, and biometric technologies, along with data surveillance, provide law enforcement officials with monitoring tools, without also unduly burdening those being watched.[272] Against this view are those who maintain that we should be worried about trading privacy for security. Criminals and terrorists, it is argued, are nowhere near as dangerous as governments.[273] There are too many examples for us to deny Lord Acton's dictum that "power tends to corrupt, and absolute power corrupts absolutely."[274] If information control yields power and total information awareness radically expands that power, then we have good reason to pause before trading privacy for security. An indication of power is the ability to forcibly demand access to information about others while keeping one's own information secret. Governments, and corporations for that matter, are notoriously good at demanding access to

Stop-And-Search, Communication Interception, Workplace Monitoring And Data-Sharing Between Governments And Corporations. -

[269] Ibid.

[270] https://www.researchgate.net/publication/228322499_Toward_Informational_Privacy_Rights

[271] Ibid.

[272] Ibid.

[273] Terrorists Are Nowhere Near As Dangerous As Governments. "From 1980 To 2000, International Terrorists Killed 7,745 People According To The U.S. State Department. Yet, In The Same Decades, Governments Killed More Than 10 Million People In Ethnic Cleansing Campaigns, Mass Executions. ... In The 1990s, Americans Were At Far Greater Risk Of Being Gunned Down By Local, State, And Federal Law Enforcement Agents Than Of Being Killed By International Terrorists." James Bovard, Terrorism And Tyranny: Trampling Freedom, Justice, And Peace To Rid The World Of Evil (New York: Palgrave Macmillan, 2

[274] Lord Acton, Letter To Bishop Mandell Creighton (April 3, 1887), In The Life And Letters Of Mandell Creighton, Ed. Louise Creighton (New York: Longmans, Green, 1904), Vol. L,Chap. 13

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information.[275] A recent counter-movement to this trend is the emergence of online information-sharing sites dedicated to shining a spotlight on the backroom activities of government agencies and corporations. Sites like WikiLeaks promise to change the "accountability landscape" so to speak. I have argued elsewhere that individuals have moral privacy rights that limit the surveillance activities of governments.[276] While not absolute, privacy rights shield individuals from the prying eyes and ears of neighbours, corporations, and the state. The question that I will consider in this article is one of balance—when are security interests weighty enough to overbalance individual privacy rights? Before defending my own account, I will critique three rival views. One way to strike a balance between privacy and security is to let those in power decide. In most cases, these individuals seek public office for noble purposes—we should let them decide how best to protect privacy and security. I call this position "just trust us." A second view minimizes privacy interests by calling into doubt the activities privacy may shield. This view, called "nothing to hide," maintains that individuals should not worry about being monitored. Only those who are engaged in immoral and illegal activity should worry about government surveillance. Similar to "nothing to hide" is the view that "security trumps." This latter account holds that security interests are—by their nature—weightier than privacy claims. After offering a critique of these attempts at balancing, I will defend my own account. I will argue that by insisting on judicial discretion for issuing warrants, demonstrating probable cause for an intrusion, and allowing public oversight of the process and reasoning involved, we may promote both privacy and security. Finally, in the concluding section I will consider the WikiLeaks movement and its impact on account.

"JUST TRUST US"—TRADING CIVIL RIGHTS FOR SECURITY"[277]

Before considering the "just trust us" view, I would like to briefly address why we should consider privacy and security morally valuable. Privacy, defined as a right to control access to and uses of

[275] https://www.researchgate.net/publication/228322499_Toward_Informational_Privacy_Rights
[276] Adam D. Moore, Privacy Rights: Moral And Legal Foundations (University Park, Pa: Penn State University Press, 2010).
[277] Privacy, Security, And Government Surveillance: Wikileaks And The New Accountability Author(S): Adam D. Moore Source: Public Affairs Quarterly, Vol. 25, No. 2 (April 2011), Pp. 141-156 Published By: University Of Illinois Press On Behalf Of North American Philosophical Publications Stable Url: Https://Www.Jstor.Org/Stable/23057094 Accessed: 19-11-2019 13:58 Utc

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bodies, locations, and information, is necessary for human well-being or flourishing. Simply put, there is compelling evidence that individuals who lack this sort of control suffer physically and mentally.[278] Security is also valuable. Whether derived from individual rights to self-defence or via a social contract, a legitimate function of any government is to protect the rights of its citizens. At the most basic level, security affords individuals control over their lives, projects, and property.[279] To be secure at this level is to have sovereignty over a private domain—it is to be free from unjustified interference from other individuals, corporations, and governments. Security also protects groups, businesses, and corporations from unjustified interference with projects and property. Without this kind of control, businesses and corporations could not operate in a free market—not for long, anyway. There is also national security to consider. Here, we are worried about the continued existence of a political union. Our institutions and markets need to be protected from foreign invasion, plagues, and terrorism. But again it seems that we value national security, not because some specific political union is valuable in itself, but because it is a necessary part of protecting individual rights.[280] Armed services, intelligence agencies, police departments, public health institutions, and legal systems provide security for groups, businesses, and, at the most fun damental level, individuals. If correct, we have good reason to think that privacy and security are morally valuable[281]. The history of democratic nations shows that what our founding fathers handed to us in the form of the Constitution of India was the result of centuries of struggle in both England and the United States of America. The bloody revolutions that took place in France and Russia against absolute monarchs are a sober reminder to the people of the world that social transformation, which took place cataclysmically in rivers of human blood, is to be eschewed. An absolute monarch like Peter the Great of Russia, could order, by decree, that no adult male shall, in the future, have a beard.[282] This was done as part of a move to bring Russia out of the middle ages and in line with other advanced European nations.[283] For most Orthodox Russians, the beard was a fundamental symbol of religious belief and self-respect. It was an ornament given by God,

[278] https://www.researchgate.net/publication/228322499_Toward_Informational_Privacy_Rights
[279] Ibid.
[280] Ibid.
[281]Privacy, Security, And Government Surveillance: Wikileaks And The New Accountability Author(S): Adam D. Moore Source: Public Affairs Quarterly, Vol. 25, No. 2 (April 2011), Pp. 141-156 Published By: University Of Illinois Press On Behalf Of North American Philosophical Publications Stable Url: Https://Www.Jstor.Org/Stable/23057094 Accessed: 19-11-2019 13:58 Utc
[282] Supra. Note 12
[283] Supra. Note 12

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worn by the prophets, the apostles and by Jesus himself. Ivan the Terrible expressed the traditional Muscovite feeling when he declared, "to shave the beard is a sin that the blood of all the martyrs cannot cleanse. It is to deface the image of man created by God." This decree was carried out overnight, with Russian officialdom 50 being armed with razors with which they were to shave, on the spot, those unfortunate wretches who had not obeyed the decree.[284] Eventually those who insisted on keeping their beards were permitted to do so on paying an annual tax. Payment entitled the owner to a small bronze medallion with a picture of a beard on it and the words "TAX PAID", which was worn on a chain around the neck to prove to any challengers that his beard was legal. The tax was graduated; peasants paid only two kopeks a year, wealthy merchants paid as much as a hundred roubles. It is in the wake of such tumultuous events in history, that the great democratic constitutions of the world have been promulgated, so that social transformation takes place peaceably, as the result of the application of the rule of law.[285]

NEED FOR A SOUND POLICY FOR PROTECTION PRIVACY OF INDIVIDUALS

A transparent society is not inevitable. Privacy at the personal level can be secured through custom and social pressure. Privacy related to big media, corporate interests, and the state can be guaranteed by law and also be grounded in customs and social practices. Justice Douglas, writing for the dissent in Osborn v. United States, noted, The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the

[284] Supra. Note 12
[285] Kantaru Rajeevaru V. Indian Young Lawyers Association And Ors. Review Petition (Civil) No. 3358/2018 (Sabrimala Review Judgement)

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Constitution envisages it will have vanished.[286] Douglas paints a grim picture, and we should heed his warning—we have good reason to resist traveling toward a watcher-based society. Transparency is not necessary for security. Striking an appropriate balance between privacy and security is difficult. Nevertheless, it has been argued that the best way to protect both of these important values is to insist on a probable cause requirement, judicial discretion, and public oversight. Gross violation of Fundamental Rights due to surveillance by State, Institutions and other entities and its effect on other fundamental rights The expression "rule of law" can be traced back to the great Greek philosopher Aristotle, who lived 2,400 years ago. In his book on the 'Rule of Law' by Brian Z. Tamanaha, Aristotle is reported to have said: "It is better for the law to rule than one of the citizens…so that even the guardians of the law are obeying the laws."[287]

Cases of breach and violations by state agencies and their effect on individuals.

Since 2009, the Government of India has been developing the Central Monitoring System (CMS), a system that seeks to automate and centralize the interception process. It will allow security agencies to bypass the service provider and directly intercept communications.[288] Regional Monitoring Systems (RMS) for the lawful interception of telecommunications will also be established. The CMS is under the Centre for Development of Telematics (C-DoT), a registered society under Department of Telecommunications and Ministry of Information Technology.[289]

I. NETRA (Network Traffic Analysis)

NETRA (Network Traffic Analysis) is a software network developed by India's Centre for Artificial Intelligence and Robotics (CAIR), a Defence Research and Development Organisation (DRDO) laboratory. It is capable of detecting words like 'attack', 'bomb', 'blast' or 'kill' from public and private internet traffic such as tweets, status updates, emails, internet calls, blogs and forums. It has been reported that through this network, security agencies will also be able to monitor voice

[286] Supreme Court Of The United States, 530 U.S. 1237; 120 S. Ct. 2676; 147 L. Ed. 2d 287; 2000 U.S. Lexis 4126; 68 U.S.L.W. 3756, June 12, 2000, Pp. 341-35
[287] Supra. Note 12
[288] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit
[289] Https://Privacyinternational.Org/State-Privacy/1002/State-Privacy-India (Last Visited On 19/11/19)

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traffic on international services like Skype and Google Talk. As part of implementation of the network, a national Internet scanning and coordination centre will be established.[290]

II. NATGRID (National Intelligence Grid)

The Ministry of Home Affairs had proposed the creation of a National Intelligence Grid (NATGRID) in India following the 2008 Mumbai terror attacks. The aim of the project was to collect comprehensive patterns of intelligence (21 citizen data sources) that can be readily accessed by 11 intelligence and investigative agencies in real time to track terror activities. These data sources will include bank account details, telephone records, passport data and vehicle registration details, among other types of data. Concerns were raised around NATGRID on grounds of potential violations of privacy and leakage of personal information.

III. New Media Wing

In the year 2013, a New Media Wing (NMW) was established under the Ministry of Information and Broadcasting to publicize government initiatives through multiple social media platforms. NMW monitors online media to track trends and gauge public opinion.

BlackBerry controversy.[291] Since 2008 the Indian Government has sought access to content on BlackBerry phones through a number of different proposals. After much pushback, in 2013, the Company delivered a solution that enables India's wireless carriers to address their lawful access requirements for consumer messaging services of BlackBerry, including BlackBerry Messenger (BBM) and BlackBerry Internet Service (BIS) email. However, this enabling of lawful access does not extend to BlackBerry Enterprise Server (BES). As a result, the Indian government can now monitor the exchange of emails and email attachments on BlackBerry devices, and also whether messages on BlackBerry Messenger have been marked 'delivered' or 'read.' The BES was

[290] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit
[291] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit

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excluded as BlackBerry managed to persuade the government that it did not possess the BES encryption keys.[292]

IV. Interception technologies

The operating licenses for service providers specify the capabilities that the technology must have. See also the section on telecommunications industry licensing for more detail. To build the technological capacity of intelligence agencies, in 2010, the Indian government dedicated INR 660.92 million (66.92 crores) to revamping the special branches/intelligence agencies. This included enhancing GIS mapping, integrated documentation systems and integrated data centres, voice loggers, IED Jammers, VHF Mobile Jammers. These funds were sanctioned by the High Powered Committee under the Ministry of Home Affairs.[293]

V. Surveillance companies

India hosts many security technology expos. These include Ground Zero, Convergence Secutech India, International Police Expo, Secure Cities, defexpo, IFSEC India, and the India International Security Expo. A wide range of technologies is on offer at these events, including access control systems; perimeter protection; surveillance devices; burglar alarm systems; explosive detection and disposal equipment; aviation security; disaster management and NBCW protection equipment; equipment for bank and hospital security; information security devices; audiovisual surveillance and de-bugging devices; equipment for forensic science; and more. A number of world's largest communications surveillance companies like ZTE, Utimaco and Verint Systems also have India offices. Additionally, command and control servers of intrusion malware FinFisher have been found in India.[294] The Centre for Internet & Society (CIS) published a study of 100 surveillance companies in India. Out of the 100 identified, 76 companies appear to sell surveillance products performing functions such as internet monitoring, social network analysis, data mining and profiling, and also surveillance cameras, analytics, biometric collection, and access control

[292] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit
[293] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit
[294] Ibid.

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systems. Most of the companies were headquartered in India; however, some were headquartered in countries including the United States, the UK, France and Poland. The research report suggested that biometric technology, access control systems, Internet and phone monitoring solutions as well as RFID and GPS tracking devices are in high demand.[295] The data collected by CIS suggests that the clients for the security solutions include law enforcement agencies, intelligence and securities government agencies, military, internet service providers, telecommunications service providers, corporations and the public. For instance, many of the companies sell CCTV cameras and unmanned aerial vehicles (UAV) to law enforcement agencies and the Indian military, biometric systems to the Unique Identification Authority of India (UIDAI), and possibly phone and Internet monitoring tools to intelligence agencies. Lawful interception technical regulations and standards adhered to by these companies include those proposed by Alliance for Telecommunications Industry Solutions (ATIS), European Telecommunications Standards Institute (ETSI) and Communications Assistance for Law Enforcement Act (CALEA), and standards such as ISO 9001: 2008, ISO 27001: 2005, STQC Certification, INCITS 379 and BS 7799. However, fewer than half of the companies in the study had publicly available certification information. Similarly, fewer than half of the companies in the study have privacy policies available on their websites. The remaining companies do not clearly define how they handle the data they collected.[296]

CCTV IN EDUCATIONAL INSTITUTIONS - A CRITICAL ANALYSIS

Surveillance and Right to Life and Personal Liberty

It becomes relevant to draw an analogy with Foucault's social analysis through Bentham's Panoptical prison design. Foucault said that this architectural design was symbolic of how the Panoptical was invested with power while the inmates were exposed as "an object of information, never a subject in communication." The Panoptical model has been used to show how uncertainty can be used as a means of social control. Bentham's model represents the idea of omnipresent gaze, which is exactly what the impugned decision stands for. The panoptic power of CCTV lies

[295] Ibid.
[296] https://www.quora.com/Does-India-have-a-privacy-policy-for-their-citizens-If-yes-what-isit

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in the ambiguity and uncertainty of whether or not the child is being watched which has the effect of self-policing. Every action that a student undertakes will be oriented towards projecting a certain image to parents and the larger community who has access to the footage. Puttaswamy at Para 509 notes the need to protect individuals from such scrutiny, by citing Gobind v. state of M.P[297]. wherein it said, "Individuals need a sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures." Sanctuary of a classroom is one, which needs such protection. Essential to an environment of learning should be that students do not feel weighed down by parental pressure and expectations. Puttaswamy at Para 403 helps carve out a collective right of children to learn in privacy, where the panoptic gaze does not lead them to self-police their behaviour, "The disconcerting effect of having another peer over one's shoulder while reading or writing explains why individuals would choose to retain their privacy even in public."

ADVERSE IMPACT OF VIOLATION OF PRIVACY ON FEMALES

It is further stated that constant CCTV surveillance subjects the individuals to a gaze of people they do not want to be watched or observed by. It is specifically intrusive for young girls and subjects them to a unique harm. An example of how such invasive culture would violate dignity would be when women go through their menstrual cycles. Women of that age are usually unsure of how they are expected to handle their reproductive health. It is natural to be baffled at the sudden changes the body goes through and balance that with the unique social pressure that is placed on women. Menstrual health and hygiene concerns are pivotal to the way women conduct themselves at the time of their cycle especially. It is preposterous to have those private actions subjected to scrutiny of the community and amounts to gross violation of the right to dignity of the children as well as the female teachers.[298] It further remains unclear what are the policies in place that prevent the data generated from being misused either by the School or the state or any third party with access to it. It is clear from the reading of the Personal Data Protection Bill, 2018 which defines

[297] ***(1975) 2 SCC 148***
[298] Supra.

personal data that the state will be collecting and processing enormous sensitive and personal data of the children and teachers in the classrooms. In the absence of an adequate infrastructure, policy and regulatory mechanism in place, the impugned policy will be in contravention of Puttaswamy, where this Court considered the fact that modern technology allows permanent storage of information of a person and his/her behaviour and specifically held that there is a special need to protect children from the same, "Privacy of children will require special protection not in context of the virtual world, but also the real world."

The Justice B.N. Srikrishna Expert Committee:

Report on protection of children's personal data states that the personal data of children is to be accorded greater protection than regular processing of data. The Expert Committee Report expressly lays down the legal obligation on all data fiduciaries to process data relating to children in their best interest. Further, Section 23 of The Personal Data Protection Bill also has the same requirement. Article 16 of the Convention on the Rights of the Child, 1989, to which India is a signatory, states that "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence, or to unlawful attacks on his or her honour and reputation."[299] The sub clause (2) of Article 16 further stipulates that "the child has the right to the protection of the law against such interference or attacks." Video generated data can be misused in a myriad of ways and the video feed of children in classrooms stands even more at the risk of being misused in the garb of anonymity offered by the internet the state have not offered any solution to this problem of data protection which if falls into the wrong hands can have dire consequences.[300]

RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

The surveillance on teachers and children will have a chilling effect on the speech and expression of the individuals inside the classroom, thereby violating Article19 (1)(a). Hon'ble Supreme Court in the case of Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal[301], has held that the right to freedom of speech and expression also includes the right to

[299] Article 16 of the Convention on the Rights of the Child, 1989
[300] Ibid.
[301] [(1995) 2 Scc 161]

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educate, to inform and to entertain and also the right to be educated, informed and entertained. This was upheld by a constitution bench in State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools[302]. Further, Puttaswamy states "Privacy in all its aspects constitutes the springboard for the exercise of the freedoms guaranteed by Article 19(1). Freedom of speech and expression is always dependent on the capacity to think, read and write in private and is often exercised in a state of privacy, to the exclusion of those not intended to be spoken to or communicated with." Students and teachers both will not be able to express themselves freely in a classroom where everything is closely and continually monitored. The expression of learning is strongly embedded in their fundamental right to speech and expression. Cognitive freedom is essential for the exercise of expressive freedom. Classrooms are spaces of learning where children should be able to express their ambitions, ideologies and opinions freely without fear of constantly being watched. Irrespective of whether the cameras permit voice recording or not, there is a deprivation of the right under Article 19(1) (a). As held by this court in PUCL v. Union of India, [303]freedom of expression which overlaps with freedom of speech is not confined to expressing something orally or in writing, it includes manifestation of any emotion. Visual recording permits one to monitor speech and expression as Understood under Article 19(1) (a). An example could be when parents expect their children to participate vocally in class and children who do not do so will be compelled to be outspoken in class. The teaching tools of teacher on display, like blackboard notes or power point presentations etc. will be captured by the cameras. Classroom forms of speech are intrinsically linked to other forms of expression which can attack freedom to speak even in the absence of voice recording technology. Some examples to illustrate this would be: A lecture being given to students on sex education and a diagram on board which easily shows what the topic of discussion in class is, students shy of asking questions in the knowledge of being watched will stifle their speech. There is a great amount of sensitivity with which students require to be acquainted with issues of reproductive health. Conversations and discussions that revolve around these issues leave a very poignant impact on the development of teenage minds. Unfortunately, there is a marked reluctance in our society to address these issues. It is absolutely important that such conversations take place openly among students and teachers without fear of being observed by the community at large. The knowledge of being watched can

[302] [(2014) 9 Scc 485]
[303] [(2003) 4 Scc 399]

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compound the stigma revolving around this and potentially jeopardise the chances of honest and inquisitive conversations from taking place. A teacher while dealing with politically or historically sensitive issues may try to avoid class discussion so as to avoid being attacked for inciting passions of students or 'brainwashing' them. Further, this policy of the state cannot be protected by Article 19(2) because the constitution bench in the case of Kharak Singh v. State of U.P[304], (Para 16) held that merely executive or departmental instructions would not be 'a law' which the state is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1). This was further upheld by this Court in the case of Bijoe Emmanuel and Ors. v. State of Kerala and Ors.,[305]

Conclusion

In this article, we have argued that balancing tests that purport to justify invasions of privacy in the name of security often go awry and attempt to trade values that are difficult to measure. It has also been argued that, in trading privacy for security, we should insist on establishing probable cause, judicial oversight, and accountability. Probable cause sets the standard for when security interests override privacy rights. Judicial oversight, sensitive to case-specific facts like the context and magnitude of the proposed intrusion, introduce an "objective" agent into the process. Sunlight provisions allow for a public discussion of the merits of specific searches and seizures. All of this promotes accountability in that the reasons for a search and the actions of government officials are open to public scrutiny. A further benefit is that such policies engender trust and confidence in public officials. A transparent society is not inevitable. Privacy at the personal level can be secured through custom and social pressure. Privacy related to big media, corporate interests, and the state can be guaranteed by law and also be grounded in customs and social practices. Justice Douglas, writing for the dissent in Osborn v. United States. The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who

[304] AIR 1963 SC 1295
[305] [(1986) 3 SCC 615].

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can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. The incidences of breach and violation that occur on a daily base are self-speaking that there is a huge gap in our policies and something's are fundamentally wrong in our system which need to be urgently be looked into and fixed, since it is more a matter of justice than mere right. Freedom as the Constitution envisages it will have vanished.[306] Douglas paints a grim picture, and we should heed his warning—we have good reason to resist traveling toward a watcher-based society. Transparency is not necessary for security. Striking an appropriate balance between privacy and security is difficult. Nevertheless, it has been argued that the best way to protect both of these important values is to insist on a probable cause requirement, judicial discretion, and public oversight.[307]

[306] Supreme Court Of The United States, 530 U.S. 1237; 120 S. Ct. 2676; 147 L. Ed. 2d 287; 2000 U.S. Lexis 4126; 68 U.S.L.W. 3756, June 12, 2000, Pp. 341-3

[307] Privacy, Security, And Government Surveillance: Wikileaks And The New Accountability Author(S): Adam D. Moore Source: Public Affairs Quarterly, Vol. 25, No. 2 (April 2011), Pp. 141-156 Published By: University Of Illinois Press On Behalf Of North American Philosophical Publications Stable Url: Https://Www.Jstor.Org/Stable/23057094 Accessed: 19-11-2019 13:58 Utc

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JUDICIARY ON ENVIRONMENT JUSTICE

- SHISHIR YADAV & PRITHIVI RAJ

ABSTRACT

The formulation and recognition of various doctrines and strategies signify a judicial awareness on the need for reconciliation of the developmental, socio-economic, and ecological conflicts in the present day Indian society. This awareness is reflected in the cases that came before the courts for review. Man must live and he must live well, in a healthy and safe atmosphere – this has been the judicial dictum and its entire efforts have been directed towards achieving that goal. It has, therefore, evolved diverse principles such as absolute liability, and public trust doctrine to preserve the human environment and to uphold man's right to live in a wholesome environment. The Apex Court has also opined that the High Court has the proper authority to consider what should be the appropriate remedy for such type of cases. The decisions of the Apex Court, while strengthening the application of the principle of polluter pays, also adds new dimension regarding the qualification of punishment under this principle, though, the Apex Court has been silent about developing sound principles of quantification of pecuniary liability. On the whole, one may appreciate the bold attempts made by the Indian Judiciary to ensure the establishment of a clean, pollution-free environment. The recent pronouncements of the Supreme Court have stated about its new approach based on eco-centricism for the purpose of maintaining environmental ethics. The authors will make a detail analysis of some of the judicial pronouncements of the Supreme Court of India while making environment justice.

INTRODUCTION

The judiciary has a role to play in the interpretation, explication and enforcement of laws and regulations. As Kaniaru, Kurukulasuriya and Okidi[308] state:

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[308] D Kaniaru, L Kurukulasuriya and C Okidi, "*UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development*".

"The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment. Judiciaries have, and will most certainly continue to play a pivotal role both in the development and implementation of legislative and institution regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development will be a major force in strengthening national efforts to realise the goals of environmentally-friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process".[309]

The applications of the doctrines in the judicial process for environmental protection are remarkable milestones in the path of environmental law in India. It is interesting to note that all such cases arose out of public interest litigation. Undue influence of political bigwigs who make environmentally malign decisions is blocked. Skeletons in the governmental and administrative cupboards were revealed. Illegal contracts with adverse impact on ecology will be invalidated. The court directed to apply this jurisprudence when an entire village in Rajasthan was under an ecological catastrophe from non-disposal of hazardous wastes.[310]

PRINCIPLES RECOGNISED BY THE SUPREME COURT

The doctrines evolved by courts are a significant contribution to the environmental jurisprudence in India. Article 253 of the Constitution of India indicates the procedure on how decisions made at international conventions and conferences are incorporated into the legal system. The formulation and application of the doctrines in the judicial process for environmental protection are remarkable milestones in the path of environmental law in India. The Supreme Court has drawn on several international environmental law principles using them as guiding principles for incorporating concerns into decision making.

[309] D Kaniaru, L Kurukulasuriya and C Okidi, "*UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development*", a paper presented to the Fifth International Conference on Environmental Compliance and Enforcement, Monterey, California, USA, November 1998, p. 22 of Conference proceedings.
[310] Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446

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Briefly, these principles are as follows:

(1) Principle of absolute liability

In 1987, in the case of M.C. Mehta vs. Union of India[311] Oleum gas leak from a chemical industry in Delhi, the Court laid down the principle of absolute liability of hazardous/inherently dangerous industries. The Court recognising that the right to life of the citizens was adversely affected held that:

"…an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons working in the factory and residing in surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of activity which it has undertaken; the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part…"[312] Besides laying down the strict and absolute liability of hazardous or inherently dangerous activities without exceptions under the law of torts, the court stated that the measures of compensation are to be correlated to the magnitude and capacity of the enterprise. This formed the basis of the subsequently enacted Public Liability Insurance Act, 1991. In the same case, the court advocated the establishment of Environment courts with judicial and technical experts as members of the bench to adjudicate on environmental matters. The Supreme Court appointed expert committee to suggest certain measures to remove the existing defects in the plant. After the Court was satisfied that all safety and control measures had been complied with by the management in a satisfactory manner, the relocation of the plant was allowed by the Court subject to certain stringent conditions and the provisions of the Water (Prevention and Control of Pollution), 1974, and Air (Prevention and Control of Pollution), 1981 should be strictly observed. It is submitted that the above approach of the Supreme Court was in consonance with environment protection and sustainable development. In this case the Supreme Court, though deliberated upon but did not answer the question whether private enterprises carrying inherently dangerous and hazardous activities could be considered "State" within the meaning of article 12 of the Constitution of India so as to allow a public interest litigation under

[311] AIR 1987 SC 1086
[312] Ibid.

the writ jurisdiction. However, by allowing the writ petition under the article 32 of the Constitution, it impliedly treated the private enterprises like Shriram Chemicals as the "State". The Court also suggested the government to set up "Ecological Science Group" for the dissemination of information and the need to set up "environmental courts" to deal with environmental cases.[313] Regarding the liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, the Court observed: We are of the view that an enterprise which is engaged in a ha hazardous or inherently dangerous industry which posses a potential threat which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.[314] It was further observed:- The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.[315] On the question of the measure of compensation the Court pointed out that it "must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect." It is submitted that Supreme Court rightly rejected the century old principle of "strict liability" evolved in Rylands v. Fletcher,[316] and evolved a new principle of liability, i.e., the principle of "absolute liability" which is not subject to any exceptions. The enunciation of the new principle of "absolute liability" is justified on the following grounds: Firstly, if the enterprise is permitted to carry on the hazardous or inherently dangerous activity for its profit then the law must presume that such permission is conditional is conditional on the enterprise absorbing the cost of any accident out of such activity. Secondly, persons who are harmed as a result of such hazardous or inherently dangerous activity "would not be in position to isolate the process of operation from the hazardous operation of the substance or any other related

[313] *Id*., p. 982.
[314] *M.C. Mehta* v. *Union of India*, A.I.R. 1987 S.C. 1086 at 1099.
[315] *Ibid.*
[316] (1869) (19) L.T. 220.

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element that has caused harm." And thirdly, the enterprise alone "has the resource to discover and guard against the dangers and to provide warning against potential hazards".[317]

(2) The Polluter Pays Principle

The Supreme Court in several cases, applied the internationally recognised principle in the Rio Declaration, 1992 (Principle 16) that 'polluter must pay' to internalise the environmental cost. The application of the principle implies that the polluter should bear the cost of pollution. In the case of Indian Council for Enviro Legal Action vs. Union of India (Bichhri Case)[318] pollution by the leaching of H-Acid and sludge produced by a company named Silver Chemicals (located in Bichhri, a village near Udaipur, Rajasthan) long-lasting damage had been caused, to the soil, underground water, human beings, cattle and to the village economy. The Supreme Court held that the company was absolutely liable for the environmental degradation due to leaching of the H-acid and based on the polluter pays principle it directed the company to pay for the restitution of the environmental damage it had caused. The polluter pay principle requires that a polluter must bear the remedial or clean up costs as well as the compensation to the victims of pollution. The polluter pays principle has been incorporated in the statute governing the National Green Tribunal, 2010.[319] In R. L. & E. Kendra, Dehradun v. State of U.P.,[320] the Supreme Court allowed a mine to operate until the expiry of its lease as exceptional case on undertaking by the lessee that land taken on lease would be subject to afforestation by him. Consequently, when it was brought to the notice of the Court that he had made a breach of the undertaking and mining was done in most unscientific and uncontrolled manner causing damage to the area and environment, the Court directed the lessee to pay rupees three lacs to the fund of the monitoring committee which had been constituted earlier by the Court to supervise the afforestation programme to be undertaken by the lessee. The order of the court is based on the "polluter pays principle" which is one of the essential principles of sustainable development.

[317] *M.C. Mehta* v. *Union of India*, A.I.R. 1987 S.C. 1086 at 1099.
[318] 1996 SC 1446
[319] Section 20 of National Green Tribunal Act, 2010.
[320] A.I.R. 1991 S.C. 2216.

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(3) The Precautionary Principle

The precautionary principle, adopted in the Rio Declaration, 1992 (Principle 15) and subsequently incorporated in international protocols[321] has been recognised by the Supreme Court in several of its directions. The principle implies that even in the absence of full scientific evidence, there is a social responsibility to protect the public from harm when scientific investigation suggests a plausible risk. It is also relevant in the context of intergenerational justice. In Vellore Citizens Welfare Forum v Union of India[322] and the Shrimp culture case[323], the Supreme Court held that the government authorities must anticipate, prevent and attack the causes of environmental pollution. According to the precautionary principle the burden of proof is on the developer to show that his or her actions are environmentally sound.

(4) Doctrine of Public Trust

In M.C. Mehta vs. Kamal Nath **(Span Motels case)**[324] a public interest matter was brought before the Supreme Court, wherein a motel was constructed on the banks of the river Beas, resulting in interference in the natural flow of the water. The Court held that the state government, by granting the lease, had breached the Doctrine of Public Trust. The Court quashed the prior approval given by the Government of India for the construction of the motel and applying the 'polluter pays principle', directed the company to pay compensation for the cost of restitution of the environment and ecology of the area. The Court referred to the Public Trust Doctrine and stated that the latter extends to natural resources such as rivers, forests, seashores, and the air, among other things, for the purpose of protecting the ecosystem. The approach of the Supreme Court in this case supports the view that natural environment has to be preserved for its own sake, that human beings are the trustees and governments have an obligation to preserve the same. In the context of intergenerational equity the present generations have an obligation or a duty to preserve the

[321] Montreal Protocol on Substances that Deplete the Ozone Layer, 1989; Kyoto Protocol to the United Nations Framework Convention for Climate Change,2005
[322] AIR 1996 SC 2715,2721
[323] S Jagannath v Union of India, AIR 1997 SC 811,846,850
[324] 1997(1) SCC 388

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environment in trust so that it can be passed on to the future generation in the same or better condition than when it was received by the present generation. The application of the Professor Joseph Sax's doctrine of public trust is another important contribution by the Supreme Court of India. The doctrine of public trust calls for the state action for effective management of resources and empowers the citizens to question ineffective management of natural resources.[325] The doctrine of "public trust" implies following restrictions on governmental authority:

Firstly, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public.

Secondly, the property may not be sold, even for a fair cash equivalent.

Thirdly, the property must be maintained for particular types of uses.[326] The Supreme Court, while holding that the doctrine of "public trust" has become a part of Indian Law, observed:

"Our legal system-based on English Common Law-includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, air, forests, and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."[327]

(5) Principle of Sustainable Development

The principle of sustainable development was first enunciated by the Brundtland Commission (WCED, 1987) and subsequently adopted in the Rio Declaration, 1992. Although not legally binding, the Rio Declaration, 1992 enunciated the key principles of sustainability. Applying the principle in BK Srinivasan v State of Karnataka the court held that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the customary international law though salient features are yet to be finalized by international law jurists. The court directed that sustainable development, precautionary principle, the polluter pays

[325] P.Leelakrishnan, *Environmental Law in India,* Butterworths India, New Delhi, 1999, p.43.
[326] *Supra* note 168, p. 408; Joseph L. Sax, "Public Trust Doctrine in Natural Reasource Law: Effective Judicial Intervention", Michigan Law Review, Part 1 at 473.
[327] *Id*., p. 413.

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principle and the new burden of proof as laid down by the Court should be applied by the government development agencies in making decisions on environmental matters. This principle has been incorporated in the National Green Tribunal Act, 2010. In M.C. Mehta v. Union of India,[328](popularly known as Taj Mahal Case), is yet another case in which the judgement of the Court is based on the principle of sustainable development and where the Court applied the "precautionary principle" In this case a public interest litigation was filed alleging that due to environmental pollution there is degradation of Taj Mahal a Monument of international repute. According to the opinion of the expert committees, the use of coke/coal by industries situated within the Taj Trapezuim Zone (TTZ) were emitting pollution and causing damage to the Taj as also to the people living in the area.

It was held that the Taj, apart from being a cultural heritage, is also an industry by itself and, therefore, pollution must be stopped while the development of the industry must go on and it must be encouraged. The Court followed the path of sustainable development and applied the "precautionary principle" by holding that the environmental measures must anticipate, prevent and attack the causes of environmental degradation. Thus it directed that all the industries operating in TTZ must use natural gas as a substitute for coke/coal, as an industrial fuel, the industries which are not in a position to obtain the natural gas connections for any reason, they must stop functioning with the aid of coke/coal in the TTZ and they may relocate themselves as per directions of the Court. The shifting industries on the relocation in the new industrial estates were to be given incentives.[329]

(6) The Principle of Intergenerational Equity

The principle of inter-generational equity was first enunciated by the Brundtland Commission in (WCED, 1987). According to the principle, the states are obliged to conserve and use the environment and natural resources for the benefit of present as well as future generations. In the case of State of Himachal Pradesh v Ganesh Wood Products[330], the Court, with respect to the natural resources, held that the present generation owes an obligation to the future generation to

[328] (1997) 2 SCC 353; *Kholamuhana Primary Fishermaen Co-op. Socoiety* v. *State*, A.I.R. 1994 Oris. 191.
[329] *Supra* note 171, p. 384-385.
[330] AIR 1996 SC 149,159, 163

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hand over to them an environment that the present generation inherited from the previous generation83. The recognition of the internationally accepted principles by the Supreme Court has guided the executive and the legislature to incorporate these principles into the government policy framework and legislative enactments, the more recent one being the National Green Tribunal Act, 2010. In S. Jagannath v. Union of India,[331] a public interest litigation was filed alleging that intensified shrimp (Prawn) farming culture industry in coastal areas, by modern methods is causing degradation of mangrove ecosystem, depletion of plantation, commercial use of agricultural land and salt forms, discharge of highly polluting effluents, pollution of potable water as well as ground water, obstruction of natural drainage of flood water , reduction of fish catch and blockage of direct approach to seashore. Besides it has affected the normal traditional life and vocational activities of the local population of the costal areas were seriously hampered. The Court held that sea coast and beaches are gift of nature and any activity polluting the same cannot be permitted. The Court relying on the various reports of the different expert committees on the point, held that the intensified shrimp farming culture by modern methods is violative of the constitutional provisions and various environmental laws and thus it must be stopped. The sustainable over long periods Court was of the view that "sustainable development" should be the guiding principle for shrimp agriculture and by following the natural method, though the harvest is small but sustainable over long periods and it has no adverse effect on the environment and ecology.[332] It was further held that before any shrimp industry is permitted to be installed in the ecology fragile costal area it must pass through a strict environmental test. There must be an environmental impact assessment (EIA) before permission is granted to install commercial shrimp farms. The conceptual framework of the assessment must be broad based primarily concerning environment degradation linked with shrimp farming. The assessment must also include the social impact on different population strata in the area. It must take into consideration the inter generational equity and the compensation for those who are affected prejudiced.[333]

JUDICIAL PRONOUNCMENTS IMPARTING ENVIRONMENTAL JUSTICE

[331] (1997) 2 SCC 87.
[332] *Id*., p. 97.
[333] *Id*, p. 146.

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1. In R. L. & E. Kendra, Dehradun v. State of U.P.,[334] (popularly known as Doon Valley Case) was the first case of its kind in the country involving issues relating to environment and ecological balance which brought into sharp focus the conflict between development and conservation and the court emphasized the need for reconciling the two larger interest of the country, mining which denuded the Mussoorie Hills of the trees and forests cover and accelerated soil erosion resulting in landslides and the blockage of underground water which fed many rivers and springs in the river valley. The Court appointed an expert committee to advise the Bench on the technical issues and on the basis of the report of the committee, the court ordered the closure of number of limestone quarries. The Court was also conscious of the consequences of the order which rendered the workers unemployed after the clousure of the limestone quarries and caused hardship to the lessees. The Court observed that "this would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment".[335]

2. In Subash Kumar v. State of Bihar[336] (Right to Pollution Free Environment) the Apex Court declared right to live is a fundamental right under Article 21 of the constitution and it includes the right to enjoyment of pollution free water and air for full enjoyment of life. And if anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the constitution for removing the pollution of water or air which may be detrimental to the quality of life. This interpretation of the Apex Court ultimately led to the creation of compensatory jurisprudence regarding environmental protection.

[334] A.I.R 1985 S.C.652.
[335] *Ibid.*
[336] A.I.R. 1991 SC 420.

3. The Apex Court ruled in T.N. Godavarman Thirumulkpad **v.** Union of India[337] (popularly known as Forest Conservation Case) that preservation of the eco-system is an immutable duty under the Constitution and a fine balance must be struck between environmental protection and development. The court observed that many regions in India are biodiversity `hotspots', known to host a staggering variety of flora and fauna. However, they are under the constant threat of environmental degradation and rapid depletion of natural resources, due to various factors, including the desire to earn quick money. Consequently, a major challenge in this backdrop is to arrive at a successful model of sustainable development, one that aims to preserve the rich ecosystem, while addressing the economic needs of the people in the region.

4. In Union Carbide Corporation v. Union of India and others (popularly known as the Bhopal Gas Tragedy Case),[338] the Union Carbide Corporation filed an application in revision in the Supreme Court, in terms of Section 155 of the CPC, against the order of the Bhopal District Court, in a claim for damages made by the Union of India on behalf of all the claimants, under the Bhopal Gas Leak Disaster (Processing of Claim) Act, 1985. The Union Carbide Corporation as well as the Union of India filed separate appeals in the Supreme Court against the judgement of the Madhya Pradesh High Court, both of which were heard together. Damages were sought on behalf of victims of Bhopal gas leak disaster. The Court examined the prima facie material for the purpose of quantifying the damages, and also the question of domestication of the decree in the United States for the purpose of execution. The Court held that firstly, Union Carbide Corporation should pay a sum of four hundred and seventy million U.S. Dollars to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal gas disaster. Secondly Union Carbide Corporation shall pay the aforesaid sum to the Union of India on or before 31 March 1989. Thirdly to enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal gas disaster shall there by stand transferred to the Supreme Court and shall stand concluded in terms of the settlement, and all criminal

[337] (1997) 2 SCC 267.
[338] A.I.R. 1990 SC 273.

proceedings related to and arising out of the disaster shall stand quashed, wherever these may be pending.

5. In M.C. Mehta v. Union of India,[339] (popularly known as Ganga Water Pollution Case or Kanpur Tanneries Case), a public interest litigation was filed, inter alia, for the issuance of directions restraining the tanneries from discharging trade effluent into the river Ganga till such time they put up necessary treatment plant for treating the trade effluents in order to arrest the pollution of water in the said river. The tanneries discharging effluents in the river Ganga did not set up primary treatment plant in spite of being asked to do so for several years. Nor did they care to put up an appearance in the Supreme Court expressing their willingness to set up pre-treatment plant. Consequently, the Supreme Court directed them to stop working. The Supreme Court further observed: The financial capacity of tanneries should be considered as irrelevant while requiring them to establish treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be an existence for the adverse effect on public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labor employed by it on account of its closure. K.N. Singh, J., who delivered concurring but a separate judgment in this case further observed: "We are therefore issuing the direction for the closure of those tanneries which have failed to take minimum steps required for the primary treatment of industrial effluent. We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance people."

[339] A.I.R. (1987) 4 SCC 463.

6. The Apex Court in Murli S. Deora v. Union of India[340] observed that a non-smoker is afflicted by various diseases including lung cancer or of heart, only because he is required to go to public places. It is indirectly depriving of his life without any process of law. Undisputedly, smoking is injurious to health and may affect the health of smokers but there is no reason that health of passive smokers should also be injuriously affected. The court went on to observe that in any case, there is no reason to compel non-smokers to be helpless victims of air pollution.[341]

7. In Narmada Bachao Andolan v. Union of India. [342] the court observed that "Sustainable development means what type or extent of development can take place, which can be sustained by nature/ecology with or without mitigation." The Narmada Bachao Andolan had filed a written petition with the Supreme Court of India, with the goal to stop the work on the dam. The Supreme Court first ruled in favour of the petitioners and stayed the construction till the entire rehabilitation work was done as envisaged. After seven years, the Supreme Court gave the green signal to the construction of the dam but also brought about a machinery which ensured the continuous rehabilitation of the affected population and kept a strict eye on the issue of raising the height of the dam through the Grievance Redressal Authorities (GRA) which was established in every state which had a stake in the project. The court's final line of the order states "Every endeavour shall be made to see that the project is completed as expeditiously as possible". Subsequent to the court's verdict, Press Information Bureau (PIB) featured an article[343] which states that: "The Narmada Bachao Andolan has rendered a yeoman's service to the country by creating a high-level of awareness about the environmental and rehabilitation and relief aspects of Sardar Sarovar and other projects on the Narmada. But, after the court verdict it is incumbent on it to adopt a new role. Instead of 'damning the dam' any longer, it could assume the role of

[340] A.I.R. 2002 SC 40.
[341] *Ibid.*
[342] (1998) 8 SCC 308.
[343] Dinkar Shukla "*Verdict on Narmada 2000*", Press Information Bureau, Government of India http://pib.myiris.com/features/article.php3?fl=001108161656 [Accessed on 30.04.2014 at 07.02 IST].

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vigilant observer to see that the resettlement work is as humane and painless as possible and that the environmental aspects are taken due care of."

8. In Prafulla Samantray Lohiya Academy v.Union of India,[344] (National Green Tribunal Cases) in this case an MOU was signed between the Government of Orissa and POSCO for setting up an integrated steel plant with captive port with the total capacity of 12 million tons per annum at Paradip in Orissa, wherein an estimated investment of 51,000/- crore would be made. As per the MOU, the Government of Orissa agreed to facilitate and use its best efforts to enable POSCO to obtain a 'No Objection' through the State Pollution Control Board in the minimum time possible and also to put in its best efforts to procure the grant of all environmental approvals and forest clearance from the Central Government within the minimum possible time. Also under it POSCO would conduct a rapid Environment Impact Assessment (EIA) and prepare a detailed EIA report and an environment management plan for the project. In this case an appeal was filed against the final order of the Ministry of Environment & Forests, imposing additional conditions to the Environmental Clearances in respect of steel cum captive power plant project. The main contention of the appellant was that the manner in which the entire appraisal starting from preparation of EIA report to conduct of public hearing to examination by the respective Expert Appraisal Committee of Ministry of Environment and Forests for Industries and Infrastructure respectively was done, shows that the provisions of EIA Notification 2006 were not followed in letter and spirit. These authorities failed to consider the environmental and social implications of such a large project and relied mainly on the assurances given by the project proponent. The Court keeping in view the need for industrial development, employment opportunities, etc. but not compromising with the environmental and ecological concerns issued a list of exhaustive directions to the Ministry of Environment & Forests. The court ordered the Ministry to constitute fresh review committee by engaging subject matter specialists for better appreciation of environmental issues in addition to it, it was asked to undertake a study on Strategic Environmental Assessment for establishment of number of ports all along the coastline of Orissa having due consideration to the issues related to biodiversity, risks associated, etc.

[344] MANU/GT/0018/2012

9. In The Sarpanch Grampanchayat and Others v. Ministry of Environment Forests,[345] the principal bench of the National Green Tribunal, comprising Justice C. V. Ramalu and Prof. Devendra Kumar Agrawal, found serious procedural lapses in grant of Environmental Clearance (EC) by an Expert Advisory Committee (EAC) of the Union Ministry of Environment and Forests (MoEF) to the company, Gogte Minerals. One of the main grounds for suspending the clearance was the fact that the chairperson of Expert Appraisal Committee (mines), M L Majumdar, was found to be serving as a director in four mining companies. An earlier order of Delhi High Court in 2009, pertaining to Majumdar's position, had stated: "As regards EAC (Mines), it is surprising that the 12 member EAC was chaired by a person who happened to be director of four mining companies. It matters little that the said four mining companies were not in Goa. Appointing a person who has a direct interest in the promotion of the mining industry as the Chairperson of the EAC (mines) is in our view, an unhealthy practice that will rob EAC of its credibility since there is an obvious and direct conflict of interest." The clearance for Tiroda was granted to the mining company while Majumdar held the chairperson's position in EAC (mines). The tribunal bench also found out that Terms of Reference (ToR) for conducting the Environmental Impact Assessment (EIA) of the mines were violated. An earlier EIA for which EC was granted obscured the existence of other mines in the same administrative block, effects of air and noise in a neighbouring school, effects on a river creek and even existence of mangrove forests. The petitioners alleged that these points were deliberately missed out while preparing the draft of EIA to get only desirable ToR to obtain clearance. The material relied upon for the purpose of EIA was prepared almost two years prior to the application for grant of ToR. The records revealed that the project proponent in question and the Redi mine were one and the same, and applications for award of ToR were made simultaneously. The tribunal, however, allowed Gogte Minerals to lift and transport the iron ore already mined by the company in previous years. Further, the company was asked to carry out a fresh EIA based on the ToRs before taking a decision on applying for revival of environmental clearance. Meanwhile, the tribunal further suggested that MoEF place the case for Gogte Minerals to the new EAC (mines) and it had the liberty to accept or reject the proposal. Further, the EAC was asked to conduct a fresh report on the village and

[345] Appeal No. 3 of 2011

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surrounding areas, while also finding ways to relocate the school within the revenue limits of the Tiroda village. The fresh report would consist of existence of number of iron ore mines with its cumulative effects on the environment and ecology of the district block. The tribunal asked EAC and the company to carry out these tasks within six months of the judgement.

10. In the case of G. Sundarrajan v.Union of India and Ors.[346], (Kudankulam Nuclear Power Plant Case) the government had ordered setting up of nuclear power plant in South-Eastern tip of India, at Kudankulam in State of Tamil Nadu which lead to large-scale agitation and emotional reaction. In appeal the main question arose whether, setting up of nuclear power plant was contradictory to public policy. The court held KKNPP[347] was set up as part of India's National Policy so as to develop, control and use of atomic energy for welfare of people of India. The policy makers considered nuclear energy as important element in India's energy mix for sustaining economic growth of natural and domestic use. The Court held trend of authorities was that delicate balance was to be struck between ecological impact and development. Other principle that was ingrained was that "Individual interest or, smaller public interest must yield to larger public interest and inconvenience of some shall be bypassed for larger interest or cause of society." Accordingly, ouster from land or deprivation of some benefit of different nature relatively would come within compartment of smaller public interest or certain inconveniences. However, when public interest touched very atom of life it became obligation of Constitutional Courts to see how delicate balance was struck and could remain in continuum in sustained position. No consideration would be totally shattering of constitutional guarantee enshrined under Article 21 of Constitution as safety, security and life would constitute pyramid within sanctity of Article 21 of Constitution and no jettisoning was permissible. Therefore, delicate balance in other spheres might have some allowance but in case of establishment of nuclear plant, safety measures would not tolerate any lapse. Consequently, AERB as regulatory authority and MoEF were obliged to perform their duty that safety measures were adequately taken before plant commences its operation. The ratio decidendi in this case was "Individual

[346] (2013) 6 SCC 620.
[347] Kudankulam Nuclear Power Plant

interest or, smaller public interest must yield to larger public interest and inconvenience of some shall be bypassed for larger interest or cause of society."

11. In Centre for Environment Law, WWF-I v. Union of India and Ors.[348], in this case application was sought to decide necessity of a second home for Asiatic Lion, an endangered species, for its long term survival and to protect species from extinction as issue rooted on eco-centrism, which supports protection of all wildlife forms, not just those which was of instrumental value to humans but also those which have intrinsic worth. The Court held, while examining necessity of a second home for Asiatic lions, approach should be eco-centric and not anthropocentric and should apply "species best interest standard", that was best interest of Asiatic lions. Further, attention was focused to safeguard interest of species, as species had equal rights to existed on this Earth. However, Asiatic Lion had became critically endangered because of human intervention. Thereby, a commission was formed to safeguard these endangered species because these species had a right to live on this earth, just like human beings. Since, it was duty of NBWL (National Board for Wildlife) to promote conservation and development of wildlife with a view to ensuring ecological and environmental security in country. Therefore, it was viewed that various decisions taken by NBWL that Asiatic lion should have a second home to save it from extinction, due to catastrophes like epidemic, large forest fire etc, which could result in extinction, was justified. Hence, Court was inclined to highlight necessity of an exclusive parliamentary legislation for preservation and protection of endangered species so as to carry out recovery programme before many of species become extinct and thereby the intervention application was allowed by the Court.

CONCLUSION

Since primitive society loves environment and environment in turns nourishes them. Environment and society are thus interdependent, and it is duty of society to protect environment. Justice P.N. Bhagawati once made an insightful observation. We need judges who are alive to the socio-economic realities of Indian life. This statement explains the gradual shift in the judicial approach

[348] (2013) 8 SCC 234.

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while dealing with the issues of sustainable development. These new cases have been set against the backdrop of a radically different socio-economic background of national life. The Judicial Activism though in most academic dialogues criticized for its over emphasizing power but when sticking to the environmental concern, Supreme Court of India has played an important role by making all legislations active which were just a piece of soft law. Therefore, In India number of Act enacted by Parliament for the protection of environment, and effectively interprets by the court of law. Indian judiciary has been very sensitive and alive to protection of environment. The Supreme Court has refashioned its institutional role to readily enforce rights of the people to clean and healthy environment and even impose positive obligations on the state. It is not only duty of judiciary to protect the environment, but it is duty of every country and their citizen to protect the environment.

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REVISITING REFUGEE PROTECTION IN 21ST CENTURY

- N. K. KIRUBA

ABSTRACT

The issues concerning the protection and rights of the refugees are well known. They are the ones who got displaced or forced to move out from their own country to another due to persecution, war or violence. They are compelled to leave as a result of so many causes. Many organizations were set up for the rights of these people. Public awareness has been provided to the public. Media being the indispensable part of our life has brought out several information on the refugees. Their crisis of existence at 2020 scaled upto 2.2 million refugees and the displaced population are 1.5 million. Some are still deprived of their rights and are remaining unknown to the world. They are well founded by fear of persecution of reasons like race, religion etc. refuge is a state of being sheltered from pursuit, danger or difficulty. Their health and social issues are the major case of emergency in short-term phase. It is now clear that the number of refugees has increased a lot in number than expected and most have stayed long enough to expect final settlement and to be considered as a citizen in their countries of asylum, a process which requires wider, more comprehensive and long-term management and re-settlement interventions. These people require their basic rights and also a little help from the state and public. This article covers about the organizations and acts implemented to favor them. Many amendments has been recorded. The circumstances for their current situation and the future predictions of their existence has been noted. This paper also highlights their social and health conditions.

REVISITING REFUGEE PROTECTION IN 21st CENTURY

The reality of being a refugee is inconceivable to most of us. All around the world, war, violence, poverty, famine and extreme weather disasters force ordinary people from their homes every day, often facing treacherous journeys before they reach a safe haven. Families are ripped apart and

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many end up living in horrible conditions with not enough food, clean water or proper sanitation. Some people spend decades as refugees with no support of basic work or a adequate education.

The refugees are being displaced from their own country to another. The causes for the persecution must be because of one of the five main factors like race, religion, nationality, membership of a particular social group or political opinion. Displacement based on any other ground will not considered under law. Race it includes the wide sense of ethnic groups and social groups of common descent. Religion includes the group or identification of the group of people who share the common tradition and beliefs. Nationality includes the citizenship of an individual. Persecution of ethnic, linguistic and socio cultural groups within a population also may be termed persecution based on nationality. Persecution among the social group can be based on the background and habits. It mostly overlaps the factors of persecution of others. This social group mostly includes the land owners, capitalists, homosexuals etc. Individuals who hides their political opinions until after they have fled their countries may be considered for refugee status that they can show that their concealed opinions are likely to subject them to persecution if they return home.

All around the world 2/3rd of the refugees are found in Syria, Afghanistan, South Sudan, Myanmar, and Somalia. The refugees are classified into different types. They are asylum seekers, internally displaced persons, stateless persons and returnees. The asylum seekers have the right to be recognized as a refugee and also to seek the legal protection. Stateless persons are the ones who are not considered as a citizen of any country. These refugees have their own legal rights. Some of those rights are freedom for torture, freedom of opinion, freedom of expression, freedom of thought, conscience and religion etc.

In 1951, the refugee convention act was implemented. It includes all the information on who is a refugee, what are the legal rights allotted to them, the protection given to them by law and other assistance, social rights he or she must receive from the countries who have signed the document. It also includes the refugee's obligations to host governments and certain categories or people such as war criminals, who do not qualify for refugee status. This convention was actually limited to protecting mainly European refugees after the World War II, but another document, the 1967 protocol, expanded the scope of the convention as the problem of displacement spread around the world. This convention excludes those individuals with respect to whom there are serious reasons for considering that 1. He has committed a crime against the peace, a war crime , or a crime against

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humanity, as defined in the international instruments drawn up to make provision in respect of such crimes 2. He has committed a serious non political crime outside the country of refuge prior to his admission to that country as a refuge 3. He has been guilty of the acts contrary to the principles of United Nations. The individuals who have voluntarily isolated themselves of the protection of their country of nationality or habitual residence or individuals who have received protection in a another country are also not considered as refugees.

The refugees around all over the world suffer from various social, economical problems. They face extreme weather conditions like droughts and floods. Thus they are also called as people displaced by the storm and after effects. Their families are drifted apart and they suffer from the lack of basic need of life like food, shelter, proper clothing etc. these people doesn't have a passport. They travel using the travel documents as they are unlikely to obtain passports from the state of nationality. Their travel documents are also called as booklets. The universal human rights for refugees were adopted in 1948. Refugees should receive at least the same rights and basic help as any other citizen who is a legal resident, including freedom of thought, of movement, and freedom from torture and degrading treatment. Refugees and asylees suffer other human rights violations despite international law. They are recognized as the violations of social, economic, and cultural rights that many refugees and asylees may endure, such as lack of access to employment, education, medical care, and basic public health measures. Refugees are considered as the human rights issue because the most of the people flee their countries due to civil conflicts, massive violations of the human rights, poverty, famine, disease and ecological disasters. In order to qualify as the refugee, he must be a political refugee.

The international protection comprises more than the physical safety. Though the protection is given they are not met. The purpose of their right isn't fully satisfied. The human rights watch was set up to respond to the emergencies during the chronic situations. They conduct on ground investigation and only proceed based on the direct primary sources. They gather information on uprooted people and document the abuses against them. They make sure all the migrants are treated with dignity and regard for their basic human rights.

Refugees all over the world face various problems in surviving. Few may have the difficulty of the language, trouble taking off the work and also the transportation from one place to the other. They will not have any access to mental health issues. They are exposed to violence like rape and

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other abuses. Common challenges for all refugee women, regardless of other demographic data, are access to healthcare and physical abuse and instances of discrimination, sexual violence, and human trafficking are the most common ones. At a certain level, children of refugees face discrimination in the form of racial and social factors. They are also being separated from other students in schools based on socioeconomic conditions. They have a less access to high-quality teachers and resources, low levels of parental engagement, and disoriented placement in special education. They overcame this by recognizing the alike minds of people and formed social clubs and activity groups. They lifted up each other among these groups. Refugee camps are set up all over the countries. It is a temporary accommodation built to receive refugees and people in alike situations as the refugees. Depending on the situation some refugees will stay in camps for months while others may stay for years. In prolonged refugee situations, or situations lasting more than five consecutive years, refugees can spend nearly two decades in a camp and the children are born and brought up in the camps. It is very common.

Turkey has the largest population of the refugees from all over the world. As of September 2019, Turkey hosts 3.66 million registered Syrian refugees, compared to 2.73 million in September 2016. About 30% live in 22 government-run camps near the Syrian border. Turkey is home to the highest number of Syrian refugees and has provided over $8,000,000,000 in aid. Currently, there are around 8,000 to 11,684 Afghan refugees in India, most of whom are Hindus and Sikhs. The United Nations High Commissioner for Refugees (UNHCR) in India was ordered by the Indian government to implement a program for them. Syrians continue to be the largest forcibly displaced population in the world. It has a total f 6.7 million refugees in total. After war erupted in March 2011, it took two years for 1 million people to be displaced. Another million were displaced within six months. Now eight years on, more than half of the pre-war population has been internally displaced or forced to seek safety in neighboring countries. That's more than 11 million people on the run, including some 6.7 million people who have escaped across the borders. Years of unemployment, insecurity and the unstable political situations have led to a massive migration from Afghanistan. It has over 2.7 million refugees. Over one million people are estimated to be living in new and prolonged displacement. In South Sudan, over 2.3 million refugees are in count. The situation in South Sudan is worse and the largest refugee crisis in Africa. More than 4 million people have been thrown away from their homes since the start of a brutal civil war in 2013, including about 2.3 million people who have been forced to cross into

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neighboring countries, the majority of them women and children. Myanmar has approximately 1.1 million refugees. The speed and scale over the course of a three-month period last fall has placed a permanent strain on conducting communities and Bangladesh as a whole, making it one of the world's largest and worst refugee crises. In Somalia there are 0.9 million refugees. More than two decades of political conflict and natural hazards such as prolonged drought and flooding have driven nearly 1 million Somalis to live in destitute refugee camps in the Horn of Africa and Yemen, while some 2.1 million people remain displaced within the country. Currently, there are around 8,000 to 11,684 Afghan refugees in India, most of whom are Hindus and Sikhs. The Indian government has allowed the United Nations High Commissioner for Refugees (UNHCR) in India to operate a program for them.

Refugee act was adopted in 1980. The Act recognizes that it has been the ancient policy of the United States to respond to the emergency needs of persons subject to persecution in their homelands and to consider them with the assistance, asylum, and resettlement opportunities to the admitted refugees. The annual count of refugees in a camp is set to a 50,000 cap per fiscal year, but in an emergency situation, the President may change the number for a period of twelve months. The Attorney General is also granted power to admit additional refugees and grant asylum to current aliens, but all admissions must be reported to Congress and be limited to 5,000 people. UNHCR (The United Nations High Commissioner for Refugees) is a United Nations agency with the policy to protect refugees, forcibly displaced communities and stateless people, and assist in their will of going back to their country, local integration or resettlement in another country. They promote three durable solutions for refugees as part of its core mandate voluntary repatriation local integration and resettlement. In Syria, there is a US501c3 non profit organization called jusoor which helps the group of Syrian expatriates supporting the country's development and helping Syrian youth realize their potential through programs in the fields of education, career development, and community engagement all over the world. There are totally 6 international charities around the world which strive for them. Status Resolution Support Services (SRSS), providing some legal, financial and medical support for asylum seekers. Organizations such as Settlement Services International (SSI) administer this program through managers who work with individuals and families, supporting them until their visa status is resolved. Refugee cash assistance is a part of refugee settlement program where they are benefited with the financial assistance.

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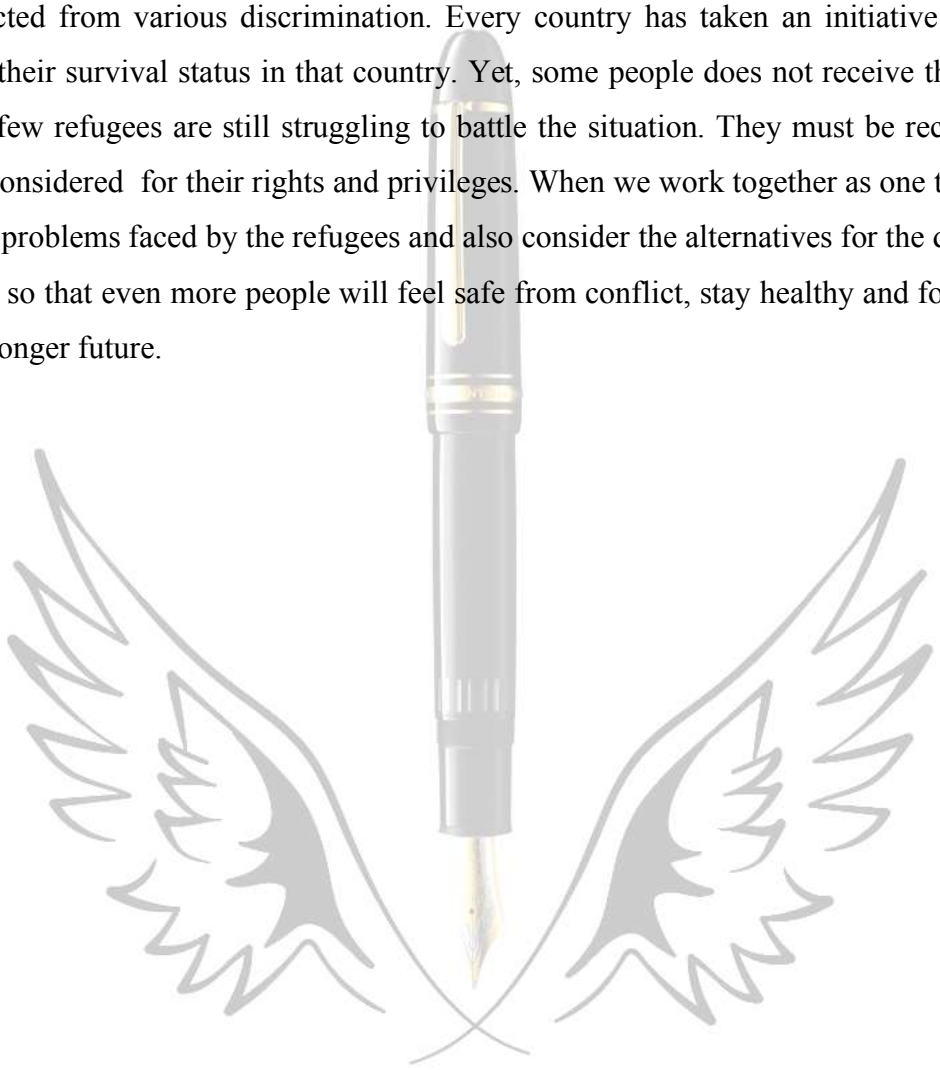
Refugees and immigrants all over the world gets all the benefits set up for them and also they have been protected from various discrimination. Every country has taken an initiative for them in improving their survival status in that country. Yet, some people does not receive their rights as stated and few refugees are still struggling to battle the situation. They must be recognized and should be considered for their rights and privileges. When we work together as one team, we can resolve the problems faced by the refugees and also consider the alternatives for the drawbacks in the system, so that even more people will feel safe from conflict, stay healthy and forge ahead to a better, stronger future.



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ADMINISTRATION OF ESTATES UNDER MUSLIM LAW

- ANSARI MOHD. ZAID

"When it comes to divide an estate, the politest men quarrel".- **Ralph Waldo Emerson**

INTRODUCTION

The commendable analysis of the Inheritance and it's Administration of the decedent's estates after his death under Muslim Law is highly diversified. The anatomisation of the Administration of Estates under Muslim Law is tremendously convoluted. It is as complex as precisely asserted by *Macnaghten – It is difficult to conceive any system containing rules more strictly just and equitable*, this definition of Macnaghten clearly indicates that in order to learn Muslim Law of inheritance one must deeply concern about the actual legalities and its explications because the Muslim Law of inheritance is based on Qur'anic texts and the Prophets sayings i.e. Hadiths. Progressing further it is evident from the conception that there is a manifest distinction between inheritance and will which one might confuse in dealing with both, the will is different from inheritance as the testator effecting a will is still alive and the law of inheritance would take its place after the persons sudden demise. Law of Inheritance under Islam is paramount as the Prophet Muhammad (PBUH) surmised, *Learn the laws of Inheritance and teach them to the people; for they are one half of useful knowledge.* Under Islamic Jurisprudence the recognition of executor or the appointment of the administrator was unknown, it is profoundly came to be known in modern law.

ADMINISTRATION OF ESTATES

The administration of estates under Muslim Law is quite intricate. Before proceeding to the vital part of vesting of estates under Muslim Law it is imperative to know certain basic norms regarding inheritance. In Muslim Law of inheritance the male heir should inherit twice the estate of what the

female heir has to inherit from the decedents estates because this is evident from the Islamic teachings that the male has to perform certain obligations like in Muslim law system of Dowry and Mahr are the two most important obligations which is incumbent on the male person to perform, giving dower would be termed as a debt due to his wife and the Mahr is given by the male at the time of his marriage. Also under Muslim Law it is obligatory for the male to maintain his family from his earnings. Under the Muslim Law, there is no stringent difference between immovable or movable property and incorporeal or corporeal property. There is also no distinction between a self-acquired property or ancestral property in Muslim Law. This means that, unlike Hindu law, when a Muslim person dies all the property that the person may have acquired in his lifetime and also any property that the person may have inherited from his ancestors can be validly inherited by his heirs[349].

In Islam there was no administration of estates, administration was introduced into the fabric of Muslim Law by the reception of the English concept of administration and later by the enabling provisions of the Probate and Administration Act, 1881[350] but after independence in India the estate of a deceased muslim is administered under the provisions of the Indian Succession Act, 1925[351], it is the Sunni and Shia law which is applicable to the estate of a deceased muslim according to the rite he professed at the time of his death. If a muslim changes his school during the course of his life the test will be: what was he at the time of his death? and if however he registers his marriage under the Special Marriage Act, 1954[352] his personal law would be ejected and the Succession Act would apply[353]. In the words of Fyzee, '*It is as though the estate were a round cake which from a distance seems entire but as each heir approaches the table the cake is found to be carefully cut up and divided proportionately; and all that remains to be done is to hand over to him his particular piece.'* According to the Succession Act, 1925, the administration of payments to be made are, in order of priority, as follows:

1. Funeral expenses and death-bed charges;

[349] The Muslim Law of Inheritance, *available at:* https://medium.com/@legalresolved/the-muslim-law-of-inheritance-4ac8866ab490 (last visited on April 01, 2020).
[350] The Probate and Administration Act, 1881 (Act V of 1881).
[351] The Indian Succession Act, 1925 (Act 39 of 1925).
[352] The Special Marriage Act, 1954 (Act 43 of 1954).
[353] A. Fyzee, *Outlines of Muhammadan Law,* Oxford University Press (India), London, 6th Edn., 2018, p. 307.

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2. Expenses of obtaining probate or letters of administration;
3. Wages for services rendered to the deceased within three months of his death by a labourer or servant;
4. Debts according to their priorities;
5. Legacies not exceeding one-third of the residue (the stranger would not get more than one-third of the estate from the deceased estate) and before legacies debts should be paid[354].

VESTING OF ESTATE & PAYMENT OF DEBTS

Vesting of estate takes place immediately on the death of the propositus. In Muslim law there is twofold concept of distribution of estates i.e. per capita and per stirpes distribution.

- ***Per capita*** distribution method is majorly used in the Sunni law. According to this method, the estate left over by the ancestors gets equally distributed among the heirs. Therefore, the share of each person depends on the number of heirs. This simply means there should be proximity in inheritance the remote heir cannot occupy any estate.

Illustration: If A a testator makes a will for his three children B, C and D. B also has children B1 and B2 but B died before A, then according to per capita distribution B's children i.e. B1 and B2 cannot inherit any estate of A as it is in the case of per stirpes distribution, the share of B will directly be distributed to his siblings C and D.

- ***Per stirpes*** distribution method is recognised in the Shia law. According to this method of estate inheritance, the estate gets distributed among the heirs according to the stirpes or branch they belong to.

Illustration: The testator A, specifies in his will that his estate is to be divided among his descendants in equal shares per stirpes. A has three children, B, C, and D. B had predeceased A or died before A, B also has two children (grandchildren of A), B1 and B2. When A's will is executed, under a distribution per stirpes, C and D each receive one-third of the estate, and B1 and B2 each receive one-sixth i.e. half of what B had to inherit had he still alive. B1 and B2 constitute one

[354] Indian Succession Act, 1925, Sections 320-323 and Section 325.

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"branch" of the family, and collectively receive a share equal to the shares received by C and D as branches.

The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such[355]. It is his legal duty to collect the assets, discharge the debts, pay the legacies, and distribute the estate amongst the heirs. When a Muslim dies leaving a will, it is not necessary for the executor to obtain the probate of the will, but, if the debts due to the deceased are to be recovered, the representation is imperative, as the court will pass a decree in favour of the estate of the deceased unless the representation, in any form, as laid down in the India Succession Act, is obtained[356]. Thus, when a deceased dies leaving behind a will, the probate should be obtained but in case he dies intestate, the letters of administration may be obtained.

The executor (*wasi*), when he has realised the estate, is an 'active' trustee in respect of bequeathable one-third estate and as a 'bare' trustee as to the remaining two-thirds. This is so because a Muslim cannot by will dispose of more than one-third of his estate to stranger and the remaining two-thirds must devolve on the heirs according to the principles of the law of inheritance. A 'bare' trustee has no original duties to perform he/she doesn't have rights to give more than one-third of the deceased estate to stranger but if there is acceptance by the beneficiaries to give more than one-third estate then it will be valid in giving more than one-third estate to the stranger, the 'bare' trustee can also termed as 'simple' trustee. The 'active' trustee is applied to a person who has duties to perform and may be compared to a 'special' trustee[357]. Where, however, no executor has been appointed by the testator, or no administrator has been appointed by the court, the whole of the estate of the decedent or so much of it as has been left undisposed by will, devolved upon the heirs in specific shares at the moment of his death and such devolution is not suspended until the payment of his debts, if any[358]. When the estate vests in the heirs it vests in them not jointly but in severalty as from the time of the death of the deceased in proportion to their respective shares in the estate. They hold it subject to the payment of the charges and debts in proportion to their shares in the estate, and also subject to the payment of legacies, if any, up to

[355] Indian Succession Act, 1925, Section 211.
[356] Mulla, *Principles of Mahomedan Law,* Lexis Nexis, 22nd Edn., 2017, p. 40.
[357] Faiz Tyabji and Muhsin Tayyibji, *Muslim Law: The Personal Law of Muslims in India and Pakistan,* N. M. Tripathi, Bombay, 4th Edn., 1968, p. 641.
[358] *Supra* note 9 at 642.

the bequeath able one-third[359]. It is also said that a non-muslim could not be appointed an executor of the will; but the courts in India have held that religion is no bar and a muslim may appoint a non-muslim as an executor[360][361].

There are differing views on the concept of Muslim Law, according to the Hanafi, Shafi and Maliki schools the heirs become independent owners of the solvent estate at death of the deceased inspite of the existence of debts owned by the deceased. Only the Shia (Ithna Ashari) school maintains that until the payment of debts the devolution of ownership to the heirs is postponed. But although according to the former schools the heirs become the owners of the solvent estate they cannot exercise their rights of ownership by transferring an absolute title to the transferee (purchaser) by sale, gift, division, etc. until they have paid the deceased's debts. We are not concerned with the insolvent estate where there is no inheritance at all. To unscramble it further solvent estate means that there are still assets left over after all the debts have been paid and an insolvent estate on the other hand, is one where the debts exceed the value of the assets[362]. But it is laid down by the judicial decisions that the whole estate of a deceased muslim devolves (transfers) upon his heirs at death in specific share. It is immaterial whether the amounts of debts is smaller or larger than the value of the assets. The estate devolves upon the heirs whether the estate is solvent or insolvent or whether the debts are paid or not although the concept of devolvement of insolvent estates on the heirs are in contrary view to the Hanafi law.

The concept of devolution and other unfaltering legal parameters has been cited in the famous case of *Jafri Begum v. Amir Muhammad Khan,*[363] in this one Ali Muhammad Khan died in 1878 leaving him surviving his father, mother, widow, two sons, three daughters (Jafri Begum being the youngest) and a brother, Amir Muhammad Khan. Abdur Rahman, the husband of Jafri Begum, brought a suit and obtained a decree against the widow, two sons and three daughters for a debt due by the deceased. In execution of the decree a portion of the village belonging to the deceased was sold and purchased by Abdur Rahman himself. Later Amir Muhammad Khan, the brother,

[359] Administration of Estates of Deceased under Muslim Law in India, *available at:* http://www.shareyouressays.com/knowledge/administration-of-estates-of-deceased-under-muslim-law-in-india/117605 (last visited on April 01, 2020).
[360] *Supra* note 8 at 133.
[361] *Supra* note 9 at 647.
[362] Solvent vs. Insolvent: What's the difference ?, *available at:* https://frankkraft.com/solvent-insolvent-difference/ (last visited on April 02, 2020).
[363] (1885) 7 All. 822.

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brought a suit against the widow, two sons and three daughters to recover his share of the estate, as he was not a party to the previous suit. The case was referred to a full bench of Allahabad High Court decided the question of devolution and other legal parameters in this case. Mahmood, J. appears to have dealt with the question exhaustively. He tried to support his conclusions by citing original authorities of Muhammadan Law. Three rules were laid down:

I. When a Muslim dies leaving debts unpaid, his estate devolves immediately on his heirs and such devolution is not suspended till or contingent upon payment of debts.

II. A decree for a debt passed against such of the heirs as are in possession of the estate does not bind the other heirs.

III. If one of the heirs, who was out of possession and who was not a party to the proceedings, brings a suit against a decree-holder for the recovery of his share of the estate, he must pay his proportionate share of the debt before recovering possession of his share of the inheritance[364].

The Muslims are independent owners of their specific shares, and if they take their shares subject to the charge of the debts of the deceased their liability is in proportion to the extent of their shares. Prior to this case in the earlier case the court relying upon certain passages of al-hidayah (Hanafi Jurisprudence) expressed the correct views in the case of *Hamir Singh v. Musammat Zakia*[365] decided in 1875 by 'Phearson' and 'Turner' and it seems to demonstrate that "where the owner had died free from debts his estate will pass to the heirs, when the owner has died involved in debt his estate does not pass to the heirs."[366]

There are certain exclusions where the Muslim deceased's property cannot be inherited by his heirs, Non-muslim cannot inherit the estate from the deceased but it is now valid because of The Caste Disabilities Removal Act, 1850, in India if a Hindu converts to muslim then he will be governed by muslim law and after his death his hindu ancestors cannot inherit his properties. Homicide is another exclusion from inheriting the deceased's property but the actual concept of this may differ according to different schools of Sunni Muslims or Shia Muslims as in Hanafi

[364] *Supra* note 5 at 305.
[365] (1875) ILR 1 All 57.
[366] Md. Narul Haq, "Administration of Estate Under Muslim Law – A Review" *The Dhaka University Studies* 45-47 (1989).

school it is determined that whether the person killed another intentionally or not he will be barred from inheriting the deceased's property whereas in Shia Law there is a contrary view that if the person does not kills another intentionally then he can inherit the deceased's property. There is another exclusion that being an illegitimate child the system of inheritance will disallow the child to inherit. There is also some differing conceptions on this subject, in Hanafi school the child is barred from inheriting the father's estates but not the mother's estates whereas, in Shia law the child cannot inherit from both the father as well as mother.

EXTENT OF LIABILITY OF HEIRS FOR DEBTS[367]

The nature of the liability of the heirs to pay the debts is not a joint liability. Each heir is to pay the debts proportional to the estate that he gets. The heirs of a Muslim dying intestate on whom falls the liability to discharge the debt, proportionate to their respective shares in the estate devolved, can hardly be classified as joint contractors, partners, executors or mortgagees. They are by themselves independent debtors, the debt having been split by operation of law. Inter se they have no jural relationship as co-debtors or joint debtors so as to fall within the shadow of contractors, partners, executors or mortgagees or in a class akin to them.

They succeed to the estate as tenants-in-common in specific shares. Therefore, the acknowledgement of the debts by only one heir can be confined to himself and cannot be extended to the other co-heirs for they are independent debtors, and not as an agent, express or implied, on behalf of other co-heirs could not be said to be a payment on behalf of all so as to extend period of limitation as against all. The fact that the heir acknowledging the debt by making payment was in possession of entire estate and had not parted with it by means of partition to the other co-heirs, would not make him liable for entire debt. Muslim heirs are independent owners of their specific shares, and if they take their shares subject to the charge of the debts of the deceased their liability is in proportion to the extent of their shares. The basis for the liability of the heir can be enunciated from the case of *Hamir Singh v. Musammat Zakia* given in the above section.

[367] Heir's Liability to Pay Debts of a Deceased Muslim under Muslim Law, *available at:* http://www.shareyouressays.com/knowledge/heirs-liability-to-pay-debts-of-a-deceased-muslim-under-muslim-law/117595 (last visited on April 02, 2020).

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A creditor may join all the heirs of a deceased person for recovering his debt; in such a case no difficulties arise. However, difficulties do arise when a suit is filed and a decree obtained against only some but not all the heirs. From the first rule cited in the case of Jafri Begum we can acknowledge that each heir is liable for the debts of the deceased in proportion to the share he receives of the inheritance, and no more. For instance, a Muslim dies leaving two heirs who divide the estate amongst themselves in accordance with their rights. A creditor of the deceased sues only one of the two heirs, the heir who has been sued by the creditor will be liable to pay a part of the debt proportionate to his own share of the inheritance only and the other heir will not be liable to pay his part. Here the actual difficulty arises when the creditor sues only some of the heirs not all because the heirs sued by the creditor will only be liable to pay the debt from his own part and not the other heir which ultimately leads to the difficulty to the creditor in obtaining the whole debt of the deceased because the heirs have to inherit specific shares of the deceased not the whole share. In order to adequately glean the whole debt the creditor has to sue all of the heirs of the deceased not some[368].

It is to be noted that when one of several heirs of a deceased Muslim, has no power to alienate the share of co-heirs, not even to pay off the debts of the deceased. This can precisely be illustrated in the case of *Abdul Majeeth v. Krishnamachariar*[369], in this case one Muhammad Hamid had died in 1909 being heavily involved in debt. In 1910 his widow alienated the property. In 1912 the creditor filed an administration suit. The question arose: when one of the co-heirs of a deceased Muslim in possession of the whole estate for the discharge of the debts of the deceased, is such sale binding on the other co-heirs or creditors of the deceased, and if so to what extent? The answer given by Abdur Rahim J. that it is not a correct method of discharging any liabilities by binding the co-heirs in the deceased property.

ALIENATION OF ESTATE BY THE HEIR

The intellection about alienation of the estate by the heir has been seen as an unwanted predicament. The Qur'anic principle states that, 'There is no inheritance until after the payment of debt' it is undeniably the substantive law and so this should be regulated by the Muslim personal

[368] *Supra* note 5 at 311.
[369] (1916) 40 Mad 243.

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law only[370]. But it will be seen that the court interpreted this principle in various landmark judgments which is followed manifoldly. Any heir may even before the distribution of the estate transfer his own share and pass a good title to a bonafide transferee for value, notwithstanding any debts remained unpaid by the deceased. This can be followed from the Jafri Begum's Rule I[371].

The cases where the courts had interpreted the Muslim law in their views, in the case of *Bazayet Hossein v. Dooli Chund*[372], A Muslim dies leaving a widow and a son. A large sum of money is due to the widow for her dower. Dower is a debt, but the widow is not a secured creditor of her deceased husband. The son mortgages his share of the estate to M for Rs. 4,800 without paying the dower debt. After the mortgage the widow obtains a decree against the son who is in possession of the estate for her dower debt and attaches the son's share in execution of the decree. The mortgagee, M, thereafter obtains a decree against the son's mortgage for sale of the son's share. The share is sold in execution of the decree and is purchased by P. It was held that before the suit was instituted by the widow the son had the right to dispose of his share of the inheritance, P was entitled to recover the son's share free from the attachment, and the widow could not follow the property into the hands of P, the execution purchaser. Selling the share of an heir in execution of a decree passed against him at the suit of a creditor amounts to a valid 'transfer' and will pass a good title to the execution purchaser if he has had no notice[373].

In *Campbell v. Delany*[374] decided in 1863, the fact of this case was that the heirs had mortgaged the property to the defendant before paying the debts. A creditor of the deceased instituted a suit and obtained a decree and he executed the decree by selling the property. The plaintiff purchased the property. The plaintiff claimed possession of the property. The court's decision in this case was that the heirs was free to transfer the property. The court also decided that the bonafide acquirer who is a mortgagee took a better title than the execution purchaser.

In the case of *Wahidunnisa v. Musammat Uhufratus*[375], decided in 1870, the judges followed the same English principles of Campbell's case. They carried the English principles of the former case further by saying that upon the death of a Muslim owner the heirs themselves but not the estate,

[370] *Supra* note 18 at 51.
[371] *Supra* note 5 at 308.
[372] (1878) 5 IA 211.
[373] *Supra* note 5 at 309.
[374] (1863) Marshall 509.
[375] (1870) 6 Beng. L. R.

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become answerable for the debts. So before paying the debt the heir was at liberty to dispose of the property and pass a good title to a bonafide acquirer for value. The creditor had no right to set aside the transfer but up to the amount of the asset he could sue the heirs personally. The creditor had no lien to follow the property disposed of by the heir. Later decisions were carried on again in the famous landmark Bazayat Hossein case discussed above.

The Muslim Law on the point is totally defeated and the creditors of the deceased are also very much prejudiced. If the heirs transfer the property before the payment of the debts, the creditors cannot challenge it to be declared invalid and so they are deprived of this instrument to compel the heir to pay the debts. Although prior to these judgements delivered by the respective courts, the concept of Alienation was very much positioned according to the Muslim law like *Khajah Abool Hossein v. Maharahiah Heetnarain*[376]and *Mohammad Noor Baksh v. Budun Chand Bebe*[377], the principle was positively recognised that until the heir had first paid the debts of the deceased he had no right to alienate the property.

The general rule in transferring the share of an immovable property of the deceased by the heir during the pendency of the suit by the widow of the deceased for her dower wherein a decree is subsequently passed creating a charge on the estate for the dower debt, the transferee will take the share of the heir subject to the charge so created; but the transferee would not be affected if the widow's decree is a simple money decree. It is also evident from the fact that if the transferee or execution purchaser had the notice of some prior decree then he will not get the good title. In the case of *Mahomed Wajid v. Bazayet Hossein*[378], the deceased leftover a huge estates movable as well as immovable to his three widows and a son. The son was in the full possession of the estate. The widows brought a suit against the son, the widows applied for the charge on the money decree. Subsequently, during the pending execution the son mortgaged his own share to M. Then M sued the son on the mortgage and obtained a decree for the sale of the son's share mortgaged to him. The mortgagee sold the share to P. The privy council held that P in the circumstances took the share subject to the prior decree in favour of the widows. The case would have been different if the mortgage had been effected before the decree.

[376] Decisions of the Sadar Diwani Adalat (Bengal), 30th Apr, 1859.
[377] Decisions of the Sadar Diwani Adalat, 2nd Sept, 1852.
[378] (1878) 5 IA 211.

CONCLUSION

The Administration of the Estates ensued in India is basically evolved through the British in 1881 as Probate and Administration Act, 1881 which was later amended according to the established procedures in Indian legal system in 1925 and the act was revised as The Indian Succession Act, 1925. Many provisions were made to qualify according to the needs of the Hindu, Muslim and other religions. Though, it had made certain basic provisions according to Muslim Law but it didn't elate the Muslim law wholly. The Indian Succession Act, was made for Muslim Law mainly according to the Sunnis Hanafi school of jurisprudence but also certain provisions were made for Shia muslims as in Shia law it is incumbent for the heir to pay all the debts before devolving the estate whereas in Hanafi law the heir can immediately inherit the estate of the deceased before paying all the debts of the deceased save for ownership.

The main dilemma arises where the courts had interpreted the Muslim law in certain aspects according to their own views, in alienating the property the heir must pay the debts before alienating the property according to Muslim law but it has interpreted in various cases by the courts to modify the actual Muslim Law that the heir can transfer his share from the deceased's estate before paying all the debts. This censoriously demarcates that the main aspect of Muslim law is defeated in a certain way. In this country the restoration of the genuine Muslim Law by legislative action is no new thing. The Musalman Waqf Validating Act, 1913[379] and 1930 and the Muslim Personal Law (Shariat) Act of 1937[380] were passed to restore the authentic Muslim Law.

Thus, the prevailing Muslim Law in India is in some manner has been modified. The concept of Muslim Law is mainly based on Qur'anic texts so it will be an unfortunate and unfavourable thing for the whole Muslim community.

[379] The Musalman Wakf Validating Act, 1913 (Act No. 6 of 1913).
[380] The Muslim Personal Law (Shariat) Application Act, 1937 (Act No. 26 of 1937).

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HAS CONFIDENTIALITY CONUNDRUM SOLVED AFTER THE INSERTION OF SECTION 42A OF THE ARBITRATION AND CONCILIATION ACT, 1996?

- **PAWANPREET SINGH & ANJALI BISHT**

The faith of the parties in the arbitration has lead to a stark increase in the arbitration proceedings. India being resolute to maintain the faith of the parties in the arbitration has recently, amended the Arbitration and Conciliation Act, 1996 ("Act"). The key topic for discussion of the amendment pertaining to this article is Section 42-A of the Act, which received the assent of the President on 9th August, 2019.

Traditionally, confidentiality fashioned in the Indian arbitration only under the conciliation proceedings. The concept of confidentiality under Indian Legal System has always been crumbled and prior to this amendment was read under Section 75 of Act, invoked only when there were conciliation proceedings. Section 75 of the Act, 1996 makes it mandatory upon the parties and the conciliator to keep the matter confidential relating to conciliation proceedings except in the cases where disclosure is necessary in implementation and enforcement. Recently, the insertion of Section 42A seeks to widen the horizon of confidentiality in matters of arbitral proceedings also. The term "Confidentiality" is interpreted by the parties as a shield safeguarding themselves from unnecessary news from the public.

Recently, an amendment in the Act, left many issues untouched in relation to Section 42A of the act. Section 42A by using the word "shall" creates an obligation amongst the arbitrators, the arbitral institution and parties to arbitration agreement to maintain confidentiality of arbitral proceedings except an award where the disclosure is necessary for the purpose of implementation and enforcement of the award. This is likely an attempt to limit the concept of confidentiality under a water-tight compartment. Can confidentiality be limited to such parameters in today's scenario?

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On 30th July, 2017, a report was submitted by the High Level Committee to Review the Institutionalization of Arbitration mechanism in India chaired by Justice B.N Srikrishna, Retired Judge of Supreme Court of India. The recommendation made by the committee clearly suggested that there should be a provision dealing with confidentiality unless disclosure is required by the legal duty, to protect or enforce legal right, or to enforce or challenge an award before court or judicial authority. The same was adopted under the UNICTRAL Model in the year of 2010 under Article 34(5). Despite this, the amendment failed to consider these issues and has restricted the extent of confidentiality. Though, confidentiality provision is prominent in the arbitration but the clause has certain lacuna which should have been considered prior to the amendment.

Commercial transactions are increasing at a high pace, where the parties opt for arbitration believing it to a private settlement of dispute and maintenance of confidentiality. The amendment of 2019 though directory in nature but failed to consider the point of breach of confidentiality by other elements than those mentioned in the Section 42A of Act. The corporate companies are adopting for a secretive realm of arbitration in order to save their goodwill but what happens when the situation arises where there is breach of confidentiality by the witnesses, third party, tribunal secretary or any other member who is not a part of the arbitral proceedings but indirectly connected thereto. On the other hand, what happens when the disclosure is necessary for a larger public interest. Won't these acts be considered as breach of confidentiality or creation of space for the interference of the court or judicial body to resolve these issues? The insertion of Section 42A failed to provide the instances where the breach of confidentiality will be considered.

Confidentiality basically refers to the non-disclosure of the matter to any third party other than the disputed parties themselves. Private nature of the arbitration often attracts the big corporate companies to invoke arbitration believing it as a freedom from the interference of the media and their customers. Many a time's parties are hesitant to argue and discuss the matter in the court but feel comfortable to discuss the dispute privately. The exclusion of various elements from the list of confidentiality has created a doubt in the minds that why would a party invoke arbitration when there is no protection of their dispute or their reputation being tarnished.

Under the Indian Legal System, there are instances where different courts call upon for the production of different documents during the interference of court under section 9 of the Act, in spite of a confidentiality clause. Parties enter into an arbitration agreement with the approach that

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they are in the safe hands but isn't it breach of confidentiality when such a situation arises where it is necessary to involve the third party, appointing the expert under section 25, court assistance in taking evidence under section 27, application for setting aside the arbitral award under section 43, interim measures by the court under section 9 and many more provisions under the Act. What is the purpose when the parties have to discuss the dispute in the court or to parties other than the disputed parties and why would the parties approach the arbitral tribunal? Confidentiality has a broader perceptive if properly drafted. The doubt arises that under what criteria these situations have cleared the test of breach of confidentiality.

Say for instance, Company A enters into a contract with Company B to transport a certain quantity of fuel from state "X" to State "Y". Due to some reasons dispute arises between the two, since there was an arbitration clause, both appoints an arbitrator as per the consent of the parties. The arbitrator due to some technicalities in the dispute hires an expert. The experts are disclosed the matter. As per amended article 42A there is no obligation upon the expert to maintain confidentiality and he can further disclose the facts to the competitors of both the companies and gain financial advantage from them. Expert is saved from the clutches of the confidentiality. Isn't the sole purpose of the arbitration is hampered?

Seeing the International status, confidentiality has always been considered a fundamental element to resolve the dispute. Many international commercial contracts are based upon confidentiality. Some countries such as France and Australia consider confidentiality as an implied concept of arbitration where on the other hand there are countries which consider confidentiality only with the consent of the parties. ***In Australia Resources Ltd V Plowman (1995) 128 ALR 39***, Australian courts clearly suggested that absolute confidentiality can never be achieved.

Arbitration's sole purpose is to conduct private meetings of the parties where disputes are settled amicably, involving the production of documents, hearing and third party, therefore the insertion of Section 42A may to some extent be advantageous to the parties but need to be revised again taking all requisite recommendation of the High Level Committee report.

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EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS (AMENDMENT) BILL, 2019 – A LIGHT AT THE END OF THE TUNNEL

- **ISHAN RANA**

CHAPTER I

1. INTRODUCTION

1.1 OVERVIEW

The government has prepared a draft bill proposing major amendments in the Employees' Provident Fund (EPF) and Employees' Pension Scheme (EPS). As per the draft bill, EPF members will have the option to switch their money from EPS to National Pension System (NPS). Another proposal is to replace the existing definition of 'wage' (in the EPF Act) with a new one as mentioned in the Code of Wages, 2019. The new definition of wages is likely to impact the EPF contribution of those employees whose basic salary is currently less than Rs 15,000. To protect the employees of companies undergoing liquidation under the Insolvency and Bankruptcy Code (IBC), amendments are also proposed to give priority to the payment of PF contribution over other debts. The Ministry of Labour and Employment has uploaded the copy of the preliminary draft of the Employees Provident Funds and Miscellaneous Provisions (Amendment) Bill, 2019 on its website seeking comments on August 23, 2019.

1.2 RESEARCH PROBLEM

The recent Supreme Court ruling on 'basic wages' for provident fund social security has led to considerable concerns and confusion across the employer community in India. The government has taken note of the same and accordingly proposed the Employees Provident Fund & Miscellaneous Provisions (Amendment) Bill, 2019 ("EPF Bill, 2019") to amend the Employees'

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Provident Fund & Miscellaneous Provisions Act, 1952 ("EPF Act"). Once enacted and made effective, the EPF Bill, 2019 shall amend the EPF Act and the impact of which will be studied in this paper

1.3 REVIEW OF LITERATURE

The website *Epfinda.gov*[381] talks about the Employees Provident Fund Organization ("EPFO") which has issued an inter-departmental circular dated August 28, 2019 restricting its officers from engaging in inspections in the absence of any *prima facie* evidence of any illegal practice by an employer of avoiding its provident fund ("PF") liability by splitting the basic wages. It continues by stating that these developments will considerably benefit the employer community in general across all industry sectors and is expected to significantly uplift the business morale.

The *Economictimes*[382] also contributes to the concerned topic. *Puneet Gupta*, Director, EY India says, "The draft bill proposes to allow the current and new EPF members to switch the contribution currently being made to the EPS to NPS". He adds by saying "The draft proposal of allowing EPF members to switch from EPS to NPS is likely to benefit them as pension amount you are eligible for under EPS scheme is calculated on the basis of a prescribed formula. Also, pension amount under the EPS scheme yields a comparatively meagre amount because contribution under EPS is capped. If a person switches to NPS, the amount of pension he/she will be eligible for will be as per the rules and regulations of the NPS scheme and on the basis of corpus accumulated. Further returns in case of NPS are linked to the market." He also says that "As per the draft proposal, the option of switching from EPS to NPS would not affect the existing regulation regarding EPF contribution. You will continue to receive benefits that you are currently getting on your EPF corpus. The rules relating to conditions and limit of wages for contribution to NPS are yet to be prescribed" He concludes by saying that "The proposal seeks to give priority to the payment of EPF contribution due over other debts. This would mean that money received on sale of the assets

[381] Epfindia,<https://www.epfindia.gov.in/site_docs/PDFs/Circulars/Y20192020/Vivekanand_Vidyamandir_717.pdf > Accessed 9th April 2020

[382] Economictimes,<https://economictimes.indiatimes.com/wealth/save/govt-plans-to-amend-epf-allow-switch-from-eps-to-nps-protect-pf-dues-in-case-of-bankruptcy/articleshow/71211777.cms?from=mdr> Accessed 9th April 2020

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of the stressed company will be first utilised to pay the EPF contribution and the balance will be used to settle other debts."

The article on *Nishithdesai*[383] talks about 'wages'. It started with the EPF Bill, 2019 which proposes to replace the definition of 'basic wages' with 'wages', bringing it in line with the definition of 'wages' under the Code on Wages, 2019[384]. Unlike the definition of 'basic wages' under the EPF Act, the definition of 'wages' under the EPF Bill, 2019 sets out an elaborate list of items that would be excluded from the definition of 'wages' such as statutory bonus, house rent allowance, conveyance allowance, overtime allowance, any commission paid to an employee, gratuity, retrenchment compensation etc. It added, in the event that the quantum of the excluded components exceeds 50% (or such other percentage as prescribed by the Central Government) of the total remuneration of the employee, the amount which exceeds the one-half or such percentage as notified, will be deemed as 'wages' for the purpose of the EPF Act. In other words, the Contributory Wages of an employee for the purpose of PF contributions is unlikely to be less than one-half of the total monthly remuneration of an employee.

In the *Budget Speech*[385] there was a recommendation from the Hon. Finance Minister to allow employees below a certain threshold of monthly income an option to decide whether to make PF contributions or not, without affecting or reducing the employer's contribution. In line with the above recommendation, flexibility has been proposed under the EPF Bill, 2019 to prescribe different rates of PF contribution for such periods and such classes of employees as specified.

The Hindu[386] also said The alignment of the definition of 'wages' with that of the Code on Wages, 2019 is also a prudent step from the perspective of ensuring consistency amongst various labour laws. However, the new definition of 'wages' is likely to continue posing challenges in terms of what allowances would be subjected to PF contributions. This question would become more pertinent especially in situations where the allowances are such that they have not been specifically

[383] Nishithdesai,<http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/india-consolidates-and-codifies-its-labour-laws-the-code-on-wages-2019.html?no_cache=1&cHash=a14540513a956668ba7323abdbd4d4c8> Accessed 9th April 2020

[384] Published in the Official Gazette on Aug 8, 2019

[385] Para 62 of the Budget Speech <https://www.indiabudget.gov.in/budget2015-2016/budget.asp> Accessed 10th April 2020

[386] The Hindu,<https://www.thehindubusinessline.com/economy/govt-move-to-define-wages-in-epf-act-may-lead-to-more-confusion-experts/article29527321.ece> Accessed 11th April 2020

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included or excluded under the new definition. They concluded with the example, items such as production bonus, presents given by an employer etc. (which were earlier excluded under the definition of 'basic wages') are not covered under the exclusions in the EPF Bill, 2019 and to that extent, could lead to continuing confusion as to whether such items would continue to stand excluded, although the limit of 50% of wages for PF contributions would come in handy.

1.4 SCOPE AND OBJECTIVES

The scope of the present study is to understand the implementation of the Employees Provident Fund & Miscellaneous Provisions (Amendment) Bill, 2019 which might amend the Employees' Provident Fund & Miscellaneous Provisions Act, 1952. The main objective is to analysis the key amendments proposed by EPF Bill 2019 and further analyse the EPFO's inter-departmental notice (august 28, 2019).

1.5 RESEARCH QUESTION

- What are the key amendments which are proposed by the new EPF Bill 2019 which might benefit the concerned parties?

1.6 HYPOTHESIS

- The proposed amendments helps employers see light at the tunnel's end.

1.7 RESEARCH METHODOLOGY

Considering the objective of the paper the 'qualitative research method' is applied. Qualitative research is generally more explorative, that is dependent on the collection of verbal, behavioral or observational data that can be interpreted in a subjective manner. The hypothesis will be either validated or refuted at the end of the paper.

CHAPTER II

2. EPF, NPS AND AMENDMENTS

2.1 Background

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The recent Supreme Court ruling on 'basic wages' for provident fund (social security) has led to considerable concerns and confusion across the employer community in India. The government has taken note of the same and accordingly proposed the Employees Provident Fund & Miscellaneous Provisions (Amendment) Bill, 2019 ("EPF Bill, 2019") to amend the Employees' Provident Fund & Miscellaneous Provisions Act, 1952 ("EPF Act").

Once enacted and made effective, the EPF Bill, 2019 shall amend the EPF Act in respect of the following significant aspects:

1. Replace the definition of 'basic wages' with 'wages' in line with the definition provided under the Code on Wages, 2019
2. Allow the government to fix varying rates of contributions for different classes of employees based on select factors
3. Introduce a 5-year limitation period for initiation of an inquiry for non-compliance under the EPF Act, commonly known as a section 7-A inquiry
4. Enable employees to opt for National Pension Scheme (NPS) in lieu of pension benefits under the EPF Act and
5. Significantly higher monetary penalties may be imposed in case of a non-compliance of the EPF Act by the employer.

Subsequently, the Employees Provident Fund Organization ("EPFO") has issued an inter-departmental circular dated August 28, 2019[387] restricting its officers from engaging in inspections in the absence of any *prima facie* evidence of any illegal practice by an employer of avoiding its provident fund ("PF") liability by splitting the basic wages.

These developments will considerably benefit the employer community in general across all industry sectors and is expected to significantly uplift the business morale.

The EPF Act is one of India's most important social security legislations for employees. It applies to every establishment having at least 20 employees ("Covered Establishments").

[387] Epfindia,<https://www.epfindia.gov.in/site_docs/PDFs/Circulars/Y20192020/Vivekanand_Vidyamandir_717.pdf > Accessed 9th April 2020

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As per the EPF Act, PF contributions are required to be made in respect of (a) all domestic employees of Covered Establishments who draw Contributory Wages up to Rs. 15,000 per month[388] and (b) employees who continue to hold a PF account based on their previous employment, irrespective of the Contributory Wages that they draw and (c) employees who fall under the category of International Workers under the EPF Act ("Eligible Employees").

As per the EPF Act, Covered Establishments are required to make PF contributions for all Eligible Employees, at the rate of 12% of the employee's monthly 'basic wages', dearness allowance, retaining allowance and cash value of any food concession ("Contributory Wages"), subject to a maximum cap of Rs.1800 per month for domestic employees.[389]

What constitutes 'basic wages' for the purpose of PF contributions has been a highly litigated subject in India. In this respect, the Supreme Court of India passed a landmark ruling on February 28, 2019 clarifying its position in relation to various allowances forming part of the Contributory Wages. Please refer to our legal alert on the 2019 PF Judgement. Although a review petition was filed with respect to the 2019 PF Judgment, the same has been dismissed by the Hon. Supreme Court of India on August 28, 2019.

Given the confusion surrounding the look-back period for compliance after the 2019 PF Judgement, the Ministry of Labour and Employment has released a notification dated August 23, 2019 containing a preliminary draft of the EPF Bill, 2019 proposing to make certain significant changes to the EPF Act.

2.2 Options from switching from EPS to NPS

Puneet Gupta, Director, EY India says, "The draft bill proposes to allow the current and new EPF members to switch the contribution currently being made to the EPS to NPS."[390]

As per the current laws, 12 per cent of the basic salary (can be capped at Rs 15,000) is contributed by the employee to his EPF account. The employer makes a matching contribution. Out of

[388] This limit was revised from INR 6500 to INR 15,000 in September, 2014

[389] No such cap for International Workers

[390] Economictimes,<https://economictimes.indiatimes.com/wealth/save/govt-plans-to-amend-epf-allow-switch-from-eps-to-nps-protect-pf-dues-in-case-of-bankruptcy/articleshow/71211777.cms?from=mdr> Accessed 9th April 2020

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employer's contribution, 8.33 per cent goes into EPS. Also, the EPS contribution is calculated on a basic pay of Rs 15,000 or actual basic pay whichever is less. Therefore, if basic exceeds Rs 15,000, then EPS contribution will be calculated as 8.33 per cent of Rs 15,000 which is Rs 1,250 per month.

Gupta says, "The draft proposal of allowing EPF members to switch from EPS to NPS is likely to benefit them as pension amount you are eligible for under EPS scheme is calculated on the basis of a prescribed formula. Also, pension amount under the EPS scheme yields a comparatively meagre amount because contribution under EPS is capped. If a person switches to NPS, the amount of pension he/she will be eligible for will be as per the rules and regulations of the NPS scheme and on the basis of corpus accumulated. Further returns in case of NPS are linked to the market."[391]

As per the draft bill, a person will also have the option of switching back from NPS to EPS. Gupta adds, "As per the draft proposal, the option of switching from EPS to NPS would not affect the existing regulation regarding EPF contribution. You will continue to receive benefits that you are currently getting on your EPF corpus. The rules relating to conditions and limit of wages for contribution to NPS are yet to be prescribed".[392]

2.3 Repayment of EPF dues over other debts

To protect the interest of employees of those companies who are undergoing the resolution process under the Insolvency and Bankruptcy Code 2016 (IBC), the draft bill proposes to give priority to the EPF dues of the company over its other debts.

Gupta says, "The proposal seeks to give priority to the payment of EPF contribution due over other debts. This would mean that money received on sale of the assets of the stressed company will be

[391] Ibid
[392] Ibid

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first utilised to pay the EPF contribution and the balance will be used to settle other debts."[393]

2.4 Amendment in the definition of wages to calculate EPF contribution

Another proposal in the draft bill is the amendment in the definition of 'wage'. This proposal is likely to affect those whose current basic salary does not exceed Rs 15,000 per month.

"As per the current law, for your EPF contribution, wage is defined as sum of basic pay, dearness allowance (DA) and retaining allowance. If your basic pay exceeds Rs 15,000 then your EPF contribution may be calculated only on basic pay. However, if your basic pay does not exceeds Rs 15,000 then all the other allowances (except for house rent allowance, overtime allowance, bonus, commission or presents by the employer) will also be included to calculate the EPF contribution. This follows a recent Supreme Court ruling clarifying the definition of

wages,"[394] says Gupta.

The new proposed definition of 'wage' for EPF contribution includes basic, DA and retaining allowance and all other allowances such as special allowance, LTA etc. except for certain specified allowances and benefits. For the purpose of calculation of EPF contribution, the limit of Rs 15,000 still remains. The excluded allowances and benefits, as per new proposed definition, are as follows:

a) Bonus payable under any law

b) Value of any house accommodation

c) Contribution paid by employer to any pension or provident fund and interest which may have accrued thereon.

d) Conveyance allowance or travelling allowance

[393] Ibid
[394] Ibid

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e) House rent allowance

f) Overtime allowance

g) Commission payable

However, specific allowances / benefits are proposed to be included for the calculation of EPF contribution if total of such specific allowances / benefits exceeds 50 per cent or other percent (which will be notified by the government) of total salary which is paid to the employee.

Gupta explains this with an example. Suppose your monthly salary is Rs 30,000. The break-up of your salary is as follows:[395]

Particulars	**Amount (Rs)**
Basic	16,000
HRA	8,000
Conveyance allowance	6,000

Now because the sum of HRA and conveyance allowance i.e. Rs 14,000 does not exceed 50 per cent of your monthly salary(50% of Rs 30,000), therefore, your PF contribution will be calculated using basic pay subject to the overall cap of Rs 15,000. Now if suppose, the break-up of your salary is as follows:

[395] Ibid

Particulars	Amount (Rs)
Basic	12,000
HRA	6,000
Conveyance allowance	12,000

As the sum of HRA and Conveyance allowance (Rs 18,000) exceeds the 50 per cent of your monthly salary (50% of Rs 30,000), therefore your PF contribution will be calculated by adding these two allowances to the extent the sum of these exceeds 50 per cent of the salary, under the Overall limit of Rs 15,000.

CHAPTER III

3. RESEARCH QUESTON

What are the key amendments which are proposed by the new EPF Bill 2019 which might benefit the concerned parties?

- **Key amendments proposed & related analysis – EPF bill, 2019**

1. Definition of 'Wages': The EPF Bill, 2019 proposes to replace the definition of 'basic wages'[396] with 'wages'[397], bringing it in line with the definition of 'wages' under the Code on Wages, 2019[398]. Unlike the definition of 'basic wages' under the EPF Act, the definition of 'wages' under the EPF Bill, 2019 sets out an elaborate list of items that would be excluded from the definition of 'wages' such as statutory bonus, house rent allowance, conveyance allowance, overtime allowance, any commission paid to an employee, gratuity, retrenchment compensation etc. However, in the event that the quantum of the excluded components exceeds 50% (or such other percentage as prescribed by the Central Government) of the total remuneration of the employee, the amount which exceeds the

[396] Employees' Provident Fund Act 1952, S. 2 (b)
[397] to be inserted as of the Employees' Provident Fund Act 1952, S. 2 (n)
[398] Published in the Official Gazette on Aug 8, 2019

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one-half or such percentage as notified, will be deemed as 'wages' for the purpose of the EPF Act. In other words, the Contributory Wages of an employee for the purpose of PF contributions is unlikely to be less than one-half of the total monthly remuneration of an employee.[399] Previously, while dearness allowance and retaining allowance were covered separately as part of Contributory Wages, these items have now been included within the definition of 'wages' itself.

2. Varying rates of 'employee' PF contribution: While the EPF Act enabled employees to make higher contributions (if they so desired), the EPF Bill, 2019 introduces a new provision[400] which enables the Central Government to specify the rate of employee contributions (which maybe lesser than 12%) and the period for which such contribution rates would apply for any class of employees, after making such inquiry as it deems fit, by way of a notification in the Official Gazette. In the Union Budget 2015-16,[401] there was a recommendation from the Hon. Finance Minister to allow employees below a certain threshold of monthly income an option to decide whether to make PF contributions or not, without affecting or reducing the employer's contribution. In line with the above recommendation, flexibility has been proposed under the EPF Bill, 2019 to prescribe different rates of PF contribution for such periods and such classes of employees as specified.

3. Limitation period and timeframe for inquiry: The PF inspectors are currently permitted to conduct an inquiry as necessary to (a) determine the applicability of the EPF Act to an establishment and (b) determine any amounts due from employers under the EPF Act or the schemes framed thereunder. The EPF Act does not provide for a limitation period. This essentially means that they can go back and conduct audits for a retrospective period,

[399] Nishithdesai,<http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/india-consolidateis-and-codifies-its-labour-laws-the-code-on-wages-2019.html?no_cache=1&cHash=a14540513a956668ba7323abdbd4d4c8> Accessed 9th April 2020

[400] Employees' Provident Fund Bill 2019, S. 6

[401] Para 62 of the Budget Speech <https://www.indiabudget.gov.in/budget2015-2016/budget.asp> Accessed 10th April 2020

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without any limit on the look-back period. The EPF Bill, 2019 proposes to introduce a 5-year limitation period,[402] from the date on which the dispute referred to in (3)(a) above is alleged to have arisen or the amount referred to in Clause (3)(b) above is alleged to have become due from the employer. The EPF Bill, 2019 also requires the PF authorities to complete/conclude such inquiries within a maximum timeframe of 2 years,[403] unless for reasons to be recorded in writing, to the Central Provident Fund Commissioner (CPFC) or such other authorized officer.

4. Enhanced monetary penalties & composition of offences: The EPF Bill, 2019 proposes to significantly enhance the monetary penalties for non-compliance of the EPF Act. For example, an employer who fails to make appropriate PF contributions shall be punishable with imprisonment extending up to 3 years and a monetary fine of Rs. 50,000 which is currently set at Rs. 5,000. Similarly, the EPF Bill, 2019 stipulates a monetary penalty of Rs. 100,000 besides imprisonment in cases where the employer has deducted the PF contributions from the employee's wages but not deposited the same, whereas the monetary penalty for this offence under the EPF Act is currently Rs. 10,000. It is interesting to note that the penalty amounts have not been revised since 1988 and accordingly the ten times increase from the previous amount.

5. Interestingly, the EPF Bill, 2019 also provides for composition of certain minor offences doing away with the need to undergo a complete trial for disposition of such offences. Accordingly, these defaults can be resolved by paying up the compounding amounts as specified.

6. National Pension Scheme: The EPF Bill, 2019 proposes to introduce certain new provisions[404] under the EPF Act which will enable the members (employees) to opt for

[402] Employees' Provident Fund Bill 2019, S. 7A
[403] Employees' Provident Fund Bill 2019, S. 1(A) of 7A

[404] Employees' Provident Fund Bill 2019 S. 16B and 16C

National Pension Scheme in lieu of the benefits available to them under the EPF Act. This requires the members to make an application in this respect to the CPFC or such other authorized officer and the central government shall by way of a notification on the official gazette, specify the manner in which the contributions shall be made to the NPS. An employee who joins the NPS shall be deemed to have exited from the Employees' Pension Scheme under the EPF Act, although such member shall have the ability to join back the Employees' Pension Scheme subject to certain conditions. The manner and method to exercise this option and transfer the accumulated amounts from one scheme to the other will be as prescribed by the Central Government.

- **EPFO's inter-departmental notice (August 28, 2019)**

As a result of the 2019 PF judgment, several employers started receiving inspection notices specifically quoting the 2019 PF judgment. The employer's PF contributions for the past 3 - 5 years were questioned by the regional PF officers, in order to ascertain if any allowances were omitted by employers for the purposes of PF contributions. In light of the same, the EPFO has issued an inter-departmental circular dated August 28, 2019.

By this new circular, the EPFO has directed its officers / inspectors to not initiate any PF inspection unless there is *prima facie* evidence to support such action. Accordingly to the EPFO, "there is no reason or justification to initiate roving inquiries into the wage structure" as a result of the SC Judgement. Accordingly, the regional PF offices have been directed by the EPFO as follows:

1. In cases where notices have already been issued by the PF department to employers without any *prima facie* evidence of arbitrary bifurcation of wages with the intent to avoid PF liability, such notices should not be pursued further; and

2. Any inspections or investigations should be carried out by the regional PF inspectors only after it receives the permission of Central Analysis and Intelligence Unit (CAIU) constituted by the EPFO and following the administrative guidelines and policy **only** in those cases where there is credible basis for forming a view that the employer has *prima facie* indulged in illegal practice of avoiding PF liability by splitting basic wages.

- **Additional Analysis:**

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After the 2019 PF Judgment, the financial liability for employers (for retrospective periods) especially in the case of international workers has been a matter of grave concern. While the liability for the past non-compliances will not be eliminated, the EPF Bill, 2019 will at least help bring about some method in the madness by introducing a fixed limitation period. The EPFO inter-departmental notice of August 28, 2019 is expected to go a long way in ensuring that employers are not subjected to any undue harassment in genuine cases. It is also hoped that the PF authorities consider introducing amnesty schemes which will provide employers an opportunity to rectify any past non-compliances without incurring significant monetary liabilities in the form of interest and damages. The introduction of a fixed timeframe for concluding the inquiry will also help ensure that the power vested with the authorities is not abused.[405]

The alignment of the definition of 'wages' with that of the Code on Wages, 2019 is also a prudent step from the perspective of ensuring consistency amongst various labour laws. However, the new definition of 'wages' is likely to continue posing challenges in terms of what allowances would be subjected to PF contributions. This question would become more pertinent especially in situations where the allowances are such that they have not been specifically included or excluded under the new definition. For example, items such as production bonus, presents given by an employer etc. (which were earlier excluded under the definition of 'basic wages') are not covered under the exclusions in the EPF Bill, 2019 and to that extent, could lead to continuing confusion as to whether such items would continue to stand excluded, although the limit of 50% of wages for PF contributions would come in handy. Given that some employers have already revamped their current practices in relation to the manner of making PF contributions in light of the 2019 PF Judgment, employers may need to re-analyse their CTC structure and wage components in light of the new definition once the EPF Bill, 2019 becomes law.[406]

Given that the EPF Act is expected to eventually be subsumed by the Code on Social Security, the government would be looking to quickly implement the proposed changes by way of the EPF Bill, 2019. In any case, the EPFO inter-departmental notice of August 28, 2019 has already provided a huge relief to employers.

[405] Supra note 13
[406] The Hindu,<https://www.thehindubusinessline.com/economy/govt-move-to-define-wages-in-epf-act-may-lead-to-more-confusion-experts/article29527321.ece> Accessed 11th April 2020

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4. CONCLUSION

The Indian government continues its thrust towards ease of doing business in India by introducing progressive labour reforms. The biggest take-away and relief for employers once the EPF Bill, 2019 is enacted would be the introduction of a much-needed limitation period under the EPF Act. Although it has time and again been argued that whenever a statute does not provide for a period of limitation, action by the authorities must be taken within a 'reasonable' period of time, there have been situations in the past where (section 7A) inquiries for PF non-compliances have been initiated against employers for extended periods, making it a nightmare for employers to produce relevant records.

The option to enable employees to choose between the NPS and the employees' pension scheme under the EPF Act is also a progressive step which will enable employees to make independent decisions with respect to their retirement savings keeping in mind the benefits that each of these schemes offer. It could indirectly lead to a healthy competition between the EPF and the NPS authorities to provide more competitive service for attracting and retaining their 'clientele'. We all look forward to the betterment of the Labour Legislations. As Abraham Lincoln said "*Labour is prior to, and independent of, capital. Capital is only the fruit of labour, and could never have existed if labour had not first existed. Labour is the superior of capital, and deserves much the higher consideration*".

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THE NEXUS BETWEEN HUMAN RIGHTS AND ACTIVE EUTHANASIA: IN INDIA AND USA

- APURWA SHAH

ABSTRACT

The practice of euthanasia has always been a conflict, between releasing a person from his sufferings or letting the person meet his natural end. It is not only a legal battle but also a moral one. The landmark judgment of the Supreme Court of India on euthanasia in the case of Common Cause (A Regd. Society) v. Union of India[407], has made the position of passive euthanasia evidently clear. However, active euthanasia is a practice which is still illegal in India due to the probable human rights violation it embodies. The problem which still exists is that what is the solution with a person who wants to end his life by practicing active euthanasia? Whether, it is a human right violation or giving that person a right to die with minimum dignity at his own will. A person has a right to live a life with at least minimum dignity and if this standard if falling below that minimum level, then a person should be given the right to end his life. On the other hand it can be said that euthanasia is not a right to die but rather a right to kill and the health-care providers have professional obligations that prohibit killing. This paper will thus include a detailed discussion on the problems and the violation of human rights if any, which the practice of active euthanasia entails and what could be the probable solution to such problems and to nullify the respective violations. Also, the paper will be a comparative study between the laws prevalent on active euthanasia in India as well as USA to give a better worldwide view.

Keywords: Euthanasia; Human; Rights; Life; India; USA.

[407] Common Cause (A Regd. Society) v. Union of India, 2018 5 SCC 1.

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I. INTRODUCTION

"All indignation is in vain if it is not based on knowledge of the facts and if it does not endure. If I do not stand up for myself, then who will? If I am only for myself, who am I? If not now, then when?"[408]

- L. Goldschmidt.

The word euthanasia has been derived from a Greek word 'Euthanatos', which is a combination of *eu* meaning 'well' and *Thanatos* meaning 'death'. Euthanasia refers to ending the life of a human abnormally by a deliberate action or by a deliberate inaction on the part of the terminally ill patient and thereby causing his/her death to end the patient's suffering. A practice cannot be said to be a practice of euthanasia unless the death is caused intentionally by an overt act or intentional omission. These acts or omissions can include non-commencement of any treatment that does not provide any kind of benefit to the patient or withdrawal a treatment which does not show a positive impact and is thus ineffective it or is either too burdensome or is unwanted. It may also include giving to the patient pain-killers which when given in a large quantity are seen to endanger the life of the patient. All the above-mentioned practices are a part of good medical practice which is endorsed by law, when they are properly carried out.[409]

Euthanasia has always been a conflict between life and death. Whether the Right to Life under Article 21 of The Indian Constitution also includes the Right to Die? Euthanasia has not only been a legal battle but also a moral one, for some it is murder for others it is salvation. A person has a right to live a life with at least minimum dignity and if this standard if falling below that minimum level then a person should be given the right to end his life. On the other hand it can be said that euthanasia is not a right to die but rather a right to kill and the health-care providers have professional obligations that prohibit killing. Euthanasia is inconsistent with the roles of nursing,

[408] Rita L. Marker, et al., *Euthanasia: A Historical Overview*, 2 Medical Journal Contempt Legal Issues 257 (1991).
[409] Sujata Pawar, *Euthanasia: Indian Socio-Legal Perspectives,* 15 J.L. Pol'y & Globalization 11 (2013).

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caregiving, and healing. Moreover with the rapidly advancing medical science it is very much possible that those ill today may be cured tomorrow.

As put forth by Justice Markandey Katju in the Aruna Shanbaug case, "*Euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today*"[410].The euthanasia family as it can be said, comprises of "physician assisted, active euthanasia, passive euthanasia, voluntary euthanasia, non-voluntary and involuntary euthanasia". The demarcation between active euthanasia and passive euthanasia has been described in detail in the landmark *Aruna Shanbaug Case*[411]. According to which, the practice of active euthanasia includes the use of a lethal substance or force to kill a person, for example, a lethal injection given to a person with terminal cancer who is in terrible agony.[412] Whereas, passive euthanasia includes acts like withholding the requisite medical treatment which the patient requires to continue living, removal of the heart-lung machine, from a person in a coma.[413]

Active euthanasia is also known as 'positive' or 'aggressive' euthanasia because in this specific steps are taken to assure that the patient dies without any pain, it includes injecting the said patient with some lethal dose of a substance, for instance 'sodium pentothal dose' which causes a person to go into a deep sleep in a few seconds, and after which the person instantaneously and painlessly dies in this induced deep sleep.[414]

Many a times active euthanasia is confused with physician assisted suicide, but it is crucial to differentiate between the two because in some countries euthanasia is illegal whereas physician assisted suicide is not. Thus, when it is a physician who is helping the terminally ill patient to kill himself then is it termed as 'Physician Assisted Suicide'. Thus, if the last act of causing the patient's death intentionally is performed by a third party then this is called the practice of euthanasia, but if it is the person who is suffering himself performs the last act, then it is termed as assisted suicide.[415]

[410] Aruna Ramachandra Shanbaug v. Union of India and Ors., (2011) 4 SCC 454, 454 (SC).
[411] *Id.*
[412] *Id.*
[413] *Id.*
[414] Amelia Mihaela Diaconescu, *Euthanasia*, 4 Contemp. Readings L. & Soc. Just., 474 (2012).
[415] *Supra* note 2.

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In USA, active euthanasia is illegal in all the states but physician assisted death is legal in seven states namely Oregon, Colorado, California, Hawaii, Montana, Vermont, Washington and DC.[416] These States do not use the term euthanasia, rather they use the term Physician assisted death.

The right to one's life is universally accepted as a fundamental natural right from which all other rights flow and therefore ending the life of a person actively by another person is considered to be a grave and severe violation of the most basic fundamental right. This is the reason why majority of the countries have not legalized active euthanasia even when a person requests to end his life by practicing active euthanasia. However, respecting the right to self-determination and the right to personal autonomy, some of the countries like India have read the Right to die with dignity as a part of Right to Life under Article 21[417] of the Indian Constitution.[418]

II. **LEGAL STATUS OF ACTIVE EUTHANASIA IN INDIA**

Euthanasia is an extremely sensitive area, as it is a decision revolving around the life and death of a person making it an important facet of Article 21 of The Indian Constitution in India. In India Right to Life is a Fundamental Right under Article 21 whereas Right to Die is not. Therefore, euthanasia is of an extremely important legal and moral significance. Article 21 of the Indian Constitution contains the basic human right which has a universal application. It provides for the Right to Life and personal Liberty. It is the basic fundamental right from which other rights emanates. Passive euthanasia is a practice allowed under Article 21 of the Indian Constitution which states, *"No person shall be deprived of his life or personal liberty except according to a procedure established by law."*[419]

It was made clear in the famous case of *Aruna Shanbaug* v. *Union of India,*[420] that withdrawal of life support from a terminally ill patient whose family consents to it can be allowed but under certain circumstances, and thereby giving guidelines that how and when passive euthanasia can be practiced. However, the court failed to lay down a correct position with respect to passive

[416] Soumya Karlamangla, *How California's Aid-in-Dying Law Will Work?,* LOS ANGELES TIMES, (May 12 , 2016), http://www.latimes.com/local/lanow/la-me-ln-end-of-life-option-act-qa-20160511-story.html# (Last visited: July 18, 2018).

[417] INDIA CONST. art. 21.
[418] Common Cause (A Regd. Society) v. Union of India, (2018) 5 SCC 1.
[419] INDIA CONST. art. 21.
[420] *Supra* note 2.

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euthanasia. Neither did it clarify the status of Right to die with dignity as a facet of article 21 of the Indian constitution. Thus, recently in the case of *Common Cause (A Regd. Society) v. Union of India*[421] a five-judge bench clarified this position and declared that Right to die with dignity is a fundamental right and is protection by Article 21 of the Indian Constitution thus declaring the practice of passive euthanasia as legal even without a legislation specifically providing for the same.

The court while scrutinizing the difference between active euthanasia and passive euthanasia stated that the most important aspect is 'foreseeing the hastening of death'.[422] The court referring the judgment of the US Supreme Court of *Vacco v. Quill*[423] affirmed the distinction on the basis of legal principles of 'causation and intention'. Thus, in cases where a patient dies due to the withdrawal of life supporting measures he will die because of the underlying fatal disease and not because of any overt act of the physician, whereas in the case of active euthanasia the patient is killed by the lethal medication he ingests. Also, the patients who reject the life supporting system do not do it with the intention of dying; rather they may have a desire to live without being attached to machines and free of surgery and unwanted drugs. In India active euthanasia is a criminal offence under either section 306[424] of the Indian Penal Code which provides punishment for abetment of suicide or section 307[425] of the Indian Penal Code which punishes attempt to murder. The court pointing out the difference between passive and active euthanasia states that the former is a mere withdrawal of the life support system from the patient whereas the latter includes a positive affirmative act.[426]

Active euthanasia also includes within its realm physician assisted suicide in which the drug or injection is administered by the patient himself and not the doctor. It is illegal in most of the countries except, "Canada, the Netherlands, Switzerland and the States of Colorado, Vermont, Montana, California, Oregon and Washington DC in the United States of America."[427]

[421] *Supra* note 10.
[422] *Id* at 83.
[423] Vacco v. Quill, 521 US 793 (1997).
[424] *Supra* note 23.
[425] *Id.*
[426] *Supra* note 10, at 64.
[427] *Supra* note 10, at 65.

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The distinction between the two types of euthanasia makes it clear that even though euthanasia is a practice which encompasses compassion for the other and to relieve the terminally ill patient from his painful suffering still not every kind of euthanasia can be allowed and legalized. If the practice of active euthanasia amounts to the killing of a person then such a practice will attract the provisions of criminal law as mentioned above and it will not only penalize the patient who wants to die but it will also lead to the doctors and physicians being exposed to the shamefulness of prosecutions and punishments. Thus even if a physician out of compassion tries to help a terminally ill patient he will end up in prison for a criminal act even if he did it in good faith. This is the very reason why active euthanasia is illegal and a specific legislation is required to legalize it.

However, it is astonishing to know that the Indian Parliament enacted The Mental Healthcare Bill, 2016,[428] which is aimed at helping persons with a mental illness. The act states that any person who attempts to commit suicide shall be presumed to be mentally ill at the time and thereby he cannot be punished under the relevant provisions of the Indian Penal Code, 1860. Apart from this it will be the duty of the government to provide the person with the requisite care and treatment. Section 115 of the Act states that:

"*Notwithstanding anything contained in section 309 of the Indian Penal Code 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 the said Code."*[429]

III. **LEGAL POSITION IN THE UNITED STATES**

USA is a federation of states and thus every state has a separate and distinct stance with respect to the practice of Euthanasia. However, the status of active euthanasia is that it is uniformly illegal in all states. None of the states has legalized the practice of active euthanasia but physician assisted death is legalized in the following American states of Washington, Oregon, Colorado, Vermont, Montana and California, and in Washington, DC.[430] Oregon was the first State in US to allow the doctors to prescribe lethal medications from the year 1998, after which the practice became legal in Washington, Vermont and Montana.[431]

[428] The Mental Healthcare Act, 2017, No. 10 of 2017.
[429] *Id.*
[430] *Supra* note 15.
[431] *Supra* note 8.

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In the states of Oregon and Washington, physician assisted suicide and any other form of aid to help a person commit suicide is still outside the purview of law and will amount to a criminal offence. In both the above mentioned states only self-assisted dying is permitted.[432] To clarify the position in United Stated it would be appropriate to refer to the case of *Cruzan v. Director, Missouri Department of Health*[433], a 30 year old woman from Missouri was in a permanent vegetative state, the law in Missouri requires "clear and convincing evidence"[434] of preference of the patient, thereby the Supreme Court of Missouri rejected the parents' plea to impose upon their daughter's physician a duty to withdraw her life support system. This decision was upheld by the United States Supreme Court since the patient's clear desire to terminate her life support was not present.[435]

Discussing the constitutionality of assisted suicide in the states the Supreme Court of US in the case of *Vacco v.Quill*[436]observed that when a patients' physician withdraws the life support system of a terminally ill patient, his intent is only to respect the wishes of the patient. On the other hand and completely opposite of the above view is when a physician ends the life of a patient which requires more than just an intention to respect his wishes, i.e. it will require an intention to kill the patient.[437] The court has simply differentiated between killing and letting die.

Talking about the legal framework on physician assisted death in different states in the US where it is legalized there is a general law that the person should have a terminal illness and must have a prognosis of six months or less to live, this is an essential condition and when a physician prescribes a lethal medication to such a patient to hasten death then the doctor cannot be prosecuted.[438] However, the specific method in each state varies; expect that it requires a prescription from a licensed physician approved by the state where the patients reside.[439]

[432] *Supra* note 10.
[433] Cruzan v. Director, Missouri Department of Health, 497 US 261 (1990).
[434] Supra note 10, at 33.
[435] *Id.*
[436] Vacco v. Quill, 521 US 793 (1997).
[437] *Supra* 10, at 35.
[438] *Physician-Assisted Suicide Fast Facts*, CNN USA, (Jun. 4, 2018), https://edition.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html (Last visited: Jul. 20, 2018).
[439] *Id.*

The origin of euthanasia in US can be traced back to the year 1997, where the United States Supreme Court in the case of *Washington v. Glucksberg*[440] ruled that the state law which bans physician assisted suicide does not violate the provisions of the US constitution.[441]Further that year the state of Oregon enacted the death with dignity act.

In Washington the Death and Dignity Act came into effect in the year 2009. This was followed by the famous case of Montana Supreme Court Baxter v. Montana[442], where the court asserted the Rights of Terminally Ill Act protects a physician who prescribes aid from liability.[443] In the year 2013 Vermont signed the Patient Choice and Control at End of Life Act into law.[444]

Further in the year 2015, the state of California took the first step to legalize physician assisted death when the governor signed the End of Life Option Act. In a letter to members of the California State Assembly, Brown wrote that he thought about his own death while considering whether to sign the bill. "I do not know what I would do if I were dying in prolonged and excruciating pain. I am certain, however, that it would be a comfort to be able to consider the options afforded by this bill."[445]

Thus it can be seen from the above stated facts how physician assisted death gained popularity in the respective states of USA and thus legalized it. However active euthanasia is still illegal in all the states in USA.

IV. CONCLUSION AND SUGGESTIONS

[440] Washington v. Glucksberg 521 U.S. 702 (1997)
[441] *Supra* note 50.
[442] Baxter v. Montana, 2009 MT 449.
[443] Kristine S. Knaplund, *Montana Becomes Third U.S. State To Allow Physician Aid In Dying*, AMERICAN BAR, Https://www.americanbar.org/content/dam/aba/publications/rpte_ereport/2010/february/te_knapland.pdf.authcheckdam. (Last visited: Jul. 20, 2018).

[444] *Supra* note 50.
[445] *Supra* note 50.

The debate whether active euthanasia should be legalized or not is a complex one. For some it is morally right and has opinion that active euthanasia should be legalized because every person has a right of self-determination and cannot be forced to live against their will if they are suffering from a terminal illness. The pro euthanasia group places heavy reliance on the principle of self-determination and personal autonomy whereby a person shall have a right to decide his/her own fate and thus should be allowed to decide if he wants to continue living or end his suffering. On the other hand, legalizing active euthanasia will be against the very principle of sanctity of life and violates the right to life which is the most basic and universally accepted fundamental right. However, it will not be wrong to say that legalizing active euthanasia will open a floodgate of litigations pleading for decriminalizing crimes like abetment to suicide and attempt to suicide.

The legalization of active euthanasia depends equally on the legal policies which are prevalent in the respective country because of which it is illegal in India, as abetment of suicide is a crime in India. Thus, if active euthanasia has to be legalized in India there will be the need for a specific legislation.

After studying the laws prevalent in USA and India, the researcher is of the opinion that India should take active steps to legalize physician assisted death in India, along with maintaining its stand on active euthanasia and keeping it illegal. As discussed above, Section 115[446] of the Mental HealthCare Act, 2017 already protects a person who attempts suicide and provides him with the requisite care. In the light of this the Parliament can take active steps to recognize the right of self-determination of the patients who are suffering from excruciating pain and feel the need to hasten the process of their death. It is only parliament who has the power to legalize physician assisted death because it is a penal offence.

The researcher after examining the position of active euthanasia in India and USA has come to the conclusion that the Supreme Court of India was right in keeping the act of active euthanasia illegal.

[446] *Supra* note 43.

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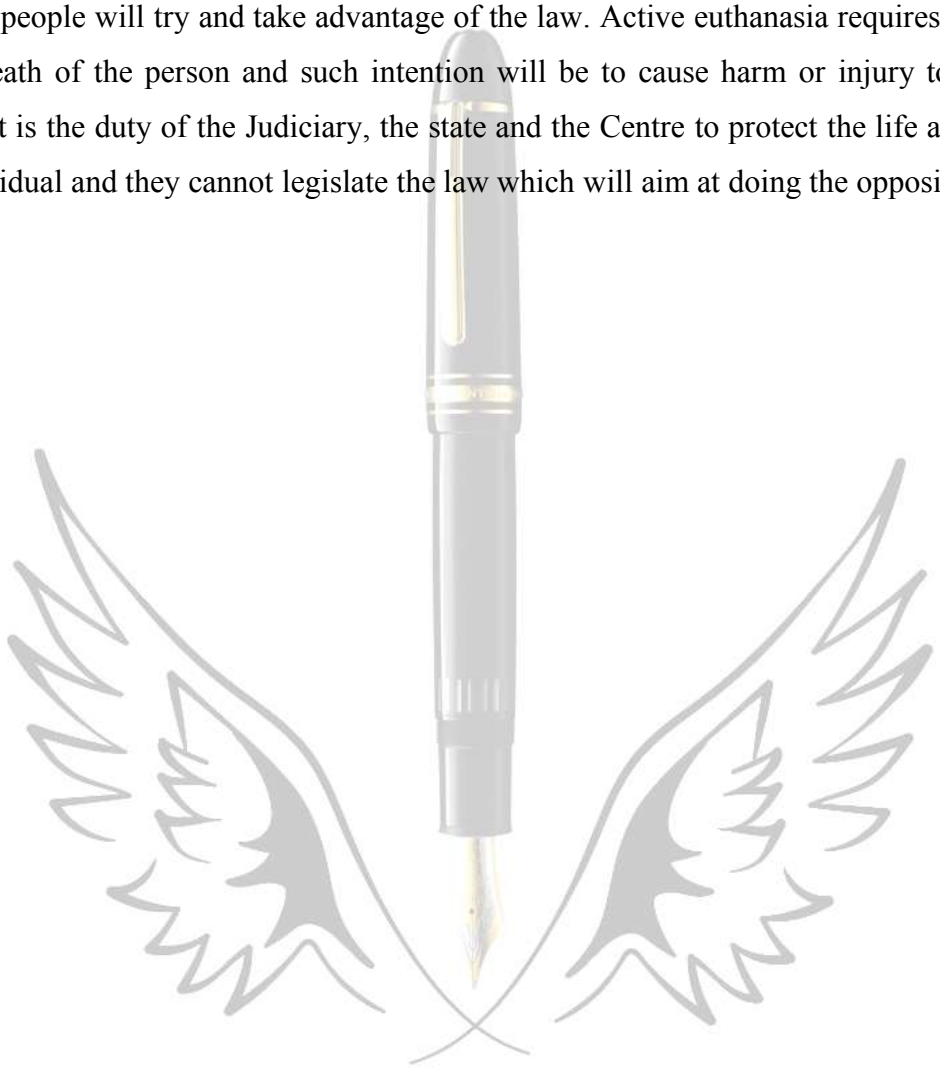
The reason being that legalizing active euthanasia would attract a lot of frivolous cases, where scrupulous people will try and take advantage of the law. Active euthanasia requires an intention to cause death of the person and such intention will be to cause harm or injury to the patient suffering. It is the duty of the Judiciary, the state and the Centre to protect the life and liberty of every individual and they cannot legislate the law which will aim at doing the opposite.



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ARTIFICIAL INTELLIGENCE, MACHINE LEARNING AND LAW

- YUKTA DUBEY & ADHITYA SANKAR

ABSTRACT

The paper focuses on Artificial intelligence and its various elements like machine learning, robotics and IP rights. With the growing capabilities of digital era the solution of every problem is at our fingertips and so is the the possibility of committing any crime. Things have all become very easy today in advanced technological lifestyle. The technology being used for making things easier to finding legal remedies instead of moving to the court is not a bad idea. The use of technology will fasten the pace of justice to the common people unlike the slow working and lengthy procedures of the judiciary. It will convince the people to update themselves to the ever-growing technological usage and adapt it.

Artificial Intelligence is an area where humans develop the computer science and create intelligent machines that are going to work better and faster than the human brains. These intelligent computers will be used further for the invention of other machines, art etc.

Keywords: Artificial Intelligence, robotics, computer science, intelligent, judiciary.

INTRODUCTION

According to Stephen Hawkins "*I believe there is no deep difference between what can be achieved by a biological brain and what can be achieved by a computer. It, therefore, follows that computers can, in theory emulate human Intelligence and exceed it"*

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Artificial Intelligence refers to the ability of the machines to think analytically, using concepts that the humans have inbuilt in them. Humans have put in tremendous of effort in order to make them self capable. Artificial Intelligence is an area where the humans will be developing the computer science and create intelligent machines, that will be developed by the human in order to work like humans. The computers AI will have the same capacity as that of a human brain and may be more.

AI has been existing from the human efforts and the humans have made efforts in improvising it to the best. Like the huge camera's used before have now turned into handy small cameras, the telephone that was huge and complicated to used with a number of wires and now turned into wireless mobile phones AI has evolved, it has changed from complicated to basic, it might be because people today are more tech savy and can easily adapt such machines, in order to make their work easy.eg. AI being used by google to give us the best possible results, everytime we use Siry or google audio it uses natural language processing and speech recognition so Artificial Intelligence is one of the biggest breakthrough in the 21st century which will give us the power to probe the universe and our humanity with a different approach. The AI machines today have the capacity of creating, making new, something original that was never made before. So will the AI's have the IP rights over their exclusive products?

ARTIFICIAL INTELLIGENCE

Artificial Intelligence was first coined in 1956 by John McCarthy, a scientist considered to be the father of AI. According to him AI is *"the ability of a digital computer or computer controlled robot to perform tasks commonly associated with intelligent beings."*[447]

According to Raquel Acosta "it was the notion of a program, processing and acting on information, such that the result is parallel to how an intelligent person would respond in response to similar input"[448]

[447] Prof. A. Lakshminath and Dr. Mukund Sarda, Digital Revolution and Artificial Intelligence- Challenges to Legal Education and Legal Research, CNLU LJ (2) (2011-2012)
[448] Raquel Acosta, Artificial Intelligence and Authorship Rights, Harvard Journal of Law and Technology (Feb 17, 2012)

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AI challenges the one sacred notion that intelligence and creativity is the existing preserve of humans today the intelligence of human is used to make the Artificial machines which create or invent machines further. This is all because of the human intelligence first.

In order to understand that the outcome of the AI is because of its own intelligence or algorithms and commands by humans Sir Alan Turing proposed a test '*Turing Test*"[449] "*this test called users to converse with a machine/human in a text only format, and then suggest whether they believed they communicated with a human or a machine."*[450]

To understand how AI works it is important to understand the some of the important elements like machine learning, the algorithms used, neural networks etc. The backbone of Artificial Intelligence is machine learning i.e. making the machines learn, based on the human knowledge and making decisions accordingly. Machine learning can be used by AI machines by two ways, by the use of algorithms to find meaning in random and unordered data and the second part is to use learning algorithms between that knowledge and improve that learning process. The learning algorithm is something that enable the machine learning and promotes Artificial intelligence. The learning algorithm powers the computer to learn and be intelligent. Machine learning is about having an input data and we find some algorithm to find the meaning of that data and in the future we use neural networks to improve the whole process.

The overall goal for machine learning is to improve the machines performance on certain tasks these tasks can be anything from inventing new machines to translating languages. With the usage and time the learning process of the machines increases rapidly, it is because of the neural networks of machine learning. The human have attempted to put this process in the computer where the neural network interact with each other towards any human input, which they would decipher through algorithm and deliver the result. These neural networks are more like a human brain which are made up of neurons and has tiny things that communicate with each other in order to process information and that's how the human brain works and we act intelligent. The biological neuron and artificial neuron perform the same function but have certain similarities and differences. Due

[449] Alan Turing, Computing Machinery and Intelligence, 59 MIND 236, 433-60 (1950)

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to these neural networks in AI the information becomes more accurate and is delivered faster, it is somewhat same to that of human mind.

Some examples of neural networks in machine learning are GOOGLE self driving cars these cars differentiate between different kinds of cars, they use image processing and neural network to process the differentiation and also the laser and ultrasonic sensors that enable the cars to form 3d models of car surrounding so that the car can navigate safely without any lag.

FUTURE WITH AI

Today the usage of AI is impeccable and compared to other times it is at its peak. AI mimics the natural intelligence of the human beings by learning, reasoning, or making decisions. Today the companies use AI in order to analyze data, perform document review, to wade through voluminous information, to interpret contacts, and to perform legal research in order to be cost and time effective. According to Thomson Reuters "*over 60% of respondents believe that usage of AI will be mainstream within the next 10 years, and 21% believe it will be within the next five years."*[451]

Today AI technology like IBM and ALPHAGO are AI machines that are being used to defeat the world champions that show jeopardy[452], "*the launch of self driven taxi services starting its first trial in Singapore called the NuTonomy, video games that adapt to the behavior of players are now common."*[453]

Some of the AI'S that have created history are**:**

[451] Thomson Reuters, Legal Department 2025: Ready or not : Artificial Intelligence and Corporate Legal Departments 11(2017)
[452] Daniela Hernandez & Ted Greenwald, IBM Has a Watson Dilemma, WALL ST. J., Aug. 11, 2018
[453] Alan Ohnsman, Waymo Shifts to "Industrializing" Self-Driving Tech as Robotaxi Launch Nears, FORBES (Sept. 6, 2018)

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- Deep Blue chess playing AI machine developed by IBM by chip test project defeated the world chess champion Garry Kasparov in 1996 under the tournament rules
- Google created DeepMind's AlphaGo, AI machine could play the most complex board game Go. The machine learnt to play the game in 3 days. And then the match was played between the AI machine and the South Korean Go Champion Lee Sedol. And AlphaGo won the match straight.
- Ai-Da first ultra-realistic humanoid artist,is an AI machine, the robot does not imitate or mimic others work, but takes picture with its camera and by making autonomous and impredictable decisions, draws original paintings from those clicked pictures. Ai-Da replicated the work of Rembrant who is considered one to be the most renowned artist who died centuries ago, there were several initiative take to replicate but failed miserably.Ai-Da created Rembrandt's portrait just by analyzing data on how Rembrandt's work looks and felt like.
- Sophia is a humanoid robot which was granted Saudi Arabian citizenship in 2017. The first AI machine to have a citizenship of any country.

AI will not only make small changes in the future but will make tremendous change.The power we have of AI is empowering but also humbling we humans are capable of making machines that will think and work like humans but as Stephen Hawking has stated that the autonomy of AI can diminish the worth of human thinking and invention. One should also not forget that AI will never be able to replace the biological intelligence yet it might will enhance our future. With the increase in the use of AI there will be a lot of savings of time, reduction in the cost and in the mitigating risks.

INTELLECTUAL PROPERTY OF AN AI

Artificial Intelligence has gain so much momentum in todays world, everyone irrespective of their age and need are becoming technosavvy. The only reason is that is makes our life much easier and the scope of modernization increase with its use. There is no denial to the fact that in the future

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these AI technologies will be the reason behind marvelous invention and that too without any human interference.

If these AI in the future will be inventing and creating new product the import question is who gets to keep the IP rights, the inventor of the AI machine or the AI machine itself?

For this different countries and organizations have set their own definition of AI machines and their domain for Intellectual Property Rights.

According to WIPO "*The world Intellectual Property Organization (WIPO) identified the existence of AI and propounded three categories of AI, i.e., expert systems, perception systems, and natural-language systems."*[454]

Expert systems are the programs that solve problems in specialized fields of knowledge, such as diagnosing medical conditions, recommending treatment, determining geographical conditions etc.[455]

"*These are also used for creative purposes such as producing art and other such works. This system gathered legal attention when a computer authored work was denied copyright by the Registrar, on the grounds of indeterminate legal status of works created with the aid of computers."*[456]

"*Perception system are the systems that allow a computer to perceive the world with the sense of sight and hearing. This is used by topologists, word context experts, etc."*[457]

Lastly, "*a natural language program is meant to understand the meanings of words, requiring a dictionary database. What is noteworthy is, the system takes into consideration different grammatical and textual contexts, to provide a semantic analysis."*[458]

[454] A. Johnson-Laird, Neural Networks: The Next Intellectual Property Nightmare? The Computer Lawyer 14 (March 1990)
[455] Id.
[456] Annemarie Bridy, Coding Creativity : Copyright and the Artificially Intelligent Author, STAN. TECH. L. RE. 5(26,2012)
[457] R. Kurzweil, The age of intelligent machines, 272-275 (MIT Press:1990)
[458] R. K Kurzweil, The age of intelligent machines, 272-275 (MIT Press:1990)

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The use and relevance of AI might be realized today but the question of IP rights was raised long time back. The use of AI systems became so prevalent that in 1960's, people wanted to procure protection on the outputs. However the 1965 denial of copyright to a literary work by an AI machine, gave very bleak hopes to the aspirants. But the debate did not end, and reached the courts for Intellectual Property rights. Today amendments are being made in order to make the laws inconsistent with the society. So when AI and IPMrights are considered the laws will have to change not today may be but in the coming decades. The law will have to change as the emergence of AI in the society. Law is suppose to look behind the things in order to make rules that are appropriate and does not violate anything in the society.

For providing IP rights to the AI it is important to consider some of the principles of law like the principle of stare decisis[459] which will change the whole face of law on Artificial Intelligence, This principle obligates the court to decide today's matter by thinking or looking at what was decided yesterday. When the court rejected the plea of granting copyright to an AI machine in the 1960's it would have some contention by both the sides and then the judgment, all these contentions and judgments are kept together and seen if relevant in today's world. The possibilities of changing the judgment or having the same judgments depends on the subject of the matter.

To grant IP rights to AI the features essential are:

- AI machines have to be creative i.e. the machines should be able to create new product, a product of their own
- The AI machines have to be autonomous i.e. they must be able to execute high level tasks with limited or no human intervention.

[459] Stare decisis is a legal doctrine that obligates courts to follow historical cases when making a ruling on a similar case

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- The AI machines must have rational intelligence and enable them to mimic human perception and cognitive abilities
- The AI machines are capable of learning which will allow them to continually gather data and feedback and process these to improve their ability.

AI machines have the ability to data processing that is learning from that data and make decisions based on it i.e. the AI machines are create layers of knowledge that did not exist before. So the AI machines are creative, autonomous and have rational intelligence from data processing, so IP rights can be given to the AI machines

IP Rights and different countries and organizations

The World Intellectual Property Organisation (WIPO) has defined AI as *"to the unique, value-adding creations of the human intellect that results from human ingenuity, creativity and inventiveness"*.

Intellectual Property laws are "*the sets of law that recognizes and protects products of the human intellect by granting to inventors and creators a legal right to exclusively control the commercial exploitation of their creation*."

IP laws grant property like rights over new knowledge and creative expressions of mankind. It allows us to control the product that we make with our intelligence.

It gives exclusivity to the person making the technology that for certain period of time no other person can make that same technology without referring to the inventor. So the cycle of Innovation and then it being protected by Intellectual property rights and economic reward goes on. The incentive also reward the huge investments of resources that go into Research and Development which had played a vital role in the continued progression of technology.

There are four forms of IP rights:

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- Patents, the exclusive rights granted over inventions that bring a new way of doing something
- Copyright, the exclusive right granted to creators over their creative works like literature, artistic, music etc.
- Industrial Designs, exclusive rights to a aesthetic designs of products, 3D designs and patterns.
- Trademarks, deals with any sign, name, or anything capable of distinguishing the goods or services of one enterprise from those of other enterprises.

ARTIFICIAL INTELLIGENCE AND COPYRIGHT

Copyright is one of the most integral part of IP rights. Copyright includes two important factor that the law recognizes, first is the originality of work one has created, second is ownership, someone who has taken the initiative to come up with this particular work. "*This rationale and justification behind this was the notion that the author is an originator merged with Locke's economic theory of possessive individualism."*[460]

In the US to qualify as a work of "authorship" a work must be created by a human being. This can be cleared from the incident when selfies were taken by the monkey named Naruto. In the case of Naruto el al v. David Slater[461] the question before the court was whether Naruto can have the ownership over the photographs? Because technically whoever clicks the picture is the owner of the picture.

In this case the US court held that Naruto cannot assert a right to copyright as animals are not humans and accordingly they do not have any standing right in the court of law, Naruto will not get the copyright over the selfies nor he can sue for copyright infringement.

[460] Leenheer Zimmerman, It's an Original : In pursuit of Copyright's Elusive Essence, 28 COLM. J. L. & ARTS 187, 194 (2005)
[461] Naruto v. Slater. No. 16-15469 (9th Cir. 2018)

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In the UK they have expanded the scope of copyright protected work to expressly include the computer generated work. According to the laws in UK, Computer generated works are "works generated by computers in circumstances such that there is no human author of the work."

"The author of such computer generated work is deemed to be the person "by whom the arrangements necessary for the creation of the work are undertaken"[462]

So in UK the IP rights are given to the AI machines when the work is original and was made by the machines entirely without any human interference.

In Nigeria in legal theory, *"a person is any being whom the law regard as capable of rights and duties. These are the only two kinds of person distinguishable as natural and legal"*[463]

So according to the laws the Artificial Intelligence lack legal personality and cannot be the authors of their work irrespectice of being creative, autonomous or make something without any human interference.

One of the contemporary areas of AI's applicability is creation of literary works, the study of copyright in light of AI's becomes relevant. This can be analysed by various case laws. In the landmark judgments of Burrow gilles Lithographic Co. v. Sarony[464]. Bleistein v. Donaldson Lithographing[465] and Alfred Bell and Co. vs Catalda Fine Arts.[466]

1. Burrow Gilles Lithographic Co. v. Sarony

This is one of a landmark case where the question was whether a copyright protection can be granted to a photograph. This case addressed the dichotomy between creative and mechanical

[462] Section 178 of uk Copyrights, Designs and Patents Act, 1988.
[463] MTN Nigeria Communications Ltd. V Emegano (2016 LPELR 41090)
[464] Burrow gilles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)
[465] Bleistein v. Donaldson Lithographing, 188 U.S. 239 (1903)
[466] Alfred Bell and Co. vs Catalda Fine Arts, 191 F.2D 99 (2D Cir. 1951).

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labor. The court discussed the possibility of granting copyright protection to a product which is the output of a machine. The court, by holding that purely mechanical labor is per se not creative, narrowed the scope of their protection.[467] Therefore if we take this in a very strict and narrow sense, then granting copyright to the AI will be difficult.

2. Bleistein v. Donaldson Lithographing

In this case the question was as same as that of the first case. In this case the court differentiated between a human work and that of an artificial work. Justice Holmes, writing for the majority, delineated the uniqueness of human personality and stipulated the same as a prerequisite to a copyright.[468] The court by using the words 'something irreducible, which is one man's alone' which meant that there was no scope for anything that was not a product of man's creativity.[469]

3. Alfred Bell and Co. vs Catalda Fine Arts

Its one of the major judgments because it took a softer approach towards copyrights being adopted. The court lowered the standard for originality and held that unintentional or accidental variations may be claimed by an author as his or her own. This judgment therefore was a respite to people claiming copyrights for work generated by AIs as iit wasn't copied, despite it being generated through certain programming and algorithms. These three judgments, to some extent, clear the ambiguity that prevails around grant of protection to AI systems. However, a lack of definitive stance still affects the prospective right holders.

AI AND PATENTS

AI as discussed is used extensively by all in order to save time and energy i.e. simplify the execution of basic functions of human beings. Today AI have been enabled to learn by themselves

[467] Burrow Gilles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)
[468] Bleistein v. Donaldson Lithographing, 188 U.S. 239 (1903)
[469] Id.

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and perform functions which creates a higher chance for them to invent something, unlike the time when machines were only working based on simple calculations and algorithms**.**

John Koza pioneered AI genetic programming which had the capability of solving complex engineering problems with virtually no human guidance. It was built over 1000 networked computers which had the ability to create new inventions that outmatch human experts. It is called the Invention machine created in 1994. This AI machine was the first to creat the first crossed bristle tooth brush. John Kazo had put in data from the existing tooth brushes and the machine processed the data and came out with the crossed bristle brush. For this invention John Kazo got the Patent right but it was not his invention, it was the machines processing and data analyzing which came up with this brush.

For any invention the patent can be granted or not it has to pass the patentability criteria which are to possess novelty, an inventive step, and be capable of industrial application.[470] The biggest challenge for obtaining IP Rights for any invention by the AI involves the satisfaction of the three step test. Novelty can be proved by proving that the invention is different from what exists today. One of the most important contention that the patents are provided to the inventors in order to protect their attachment to the invention, and AI lacks any kind of attachment to its invention and so there in no point of proving patents to their invention.[471]

In the US the inventor is defined to mean "the individual or a set of individuals collectively who invented or discovered the matter of the invention."[472] This definition eliminates an inference which supports the premise that legislative intention in the United States sought to include inventions or rather the possibility of inventions being made by anyone besides humans.[473] The European Union made an attempt seeing the increasing demand of AI systems in invention process. It encouraged the nations to expand their national laws generally, to accommodate copyrightable

[470] The Patents Act, Section 2(1), 1970 (India); The Patents Act, Section 2(ja), 1970 (India); The Patents Act Section 2 (ac), 1970 (India).
[471] Ryan Abbot, I think, therefore I invent: Creative Computers and the Future of Patent Law, 57 B.C.L. Rev. 1107 (2016)
[472] Consolidated Patent Laws, Section 100 (f), U.S.C 35
[473] Jason Lohr, Artificial Intelligence drives new thinking on Patent rights, Lime Green, IP

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works produced by computer and other devices, under the category of 'own intellectual creation'.[474]

According to the U.S. laws AI system is not an inventor only human beings are inventors and so humans can only be granted the patent right. In case the AI machine invents something like in the case of John Koza, the patent right will go to the inventor of that AI machine.

In the UK, the act of an "inventor" in relation to an invention means the actual deviser of the invention and "joint inventor" shall be construed accordingly if the number of people involved is more. The word actual deviser means that anyone including the machines, if they create anything patents right will be given to it.

IP system that we have today are not sustainable, the essence of this law to reward the creator is not present, it is practiced in the most wrong way possible, the creator of the AI machine are taking rights over the products that are created by the AI machines.

Giving IP rights is an initiative taken in order to acknowledge creativity exhibited by AI systems, while producing poetry, artwork, inventions etc., due regard must also be paid to include inventions and application of patents by AI systems and robotics. Courts deny patents to programs simply on the ground that what they perform is mechanical rather that inventive.[475]

Artificial Intelligence basically is the creation of human mind and the law confers on those all creation that are the creation of human brain, property like rights that protect those creation from being commercially exploited, so artificial intelligence and intellectual rights is not a possibility but in future will be the need of the hour. Without IP Laws innovation will be stifled. Collaborative form of Patent should be granted for the inventions of AI as this would include a human element in the functioning of the AI. But acknowledging the fact that computer as inventors along with

[474] Draft Report with recommendations to the Commission on Civil Law Rules on Robotics, European Parliament (2014-2019)
[475] Bilsk v. Kappos, 561 U.S. 593 (2010)

human counterparts[476] this cannot be taken into consideration as AI lack 'legal personality' in most of the legal system. The IP rights will help in managing the rights and obligations of the invention of AI associated with patents and copyright.

CONCLUSION

Artificial Intelligence will improve continuously while time and expense pressure on billing attorneys will increase. It is evident today that in a couple of decades Artificial Intellignec will surpass human intelligence in terms of performing functions, which uncontrolled, could pose challenges as to the manner in which these AI systems control and manage their own destiny.[477] Artificial Intelligence and its applications will likely have far-reaching effects on human life in the years to come with companies like GE, IBM, Apple etc. ALL the companies take advancing attempts towards revolutionizing technologies related to providing software solutions and sophisticated technologies. The position of AI and its right today is problematic, giving IP rights to the work generated by AI machines. But it is important to streamline the current laws and guidelines in order to grant patents and copyrights to the AI inventions. It will be a great step towards the technological future.

[476] Ryan Abbot, I think, therefore I invent: Creative Computers and the Future of Patent Law, 57 B.C.L. Rev. 1079, 1095 (2016)
[477] Draft Report with recommendations to the Commission on Civil Law Rules on Robotics, European Parliament (2014-2019)

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HENRY VIII CLAUSE - PERTINENCE TO CONTEMPORARY ADMINISTRATIVE LAW

- **ASHMITA MITRA & AMULYA BAID**

ABSTRACT

With the shift of India form Laissez-faire or Police State to a Welfare State, the burden on it has increased manifold times. The responsibilities if to be taken alone by the state will lead to an over-burdened condition of the legislative leading to its inefficiency. To overcome this situation legislative powers are delegated to executive authorities to fill in the lacunae and better administer the law. In the period of 1973 to 1977 the Parliament of India passed as many as 302 laws and in the same period not less than 25,414 statutory orders and rules were passed showing the immense delegation of powers to the administrative bodies. Delegation can be of many types including, title-based delegation, subject-based delegation, etc. Sometimes delegation can also cross the permissible limits of it. The form of excessive delegation in the name of removal of difficulties which allows changes to be made in the Parent Act is called the Henry VIII clause. Although there is no fixed definition as to what constitutes Henry VIII clause, this clause faces an immense stigma. If one out rightly denies the need of the clause in recent scenario then it can pose as a problem. However, the nomenclature of Henry VIII as it is a questionable issue. Through this paper the authors analyse the need for Henry VIII clause in the current scenario, and also examine the stigma behind the clause.

CHAPTER-I

OVERVIEW

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1.1 INTRODUCTION

The legislature's right to delegate has been debated multiple times in Indian courts; the increasing complexity of the administration has significantly highlighted its need. Although delegation of powers is permissible and recognised by the courts now, the limit of this permissibility is a questionable issue and there exists an eminent need to keep a check that this delegation does not turn to executive autocracy. One of the finest examples of executive autocracy can be identified in the 16th century under the rule of Henry VIII who enforced his will and got any difficulty that came in his way removed by using the instrumentality of a servile Parliament. Thus, such excessive delegation is named after the aforementioned king Henry VIII and is called the Henry VIII clause. However, with the increase in complexity of the society time and again there exist situations for the executive to remove difficulties from statutes while implementing it. With the shift of India form Laissez-faire or Police State to a Welfare State, the burden on it has increased manifold times. The authority that the state has in turn has increased and the state is expected to deal with problems relating to economic and social restoration. These responsibilities if to be taken alone by the state will lead to an over-burdened condition of the legislative leading to its inefficiency. To overcome this situation legislative powers are delegated to executive authorities to fill in the lacunae and better administer the law. Excessive delegation can lead to executive autocracy whereas delegation if not allowed will result in the collapse of the government. In both the broad and narrow terms whether it comes under what is called Henry VIII clause and whether Henry VIII clause in certain cases can come under the ambit of permissible delegation is a question to be looked into.

CHAPTER-II

2.1 RATIONALE

Although there is no fixed definition as to what constitutes Henry VIII clause, nevertheless the term faces an excessive amount of stigma and is hugely criticised. Denying the need for Henry VIII clause entirely can serve as a problem for the state. Though it is vehemently criticised as a tool for executive autocracy, it might in certain situations provide the state with adaptability. Due to the increase in administrative complexity and burden on the legislature, it is inconceivable to expect the legislature to be aware of all the difficulties that may arise while implementing a certain

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act. The executive has to be empowered with a degree of responsibility for removing such difficulties and therefore there arises a need for narrow Henry VIII clause. Also, in exceptional cases of natural calamities or emergencies in the state, the implementation of the statute is drastically affected and the existence of broad Henry VIII clause can be beneficial for the state. These issues will be looked into.

2.2 LITERATURE REVIEW

John Locke, in a famous passage in the Second Treatise of Government opined that, "The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands."[478] This significantly defines the position of the maxim, *delegatus non potest delegare*, i.e. a delegate cannot further delegate, thus as the parliament works under the delegated power of the citizens of the country, it cannot further delegate its powers. But the increasing complexity of the modern administrative process has made it a mandate to delegate legislative powers to the administrative authorities, with increasing burden on the State it is rather unrealistic to assume that the Parliament of India will be capable to function properly without any powers of delegation conferred to it. If so was the case, it would lead to an over-burdened non-functionary Parliament.[479] In the period of 1973 to 1977 the Parliament of India passed as many as 302 laws and in the same period not less than 25,414 statutory orders and rules were passed[480] showing the immense delegation of powers to the administrative bodies. This, however, dilutes the principle of a representative government that legislature cannot delegate the powers to make laws[481] but in today's scenario it is now an absolute necessity. But throughout time, the limits of permissible delegation have always been a questionable issue. Through a plethora of cases and judicial decisions the conclusion can be reached that essential legislative powers cannot be delegated and the delegated authority cannot change the legislative policy lay down by the

[478] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 141 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690). Retrived from yale journal the paradox of parliamentary supremacy < https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4907&context=ylj> accessed on 20 March 2020.
[479] IP Massey, *Administrative Law* (9th edn, EBC, 2017) 80.
[480] ibid
[481] Pennsylvanian case (1873) 71 Locke's Appeal 491, 497.

parliament.[482] This idea of what is essential and what is merely incidental has been debated by the courts but in the case of West Frasers Mill ltd[483]., the court held that "Delegating decision-making takes away powers from our legislatures and undermines democracy." Thus, the rule against excessive delegation of legislative authority is a necessary postulate of the sovereignty of people.[484] There are many kinds of delegated legislation, which include title-based delegation, purpose-based delegation, discretion-based and nature-based delegation. The exceptional form of nature-based delegation is popularly nick-named as Henry VIII clause. A historical perspective of this clause shows that it was originally contained in the Statute of Sewers. At that time, the clause on the Executive (Commissioner of Sewers) , the powers to enact rules having the effect of legislation. Later, the Statute of Proclamations allowed the King (the Executive) to issue proclamations having the force of a statute. Both the statutes were in prevalence during the reigns of an autocratic ruler, King Henry VIII. The King asserted his powers in a purely authoritarian manner & the provisions as per his subjective choice and modified the statues according to his whims and demands[485]. He is therefore described as despot under the forms of law.[486] Therefore even today, any legislative clause that tries exceptionally broadening the horizons of power conferred on the executive is termed as the Henry VIII clause as a personification of the despotic king and such clauses are held to be ultra vires of the Constitution. But the problem with this is that there exists no acute definition of what is Henry VIII clause and therefore any exceptional delegation or delegations that minutely broaden the powers of administrative authorities in sometimes confused as Henry VIII clause and nowadays Henry VIII is compared to a popular derogatory slogan and not an analytical tool.[487] In 1997 the Queensland Scrutiny of Legislation Committee carefully considered the scope of the term "Henry VIII clause" and decided that a broad "alteration of scope and effect" definition was misconceived because all subordinate legislation

[482] Delhi laws act case 1912 re, AIR 1951 SC 332, para. 388: 1951 SCR 747.
[483] *West Fraser Mills Ltd. v Workers' Compensation Appeal Tribunal, et al* 2016 BCCA 473 at para 59
[484] CK Takwani *Lectures on Administrative Law* (6th edn, EBC, 2018) 89.
[485] Henry VIII Clauses & The Rule of Law, RULE OF LAW, Institute of Australia, <http://www.ruleoflaw.org.au/wpcontent/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf>
[486] Supra 2 at 88.
[487] Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis: Wellington, 2013) at 79 (4.09).

alters the effect of the principal Act.[488] The Committee settled on an "express or implied amendment" definition. The basis of their proposal was that the details in subordinate legislation should not conflict with the provisions of the Act so that the Act would have to be read as if it contained different words. While the intention may have been to narrow the meaning of the term, in practice, a useful distinction may not have been made.[489] The significance of Henry VIII and its real meaning has been lost overtime. Earlier legislature reserved their law-making power as there was little of no chance of supervision, now almost in all the delegated legislations across countries including India, the legislature has right to scrutinize the acts of the executive authorities and curb the orders or regulations passed by them that changes the scope of the parent act. In a case Mathew J[490] observed that delegated legislation involves granting of discretionary power to another, but the ultimate power is reserved by the legislature and the legislature can in any moment alter the rules and orders, he further goes onto say that what is prohibited by delegation is abdication, he further suggest that it cannot be said that a legislature is abdicating its powers if at any time it could repeal the legislation and withdraw authority from the delegate on which it had vested in. But disallowing or repealing any legislation is a lengthy process and therefore parliamentary committees dealing with this function opine that treatment of problem should be at the source and it should not be dealt with by disallowance.[491] However, with the meaning of Henry VIII expanding in the recent times, it can be found in plethora of statutes in India and elsewhere as 'Removal of difficulties' clause and can also be found in the Constitution of our country (Article 372). This clause can be differentiated into two forms, narrow Henry VIII clause and broad Henry VIII clause. The narrow Henry VIII clause is conferred to the executive wherein it can make changes for implementation or better adaptability of the act in an existing legal scenario, but it

[488] Queensland Scrutiny of Legislation Committee, "The use of 'Henry VIII Clauses' in Queensland Legislation" (1997) at 3.23 < https://www.parliament.qld.gov.au/documents/committees/SLC/1997/Report003.pdf> accessed on 20 March 2020.

[489] Lee Harvey, 'Delegating legislative power: from modern day complexity to Henry VIII' (2017) 3 Loophole 27<http://www.calc.ngo/sites/default/files/loophole/Loophole%20-%202017-03%20%282017-10-01%29.pdf> accessed on 20 March 2020.

[490] Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd v CST (1974) 4 SCC 98: AIR 1974 SC 1660.

[491] Queensland Scrutiny of Legislation Committee, "The use of 'Henry VIII Clauses' in Queensland Legislation" (1997) at 2.35 < https://www.parliament.qld.gov.au/documents/committees/SLC/1997/Report003.pdf> accessed on 20 March 2020.

cannot make such an amendment which changes or is 'inconsistence' with the Parent Act.[492] These clauses help in better functioning and execution of legislations and are a need in the Indian legal structure. In the case of Jalan Trading v Mill Mazdoor Union[493] the court took a restrictive approach and held a narrow Henry VIII clause ultra vires, although in a modern welfare state it is beneficial for the running of the State to keep in check the executive actions, nevertheless such a restrictive approach can lead to curtailment of proper functioning of legal statutes than do much good, therefore, the Indian courts in later judgments has drifted from this narrow approach and in the case of Pratap Singh v State of Jharkhand[494], the court held a narrow Henry VIII clause as constitutional intra vires. However, as much as narrow Henry VIII is needed, the courts have always been of the view of holding Henry VIII clause in the broadest sense as invalid, in the case of Straw Products v I.T. Officer[495] the court held that the Government order issued was trying to change the fundamental provision of the act and there was no such problem in applying the said act, the court struck down the order. Nevertheless there have been instances of misusing the narrow Henry VIII clause to make it a broader one[496] and these have to be check time and again to prevent misuse and overstepping of constitutional mandate by administrative bodies.

2.3 OBJECTIVES

- To highlight the need for delegated legislation and scrutinize the extent of permissible delegation.
- To study the stigma behind Henry VIII clause
- To analyse the need for Henry VIII clause in a complex administrative structure.
- To suggest the limitations of the implementation of the clause

2.4 RESEARCH QUESTION

- Is Henry VIII clause a synonym of executive autocracy or a tool to provide flexibility in administration?

[492] See Section 45(10), Banking Regulation Act,1949.
[493] AIR 1967 SC 691.
[494] (2005) 3 SCC 551.
[495] AIR 1986 SC 579 : (1986) 2 SCR 1.
[496] Pratik Datta, 'Amdemnet by Stealth MCA Resurrects Henry VIII's legacy' (2014) 49 EPW 19 <https://macrofinance.nipfp.org.in/PDF/datta20141227_amendmentsStealthEPW.pdf> accessed on 20 March 2020.

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2.5 HYPOTHESIS

- Henry VIII Clause serves as a tool to provide flexibility in administration.
- When implemented in the broadest sense can be a despotic clause.

2.6 RESEARCH METHODOLOGY

The doctrinal research method is used in this research paper thus secondary data is mainly relied on and critically analysed.

CHAPTER-III

LIMITS OF DELEGATION AND STIGMA BEHIND THE CLAUSE

3.1 PERMISSIBLE LIMITS OF DELEGATION

The shift of government to a welfare state has burdened it immensely and it is a myth that the legislation can alone perform all the duties and law-making processes needed to run a country like India. In such a situation, administrative rule-making becomes important and rather inevitable. In situations where crisis legislation is required to meet emergent situations, administrative rule-making is a necessity because the ordinary law making process is over-burdened with constitutional and administrative technicalities and involves delay. Or in cases where government action requires discretion, administrative rule-making is the only valid option. Also, legislation has become highly technical because of the complexities of a modern government. Therefore, it is convenient for the legislature to confine itself to policy statements only, as the legislators are sometimes innocent of legal and technical skills, and leave the law-making sequence to the administrative agencies[497]. But it was held in a case that constitutional legitimacy of unlimited power, on occasion, is subversive of responsible government and erosive of democratic order[498] Thus, although legislation can delegate secondary or tertiary functions, it cannot delegate its primary function, if so, the structure loses its integrity and reason of existence. In the case of Delhi Laws Act[499] it was held that the legislature cannot delegate its power of policy making, however,

[497] Avinder Singh v State of Punjab (1979) 1 SCC 137 160.
[498] Ibid.
[499] AIR 1951 SC 332.

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if in a statute the broad policies are laid down and administrative bodies has to only fill in the gaps then it is constitutional. In a question whether the legislature is denude of the power after delegation, Mathew J[500], was of the opinion that although delegation involves the granting of discretionary power to another, the ultimate power always remains with the parliament, he further said that a legislature cannot abdicate its legislative function. Also, to keep a check on the limits of delegation, certain control mechanisms are applied, the administrative bodies has to follow the procedure of laying down rules within the parliament as it informs the legislature as to what rules has been made by the executive and it provides an opportunity to the legislature to question the rules.[501] In the case of Narendra Kumar v Union of India[502] it was held by the court that as the act provided a mandatory provision to lay down before both the houses, any rule passed without following the same will have no effect. Judicial control of excessive delegation include publication or consultations also, the doctrine of vires is also applied. In case of declaring a statute as ultra vires, one has to check whether the delegation involves surrender of essential legislative powers, if so it will be declared ultra vires, if not such a suit will fail. A statute challenged for excessive delegation must be subjected to two tests-

- Whether essential legislative function is delegated.
- Whether the legislature has given a broad policy for the guidance of the administrative bodies.[503]

To check whether legislature has exceeded its authority to enunciate policy and principle, mere matter of form should not be considered only but the substance has to also be taken into account.[504] However, if the power conferred on the executive is lawful and permissible, the delegation cannot be held to be excessive merely on the grounds that the legislature should have made more detailed provisions.[505]

In the case of Hamdard Dawakhana v Union of India[506] the Central Act was held ultra vires on the ground of excessive delegation. An act laid down a list of diseases on which advertisement was

[500] Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd. V CST (1974) 4 SCC 98.
[501] supra 7 at 170.
[502] 1960 AIR 430, 1960 SCR (2) 375.
[503] Vasanlal Maganbhai Sajanwala v State of Bombay AIR 1961 SC 4.
[504] supra 7 at 88.
[505] Jyoti Pershad v Administrator, UT of Delhi AIR 1962 SC 1602.
[506] AIR 1960 SCC 554.

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prohibited and it authorised the Central government to add any other disease in the list. The SC held this to be invalid and excessive delegation as no standard or principle was laid down on which basis inclusion was to be made. In the case of Krishan Prakash Sharma v Union of India[507] the Supreme Court held that, the question whether a particular legislation suffers from excessive delegation, the scheme of the statue including Preamble, the background in which the statue is enacted, the history of the legislation, the complexity of the problem which a modern State has to face and lots of other considerations have to kept in mind. The entrustment of legislative power laying down policy is inconsistent with the basic concept on which our constitutional scheme is founded. The rule against excessive delegation of legislative authority is a necessary postulate of the sovereignty of the people. In a case, Subba Rao J[508] stated that "The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the' policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. **It is the duty of this Court to strike down without any' hesitation any arbitrary power conferred on the executive by the legislature.**"

3.2 STIGMA BEHIND HENRY VIII CLAUSE

[507] (2001) 5 SCC 212.
[508] supra 26.

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The stigma behind Henry VIII clause can be held to be a rather psychological issue[509]. As this nomenclature connotes to the tyranny of the King Henry VIII and the executive autocracy that followed in his time. But one of the earliest reports on Henry VIII clause, the Donoughmore Committee report[510] stated that there is a very huge difference between the real meaning of Henry VIII clause as it was during the regime of king Henry VIII and the meaning of Henry VIII clause as it is today. There being no authoritative definition of the Henry VIII clause, many scholars define Henry VIII clause quite differently, in Takwani[511] Henry VIII clause is defined as "…clause that authorises the executive in the name of removal of difficulties to modify even the parent Act or any other Act. IP Massey[512] defines the same as a clause where "very wide powers are given to administrative agencies to make rules, including the power to amend or repeal". The Queensland Scrutiny Committee[513] defines Henry VIII clause as "A Henry VIII clause is a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action." All these three definitions although has a common thread in them, they mean entirely different in some aspect, these difference highlights the difference in interpretation of Henry VIII clause by different scholars although coming from the same root. In 1997 the Queensland Scrutiny of Legislation Committee carefully considered the scope of the term "Henry VIII clause" and decided that a broad "alteration of scope and effect" definition was misconceived because all subordinate legislation alters the effect of the principal Act.[514] Having no acute definition for the term, any exceptional delegation or delegations that minutely broaden the powers of administrative authorities is sometimes confused as Henry VIII clause. This problem of identifying the same has caused Ross Carter and other to refer to Henry VIII clause to a popular

[509] Priya Garg and Amrita Ghosh, 'The Henry VIII clause: Need to change the colour of our shades' (2017) 3 Comparative Constitutional Law and Administrative Law Quarterly 46 < http://calq.in/wp-content/uploads/2018/08/Volume-3-3.pdf> accessed on 20 March 2020.
[510] *Report by the Committee on Minister's Powers* (the Donoughmore Committee) (His Majesty's Stationery Office, London, 1932) at 36 < https://archive.org/details/1936ReportOfTheCommitteeOnBritishParliamentMinistersPowersCmdPaperNo4060/page/n35/mode/2up> accesed on 21 March 2020.
[511] supra 7 at 94.
[512] Supra 7 at 88.
[513] Queensland Scrutiny of Legislation Committee, "The use of 'Henry VIII Clauses' in Queensland Legislation" (1997) at 3.20 < https://www.parliament.qld.gov.au/documents/committees/SLC/1997/Report003.pdf> accessed on 21 March 2020.
[514] Queensland Scrutiny of Legislation Committee, "The use of 'Henry VIII Clauses' in Queensland Legislation" (1997) at 3.23 < https://www.parliament.qld.gov.au/documents/committees/SLC/1997/Report003.pdf> accessed on 21 March 2020.

derogatory slogan and not an analytical tool.[515] Henry VIII clause in the recent times has lost its real meaning as earlier during the regime of King Henry VIII, the king reserved with him the power to make laws wherein no procedure is laid or to restrict judicial control on such laws, etc.[516] However, in today's scenario none of this is applicable. Thus Lee Harvey[517] opines that the term Henry VIII clause should not be used in the recent times as it has lost its meaning, if although it has to be used, it should be used to refer to statues or rules that confer to the broadest sense of Henry VIII or what is referred to as the real Henry VIII. Thus although as according to Henry VIII clause should be used in very rare circumstances, it should not be stigmatised as much and even if that is allowed, only real Henry VIII should be referred to with the name and not any narrow form of delegated legislation that is nowhere near the meaning of Henry VIII clause as it was historically.

Thus putting it optimistically, Daniel Greenberg says that "The broader the power, the narrower the power."[518] Or:

"taking an absurdly broad power because you do not have the foggiest idea what you may want to do with it is actually a good way of ensuring that you will not be able to achieve your objectives because the wider the power, the more rigorously the courts will apply the presumption against the delegation of legislative power."[519]

CHAPTER-IV

NEED AND LIMITATIONS OF HENRY VIII CLAUSE

4.1 ADMINISTRATIVE COMPLEXITY IN IMPLEMENTATION OF HENRY VIII CLAUSE

The administrative body deals mainly with the implementation of the policies the laws made by the legislative, but through the Henry VIII clause the administrative body gains quasi legislative and quasi-judicial powers to the administrative body. There have been various instances to show

[515] Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis: Wellington, 2013) at 79 (4.09).
[516] Ibid 32.
[517] supra 12.
[518] Daniel Greenberg "The Broader the Power, the Narrower the Power"(2016), 37 *Statute Law Review* v-vi retrived from supra at 7.

[519] Ibid.

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the need for Henry VIII clause in the Indian scenario, for instance in the recent years of 2016, when the parliament session was rendered non-functional, due to the protests of the opposition against the government, at the centre due to its demonetisation decision[520]. Henry VIII clause is a provision under a parent legislation empowering the Executive to amend or repeal one or more statutes by way of the latter enactment of delegated legislation[521]. Apart from this major non-functional parliamentary session, there have been many instances where the parliament have been rendered dysfunctional due to any opposition, riots etc. Further, prior to this ongoing term of the Lok Sabha, the parliament's operations continued at a lukewarm pace because of the fragile coalition set-up under the United Progressive Alliance (UPA) government[522]. These make the implementation of Henry VIII clause inevitable in the Indian governance. But the implementation of the Henry VIII clause poses as a major problem due to the administrative complexity. Though the implementation of Henry VIII clause it increases the flexibility in the government, but it has its own drawbacks. The administrative system in India is very complex; the administrative part of the government is also the part of the parliament. The limit of the quasi legislative power of the administrative body is a question that is very objective and adds to the complexity to the implementation of the Henry VIII clause. In India there is a division of administrative power between the centre and state and it is mentioned in the articles- 256 to 263 of the Indian constitution. The powers of both centre and state are discriminated and distinguished in schedule 7 of the Indian constitution given in the centre list, state list and concurrent list. The right of the state to make bye-laws and policies mentioned in the state list poses as yet another problem, the centre is not aware of the pre-existing laws that are already applicable in a state and might make a law that is in contrary to it. The state has the superior jurisdiction over such matters thus to implement bye-laws all over India invariably constitute as the major setback in effectuating the Henry VIII clause in the Indian scenario. another major setback in implementing the Henry VIII clause in Indian administrative system is that the administrative structure in India is very elaborate

[520] 'Parliament continues to be stalled' *Deccan Herald* (New Delhi 5 Decmber 2016) <https://www.deccanherald.com/national/parliament-continues-to-be-stalled-563022.html > accessed on 28 March 2020.
[521] Press Trust of India, 'BJP MPs Protest Disruption Of Parliament By Congress Members' *The Indian Express* (5 December 2014) <http://indianexpress.com/article/india/india-others/bjp-mps-protest-disruption-of-parliament-by-congress-members/> accessed on 28 March 2020.
[522] Harish Khare, 'An Opportunity Not a Crisis' *The Hindu* (20 Sept 2012), <http://www.thehindu.com/opinion/lead/an-opportunity-not-a-crisis/article3915471.ece;> accessed on 28 March 2020.

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and complex to make a bye law that is accepted by a majority and having it implemented taking into consideration all the states its requirements, the pre-existing laws and implementing a law by the administrative under the function delegated by the Henry VIII clause, this acts as yet another stumbling block for the implementation of Henry VIII clause. The procedural requirement, the substantive defects and directory procedural provision is a necessary pre requisite for making bye laws by the administrative authorities. Another difficulty lies in the fact that, the term and extend of state is questionable, is it limited to the geographical territory or extends further, in the case of, state of Karnataka v union of India[523]the supreme court held that, the power of the union with respect to property initiated in states, even if the states are regarded qua the union as sovereign, remains unrestricted and the state property is not immune from its operation. The union again has the power to make union power in the state, this gives the the probability to dual existence of legislative power in the state. In the case of Jayanilal Amratlal Shodhan V FN Rano[524], the court ruled that the president can only entrust to the states the function which are vested in the union which are exercisable by the president on behalf of the union. It doesn't authorise the president to entrust to any person or body the powers and functions with which he is b the express provision of the constitution. All of these instances prove the administrative complexity that make the execution of Henry VIII clause in the Indian administrative scenario. Some of these complexities have been looked into by the full faith credit clause, but the implementation of bye laws by the centre in the entire country of India. The complexity in the Indian administrative structure is one of the plausible reasoning to the inadequacy in implementing the Henry VIII clause in the administrative structure of India.

4.2 LIMITATION OF HENRY VIII CLAUSE

The Henry VIII clause is different from the situation where the Executive is conferred by the Legislative with the authority to extend the statute already in operation in one area to another area along with the power of modification which allows for making necessary adjustments to the existing law to better suit the requirements of the new territory[525]. This is because in such cases, modifications are made to the fresh operation of the parent Act in the new area instead of altering

[523] AIR 1978 SC 68.
[524] AIR 1963 Guj 80.
[525] M.P. Jain & S.N. Jain, *Principles Of Administrative Law* (6th Ed., Lexis Nexis, 2007) 70.

the original statute[526]. The power of administrative body in way of quasi legislative function, by the virtue of Henry VIII clause, should be exercised in a limited perspective and not in its broader sense, if this clause is used in the broader sense it would lead to excessive delegation of the legislative power. Further, the Henry VIII clause is also different from the clause present in the parent legislation vesting the Executive with rule making powers in order to give effect to the parent statute[527]. This is because sometimes it is mistakenly presumed that any clause present in the parent statute, conferring upon the Executive, unguided rule making powers is a Henry VIII clause; or that any and every instance of excessive delegated legislation constitutes the Henry VIII clause[528]. Again, the Supreme Court ruled that, that the conferment of arbitrary powers upon the Executive officials due to the presence of a regulation, makes the Regulation the Henry VIII clause[529]. Thus, from the judgements of the courts it can be clearly seen that there are two types in Henry VIII clause, which is identified as broad and narrow clause. The narrow clause of the Henry VIII clause permits executive to enact the delegated legislation but it should not contravene with the provisions of the parent act. In the broader clause, the executive derives the power to enact statute with maybe derogatory to the parent act and the provisions of the parent act. If objective of delegation is taken as a criterion, the Henry VIII clause may have the objective of facilitating transition from an old legislation to a new law upon the same matter[530]. Further, the Henry VIII clause may also have the objective of allowing flexibility in bringing any new law in its full operation[531]. One of the major drawbacks of the implementation of the Henry VIII clause was debated and reasoned by lard mayor and he stated that, "You can be sure that when these Henry VIII clauses are introduced, they will always be said to be necessary. William Pitt warned us how to treat such a plea with disdain. Necessity is the justification for every infringement of human liberty: it is the argument of tyrants, the creed of slaves[532]." The purpose of the Henry VIII clause is to remove difficulties and doubts and fill in the gaps left by the legislative body. If the executive

[526] Ibid.
[527] C.K. Takwani, *Lectures on Administrative Law* (3rd ed., EBC, 1998) 82-83.
[528] Central Inland Water Cooperation V Brojo Nath, AIR 1986 SC 1571.
[529] WB Electricity Board V Ghosh, 1985 AIR 722.
[530]The Constitution of India1950, A 392.
[531] Henry VIII Clauses & The Rule of Law, Rule Of Law, Institute of Australia, <http://www.ruleoflaw.org.au/wpcontent/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf>, accessed on 29 March 2020.
[532]Standing Committee on Justice and Community Safety, Legislative Assembly, Formal Op. (2017) (discussing Henry VIII Clauses), <http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-FactSheet.pdf>, accessed on 29 March 2020.

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tries to overreach this power conferred to them, by the virtue of Henry VIII clause it would amount to excessive delegation of the legislative power, and is termed as overreaching the quasi legislative power. Justice Shah rightly ruled in a judgement that, "Condition of the applicability of s. 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the Act, s. 37 is not saved from the vice of delegation of legislative authority, Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of s. 37 which purports to make the order of the Central Government in such cases final, accentuates the vice in sub. s. (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act[533]." This judgement clearly portrayed the disposable of the broad clause of Henry VIII clause in the Indian administration due to the permissibility of instances of excessive delegation. In another case the court ruled that, "two things demand attention regarding the decision. First, despite the Bench pronouncing the verdict being the Constitutional Bench itself, it did not overrule the decision of the Jalan Trading case; rather, it applied the ratio of the Jalan Trading case and distinguished the Gammon India case on its facts.64 Second, it partially misread the Jalan Trading case suggesting that the latter case declared Section 37 of Payment of Bonus Act as invalid for two reasons; one that it conferred finality upon the decision of the executive's rule making powers and second that it permitted the Executive to alter the statutory provisions[534]." This judgement cites that mere existence of the broad Henry VIII clause does not render the clause invalid per se, it should be coupled with other aggravating factors such as, the finality attached to the condition of the Henry VIII clause and it becomes invalid only on the ground that it had exercised excessive delegation, in absence of the overreach of the legislative power by the executive, the Henry VIII clause is not deemed to be annulled. Though the majority judgement ruled there was a sharp contrast to the majority's judgement, the opposing judgement in the gammon's case ruled that, "Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of

[533]Jalan Trading Co v. Mill Mazdoor Union, AIR 1967 SC 691.
[534]Gammon India Ltd v. Union of India, AIR 1974 960.

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s. 37 which purport to make the order of the Central Government in such cases finally accentuate the vice in sub. s. (1).[535]" Thus the court clearly lay down that the main legislative functions cannot be delegated any further; the secondary functions of the legislature can be delegated. If the Henry VIII clause is exercised in the broad sense it would lead to excessive powers in the hands of the executive and the executive might misuse the power for their best interests. Though the direct implementation of the braod Henry VIII clause is not permissible the legislature has found ways to indirectly implement it. This is done by the legislature in two ways. Firstly, the legislature drafts the main statute in a skeletal manner[536].Therefore; the individual provisions are broadly termed[537]. In this way the legislature indirectly implements and uses the broad Henry VIII clause but in a narrow sense such that the quasi legislative power conferred to them through the implementation of Henry VIII clause is not misused. In spite of the measure and all the control by other two organs of the government, this has been misused by the executive in Indian scenario. The ban on the beef in India except a few states was highly arbitrary and misuse of the quasi legislative power conferred upon the executive, they exercised legislative power. The unlawful activities prevention act also has given a lot of legislative powers in the hands of the executive body. Secondly, these days, the subtle and newly emerging manifestation of the broad Henry VIII clause is the power under the parent Act to allow the Executive to clarify or interpret the meaning of the provisions given in the parent Act[538].The clarification clause thereby indirectly empowers the Executive to amend the provisions of the main Act wherever the existence of ambiguity in the parent law provides such scope[539]. Therefore, it becomes crucial for the judiciary to take a step and prevent the indirect implementation of the broad Henry VIII clause. it should also be taken into consideration that the scope of the Henry VIII clause is not broad enough to recognise the amendment of the provisions of law, by the executive, and the independent utility of Henry VIII clause is absent in the Indian scenario. Furthermore, the primary rationale behind incorporating the Henry VIII clause in the parent act is to provide for contingencies of lack of foresight by the legislature despite it exercising all reasonable care and enquiries and contingencies of technicalities and complexities involved in

[535] Ibid
[536] M.P. Jain & S.N. Jain, *Principles Of Administrative Law*, (6th ed., 2007)70.
[537] N.A.K. Sarma, *Henry VIII Clause in India*, 15 Journal of the Indian Law Institution, (1973)460.
[538]86 Securities And Exchange Board Of India (Settlement Of Administrative And Civil Proceedings) Regulations,2013, Regulation 22 (Oct. 2013).
[539]Seema Ray, FAQs and Clarifications, India Corp Law Blog, 2014

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the new legislation[540]. Presently, the Parliament has a variety of issues to enact laws upon and is overburdened with the job of enactment and amendment. It must be borne in mind that the disruptions in the Parliament have become a common landscape[541], and coalition politics is on rise due to which arriving at the consensus which is required for making or amending laws has become difficulty[542]. This has led to the excessive implementation and exercise of the broad Henry VIII clause. the executive has derived power to make law which is a primary function of the legislature has been now conferred upon the executive and the executive have become in charge of various segments of the government and the misuse of the same has been carried out very frequently. In light of all the above given circumstances it can be said that, the broad Henry VIII clause must be curtailed and the parliament must not indirectly implement the same on the executive.

CONCLUSION

The ambiguity and obscurity regarding the validity and necessity for the implementation of the Henry VIII clause yet remains to prevail. Through this paper it can be concluded that the Henry VIII clause cannot be annulled ipso facto and the extent and nature of the implementation should be taken into consideration. The clause has its own negative and positive impacts and it should be implemented in a way such that it reduces the negative impact and expands the positive impact. The major reasons for looking at the Henry VIII clause with an eye of suspicion comes down to the history of its implementation and the nomenclature of the clause, for the acceptance of the Henry VIII clause as a part of the government structure the amendment of the nomenclature of the clause is of utmost importance.

Under ideal circumstances the Henry VIII clause should have certain, limitations regarding the scope of the implementation. These constraints in the Indian scenario are exercised in the form of, temporal restrictions, procedural guidelines, impermissibility to amend the essence or the underlying policy of the parent statute, requirement of laying the delegated law so enacted before the Parliament and/or limiting the power of amendment of provisions in the Act up to one or a few

[540]Madeva Upendra Sinai and Ors. v. Union of India, AIR 1975 SC 797.
[541]Baijayant Jay Panda, 'Has The Indian Parliament Lost Its Relevance?' *BBC* (7 January 2015) <http://www.bbc.com/news/world-asia-india-34992800> accessed on 29 March 2020.
[542]Hoveyda Abbas, Ranjay Kumar & Mohammed Aftab Alam, *Indian Government And Politics* (1st Ed. 2011) 225.

statutes, among other possibilities[543]. Most importantly, the authority which can exercise the powers under the Henry VIII clause on the behalf of the Executive ought to be carefully chosen[544].

The first part deals with permissible limits of delegation and reason for stigma behind the term. Various judicial decisions have been analysed and a two way test has been arrived at by the courts. A statute challenged for excessive delegation must be subjected to two tests-

- Whether essential legislative function is delegated.
- Whether the legislature has given a broad policy for the guidance of the administrative bodies.

Again the reason for stigma is analysed and a conclusion has been reached that Henry VIII clause as such has lost its meaning.

The second part of the paper deals with the implementation of the Henry VIII clause in the present administrative scenario. In the Indian administrative scenario, the implementation of the clause becomes a difficult task as to the complex government structure, the distribution of power between the centre and the state, the overlapping of territories in the concurrent list. Different laws applicable to different states, so to apply any bye law or policy passed by the executive uniformly throughout India poses as a challenge to accomplish.

The third part of the paper deals with the limitations with implementation of the Henry VIII clause. It is because the narrow Henry VIII clause have been accepted in the India by the Indian judiciary and is allowed only to that extend but the legislature due to its overburdening and recent obstacles in the smooth functioning have found ways to implement the Henry VIII clause in the broad sense, due to which there has been excessive powers being delegated to the executive and there has been instances of constant misuse of the same. As the court had ruled, "It must lay down essential legislative policy and indicate the guidelines to be kept in view by that authority in exercising the

[543]Mirko Picaric, *An Old Absolutist Amending Clause As The New Instrument Of Delegated Legislation*, The Theory And Practice Of Legislation (2016)4.

[544]95 The General Council of the Bar, Bar Council Response To The Constitution Committee Inquiry: The LegislativeProcess Call For Evidence On The Delegation Of Powers Consultation Paper, THE BAR COUNCIL (Jan. 18, 2017),<http://www.barcouncil.org.uk/media/516127/bar_council_response_to_constituion_committee_inquiry-delegated_powers.pdfhttp://www.barcouncil.org.uk/media/516127/bar_council_response_to_constituion_committee_inquiry-delegated_powers.pdf>, accessed on 30 March 2020.

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delegated powers. In delegating such powers, Parliament cannot abdicate its legislative functions in favour of such authority[545]", this should be rightly upheld and followed to prevent the abuse of power in lieu of Henry VIII clause.

Thus, analysing all the objectives of the paper, the hypotheses can be validated-

- *Henry VIII Clause serves as a tool to provide flexibility in administration.*
- *When implemented in the broadest sense can be a despotic clause.*

[545]The Registrar Of Cooperative Societies Trivandrum V K Kunjambu And Another, 1980 AIR 350.

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NECESSITY OF PROFESSIONAL ETHICS AND EMERGING CHALLENGES IN THE LEGAL SPHERE

- **AISHA KHAN**

ABSTRACT

Known for its exuberant population, India has the world's second largest number of lawyers; the number scaling to more than 600,000. The range of legal service providers range from individuals, small firms to big corporate firms. The country follows a very efficient adversarial litigation system which helps in providing justice to the rich and the poor. Legal services are perceived to fall in the category of "NOBLE PROFESSION" and hence ETHICS, which are more or less severe and restrictive, are in place in the Indian regulatory mechanism.

"Dignity of profession" is something that the Indian society strongly believes in and has manifested it through time and again reinforcement by the judiciary.

Through this paper, I have evaluated the legal profession in the light of the ethics attached to it, challenges to it and the way forward.

INTRODUCTION

Justice Krishna Iyer, once quoted, "Law is not a trade, not briefs, not merchandise, and so the heaven of commercial competition should not vulgarize the legal profession."1

The statement very precisely explains the imperative position that an advocate holds and hence respect, morals conduct, ethics, reverence and other synonym adjectives follow with the profession. Luminaries call it a "profession par excellence." For the general public, the court is believed to be just and fair and is prefixed with an Honourable. No other profession is believed to touch humans at so many points and levels. No individual can deny the fact that any professional while carrying out his job does so with an intention to earn and make financial fortune for himself.

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An advocate while advocating, a lawyer while lawyering, is no doubt trying to do the same for himself but while doing so the impact he creates for and on the society is exemplary. Their contribution towards achieving the ends of justice is over arching as they ultimately shape the entire future path of the society.

The contribution of a lawyer is essential at all three levels. To the judiciary he is a key player, to the state he is an essential contributor and to the society he is an irreplaceable contributor.

There have been many shrewd, competent, renowned, upright and assiduous advocates, but it can hardly be said that there are settled traditions to encourage the young man who is at the threshold of profession. Yet young men are choosing a most ancient and exalted profession of the world, a profession which is to have a s its members lawyers whom Mr. Justice Maugham (later the Lord Chancellor) described as the 'custodian of civilization' than which there can be no higher aim and no nobler duty - a profession demanding the cardinal virtues in its members which would make the order "as one of the means most proper to maintain the propriety, delicacy, disinterestedness, desire of conciliation, move of truth and justice and enlightened regard for the weak and the oppressed."

When such an elated position is granted to an advocate then a conduct which is above board, is also expected. His services are of essential importance to the society and influence it at all levels, hence an “instrument” to guide their conduct called LEGAL ETHICS serves as a mechanism to regulate the same. The spirit of fairness, equity, cooperation, justice and social good is kept at the right pedestal by keeping in place “Legal Ethics” at the forefront.

MEANING OF LEGAL ETHICS

Just like law and its components, ethics too has its roots instilled in “tradition.” After years of general practice they become usages, then customs, then statutory rules. Dean John H. Wigmore, one of America's great legal writers, once said, "this living spirit of the profession, which limits it yet uplifts it as a livelihood, ha s been customarily known by the vague term 'legal ethics' . . . An apprentice must hope and expect to make full acquaintance with this body of traditions, as his

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manual of equipment, without which he cannot do his part to keep the law on the level of profession."

The term legal ethics ha s been defined as "that branch of moral science which treats of the duties which a member of the legal profession owes to the people, the court, his professional brethren and his client . . ."

The term legal ethics can be bifurcated into two: ethics - the noun part and legal - the adjective part. In a broader perspective ethics are a kind of duty. They could be called the manifestation of right living. Moral science, the branch under which “legal ethics” falls , lays down the duties that an advocate must observe towards the court, the society, the profession, the opponent, the clients and to himself. People do confuse ethics with etiquettes, but to do so would not be right in the legal parlance as they say in law, a thing might be etiquette wise incorrect but still legally right! In the legal profession, including its proceedings and other mechanisms, great importance is attributed to ethics.

The bar and the bench are expected to conduct themselves in a certain manner. That manner is determined by a body of rules and practices known as “Legal Ethics.” These legal conduct parameters have been shaped by general conduct in ages and determine the social and professional responsibilities of a lawyer.

The four interwoven ethics or conceptions of what a lawyer ought to do can be discovered in lawyers ethical debates, treatises, and judicial pronouncements. They are:

(i) The ideal of devoted service to clients in a legal system where citizens need advice and representation to us e the legal system (the advocacy ideal),

(ii) The ideal of fidelity to the law and justice if the system is not to be sabotaged by clients who will pay a lawyer to anything (the social responsibility ideal),

(iii) An ideal of willingness to work for people and causes that are usually excluded from the legal system (the just ideal)

(iv) The ideal of courtesy, collegiality, and mutual self-regulation amongst members of the profession (the ideal of collegiality).5

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In India, the ADVOCATES ACT, 1961, has provided for Section 35, which subsequently provides for punishment of advocates for professional and other misconduct. Chapter II – Standards of Professional Conduct and Etiquette lays down the relevant rules under part IV of the Bar Council of India Rules.

DUTIES OF LAWYERS

The public sees an advocate as someone who can be trusted and relied upon, hence a code of conduct that satisfies the public view must be observed by him. More than half of the population of India is ignorant about its rights and is therefore dependent upon advocates for protection of their rights. This creates high ideals of conduct from them!

A Charter of Standards of Professional Conduct and Conduct has been framed by the Bar Council of India and there are broadly five types of duties that need to be observed by the advocates:

- - Duty to Client
- - Duty to Opponent
- - Duty to Colleague
- - Miscellaneous Duties6

Every advocate who's enrolled under the roll of State Bar Council is required to follow the standards strictly.

Duty towards the court

The duties of an advocate towards the court are ten in number. These are enlisted under Section I of Chapter II. To talk about the most basic and fundamental duty of an advocate, it is to always be respectful towards the court. Though to make the ends of the justice meet, an advocate is required to be fearless and independent in the court, but at the same time he is supposed to maintain a respectful attitude towards the court at the judge. Even at times when the advocate is of the opinion that a particular ruling given by the court is erroneous or irregular, he is still supposed to show utmost reverence and dignity towards the court.

Duty towards the client

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The client is an important aspect for an advocate and hence the duty towards the client is an important duty. Only when a brief is accepted from a client, professional work commences. The client entrusts the advocate with a lot of responsibility. In that capacity a lawyer must discharge this duty with all sincerity and gravity that he possesses. An advocate must be welcoming towards his client. There is a lot of confidential and personal information that the client shares or might share with the advocate. Not only is a client worthy of patient hearing but also special care and attention to cater his needs must be provided. A majority portion of the bar council of India rules starting from rule 11 and extended to rule 33 under section II enumerates the different duties an advocate owes to the client.

Duty towards the opponent

Opponents are like friends turned foes but only for a particular case or more so only for the time period where the two are battling a case against each other. This is so because, clients and other parties come and go but advocates are to be together and they meet frequently. They are equally part of the same system and fight for justice. There might be a controversy on an issue between them, or they might share difference of opinion on a particular case or thought but as far as personal and more so professional nature is concerned, there must be no such issues between them.

For every advocate, the primary aim is and must be the welfare of the people. Advocates form an important; in fact they are the most significant aspect of the administration of justice. Respect for colleagues and all members of the bar association is pivotal to ensure that the “real job” of administering justice is carried out in the best way possible. Criticism of co-advocates would only lead to bitterness and no good of any sort can be ensured. To reverberate the same, Rules 36, 37 and 39 have been put in place.

Duty to State

The fact that leadership is essential can “not” be denied. For that purpose, advocates play an important position. Since the freedom struggle, the advocate

has been strength and continues to the same till date. Researchers claim no one profession has done so much good for the society as a whole as much as the legal sphere has. The defend the liberties is not only a noble cause but also has a role to play I the progress of the society. Frontiers of justice,

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officers of the court of justice and hence the servants of the society, a layer is determined to ensure that nothing but justice prevails. They truly maintain the integrity of the state.

Duty to public

The entire set of duties with regard to professional ethics is imposed on advocates to ensure that the interest of the general public can be at all costs preserved. For the existence and progress of a nation, lawyers in every country play an important role.

Duty to Law Persons

Violation of law is something that no legal person including an advocate involves in nor advises their clients to indulge into. Faithful allegiance, respect to the country and its laws and enforcement of the same is what is sought by advocates. Therefore assistance is fully rendered by lawyers for complete allegiance to ensure the preservation of the spirit of law!

In the case of, Allahabad Bank ltd, "Fyzabad vs Thakur Bakshi Singh" the Privy Council held that if some client comes with a case and is ready to pay a fair and proper fees and invites them to undertake a case that they are accustomed to do, if the advocate refuses to take such a case; it would amount to professional misconduct and would amount to punishment.

Hence, it can be said that no lawyer has a right to reject a brief which is offered to him on payment of fee and agreed grounds.

LEGAL ETHICS- HOW FAR ARE THEY PRACTICED OR ENFORCED

A lawyer is expected to observe the prime code of conduct and follow other crucial etiquettes. More importantly they are expected to observe these codes of conduct in other "real life" situations too. Observance of care plus diligence all times is expected from a lawyer. Lawyering and advocacy is such a profession where high expectations from all around the society are placed. Not only does the court demand the highest code of conduct but also the clients and individuals who may or may not be stake holders expect lawyers to be always "righteous". Also, lawyers are expected to provide the most correct advice and service to its clients.

The larger goal of this profession is to ensure the "welfare of the general public". All the focus is put on the greater good and prevalence of "fairness".

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The difficult part or the area of grey is determination of right and the wrong. No settled rules or tradition exist to direct young entrants. Various researches show that swaying away from the expected conduct does exist and new entrants are often in a tussle between the lines of integrity and treachery. There are number of pitfalls and mantraps at the very step, and the young lawyer at the outset of his career, needs often, the prudence and self-denial, as well as the moral courage which belong to riper years.

Another prevalent scenario is described by various researchers. They claim that lawyers do not come from patrician which they primarily did, some time back. A "class" was often associated with the profession. In today's world the profession is compared with "business" and clients belonging to all sections of the society are to be dealt with. Lawyers have a great deal of understanding of the problems of people. The everyday dealing helps them to get acquainted with the weak points of such clients and they take full advantage of this for extracting monetary gains. The Bar Councils do not have any effective control over such extortions by lawyers. The lawyers take full advantage of the professional autonomy for indulging in such unprofessional activities.8

With the course of time researchers have found that that there is increasing commercialization in the delivery of "professional services." By and large, new entrants to the profession are rarely trained according to the standards of ethical conduct and they bear poor impressions of their own profession.

CONCLUSION

Some parameters of professional conduct are laid down under the Advocates Act, but there are other canons of conduct not specifically mentioned but are deemed to be included in these rules. Though the code does not explicitly explain how far these rules are enforceable but it does imply some sense of importance.

One such example is Rule 46 which describes the obligation to provide "Legal Aid" to the oppressed and the indigent. An eminent jurist, Upendra Baxi, compares the canons of conduct with directive principles of the State Policy which implies that the obligation is subject to the "economic condition" of the lawyer.

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Studies have revealed that even the most prominent and luminary lawyers, who are affluent, refuse and are indifferent towards the indigent persons who are in dire need for legal assistance. To our dismay, some senior and big lawyers even stay away from programs of the state catering to "Legal Aid."

One of the major challenges faced in the legal profession is the prevalence of the instrument of "strike". It has since forever had a deep and far reaching effect on the justice delivery mechanism of justice. Not many agree with fact but the truth is that this practice leads to deterioration of the status of courts. Not only this but the general public's faith in the instrument and mechanism of justice is also misplaced to a large extent. Many times a financial turmoil and mental harassment is also faced by individuals when such unpredicted, rather unprecedented boycotts take place. Such strikes have a definite effect against public interest.

Another area of concern is the legal framework. Though hard to digest but major legal frameworks, such as the Advocates Act, 1961 has certain infirmities. The manifestation of the same is Section 2(1)(a) which gives power to the Bar Council Of India to receive complaint against an advocate whose name is not entered in an state rolls. Complying with the provisions of the act such s person is outside the purview of the disciplinary jurisdiction of the Bar Council of India as he cannot be called an advocate as per the act.

Hence it can be concluded that not everything is as good as it seems even with respect to the ever reverential area of Law and Justice. The need of the hour is that maintenance of the epitomical standards of conduct are preserved, followed and manifested to ensure that justice is delivered and the modern complexities are tackled in the best way possible.

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ESSENCE OF CARE & CAUTION UNDER SECTION 80 OF THE I.P.C.

- **ISHAN BHADURI**

JURISPRUDENCE BEHIND THE SECTION OF OFFENCE

The object of repressing a crime is to preserve order and peace in human society and as the objective of criminal law is to punish only serious infractions of the rules of society, therefore it is understood that criminal law cannot punish a man for his, mistake or misfortune. Criminal intention or knowledge as reflected in the second constituent of crime under criminal law i.e. "Mens rea" is one of the vital parts which is necessary to make an individual liable for his acts. Intention is when the accused brings about the very result which it was his purpose to bring about, he is said to have acted intentionally. In criminal jurisprudence it is presumed that a man intends the natural consequences of his act. Knowledge on the other hand means an acquaintance with the fact or the truth pertaining to a certain event, it involves awareness of a fact, belief or mental impression and many offences under the IPC make "knowingly" doing of an act as punishable. Accidents and misfortunes by their very nature negate the presence of a criminal intention or knowledge and on this ground the accused may be excused from criminal liability.

Section 80 gives statutory recognition to the common law doctrine of mens rea, that there can be no crime without a criminal intention. That is to say, to constitute a crime both act and intent must go together (Actus non facit reum, nisi mens sit rea). In other words, no act is per se criminal, unless the actor did it with criminal intention. But accident is not itself a defence to a civil suit, unless it was not -or lawful manner from any unforeseen result that may ensue from accident or misfortune; secondly, the act was not accompanied by any criminal intention or knowledge; thirdly, it was an outcome of lawful act done in a lawful manner by lawful means, and fourthly, it was done with proper care and caution. If either of these elements are wanting the act will not be excused on the ground of accident.

In State of M.P. v. Rangaswamy[546], accused though that he'd seen a hyena 152 feet away and shot at its direction. But later on, it was found out that it was a person, he pleaded that it was raining and had a bonafide impression that it was a hyena and he in order to protect the people around him fired the shot. Court held that he will be entitled to the benefit under section 80 as besides the other facts, there was no expectation of any other person being present in the area where the shot was fired which resulted in the death of a human being.

MEANING OR EXPLANATION

Section 80 of Indian Penal Code states that:

- Accident in doing a lawful act- Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."[547] Which can be explained as follows:
- Nothing is an offence- When studying chapter IV which talks of general exceptions, the phrase "nothing is an offence" appears frequently. This phrase has to be read with section 6 of the Indian Penal Code which says that the offences be read subject to general exceptions as given under chapter IV. Hence, the phrase elucidates that when a particular situation falls under section 80 and satisfies the ingredients given it will not be an offence.
- Done by accident or misfortune- The word 'accident' is derived from the Latin word 'accidere' signifying 'fall upon, befall, happen, chance. It does not mean here a mere chance. It rather means an unintentional, an unexpected act. This indicates the core of this general exception that there was no fault of a party which led to the unwanted consequence. The second term used i.e. "Misfortune" is synonymous with bad luck or an event which was undesirable. Misfortunes are similar to accidents but with the only difference that accidents result in harm to others but misfortune may also result in harm to the doer. Section 80 talks about accident and misfortune as a general exception and which can lead to avoidance of criminal punishment

[546] AIR 1952 Nag. 268
[547] Bare act Indian Penal Code, 1860

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and liability if established fully before a court of law. Law does not intend to punish a man of the things over which he could possibly have no control over.

- Without any criminal intention or knowledge- Intention is when the accused brings about the very result which it was his purpose to bring about, he is said to have acted intentionally. Knowledge on the other hand means an acquaintance with the fact or the truth pertaining to a certain event, it involves awareness of a fact, belief or mental impression and many offences under the IPC make "knowingly" doing of an act as punishable. Accidents and misfortunes by their very nature negate the presence of a criminal intention or knowledge and on this ground the accused may be excused from criminal liability.
- Lawful act in a lawful manner by lawful means- It is important that the act which was being done was lawful, in a lawful manner and by lawful means. As in Tunda v. Rex, where section 80's benefit was also given due to the fact that there was no foul play by the deceased and both friends impliedly agreed to accidental injuries while going for a wrestling bout with each other. A woman who in order to discipline her child, hits him with an iron rod but the rod hits another child and causes injury will not be entitled to the defence of accident as the act itself lacks lawfulness and cannot be said to be in a lawful manner and by lawful means.
- With proper care and caution – Act done without any regard to proper care and caution also come within the purview of mens rea as they come under the concept of negative mens rea. Offences such as criminal negligence have this negative mens rea imbibed in them. In these cases, a person does an act with total disregard to the consequences which may ensue from such carelessness.

ILLUSTRATIONS

(i) A is at work with a hatchet; the head flies off and kills a man. Here if there was no want of proper caution on the part of A, A has committed no offence.

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(ii) A and B go a hunting. They take up certain positions and lie in wait for the game. A hears a rustle and thinking that an animal is moving about fires in the direction of the rustle. The shot reaches B and causes B's death. B's death is the result of an accident or misfortune.

(iii) A takes up a gun and without examining whether it is loaded or not points it in sport at B and the gun goes off killing B. Such a death is an accident or misfortune and A had no criminal intention or knowledge in pointing it at B, but since there is an absence of proper care and caution on his part his act shall not be excused under Section 80. The position would have been otherwise if A had reason to believe that the gun was not loaded and he had acted with proper care and attention.

(iv) A shoots at a bird in B's house in order to steal it and kills B. The act of A is not lawful as he intended to commit theft and he is not protected for shooting under this section.

(v) A and B are fighting. C intervenes to separate them and in doing so C is stabbed by a spear in the hand of A. A's act in stabbing C is illegal. It is not a lawful act.

To invoke the help of Section 80, there should be the absence of both criminal intention as well as criminal knowledge. No act is per se criminal unless the actor did it with criminal intent. As the object of criminal law is to punish only serious infractions of the rules of society, it cannot punish a man for his mistakes or misfortune.If people in following their common occupations, use due caution to prevent danger, and nevertheless happens unfortunately to kill anyone, such killing is homicide by misadventure.Accident is not of itself a defence to a civil suit, unless it was only an accident but also a misfortune. The word "accident" in the section does not mean mere chance. It rather means an unintentional, an unexpected act.In common parlance, "accident" means an event that occurs without one's sight or expectation and in the same way law also adopts it.Actually accident is really an event which occurs all of a sudden and no man of ordinary prudence could anticipate it. If consequence is caused by an accidental act, the conscience of nobody would allow to punish the doer, because accidental act is not his act at all. He does not will it; and therefore he is not responsible for the consequence.

Research Questions

(1) Liability of master for servant's acts even when due care and caution was kept?

If the master and servant engage in a dangerous trade, and the master is guilty for some negligence, which alone, however, was insufficient to produce the mischief, the fact that the negligence of the servant, superadded, to that of the master, had caused the injury, would not render the master criminally liable for it. It was also held in a case in which the prisoner was the maker of fireworks which he stocked on the premises, contrary to statute. During his absence by the negligence of one of his servants, the fireworks became ignited and set fire to a neighboring house, the occupant of which was burnt to death. The master was convicted of misdemeanor holding that, if he had not stocked the fireworks contrary to the statute, the fire would not have occurred. Here, though the prisoner was guilty of an illegal act, it was not the necessary and immediate cause of the death, since superadded to this negligence, there was the negligence of the servant. But this was a case of negligence of the servant. The case could have been differently decided, if the servant had been guilty of a willful act as in the case of the baker who was held liable, because his servant, to his knowledge, had mixed, noxious materials in his bread. In another case, it was suggested that even in a case of a negligence of a servant, if it could be shown that the injury was well within the contemplation of the master, he would be liable. When the act is that of the servant in performing his duty to his master, the rule of the law to be considered is that the only remedy in that case is against the master and then only is maintainable when that act is negligent or improper. So, where the servant was driving his master in a carriage and the horses took fright at the barking of a dog and bolted knocking down the plaintiff who was in the highway, it was held that injury was purely accidental, and as it could not be attributed to the negligence of the servant, neither the master nor the servant was liable for damages.[548]

(2) How to ascertain standard of care and caution to be taken in gun accidents?

[548] Holmes v. Mather, L.R. 10 Ex. 261

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The accused with some twenty companions went into the jungle to shoot pigs. He took up his position and waited in the jungle while his companions proceeded to beat a pig towards him due course a boar was driven in his direction, and, on coming into the one where he was the accused fired at him. He, however, missed the boar and hit one of the accused's companions causing him injuries which resulted in his immediate death.[549] It was held that his act in firing cannot be regarded as either negligent or rash within the meaning of those two expressions as continued in Sec. 304-A, I.P.C.

The Apex Court in Sukhdev Singh v. State (Government of NCT of Delhi)[550] held that in the present case, the factual position shows that the accused who was posted as Personal Security Officer, deliberately used the gun, of course during the scuffle and evidence of prosecution witness clearly show that appellant accused had not told him that the bullet went off in the process struggle and snatching, but the accused specifically told him that as the deceased tried to snatch the pistol, he fired at him. Hence, it was not a case of an accident and therefore, provision of section 80 would not be applicable.

Similarly, in Shankar Narayan Bhodolkar v. State of Maharashtra, the Apex Court held that when the accused picked up gun, unlocked it, loaded it with cartridges and shot gun from close range of about 4-5 feet aimed at chest of deceased Section 80 would have no application to facts. The amount of care and circumspection taken by an accused must be one taken by a prudent and reasonable man in the circumstances of a particular case. Where the act of the accused is itself criminal in nature the protection under section 80, IPC is not available. If the accused pleads exception within the meaning of section 80 there is a presumption against him and the burden to rebut the presumption lies on him. The evidence on record as substantiated by the testimony of prosecution witnesses show that the accused picked up the gun, unlocked it, loaded it with cartridges and shot the gun from a close range of about 4/5 ft. aimed at chest of deceased. Certainly, in view of such unimpeachable evidence section 80 would have no application.[551]

[549] Basant Singh v. Emperor, A.I.R. 1927 Lah. 880
[550] 2003 7 SCC 441: AIR 2003 SC 3716
[551] Bhupendrasingh v. State of Gujarat, AIR 1997 SC 3790

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(3) Should principle of care and caution apply in cases of criminal rashness and criminal negligence?

In the case of Empress of India vs. Idu Beg[552], differentiated between criminal rashness and criminal negligence, that:

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular.

Culpable rashness can be defined as acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have the consciousness.

In a case it was pointed out that the question whether the accused's conduct amounted to culpable rashness or negligence depended directly on the question as to what was the amount of care and caution which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case. In "Bonda Kui vs, Emperor"[553] to the extent that an accused who had been convicted under Section 304 of the Indian Penal Code was acquitted on the mund that she believed in good faith at the time of her attack that the object of the attack was not a living human being but a ghost or some object other than a living human being, because the intention to do wrong or to commit an offence was not present in the case.

[552] 3 ALL 776
[553] 43 CrLJ 787 (Pat)

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CONCLUSION

As was observed by this court in Atmendra vs. State of Karnataka[554] to claim the benefit of the provisions of Section 80, it has to be shown (I) that the act in question was without any criminal intention or knowledge; (2) that the act was being done in lawful manner and by lawful means; (3) that the act was being done with proper care and caution.

In K.M. Nanavati vs. State of Maharashtra,[555] it was observed that Section 80 exempts the doer of an innocent or lawful act, in an innocent or lawful manner and proper care and caution from any unforeseen evil result that may ensue from accident or misfortune. When an accused pleads an exception within the meaning of Section 80 there is a presumption against him and the burden to rebut the presumption lies on him.

One of the primordial requirements of section 80 is that the accidental act should not only be without any criminal intention and a lawful act, but the said lawful act should also have been exercised with proper care and caution. What is expected is not the utmost care, but sufficient care that prudent and reasonable man would consider adequate, in the circumstances of the case. For example, an accused gave a kick to a trespasser for the purpose of turning him out of the house. trespasser died as result of the kick. The court found him guilty as 'a kick is not justifiable mode of turning a man out of the house'. Also, For the application of this section, it is essential to establish that the act was done without any 'criminal intention or knowledge'. In other words, it must be without mens rea or guilty mind. An act which was intended or known, cannot obviously be an accident.

[554] 1998 (4) SCC 256
[555] AIR 1962 SC 605

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INSIGHT INTO *SANCTION FOR PROSECUTION*: SECTION 197 OF THE CRIMINAL PROCEDURE CODE, 1973

- **SHIVAM GOEL**

"*Offence committed while acting or purporting to act in discharge of official duty*":

In the matter of: ***Station House Officer, CBI/ ACB/ Bangalore*** **V/s** ***B.A. Srinivasan & Anr***, Criminal Appeal No. 1837/ 2019 (Supreme Court of India), Date of Decision: 05.12.2019, it was held that:

i. Acts performed using the *office* as a mere cloak for unlawful gains:

The protection under Section 197 of the Cr.P.C. is available to the public servants when an offence is said to have been committed '*when acting or purporting to act in discharge of their official duty*', but where the acts are performed using the office as a mere cloak for unlawful gains, such acts are not protected.

ii. When question as regards *sanction* under Section 197 of the Cr.P.C. is to be raised?

In Para 12 of the report, it was observed that:

"*... It has been observed by this Court that, at times, the issue whether the alleged act is intricately connected with the discharge of official functions and whether the matter would come within the expression 'while acting or purporting to act in discharge of their official duty', would get crystalized only after evidence is led and the issue of sanction can be agitated at a later stage as well.*"

iii. For application of Section 197 of the Cr.P.C., there has to be reasonable connection between the *act complained of* and the *discharge of official duty*:

In the matter of: ***P.K. Pradhan*** **V/s** ***State of Sikkim (CBI)***, (2001) 6 SCC 704, it was held that:

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(a) For claiming protection under Section 197 of the Cr.P.C., it has to be shown by the accused that there is reasonable connection between the *act complained of* and the *discharge of official duty*. An official act can be performed in the discharge of official duty as well as in dereliction of it.

(b) For invoking protection under Section 197 of the Cr.P.C., the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there is no reasonable connection between the *acts complained of* and *those which are to be performed in discharge of their official duties* then no sanction in terms of Section 197 of the Cr.P.C. is required.

(c) In Para 15, it was observed that:

"*... It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial.*"

iv. Sanction from Appropriate Government required before taking cognizance:

In the matter of: ***N.K. Ganguly* V/s *Central Bureau of Investigation***, (2016) 2 SCC 143, it was observed that:

"*... From a perusal of the case law referred to supra, it becomes clear that for the purpose of obtaining previous sanction from the appropriate Government under Section 197 CrPC, it is imperative that the alleged offence is committed in discharge of official duty by the accused. It is also important for the Court to examine the allegations contained in the final report against the appellants, to decide whether previous sanction is required to be obtained by the respondent from the appropriate Government before taking cognizance of the alleged offence by the learned Special*

Judge against the accused. In the instant case, since the allegations made against the appellants in the final report filed by the respondent that the alleged offences were committed by them in discharge of their official duty, therefore, it was essential for the learned Special Judge to correctly decide as to whether the previous sanction from the Central Government under Section 197 CrPC was required to be taken by the respondent, before taking cognizance and passing an order issuing summons to the appellants for their presence."

Also, in the matter of: ***Dr. Ramesh Kumar Gupta*** **V/s** ***State of Chhattisgarh****,* 2017 SCC Online Chh 198, it was observed that:

(a) If a police officer in discharge of his duty uses force then such use of force can be termed as a crime if the same was excessive and not reasonable; in such a situation, the prosecutor for the prosecution of the offence would require grant of sanction. But if the same officer commits an act (offence) in course of service but not in discharge of his duty then the bar under Section 197 of the Cr.P.C. would not be attracted. (***State of Himachal Pradesh*** **V/s** ***M.P. Gupta****,* (2004) 2 SCC 349)

(b) That while observing that Section 197 of the Cr.P.C. is couched in a mandatory language, in the matter of *Dr. Ramesh Kumar Gupta* (Supra), it was observed that:

"*... Once when we reach to the conclusion that the entire prosecution initiated by the State is bad in law on account of the non-compliance of the mandatory requirement under Section 197 Cr.P.C., the entire prosecution case itself so far as the petitioner is concerned is totally without any authority of law. In the said circumstances, permitting the petitioner to undergo the trauma of trial when prima facie the entire prosecution itself is bad in law, non-interference at this stage by the High Court would amount to miscarriage of justice, an abuse of the process of law and also in the long run would also be detrimental to the prosecution side.*"

Thus, against the summoning order, in the absence of sanction for prosecution, the accused can prefer petition under Section 482 of the Cr.P.C. seeking quashing of the summoning order.

PRINCIPLE OF RATIONAL NEXUS:

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In order to attract the rigour of Section 197 of the Cr.P.C., it is necessary that the offence alleged against a Government Officer must have some nexus or/ and relation with the discharge of his official duties as a Government Officer. [***Devendra Prasad Singh*** **V/s** ***State of Bihar****,* Criminal Appeal No. 579/ 2019 (Supreme Court of India), Date of Decision: 02.04.2019]

Not every offence committed by a public servant requires sanction for prosecution under Section 197 of the Cr.P.C.:

In the matter of: ***Amrik Singh*** **V/s** ***State of Pepsu****,* AIR 1955 SC 309, it was observed that:

i. It is not every offence committed by a public servant that requires sanction for prosecution under Section 197 of the Cr.P.C.; nor even every act done by him while he is actually engaged in the performance of his official duties; but if act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary.

ii. There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

Sanction can be produced by the prosecution during the course of trial:

In the matter of: ***K. Kalimuthu*** **V/s** ***State by DSP****,* (2005) 4 SCC 512, it was held that:

"*... The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. The question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage ...*".

That the *ratio* in the matter of *K. Kalimuthu* (Supra) was cited with approval recently in the matter of: ***State of Telangana*** **V/s** ***Managipet alias Mangipet Sarveshwar Reddy***, 2019 SCC Online SC 1559.

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PRINCIPLES OF LAW SUMMARIZED:

Sanction under Section 197 of the Cr.P.C.:

In the matter of: ***Devinder Singh & Ors*** **V/s** ***State of Punjab (CBI)***, (2016) 12 SCC 87, summarizing the principles of law albeit Section 197 of the Cr.P.C., it was held that:

i. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

ii. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under Section 197 of the Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

iii. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.

iv. Question of sanction may arise at any stage of proceedings and question of sanction can be considered at any stage of the proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

v. In some case it may not be possible to decide the question of sanction effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial.

Protection of Sanction under Section 197 of the Cr.P.C. is not available to employees of Public Sector Undertakings/ Corporations:

i. It is important to note that in the matter of: ***Dr. Lakshman Singh Himat Singh Vaghela*** **V/s** ***Naresh Kumar Chandra Shankar Jha,*** (1990) 4 SCC 169, it was observed that:

"*... Section 197 Cr.P.C.* [read with Section 21 (*Twelfth*) of the IPC] *clearly intends to draw a line between public servants and to provide that only in the case of the higher ranks should the sanction of the government to their prosecution be necessary.*"

ii. Also, in the matter of: ***Mohd. Hadi Raja*** **V/s** ***State of Bihar & Anr,*** (1998) 5 SCC 91, it was observed that the protection of sanction under Section 197 of the Cr.P.C. is not available to officers of Government Companies or Public Undertakings even if they fall within the definition of "State" under Article 12 of the Constitution of India, 1950.

iii. Moreover, in the matter of: ***N.K. Sharma*** **V/s** ***Abhimanyu,*** (2005) 13 SCC 213, it was observed that:

"*... Prosecution against an officer of a government company or a public undertaking would not require any sanction under Section 197 Cr.P.C.*"

iv. Further, recently in the matter of: ***BSNL*** **V/s** ***Pramod V. Sawant***, Criminal Appeal No. 503/ 2010 (Supreme Court of India), Date of Decision: 19.08.2019, it was held that:

"*... The question is no more res integra and stands authoritatively settled that employees of public sector corporations are not entitled to the protection under Section 197 Cr.P.C. as 'public servant'.*"

Section 197 of the Cr.P.C. vis-à-vis Section 19 of the Prevention of Corruption Act, 1988:

i. It is settled position of law that if the offences on the charge of which the public servant is expected to be put on trial include offences other than those punishable under the Prevention of Corruption Act, 1988 (hereinafter referred to as the PC Act), that is to say under the general penal law (the IPC), the court is bound to examine, at the time of cognizance and also, if necessary, at subsequent stages (as the case progresses) as to

whether there is a necessity of sanction under Section 197 of the Cr.P.C. There is a material difference between the statutory requirements of Section 19 of the PC Act, on one hand, and Section 197 of the Cr.P.C., on the other. In prosecution for offences exclusively under the PC Act, the sanction is necessary qua the public servant. In cases under the general penal law (the IPC) against the public servant, the necessity (or otherwise) of sanction under Section 197 of the Cr.P.C. depends on the factual aspects. The test in the latter case is of the "*nexus*" between the act of commission or omission and the official duty of the public servant.

ii. Generally speaking, as per Section 19 (1) of the PC Act, no court is to take cognizance of an offence punishable under Sections 7, 11, 13 and 15 of the PC Act, alleged to have been committed by a public servant, except with the previous sanction from the Sanctioning Authority under the PC Act.

iii. The term "public servant" for the purpose of Section 197 of the Cr.P.C. is defined under Section 21 of the IPC, whereas, for the purpose of Section 19 of the PC Act is defined under Section 2 (c) of the PC Act.

Excursus:

i. Marginal Note to the Section:

Marginal Note to Section 197 of the Cr.P.C. reads "*Prosecution of Judges and Public Servants*".

ii. Meaning of Public Servant:

For the purpose of Section 197 of the Cr.P.C., "*public servant*" means individuals as defined in Section 21 of the Indian Penal Code, 1860 (the IPC).

iii. Effect of Retirement:

Clauses (a) and (b) of Sub-section (1) of Section 197 of the Cr.P.C. take within their fold a "*Judge or Magistrate or a Public Servant*" who ***is*** or ***was*** at the time of commission of the alleged offence was removable from his office only by or with the sanction of the Central/ State Government. This means:

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I. That sanction for prosecution will be necessary even if the public servant has retired as on the date of cognizance.

II. That, if instead of the Government, a lower authority under the Government has been empowered to remove the public servant from office, then the public servant is not removable by or under the authority of the Government and consequently, no prosecution sanction will be necessary.

iv. Employees covered:

Sub-section (1) of Section 197 of the Cr.P.C. takes within its fold only Central and State Government employees.

v. Grant of Sanction for Prosecution:

Under Section 197 of the Cr.P.C., sanction for prosecution, is to be granted only by the Central or the State Government as the case may be.

vi. Offence:

Section 197 of the Cr.P.C. mentions the term "*any offence*". This means that the definition of the term "*offence*" as mentioned in Section 2 (n) of the Cr.P.C. is to be applied, and the scope of Section 197 of the Cr.P.C. is not to be confined to offences mentioned under the IPC alone.

vii. Commission of Offence:

As per Section 197 of the Cr.P.C., the alleged offence should have been committed while acting or purporting to act in discharge of the official duty. Hence, there should be a reasonable nexus between the official duty and the alleged act.

viii. Discharge of Official Duties:

In cases covered by Section 197 of the Cr.P.C., the substratum and basic features of the case have to be considered to find out whether the alleged act has any nexus with the discharge of official duties of the Judge, Magistrate or the Public Servant.

ix. Section 156 (3) of the Cr.P.C. vis-à-vis the PC Act offences:

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In the matter of: ***Manju Surana* V/s *Sunil Arora***, (2018) 5 SCC 557, the question of law that was referred to larger bench for adjudication was: "*Whether prior sanction under the PC Act is required before a direction (as regards the registration of FIR or directing investigation) can be issued under Section 156 (3) of the Cr.P.C. by the Magistrate?*"

That the above-mentioned question of law is still pending adjudication.

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A GENDER THAT IS STILL NOT THAT EQUAL: THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

- **SHIVAM GOEL**

PREFACE:

According to Sub-section (2) of Section 1 of the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as the TPA), it extends to the whole of India and as per Clause (k) of Section 2 of the TPA, "*transgender person*" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy), persons with intersex variations, genderqueer and person having such socio-cultural identities as: *kinner, hijra, aravani* and *jogta.* Importantly, Clause (i) of Section 2 of the TPA defines a person with intersex variations as a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body.

According to Section 4 of the TPA, a person has the right to be recognized as transgender person in terms of Section 2 (k) of the TPA and further, a person recognized as a transgender has a right to self-perceived gender identity. As per Section 5 of the TPA, a transgender person has the discretion to make an application to the District Magistrate for issuing a certificate of identity as a transgender person.

Interestingly, if a transgender person undergoes surgery to change gender either as a male or female, then such change in gender effected by virtue of the surgery undergone by the transgender person will not disentitle such person from the rights and entitlements under the TPA.

MANDATE OF SECTION 12 OF THE TPA:

According to Section 12 of the TPA:

(a) No child is allowed to be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the best interest of the child;

(b) Every transgender person has the right:

i. To reside in the household where parent or immediate family members reside;

ii. To be not excluded from such household or any part thereof; and,

iii. To enjoy and use the facilities of such household in a non-discriminatory manner.

(c) Where any parent or a member of the immediate family of the transgender person is unable to take care of such person, then the competent court has the authority to order/ direct that such person be placed in Rehabilitation Centre.

It is important to note that the term "*rehabilitation centre*" has not being defined in the TPA. That the TPA only defines the term "*institution*". According to Sub-clause (ii) of Clause (b) of Section 2, the term institution falls within the purview of the term "*establishment*". Clause (e) of Section 2 of the TPA defines the term institution to mean an institution, whether public or private, for the reception, care, protection, education, training or any other service of transgender persons.

"INCLUSIVE EDUCATION" AND EXCLUSION OF RESERVATION- THE MISSING LINK IN SECTION 13 OF THE TPA:

The Section heading of Section 13 of the TPA is worded as: "*Obligation of educational institutions to provide inclusive education to transgender persons*". That the entire pivot of Section 13 of the TPA surrounds around the words "*inclusive education*". Clause (d) of Section 2 of the TPA defines inclusive education as a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students.

A bare perusal of Section 13 of the TPA would show that it is legislated in a rather routine and cliché manner, stating that:

i. Every education institution:

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(a) Funded, or

(b) Recognized,

by the appropriate Government has to provide:

(a) Inclusive education,

(b) Opportunities for sports,

(c) Recreation and leisure activities,

to transgender persons without discrimination on equal basis with others.

ii. Thus, a private education institution even if not funded by the appropriate Government but is recognized by the appropriate Government, has to follow the mandate given in terms of Section 13 of the TPA.

iii. That is to say, even an unaided, recognized, non-minority, private education institution on private land, has to see that it complies with the mandate contained in Section 13 of the TPA.

That Section 13 of the TPA doesn't speak at all about issues pertaining to:

i. Gender sensitization of teachers and members of staff of such educational institutions.

ii. Possibility of having certain minimum number of transgender persons having the requisite academic and other qualifications as teachers in the educational institutions.

iii. Teaching "*Gender Justice*" as a compulsory and non-elective subject from the primary/ elementary level.

iv. Having certain minimum number of seats reserved for transgender students in educational institutions aided and/ or recognized by the appropriate Government.

CLAUSE (d) OF SECTION 18 AND INEQUALITY WRIT LARGE:

i. According to Clause (d) of Section 18 of the TPA, whoever, harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a

transgender person or tends to do acts including causing *physical abuse*, *sexual abuse*, *verbal* and *emotional abuse,* and *economic abuse* is to be punished with imprisonment for a term which shall not be less than *six months* but which may extend to *two years* and with fine.

ii. That Clause (d) of Section 18 of the TPA on the face of it seems to be in teeth of Article 14 of the Constitution of India, 1950 because it offers to treat even an offence as grave as "*sexual abuse*" as a summons case and not as a warrant case. That as per Section 2 (x) of the Criminal Procedure Code, 1973, a warrant case means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding *two years.*

iii. That the term "*sexual abuse*" has not being defined under the TPA. However, if we see the scheme of the IPC, Chapter XVI of the IPC deals with "*Of Offences Affecting the Human Body*" and in this chapter "*sexual offences*" are being dealt with from Sections 375 to 376-E of the IPC. All "*sexual offences*" in the IPC are to be tried as warrant cases, being cognizable, non-bailable and having imprisonment of minimum of 10 years. Thus, Section 18 (d) of the TPA on this count seems unconstitutional.

iv. Even otherwise, the offence under Section 354 of the IPC dealing with "*Assault or use of criminal force to a woman with intent to outrage her modesty*" despite being on the *lighter side* in comparison with the offences stipulated under the heading "*sexual offences*" in the IPC, has being made punishable with minimum of *one year* and maximum of *five years* of imprisonment. Thus, the legislative move, making the offence under Section 18 (d) of the TPA punishable with minimum of *six months* and maximum of *two years*, in itself is writ large questionable.

v. That as the definition of the term "*sexual abuse*" in the TPA seems lost in oblivion, same is the case as regards definition of the terms, namely, *verbal, emotional* and *economic abuse*.

vi. That "*sexual offences*" under the IPC (Sections 375 to 376-E) are to be tried by the Court of Session, but as per Section 29 of the Criminal Procedure Code, 1973, an offence committed under Section 18 of the TPA, having a maximum punishment of

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two years is to be tried by the Magistrate of First Class. Thus, discrimination on this count also is quite obvious and apparent.

SECTION 20 OF THE TPA, NOT OF MUCH HELP:

That Section 20 of the TPA states that the provisions of the TPA shall be in addition to, and not in derogation of, any other law for time being in force. That the idea behind this provision of law seems to be, to save the application of the provisions of the IPC, so that transgender persons can sue their abusers, assaulters, assailants and aggressors under the provisions of the IPC as well. But this does not seems to be the case, because the TPA does not causes or effects any amendment to the provisions of IPC, and for that matter to the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and the Protection of Children from Sexual Offences Act, 2012, so as to make them gender-neutral. However, the provisions of the IPC *not* being gender-neutral, cannot be applied to transgender persons especially in cases of "*sexual offences*", that is to say that, no protection as such is extended by the provisions of the IPC to transgender persons, to protect them from their abusers, assaulters, assailants and aggressors, and this can be seen from the following:

i. Section 8 of the IPC defines the term "*gender*" as follows:

"*The pronoun "he" and its derivatives are used for any person, whether male or female.*"

Further, Section 10 of the IPC defines the terms "*Man*" and "*Woman*" as follows:

"*The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.*"

Lastly, Section 11 of the IPC defines the term "*Person*" to mean a company, association or body of persons, whether incorporated or not.

Thus, the IPC:

(a) Firstly, does not define who a "*transgender person*" is;

(b) Secondly, does not recognize "*transgender*" as a third-form of gender; and,

(c) Thirdly, it does make any offence transgender-specific, like the offence of "*rape*" in the IPC is women/ female specific.

ii. That in the matter of: ***National Legal Services Authority* V/s *Union of India & Ors***, AIR 2014 SC 1863, it was observed that non-recognition of gender identity of transgender persons is violative of Articles 14 and 21 of the Constitution of India, 1950. But still, since then, the provisions of the IPC have remained unaltered and unamended.

LOST OPPORTUNITY- "*RIGHT TO PROCREATE*":

i. In 2006, in response to the well documented patterns of abuse of transgender persons, a distinguished group of international human rights experts met in Yogyakarta (Indonesia) to outline a set of international principles relating to "*sexual orientation*" and "*gender identity*". The result was the *Yogyakarta Principles,* which formed, a universal guide to human rights which affirm the binding international legal standards with which all States needed to comply.

ii. In the matter of *National Legal Services Authority* (Supra), it was held that "*Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity*" not being inconsistent with the fundamental rights enshrined in Part III of the Constitution of India, 1950, must be recognized and followed in India as part and parcel of its national law.

iii. That the TPA states nothing about the "*reproductive rights*" of transgender persons. It is important to note that *Principle 24* of the *Yogyakarta Principles* deals with the right to found a family; and it expressly states that, all States should take necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity.

CHALLENGE TO THE PROVISIONS OF THE TPA:

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That, lately, the first transgender Judge of Assam, Swati Bidhan Baruah, has challenged the constitutional validity of certain provisions of the TPA before the Hon'ble Supreme Court of India, and the matter is still *sub judice* and pending for consideration (and adjudication) before the Hon'ble Court.

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PUBLIC NUISANCE: JUDICIAL DISTINCTION UNDER TORT LAW AND PROCEDURAL LAW

- **AUM PUROHIT**

ABSTRACT

The view that public nuisance is a species of tort liability is a product of the Restatement of Torts, which sought to transform public nuisance into a weapon to combat several harms. If public nuisance is properly regarded as a public action rather than a tort, then the effort to enlist public nuisance as an instrument of social reform without authorizing legislation suffers from a delegation deficit. Public nuisance, like other public actions, should not proceed unless the legislature has first specified the circumstances in which liability exists, and who has authority to bring an enforcement action. The proceedings under section 133 are enacted in order to maintain peace and tranquility and the orders rendered under these sections are merely temporary orders. The orders taken out by the court are coterminous with the judgment or decree of the civil court. This paper aims to draw inference with relation to nuisance under tort law and the criminal law for the better understanding of nature of nuisance committed.

INTRODUCTION

The word "nuisance", in everyday vernacular, is synonymous with the word "annoyance". Essentially, this is the legal definition of nuisance as well. A nuisance is some sort of interference that affects either an individual plaintiff or the public at large and which gives rise to liability for defendant who has caused this inconvenience. Nuisances are generally in the form of things like noises, odors, smoke or other kinds of pollution, where a suit for trespass to land cannot be brought. In order for a nuisance suit to be viable, the plaintiff must show that defendant's act was either intentional, negligent or governed under the doctrine of strict liability. There are two kinds of actionable nuisances in tort law: private nuisance and public nuisance.

The word "nuisance" is derived from the word *nuire*, to do hurt, or to annoy. Blackstone describes nuisance (*nocumentum*) as something that "worketh hurt, inconvenience, or damage." A nuisance may be caused by negligence, and may be cases in which the same act or omission will support an

action of either kind, but, generally speaking, these two classes of actions are distinct, and the evidence necessary to support them is different.[556] Nuisance is no branch of the law of negligence, and it is no defence that all reasonable care to prevent it is taken.[557]The tort of nuisance has been said to defy definition except to the limited extent that it may be negatively defined through being distinguished from other tort actions. It has been noted also that the term "nuisance" does not indicate any particular reason for possible liability because the various wrongs placed under this heading are based on breaches of differing duties.Some contend that public and private nuisance are so different in nature that they should have unrelated names,[558]while others believe that the public-versus-private distinction has little relevance to many recent cases[559] The word "nuisance" was first used in English law to describe interferences with servitudes or other rights to the free use of land.

PUBLIC AND PRIVATE NUISANCE

Public nuisance is an act affecting the public at large, or some considerable portion of it and it must interfere with rights which members of the community might otherwise enjoy.Therefore, it is a criminal offence. Thus, in simple language, it can be said that public nuisance is a crime and is responsible for the interference with the rights of the public and is punishable as an offence.[560] Like for example, where A digs a ditch on the land used by many common people for travelling for their daily use. Then in that situation digging of ditch injures the right of the public, and therefore it can be termed as a public nuisance.

Simply speaking, public nuisance is an act affecting the public at large, or some considerable portion of it; and it must interfere with rights which members of the community might otherwise enjoy.Thus acts which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals have always been considered public nuisance.Examples of public nuisance are Carrying on trade which causes offensive

[556]Cunard v. Antifyre Ltd, (1933) 1 KB 551, 558.
[557]Rapier v. London Ramways Co, (1893) 2 Ch 588, 599.*see also,* Newsome v. Darton Urban District Council, (1938) 1 All ER 79,81
[558]W. PROSSER, TORTS 573 (4THed., 1971). *SEE ALSO,* JOHN ANTHONYJOLOWICZ&WINFIELD, WINFIELD AND JOLOWICZ ON TORT 466 (SWEET & MAXWELL LTD, 20THed., 1937).
[559]Beuscher& Morrison, Judicial Zoning through Recent Nuisance Cases, 1955 Wis. L. Rev. 440.
[560]PEN. CODE, 1860, §268.

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smells,[561]carrying on trade which cause intolerable noises,[562]keeping an inflammable substance like gunpowder in large quantities,[563]drawing water in a can from a filthy source,[564]public nuisance can only be subject of one action, otherwise a party might be ruined by a million suits. Further, it would give rise to multiplicity of litigation resulting in burdening the judicial system. Generally speaking, Public Nuisance is not a tort and thus does not give rise to civil action.

Private nuisance is a kind of civil offence and is being filed in a case where there is the interference of rights of the private individual. That is where a person's right is being infringed or wrongfully interfered with by other. Therefore, if X plays music in such a loud way that it disturbs his nature, then in that condition the neighbor can file suit against X, this is known as a private nuisance. Public nuisance can also become a private nuisance. But it happens only when there is some harm which ought to have suffered by the public at large but there is some special or huge loss is being suffered by it. Like where the dig was ditched there was a possibility that the general people would face a problem but one specific person was injured in that act, therefore, it can come under civil law court.'

In contrast to public nuisance, private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. The remedy in an action for private nuisance is a civil action for damages or an injunction or both and not an indictment. Private nuisance is an unlawful interference and/or annoyance which cause damages to an occupier or owner of land in respect of his enjoyment of the land. Thus there are three elements ofprivate nuisance: *Firstly,* unreasonable or unlawful interference; *Secondly*, such interference is with the use or enjoyment of land, or some right over, or in connection with the land, and *Lastly* damage should be done.

In *Ram Raj Singh* v. *Babulal*,[565] the plaintiff, a doctor, complained that sufficient quantity of dust created by the defendant's brick powdering mill, enters the consultation room and causes discomfort and inconvenience to the plaintiff and his patients. The Court held that when it is established that sufficient quantity of dust from brick powdering mill set up near a doctor's consulting room entered that room and a visible thin red coating on clothes resulted and also that

[561]Malton Board of Health v. Malton Manure Co., (1879) 4 Ex D 302.
[562]Lambton v. Mellish, (1894) 3 Ch 163.
[563]Lister v. Hesley Hall Ltd., (2001) UKHL 22.
[564]Attorney General v. Hornby, (1806) 7 East 195.
[565]AIR 1982 All. 285.

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the dust is a public hazard bound to injure the health of persons, it is clear the doctor has proved damage particular to himself. That means he proved special damage.In *Hollywood Silver Fox Farm Ltd v. Emmett*,[566]A carried on the business of breeding silver foxes on his land. During the breeding season the vixens are very nervous and liable if disturbed, either to refuse to breed, or to miscarry or to kill their young. B, an adjoining landowner, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of disturbing A's vixens.

Moreover for proving a nuisance, the following essentials are required: *Firstly*, Unreasonable interference: Interference with one's enjoyment of land can constitute a nuisance, but notevery interference so caused by the person can't constitute a nuisance. Like playing music at normal voice which might disturb a neighbor, but that can't constitute a nuisance, as everyone has got the freedom to enjoy their own rights of enjoyment. Therefore, interference that causes damage to plaintiff's property or personal discomfort can constitute a nuisance, provided that such interference should be unreasonable i.e. beyond the limit of their own granted enjoyment right. Like if A has a house by the side of the road, then he can't have a claim for the inconvenience which is necessarily incidental to the traffic on the roads.However, the reasonability of nuisance varies according to localities.

Furthermore, in the landmark case of, *Radhey Shyam v. Gur Prasad*,[567] the defendant's alleged to put a permanent injunction to restrain them from installing and running of flour mill industry in the locality, as that would make already noisy locality noisier. Moreover, due to the installation of the machine, the plaintiff would lose their peace because of the rattling noise of the machine and resultant would be an adverse effect on their health. It was held that the installation of the machine would lead to unreasonable interference on the plaintiff's right and therefore injunction was granted against the defendant.

Secondly, Interference with enjoyment on use of land: Interference with the use of land may either lead to the damage or loss to the property itself or injury to the health or comfort of the occupant of the certain property. An unauthorized interference with the use of another property causing him to lose to suffer, whether it be tangible or intangible which may lead to damage of one's property then in that situation it leads to action for nuisance. Moreover, interference with the property of

[566](1936) 2 KB 468.
[567]A.I.R. 1978 All. 86.

other causing him discomfort and inconvenience in using the premises can be held him liable for nuisance. But the rule for the same is *De minmis non curatlex*, i.e. *the law does not take account of ordinary matters*. There should be interference and inconvenience which is of a serious nature and is causing harm to the property. However, the inconvenience and discomfort do not depend upon the point of view of the plaintiff. The test is based upon how an average man residing in the same locality would consider.

Lastly, Damage: For bringing an action against nuisance it is necessary for the plaintiff to prove for the damage being suffered by the plaintiff through the act of the defendant. In the case of *Fay v. Prentice*,[568]there was a cornice being built of defendant house was projected towards the plaintiff's house. Plaintiff presumed that during rain the water would fall from the defendant's house to plaintiff's garden which would damage his property. This was needed to be proved by the plaintiff and therefore the defendant was held liable for the same.

Nuisance in any form recognized under tort law which results in affecting anyone's personal or property rights, gives to such person cause of action to seek remedial measures from court.[569] The remedies for private nuisances are Abatement, Damages and Injunction. Abatement means the removal of the nuisance by the party injured without recourse to legal proceedings. For this removal should be peaceable, without danger to life and nuisance is entering another person's house than notice may be required. The measure of damage is the diminution in value of the property in consequence of the nuisance. The principle to be applied in cases is not whether defendant is using his property reasonably or otherwise, but whether he injures his neighbor.[570] In order to obtain injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character cannot be adequately compensated in damages. Lastly if the injury is continuous the court will not refuse an injunction because the actual damage arising from it is slight.[571]

CRIMINAL PURVIEW OF NUISANCE

[568](1854) 1 C.B. 828.
[569]Balwantsingh v. commissioner of police, (2015) 4 SCC 801.
[570]SA Basil v. Corporation of Calcutta, ILR (1940) 2 Cal 131.
[571]Kuldip Singh v. SubhashChander Jain, AIR 2000 SC 1410.

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In addition to the provisions of CrPC, Chapter XIV[572]of the Indian Penal Code deals with public nuisance. It is undoubtedly an offence affecting the public health, safety, convenience, decency and morals. Under the penal law of India, nuisance is of two kinds: public and private. Public or common nuisances, which affect the public, and are an annoyance to all citizens are treated as public wrongs.[573]Thus a person trotting rams trained to fight in a market place, a person fouling the water of a streamlet by putting into it bundles of stalks of *tur* plants, a person throwing dust and sweeping on the road in front of his house and thus making the atmosphere noxious to health, a woman keeping on her premises vegetable matter which caused a smell offensive to a person using the public street were guilty of public nuisance.

The purpose behind the Sec 133 of CrPC,[574] is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately, irreparable injury would be done to the public. The Magistrate has to act purely in the interest of the public.[575] Although every person is bound to use his property that it may not cause legal damage or harm to his neighbour. On the other hand, no one has a right to interfere with the free and full enjoyment of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm.[576]Moreover, The Magistrate can act on information derived from any source.[577]

The procedure to remove the public nuisances which can be redressed according to Section 133 of the Criminal Procedure Code it provides that a district magistrate or sub-divisional magistrate or any other executive magistrate specially empowered on this behalf by the State government can make a conditional order to remove such nuisance, and if the nuisance maker objects to do so, the order will be made absolute. Any order duly issued under this provision shall not be called in question in any civil court. The magistrate can act under this provision, either on receipt of a report of a police officer, or on other information, and taking such evidence that he thinks fit. Nuisance is defined in very liberal terms and includes construction of structures, disposal of substances,

[572]PEN. CODE, 1860, § 268,269-286.
[573]P.S.A. PILLAI: PSA PILLAI'S CRIMINAL LAW: INCORPORATING THE CRIMINAL LAW (AMENDMENT) ACT, 2013, (LEXISNEXIS, 14th ed., 2019), p. 505.
[574]CODE CRIM. PROC., 1973, §133.
[575]Narayan v. S.D.M., 1986 Cri.LJ 102 (Ori).
[576]Mahesh Yadav v. State of Uttarakhand &Anr, 2013 SCC OnLineUtt 3503.
[577]TejmalPunamchandBurad v. State of Maharashtra, 1992 Cr.LJ 379 (Bom).

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conduct of trade or occupation. But in case of disobedience of orders, the Court can impose penalties provided under section 188 of Indian Penal Code, 1860. It provides punishment for a maximum period of six months and a fine which may extend to one thousand rupees. Section 144 of the Criminal Procedure Code confers powers on an executive magistrate to deal with emergent situations by imposing restriction on the personal liberties of individuals, whether in a specific locality or in a town itself, where the situation has the potential to cause unrest or danger to peace and tranquility in such an area, due to certain disputes. It confers power to issue an order absolute at once in urgent cases or nuisance or apprehended danger. Specified classes of magistrates may make such orders when in their opinion there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable. Action under this section is anticipatory. It is utilized to restrict certain actions even before they actually occur. Anticipatory restrictions are imposed generally in cases of emergency, where there is an apprehended danger of some event that has the potential to cause major public nuisance or damage to public tranquility.

Preservation of the public peace and tranquility is the primary function of the Government and the aforesaid power is conferred on the Executive magistrate enabling him to perform that function effectively during the emergency situations. Besides orders under this section are justifiable only when it is likely to prevent any of the following events from happening; *Firstly*, Annoyance, *Secondly*, Injury to human life and *Lastly*, Disturbance of public tranquility. Order cannot be made to give advantage to one party. Thus the provision under section 144 is best suited for avoiding public nuisance and protecting the environment. Interpretation of the Scope of Section 133: Despite the numerous provisions criminalizing instances of pollution which would amount to public nuisance, the efficacy of recourse to them is very limited. This is because of two reasons. *Firstly*, after a complaint is made to a magistrate under section 190 of the IPC, criminal proceeding will have to ensure an adequate evidence of the standard required for criminal proceedings will have to be produced in order to secure a sentence and this may take a long period of time. *Secondly*, and perhaps more importantly, the maximum punishments provided for by the provisions are very low almost negligible making prosecution under these section almost pointless. As opposed to the IPC, the CrPC provides a far better option in preventing environmental damage where it amounts to a public nuisance. Section 133 of the Code gives an executive magistrate vast powers put up a stop to public nuisance. From an criminal perspective the section empowers a magistrate if he considers that a) any unlawful obstruction or nuisance should be removed from any public place

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or any, way, river or channel which is used by the public or occupation or that b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, then he may make a conditional order requiring the person causing the nuisance, within a time to be fixed in the order to desist from continuing the nuisance or if he fails to do so, to appear before him on date to be fixed by him and to show cause why the order should not be made absolute. Although the section uses the word „may", it has been held to be mandatory where the circumstances for its use exist.

The remedy under section 133 of CrPC has several advantages that should lead to its choice in seeking to prevent damages. Any person can simply complain to an executive magistrate to set it in motion keeping in mind the mandatory nature that has been read into section 133. It is also comparatively speedier and when evidence is taken under section 138 it is to be taken as in summons case which provided for trial in a summary manner. In addition s. 144 of CrPC provides for situations of emergency where orders can be passed ex-parte, without giving notice etc. The magistrate has wide powers under s.133 to stop or remove the nuisance even he can pass orders requiring public bodies to perform their mandate. Actually, the true meaning, scope and usefulness of remedy under the Sections 133-144 have been articulated by the judicial interpretation of these provisions for the benefits of people and to avoid damages.

The conventional feature is that the cases and commentaries insisted at least traditionally that public nuisance is always a crime. This proposition, unfortunately, was repeated more often than it was explained. What I believe the proposition meant is that liability for public nuisance lies only for a condition that will also support a prosecution for a crime. In other words, public nuisance includes both criminal and what we would now regard as a form of civil liability, but always covers the same set of circumstances. Hence civil liability for public nuisance lies only for conduct that is also a crime. Of course, the commission of a crime, such as an assault, will often give rise to liability in tort. But there is this important difference: the commission of the crime of public nuisance was both a necessary and a sufficient condition for civil liability for public nuisance. One had to create a condition that could give rise to a criminal prosecution in order to be subject to an action for abatement of this condition. In contrast, the commission of a crime is neither a necessary nor a sufficient condition for tort liability.The identification of public nuisance as grounded in a type of criminal liability powerfully reinforces the conclusion that public nuisance is a public action, not a tort. Criminal law, at least in modem times, is understood to be a public action,

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initiated by public authorities, designed to condemn conduct that has been identified as violating basic community norms. It is an aspect of the police power one which employs the judiciary as an instrument of social control. If public nuisance is always based on conduct that would support a criminal prosecution, then this strongly suggests that it too is a public action.

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CONSTITUTIONAL VALIDITY OF COVID-19 LOCKDOWN IN INDIA

- PRATEEK JAIN

ABSTRACT

The World Health Organization and Public Health Emergency of International Concern announced the outbreak of Novel Coronavirus (COVID-19) and declared as a pandemic. Novel Coronavirus is infectious disease that spreads through human to human transmission, it's majorly transmitted through droplets of saliva or discharge of nose when an infected person coughs or sneezes and it directly affect the respiratory system of the infected person. The WHO recommended the procedure of lockdown to prevent the spread of this disease. This particular paper gave an overview about the Constitutional validity of order passed by Central government for Lockdown in whole nation. This paper explains about the concept of the reasonable restriction under article 19(5) & 19(6) of the Constitution to justify the Constitution validity of Lockdown. It also explains about the Doctrine of Repugnancy that helps to implement the legislation passed by Central and State government related to the lockdown. And in the end this paper throw some light on the provision of Lockdown and Curfew and try to differentiate them. It explains how provision of curfew helps in effective implementation of orders of the lockdown across the affected territory and penal provision to punish the person who disobey the orders of government.

KEYWORDS: Covid-19, Constitution, Constitution Validity, Repugnancy, Lockdown, Curfew.

INTRODUTION

Epidemics follow patterns because diseases follow patterns.

Viruses spread; they reproduce; they die.

-Jill Lepore (American historian)

Recently, an outbreak of COVID-19 (Novel Coronavirus Diseases) which has been originated from Wuhan, China has been spread globally. The outbreak of COVID-19 was declared by Public Health Emergency of International Concern on 30 January 2020. On 11 March, 2020 World Health Organization (WHO) has declared COVID-19 a pandemic, i.e., "a world-wide spread disease".

According to World Health Organization, *"A pandemic is defined as "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people".*[578] Dr. Tedros Adhanom Ghebreyesus, Director General of the WHO said that, *"We have never before seen a pandemic sparked by a coronavirus, and we have never before seen a pandemic that can be controlled, at the same time."*[579] WHO updated that as of March 31, the numbers of confirmed cases of COVID-19 1,133,967 world-wide with 60,403 deaths and 236,083 recovered persons, and number of affected countries has reached to 205 countries and territories.

WHO suggested that with the help of 'Lockdown of covid-19 infected territories', 'social-distancing', 'sanitization', 'quarantine', 'Prohibiting mass gathering' and 'Isolation' are the best way to fight with COVID-19 and help to reduce the increasing no. of affected cases. After the guidelines of WHO, government of various countries effectively imposed lockdown around the whole territory, prohibiting the mass gathering in the country and suggested to follow the of social-distancing. In fact, leading international companies have asked their workers to operate from home and all big sporting activities have been cancelled for the time being.

Similarly, India's Prime Minister Narendra Modi announced a Nation-Wide-Lockdown for 21 days on 24th March, 2020 to break the chain of Novel Corona Virus and asked citizens to follow the rule of social-distancing which will prevent the spread of virus. In addition, the Central

[578]"A dictionary of epidemiology", 4th ed., Oxford University Press- New York, 2001.
[579]Media briefing on Covid-19 available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (Visited on April 01, 2020).

Ministry has found that continuity in the implementation and application of various initiatives across the nation has become important to ensure the maintenance of critical services and supplies.

In India, many states like Haryana, Rajasthan, Punjab, Delhi and Uttar Pradesh has declared novel corona virus disease an 'epidemic' and state governments ordered to shut down all Public places, Coaching Centers, Educational Institutes, Public Transport, restricted the marriage functions and prohibited the mass gatherings. According to WHO, the term 'epidemic' means, *"The occurrence in a community or region of cases of an illness, specific health-related behavior, or other health-related events clearly in excess of normal expectancy. The community or region and the period in which the cases occur are specified precisely. The number of cases indicating the presence of an epidemic varies according to the agent, size, and type of population exposed, previous experience or lack of exposure to the disease, and time and place of occurrence."*[580]

After implementing the nation-wide-lockdown and invoking the provisions of Disaster Management Act, 2005 by the Home Ministry. There has been some debate in the legal filed about the constitutional validity of nation-wide-lockdown ordered by central government.

1. CONSTITUTIONAL VALIDITY OF LOCKDOWN

"It's useful to compare our preparations for epidemics with our preparations for war."

-Bill Gates (co-founder of Microsoft Corporation.)

The constitution is the basic framework of Indian legal system. Every act or Law must conform to the basic structure of constitution. To test the constitutional validly of any act, the judiciary needs to examine the act on the basis of basic structure that consists of certain features which includes secularism, federalism, democracy, etc. But before taking an action against any law on the context of its constitutional validity the judiciary has to check the reasonable restrictions and object of that law that legislation want to achieve.

When we debating about, whether order of lockdown by the government is constitutionally valid or not? Then the answer is yes because the order of lockdown benefits the community at large and

[580]Epidemic- Definition available at https://www.who.int/hac/about/definitions/en/ (Visited on April 01, 2020).

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safeguard citizen from novel corona virus. It may have some negative impact on society at large but definitely, it may have a positive impact in the future.

Article 21 of the Constitution of India reads as: *"No person shall be deprived of his life or personal liberty except according to a procedure established by law."* According Justice Bhagwati, Article 21 *"embodies a constitutional value of supreme importance in a democratic society*." Justice Iyer, has characterized Article 21 as *"the procedural magna carta protective of life and liberty.*[581] And it is considered the most sacred fundament right under the Constitution. There can be no freedom without life. Thus, it overlays the way for all other fundamental rights to exist.

In a case, the Supreme court has interpreted Article 21 in a wide sense that, *"right to health is integral to the right to life. The government has a constitutional obligation to provide health facilities."*[582]So, the state has obligation under Article 21 of the Constitution to took proper action and pass necessary orders to ensure the public health & Safety and protect the lives of citizens during public health emergency.

When any government ordered for lockdown then it affects two major fundamental rights of citizens, that includes:

- Article 19(1)(d)- the right to move freely throughout the territory of India.
- Article 19(1)(g)- the right to practice any profession, carry on any occupation, trade or business.

But when look into Article 19(5) & 19(6) it clearly says that "reasonable restrictions" can be imposed by the state on these rights to protect the interest of general public and it is done by procedure established by law.

In a case, the Supreme Court held that, *"to determine the reasonableness of a restriction, among other factors, it must consider the background of the circumstances in which the order is issued and whether the restraint caused by the law is more than necessary in the interest of the general public."*[583]

[581]"Article 21 of the Constitution of India available at http://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/ (Visited on April 02, 2020).
[582]State of Punjab v. M.S. Chawla, 1997 (1) SC 416.
[583]Narendra Kumar v. Union of India, (1960) 2 SCR 375.

Similarly, the Supreme Court observed that, *"a restriction does not become unreasonable merely because it operates in a harsh manner."*[584]

According to WHO, *"COVID-19 is an infectious disease and it spreads primarily through contact with an infected person when they cough or sneeze. It also spreads when a person touches a surface or object that has the virus on it, then touches their eyes, nose, or mouth."*[585] And there is no specific medication and vaccine available for novel Corona Virus.

Countries like China, Italy, USA, Iran had good medical infrastructure and resources but still, they are struggling with the outbreak of novel Corona Virus. As we all know that India has status of developing country and still, we struggle with issues like unemployment, poverty and sanitation. So, we don't have the capacity to deal with the situation happened in developed countries due to novel Corona virus. Strict actions, like Lockdown & Curfew helps our country to implement social distancing, Quarantine and Isolation, which is the most required action on the restriction of virus spread. While some of us consider this kind of restriction on our movement, profession and occupation unreasonable and it is not adequate in the current situation. But, In the interest of the general public and their health, it is the most required and appropriate action. However, the guidelines mentioned under the Disaster Management Act, 2005 will be considered as a reasonable restriction under Article 19(5) & 19(6) of The Indian Constitution.

2. CAN THE CENTRAL GOVERNMENT ORDER A LOCKDOWN?

The Constitution of India establishes a federal structure of Indian government and declared to be a 'UNION OF STATES. Article 245 of the Constitution states that, *"Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."* Article 246 provides for the *"division of powers between Centre and state government which is mentioned in Union, State and concurrent list of 7th schedule of the Constitution."* State government has Jurisdiction and legislative power related to public health issue that falls under Entry 6 of the State list. Meanwhile, Entry 29 of the Concurrent list provides power to central government to make laws on issues related to *"the prevention of an*

[584] Bannari Amman Sugars Ltd. v. CTO, (2005) 1 SCC 625.
[585] https://www.who.int/health-topics/coronavirus (Visited on April 02, 2020).

infectious or contagious disease spreading from one state to another." This entry doesn't restrict the State of Centre Government to make laws only related to Public health issues, but provide wide power to make laws that helps to prevent the disease from spreading across the whole nation and there jurisdiction.

If we take a look into present situation, there is a threat of spreading Novel Corona virus across the whole nation that is a concern issue related to Entry 6 of the State List as well as Entry 29 of the Concurrent List which leads to collision between the powers of State and Central government to make laws for preventing the spread and protect the public health. So, to deal with this issue the makers of the Constitution provided for Article 254 that says,

"Inconsistency between laws made by Parliament and laws made by the Legislatures of States:

> *(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament where Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."*[586]

In a case, the Supreme Court of India explains 'The Doctrine of Repugnancy' and deal with an event *"where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy."*[587]

"The application of Article 254 of The Indian Constitution occurs when there is a direct conflict between Laws enacted by both the Centre and the State on issues in the Concurrent List, and there is repugnancy between them. Repugnancy arises between two statues when they occupy the same field and are completely inconsistent with each other and have absolutely irreconcilable provisions."[588]

[586] Article 254 of The Constitution of India, 1950.
[587] M. Karunanidhi v. Union of India, (1956) SCR 393.
[588] Deep Chand v. State of Uttar Pradesh, AIR 1980 SC 633.

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However, "*the final say rests with the centre which would eventually decide whether the central law would give way to the state law or not. The state law so assented to, would prevail only to the extent of its inconsistency with the central law. It would not override the whole of the central law.*"[589]

The Indian Constitution provides priority to parliamentary law over state legislation. So, after application of Article 254 of the Constitution if there is any repugnancy occurred then the legislation passed by the Central government will be considered and State legislation will considered void.

3. DIFFERENCE BETWEEN LOCKDOWN AND CURFEW

The term 'Lockdown' has no legal definition, this term used by the PM Narendra Modi on 24thMarch, 2020 in his speech that means, restriction imposed on the movement of goods except essential commodities mentioned under Section 2, 3, 4 of the Epidemic Diseases Act. Lockdown includes restriction on Public Transport, Railways, Domestic & International Flights and closure of public and private establishments also.

During a lockdown, public is ordered to stay inside their home and go out only when they have a requirement of essential services and commodities such as access to hospital in case of emergency or need of grocery items. People are required to follow the concept of social distancing even at their home during quarantine and maintain a proper distance of minimum 1 meters.

Lockdown is a long-term plan to control the spread of epidemic disease across the nation. To maintain this lockdown, Central government passed an advisory order to state governments that in the light of Epidemic Diseases Act & Disaster Management Act they need to act and took necessary step to regulate a proper lockdown the nation. The Delhi Epidemic Diseases COVID 19 Regulations, 2020; the Maharashtra Epidemic Diseases COVID-19 Regulations, 2020; the Punjab Epidemic Diseases COVID-19 Regulations, 2020; the Himachal Pradesh Epidemic Disease (COVID-19) Regulations, 2020, etc. provides powers to state government to exercise the lockdown.

[589]Pandit Ukha Kolhe v. State of Maharsthra, AIR 1963 SC 1531.

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However, 'Lockdown' is completely a different concept than 'Curfew'. Again, the Curfew is not a legal term but generally it refers to a situation where people are required to stay at home specially at night and there is a restriction on mass gathering in the territory at that particular time.

Under Section 144 of the Criminal Procedure Code, *"the District Magistrate, Executive Magistrate or Sub-Divisional Magistrate are empowering to issue an order to prohibit the public to assemble at one place or organize any such event where five or more person's gathering can be expected."*

Under this section, there shall be a restriction on the functioning of public establishment like education institution, Mall, Complex, Cinema hall, Parks, Garden and Public transport except emergency services and essential commodities. The section 144 of CrPC also provide power to government to block the internet service for general public.

The order passed under section 144 can remain in force for more than 2 months, but if require state government can extend the restriction up to six months and authorities can withdraw the order at any point of time if situation seems normal and under control.

In the current situation that requires public health safety and control the spread of COVID-19, if any person disobey the order of lockdown that follows the guidelines of epidemic diseases act & disaster management act and order passed under section 144 of CrPC. Then the person can be arrested by police and charged with following penal provisions:

- SECTION 188 OF CRPC[590]- "*Disobedience to order duly promulgated by public servant, and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."*
- SECTION 269 OF IPC[591]- *"Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease*

[590] The Code of Criminal Procedure, 1973 (Act 2 of 1974).
[591] The Indian Penal Code, 1860 (Act 45 of 1869).

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dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

- SECTION 270 OF IPC- *"Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*
- THE NATIONAL SECURITY ACT, 1980[592]- *"An act that empowers the government to detain a person if the authorities are satisfied that he/she is a threat to national security or to prevent him/her from disrupting public order. A person can be detained for up to 12 months without a charge."*

4. CONCLUSION

Due to the outbreak of Novel Coronavirus around the world, the number of confirmed cases of COVID-19 1,133,967 world-wide with 60,403 deaths and 236,083 recovered persons, and the number of affected countries has reached to 205. And similarly, in India, the numbers of confirmed cases are more than 4000 with more than 100 deaths.

To control the spread of Novel Coronavirus, World Health Organisation recommended the procedure of Lockdown, Social-distancing, Isolation and Quarantine. And to follow these guidelines Indian government ordered to implement 21 days lockdown in the whole country. Central Government gave advisory orders to the State government to take all necessary steps to prevent the spread of epidemic disease in their jurisdiction. State government passes an order under Section 144 of CrPC to effective implementation of the lockdown in their territory.

When any government ordered for lockdown then it affects two major fundamental rights of citizens, that includes free movement around the territory and practice any profession, trade & occupation. But for the public health and safety lockdown falls under the reasonable restriction that is implemented with the procedure laid down by the law.

[592] The National Security Act, 1980 (Act 65 of 1980).

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However, for effective implementation of Lockdown Central & State government need to work together for the public health and safety to prevent the spread of epidemic disease across the whole nation.

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RIGHT TO HEALTH AND MISCARRIAGE

- **GARGI SHARMA**

INTRODUCTION

Women from the very old times were considered to be a member of the vulnerable section of society. As the word, vulnerable declares that they need special attention in terms of everything. Health is the most important aspect among them all.

Women's health has been described as "a patchwork quilt with gaps".[593] Women are subjected to many health problems regarding pregnancy, reproductive health, etc. It is of paramount importance to provide better health care to women.

The reproductive health of a woman is something which should be taken into account as a separate topic, as it requires special care. There are certain cases where it becomes necessary for the mother to get her miscarriage done with her consent. There are other cases also where such thing is done with ill intentions and there it becomes an offence. Whatever be the intention, the woman who had a miscarriage requires some special protection for a certain period of time and it is her right to health.

It is women's right to decide whether she wants the child or not as health is not only a physical aspect but also a mental and emotional one.

ISSUES

As women need special protection, there are various issues which are to be dealt with regarding their health. The issues are as follows:-

- Reproductive
- Social

[593] Clancy & Massion 1992.

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- Cultural
- Regional
- Physical

CHALLENGES

The major challenge is to provide health care facilities to women around the world. There are many areas where proper health care facilities are still a dream. Several social challenges are also there like some several communities or tribes like to remain under the veil. In India, some of the challenges are as follows:-

SEX DETERMINATION:-

Sex determination or amniocentesis is prevalent in India since time immemorial. This heinous practice is, however, is declared as an offence by the pre-natal diagnostic techniques (prohibition of sex selection) act, 1994. In Vinod Soni & Anr. v. Union of India[594], Mumbai high court rejected the argument of unconstitutionality of Pre- Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, based on the right to privacy.

RECENT SCENARIO:-

COVID-19 or coronavirus disease is widespread. This virus has been declared as a pandemic by the WHO. To safeguard the countries' people, many nations have called lockdown. The lockdown has resulted in the closure of every essential facility including the health facility. Only government hospitals are open which are flooded with people and hence resulting in the delay of treatment. There are several pregnant women currently in the world and they are facing severe troubles. For example, if we talk about India, we have come across many headlines that say the death of the woman under labour pain or miscarriage of the child she was carrying, due to delay in treatment.

MEANING OF MISCARRIAGE

The medical definition of miscarriage involves spontaneous abortion or pregnancy loss. However, its definition is also given under the maternity benefit act, 1961. It is as follows:-

[594] 2005 CriLJ 3408, 2005 (3) MhLj 1131

"Miscarriage" means expulsion of the contents of a pregnant uterus at any period before or during the twenty-sixth week of pregnancy but does not include any miscarriage the causing of which is punishable under the Indian Penal Code (45 of 1860)"[595]

Definition according to WHO is, "a baby who dies before 28 weeks of pregnancy is referred to as a miscarriage, and babies who die at or after 28 weeks are stillbirths."[596]

HOW IT IS DIFFERENT FROM ABORTION

These two terms are different and cannot be used synonymously. The same is clear from Sections 312 to 314 of the IPC. Nowhere do these sections use the term abortion. Rather they only use the phrase 'causing of miscarriage'.

Medically as well there is a difference between the two terms. The term 'abortion' is used only when an ovum is expelled within the first three months of pregnancy. On the other hand, 'miscarriage' is used when a fetus is expelled from the fourth to the seventh month of gestation before it is viable.[597]

A miscarriage is the spontaneous loss of a fetus before the 20th week of pregnancy (pregnancy losses after the 20th week are called stillbirths). Miscarriage is a naturally occurring event, unlike medical or surgical abortions. A miscarriage may also be called a "spontaneous abortion."[598]

Miscarriage When An Offence

Miscarriage under IPC,1860 is given under chapter 16 which is offences affecting the human body from sections 312 to 318 within the head "OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF CONCEALMENT OF BIRTHS". The provisions from section 312 to 315 in particular deal with miscarriage. The essential is the mala fide intention either on the part of the mother herself or any other person. The provisions are as follows:-

Section 312: Causing miscarriage:-

[595] Section 3(j), maternity benefit act, 1961.
[596] www.who.int
[597] www.blogipleaders.com
[598] https://medlineplus.gov.in

Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage is not caused in good faith to save the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman is quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation: A woman, who causes herself to miscarry, is within the meaning of this section.[599]

Section 312 does not permit any person including the pregnant woman to miscarry. The exception given by the Section is that to save the life of the pregnant woman miscarriage can be allowed.

If any person attempts to cause miscarriage but fails to do so. Then the provisions of Section 312 do not apply. However, the provisions of Section 511 (attempt) read with Section 312 may be attracted, and the wrong-doer should be punished accordingly. (Queen Emp. vs. Aruna Bewa)[600]

Section 313: Causing miscarriage without woman's consent:-

Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with the child or not, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[601]

In the offence under Section 312, the pregnant woman's consent is inherent. In the offence under Section 313, there is no consent of a pregnant woman. A person, who causes miscarriage, against the consent of the pregnant woman, he shall be punishable under Section 313.

Section 314: Death caused by act done with intent to cause miscarriage:-

Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; If the act is done without woman's consent.—And if the act is done without the consent of the woman, shall be punished either with [imprisonment for life] or with the punishment above mentioned.

[599] Indian penal code,1860
[600] (1873) 19 WR
[601] Indian penal code,1860

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Explanation: It is not essential to this offence that the offender should know that the act is likely to cause death.[602]

It is not necessary for Section 314 that the offender should know that the act is likely to cause the death of a woman. Hence the rash, negligent or involuntary act of the offender can attract the provisions of this Section.

Section 315: Act done with intent to prevent the child from being born alive or to cause it to die after birth:-

Whoever before the birth of any child does any act to thereby prevent that child from being born alive or cause it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act is not caused in good faith to save the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.[603]

Right to health

The right to health is a fundamental part of our human rights and our understanding of a life in dignity. It was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." **The 1948 Universal Declaration of Human Rights also mentioned health as part of the right to an adequate standard of living (art. 25)**. **The right to health was again recognized as a human right in the 1966 International Covenant on Economic, Social and Cultural Rights. Since then, other international human rights treaties have recognized or referred to the right to health or elements of it, such as the right to medical care.**

The right to health, as with other rights, includes both freedoms and entitlements:

[602] Ibid.
[603] Ibid.

- Freedoms include the right to control one's health and body (for example, sexual and reproductive rights) and to be free from interference (for example, free from torture and non-consensual medical treatment and experimentation).
- Entitlements include the right to a system of health protection that gives everyone an equal opportunity to enjoy the highest attainable level of health.[604]

Women's right to health regarding miscarriage under various legislations

The rights of the women related to miscarriage under various legislations are as follows:-

A. **International instruments**:-

India is a signatory to various international conventions, such as:-

Convention on the Elimination of All Forms of Discrimination against Women, art. 12:-

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

International Covenant on Economic, Social and Cultural Rights, art. 10 (2):-

It provides that Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. Women are affected by many of the same health conditions as men, but women experience them differently.

B. **Constitution of India**:-

The CONSTITUTION OF INDIA provides various rights, the rights regarding the woman's health are as follows:-

[604] https://www.who.int.org

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Article 14, 15 &16:-

The Constitution of India recognizes many of these same rights as fundamental rights that the government must uphold, including the right to equality and non-discrimination (Articles 14 and 15).

Art.14 guarantees equality before the law and equal protection of law to all its citizens. Articles 15 (1) and 16 (2) expand this principle further and prohibit discrimination based on religion, race, caste, sex or place of birth. This ensures that there is no discrimination between men and women, upper castes and lower castes, rich and poor and all will be treated as equals before the law and will be provided equal protection of the law.

Article 21:-

Article 21 deals with the right to life and includes the Right to Life with Dignity. The Delhi High Court issued a landmark joint decision in the cases of Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors. And Jaitun v. Maternity Home, MCD, Jangpura & Ors.[605] Concerning the denials of maternal health care to two women living below the poverty line. The court stated that "no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background…This is where the inalienable right to health which is so inherent in the right to life gets enforced."

Abortion as a Fundamental Right:-

No woman can call herself free until she can choose consciously whether she will or will not be a mother - Margaret Sanger

In Suchita Srivastava and V. Krishnanan[606], the Supreme Court and the High Court of Madras have respectively affirmed women's rights to choose in the context of continuing a pregnancy. In Laxmi Mandal v. Deen Dayal Hari Nagar Hospital[607], the Delhi High Court ruled that preventable maternal death represents a violation of Article 21 of the Constitution.

[605] W.P. (C) 81/2012
[606] Supreme Court of India, Suchita Srivastava & Another v. Chandigarh Administration, 28 August 2009, SLP (C) 5845/2009.
[607] W.P. (C) 81/2012

In Sandesh Bansal v. Union of India[608], the MP high court stated that "the inability of women to survive pregnancy and childbirth violates her fundamental right to life as guaranteed under Article 21 of the Constitution of India" and "it is the primary duty of the government to ensure that every woman survives pregnancy and childbirth."

C. **Maternity benefit act,1961**:-

The important provisions of the maternity benefit act dealing with miscarriage are as follows:-

Section 4: Employment of, or work by, women prohibited during a certain period:-

(1) No employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of her delivery or her miscarriage.

(2) **No woman shall work in any establishment during the six weeks immediately following the day of her delivery or her miscarriage**.

(3) Without prejudice to the provisions of section 6, no pregnant woman shall, on a request being made by her in this behalf, be required by her employer to do during the period specified in sub-section (4) **any work which is of an arduous nature or which involves long hours of standing or which in any way is likely to interfere with her pregnancy or the normal development of the foetus, or is likely to cause her miscarriage or otherwise to adversely affect her health.**

(4) The period referred to in sub-section (3) shall be –

(a) At the period of one month immediately preceding the period of six weeks, before the date of her expected delivery;

(b) Any period during the said period of six weeks for which the pregnant woman does not avail of leave of absence under section 6.

Section 8: Payment of medical bonus:-

Every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of twenty-five rupees if no pre-natal confinement and post-natal care is provided for by the employer free of charge.

[608] W.P. (C) 9061/2008.

Section 9: Leave for miscarriage:-

In case of miscarriage, a woman shall, on production of such proof as may be prescribed, be entitled to leave with wages at the rate of maternity benefit for a period of six weeks immediately following the day of her miscarriage.

Section 10: Leave for illness arising out of pregnancy, delivery, premature birth of child, or miscarriage:-

A woman suffering illness arising out of pregnancy, delivery, premature birth of child or miscarriage shall, on production of such proof as may be prescribed, be entitled in addition to the period of absence allowed to her under section 6, or, as the case may be, under section 9, to leave with wages at the rate of maternity benefit for a maximum period of one month.

Section 13: No deduction of wages in certain cases:-

No deduction from the normal and usual daily wages of a woman entitled to maternity benefit under the provisions of this Act shall be made by reason only of –

(a) the nature of work assigned to her by virtue of the provisions contained in sub- section (3) of section 4 : or

(b) Breaks for nursing the child allowed to her under the provisions of section 11.

D. **Medical termination of pregnancy act, 1971**:-

The MTP Act, passed by Parliament in 1971to permit legalized abortions. Prior to 1971, abortion was criminalized under Section 312 of the Indian Penal Code, 1860, except in cases where the procedure was necessary to save the woman‘s life. **The Shah Committee, appointed by the Government of India, carried out a comprehensive review of socio-cultural, legal and medical aspects of abortion, and in 1966 recommended legalizing abortion to protect women‘s health and lives on both compassionate and medical grounds**. It was also viewed as a population control measure.

Section 3: When Pregnancies may be terminated by registered medical practitioners:-

(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for

the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) Where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are. Of opinion, formed in good faith, that,-

(i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to physical or mental health; or

(ii) There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

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Section 5: Sections 3 and 4 when not to apply.-

(1) The provisions of Sec.4 and so much of the provisions of sub-section (2 of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified.

To perform an abortion procedure on a pregnant woman, you require the permission of certain persons. Like, if a woman is married, her own written consent is sufficient. No requirement for her husband's consent then.

Amendments in the act:-

In late January 2020, the Union Cabinet amended the 1971 Medical Termination of Pregnancy (MTP) Act which allows women to seek abortions as part of reproductive rights and gender justice. The amendment has raised the upper limit of MTP from 20 to 24 weeks for women including rape survivors, victims of incest, differently abled women and minors. Failure of contraception is also acknowledged and MTP is now available to "any woman or her partner" replacing the old provision for "only married woman or her husband."

E. Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994:-

This act was enacted to control the female foeticides. this act is related to the miscarriage right as it is the right of the mother only to decide whether she wants the child or not. The killing of a child whether it a girl or boy adversely affects the woman mentally and hence affecting her health. Such killing not only affects her mental health but may result in the deterioration of her physical health too. such sex-based miscarriages or miscarriages, in general, may make the woman infertile. The object of this act is as follows:-

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An Act to provide for the prohibition of sex selection, before or after conception, and for the regulation of prenatal diagnostic techniques to detect genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto.[609]

Section 3A: Prohibition of sex-selection:-

No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

Section 4: Regulation of pre-natal diagnostic techniques:-

On and from the commencement of this Act,—

1. no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);

2. no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:—

(i) chromosomal abnormalities;

(ii) genetic metabolic diseases;

(iii) haemoglobinopathies;

(iv) sex-linked genetic diseases;

(v) congenital anomalies;

(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

[609] THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994

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3. no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:—

(i) age of the pregnant woman is above thirty-five years;

(ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;

(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;

(iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;

(v) any other condition as may be specified by the Central Supervisory Board; Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography;

4. no person including a relative or husband of the pregnant woman shall seek or encourage the con- duct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2).

5. no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

Section 5: Written consent of pregnant woman and prohibition of communicating the sex of foetus:-

1. No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless -

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and

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(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

2. No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.

Section 6: Determination of sex prohibited:-

On and from the commencement of this Act:-

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

Section 22:- Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention:-

(1) No person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue or cause to be issued any advertisement in any manner regarding facilities of pre-natal determination of sex available at such Centre, Laboratory, Clinic or any other place.

(2) No person or organisation shall publish or distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation:-For the purposes of this section, "advertisement" includes any notice, circular, label wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

Suggestions

Referring to the recent scenario of the miscarriage related aspect, a few suggestions for the dispersal of better health rights are as follows:-

i. Awareness needs to be spread regarding the laws containing such rights through campaigns or legal-aid camps.

ii. Government hospitals must provide more of such facilities fulfilling all the legal provisions so that a large number of women can be covered.

iii. Younger generations must be told about the miscarriage laws and practices for their awareness and safer abortion practices.

iv. Misconceptions regarding the practices and the myths must be busted.

v. Norms regarding sex determinations must be made more stringent to lessen the rate of female foeticide as much as possible.

vi. Ethical camps must be organized for the people as well as the doctors. They must be made to understand that killing a child is a sin and a doctor who, despite the presence of PNDT act is supporting such a deed by performing sex determination is even more guilty.

vii. The proper medical differences must be made clear to the people regarding miscarriages and abortions.

viii. Penal provisions regarding this practice must be made clear to spread awareness.

ix. Amendments must be made in the acts as they are very old and somewhere lacking in punishing the wrong-doer.

x. Awareness to be spread among women that they are not alone and they may file a complaint if someone is forcing her to miscarry or to have sex- determination.

Conclusion

It is to be concluded that women are one of the most vulnerable groups. They require a proper health care system and facilities. Health is the most basic right which is to be given to all. The right to health for women is even more basic right as they need more attention. Miscarriage is the causing of death of the child inside the mother's womb. It may be voluntarily that is by external interruption or involuntarily that is due to any natural force.

The basic difference between miscarriage and abortion is the duration of the pregnancy. However, if we ask a layman about it he would differentiate abortion with miscarriage as there is voluntary causing of death in one and natural death in another. But Indian penal code, 1860 uses the term miscarriage in place of abortion. So, legally it may be said that miscarriage is a wider aspect in which abortion is included. It is to be understood that causing the death of a child that is miscarriage in terms of IPC is a punishable offence if done without any bona fide reasons.

The bona fide reasons like effect to the mental and physical health of the mother or deformity of the child are provided within the MTP act, 1971. The term abortion is used in that act and the duration is also prescribed. However, the duration is enhanced by the recent amendment making it more flexible. Various international legislations like CEDAW provide certain provisions.

It is to be understood that miscarriage is a very important aspect of women's health and hence it must be dealt with accordingly. Better health facilities need to be provided. Negligence in

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miscarriage related things might affect the woman not only emotionally, mentally but physically as well.

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AIR POLLUTION CONTROL LEGISLATIONS IN INDIA AND RIGHTS AND DUTIES WITH RESPECT TO DELHI'S AIR POLLUTION

- DEEPALI SEHRAWAT

ABSTRACT

This research paper revolves around the issue of recent Delhi pollution. It deals in brief with various aspects surrounding the problem. It first states a few legislations that are already existing in India, and mentions their provisions that have been specifically made to curb air pollution. It covers The Air (Prevention and Control of Pollution) Act, 1981, The Environment (Protection) Act, 1986, and The Ozone Depleting Substances (Regulation and Control) Rules, 2000. It then states the rights, responsibilities and duties of citizens towards the environment, provided under the Constitution of India. A summary of a few cases with respect to air pollution in India has also been provided, after which the causes of Delhi's air pollution have been explained. Lastly, the steps taken by the authorities and how successful these were have been mentioned, and suggestions along conclusion have been provided.

INTRODUCTION

India, with 15 of the 20 most polluted cities in the world, has recently witnessed one of the most hazardous air quality in its capital city of Delhi. There are various factors that have led to this environment and health hazard. It being a landlocked city, cannot use the moderating effect of the sea to dilute its emissions. Also, apart from pollutants being produced within the city, there is smoke coming from outside too. The situation had become so extreme that scientists estimated that breathing in that air was equal to smoking 50 cigarettes a day. There were increased cases of breathing disorders, and the old and the young along with asthma patients were most at risk. The

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air quality index had reached 50 times what is considered healthy. Everybody including the sensitive as well as the healthy groups were advised to stay indoors, and do no physical activity. A health emergency was declared and schools were shut, construction work had been banned, vehicles on roads were limited. Several steps were taken by the authorities, some with aggressive implementation, and some only on paper. The problem is, that there is not one, but many sources of pollution, and each of these sources is a constituency of its own. There are farmers, builders, property developers, industries, energy companies, etc., none of which can be pressured into completely stopping the emissions they produce, because each sector blames the other, and wants them to stop first. Prohibiting activities of farmers would seem unfair, and big builders and energy companies are too powerful to be prohibited. Therefore, despite Supreme Court orders and statutes, this problem arises every year, and will continue to do so.

REVIEW OF LITERATURE

Michael Greenstone et al. (2017) in the work "The Solvable Challenge of Air Pollution in India" has mentioned how India's air does not meet the National Air Quality Standards, and how policies have been proven difficult to implement. It also analyses the data and the changes before and after ration driving system, as well as industrial emissions.

Carmen E. Pavel (2016) in his work "A Legal Conventionalist Approach to Pollution" has dealt with the position of pollution before and after legal conventions. It states that pollution is a kind of harm that creates liability, but only under certain specific conditions, and not otherwise. He argues that people cannot be held responsible and liable for causing pollution without a legal framework.

Linda Hajjar Leib (2011) in her book "Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives" deals with the matter of human rights with respect to pollution in Chapter two. She concentrated on the controversies in conceptualisation and implementation of contemporary international human rights in order to determine the appropriateness and constraints of the human rights based approach to environmental issues.

Alfred Endres (1985) in his book "Environmental Policy with Pollutant Interactions" has primarily focused on environmental policies and standards, and how they are targets that need to be met. He also states that acceptability standards for pollutants should be defined as dependent

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on each other, and not independently, because they often react chemically to form pollutants, and are not harmful independently.

Central Pollution Control Board analysis of Air pollution in Delhi (2016) deals with the major sources of air pollution in the region. It then introduces the National Air Quality Monitoring Programme and National Ambient Air Quality Standards. Further, it analyses the situation in Delhi and the air quality trends. Lastly, it provides suggestions that may be implemented by the authorities in order to control the situation.

Greenpeace Assessment of Air Pollution in Indian cities (2017) deals with not just the problem of air pollution in Delhi, but in several Indian cities including Haryana, Jharkhand, Madhya Pradesh, Maharashtra, etc. It provides an introduction in order to make the readers understand the basics, and then moves on to the statistical data of several cities. Additionally, it states the initiatives taken by the government, and further compares the situation in India with several other countries.

AIR POLLUTION CONTROL LEGISLATIONS IN INDIA

THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT

India has had a number of acts that have indirectly addressed the issue of air pollution. But the first act that was made for the sole purpose of controlling air pollution was **The Air (Prevention and Control of Pollution) Act, 1981**. This Act was made for prevention and control of air pollution, and to establish Boards, which would have powers and would be assigned functions for this purpose.[610] The Act was primarily implemented in fulfillment of the decisions taken in the United Nations Conference of the Human Environment held in Stockholm in June, 1972, of which India was a part. Under the Act, the Central Pollution Control Board has been given the powers and the responsibilities of performing the functions in the Union Territories including Delhi, that a State Pollution Control Board performs in states.

THE ENVIRONMENT (PROTECTION) ACT, 1986

[610] The Air (Prevention and Control of Pollution) Act, 1981

The Environment (Protection) Act, 1986 defined environment as inclusive of water, air and land[611] The Act states that the Central Government has the power to execute a nation-wide programme in order to control pollution[612], and also lay down standards for emission of pollutants, no matter their source.[613] It may also lay down safeguards for handling hazardous substances.[614] The Act also states that "no person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess or such standards as may be prescribed."[615] This Act is also serving as an umbrella under which various laws and rules have been made, including the notification on lead free petrol, etc.[616]

THE OZONE DEPLETING SUBSTANCES (REGULATION AND CONTROL RULES), 2000

This act deals with regulation and control of substances that result in ozone depletion, many of which are also major causes of air pollution. These include chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs), hydrobromofluorocarbons (HBFCs), etc.[617] The act prohibits all persons from producing any ozone depleting substances in excess of the calculated base level of production. It also prohibits the sale of such substances, unless a person has registered himself with authority.[618]

RIGHTS AND DUTIES UNDER THE CONSTITUTION OF INDIA

The preamble of the Constitution itself ensures a socialistic pattern of society and the dignity of individuals, and a decent standard of living and pollution free environment is inherent in this.[619]

[611] The Environment (Protection) Act, 1986. Section 2a

[612] The Environment (Protection) Act, 1986. Section 3(2)(ii)

[613] The Environment (Protection) Act, 1986. Section 3(2)(iv)

[614] The Environment (Protection) Act, 1986. Section 3(2)(vii)

[615] The Environment (Protection) Act, 1986. Section 7

[616] Prashant Bhave & Nikhil Kulkarni, *Air Pollution and Control Legislation in India*, 96 J. Inst. Eng. India Ser. A (2015).

[617] Ozone depleting substances | Ministry for the Environment, , https://www.mfe.govt.nz/more/hazards/risks-ozone-depleting-substances/what-are-ozone-depleting-substances (last visited Feb 2, 2020).

[618] The Ozone Depleting Substances (Regulation and Control) Rules, 2000

[619] Environment Protection under Constitutional Framework of India, , https://pib.gov.in/newsite/PrintRelease.aspx?relid=105411 (last visited Feb 3, 2020).

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Therefore, we see that protection against any kind of pollution is provided to the citizens of India in the basic structure itself.

RIGHT TO LIFE UNDER ARTICLE 21 WITH REGARD TO ENVIRONMENT DEGRADATION

Article 21 of the Constitution of India talks about the right to life. It states that "no person shall be deprived of his life or personal liberty except according to procedure established by law."[620] This article has had various interpretations over the years which are still evolving. The Constitution provides us with six categories of fundamental rights, out of which the right to life is the most important, others just adding quality to this right.

Right to life does not just refer to the physical act of breathing, but also includes the right to education[621], the right to health, the right to live in a safe, clean and pollution free environment, and so on. There have been certain cases that have helped establish a wider interpretation of Article 21 of the Indian Constitution, in which the courts have stated that right to life includes the right to live in a safe and pollution free environment. This paper will mention a few of them, those particularly relating to the right to live in a healthy and pollution free environment. In regard to the condition of air quality in Delhi, MC Mehta filed a writ petition claiming violation of right to life. The court said that "it is a blatant and grave violation of right to life," because it clearly violates what this right encompasses.

FUNDAMENTAL DUTIES WITH REGARD TO ENVIRONMENT PROTECTION

Article 51A mentions the fundamental duties of citizens. These are not enforceable, but citizens are expected to abide by them. One of these includes the duty "to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."[622] Therefore, along with rights come duties, which one must fulfil because somebody

[620] Constitution of India. Art. 21.

https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf (last visited Feb 2, 2020)

[621] Constitution of India. Art. 21.

https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf (last visited Feb 2, 2020)

[622] Constitution of India. Article 51A(e)

else's right is one's duty. The government and other authorities will take appropriate steps, but it is ultimately the responsibility of the citizens to support them and their decisions, and follow these decisions in order to achieve the desired result.

DIRECTIVE PRINCIPLES OF STATE POLICY WITH REGARD TO ENVIRONMENT PROTECTION

DPSPs are also not enforceable by any court, just like fundamental duties. **Article 38(1)** states that "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."[623] The word 'welfare' here includes social welfare, and therefore a healthy environment where the society has no risk of polluted air or water is an essential element of a welfare state. **Article 47** states 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."[624] Here, improvement of public health can only happen when there is a clean living environment and there are no health risks due to poor quality of basic necessities like air and water to the citizens. Additionally, **Article 48A** states that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."[625] It directly mentions the responsibility of the State to protect the environment, which includes air, water and land, and therefore the responsibility to prevent air pollution, and take control measures when it occurs.

INDIAN CASES RELATING TO AIR POLLUTION

https://doj.gov.in/constitution-day-citizens-duties/fundamental-duties (last visited Feb 3, 2020)

[623] Constitution of India. Article 38(1)

https://www.mea.gov.in/Images/pdf1/Part4.pdf (last visited Feb 3, 2020)

[624] Constitution of India. Article 47

https://www.mea.gov.in/Images/pdf1/Part4.pdf (last visited Feb 3, 2020)

[625] Constitution of India. Article 48

https://www.mea.gov.in/Images/pdf1/Part4.pdf (last visited Feb 3, 2020)

The case for Delhi's pollution level in 2019 is the **MC Mehta vs. Union of India and Ors.**, writ petition (civil) no. 13029/1985. In this case, MC Mehta filed a writ petition to bring the issue of Delhi's hazardous air pollution to the notice of the court. The court said that "every year this kind of piquant situation arises for a substantial period. It is compounded by the fact that year to year in spite of various directions issued by the High Court, other authorities including this Court the State Governments, Government of NCT of Delhi and the corporations of Delhi and nearby States are not performing their duties as enjoined upon them." It also said that "it is a blatant and grave violation of right to life." The Court directed Chief Secretaries of the State Governments, District Collectors, Tehsildars, Director General, IG/SP and other police officers of the area of concerned police station and the entire police machinery to ensure that not even a single incident of stubble burning takes place.

In the case of **Subhash Kumar vs. State of Bihar and Ors.**[626], a writ petition was filed stating that West Bokaro Collieries and Tata Iron and Steel Company had been polluting river Bokaro, and making its water unfit for drinking and irrigation purposes, thereby causing health risks. The court held that "right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life."

In another case, **MC Mehta vs. Union of India and Ors.**[627], MC Mehta filed a public interest litigation against the foundries, hazardous chemical industries, and the refinery at Mathura, stating that they emit sulphur dioxide, which reacts and forms sulphuric acid which leads to acid rain. The polluted air around the Taj Trapezium Zone damaged the Taj Mahal. The court in this case held that there needs to be a balance between economic development and protection of the environment, and issued several guidelines for the protection of the monument.

Another delhi pollution case filed as a writ petition for vehicular emissions was **MC Mehta vs. Union of India and Ors.**, writ petition (civil) no. 13029/1985 that was filed in 1985 under Article

[626] Subhash Kumar vs. State of Bihar and Ors., 1991 AIR 420, 1991 SCR (1) 5

[627] MC Mehta vs. Union of India and Ors., AIR 1997 SC 734 : (1997) 2 SCC 353

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21 of the Constitution. The inaction on the part of the authorities was challenged, and it was claimed that highly toxic and corrosive gases as well as smoke was allowed to be released in the air without any restrictions, therefore putting the citizens of Delhi at high risk. In this case, the Supreme Court issued several guidelines and ordered the concerned authorities to take required steps to deal with the situation. These measures included elimination of leaded petrol, replacement of old autos, taxis and buses, construction of new Interstate Bus Terminus at entry points, along with strengthening the air quality monitoring.[628]

In the same year in 1985, MC Mehta filed another writ petition regarding the industrial pollution in the NCT of Delhi, and mainly against the industries in residential areas, as they prove to be a greater health hazard for people. This was the case of **MC Mehta Vs Union of India and Ors.**, writ petition (civil) no. 4677/1985. The court took various steps after considering the petition. 168 industries falling in 'Ha' and 'Hb' categories which were hazardous/noxious/heavy and large industries, 513 industries falling under 'H' category 43 Hot Mix Plants, 246 brick kilns falling under category 'H', 21 arc/induction furnaces falling under 'H' category industries under the Master Plan of Delhi (MPD-2001) were directed to close down and stop functioning and operating in Union Territory of Delhi. However, those industries could relocate to any other industrial estate in the NCR or may change their technology to cleaner one.[629]

CAUSES OF DELHI'S AIR POLLUTION

There are a variety of causes that have led to the hazardous air quality of Delhi. 28% of the total pollution comes from vehicular emissions, 4% from crop burning, 30% from industries, and 10% from households.[630]

The Delhi Chief Minister Arvind Kejriwal said, "Delhi has turned into a gas chamber due to smoke from crop burning in neighbouring states". Crop burning in the states of Punjab and Haryana is clearly one of the major causes of Delhi's unhealthy air quality, given the pollution spike at a

[628] Bhave and Kulkarni, *supra* note 7.

[629] *id.*

[630] M.C. Mehta vs Union Of India on 15 November, 2019

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particular time of the year, in the months of October-November. The region of Punjab and Haryana is known as the breadbasket of India, given that most of the area in the region is used for agricultural purposes. The agriculture here has grown rapidly, especially in the 2000s. Therefore, farmers started producing more, leading to an increase in demand for water for irrigation. This lead to depletion in groundwater, for which the government had to take steps. Two new acts were passed in the year 2009, namely **The Haryana Preservation of Sub-Soil Water Act, 2009** and **The Punjab Preservation of Sub-Soil Water Act, 2009**. Section 3(1) and 3(2) of the Haryana Preservation of Sub-Soil Water Act, 2009 banned the sowing of nursery of paddy before 15th May and transplant of paddy before 15th June.[631] This was done so that the farmers could not plant paddy until right before the monsoon season, when the groundwater replenished. This further lead to late harvesting of crops, and therefore lesser time to prepare the field for the next plantation. To quicken this process, more and more farmers started burning their stubble. This happens in the months of October-November, and all the smoke from the stubble fire forms a cloud of smoke over Delhi. This is because in the winters, the cold mountain air rushes down from the Himalayas towards Delhi. Additionally, the Himalayan Mountains act as a barrier and push the smoke southwards. This cold air is trapped beneath the warm lowland air which acts as a lid and the stubble fire smoke along with the pollutants has nowhere to go.[632] This, along with the urban city pollution forms a toxic layer of smog over the city, making the air hazardously toxic.

Environmentalists filed a petition in the Supreme Court regarding this practice of crop burning, and subsequently, the Court ordered a complete halt.[633] Despite this ban, the implementation has been a problem, and stubble burning still continued. The reasons include poverty of farmers. Other manual or machinery methods of clearing fields are time consuming and expensive respectively, and therefore farmers are left with no other choice.

Another reason stated for increased pollution is the population of the city. Delhi has always been a big city with a huge population. But the pollution levels have drastically gone up in the last

[631] Haryana Preservation of Sub-Soil Water Act, 2009

[632] Air Quality of Delhi _060716_, Introduction 26.

[633] Delhi pollution: farm fires set to continue despite court ruling | World news | The Guardian, , https://www.theguardian.com/world/2019/nov/05/india-top-court-orders-halt-to-stubble-burning-to-cut-delhi-pollution (last visited Jan 30, 2020).

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decade. One of the major reasons other than crop burning is the rise in population. More people results in more vehicles on roads, more construction work, and more industrial activity. All of this combined, results in more pollutants in the air, and more dust particles.

Additionally, the festival of Diwali usually falls in the month of October or November. There has always been a culture of bursting crackers during Diwali, that makes the already hazardous air even worse. Though the government has launched various initiatives to reduce the bursting of crackers by introducing green crackers and public awareness programmes, there are still some loopholes in their implementation. For instance, green crackers cost much higher than the normal ones, leading to less demand, and therefore, even shopkeepers are not ready to keep them in their shops because they are not able to sell. Despite initiatives of public awareness, some people are still of the opinion that bursting crackers for a day in one whole year makes little difference in the level of pollution.

WHAT ARE THE AUTHORITIES DOING?

The Delhi government took various steps in order to bring the situation down from worse to less worse. These include the odd-even policy, ban on civil construction, enhancement of parking fees, ban on entry of trucks, ban on waste burning, increase in metro trips, distribution of masks, shutting schools, etc. The Supreme Court also ordered a ban on crop burning in the states of Punjab and Haryana, but the implementation was notably not aggressive.

SUPREME COURT ORDER

The Supreme Court directed the authority and respective personnel to make sure that no case of stubble burning takes place after the order, and that just because farmers cannot use their stubble as manure does not mean that they have the right to put the lives of the masses in jeopardy. The Court also said that if such a case takes place, then not just the farmer or the person doing it, but the entire administration from the Chief Secretary Commissioner, Collector and all other concerned functionaries and Panchayats will be hauled up for violation of the order passed by the Court and be liable for tortious act. The Court ordered the State Governments, Central Government and the Government of NCT of Delhi to take immediate action, and ensure that no garbage and waste burning takes place. The Environment Pollution (Prevention and Control) Authority was ordered to not allow any diesel vehicles to enter Delhi. NCT of Delhi along with the Municipal

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Corporation was ordered to ensure that no open dumping of waste takes place, and that all garbage is moved to safe places.

ENVIRONMENT POLLUTION (PREVENTION AND CONTROL) AUTHORITY

The EPCA issued notice to the authorities of NCT of Delhi, UP, Rajasthan and Haryana and Punjab regarding the measures needed to combat air emergency in Delhi.[634] It ordered these authorities to stop construction activities in regard to the order of the Supreme Court, to close all hot mix plants, ready mix plants and stone crushers in all NCR districts, and to also close all coal or other fuel based industries which do not operate on natural gas or agro residue. They also banned firecracker burning for the whole of winters, and ordered a check on stubble burning.

ODD-EVEN POLICY FOR VEHICLES

The Delhi Government implemented the third edition of the odd-even policy for eleven days, starting from November 4, 2019 till November 15, 2019 in order to reduce vehicular emissions and control the hazardous pollution levels. It is a car rationing method in which cars with odd number plates can only ply on odd dates, and the ones with even number plates can ply on even dates. This reduces the number of cars on the roads, therefore less emissions. It also encourages car pooling and use of public transport. This policy also ensures that there is no inconvenience by providing for some exceptions, which include two-wheelers, vehicles used for medical emergencies, lone women drivers, cars with all women as occupants, women drivers accompanied by children of 12 years or less, and vehicles with school children in uniform. Additionally, there was also a list of VIPs who were exempted. Also, the scheme is only applicable from 8 am to 8 pm everyday, excluding Sundays. The fine for violation of this rule was Rs. 4,000. This was a well implemented policy, with strict checking by the traffic personnel. Though the air quality index showed no improvement in Delhi's pollution level, but that could be a result of various other factors like crop burning, industrial activities and the festival of Diwali, given that this policy only deals with vehicular emissions and not other major causes, which was seen as a drawback to this rule. Additionally, people tend to find a way around the laws implemented for their own convenience, for example, by simply changing the number plate. Vehicular emissions contribute

[634] Environment Pollution (Prevention & Control) Authority for the National Capital Region, , http://www.epca.org.in/ (last visited Feb 3, 2020).

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to 28% of the total causes of Delhi pollution, and odd-even scheme only deals with cars, which is only 3% of this 28%. Therefore, this is another drawback to the rule.

RESEARCH METHODOLOGY

This paper is based on a very simple research methodology. The data that has been obtained is secondary, and not primary. It is based on already published research by different analysts. A part of the paper is based on review of literature. The data has been collected from published materials, books, journals and online sources. For this purpose, use of libraries and the internet has been made. Selection of the paper has been done based on the relevance and contribution to the body of knowledge.

SUGGESTIONS

Through the research, it is clearly visible that despite initiatives by the authorities, the pollution level in the capital city of Delhi had only increased. Be it the odd-even rule, introduction of green crackers, or the orders by the Supreme Court, no remarkable results were seen. Other methods can still be tried and tested for their effectiveness. The first and the foremost step may be to encourage afforestation, especially in areas near busy roads and highways, and in areas near an industrial location. Though we cannot stop the growth of industries because they are important for the continuous development of the economy, we may still impose stringent laws to check the quantity of pollutants they release, and ensure installation of proper pollution control devices. Additionally, a uniform standard of fuel and engine quality may be maintained, in order to reduce pollution caused due to inefficient engines. Dust suppression techniques such as water sprays may be used to control construction and road dust. In order to encourage the use of cleaner fuels in vehicles, subsidies may be given, and fine may be imposed on old vehicles that do not meet the standards. Restrictions may also be imposed on the number of vehicles owned by a family according to the number of members. Citizens must be encouraged to use public transport, one by spreading awareness, and in addition, by improving the quality and quantity of such transport. Car pooling may also be encouraged by various methods. Lastly, corporates and companies that take initiatives towards a better environment, and takes up such issues as a part of their corporate social responsibility may be given benefits, and also may be favoured when giving out government tenders, etc.

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CONCLUSION

Based on the research paper, it can be concluded that the situation is bad, and it will only get worse if appropriate steps are not aggressively implemented. There are so many factors that have contributed to the indispensable air into becoming a health risk. Therefore, stringent initiatives have to be taken not only on paper, but with proper implementation. The authorities are taking steps to move closer to a healthier air, but it can be seen from the results that these are not enough, and therefore, additional responsibility has to be taken by not only the government, but also the citizens. Instead of using ways of getting around the laws, people must be self aware and self motivated to protect their own environment, because it is ultimately them who suffer. When citizens are given rights, there are also duties that come along, and in order to claim those rights, they must perform their duties. This is simply based on the principle that one person's right is another person's duty.

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LAWS AND BENEFITS TO MENTALLY ILL AND MENTALLY DISABLED HUMAN BEINGS

- **AYUSH SONI**

"Mental illness is nothing to be ashamed of, but stigma and bias shame us all."

Human beings are considered as the most intelligent species to have ever walked on the earth. Until today medical science has not been able to explain human brain in entirely. But sometimes there occurs a disorder in brain which we colloquially refer to as foolishness and insanity. Mental illness is considered to be characterized by the inability of individual to perform daily chores of his/her life. In mental illness the person is unable to function as a normal human being. Therefore, they are considered as unproductive, unwanted and useless. But in India, there are different Laws for mentally ill and mentally disable.

Constitution of India provides certain Articles like Art. 15(2) – Right against discrimination. Mentally challenged people are also citizen of India so, they cannot be denied access to public goods and they are equally eligible for equal opportunities like normal human being.

Art. 21 provide them the Right to Health. In **1971**, "**the deceleration of mentally retarded persons**" was adopted by UN general assembly which laid down certain guidelines regarding the recognition, safeguards, economic security and special care of mentally ill and mentally disabled.

There are some local laws which are made for mentally disabled like-

- **The Indian Mental Health Act, 1987-** which provide them the right to treatment and care. Act also provide the legal security to the mentally challenged.
- **The Person with Disabilities (equal opportunities, protection of rights and full participation) Act, 1995-** under this few landmark steps were taken like establishment of special school for free education of mentally challenged children, 3% reservation for mentally disabled in government jobs.

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Towards mentally ill and mentally disabled person everyone has a sympathetic approach. They deserves the same privileges enjoyed by any other human beings. They are the part of our society, they are strong enough to live their life. They deserve love, respect and nothing less from anyone

1. INTRODUCTION

Mental Health problems are very difficult to understand as there is so much about the human brain which even doctors aren't aware of. Mental problem differs from individual to individual because every person has different brain functioning. In a countrywide survey of Mental Health and Neurosciences has disclosed a disgraceful prevalence of mental health condition in India. Around

13.7 percent of Indian population is suffering from number of mental diseases. And 10.6 percent of this amount needs immediate medical treatment. Nearly, 150 million Indians are in condition of immediate medical treatment.

India is lacking very behind in mental health policy as there are only 0.3 psychiatrists for every 1, 00,000 people. According to WHO, Indian Government spends only 0.06 percent of its health budget on mental health which is very hard to believe. Many people commit suicides due to their mental disorder. Hence, this shows that there is a need of proper treatment and medical facilities for all mentally ill persons and government should also think about these mentally disabled people who are suffering in our society in one and another way.

In India, mental health facilities are very poor because of several reasons like-

- **Less trained Psychiatrists-** the number of psychiatrists are very few in number in India, which is a major issue. Less number of psychiatrists are the reason that the mentally disabled persons are not getting proper medical treatment.
- **Insufficient infrastructure-** it is claimed that there is not just a shortage of doctors but of hospitals as well. The number of beds for mentally sick persons are very few in

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numberand the condition of the wards are also very pathetic. There is no good scope of treatment for mentally ill people in the hospitals due to improper infrastructure.

- **Negative thoughts towards mentally disabled-** mentally challenged persons have a very poor standing in the society. No one provides them respect, they are victims of name-calling such as PAGAL, CRAZY, and MAD etc. which makes them realize that they are unwanted creatures in the society. People feel ashamed to help them and to call them their near ones.
- **No insurance policies for mentally challenged-** it is one of the saddest realities that prevail in the society that there is no provision for medical insurance for people who are admitted in the hospital with illness affecting their mental health.
- **Discrimination in Jobs-** when it comes to light, the mental illness of a person, he/she faces an obvious discrimination in the job field. They are thrown out of jobs or much worse, not accepted.

The Constitution of India provides for equal rights irrespective of whether he/she is able, disabled, mentally/physically capable or incapable. It is seen that the rights of such person are violated and ignored because people fail to realize that even they have such rights by virtue of their existence in the society. We as a society are responsible for this situation. When society fails, it requires a law to be enacted to enforce those rights.

LAWS THAT PROMOTE MENTALLY ILL BEINGS OF THE SOCIETY

The Mental Health Bill, 2013- Mental illness was earlier defined as any mental disorder other than mental retardation. The Bill passed by Rajya Sabha defines mental illness to mean a disorder of thinking, mood, perception, orientation or memory. Such a disorder impairs a person's behavior, judgment, capacity to recognize reality or ability to meet ordinary demands of life. This definition also includes mental conditions associated with substance abuse, and does not include mental retardation.

- **Manner of treatment-** the bill states that every person will have the way he wishes to be treated in the case of mental health situation.

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- **Access to Public health care-** the person will have the right to claim easy access to mental health services and treatment from the government which are affordable and of good quality.
- **Suicide decriminalized-** this bill aims to decriminalized suicide. Here it will be presumed that any person who attempts suicide was under severe stress and hence will not be punished for it.
- **Insurance-** this bill makes it mandatory for all insurance companies to provide medical insurance for mentally ill people on the same basis as it is provided for physical illness.

The Mental Health Bill, 2013, provides compulsorily provisions to access mental health services in every district. The central and state government are liable to follow the bill properly. There are several states which does not have sufficient funds to provide all the medical treatment to all mentally sick persons, in that case the central government step in to ensure funds for the implementation of the law.

The Mental Health Act, 2017, also provides certain provisions with the related issue. The same Act is made with the aim to provide the treatment and security to all those individuals who are suffering from several mental illness. Few important sections of the Act are-

- **Section 2(o)** "Mental healthcare" includes analysis and diagnosis of a person's mental condition and treatment as well as care and rehabilitation of such person for his mental illness or suspected mental illness.

- **Section 2(s)** “Mental Illness” means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize 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 characterized by sub normality of intelligence
- **Section 3 Determination of Mental Illness** (Mental illness shall be determined in accordance with such nationally or internationally accepted medical standards (including

the latest edition of the International Classification of Disease of the World Health Organization) as may be notified by the Central Government.

No person or authority shall classify a person as a person with mental illness, except for purposes directly relating to the treatment of the mental illness or in other matters as covered under this Act or any other law for the time being in force.

Mental illness of a person shall not be determined on the basis of, (a) political, economic or social status or membership of a cultural, racial or religious group, or for any other reason not directly relevant to mental health status of the person; (b) non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community.

Past treatment or hospitalization in a mental health establishment though relevant, shall not by itself justify any present or future determination of the person's mental illness.

The determination of a person's mental illness shall alone not imply or be taken to mean that the person is of unsound mind unless he has been declared as such by a competent court.

- (**Section 18)**-Every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government.
- **(Section 19)-**Every person with mental illness shall, (a) have a right to live in, be part of and not be segregated from society; and

(b) Not continue to remain in a mental health establishment merely because he does not have a family or is not accepted by his family or is homeless or due to absence of community-based facilities.

- **Right to Legal Aid (Section 27)**

A person with mental illness shall be entitled to receive free legal services to exercise any of his rights given under this Act.

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It shall be the duty of magistrate, police officer, person in charge of such custodial institution as may be prescribed or medical officer or mental health professional in charge of a mental health establishment to inform the person with mental illness that he is entitled to free legal services under the Legal Services Authorities Act, 1987 or other relevant laws or under any order of the court if so ordered and provide the contact details of the availability of services

- **(Section 28)**-Any person with mental illness or his nominated representative shall have the right to complain regarding deficiencies in provision of care, treatment and services in a mental health establishment

In our society mentally sick persons were treated very badly, in fact many people treated them as they are the burden on the earth. Even they were not having any rights to access justice too. Mentally retarded people were not considered fully humans, so no equal rights were given to them. They were suffered from many basic rights like right to travel, right to education, right to insurance, right to vote and etc. but the Constitution of India provides right to justice, liberty of thoughts, expression, worship, belief, equal status and opportunity to mentally disabled. They cannot be discriminated on the basis of race, religion, se, caste, etc.

Article 21- Mentally challenged persons have right to get proper treatment and health care and they cannot be denied to access this right.

Article 41- This Articles states that every state has to secure right to work, education and public assistance for old, sick and disabled persons.

To deal with the issues relating to mentally retarded persons, State legal services should organize training camps by setting up special legal aid clinics in psychiatric hospitals and nursing homes with the help of NGOs.

In the landmark case of **Suchita Srivastava v. Chandigarh Administration** that occurred in Chandigarh Nari Niketan, where a 19 year old girl who was raped and had become pregnant, who was also mildly mentally retarded had appealed Supreme Court to keep the pregnancy and deliver the baby, which the Punjab High Court had rejected. In Supreme Court a bench comprising of Chief Justice P Sathasivam, Justices B S Chauhan and Justices K G Balakrishnan had upheld her right of motherhood. Court held that termination of pregnancy should be done only with the

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woman's consent even if she has any disability and thus this was a landmark judgment relating to mentally ill person.

In another landmark judgement in the case of **Deaf Employees Welfare Association v Union of India** petition was filed seeking a Writ of Mandamus directing the Central and state governments to grant equal transport allowance to its government employees suffering from hearing impairment as what was being given to blind and other disabled government employees. The allowance given to the hearing impaired employees was significantly lower than the allowance granted to other employees with disabilities. The Supreme Court allowed the petition and directed the Respondents to grant transport allowance to speech and hearing impaired persons also on par with blind and orthopaedically disabled government employees. The court held that "there cannot be further discrimination between a person with disability of 'blindness' and a person with disability of 'hearing impairment'. Such discrimination has not been envisaged under the Disabilities Act." It held that equality of law and equal protection of law afforded to all persons with disabilities while participating in government functions. The court held that the dignity of persons with hearing impairments must be protected by the state. Even the assumption that a hearing or speech impaired person is suffering less than a blind person is, in effect, marginalizing them; and as such, the same benefits must be given to them, as are awarded to blind citizens. Any move made by the state to further this objective is in consonance with the principles enshrined in Articles 14. This case held that deaf and mute people should also be given transportation allowances on par with blind and orthopedically handicapped employees of the government.

Government of India v Ravi Prakash Gupta - In this case, the respondent was a visually challenged person who appeared for the civil services examination conducted by the Union Public Service Commission and was declared successful. However, he was not given an appointment even though he was at Sl. No. 5 in the merit list of visually impaired candidates. The respondent approached the Central Administrative Tribunal which refused his application and thereafter the respondent approached the high court. The high court directed the government to accommodate the Respondent in the merit list, against which the state filed an appeal in the Supreme Court. The state contended that since the post for which the respondent was applying was not identified for

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persons with disabilities and therefore not reserved for them, the government could not make reservations in the same.

The Supreme Court refused the state government's contention that identification of jobs was a pre-requisite for reservation and appointment under section 33 of the Act.[4] The court held,"*It is only logical that, as provided in section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate government to make appointments in every establishment*."[5]

India has signed the UN CONVENTION ON THE RIGHTS OF THE DISABLED PERSON and since it has ratified this, it is under obligation to make sure the human rights and their fundamental freedom of such disabled persons are not violated and are given equal protection under the law. National Trust Act, 1999 also provides certain laws for mentally retarded persons who are orphans that they will get a guardian for their benefits and assistance. Another purpose the Act is to provide the same privileges like other human beings gets around the world.

HUMAN RIGHTS OF MENTALLY ILL PERSON

- **Right to Health and Indian Constitution-** like all other citizens of India they are also entitled to get right to health. The Supreme Court has also held that the maintenance and improvement of public health is one of the obligations that flow from Article 21 of the Indian Constitution.
- **Right to Health and as a basic Human Right and International Covenant-** in 1948, the United Nations through its deceleration of Human Rights affirm the basic principle that it is the duty of all human beings to treat, at all times, a mentally ill person with

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humanity and respect by virtue of his very being. The Deceleration of the rights of the disabled, which includes persons with mental illness, was adopted by the United Nations in 1975.

- The 1971 Declaration on the Rights of Mentally Retarded Persons: This Declaration was adopted by the General Assembly on 20th December 1971, keeping in view the necessity of providing help to mentally retarded persons in order to enable them to develop their abilities and promoting their integration in the normal life.
- **Steps taken by Government of India-** National legal services authority introduced National legal services authority (legal services to the mentally ill persons and persons with mental disabilities) Scheme, 2010,-

This scheme makes it obligatory for our legal system to ensure the human rights and fundamental freedoms of persons with disability (including mentally ill person and persons with mental disability) are enjoyed on equal basis with others and to ensure that they get equal recognition before the law and equal protection of the law.

ROLE OF NGOS CIVIL SOCITIES AND LEGAL AID

These organizations act proactively to achieve the desired goal of the Government. NGOs, Civil Society themselves or by approaching legal service authority become entitled to take action in order to help the affected person to get their rights. Recently NALSA documented legal aid that were provided to a mentally challenged woman. NALSA succeeded in getting rights for the woman. There are certain MHNGOs that, even after facing a great number of challenges has done commendable job in spreading awareness regarding mental health issues and helping those who became the victim of the same. It is to be noted that a lot of these organizations are urban based but now are extending their branches in rural areas as well.

In the case of **U.P. Vishesh Shikshak Association v. State of U.P**[6]. Here the Petitioner Association had filed a public interest petition before the Allahabad High Court contending that the pupil-teacher ratio so far as specialized teachers and children with disabilities was concerned

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was not adequate and claimed that the government circular on Integrated Education for Disabled Children Scheme mandated a pupil teacher ratio of 8:1. It also claimed that the Rehabilitation Council of India Act, 1992 imposed a statutory duty on the State to make arrangements for adequate number of teachers for persons with disabilities.

The Allahabad High Court recognised the statutory duty of the State to "provide all necessary help and assistance to physically disabled students." However, in response to an argument that orthopedically handicapped children do not require specialized teachers, it held, "*We are of the view that now, the right to education and right to livelihood being the fundamental rights enshrined under Articles 21 and 21-A of the Constitution, the State Government has to make all efforts to provide necessary assistance to all disabled persons. Taking into consideration the meagre strength of 1291 teachers, we cannot presume that State Government may be able to impart education to disabled students.*"

CONCLUSION

Mental illness and disorders are considered as dejected part of the society and those suffering from it are considered as an abomination but it is a prevailing situation in the society and that too at an alarming rate and the people need to accept it instead of ignoring its prevalence.

Mental disorders are seem to very across time, within the same population at the same time. Various studies and surveys have concluded that the tendency of such disorders are high in female gender, child and adolescent population, student, elderly population etc. hence it is obligatory for the existence of various mental health legislations for the management of psychiatric disorders and similar matters. The laws generally covered the requirements and procedures for the involuntarily commitment and compulsorily treatment in a psychiatric hospital or other facility.

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A DECADE OF RIGHT TO EDUCATION ACT, 2009: IT'S IMPACT

- **EKTA SOOD**

INTRODUCTION

"*Education is the most powerful weapon which you can use to change the world*."
- Nelson Mandela

Education is like a light which empties the darkness of understanding thing in life. Education is the tool with which one can live life with happiness and prosperity. It empowers the mind with which one can be able to formulate good thoughts and ideas. Every day, life throws numerous challenges to survive for humans but it is only education that guides a human being to fight with failures and get success in life. Education helps in analyzing how to make decisions in life. Corruption, unemployment, poverty and all other problems which we all are facing in this world can be removed by education only. Education does not mean living on your foot by obtaining a degree. It is much more than that. Through education one can become a good child, parent, doctor, teacher, engineer, entrepreneur and an honest citizen. It helps in developing a good political ideology and it also expands the process of national development. Mostly, in all the countries of the world, the standard of living of its citizens depends on the level of education, they are acquiring.[635]

Everyone deserves to be educated. The first early investment for the development of a child is education only. For a country to be developed, every government of the nation allocates its first budget on educational infrastructure in schools and colleges. A value grows from education. If a person has an education but he does not value it, then an educated person can be more of a useless

[635] Samantha Stewart, *Why is education important in our life?*, PROPROFS (Apr. 7, 2020, 3:49 PM), https://www.proprofs.com/discuss/q/1765350/why-education-is-important-in-our-life.

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person. Therefore, every child in a nation must get to have an education with values as a country needs to develop progressively. Education should be accessible to all.[636]

That is why the right to education is considered a basic Human Right all over the world and in India, education is a basic fundamental right which every child must-have.

WHAT IS RIGHT TO EDUCATION

The right to education is recognized as a human right and it provides compulsory primary education to all children free of cost. It also included access to higher education which should be easily accessible to all. The right to education being a human right is also a fundamental right. The right to education provides for the elimination of discrimination among students at all levels of the educational system and it also set up for minimum standards to improve the quality of education. Education always administers to the full development of human personality and it also helps to strengthen the respect for human rights. Education promotes the individual freedom of a man and its way of thinking towards life. The right to education is an inherent right. Across the globe, there are various types of right to education such as primary education, secondary education, higher education, vocational education, etc. Education is free under primary or elementary stages and is compulsory. The right to education also includes higher education which should be equally accessible to all the students based on merit. [637]

According to UNESCO, the right to education is an important human right and is essential so that one can exercise other human rights too. For the development of a fully rounded human being, quality education is a must. Education acts as a most important and powerful tool which helps in lifting the socially excluded children and adults out of poverty. As per the UNESCO data, if all the adults across the globe complete their secondary education then the number of poor people could be reduced to less than half. It helps in the reduction of the gender gap for girls and women. According to the UN study, each year of schooling reduces the infant mortality rate by 5 – 10%

[636] *Importance of education in life*, KLIENT SOLUTECH (Apr. 9, 2020, 4:10 PM), http://www.klientsolutech.com/importance-of-education-in-life/.
[637] *The Right To Education As A Human Right Education*, UKESSAYS (Apr.7, 2020, 4:10 PM), https://www.ukessays.com/essays/education/the-right-to-education-as-a-human-right-education-essay.php?vref=1.

because of awareness resulted out of education. But for the working of this human right, nations must ensure the equality of opportunity, universal access and improved quality standards.[638]

RIGHT TO EDUCATION AT INTERNATIONAL LEVEL: A QUICK GLANCE

Universal Declaration of Human Rights was adopted by the United Nations on 10th December, 1948. It sets out the fundamental human rights that have to be universally protected. Article 26 of UDHR set out the right to education as a basic human right. As per this article, everyone has a right to education and it must be free and compulsory at elementary and fundamental stages. Professional and higher education must be generally available and shall be easily accessible to all based on merits. It also gives the right to parents to choose what kind of education they want to give to their children.[639] The right to education under the Universal Declaration of Human Rights has been reaffirmed by multiple nations in the form of international treaties and developed according to their needs and circumstances. Today, almost every country has ratified at least one human right treaty except Sudan by accepting the legal obligation to respect and protect this right for all without any discrimination.[640]

Articles 28 and 29 of *Convention on the Rights of Child*, 1989 deals with the right to education. It states that every nation has to provide compulsory and free education; it must encourage the development of vocational and secondary education and also provides the resources if needed. Article 13 of *International Covenant on Economic, Social and Cultural Rights*, 1966 also recognizes the right to education. The Convention talks about education that directs the full development of human personality and it also strengthens respect for other human rights. Education is a right that must be available to everyone as it enables every person to participate effectively in the society, to promote understanding and tolerance towards other nations which resulted in peace as per the purpose of the United Nations. It also states that the scope of the right to education consists of four A's – availability, accessibility, acceptability and adaptability[641].

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[638] *Education is a fundamental Human rights*, UNESCO (Apr. 7, 2020, 4:01 PM), https://en.unesco.org/news/what-you-need-know-about-right-education.

[639] *The Universal Declaration of Human Rights*, UNITED NATIONS (Apr. 7, 2020, 4:16 PM), https://www.un.org/en/universal-declaration-human-rights/.

[640] Delphine Dorsi*, The Right to Education: A Daily Challenge*, RIGHT TO EDUCATION (Apr. 7, 2020, 4:07 PM), https://norad.no/en/front/thematic-areas/education/right-to-education/.

[641] *The Right To Education As A Human Right Education*, UKESSAYS (Apr.8, 2020, 4:15 PM), https://www.ukessays.com/essays/education/the-right-to-education-as-a-human-right-education-essay.php?vref=1.

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Article 4 of the UNESCO *Convention against Discrimination in Education*, 1960 deals with the standard and quality of education. The Convention wants that every nation signing the treaty ensures that standard of education must be equal in all public institutions and it also encourages that suitable methods must be provided for the education of those persons who have not received primary education. The Convention explicitly talks about the prohibition of discrimination at any level by providing equal opportunity to all.[642]

RIGHT TO EDUCATION AT NATIONAL LEVEL

19% of the world's children population is in India which means that majority of young the generation is in India only. One-third of the world's illiterate population also resides in India. It does not mean that there is no growth in the rate of literacy in India but such growth is slow. These are alarming issues for any nation. Therefore, the Government of India introduced the Right to Free and Compulsorily Education Act, 2009 and makes education a fundamental right under Article 21A. With this implementation India becomes one of the 135th countries to implement the right to education as a fundamental right.[643]

Eighty–Sixth Amendment Act, 2002 inserted Article 21A in the Indian Constitution. However, article 21A and Right to Education Act, both came into force on 1st April 2010. Article 21A of the Constitution incorporates free and compulsory education to all the children age six to fourteen years as a fundamental right. The title of Right to Education Act embraces words "free and compulsory education" where the word "free education" means that every child is entitled to get an education without paying any cost or charges or expenses for it and the word "compulsory education" embraces an obligation on the appropriate government to ensure and provide admission, attendance, and completion of compulsory education of children of age 6- 14 years.[644]

The 86th Amendment Act, 2002 where inserted Article 21A, substituted Article 45 which earlier provides for free and compulsory education to all children up to the age of 14 years as a Directive Principles. After the substitution of the RTE Act, the State's responsibility is now to provide care and education to children below 6 years of age. This amendment added a new clause into Part IV

[642] Birutė Pranevičienė, *Right to Education in International Legal Documents*, 3 JURISPRUDENCE 133, 142(2010).
[643] Diva Rai, *Right to Education*, IPLEADERS (Apr. 7, 2020, 4:27 PM), https://blog.ipleaders.in/right-to-education-3/.
[644] *Right to education*, MHRD (Apr.7, 2020, 4:30 PM), https://mhrd.gov.in/rte.

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– A of the Indian Constitution which is related to Fundamental Duties under Article 51A. Article 51A (j) requires that every parent or guardian shall have to provide education to his child from the age of 6 years until the age of 14 years.[645]

The main points of the Act are as follows:

- The act provides for free and compulsory education in a neighborhood school till completion of elementary education.
- It provides for the provision of admission of non–admitted children to an age-appropriate class.
- The act laid down the responsibilities and duties of parents, local authorities and of appropriate government in providing free and compulsory education. It also laid down the criteria for sharing financial and other responsibilities between Central and State Government.
- The act laid down the standards for infrastructure, working hours of school, working hours of teachers and most importantly, Pupil-Teacher Ratio (PTRs).
- It provides for the appointment of teachers to ensure that Pupil-Teacher Ratio must be maintained without looking into District or Block schools by maintaining rural-urban balance in the State.
- The Act prohibits the distribution of teachers into non–educational work except decennial census, elections duty in local, state legislature and parliament election, etc.
- The act also prohibits:

    a) Any type of punishment be it physical or mental

[645] Khumtiya Debbarma, *Challenges in Implementation of Right to Free and Compulsory Education Act*, *2009*, FISCAL POLICY INSTITUTE (Apr. 13, 2020, 4:10 PM), http://www.fpibangalore.gov.in/design/styles2/files/Academic_Reports/Khumtiya%20Debbarma%20-%20RTE%20.pdf.

b) Screening procedure during the admission of a child

c) Private tuition by teachers

d) Capitation fee

- The Act requires the appointment of properly trained and qualified teachers.
- The Act provides for the development of curriculum in concord with the Constitution of India to ensure all-round development of a child and also to make a system where children are free from any fear, trauma, and anxiety by making a friendly atmosphere.[646]
- The act directs for the 25% reservation for Scheduled Caste, Scheduled Tribe and Differently abled students.
- It had a no-detention policy which is now removed by the Right of Children to free and Compulsory Education (Amendment) Act, 2019.[647]

IMPACT OF RIGHT TO EDUCATION ACT IN A DECADE

Almost a decade ago, India passed a very important piece of legislation to achieve the very purpose of universalization of elementary education for all Indian children which is known as the Right to Education Act, 2009. It is an attempt to deliver the quality education to every child in India without making any discrimination based on income, caste, class, religion, etc. this fact cannot be denied that successful implementation of RTE Act has led to an improved net enrollment rate of children in primary education, improved infrastructure of the school and states effort to follow the mandate passed by the Act. Act's main focus was on the improved infrastructure and increase in enrolment rates but it was not at all successful in improving the quality of education which results in poor learning outcomes from the children. It loses its focus on quality in education.[648]

In the following sections of the article, we will discuss the impact of the Right to Education Act till 2019 under the main heads highlighted by the Act.

[646] *Right to education*, MHRD (Apr.7, 2020, 4:30 PM), https://mhrd.gov.in/rte.
[647] *Right To Education*, DRISHTI (Apr. 13, 2020, 3:50 PM), https://www.drishtiias.com/to-the-points/Paper2/right-to-education.
[648] *Assessing the impact of Right to Education Act*, KPMG (Apr. 13, 2020, 4:45 PM), https://assets.kpmg/content/dam/kpmg/pdf/2016/03/Assessing-the-impact-of-Right-to-Education-Act.pdf.

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1. Increase in enrolment.

The act has successfully managed to secure the enrolments. The Act brings an improvement in the enrolment number of girls which has been increased from 48% in Financial Year 2009-10 to 49% in Financial Year 2013-14. The overall enrolment in school in the age group of 6 to 14 years is 96.5% in FY 2009-10 which increased to 96.7% in FY 2013-14 and in FY 2017-18, it raised up to 97.2%. The stats were taken from the Annual Status of Education Report (ASER) which was released by an NGO Pratham.[649]

According to the ASER 2018 rural findings, since 2007, the enrolment of children has been above 95% for the children of the age group of 6 – 14 years. For the first time in 2018, the proportion of children who are not enrolled in school has been fallen to 2.8% and the total number of girl children out of school has been fallen to 4.1%.[650]

We should not be happy to see these figures as these national figures; it shows enormous numbers of discrepancies in every state. For instance, the rate of enrolment of children age 6–14 years was more than 97% in Orissa but less than 80% in Andhra Pradesh. There is a steady increase in enrolment in the upper primary section in the state of Bihar, Uttar Pradesh and Rajasthan, whereas Madhya Pradesh, Assam and West Bengal saw a significant decrease in the same time period. It is also considered that sanitation also plays a major role in increasing female enrolment as well as in holding female teachers.[651]

2. Improved infrastructure norms

If we talk about improvement in infrastructure then there is a significant improvement in schools from FY 2009-10 to FY 2013-14. Many schools are still lacking playgrounds and boundary walls but still there is an increase in the percentage of playgrounds from 51% to 58% from FY 2009-10

[649] Sankalp Aggarwal, *Evaluation of Right to Education Act*, COUNTER CURRENTS.ORG (Apr. 14, 2020, 4:20 PM), https://countercurrents.org/2019/08/evaluation-of-right-to-education-rte-act.
[650] *The thirteenth Annual Status of Education Report (ASER 2018)*, ASER (Apr. 14, 2020, 4:40 PM), https://img.asercentre.org/docs/ASER%202018/Release%20Material/aser2018pressreleaseenglish.pdf.
[651] Sanchayan Bhattacharjee, *Ten years of RTE act: Revisiting achievements and examining gaps*, ORF (Apr. 14, 2020, 5:00 PM), https://www.orfonline.org/research/ten-years-of-rte-act-revisiting-achievements-and-examining-gaps-54066/#_edn2.

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to FY 2013-14.[652] However, in 2018, 8 out of 10 schools had the facility of the playground which is either available in the school premises or close by. 90% of schools in Himachal Pradesh, Haryana and Maharashtra had access to playgrounds. However, states of Jammu and Kashmir, Bihar, Orissa and Jharkhand have schools where more than quarters of all schools does not have access to playgrounds.[653]

The percentage of schools with boundary walls has increased from 51% to 62% from FY 2009-10 to FY 2013-14 and till 2018 it reached 64.4%. The percentage of schools with kitchen sheds has also increased to 91% in 2018 and a fraction of schools with which has the facility of girls toilet has increased to 66.4% in 2018. One more remarkable feature is the facility of the library which has been considerably increased over the years as the proportion of books other than the text-books has increased from 62.7% to 74.2% from 2010 till 2018. Again the national number of schools having facilities of girls' toilets is hidden by the variations in state wise list. State of Jammu and Kashmir and most of the north eastern states are deficit in providing this facility as less than 50% of schools in these states provide provision for drinking water or toilets.[654]

Section 19 and 25 of Right to Education Act, 2009 deals with infrastructure facility, toilet facility, playground facility but only 13% of all the schools in India have achieved full compliance with the provisions mentioned under the Act as per District Information System of Education. The reasons are inadequate funds, incompetent management and lack of best use of infrastructure facilities available. The Act talks about the studying of students in the neighborhood school, even though such school is not in compliance with the RTE Act.[655]

3. Teacher-Student Ratio and attendance

The Pupil-Teacher ratio should be 1:30 according to the provisions of the Act and there has been a considerable drop in the number of schools that comply with this provision. PTR is fixed to ensure smaller classrooms which resulted in more attention to each student for their overall

[652] *Right To Education*, DRISHTI (Apr. 15, 2020, 8:10 PM), https://www.drishtiias.com/to-the-points/Paper2/right-to-education.
[653]Sankalp Aggarwal, *Evaluation of Right to Education Act*, COUNTER CURRENTS.ORG (Apr. 15, 2020, 8:24 PM), https://countercurrents.org/2019/08/evaluation-of-right-to-education-rte-act.

[654] Sankalp Aggarwal, *Evaluation of Right to Education Act*, COUNTER CURRENTS.ORG (Apr. 15, 2020, 8:30 PM), https://countercurrents.org/2019/08/evaluation-of-right-to-education-rte-act.
[655]*The thirteenth Annual Status of Education Report (ASER 2018)*, ASER (Apr. 15, 2020, 8:40 PM), https://img.asercentre.org/docs/ASER%202018/Release%20Material/aser2018pressreleaseenglish.pdf.

assessment. According to the KPMG report, the ratio has been dropped from 46% in FY2009-10 to 33% in FY2013-14 for the primary schools and upper primary schools, the drop was from 36% in FY 2009-10 to 31% in FY2013-14.[656] As per the data given by the Unified District Information System for Education (UDISE), the Pupil-Teacher Ratio till 2017 is 24:1 in elementary schools and 27:1 for secondary schools.[657]

As per ASER, till 2018, students' and teachers' attendance had no major changes. Average teacher attendance remained at around 85% whereas average student attendance was around 72%. Karnataka and Tamil Nadu have the highest student attendance of 90% or more in the primary level whereas states having more than 90% of teacher attendance are Jharkhand, Orissa, Karnataka and Tamil Nadu.[658]

4. The 25 percent quota.

According to Section 12(1) (c) of the RTE Act, 2009, all schools whether private, aided, un-aided or fall under any special category has to reserve at least 25% of their seats for the economically weaker section and disadvantaged group of the society at the elementary level (Class1). This provision fulfills the very basic objective of the RTE Act, equality of opportunity about concerning education. States are allowed to frame the rules regarding the eligibility of Economically Weaker Section and Disadvantaged Group. State Government reimbursed the schools either in the total fee charged by the school or per child expenditure incurred by the State Government, whichever is lowest. More than 3.3 million students acquired admission under this provision in FY2018-19.

It also provides for the lottery system in case the number of applicants is more than the prescribed seats and to implement this, the school conducts multiple rounds of lotteries till the time seats got filled. However, it results in a delay in the process of admission. Till the time, students don't get admission in the first round, round two would not start and it delays the process. In Indore, more

[656] *Right To Education*, DRISHTI (Apr. 16, 2020, 4:49PM), https://www.drishtiias.com/to-the-points/Paper2/right-to-education.
[657] *Student-Teacher Ratio,* MHRD (Apr. 17, 2020, 12:53PM), https://pib.gov.in/newsite/PrintRelease.aspx?relid=158326.
[658] Sankalp Aggarwal, *Evaluation of Right to Education Act*, COUNTER CURRENTS.ORG (Apr. 17, 2020, 1:11 PM), https://countercurrents.org/2019/08/evaluation-of-right-to-education-rte-act.

than 44,000 students did not get admission on time in the year 2018. Delay in admission would hamper the academic progress of students. [659]

5. Quality Education

The aim of providing education is to provide skills, knowledge and qualities in the child to make him an independent and creative human being. ASER conducted reading test which assesses whether the child can read letters, words or paragraph according to the difficulty level in Class 1or reading story at Class 2 difficulty level. The test conducted on all the children of age group 5 to 16 years. The percentage of all children who are in Class 3 and can read the Class 2 level is increased from 21.6% in 2013 to 23.6% in 2014 to 25.1% in 2016 and finally to 27.2% in 2018. ASER also conducted an arithmetic test that assesses whether the child can recognize the number from 1 to 99 can do two-digit numerical problems and was conducted on the age group of 5 to 16. The all India status shows that there is only a slight increase from 27.6% in 2016 to 28.1% in 2018 for children in Class 3 who can do at least subtraction.[660]

After seeing these figures, we can seriously raise doubts regarding the performance of the Right to Education Act. It is very important to improve the learning environment for ensuring quality education. The Act provides for enrolment of children in a school but fails to impart ways to improve the level of education which is to develop the mind of an individual at an early age. This is the biggest shortcoming of the Act.

Quality education also depends on various other factors. It is mandatory by the Act that teacher must have prescribed professional qualifications to teach. However, only 80% of teachers in government schools have prescribed professional education. The percentage of attendance of students as well as teachers is also the main concern. Absenteeism of teacher or student hampers the growth of the learning of students.[661]

No doubt steps have been taken from time to time by the government. According to the press release by Press Information Bureau in 2018, the Central rules have been amended, to increase the

[659] *The thirteenth Annual Status of Education Report (ASER 2018)*, ASER (Apr. 17, 2020, 1:40 PM), https://img.asercentre.org/docs/ASER%202018/Release%20Material/aser2018pressreleaseenglish.pdf.
[660] Sankalp Aggarwal, *Evaluation of Right to Education Act*, COUNTER CURRENTS.ORG (Apr. 17, 2020, 2:31 PM), https://countercurrents.org/2019/08/evaluation-of-right-to-education-rte-act.
[661] *Right To Education*, DRISHTI (Apr. 17, 2020, 2:55PM), https://www.drishtiias.com/to-the-points/Paper2/right-to-education.

quality of education. Rules include the reference on class-wise and subject-wise learning outcomes. It also talks about the launch of an integrated scheme such as Samagra Shiksha Abhiyan in 2018-2019 which includes three schemes i.e. Sarva Shiksha Abhiyan (SSA), Rashtriya Madhyamik Shiksha Abhiyan (RMSA) and Centrally Sponsored Scheme on Teacher Education (CSSTE). But still, effective steps should be taken by the government otherwise the level of education would fall in the future.[662]

6. No Detention Policy

Another feature of the RTE Act is "no detention" which means that no child shall be held back or expelled from the school until Class VIII. The aim of inserting this provision is to provide a fear-free environment for children for their development. This particular policy receives severe criticism from all the states as it defeats the very purpose of education by de-motivating children for learning. Students are becoming less serious for studies as they know that they cannot be held back and it indirectly affects their competitive skills.[663]

But in January 2019, an amendment was made to RTE Act which modified the "no detention policy". Now students of Class VIII and Class V have to appear for their regular examinations. In case of any failure by the student, he must be provided with the additional training and examination will be re-conducted after 2 months. If he fails for the second time, he will be detained. However, there are six states which were against the amendment because they have higher learning outcomes amongst the students and they are Andhra Pradesh, Karnataka, Kerala, Goa, Maharashtra and Telangana.[664]

SUGGESTIONS TO IMPROVE RTE ACT

1. There are lot more schools where seats remained vacant under 25% quota for reserved. Schools must release the data of the number of seats available under the 25% quota and

[662] *Various steps have been taken to improve the quality of Primary Education*, PRESS INFORMATION BUREAU (Apr.18, 2020, 6:38PM), https://pib.gov.in/newsite/PrintRelease.aspx?relid=180894.
[663] *Right to Education*, DRISHTI (Apr. 18, 2020, 3:35PM), https://www.drishtiias.com/to-the-points/Paper2/right-to-education.
[664] *The thirteenth Annual Status of Education Report (ASER 2018)*, ASER (Apr. 18, 2020, 3:43 PM), https://img.asercentre.org/docs/ASER%202018/Release%20Material/aser2018pressreleaseenglish.pdf.

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have to find the ways to publicize it so that parents were able to recognize the schools nearby with vacant seats.

2. No doubts enrolment rates have increased but it is a challenge to keep students in a school for the given number of hours at each academic level. Enrolment rates are increasing but the RTE Act must focus on attendance also. Any local authority designated by the RTE Act must maintain a database to keep track of attendance of students within their jurisdiction.

3. Parents play a very important role in the life of children. They must be included in the process. Although under RTE Act there is a provision of SMC (School Management Committee) but more powers should be given to them so that they can provide assistance regarding any failure of mechanism in the schools. Under the Central RTE Act, SMCs must be comprised of parents and school management. However, some states do not meet these criteria.

4. If we are looking for the learning outcome of the child then the government must include the children age below 6 years. According to the Act, the children with the age of 6 years must be admitted into Class 1. But in private schools, the children of age 6 are either in Class 1 or in Class 2. In this way, students of government schools are far more behind the students of public schools in context with an intellectual level.

5. The Act provides for the prohibition of non-educational duties to teachers except in census counting, election duty in the state legislature, etc. The work of teachers must be related to education and schools only. The duty of teachers in census counting or the election also hampers the attendance of teachers in schools and consumes significant time which further results in less effort by the teacher in classrooms.

6. The burden of teachers must be reduced. It is difficult for a teacher to teach a class where students are from varying backgrounds. A teacher always faces challenges while dealing with the parents of children having a EWS Certificate. The involvement of teachers in such activities also consumes their time.

7. The main focus of the RTE Act or any discussion regarding it points out on education of students. There is hardly any discussion regarding the quality of teachers. If we want an

educated and developed nation then we need to focus on the quality of the teacher as well. There are still 20% of teachers who do not meet the prescribed qualification. Proper training facilities must be given to the teachers so that they can also take a step forward with the changing circumstances.

8. The last and most important is the restraint in allocating the budget. The government is spending less than 4% of GDP on education. If we want our nation to be progressive, educated and developed, it is a need to focus on allocating more investment in the education sector.

CONCLUSION

India took 62 years to add education as a fundamental right. It is the need of an hour that RTE must focus on the improvement in the quality of education. There are several loopholes in the Act which need to fill in. No doubt government is taking steps to improve the quality education and on figures of learning outcome, but with the pace of a turtle. We entered into the world of digitization but the major amount of youth is lacking the basic knowledge. Time to time amendment must be made in the Act to pick up the pace with changing circumstances. Out of all these recommendations, important is that children with early childhood i.e. children below 6 years must be included in the Act rather than keeping them in Anganbadis so that the intellect of children in public schools must be the same as the student of private school.

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AN ANALYSIS OF ETHICAL AND LEGAL ISSUES IN CRISPR

- JOSEPH CYRIAC

ABSTRACT

Technology is growing day by day, the growth of science and technology is vital for the development of the world. Gene editing or CRISPR technology is one of such technology that has a paved the way towards biomedical revolution. CRISPR technology is something that could alter the existing clinical methods and replace them with most effective technologies. The commercial importance of this biomedical revolution and the ethical concerns over it had made it into a matter of discussion in legal perspective. The commercial side covers the right to patent where industries or universities fight each other presenting different claims. Till now there no conclusive verdicts have come out on the issue. but the existing rulings dealing with ordinary skill, obviousness etc. The emergence of patent pool models has helped this issue positively. In the ethical debate both stands are strong enough to be admired. The argument on protecting the organic nature of ecosystem supported by doubts on safety of the technology should be given adequate concern. At the same time the right to science supported by science growing as a tool for economic development is also attention seeking. CRISPR is a very recent innovation that requires more and more studies to be well understood. Depriving the benefits of this technology on grounds of mere assumptions is impractical.

KEYWORDS: Genome editing, Patent, Right to science, gRNA

INTRODUCTION

History of human race is the history of scientific development as well. Science definitely has it's dual aspects of being a boon or curse. The process or technology through which DNA structure is modified through addition or removal of genetic material is called CRISPR. Science has a specific

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role and different functions to perform in improving the quality of human life.[665] Thinkers like Rene Descartes clarifies that through statements like "Cogito ergo sumo, I think, therefore I am"[666]. CRISPR stands for Clustered Regularly Interspaced Short Palindromic Repeats and Cas9is the CRISPR associated protein.[667] Bacteria captures DNA fragments from invading viruses and creates CRISPR array, which helps in disabling the virus during next attack.[668] The guide RNA (gRNA) takes a hairpin shape in this process with one end left to interact with foreign DNA and the other to associate with endonuclease part. The first paper on CRISPR was published in 1993.[669] By 2003, the technology gained wide acceptance across the world. The CRISPR system then invited wide attraction among different stakeholders across the globe. This include business enterprises, educationalists, research scholars, government etc. The technology has extended it's scope in different and resulted in successful outcomes in areas like agriculture. Even though debate on ethics has also risen parallel to it like the infamous incident of gene modified babies in China. Science definitely has a key role in defining day to day activities of human behaviour. Still we have to look into different dimensions of this topic.

IMPACT IN RESEARCH SECTOR

Genome editing was a big breakthrough in the field of biomedical research. Frederick Sanger lit a start to this revolution by developing a proper sequence of DNA. The future researches carried out shed light to different possible areas of gene editing in medical sector including therapies. DNA was also used as a research sample in areas of evolutionary research and anthropology. Still the major expectation of gainful usage of this technology lies in medical sector. Gene editing could revise the existing clinical methods of treatment and overcome limitations imposed by DNA on a person.[670] Several contributions on vaccination, disease management and diagnosis are already

[665] https://en.unesco.org/themes/science-society (Mar. 31, 2020, 10:47AM).
[666] Rene Descartes, Discourse on m
Method, Part IV,in Saxe Commins & Robert Linscott (Eds.), *Man and the Universe : The Philosophy of Science (The World Great Thinkers),* Random House, New York (1st edn, 1947) p186 .
[667] What is Genome Editing? GENETIC HOME REFERENCE, (Mar.31, 2020 10:55 AM) https://ghr.nlm.nih.gov/primer/genomicresearch/genomeeediting.
[668] Kelly E Ormond et. Al, *Human Germline Genome Editing,* A.J.H.J(2017)., http://dx.doi.org/10.1016/j.ajhjg.2017.06.012.
[669] Mojica F.J.M., Juez, G., and Rodriguez-Valera, F. (1993). Transcription at different salinities of Haloferax mediterranei sequences adjacent to partially modified Pstl sites. Mol. Microbiol. 9,613-621.
[670] Benjamin Goodman ,*"Genetics and the Law" 26 UNSLW LAW journal 741 (2003).*

made through this.[671] Risk is inherent within the process, so it can become a hero or villain at any time. This technology consists of a long sequence of activities from understanding cells, knowing their genetic expression, gainfully utilizing the normal genetic variation, gene modification and their transfer to new host.[672] Gene editing has been identified among human reproduction process where editing is done on sperms, eggs or embryo changing the genetic features of their offspring, and cloning produces identical copies of individuals by proportionate splitting made in embryo.[673] It focuses on exact and precise cell modification. It is used in clinical medicine to modify blood cells. CRISPR –Cas9 technology brought a precise method to add and remove DNA effectively. Arguments arose on this technology on ethics where some researchers argued that it could help in alleviating a lot of human suffering.[674] Germline genome editing in China a;lso led to many controversies. Issues raised were mainly questions on reproductive health of women, side effects of experiment on new born babies and the ethics of pre-determining the characterstics of future generations.

PATENT AND CRISPR

A patent provides right to the inventor to carry out the legal ownership of invention. CRISPR patents are owned by more than 500 inventors. The patents are valued from 100 million USD to 265 million USD. The most significant case on this issue was the one between *Regents of the University of California, Emmanuelle Charpentier* Vs. *Broad Institute MIT, Harvard College.*[675] University of California initially published an article on CRISPR-Cas9 system. Later the Broad Institute had an article upholding same content but it was limited on the application in eukaryotic cell. Being related to the existing law priority should have been given to the first to invent but this time enquiries were conducted to know that if the arguments were distinctive. The Supreme Court set certain factors with the help of *Graham* Vs. *John Deere Co*., [676] on the scope of art, content of

[671] Ethical Policies on the Human Genome, Genetic Research and Services, January 2002 Department of Biotechnology, Ministry of Science and Technology, India. Chairman Prof MS Valiathan.
[672] www.criso.au/resources/Gene- technology (Mar. 31, 2020, 11:00 AM).
[673] Peter Koller, "Human Genome Technology from the viewpoint of efficiency and justice" in Casimo Marco Mazzoni (Ed), Ethics and Law in Biological Research, Kluwer Law International, (2002) p15 .
[674] https://www.britannica.com/science/gene-editing/Applications-and-controversies(Mar. 31, 2020, 11:09 AM).
[675] Cancer Test et al., United states Court of Appeals for the Federal Circuit, 25 Biotecnol.Law Rep. 355-362 .
[676] Graham v. John Deere Co. 383 U.S. 1, 17-18 (1966).

art, considerations on setting limit of ordinary skill and non-obviousness. Similarly in *re Stepan Co*.,[677] it was stated that motivation, modification and combining teachings of an art by person of ordinary skill is question of fact. Board concluded that person with the ordinary skill would not have such a success expectation to apply this system on eukaryotic cell. Finally USPTO (United States Patent and Trademark Office) decided to accept it as a simultaneous invention owing to lack of sufficient evidence of interference. Any finding with interference would not be patentable. This case sheds light to the commercial importance of CRISPR technology.

The idea of being different enough to claim patent was a question raised in US Patent system. Therefore for the applicants there existed an unpredictability in claiming for them. In case of Feng Zhang's application PTAB observed that he is an ordinary biologist and would not have the reasonable expectation in carrying out them with eukaryotic cells.[678] Accordance to this interpretation inventions that experiment with the scope of applicability for technology may not always have the reasonable expectation and it cannot be measured with a given scale.[679] Also the problem of non obviousness has arisen along with it. These inventions try to develop a different organism and it is an artificial being hence it may not always sink properly with the organic ecosystem.[680] Even though we cannot conclude all sorts of genetic research are non obvious. The EPO decided to move back from legality by citing different reasons. It is evident that this change of opinion is persuaded by UC's responses to criticisms. So they moved from legal terms to scientific ones. Patent cases often show opposite views in their final verdict. So it raises questions on future of this technology. Also CRISPR is never a technology limited in gene editing but it can also be used for gene analysis. So the question of this obviousness is more confusing in the different usages of this technology.[681]

RIGHT TO SCIENCE AND CRISPR

[677] Re Stepan Co. 868 F.3D 1342, 1345-46 (Fed.Cir.2017).
[678] South Street & Joe Hadzima,Lemelson-MIT prize U.S. Patent Portfolio for Feng Zhang- 2017 Winner Report for : Lemelson-MIT Program Table of contents, (2017) .
[679] Forum, supra note9.
[680] Patent –related Aspects & Crispr-cas Technology, Patent-Related Aspects of CRISPR-Cas Technology.
[681] CRISPR/Cas9 technology intellectual property and economic issues ARRIGE kick-offmeeting,(2018) .

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The international organizations have recognized the right to science as a human right that should not be denied on grounds of illogical arguments.The Universal Declaration of Human Rights in 1948 under Article 27 every member of the community has the right to avail benefits of scientific development.[682] Article 27 also safeguards protection of moral and material interests arising from findings related to science.[683] Those who opposed this Article 27 argued that it should not be opposed to public policy restricting public access.[684] In 1966 UN blended Article 27 with Article 15 [685] which recognized right provision to enjoy scientific development's positive outcomes, protect individual freedom and enhance co-operation in the field of science.[686] So it is evident that this allows everyone to gain benefit from scientific development and also provides rights to scientists to carry out innovations in scientific sector. It also covers duties of the state to ensure proper circumstances for it. The primary thing to be concerned in this matter is that all these rights should be used for common good.[687]

UNESCO later tried to understand and explain this right deeply. Science which is based on cause and effect relationship and evidences with universal validity would definitely have benefits in applying them for personal thought processes. This right also covers and protects the need of making a suitable environment needed for effective research purpose. Scientists should be able to avail benefits of the international scientific environment. This right is not merely one that grants freedom but one that ensures responsibility to scientists in working for common good.[688] In 2018 a list of questions were raised by UN on scientific rights making it evident that this idea is still an abstract one. So right to science while associated with CRISPR we still cannot make a conclusive statement.

[682] Article 27 ;"Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author".
[683] Article 27(2) UDHR- "Everyone has the right to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author".
[684] Aurora Plomer, The Human Rights Paradox : Intellectual Property Rightsand Right of Access to Science vol35 (1),Human Rights Quarterly, (2013) ppl 43-175.
[685] Article 15, International Covenant on Economic, Social and Cultural Rights.
[686] https://www.aaas.org/programs/scientific-responsibility-human-rights-law/resorces/article-15(Apr.1, 2020, 9:04 AM).
[687] Lea Shaver, The Right to Science and Culture, Wis. L.Rev. (2010) p12 .
[688] Jessica M Wyndham et al, Define the Human Right to Science, *Science* Vol 302(64) 2018 pp975.

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Freedom of scientific research is a must in democratic regime. Normally Scientific Research start with the process of collecting and disseminating data and information.[689] Next stage is that of experimentation. Legendary scientists like Newton claim that scientific research is not a mechanical process but it is more complex involving unexpected turnarounds.[690] But granting absolute freedom to experimentation is impractical as it can cause ill effects to the society. DNA Research is such an experimentation that questions the commonly accepted moral principles like the innate abilities of human beings, human relations with family, human's organic structure designed by nature etc becomes questionable. Scientists have seen this issue seriously and resorted to self imposed restrictions on this practice. The Gordon Conference held in New Hampshire (1973) and Asilomar Conference (1975) took such a stand. The restrictions imposed by government on rDNA research in US resulted in a controversy.[691] So the decisions made these researchers prove that technologies may have destructive outcomes as well. Right to Science's dimension of responsibility was treated with more importance by them. Still there exists paradox in case of CRISPR.

LEGAL RESPONSE

The declaration made by UNESCO in 1997 states that genome editing undermines the value of human dignity.[692] Several associations and bodies have came against genome editing mainly against CRISPR-Cas9.[693] Germline editing created doubts in the minds of people. The safety of this technology was questioned many times. International Summits that handled this controversy allowed provision to continue research but observed that usage of germline editing in pregnancy should be stopped considering the questions on safety and effectiveness. The Council of Europe *Convention on Human Rights and Biomedicine* is a law that regulates genome editing in full and absolute sense. It allows genome editing only for medical purposes. Restriction is clear and

[689] Richard Degado & David R Mien "God Galileo and Government- Towards protection of Scientific Inquiry",53 *Washington law review* 353 (1978).
[690] John Meurig Thomas, *Intellectual Freedom in Acaedamic Scientific Research under Threat* 52(33) Angewandte Chemrie Internatinal edition Available at library.eiley.com/doi/10.1002/201302192/pdf (Apr. 02, 2020, 10:03 AM).
[691] The Donald S Frederickson Papers,' The Controversy over the regulation of Recombinant DNA Research 1975-1981 available at profies.nm.nih.gov/ps/retrieve/narrative/ff/pind/74 (Apr.04, 2020, 10: 38 AM).
[692] Article 24 of UNESCO Universal Declaration on the Human Genome and Human Rights.
[693] Fruzsina Molnar-Gabor, Integrating Ethical Standards into the Human Rights Framework Considerations towards Future Regulation of Genome Editing on an International Level, Nature, Springer, 2018 pp31.

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absolute. This law prevents the scientists from modifying genetic contents. It strictly abolishes gene editing during pregnancy.[694] In Indian conditions provisions to gene editing are granted by ICMR. The policies are clearly laid down by that authority on how and when to use this revolutionary technology. According to this Ethics and Safety need to be complied in the rightful sense during clinical practices and research. Also gene therapy is prohibited through these guidelines. These are drawn from ethical guidelines of 2017. To enable germline gene editing in the beneficial sense the legal regime, rules and protocols should move more forward. Otherwise the scope of CRISPR would be limited to minor medical usages.

ETHICAL DEBATE

The ethical concern in CRISPR accelerated right from the day when He Jiankui announced the birth of embryo altered babies at a scientific summit held in Hong Kong. The commercial viability of this technology led to increase in the number of experimentations in this zone. By 2017 number of papers increased too much based on previous studies.[695] Some scientists argue that Embryo editing is not always an unethical practice and it can be justified at times of serious illness predictable to new born babies. By 2019 scientists therefore called for a global moratorium.[696] Application of CRISPR in agricultural sector, gene drives and human features are also questioned on ethical grounds.[697] Applications in Agricultural Sector have turned vast and therefore the implications will also be high in numbers. Malnutrition of nearly 795 million people in the globe was reported by United Nations Food and Agriculture Organization.[698] Also WHO reported lack of access to sufficient nutrients among around 2 billion people in the world.[699] All these evidences make it clear that CRISPR system's positive and innovative usage would help in improving nutrition standards. Through CRISPR usage we can easily identify malnutrition in a person, resulting expert healthcare service. All ethical concerns become inferior to this highly positive and

[694] https://www.nuffieldbioethics.org/blog/genome-editing-human-rights- posthuman (Apr. 02, 2020, 11: 14 AM).
[695] https://www.elsevier.com/research-inteligence/campaigns/crispr.
[696] CRISPR in context :towards a socially responsible debate on embryo editing by Michael Morrison & Stevienna de Saille.
[697] J. Savulescu, N. Bostrom, Human Enhancement, Oxford University Press, New York, 2009.
[698] United Nations Food ,(visited 03-04-2020) available at : http://www.un.org/sustainabledevelopment/hunger/.
[699] World Health Organization, Nutrition, (visited on 03-04-2020) available at : http://apps.who.int/iris/bitstream/10665/43412/1/9241594012_eng.pdf?ua=1.

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meritorious side of CRISPR revolution. Another application of CRISPR lies in gene drive technology where millions of people can be saved from their challenges to life.[700] It is a highly forward looking technology in the sense that it can ensure social justice proper gene allocation. These benefits are not limited to the case of CRISPR but it lies with every researches carried out in the field medicine and genetics. As technology becomes better through evolution same is the case of value system and legal framework. We should change our prejudiced mindset to get into the large number of expert services offered by scientific advancement. National and International bodies have took different decisions on the topic at different times. We have follow that guidelines and at the same time look into possibilities of innovative scientific research.

CONCLUSION

Human beings throughout their life history had shown their interest in improving standard of living. It is the scientific development that acted as a tool in taking us forward to where we are now. But in the recent times Science had shown tendency to be hijacked by corporate funding and profit motive and so it needs to be controlled to avoid negative impacts in society.[701] Incidents of unethical practice of the technology aggravated this concern of law makers and they started looking to it more seriously. If unethical practices continue it affects the existence of entire human race.[702] Till now satisfactory and precise guidelines on CRISPR technology are not made by the authorities. We should also take the issue of patents into consideration which the most commercially important and legally paradoxical section of this technology. The introduction of patent tool models was helpful in this section. It provided a balance in the fight between public and private enterprises. Patent tools have also helped in fastening the research process and fostering innovations. The future of human race is largely dependant on bio-medical technology. Information regarding technology should be properly followed by legal regime to enact an acceptable law on this complex subject. Especially it can play a pivotal role in development of

[700] V.M.Gantz, E.Bier, Genome Editing. The mutagenic chain reaction: a method for converting hectrozygous to homozygous mutations, Science 348 (2015) 442-444 .
[701] Colin Todhunter ,' The Corporate takeover of science and the destruction of freedom' Global Research 'September17,2012 Available at www.globalresearch.ca/the-corporate-takeover-of-science-the-destruction-of-freedom /15304984 (Apr. 04, 2020, 11:20 AM).
[702] Md Fakrudeen et al, "Scientific Freedom and limits-Clinical Research perspective", 4(1) Bangladesh Journal of Bioethics 31(2013).

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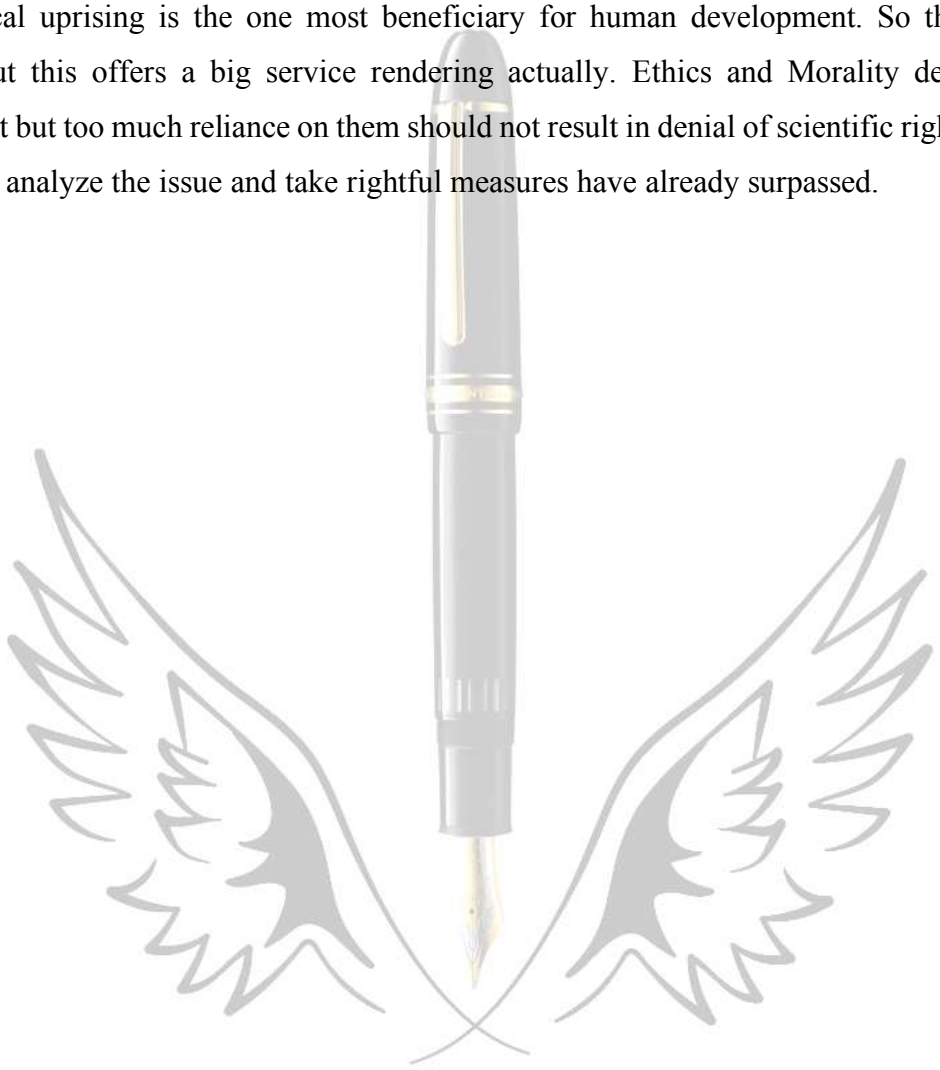
developing nations. In the ethical debate the cry is always for humanity but the question is the technological uprising is the one most beneficiary for human development. So the industries carrying out this offers a big service rendering actually. Ethics and Morality definitely is a requirement but too much reliance on them should not result in denial of scientific rights. The time for India to analyze the issue and take rightful measures have already surpassed.



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ENVIRONMENT PROTECTION AND SUSTAINABLE DEVELOPMENT – A CASE STUDY

- MAAZ AKHTAR HASHMI

Environment Protection has always been the primary concern of those activists who on a daily basis in one way or the other strive hard to guarantee at most protection and restrictions to the natural environment and biodiversity, thereby preventing it from getting tarnished and abandoned. The environment due to the hazardous greedy needs of the humans is continuously on the verge of getting depleted an if proper guidance and protective measures aren't dispensed with on time, then a eventually the world is going to witness a rather cruel phase where people will have to beg for even a single drop of water, a lump of bread & the other basic amenities of life. It is high time that the world and its people should learn a lesson from the prevailing situation and come forward to take a stand to show sympathy towards the nature & environment and protect it from getting polluted.

This paper primarily focuses on a guide for Environment Protection and how through using the nature and environment abundantly in making the nation grow and develop, we as producers and consumers are consequently destroying the roots of environment. The instant need has arrived to compensate for the harm caused to the environment in lieu of the destructions created. Thereby with using the natural resources, time has arrived to protect the environment and help in its sustainable development keeping in view the demands to be met for the generations to come.

This paper includes a case study on three real life accounts of how due to inhumane conditions, the environment is suffering uncertain damages and how it can the guarded against as it is high time to use, develop and protect the nature simultaneously.

>ENVIRONMENT PROTECTION:

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Environmental protection is the practice of protecting the natural environment by individuals, organizations and governments. Its objectives is to conserve natural resources and the existing natural environment and, wherever possible, to repair damage and reverse trends. Due to the pressures of overconsumption, population growth and technology, the environment is being degraded, sometimes permanently thereby coming at the stage of extinction. This has been acknowledged and governments have begun placing restraints and initiated steps on activities that cause environmental degradation. Since the 1960s, environmental movements have created more awareness of the various environmental problems. This not so handy process is still on hoping to get better with the passage of time. [703]

The Environmental Protection promotes the protection of our natural environment, the health and well-being of our citizens, increasing awareness in environmental issues. It also facilitates the participation of Non-Governmental Organizations and civil society. Whatever is the current state of the nation, if proper measures and steps are not taken then indications exist that a dangerous situation which might reach disastrous proportions. A burgeoning population having crossed the billion mark coupled with large scale rural - urban migration has put unbearable strain on the already overstretched infrastructure of towns and cities. The civic agencies cannot cope up with the *increasing demands for water and power supply, sanitation, sewage and waste management, etc., Depleted water availability, shortage of power, non-availability of land for garbage disposal, increase in the number of vehicles, non-effective controls on emissions, absence of water conservation schemes, depletion of tree cover due to mushrooming commercial and housing complexes,* add up to the complexities which urban areas face. Lowering of water table, selected cultivation of cash crops which are water intensive, destruction of trees for wood as construction material, extensive degradation and salination of agricultural land are some aspects which need to be addressed and ameliorative mitigation actions taken. Environmental protection is an integral part of the development process and cannot be considered in isolation from it. This involves a holistic approach and understanding of issues which are best handled with the participation of all concerned. It also involves changing of attitudes and lifestyles, such that we minimise and reduce the impacts on environment.[704]

[703] Shyam Diwan, Environmental Law & Policy in India, 23(Oxford India, 21st edn, 2017)
[704] ibid

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Environmental management tends to be, and in our country becoming more integrated practice management to community involvement. Environmental management is a component of the overall management system which includes organizational structure, planning activities, responsibilities, practices, procedures, processes and resources for developing, implementing, achieving, reviewing and maintaining the environmental policy. With all the concerns in each country and internationally oriented environment and protecting natural resources, preservation of life, ecological diversity is widely appreciated that efforts are insufficient and unevenly distributed around the globe. The twenty-first century has taken a great unsolved problem of the previous century environmental protection. Currently, there are many warning signs of excessive pollution and depletion of natural resources. With all the concerns in each country and internationally oriented environment and protecting natural resources, preservation of life, ecological diversity is widely appreciated that efforts are insufficient and unevenly distributed around the globe. Financial support for environmental spending is dependent on the economic situation of each country, so the gaps between countries will make deep and this area. Environmental management tends to be, and in our country becoming more integrated practice management to community involvement. Environmental management is a component of the overall management system which includes organizational structure, planning activities, responsibilities, practices, procedures, processes and resources for developing, implementing, achieving, reviewing and maintaining the environmental policy.[705]

>Measures For Environment Protection:

The strategy of prevention consists of raising public awareness, strict enforcement of laws, statutory assessment of environmental impact of projects and efforts to regenerate the productivity of ecosystems. The raising of public awareness is effective in some cases in refraining people from harmful activities, once they are convinced of the dangers. Strict laws, rigorously implemented, can prevent environmental destruction through stringent punitive measures making an undesirable action very expensive for the offender. Statutory environmental impact assessment of all projects and activities before their implementation can prevent degradation through obligation on the executing agencies to undertake compensatory measures. And so regarding this, India with respect to the violation & degradation of the environment and its protection has its very own statute **The**

[705] Id. 25

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Environment Protection Act 1986. Environment Protection Act,1986 is an Act of the Parliament of India. In the wake of the Bhopal Tragedy, the Government of India enacted the Environment Protection Act of 1986 under Article 253 of the Constitution. Passed in March 1986, it came into force on 19 November 1986.It has 26 sections.The purpose of the Act is to implement the decisions of the United Nations Conference on the Human Environments. They relate to the protection and improvement of the human environment and the prevention of hazards to human beings, other living creatures, plants and property.[706]

Some of the crucial measures taken by the Indian Government for protecting the environment from faults include:

(i) A detailed report should be prepared identifying the sources of pollution by the project or activity and indicating in a realistic and time-bound manner the measures required to be taken

(ii) A similar report should be prepared about domestic and agricultural pollution, especially from pesticides, locating sources and suggesting remedial measures

(iii) Functioning of the Central and State Pollution Control Boards should be strengthened and be made more open

(iv) Comprehensive and realistic standards should be formulated for environmental pollution and for procedures and standards for assessing environmental damage

(v) Industries should be made to recognise, if necessary by a dialogue with the government the cost on economy of environmental effects and be persuaded to show greater leadership and responsibility by controlling pollution through built-in measures;

(vi) Public participation in prevention and control of pollution and environmental degradation should be facilitated by providing necessary technical help and by the governments setting up appropriate machinery for speedy response to investigation and disposal of public complaints;

(vii) For encouraging public vigilance, incentives should be offered for reporting instances of violation of laws relating to pollution, forests, wildlife and other environmental issues; and

[706] Id.87

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(viii) The regulatory functions of the Government should be decentralised, especially in relation to pollution with essential training and equipment being provided to representatives of communities.[707]

>SUSTAINABLE DEVELOPMENT:

The protection of environment is needed for sustainable development. There is the need to conserve the natural resources and therefore protect the natural environment in order to live happily & peacefully in the environment. In very simple terms, "sustainable development is development that meets the needs of the present, without compromising the ability of future generations to meet their own needs." Sustainable development is the organizing principle for meeting human development goals while at the same time sustaining the ability of natural systems to provide the natural resources and ecosystem services & protection upon which the economy and society depend. The desired result is a state of society where living conditions and resources continue to meet human needs without undermining the integrity and stability of the natural system. Sustainable development can be classified as development that meets the needs of the present without compromising the ability of future generations.

The concept of sustainable development can be interpreted in many different ways, but at its core is an approach to development that looks to balance different, and often competing, needs against an awareness of the environmental, social and economic limitations we face as a society. [708]

>Sustainable Development & Environment:

Living within our environmental limits is one of the central principles of sustainable development. One implication of not doing so is climate change.

But the focus of sustainable development is far broader than just the environment. It's also about ensuring a strong, healthy and just society. This means meeting the diverse needs of all people in existing and future communities, promoting personal wellbeing, social cohesion and inclusion, and creating equal opportunity.

[707] ibid
[708] P Leelakrishnan, Environmental Law in India, 33(Lexis Nexis, 4th edn, 2016)

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Sustainable development is about finding better ways of doing things, both for the future and the present. We might need to change the way we work and live now, but this doesn't mean our quality of life will be reduced. A sustainable development approach can bring many benefits in the short to medium term.[709]

>Effects & Reforms

The way we approach development affects everyone. The impacts of our decisions as a society have very real consequences for people's lives. Poor planning of communities, for example, reduces the quality of life for the people who live in them.

Sustainable development provides an approach to making better decisions on the issues that affect all of our lives. By incorporating health plans into the planning of new communities, for instance, we can ensure that residents have easy access to healthcare and leisure facilities. We all have a part to play. Small actions, taken collectively, can add up to real change. However, to achieve sustainability in the country, we believe the Government needs to take the lead. The authority's job is to help make this happen, and we do it through a mixture of scrutiny, advice and building organisational capacity for sustainable development.

This project will primarily focus on the three aspects i.e coal mining, petroleum industry & deforestation and how these are causing harm to the environment and how through satisfactory measures and protection these can lead to the non-violation of the norms of the environment, thereby leading to sustainable development.

1. COAL MINING

>Important Role in the Environment

Coal a fossil fuel is far more plentiful than oil or gas, with around 109 years of coal remaining worldwide. Coal provides not only electricity; it is also an essential fuel for steel and cement production, and other industrial activities. Around 69% of India's power generation is coal based. Even under a least coal usage scenario, coal will supply more than 40% of the primary commercial

[709] ibid

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energy in 2031-32. It is the most abundantly domestically available fossil fuel, while about 80% of oil has to be imported. A total of 293.50 billion tons (BT) of geological resources of coal has been estimated in the country (8% of the global coal reserve).

Coal is viewed as a key element in increasing energy access in India. As over a quarter of the Country does not have access to electricity. Coal will remain the cheapest source of electricity for at least another two decades. CAGR for Indian coal production has been estimated at 5% - 6% in the medium term.[710]

>Mining In Jharkhand

Jharkhand is one of the richest areas in the whole country, rich in minerals deposit and forests. *The region has huge reserve of coal, iron ore, mica, bauxite and limestones and considerable reserves of copper, chromite, asbestos, kyanite, china clay, manganese, dolomite, uranium etc.*

- **RICH ECONOMY –** *The value of minerals extracted in Jharkhand in 2004-2005 was Rs 5,760 crore- approximately eight per cent of the total value of mineral production of the country.* The state is a larger producer of fuel minerals and accounts for 10 per cent of their total value in the country. **Coal contributes the most -92-93 per cent- to the total revenues from mining received by the Jharkhand government, iron ore accounts for another two to three per cent.** Jharkhand receives the maximum mining royalty among the coal-producing states of India.[711]

- **THE BEGINNING –** In the name of national interest the Jharkhand area is witnessing a gigantic industrialization and development process for the exploitation of its natural and human resources. The working of **Jharia, Bokaro and Karanpura coalfields** started in the 1856. The opening of **coal mining in Dhanbad** area during the second half of the 19th century and the establishment of the **Tata Iron and Steel company in Jamshedpur in Singhbhum district** in 1907 marked the beginning of the large scale exploitation of mineral and other industrial resources in this area.[712]

[710] Nitish Priyadarshi, Impact of mining & industries in Jharkhand, sawc.net, November 16 2008
[711] ibid
[712] ibid

- **POSITIVE IMPACTS –** The Jharkhand region an account of its richness in some key ores and minerals and its abundance in cheap labour, thanks to its backwardness, otherwise, has been the site of many good industrial establishment since pre-Independence days. And coal mining being one of the prominent activities in the country due to its large positive impact on the economy thereby boosting the Indian Economy considerably high that lead to healthy resolutions not only to the industry but even to that particular region. In Jharkhand mining activity ranges from the small, completely manual stone quarries to mechanical mines. With increasing mechanization, mining equipment has grown larger and more powerful. Entire landscapes are altered in a relatively short period of time. But since every coin has two sides so this again lead to some unhealthy consequences and with industrialization, it has brought with it concomitant ill effects the worst of which is the devastation of its environment. In the name of the development large forests have disappeared, tracts of inhabited land have gone under water. Water in the region around industrial areas have been polluted to an extent far exceeding the prescribed safety level.[713]

- **DESTRUCTION TO THE ENVIRONMENT -** The natural wealth of this area contrasts vividly with the desperate poverty of the people who inhabit it. The indigenous groups living in the area have been the worst hit by the large scale exploitation of the natural resources of the region through the development of mines, industries and commercial exploitation of forests. The majority of them live in a state of semi-starvation through out the year.

  - Unless it is carefully planned and thoughtfully carried out, it can barren the land, pollute water, denude forests, defile the air and degrade the quality of life for people who live and work in the vicinity. Modern technology has enormously magnified our ability to extract minerals.

  - Mining ruins the land, water, forests and air. The loss or pollution of natural resources degrades the quality of human life in these areas. Increasingly, mineral-based production units like coal-fired power plants, steel plants and cement factories are

[713] ibid

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located near the mines. A cluster of thermal power stations are planned near the major rivers of Jharkhand.

- The large scale mining and allied activities going on in the Jharkhand region have caused severe damage to the land resources of the area. Vast areas of rich forests and agricultural land belonging to the indigenous people have become mere a waste product because of haphazard mining.

- Much of the groundwater pollution is caused by human activities, especially mining. Mining wastes pollute streams and rivers. Ore fines and toxic substances carried by rain water into nearby water courses, alters their chemistry and often makes the water unfit for human use.[714]

2. PETROLEUM INDUSTRY

The oil industry in India dates back to 1889 when the first oil deposits in the country were discovered near the town of Digboi in the state of Assam. As on 31 March 2015, India had estimated crude oil reserves of 763.48 million tonnes and natural gas reserves of 1488.49 billion cubic meters (BCM). India is suddenly becoming a global petroleum producing center because of having increasing the depth of product flows and strengthening supply chains especially clean transport fuels and for high-end industrial product. It also have far-reaching implications for regional product markets. The petroleum industry includes the global processes of extraction, exploration, refining, transporting and marketing petroleum products. The largest volume products of the industry are gasoline (petrol) and fuel oil. Petroleum (oil) is also the raw material for many chemical products, including solvents, pharmaceuticals, pesticides, fertilizers, and plastics. [715]

>IOCL

Indian Oil Corporation Limited (IOCL), commonly known as Indian Oil is an Indian state owned oil and gas company with registered office at Mumbai and primarily headquartered in New Delhi. It is the largest commercial oil company in the country, with a net profit of INR 19,106

[714] ibid
[715] Environmental Impact Assessment(EIA) Report to IOCL, 2017

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crore (USD 2,848 million) for the financial year 2016–17. It is ranked 1st in Fortune India 500 list for year 2016 and 168th in Fortune's 'Global 500' list of world's largest companies in the year 2017. In May 2018, IOC become India's most profitable state-owned company for the second consecutive year, with a record profit of ₹21,346 crore in 2017-18, followed by Oil and Natural Gas Corporation, whose profit stood at ₹19,945 crore.[716]

- **ECONOMY BOOSTER –** In 1954, petroleum exploration & production activity was controlled by the government-owned National Oil Companies (NOCs), namely Oil India Private Ltd (OIL) and Oil & Natural Gas Corporation (ONGC).India's refining capacity has more than trebled in the last 13 years. Reliance Industry is the first refinery industry in Jamnagar in 1999, India has an installed capacity of around 193.5 million tpa in April, 2011.

The growth is likely to continue with refining capacities touching 255 million tpa in the duration of 2012-13 and 302 million tpa probably in 2017-18, with a slew of projects announced by both the private and public sector. Today, private sector accounts for 76.5 million tpa (around 39.5 per cent) and public sector oil companies account for close to 117 million tpa (around 60.5 per cent) which eventually is a boost to the Indian economy.[717]

ENVIRONMENTAL DAMAGE - Petroleum is highly toxic. Oil is absolutely lethal to fish, so the various oil spills that occur frequently cause irreparable harm to the oceans.

- Human beings are also badly affected by the side effects of crude oil as it can be highly carcinogenic. In both crude oil and gas you will often find benzene, which is a substance known to cause leukemia. The fact that this product can lower white blood cells causes immunity to drop and a higher susceptibility to diseases. It has even been established that many birth defects can be linked to petroleum products.

- Crude oil can't be used in its natural state, so it needs to be refined. This releases toxins into the atmosphere that damage the ecosphere and impact human health. Thereafter, the way that oil is used is usually by burning it. This releases huge amounts of CO_2

[716] ibid
[717] ibid

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into the atmosphere and definitely contributes to the greenhouse gases that are causing so many problems today.

- In the case of acid rain, there is a chemical process set in motion by the high temperatures created by the combustion of petroleum that sets off a deadly cocktail of toxic gases. When these gases combine with the water in the air, the rain that falls is highly acidic. One of the results is the extraordinary sight of whole forests of dead trees.

The pervasive use of oil has led to the many ailments the planet faces today, the most serious of which is global warming. There is no doubt that the overall temperature of the earth's atmosphere is gradually rising, and this is generally attributed to the greenhouse effect caused by increased levels of CO_2, CFCs, and other pollutants. As can be seen, the use of petroleum has played a major part in this looming disaster.[718]

3. DEFORESTATION

Deforestation is the permanent destruction of forests in order to make the land available for other uses. An estimated 18 million acres (7.3 million hectares) of forest, which is roughly the size of the country of Panama, are lost each year, according to the United Nations' Food and Agriculture Organization (FAO). Deforestation occurs for multiple reasons: trees are cut down to be used for building or sold as fuel (sometimes in the form of charcoal or timber), while cleared land is used as pasture for livestock and plantation. The removal of trees without sufficient reforestation has resulted in habitat damage, biodiversity loss, and aridity. It has adverse impacts on biosequestration of atmospheric carbon dioxide. Deforestation has also been used in war to deprive the enemy of vital resources and cover for its forces. Modern examples of this were the use of Agent Orange by the British military in Malaya during the Malayan Emergency and the United States military in Vietnam during the Vietnam War. As of 2005, net deforestation rates have ceased to increase in countries with a per capita GDP of at least US$4,600. Deforested regions typically incur significant adverse soil erosion and frequently degrade into wasteland. About 31 percent of Earth's land surface is covered by forests.[719]

[718] ibid
[719] Shyam Diwan, Environmental Law & Policy in India, 288(Oxford India, 21st edn, 2017)

>THE MAHAN FOREST

Mahan, in the Amelia village of Madhya Pradesh forms an integral and unfragmented wildlife corridor supporting an extensive variety of flora and fauna including sloth bears, leopards and elephants that are listed as scheduled 1 wildlife species. It also forms one of the largest and oldest sanctuaries of native Sal, a tree that is both economically rich and sacred to its people. The forest is also an important source of income to the indigenous communities like Bechanlalji's, who go into the jungles to harvest the *mahua* flowers and the tendu leaves. Every year, in the month of April, the villagers head into the forests to collect *mahua* flowers that are used in food preparations, medicines, cosmetics and a popular alcoholic drink – a kilo of these flowers can fetch up to Rs 25 in the local market. The tendu leaves are hand-rolled into beedies. The income generated from the two see through the difficult times the families may face during the year. And hence the gathered produce is often stored and sold only in times of need.

- **DESTROYING THE MAHAN – THE MAHAN COAL LTD (MCL):** MCL is a 50:50 joint venture of Hindalco (Aditya Birla Group) and the Ruia-owned Essar Power being setup to mine coal for their thermal power plants. Undergoing trials at the moment, the Essar power plant near Amelia village was setup even before the required environmental clearances were obtained. For coal reserves that would last a mere 15 years the coal company is ready to bring down an entire ecosystem that has probably taken millions of years to evolve. The then Minister of Environment and Forests, Jairam Ramesh, admitted that he was he was "unable to agree" to consider forest clearance for Mahan coal block since it came under the 'no-go' area. Jairam Ramesh's successor Jayanthi Natarajan was forced to give stage 1 clearance in 2012, she laid down 36 conditions that the company had to fulfil before going ahead with the project. This included the implementation of the Forest Rights Act (FRA) by conducting *grama sabhas* in the villages seeking people's approval.[720]

[720] Vivek Muthuramalingam, The Fight for Forests, August 2013

- **IMPACTS -** In January 2011, a survey done by the Central Pollution Control Board and IIT Delhi counted Singrauli coalfield region (of which Mahan is a part of) as the seventh most critically polluted area in the country.

- Amelia and other villages are also facing threat from growing fly ash pond. Fly ash, dumped in huge open mounds and in toxic ponds, is likely to displace colonies and cause large-scale air, land and water pollution in the area, adversely affecting the health of the people and the environment.

- In 2013, the Essar power plant faced closure action from Madhya Pradesh Pollution Control Board for not following the norms related to the disposal of fly ash.

- The Mahan Sangharsh Samiti (MSS) was set up in March 2013 as an independent organisation to assert the rights of the local communities and protect them against the corporate high handedness.

- The MCL has been making many promises to convince people to part with their land, by offering jobs at the power plants and assuring them of better shelter and access to healthcare.

- The state of rehabilitations that had taken place in the Singrauli region for the bargain of the destruction of the forest were a shame. The so-called 'houses' were a thoughtlessly designed, concrete structures with glass panes that showed utter disregard to their traditional dwellings which have aesthetic, functional and well ventilated spaces.[721]

[721] ibid

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LEGALISATION OF PROSTITUTION IN INDIA

- NEELIMA SINGH THAKUR

ABSTRACT

The main objective of this paper is to focus on the problems of prostitutes and the women engaged in this profession and their families. Prostitution is considered to be one of the oldest professions in the world. However, prostitution is illegal in India, nut is widely practiced. There are more than two million prostitutes and more than two hundred thousand brothels in India.

Most of the female sex workers are dragged into the pond of prostitution due to human trafficking which is the main root for prostitution. In India, child prostitution is a multi-billion dollar industry. They do not enter the industry by their free will; some of them are runaway, victims of domestic abuse or sold by parents or relatives and mostly are the abducted ones.

This paper focuses on those women who get into the business just because of their financial incapacity, other is forced and remaining joins the industry willingly. In recent years, the prostitution industry has witnessed tremendous growth and this growth will keep on increasing.

This paper will mainly focus on the legalization of prostitution in India. If prostitution is legalized, then offence related to rape, sexual assault and harassment will gradually decline. Prostitution industry needs proper regulation by the government. If it is properly regulated then the offences like human trafficking, kidnapping etc will gradually stop. As per the society evaluation, the people engaged in prostitution are often considered to be people of less moral values and their character is often assassinated. Although the prostitution is considered as taboo in the society, yet the industry is flourishing day by day.

The paper also talks about the society who wears the mask of morality and ethical values in one hand, and on the other hand it has a bitter opinion regarding them. This society is nothing but a hypocrite. The cure to fight prostitution is to inculcate the sex education amongst the children.

CHAPTER I: INTRODUCTION

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A *tawaif*or, a *devadasi* or a *prostitute* as being called in different times in India. It is considered as one of the "*oldest profession of the world"*. It is $100 billion global industry whose legal status varies from country to country.[722] Prostitution refers to the sexual intercourse outside or without wedlock on a commercial basis with exchange of money. It is considered as a sinful act, immoral and degrading indulgence of a natural appetite for itself alone.

Earlier Prostitution was considered as a theme of Indian literature and arts for centuries, as per Indian mythology there are many references of high-class prostitution n form of celestial demigods acting as prostitutes. They were referred as *Menaka, Rambha, Urvashi* and *Thilothamma*. They were described as flawless incarnation and unsurpassed beauty and feminine charm. They were treated very royally during the medieval period and rule of Mughals. Sanskrit plays have been written as well as some movies were released which have central theme based on prostitution. Some of these movies have been able to provide an insight plight of the prostitutes in India, but the actual situation still lies hidden. Ever since the downfall of Mughal Empire, the conditions of prostitutes have atrophied to deplorable level.

The legal status of prostitution is still questionable in India. Prostitution is considered legal in India but other related activities like soliciting, pimping and brothels are illegal. Prostitution is not only about the female prostitutes but also about the male counter-part. Male prostitution is also getting prominence in recent time in cities of India such as Delhi, Kolkata, Pune and Mumbai. Though homosexuality is not a crime anymore in India but it is not so much accepted by the society in India. Male prostitution in India faces more criticism and harassment due to the stigma which is attached to the 'concept of masculinity' and 'manhood'.

Prostitution is forbidden by the religious and civic group and is also prohibited by law. There is a belief that prostitution is the primarily responsible for the origin and spread of AIDS in India.

Exploring through the *causes of prostitution*, the main and foremost factor is *Poverty*. Poverty is considered as one of the main causes of prostitution. Poverty brings helpless woman to the doorstep of prostitution. Today prostitution in India has flourished into full-fledged multibillion dollar

[722] Pratik Goyal, *Prostitution In India: Understanding The Conditions of Prostitutes,* Youth Ki Awaaz, 6th March 2011.

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industry with around two hundred thousand prostitutes in Mumbai, which is described as 'Asia's largest sex bazaar'.

CHAPTER-2: HISTORY AND EVOLUTION

India has a history full of stories where we get encounter stories related to art, music, dance and theatre which were mostly associated with entertainment and prostitutes. Back then prostitution was considered as a form of art used to entertain royal and upper castes in India. As a profession Prostitution has a long back history in India. In Kautilya's Arthashastra there is a whole chapter devotes to prostitution which was written in circa 300 BC and Vatsayana's Kama Sutra which was written between the first and fourth centuries AD.[723] In Vedic Text, word *sadbarani* refers to a woman who offers sex for payment.

The celestial nymphs were described as perfect embodiment and unsurpassed beauty and feminine charms. They use to entertain divinities and their guests in the court of Lord Indra. An apsara named Menaka caused the downfall of the great saga Vishwamithra, and became the mother of Shakuntala.

Indian Aryan rulers followed the system of celestial court and originated the system of guest prostitution. Rulers present well-accomplished maidens in token of friendship of kings. Prostitutes were also offered as ransom to the victor to part with his most beloved prostitute. Another class of girls from early childhood were carefully selected and fed on poisonous herbs and venomous foods. They were called Vishkanyan.

Prostitutes were common during the region of the Pandavas and Kauravas. They were a pertinentto the court and both the dynasties possessed harems of aristocracy in Brahmanic India. Mahabharata has recorded the name of fort to apsaras in all. Urvashi, Menaka, Tilottama, Rambha and Ghritachee are the stars amongst heavenly courtesans.

Kautilya's famous 'Arthasasthra' contains roles and rules for prostitutes and activities they perform and gives an account of how they should behave and how their lives are organized. A code of conduct was formulated for people seeking their favor. Ramayana and Kamasutra also contain various stories regarding prostitutions. The Mughal Empire (1526-1857) also witnessed

[723] Moni Nag, *Sexual behavior in India with risk of HIV/AIDS transmission,* Health Transition Review 295, (1995)

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prostitution. Word like 'tawaif' and mujra became common during this era. Prostitution had a strong nexus with performing arts.

It is of ancient origin to attach prostitutes to a place of worship. According to ancient Indian practice, young pre-pubertal girls are 'married off', 'given away' in matrimony to God or Lord religious deity of the temple. The marriage usually occurs before the girls reached puberty and requires the girl to become a prostitute for upper-caste community members.[724]

Devadasi is a woman who is considered to be given to God in marriage. These women dedicated their lives to God and once held high social status and were well respected amongst all. But now the tables have been turned, they are no more respected. They are treated nothing more than sex slaves. Devadasi or Devradiyar means 'servant of God'. These women were devoted to God and were considered married to God means that they could therefore not marry any 'mortal'. They would dance, sing in temples or in front of royalty and earn gold and land as a reward. [725] During 18th and the first-half of 19th centuries of British rule, there are good records of prostitution in large cities of India; it was from the second-half of 19th century that prostitution was not considered as a degrading profession. Form 'Dasi system' of ancient era to "Prostitution system' of modern era, India has travelled a long way, not just in terms of how we perceive this profession on morality grounds but also how we as a society of India have stand off from accepting it as a profession.[726]

CHAPTER-3: PRESENT CONDITION

At present, Devadasi are nothing more than sex slaves. The children are forced into becoming Devadasis by their own parents, because they are the only source of income in their family in most cases.

There are 7 places in India where Prostitution is a '*tradition'*. There are many women who are largely dependent on it for their livelihood.[727]

[724] Pallavi Thakur, *Tradition of Devadasi: The sacred prostitutes,* Speakingtree.in, November 12, 2014
[725]KrithihaRajam, *how Devadasis went from having high social status to bring sex slaves and child prostitutes,* April 23,2017
[726]Shivam Srivastava, *Prostitution in India,* General Legal, May 9, 2018
[727]Charnamrit Sachdeva, *7 places in India where prostitution is a 'tradition'; women depend totally on it for their livelihood*, September 30, 2017

1. **Kamathipura, Mumbai** – Kamathipura in Mumbai is no longer exists by its actual name and it is quite famous for brothels. Now days it is popularly known as "*Red Light Area/Red Street of Bombay'*. It is also considered as one of the largest Red Light Area of Asia.

2. **Wadia, Gujarat** – The women in Wadia area in Gujarat, ever since the older times have been popularly known for supporting their families through their profession i.e., Prostitution, while men actually finds customers for their ladies. In general term, the men in town are pimps and the culture has been existing for centuries and it is very difficult to put an end to it.

3. **Shivdaspur, Varanasi** – Since ancient times Varanasi is famous for its brothels and elegant danseuses, whom we called it as a 'tawaif culture'. Some Bollywood movies have shown the darkest side of this culture and the similar situation still persists and at a more atrocious scale.

4. **GB Road, Delhi** – Garstin Bastion Road, popularly known as GB Road is one of the commercial centre of the national capital where we can find old multi-storied buildings adjacent to each other where the ground floor act as regular shops while the rest of the floors act as brothels. This is the area where girls and minors from entire country are sold.

5. **Nat Purwa, Uttar Pradesh** – Nat Purwa is a small village has a tradition of prostitution for 400 years. The kids in the village, usually living with their mother hardly know who their fathers are.

6. **Devadasis concept, Karnataka** – The concept of Devadasis is still followed in a small section in Karnataka, where a girl is 'dedicated' to worship and service of god or temple for her life time. Children are considered to be married to the God, after which they devote rest of their lives to the religion. Their virginity is then auctioned off in the community. The girls spend their rest of their lives as prostitutes who earn money for their families.

7. **Shonagachi, Kolkata**–Shonagachi is not only the most dangerous and dishonorable area, nut is also one of the largest Red Light Area of Asia. This region in Kolkata witnesses the highest crime rate.

In India, Child prostitution is a multi-billion dollar industry. India have more than half a million children in brothels, more than any other country in the world, many are barely in their teens. They do not enter the industry on their free will, some of them are runaways, victims of abuse or sold by their parents and relatives or abducted.

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More than 6,000 young girls are brought from Nepal and Bangladesh to India to become part of this industry. According to human right groups, about 90 percent of the Bombay prostitutes are indentured servants, with close to half are trafficked from Nepal and Bangladesh. Some of the families even sell their daughters into prostitution. Nepalese women are considered more attractive because of the features and relative fair skin, slender bodies.

Many of the girls are illiterates and come from villages. Most of them are lured to be giving job and work in factories or a servant; instead they are taken by human traffickers and sold to various brothel owners or even exported to various countries, who often force them to have sex/ sexual intercourse with the strangers.

One victim told the Times of India, that, after her family's house was washed away by flood in Los Angeles, she was asked by a woman if she wanted to make money working in a garment factory. The girl, who was 14 at the time said yes, with intent to help her family. She along with other girls was taken by a bus to the India Border and handed over to some men who took her across the border to a brothel situated in Pune, India. She even said that there were 13 other Nepalese girls at the brothel, most of them were around 13-14 years. She later on find out that she was sold for about $700. Moreover she said that they beat her for several days before she agreed to work. She was confined to a windowless room with little more than bed and a light bulb. She serviced up to 30 men a day and being paid $3.50 to $12 depending on what she did and how much time they spent with her.[728]

Another victim told that at the age of 9 she was married to a 20 year old drunk man. At 15, she was raped by her uncle. Out of shame her family sent to brothel. *'I never saw the sun rise or set because the windows were always locked'* she said. *'Every night they send me 10 to 15 outsiders. Sometimes they raped or burned my body with cigarettes. Afterwards they gave us tips, and we hid them in our cloths to buy food'.*[729]

One of the main factors cited in the spread of HIV-AIDS in India has been heterosexual transmission without using protection. By estimate 50-80 percent of prostitutes in Red Light Area in India have HIV-AIDS, but still they do not insist on use of condom. In April 1986, the first confirmed evidence of AIDS infection came in India, when six prostitutes from Tamil Nadu tested

[728] Jeff Hays, *Prostitution In India*, Factsanddetails.com, June 2015
[729] Ibid

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positive for HIV antibodies. AIDS spread out of the cities along with truck routes. Prostitutes gave the decease to truck driver which passes on to the other prostitutes of other town and the prostitutes gave it to the other truck drivers.

Indian prostitutes on average sleep with seven to eight men a day. Some women say that they cannot turn down the men who refuse to wear a condom because they need money to take care for their children. Time talked with one of the prostitute who believe that she got HIV at the age of 15 and had unprotected sex with over 3,000 customers.

CHAPTER-4: ISSUES

The main cause of prostitution can be categorized in the basis of economic cause, poverty, population, pollution and corruption in Industrial Centers, Immoral traffic in Children and women, Social cause, Marital factors, Bad neighborhood, Illegitimate motherhood, Biological cause, Lack of sex education, Inability to arrange marriage, Early marriage and desertion, Kidnapping and abduction, Sale by parents and husbands, Deceit and cheating by partners, Debt and cast system in society, Problematic drug use and alcohol abuse, Pornography including soft and strong literature and entertainment etc.

Prostitutes leads to many health problems for the prostitutes like cervical cancer, Traumatic brain injury, HIV, AIDS, STD, psychological disorders. In a country like India, most of the people indulge themselves in unprotected sex with prostitutes. It is very difficult to eradicate the problem of AIDS. AIDS was first identified amongst sex workers and their clients, before any other sections of society became affected. The sex workers themselves are taking steps to combat with aids in some brothel for example in Kolkata, the sex workers are insisting their clients to use condom in order to avoid aids.

Meena was married off at 12, soon after she was taken to Delhi by her husband. She found out that he was a pimp. In last three years, she has served up to six clients a night. The major part of her earning goes to pay rent and rest goes to her husband.

Maya, was 10 when she was taken to Gorakhpur in Uttar Pradesh by her aunt who was paid Rs. 3000. When Maya refused to have sex with stranger, she was locked in a room for three days and beaten unconscious. Now Maya lives in Red Light Area in Mumbai.

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Government should take strict action towards the people who are engaged in this kind of practice and in order to fight prostitution.[730]

1. Formal education should be made available to those victims who are still within the school going age, while no-formal education should be made accessible to adults.

2. The Central Government and State Government in partnership with non-governmental organizations should provide gender sensitive market driven vocational training to all those rescued victims who are not interested in education.

3. Rehabilitation and reintegration of rescued victims being a long-term Recruitment of adequate number of trained counselors and social workers in institutions or homes run by the government independently or in collaboration with non-governmental organization.

4. Awareness generation and legal literacy on economic right, particularly for women help lines about the problem of those who have been forced into prostitution.

5. Adequate publicity, through print and electronic media including child lines and women help line about the problem of those who have been forced into prostitution.

6. Culturally sanctioned practices like the system of devadasis, jogins, bhavins etc. which provides a pretext for prostitution should be addressed suitably.

Some people opine that prostitution shall be made legal in India and should accept them as a part of society. The benefit of legalizing prostitutes in India will be that at least we will have a track record of number of people working as sex worker in various Red Light Areas throughout India. Legalization of prostitution will also help to keep a check and balance in the industry by the government. Proper medical treatment and medical facilities will be given to these women as well as deceases like AIDS-HIV can be controlled. There is a strong need to treat prostitution industry like any other industry and empower it and the people engaged with legal safeguard. By legalizing prostitution, the sex worker can claim for their rights as a part of society.

Crime related prostitution i.e., human trafficking, kidnapping, rape, selling, pimping etc will gradually decline as soon the prostitution is legalized. Legalization of prostitution will promote

[730] Kaustabh Nandan Sinha, *the Problem of Prostitution an Indian Perspective*, Legalserviceindia.com, June 11, 2008.

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women's health as they can have easy access to medical facilities which they do not get. Minimum wages can also be fixed by the government for the services provided by the sex worker.

CHAPTER-5: COMPARATIVE ANALYSIS

A state like Canada, Argentine, Germany and Netherlands has taken steps to decriminalize the profession and has initiated regulation of the industry subjecting to the labour laws of the country like any other 'Normal Profession'. The states have taken such steps to restore the fundamental rights to life, liberty and profession and have recognized the job as noble as any other profession. The prostitutes are duly registered in the employment category and the municipality is responsible for taking care of the standard of working conditions. The prostitutes pay taxes and also charge a VAT on the services that they offer. The brothel owners should own valid license in case they serve liquor and food.

U.K. does not have the profession illegal per se, has made the acts related to it as illegal. Pandering, Kerb Crawling, Soliciting, Escorting and Pimping are some of the illegal activities.

In Canada, recently 3 main laws prohibiting the profession were struck down altogether by the highest court of the country by a straight 9-0 ruling. It's a win for sex workers who have been seeking safer and exposed them to more danger. The court has given 1 year of frame to the parliament for making new laws on the same.

Whereas, in U.S.A., the act of prostitution or any job related is considered illegal and penalties apply. Heavy fines, penalties and even imprisonment are imposed to those who are involved in any act of patronizing a brothel, exchanging sexual services and the avails from the same.

CHAPTER-6: Remedial Measures

International concern: The international cooperation began in 1899 to end the traffic in women for the purpose of prostitution. League of Nations appointed a committee on the Immoral Traffic in Women and Children in 1921. The United Nations General Assembly adopted a convention for the suppression of prostitution in 1949. In America's Los Angeles an international conference was organized in 1977. More than 1000 sex workers participated in this conference. This conference drew the international attention towards prostitution and their problem.

Pre-Independent efforts: East India Company made certain regulations in the beginning to deal with sexual offences. Later on provisions were made in Indian Penal Code, 1860, in order to deal with sexual offence, whose main objective is to protect the modesty of women against forced illicit sexual intercourse. Code provides punishment for insulting the modesty of any women by word, sound, gesture or exhibition of any object, or introducing on her privacy, an imprisonment with may extend up to one year or fine or both.

Indian Penal Code, 1860 (regarding Prostitution)

Section - 354: A penalty of two years imprisonment or both was given for the offence of assault or use of criminal force upon a woman with intent to outrage her modesty.

Section- 366: Kidnapping or abducting a woman, and in order that she may be forced to reduced to illicit intercourse with any person, including a woman to go from any place in order that she may be reduced to illicit intercourse by criminal intimidation or by an abuse of authority or under any other compulsion inducing a girl which is under 18 years of age, by any other means, go to from any place or to do any act, in order that she may be forced or reduced to illicit intercourse, kidnapping or abducting any person in order that she may be subjected to unnatural list of any person, each of these was a grave offence punishable with imprisonment of either for 10 years or fine or both.

Section –372: Selling, Letting for hire or otherwise disposing of, or buying, hiring or obtaining possession of any girl under 18 years of age for any unlawful or immoral purpose was made an offence punishable with imprisonment for not less than seven years which may extend to imprisonment for life or fine or both.

Section – 375: Sexual intercourse with a woman under 16 years of age was treated as rape notwithstanding that she may have consented to it and punishable for rape was up to 10 years.

Section – 497: Sexual intercourse by a person with the wife by another man without the consent or connivance of that man constituted the offence of adultery punishable with imprisonment up to 5 years or fine or both.

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Section – 498: The woman herself was declared free from any liability as an abettor. Enticing a married woman, in order that she may have illicit intercourse with any person or concealing or detaining her with such intent with imprisonment for 2 years or fine or both.

The above given provision in Indian Penal Code did not make prostitution illegal, nor did it make procuring a criminal offence under all condition. But as far adult females are concerned, the provision was that it must be accompanied by kidnapping abducting or criminal intimidation. Whereas it is an offence in case of minor girls under 18 years of age for their buying and using them for immoral purposes and importing into India girls under 21 years of age for immoral purposes. Thus, the effort on the part of the Government is to check prostitution were salutary.[731]

The law is vague on prostitution itself.[732] The primary law dealing with the status of sex workers is the law referred to as *The Suppression of Immoral Traffic in Women and Girls Act (SITA), 1956 and The Prevention of Immoral Traffic Act (PITA), 1956.*

The Immoral Trafficking Prevention Act, 1956, deals with the sex work in India. It does not criminalize prostitution or prostitutes per se, but it mainly punishes act by third party facilitating prostitution like brothel keeping, soliciting and pimping are illegal. Section-3 talks about the Punishment for keeping a brothel or allowing premises to be used as a brothel. It also provides rigorous imprisonment for a term no less than one year and not more than three years and fine which may extend up to two thousand rupees, to any person who keeps or manages, or act or assists in the keeping or management of a brothel.

Following are the major points of the Act:[733]

1. **Sex workers**: the law frowns at sex workers who solicit or seduces clients. Conversely, call girls are barred from publishing their phone numbers in the public domain. Violators may be imprisoned for up to 6 months.

2. **Clients**: A client may be charged if he seeks the services of a sex worker within 200 yards in a public domain. He may be imprisoned for up to 3 months.

[731] Haveripeth Prakash, *Prostitution and Its Impact on Society- A Criminological Perspective,* March 10, 2013.
[732] *"Prostitution in India: Make it legal"*. The Economist, November 1, 2014.
[733] Admin Lawnn, *Prostitution in India: Laws, Rights and Legal Protection of Sex Workers,* March 23, 2018.

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3. **Pimps and Babus**: Those who are earning a living from a sex worker are guilty under this Act. An adult male who permanently lives with a sex worker may be charged unless until he proves otherwise.

4. **Brothel**: Owning and managing a brothel is illegal. Offenders shall be charged under this Act. Imprisonment may last up to 3 years in some cases.

5. **Procuring and Trafficking**: Anybody that attempts to procure or traffic another person is liable to be punished.

CHAPTER-7: SUGGESTIONS

Prostitution should be legalized so that the rights of minor can be protected. According to various research carried out, it can be estimated that as many as 10 million children are engaged in prostitution worldwide. Child prostitution exists in all countries, irrespective of their level of economic development. By legalizing prostitution and taking strict measures to regulate prostitution, we can ensure removal of minors from the profession. Thus protection of rights of children and their safety can be guaranteed.

Regular medical checkups will reduce the spread of STDs; regulation of prostitution would include conducting regular medical checkups of sex workers and provision of adequate birth control tools, which will reduce the risk of sexual diseases being transmitted from workers to consumers and vice-versa. It will promote cleaner working condition and the process will thus become healthier and safer. This will be beneficial to both parties involved as well as the society.

In brothels, every customer should provide condom as well as the facility to shower before and after the session. The prostitutes should require maintaining health cards which should be up-to-date. If a prostitute is tested positive with any sexually transmitted disease or infection, she is immediately required to stop providing services. The brothels should also implement various measures to ensure the security of both the parties.

Once decriminalized, the entire industry will come under the sphere of legal control which will enable law upholders to detect instances of forced prostitution and help victims of the same. Not all people who visit sex workers holds criminal record or have the tendency to assault them. Most of them are men with no criminal record of any type.

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In India, Prostitution is approximately an $8.4 billion industry. Legalizing and taxing the prostitution like any other business will provide an incentive for the government, and facilitate them in providing medical check-ups and protecting the rights of people engaged in this profession.

Every person has the legal right to use his or her body according to their will. Portraying it as morally wrong does not depict anything but a biased value system. If a person finds prostitution wrong, it is perfectly accepted for them to stay away from it. Nobody has the right to force a person to adhere to somebody else's moral standards.

If prostitution is legalized and regulated, government will save excess expenditure incurred on police, prison etc. and this will facilitate redirection of police resources to bigger problem.

Alcohol, drugs, weed and any kind of intoxication etc are prohibited because they impose serious threats to the health of a person. But unlike them, prostitution does not harm a person either physically or mentally, which is why placing a prohibition on it does not stand justifies.

Regulated prostitution protects the rights of sex workers. When a sex worker is sexually assaulted or not paid the agreed dues, he/she will have the right complain about the same and get it remedy.

With the legal and easier substitute available to people who wants to satisfy their sexual desire, they can approach the prostitutes rather than committing heinous crimes such as rapes. Legalization of prostitution will lead to a systematic up gradation to the industry. The service of pimps and middleman will no longer be required, leading to a decrease in criminal behavior and an increase in the wages of the sex workers.[734]

CONCLUSION

The commercial sex industry is a multi-billion dollar industry. Prostitution in itself is a problem and child prostitution is making it more complicated. Criminalizing the prostitution, including other things which surround sex work is not the only solution. Sex trade is here to stick, and by recognizing it as a legitimate form of work, all parties involved in it can receive guaranteed benefits. It would effectively minimize the burden of the government in terms of executing anti-prostitution laws and paying additional law enforcement. In addition, countries would increase their revenue via taxes, foreign exchange, and increased employment rate. Countries can also

[734] MD Sahabuddin Mondal, *Legalization of Prostitution in India: Need of the hour*, 17October, 2017.

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ensure safe environment for their people because sex workers will be required to undergo medical tests and receive adequate medical care timely. Most importantly, legalizing prostitution would protect the right of sex workers and give them a chance to live a normal life they deserve. But of course, it would be a lot better if the government will legalize prostitution because it will give the sex workers their rights and protection on their job.

Thus India should legalize prostitution which will not only help the sex workers but will also help the government to keep an eye on the activities related to it. Laws should not be such as to make me legalized but also to change the mentality of people in respect of the profession and choices that a person makes.

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RIGHTS OF ARRESTED PERSON: A CRITICAL OVERVIEW

- AYUSH SHARMA, DEVASHISH TIWARI & PRAACHEE PATHAK

INTRODUCTION-

Any person must be treated as a person; no matter the very fact that such someone proved to be a criminal or not. The accused persons are granted bound rights, the foremost basic of that are found within the Indian Constitution. The vital theories behind these rights are entitled to some protection from the misuse of these powers by the government. An accused has bound rights throughout the course of any investigation; enquiry or trial of offence with that he's charged, and he ought to be protected against impulsive or criminal arrest.

In our country India, there is one vital principle of our Indian legal system that is the presumption of innocence of the guilty person until or unless he found or proved guilty by the court after the completion of the trial. In the country like India where the rule of democracy is followed, the rights of the guilty person are untouchable, though after being guilty of a crime, he will stay a person, he does not turn out to be a non-person. Rights of the guilty include the right at the moment of arrest, search or seizure throughout the procedure of trial.

The accused person in our country is afforded bound rights, the foremost basic of that are found within the Indian Constitution. The overall theory behind these rights is that the govt. has huge resources offered to that for the prosecution of people, and people are entitled to some protection from abuse of these powers by the government. The guilty person has some rights which are enshrined in the constitution, for the period of the investigation, enquiry or trial of the crime of which he was alleged and also protected against the arrest which is against the law. Police have ample of powers conferred on them to arrest any individual under cognizable offence without the notice of magistrate, therefore courts should be cautious to check that these powers must not be utilized for any personal interest. An individual cannot be arrested on mere suspicion or information. Even an individual must not arrest any person on the statement of another, however, indict it is.

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In the leading case of Kishore Singh Ravinder Dev v. State of Rajasthan[735], it was said that the laws of India i.e. Constitutional, Evidentiary and procedural have made elaborate provisions for safeguarding the rights of accused with the view to protect his (accused) dignity as a human being and giving him benefits of a just, fair and impartial trail. However in another leading case of Maneka Gandhi v. Union of India[736], it was interpreted that the procedure adopted by the state must, therefore, be just, fair and reasonable.

RIGHTS OF ARRESTED PERSON-

1. Right to know the grounds of arrest-

Section 50(1) of Code of Criminal Procedure, 1973 states-

50(1)-'Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.'

Therefore whenever a police officer is effecting an arrest without warrant, It becomes legally obligated for the officer to apprise the arrested person the reasons and grounds for his arrest, failure to do so will render the arrest unlawful. In Ajit Kumar v. State of Assam[737] the Court held that the arrest and detention of that person was illegal even if such oral communication was made, it is not clear whether full particulars were communicated or mere section was communicated.

Section 55(1) of Code of criminal procedure, 1973 further states-

55(1)-'When any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.'

[735] Kishore Singh Ravinder Dev v. State of Rajasthan, AIR 1981 SC 625.
[736] Maneka Gandhi v. Union of India , AIR 1978 SC 597.
[737] Ajit Kumar Vs. State of Assam ,1976 CriLJ 1303.

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This section affirms that whenever a police officer engages an officer subordinate to him to effect an arrest without a warrant, he shall be legally obligated to the officer concerned to deliver an order specifying essential particulars, before making an arrest, subordinate officer is bound to notify the arrested person of the same, and if necessary show him the order. Non- Compliance with this provision will render the arrest illegal.[738]

Section 75 of Code of Criminal Procedure, 1973 states-

75-'Notification of substance of warrant. The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.'

In case arrest is to be made under warrant, the police officer is bound to notify the substance to the person arrested, and if required show him the warrant. If the substance of the warrant is not notified, the arrest would be unlawful.[739]

Constitutional provisions concerning the right

Our constitution has also conferred this right as a status of fundamental right enshrined under III Schedule of Indian constitution, Article 22(1) of our constitution specifically deals with the right, which is stated below-

22(1)-'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.'

Right to know the ground of arrest is constitutional conferred right. The right to be informed of the grounds of arrest is a precious right of the arrested person.[740] Timely information of the grounds of arrest serves the arrested person in three ways-

(1). It enables the arrested person to determine appropriate court for moving his bail application.

(2) It enables the arrested person to make arrangements for his defence expeditiously.

[738] Ajit Kumar Vs. State of Assam, 1976 CriLJ 1303.
[739] Satish Chandra Rai Vs. Jodu Nandan Singh, ILR (1899) 26 Cal 748; Abdul Gafur Vs. Queen Empress, ILR (1895-96) 23 Cal 896.
[740] Udaybhan Shuki Vs. State of U.P, 1999 Cri LJ 274 (All).

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(3) It apprises the arrested person, whether moving a writ, specifically habeas corpus would be appropriate.

Article 22(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where rule of law prevails. The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also, to know exactly what the accusation against him is, so what he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him.[741] The words "as soon as may be" in Article 22(1) would mean as early as is reasonable in the circumstances of the case.[742] Further grounds of arrest should be communicated to the arrested person in language which is understood by him; otherwise it would not amount to sufficient compliance with the constitutional requirement.[743]

Once the arrest has been effected, police is under an obligation not just to inform the friend or relative of the arrested person, in addition they are also suppose to make an entry in the register maintained by police.

2. Right to keep quiet

The right to keep quiet does not have any mention in any Indian law; however, its authority can be derived from CrPC as well as the Indian Evidence Act. The right to stay silent is principally related to the statement and confession made by the accused person in the court. In addition to this, it is the responsibility of the magistrate to perceive if any statement or confession made by the accused person was voluntarily or was after the use of force and manipulation. Therefore, police or any other authority for that matter is not allowed to compel an accused person to speak anything in the court.[744]

Article- 20(2)[745] additionally, reiterates that no person whether accused or not cannot be compelled to be a witness against himself. This act of exposing oneself is the principle of self- incrimination.

[741] Madhu Limaye, re, (1969) 1 SCC 292: 1969 Cri LJ 1440.
[742] Tarapada De Vs. Sate of W.B., (1951) 52 Cri J 400: AIR 1951 SC 174.
[743] Harikisan Vs. State of Maharashtra (1962) 1 Cri LJ 797: AIR 1962 SC 911,914.
[744] http://www.helplinelaw.com/employment-criminal-and-labour/RAPI/rights-of-an-arrested-person-in-india.html
[745] Indian Constitution, 1950

This principle was affirmed in the case of Nandini Satpathy v. P.L. Dani[746], where the court observed that, "No person can force any other person to furnish any statement or compel to answer any question because the accused person has a right to keep quiet during his interrogation".

3. Right to be informed of release on bail

Section 50(2) of Code of Criminal Procedure, 1973 states-

50(2) - Where a police officer arrests without warrant any person other than a person accused of a non- bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

It is mandate of this section that a police officer is bound in cases other than non-bailable offence to apprise the arrested person that he is entitled to bail, provided sureties is arranged on his behalf.

4. Right to be produced before a magistrate

It is the mandate of section 56 and 76 of Code of Criminal Procedure, 1973 that person making a arrest under warrant or without warrant should produce the arrested person before a magistrate without unnecessary delay, before taking the arrested person before a magistrate, he should be confined at no place other than a police station. The reproduction of the said sections is stated below for the sake of convenience-

Section 56 of Code of Criminal Procedure, 1973 states-

56- Person arrested to be taken before Magistrate of officer in charge of police station. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

Section 76 of Code of Criminal Procedure, 1973 states-

76- Person arrested to be brought before Court without delay. The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law

[746] AIR 1978 1025.

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to produce such person: Provided that such delay shall not, in any case, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

5. Right to not being detained for not more than 24 hours

Section 57 of Code of Criminal Procedure, 1973 states-

57- Person arrested not to be detained more than twenty- four hours. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Irrespective of the fact whether the arrest has been made under a warrant or without a warrant, the arrested person needs to be produced before the magistrate within 24 hours, the detention beyond 24 hours can be extended only by order of judicial magistrate. Besides being a right recognised by code of criminal procedure, it's also a constitutional conferred right, enshrined under III Schedule of Indian constitution, it is also dealt under Article 22(2) of Constitution who's reproduction is state below-

22(2) - Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

The right to be produced before a magistrate before duration of 24 hours has been incorporated with following objectives in mind-

1. Prevent police officers from extracting information by means of confessions.
2. To afford an early recourse to judicial enquiry this is independent in its functioning.
3. To prevent police station for being used as a prison for the purpose of torturing arrested person.

The Supreme Court on various instances have instructed state and police officials to observe the directives given by code of criminal procedure and constitution, as to producing arrested person

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before a judicial magistrate before 24 hours. This healthy provision which enables the Magistrates to keep check over the police investigation and it is necessary that the Magistrates should try to enforce this requirement and where it is found to be disobeyed, come down heavily upon the police.[747] If a police officer fails to produce an arrested person before a magistrate within 24 hours of the arrest, he shall be held guilty of wrongful detention.[748] The tendency of certain officers to note the time of arrest in such a manner that the accused's production before a Magistrate was well within 24 hours has been disapproved.[749] If the Magistrate is satisfied that the investigation has not been completed, he is authorised to order the extension of police custody for a limited period, to facilitate investigation under section 167 of Code of Criminal Procedure, 1973.

In addition to the above safeguards provided, constitutional protection is also conferred in this regard. A writ of habeas corpus can also be moved under article 32 and 226 of the constitution, in case of failure on the part of the police to produce the arrested person within 24 hours. It can be filed by any person who is familiar with circumstances of the case or with the person arrested. In case of Additional district Magistrate of Jabalpur v.Shiv Kant Shukla Justice Khanna in his dissenting opinion stated- The Constitution and the laws of India do not permit life and liberty to be at the mercy question is whether the law speaking through the authority of the court shall be absolutely silenced and rendered mute... detention without trial is an anathema to all those who love personal liberty. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. [750]The writ, declared the court is a command addressed to the person who is alleged to have another person unlawfully in his custody, requiring him to bring the body of such person before the court in order that the circumstances of the detention may be enquired into and an appropriate judgment rendered upon judicial enquiry into the alleged unlawful restraint.[751] The writ of habeas corpus cannot only be used for releasing a person illegally detained but it will be also used for protecting him from inhumane treatment inside the jail.[752]

6. Right to consult a lawyer of his own choice

[747] Khatri And Others vs State Of Bihar & Ors, 1981 SCR (2) 408, 1981 SCC (1) 627.
[748] Sharifbai Vs. Abdul Razak, AIR 1961 Bom 42.
[749] Ashok Hussain Allah Dehta Vs. Collector of customs, 1990 Cri LJ 2201 (Bom.).
[750] Additional district Magistrate of Jabalpur v.Shiv Kant Shukla (1976) 2 SCC 521.
[751] Kanu Sanyal v. District Magistrate AIR 1973 SC 2684.
[752] Sunil Batra vs. Delhi Administration, (1978) 4 SCC 409.

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Article 22(1) of the constitution states-

22(1)-No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

It is the constitutional mandate that every arrested person has a right to consult a lawyer of his own choice, further state is under an obligation to provide free legal aid to indigent arrested person which is implicit right under Article 21 of the constitution. Supreme Court observed as pointed out in Hussainara Khatoon's case (supra) which was decided as far back as 9th March, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a Fundamental Right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding through-out the territory of India.[753] Non compliance with the requirement and failure to inform the accused of this right would vitiate the trial.[754]

Section 303 of Code of Criminal Procedure, 1973 Further States-

303- Right of person against whom proceedings are instituted to be defended. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

The right of an arrested person to consult his lawyer begins from the moment of his arrest.[755] Therefore both constitutional and legal right has been conferred to the arrested person as to his

[753] Khatri And Others vs State Of Bihar & Ors. 1981 SCR (2) 408, 1981 SCC (1) 627.
[754] Suk Das Vs. UT of Arunachal Pradesh, (1986) 2 SCC 401.
[755] Moti Bai Vs. State, (1954) 55 Cri LJ 1591.

right of consulting a lawyer of his own choice, from the very beginning of the trial, non compliance to the same will vitiate the trial and infringe the rights of the arrested person.

7. Right to free Legal Aid and to be informed of it

The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require.[756] In view of the same, Supreme Court through its various directives has imposed a duty on Magistrate and courts to inform the indigent accused about his right to get free legal aid.[757]

8. Right to be examined by the medical practitioner

The guilty person, who is accused of any offence and arrested, is having right to be examined by the medical practitioner with his own voluntary choice, to defend and protect himself properly. Section 54 has been amended and this section empowers the court to get the arrested person medically examined. Section 54[758] states that-

Examination of arrested person by medical practitioner at the request of the arrested person- When a person who is arrested, whether on a charge or otherwise alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.[759]

While section 53 enables a police officer to compel an arrested person to undergo a medical examination with a view to facilitate investigation, section 54 gives the accused the right to have himself medically examined to enable him to defend and protect himself properly. It is considered desirable and necessary "that a person who is arrested should be given the right to have his body

[756] Khatri And Others vs State Of Bihar & Ors. 1981 SCR (2) 408, 1981 SCC (1) 627.
[757] Mohd. Ajmal Amir Kasab Vs. State of Maharashtra, (2012) 9 SCC 1.
[758] The Code Of Criminal Procedure, 1973.
[759] https://indiankanoon.org/doc/441720/

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examined by a medical officer when he is produced before a magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subjected to physical injury".[760]

According to the Supreme Court in the case Sheela Barse V. State of Maharashtra[761], the arrested accused person must be informed by the magistrate by the magistrate about his right to be medically examined in terms of Section 54. In case of the examination taking place at the instance of the accused under sub-section (I) a copy shall be given to him.[762] It has been laid down in section 54-A that on the request of a police officer in charge of the station, a court having jurisdiction can require an accused to subject himself for identification by others if it is found necessary for the investigation of the offence.[763]

In the case Mukesh Kumar V. state[764], Non-Compliance of this important provision by the magistrates has prompted the Delhi High Court to issue directions making it obligatory for the magistrates to ask the arrested person as to whether he has any complaint of torture or maltreatment in police custody. The High Court has also directed the magistrates to inform the accused of his right under Section 54 to be medically examined as it is his ignorance of this right which makes him unable to exercise it. The salutary Principle that the medical examination of a female should be made by a female medical practitioner[765] and similar provision has now been expressly made in section 54.[766]

In sort to have transparency, the Supreme Court in Joginder Kumar V. State of U.P.[767] formulated the following rules:

i. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare, told, as far as is practicable that he has been arrested and where he is being detained.

[760] Joint Committee Report, P.ix
[761] (1983) 2 SCC 96: 1983 SCC (Cri) 353.
[762] Section 53-A and 54, The Code Of Criminal Procedure, 1973.
[763] Section 54-A, The Code Of Criminal Procedure, 1973.
[764] 1990 Cri LJ 1923 (Del.)
[765] Section 53 (2), The Code of Criminal Procedure, 1973.
[766] The Code of Criminal Procedure, 1973.
[767] (1994) 4 SCC 260: 1994 SCC (Cri) 1172.

ii. The police officer shall inform the arrested person when he is brought to the police station of this right.

iii. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Article 21 and 22 (1) enforced strictly.

Guidelines drawn by judiciary-

The Hon'ble Supreme Court, In D.K. Basu Vs State of West Bengal[768], has laid down specific guidelines required to be followed while making arrests:

I. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designation. The particular of all such personnel who handle interrogation of the arrestee must be recorded in a register.

II. That the police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

III. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

IV. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through

[768] AIR 1997 SC 610.

the Legal Aids Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

V. The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

VI. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclosed the name of the next friend of the person who has been informed of the arrest and the names land particulars of the police officials in whose custody the arrestee is.

VII. The arrestee should, where he so request, be also examines at the time of his arrest and major and minor injuries, if any present on his /her body, must be recorded at that time. The Inspector Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

VIII. The arrestee should be subjected to medical examination by the trained doctor every 48 hours during his detention In custody by a doctor on the panel of approved doctor appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

IX. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

X. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

XI. A police control room should be provided at all district and State headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.[769]

9. Right to Fair Trial

[769] https://shodhganga.inflibnet.ac.in/bitstream/10603/95855/12/18%20d.k.%20basu%20guidelines.pdf

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The Constitution under Article 14[770] guarantees "the right to equality before the law". The Code of Criminal Procedure also provides that "for a trial to be fair, it must be an open court trial". This provision is intended to make sure that convictions are not to be undisclosed. In exceptional cases which are sensitive, the trial may be held in camera. Every accused is entitled to be informed by the court before taking the evidence that he is entitled to have his case tried by another court and if the accused subsequently moves such application for transfer of his case to another court the same must be transferred. However, the accused has no right to select or determine by which other court the case is to be tried.[771]

10. Right to Speedy Trial

The Constitution provides an accused the right to a speedy trial.[772] Although this right is not explicitly stated in the constitution, it has been interpreted by the Hon'ble Supreme Court of India in the case of Hussainara Khatoon & Ors vs. Home Secretary, State Of Bihar[773]. This case mandates that an investigation in trial should be held "as expeditiously as possible". In all summons trials (cases where the maximum punishment is two years imprisonment) once the accused has been arrested, the investigation for the trial must be completed within six months or stopped on an order of the Magistrate, unless the Magistrate receives and accepts, with his reasons in writing, that there is cause to extend the investigation.

CONCLUSION

In a country like India, where immense power are vested with police, where country is governed by rule of law, it becomes even more imperative to recognize the rights of the arrested person and enforce it. If there are no rights of the arrested person, police officials can go to any lengths to effect an arrest, sometimes even at a cost of fundamental rights, which would lead to discords and chaos in the society. Judiciary plays a very active and indispensable role by keeping a check on the activities of police and making sure the rights of the arrested person are not compromised to ensure a speedy and fair justice redressal system. The rights conferred are for the benefit of society

[770] Supra 14.
[771] http://www.legalservicesindia.com/article/1635/Rights-of-Arrested-Person.html
[772] Ibid.
[773] AIR 1979 1369.

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at large to keep the atrocities of police under check. Therefore every endeavour should be made to protect and enforce the right of the arrested person, failure to which there would be no rule of law.

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FEMINISM (CONSTRUCTIVE OR DESTRUCTIVE)

- ANURAAG SHARMA & HARSHITA DEORA

ABSTRACT

Right from 18th century to 21st century Indian society has evolved a lot where from some literate to everyone literate, from patriarchal society matriarchal society to an equality in society, from male leaders to female leaders everything has been evolved and changed where some customs were changed and new laws has been introduced to the society but still somewhere in this present society women cannot properly use their rights being illiterate and the women who are able to practice their rights are practicing it in a way to suppress men in the society. The word feminism was introduced with a positive notion but as society has evolved the meaning turns negative.

Feminism where was introduced just for pros of women and for their rights now it has created it cons due to excessive practicing of rights by women's

Feminism which is a support to women is now a threat to a man hence this paper describes that how women's while empowering themselves are suppressing men and overpowering them. Where I too become the highlight of the day and men too is never a story. Discussed below is that how sustainable practice of law turned into excessive practice of law.

INTRODUCTION

Feminism the concept or the word propounded which means to empower women or either can be said as suppressing men in the society. Feminism means to make women that eligible they can have equal rights as of men's in the society. Is that so?

No, feminism means to suppress men, why is it so where any incident happens where women is involved the man is always said to be the convict and not women, is that women aren't wrong or is that a man is always wrong.

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Indian laws provide every safety to women and not men why? Why men is always said to be guilty and why not women.

Indian constitution provides with article 14 which says that every person is equal. i.e. equality before law and equal protection of law.

Article 15 provides that there should not be any discrimination on basis of caste, color, Creed, sex. On other hand coming to the Indian penal code where most of the rights and privileges are provided to women's. Isn't it discrimination? May be not but introducing new and special acts to provide women with more privileges and suppressing men, is it equality?

Feminism, means to provide women equal right as that of men in the society. But due to some people it is wrongly interpreted. Who should be made responsible for this bloody politics, laws or illiterate society? I am not against feminism but against the wrong interpretation and wrong usage of the word feminism. In fight of bringing women equal to men the society has lifted women more and suppressed the men. Article 15 of Indian Constitution includes no discrimination on basis of sex, do society agree on this, is there no discrimination present in society on the basis of sex.

History

The feminist movement was firstly started in 1848 by savitribai phule who introduced the first school for girls in India. As time passes alternative philosophers and writers[774] came into movement and wrote their findings concerning women's right and commenced building an equal platform for women's as of women. Also with writers and reformers came into act and helped the community in abolishing Sati Pratha in Bengal.

The 19th century was the amount that saw a majority of women's issues that came underneath the spotlight and reforms began to be created. Much of the early reforms for Indian women were conducted by men. However, by the late 19th century they were joined in their efforts by their wives, sisters, daughters, protégées and alternative individuals directly suffering from campaigns like those administered for women's education. By the late 20th century, women gained greater autonomy through the formation of independent women's own organizations. By the late thirties and forties a replacement narrative began to be constructed regarding "women's activism". This

[774] Tarabai shide: Stri Purush Tulana (A Comparison Between Women and Men) in 1882 was first ever text on feminist.; pandita ramabai: criticzed patriarchy and caste system in Hinduism.;

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was freshly researched and expanded with the vision to create 'logical' and organic links between feminism and Marxism, as well as with anti-communalism and anti-casteism, etc. The Constitution of India did guarantee 'equality between the sexes,' which created a relative lull in women's movements until the 1970s[775]

The history of feminism is split in three phrases where 1st phrase includes abolition of sati in India and where women's are the one to rule on some states of India. 2nd phrase started after 1915 where Mahatma Gandhi started several movements which were joined by women's afterwards. 3rs phrase i.e. post 1947 where the women's were provided constitutional rights on not getting discriminated and power was given to state to make laws in favor of women under article 15(3) and Article 15(non- discrimination) under Indian constitution. Also in this phrase women's introduced themselves as a great leader such as Indira Gandhi (former prime minister of India) where it was proved in Supreme court that restricting women entering into the Sabrimala temple was discriminatory and violative of constitutional and religious rights of women, where on this ground the ban was removed by the apex court and all women were allowed to enter the temple. Also to provide women with the privilege by introducing some of the legislation to abolish discrimination.[776]

FEMINISM AS A SUPPORT TO WOMEN IN INDIA

Feminism is a supportive movement for women in country like India where women's are treated as an object and from the past where it can be seen that the Indian societies are based on patriarchy that is men based society where women's are only allowed to do household chores and where women's are discriminated at very large scale not only in houses as a wife but also as an employee at workplace, where women's are not only discriminated but also harassed sexually as well as mentally. There was a need of legislations to control these harassment on women and to protect women. Hence the legislators introduced some legislations and provisions which support women, as the leading case Vishakha v. State of Rajasthan[777] popularly known as Vishakha case where

[775] Kumar, Radha. The History of Doing Archived 10 January 2016 at the Wayback Machine, Kali for Women, New Delhi, 1998
[776] Protection of Women from Domestic Violence Act 2005; Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
[777] AIR 1997 SC 3011

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being an NGO Vishakha filed a petition in Supreme Court of India regarding protection of women at work place from harassment, where supreme court provided with guidelines for protection of women at workplace which afterwards constituted an legislation[778] which came into force from 9th December 2013.

Not only at workplaces women's were harassed at streets at every point in India, and where simultaneously there was a rapid increase in rape cases. One of the most highlighted case was Nirbhaya rape case[779] where a girl was brutally gang raped on roads of Delhi which was the main reason of introduction for amendments in Indian penal code 1860 (Sec 376), where punishments was increased by the apex court and also some of the offences was taken seriously in such as stalking, disrobing, outraging women's modesty (section 354) Indian Penal code, 1860. Which was concluded as Criminal Law (Amendment) Act, 2013, where gang rape punishment was increased to death penalty or imprisonment for whole life. Also it was stated that the minor being an accused of rape will be prosecuted under this act and not under juvenile justice act. 2000 (amended in 2015).

Also, Indian penal code, 1860 contains some provisions where rights are given to women against men such as section 498- A[780], also under criminal procedure code, 1973 provides protection to the divorced women (section 125 (1))[781], not only these section but some more legislation were introduced by the legislators for protection of women which are:

1. The Immoral Traffic (prevention) act, 1956
2. The Dowry Prohibition Act, 1961

[778] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
[779] 16th December 2012
[780] 498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be pun-ished 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—
(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.
[781] Order for maintenance of wives, children and parents.
(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

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3. The Indecent Representation of Women Prohibition act 1986
4. The Commission of sati (prevention) act, 1987
5. Protection of Women from Domestic Violence act, 2005
6. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
7. Criminal Law (Amendment) Act, 2013

These are some women specific legislation where women's are given protection from discrimination and harassment by men. As India is a vast country there is a need of legislation at each and every situation. And protection of women was always a priority as the Indian society is still patriarchal in nature.

Feminism in 21st Century/ Destruction

Feminism means the idea of the political, economic, and social equality of the sexes; organized activity on behalf of women's rights and interests[782]

21st century as stated in Webster's dictionary i.e. equality of sexes feminism has actually helped women in equality as women nowadays are independent can earn there are less cases of violation of their rights and harassment, the situation which has not yet changed is rapes and in that part of the country where mostly illiterate people live.

But what about the usage of these legislations which are introduced to protect women? Are they actually used to protect women or they are used to harass men. Actually the situation in today era that the power to women or rights to women are that powerful or that they are used to harass men in the society.

Many cases are falsely filed by women against men as they are just trying to suppress men and most false cases are filed under section 498 A IPC, 1860 which was declared by the court.

In the present case the facts detailed within the complaint are noticed above. Omnibus allegations had been made against all the accused in respect of demand of dowry, harassment, torture and

[782] https://www.merriam-webster.com/dictionary/feminism

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beating given to her during the amount she stayed within the matrimonial home. No specific date, month or year had been specified when these incidents had taken place. It cannot be ignored that every member of the family of the complainant's husband has been implicated in this case. The allegations made are vague and general and for that reason no offence under Section 498-A, IPC is made out against the accused.[783] On the face of the compliant it shows that complaint is false, charge should not be framed. In the instant case, there is evidence that respondent No.3 who is the sister of the husband of the complainant was living separate with her husband-respondent No.2 in a different village and were employed as teacher, the learned trial court has rightly discharged respondents 2 and 3.

For the explanations mentioned above, there is no ground to interfere in the well reasoned orders passed by the learned courts below. Hence this petition is dismissed.[784]

Allegations made by the complainant that her husband used to misbehave with her, at the behest of the petitioner are totally vague, inherently improbable and unworthy of credence. From these allegations even a strong suspicion cannot be interfered. Even the statements recorded during investigation do not furnish the requisite material so as to make out the prima facie case under section 498-A, IPC against the petitioner.[785]

These are some cases where the petitioner or applicant has been proved wrong and therefore the petition is quashed by the court. Not only under section 498 A IPC, 1860 but section 375 IPC, 1860 is also misused by women playing women card.

Recently in Noida, Delhi NCR, the Amity case where a girl got some fellow students together with her and ask them to beat Harsh and Madhav not only this she lodged an fir against them under section 354 IPC, 1860 for outraging her modesty as the case was totally fake and the girl was guilty no action was taken against her.[786]

This is what feminism today is where empowering girls and women are not the motto of the movement but to lower down men and suppressing them are the motto.

[783] Harsh Vardhan Arora v. Smt Kavita Arora, 2002 MLR 528
[784] Mukesh Rani V. State of Haryana, 2002 MLR 175
[785] Anu Gill V. State and Anr., 2001 MLR 467
[786] https://www.indiatvnews.com/news/india-amity-university-boys-thrashed-by-fellow-students-over-car-parking-issue-netizens-demand-justice-harsh-yadav-madhav-chaudhary-noida-uttar-pradesh-547015

Me too movement which began in late 2018 and still going on in this moment women are accusing men's for sexually harassing them not for that point of time but the cases which were not in role and it was happened (may be not) long ago. Where first impact of me too movement was on our Bollywood industry where Tanushree Dutta accused Nana Patekar for sexually harassing her on the sets of "Horn Ok Please". Where he was clean chit,after which a women came with a case accusing Ganesh Acharya where Tanushree Dutta asked industry to boycott the choreographer, not only this tv artist Alok Nath, Director sajid khan was also made accused under me too movement After this women from different industries came out and started accusing men of their own industry.[787]

Now here question arises that do men have rights, do they have any kind of protection against these kind of harassment.

Answer comes is no there is no protection for men against these acts of women, there are equal rights of men as that of women but the men cannot practice them up. Discrimination should be stopped but of Men as now they are more Discriminated and harassed.

SUGGESTIONS AND RECOMMENDATIONS

For Police authorities

- Both sides should be heard properly before filing a case.
- Mobile police should be appointed for patrolling purpose may be an NGO worker' s help can be taken
- Authority of taking decision should be given to each and every policemen
- Surveillance should be done properly.

For Government Authorities

- There should be an increase in literacy rates practically.

[787] https://economictimes.indiatimes.com/magazines/panache/metoo-row-tanushree-dutta-urges-bollywood-to-boycott-ganesh-acharya-after-fresh-allegations-surface/articleshow/73764488.cms

- Separate authority to police should be given
- These fake movements should be stopped

For judiciary

- Principle of natural justice should be thoroughly followed in the case related to rights of men and women.
- Evidences should be thoroughly examined
- The men should never be treated as guilty
- Guidelines for men specific legislation should be made.

CONCLUSION

Women and men both are pillars of the society, which should go equally to maintain sustainability and harmonious relationship. Yes being a patriarchal society women needs more protection and specific legislation to practice their rights. But the rights should be used to grow themselves to empower themselves and not to suppress men the meaning feminism and the feminist movement was to empower women, educate women and not overpower women.

As we all know that fundamental rights provided under part III Indian constitution are not for a single person or community they were constituted and was enforced for all the citizens of India.

So every citizen should be equally treated, yes I agree that women should be given special rights and privileges but rights and privileges should be provided to those women's who are actually in need of it. That means as Tarabai Shinde was the first women to start feminist movement with the motto to empower women to literate them to make them equal to men at that point of time. Where she got successful as after that many Indian states were ruled by women's.

So, let just go through equally and matriarchy and patriarchy should be left alone also no community should be suppressed and just make feminism a positive movement and not allow it to destroy our communities.

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IMPACT OF THE UPCOMING NAVI MUMBAI INTERNATIONAL AIRPORT ON THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

- VAISHNAVI VENKATESAN

ABSTRACT

While there is consensus that urbanisation and development of smart cities is one of major trends of the 21st century in developing countries, there is debate as to whether building of smart cities and development of large projects impacts the environment and to what extent. The researcher in this paper would be mainly focusing on the building of Navi Mumbai international airport, being a large project upcoming in the smart city of Navi Mumbai which contributes to a major disaster in the environment. There is a correlation between large projects ,smart cities and the adversarial affect it has on the environment.The paper examines the environmental impacts of new airport construction at Navi Mumbai. There are different types of environmental impact assessment that can be air, water and the flora and fauna and that can be social or that can be economical in nature. The main environmental impacts of airports growth are noise and air quality. The paper also emphasizes on the relationship between smart cities, large projects and Sustainable development.

KEY WORDS

Navi Mumbai, International Airport, Mangroves, Environment, Sustainable Development

INTRODUCTION

"The greatest threat to our planet is the belief that someone else will save it."
- Robert Swan

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Sustainable development is development that fulfils the wants of the present, without compromising the ability of future generations to meet their own needs. It involves preserving natural resources for the generations to come, as ancestors did for us.[788]

The concept of sustainable development is understood in many different ways, but at its core is an approach to development that looks to balance different, and often competing, needs against an awareness of the environmental, social and economic limitations we face as a society. Many a times, development is driven by one particular need, Irrationally without considering the future impacts. We are able to see the damage this can cause, from large-scale financial crises caused by irresponsible banking, to changes in global climate resulting from our dependence on fossil fuel-based energy sources. The longer we tend to pursue unsustainable development, the more frequent and severe its consequences are likely to become, which is why we need to take action now.

RELATIONSHIP BETWEEN SMART CITIES AND SUSTAINABLE DEVELOPMENT

Cities are the economic engines of the future because people shift from rural environments to urban areas and more than 60 % of the world's population will live in cities by 2030.[789] These circumstances may lead to an unsustainable growth. Sustainability should be understood from a multidisciplinary perspective taking into account all the people concerned. Under this premise new urban development's arise, called smart cities, where it works to develop sustainable management. A smart city could be a designation given to a town that includes data and communication technologies (ICT) to reinforce the standard and performance of urban services like energy, transportation and utilities so as to scale back resource consumption, wastage and overall costs. [790]The objective of a smart city is to enhance the quality of living for its citizens through smart technology.

To understand the aspect of sustainable development vis-a-vis smart cities, we take into consideration the Indian government's initiative, the 'Smart City Mission' which has been defined as an 'urban renewal and retrofitting program' with the mission to develop one hundred smart cities across the country, creating them 'citizen friendly and sustainable'. The agenda is sought to

[788] Definition by UNDP, www.UNDP.org
[789] Economic Survey of India, 2014
[790] Government of India, http://smartcities.gov.in/content/

be achieved with tangible results between 2017 and 2022 planned by the Central and state governments by providing financial help to these cities.

'Sustainable' in terms of urban development and growth can be defined as the 'magic mantra' of reuse, recycle, replenish. It is all about being in sync with nature and its components. This can be done with the new real-estate development, which has to be developed into a 'Smart City'.

Sustainable, in respect to smart cities, is ideally about projects which implement 'Green Building' concepts within an existing city[791]. Being associate degree eco-friendly and sustainable township is also about recycling garbage to form compost for gardens, to create methane gas to power utilities, to harness wind and solar power to provide a part of power requirements. Being eco-friendly also involves charging the water table through rain water harvesting, as also sewage treatment which provides treated sewage in form of water for gardens and construction/ cleaning purposes. It also involves logical architecture which ensures being in sync with wind and natural light resources, so that load on HVAC and luminaries is reduced. This is the best manner of ensuring that new initiatives turn out to be smart cities. It is important to target areas like air and water pollution management, sewage disposal, connectivity that ensures low pollution emission on the roads, a maintenance and management system which includes e-governance and internet-based solutions for citizens and also using construction material that's 'eco-friendly' and that should not produce ecological imbalance.

OBJECTIVE: To study the negative impact of the upcoming Navi Mumbai International airport on the environment mainly marshy lands and Rivers.

Impact of Navi Mumbai International Airport on the Environment

[791] Nick Ismail, *Smart cities are all about Sustainable Development* (September 5, 2018), https://www.financialexpress.com/money/smart-cities-are-all-about-sustainable-development/1303428/

The Navi Mumbai International Airport is an international airport being built at Ulwe Kopar-Panvel in Maharashtra, India whose construction is still going on. On completion, It will be the second international airport of Mumbai, along with Chhatrapati Shivaji Maharaj International Airport being India's first urban built multi-airport system.

The NMAI project, whose objective is to reduce the burden of traffic on Mumbai international airport, is such a. project where climate-related issues have not been taken into account in the planning specifications.

Out of 250 hectares of used by CIDCO for the project, the site encompasses 121 hectares of forest, 162 ha of mangroves and 404 ha of mudflats.[792] The removal of forest for the project will cause soil erosion and take away the cushions created by the mangroves, destroying a unique wildlife habitat. Because of the project, these mangroves will be totally lost forever. An amount of 161.5 Ha of mangroves will be lost due to the project. Most of the vegetation of trees in and around the villages are planted fruiting trees like mango, jamun, jackfruit, guava, custard apple etc. and the wood yielding trees like teak, etc. The ornamental trees, bamboos and palms also have been planted and/or maintained by the villagers. This project will result in loss of all vegetation in the project site. [793]

The Bombay High Court in 2005 ordered the government of Maharashtra to stop any further destroying of mangroves forest and in 2012 banned the conversion of wetlands in the western province.

The ecosystem has a large number of migratory birds and houses a number of species of crabs, fish and molluscs. They provide as a barrier to waves from eroding land in the inside, these are now in danger of getting destroyed and under extreme threat from coastal developmental activities. More than 50% of the airport area falls in the shallow mud adjoining the creek and the whole land is required to be developed to a safe level. The northern side of the airport will be abutting the Panvel Creek which is calm and shelter area.

Also, it says that the course of Ulwe River, which runs in the north-south direction through the site, will be re-routed and the Ghadi River, running alongside the northern boundary, will have to

[792] Environmental impact assessment study
[793] Shruti Jha, *Navi Mumbai airport: A silent conspiracy, Sunday*,(7th June 2015), https://www.downtoearth.org.in/blog/navi-mumbai-airport-a-silent-conspiracy-1497

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be re-channelled. . The work on it is proceeding at a fast pace, affecting the houses of those families yet to be relocated. The site of the Navi Mumbai International Airport faces a high risk of bird hit. Navi Mumbai has a huge bird diversity, which is being threatened by fast-paced development," states the study, which observed around 287 species within 10 km of the proposed site since December 2011. According to the BNHS, as many as six "globally threatened" and eight "near threatened" species, including the Lesser Flamingo and Black-headed Ibis, were seen in abundance at the site during the study period[794]. For example, so many species of 'waders' have often been spotted at the airport site. Many birds that must be roosting at inner wetlands also tend to fly over the airport site. Such a construction poses a serious threat to such migratory birds.

IMPACT

The over concretization result in increase in temperature during the day time and summer time along the roads. Diversion of agricultural land lead to issues of land use change and food security. Also, 300 Ha. Area is required for the housing needs of workers. This housing needs is to be supported by all the requisite social and cultural facilities. Also needs of water and energy would have to be met. The diversion of rivers Ulwe and Ghadi will lead to harmful effects on the aquatic community mainly due to channel excavation, dredging, clearing and removal of vegetation. Siltation affects aquatic vegetation by increasing the turbidity of water. Loss and reduction in the number of organisms Since wetlands regulate the temperature of its surroundings, protects flood channels, and transmits water into underground water reservoirs, preserving such ecosystems is central to building resilience to climate change.[795]

The question of building only one runway to reduce environmental damage did not arise because The Minister of Civil Aviation brought out that international airports everywhere are built with parallel runways. This ruled out the option of having just one runway at Navi Mumbai to minimise adverse environmental impact. CIDCO explained that, apart from its easy connectivity to Mumbai,

[794] Study conducted by Bombay Historical Development Society
[795] Environment Impact Assessment study

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the main advantage of Navi Mumbai is that bulk of the land needed for the project (about 66%) is already in its possession (and another 12% is government land) and that fresh land acquisition elsewhere will not only be expensive but also virtually impossible. Also other small measures to reduce environment damages could not be taken due to various reasons, E.g.: the runways could not be moved south so as to save all mangroves since there is an existing highway and railway line that acts as a natural barrier. Also, the terminal building has to be between the two runways to maximise operating efficiency. The option of having one runway on stilts to minimise mangrove loss was ruled out on security grounds that have acquired greater significance following the horrific events of 26/11(terror attacks).

Hence, overall the negative impacts of the construction of the airport to be summarised are:

1. Around 98 hectares of mangroves (albeit of low quality) will be lost forever in the area where the runways are being built.

2. The tidally-influenced Ulwe water body and Ghadi River will need to be recoursed

3. The 90-meter high hill will need to be removed to enable smooth access to the runaways. The hill, admittedly, has already been quarried indiscriminately to significantly diminish its ecological value.

4.High risk of bird hit and disturbance to habitats of many bird species.

The proposed location of the NMIA requires diversion of rivers, blasting of hills, reclamation of mangroves and disturbance to habitats of many bird species. Environmentalists have frequently raised objections over the ecological damage to the Navi Mumbai area through the airport. However, with the stage-II forest and wildlife clearance from the Union Ministry of Environment and Forests obtained in 2016, CIDCO has acquired all approvals needed to construct the airport.[796]

Environmental Laws pertaining to the construction

[796] Hiren Kumar Bose ,Nov 21, 2018,Indiaclimatedialogue.net

(i) A land regardless of its ownership on which there are mangroves, is a forest within the meaning of the Forest(Conservation) Act of 1980 and therefore, the provisions of Section 2[797] of the Forest (Conservation) Act of 1980 and the law laid down by the Apex Court in the case of T.N. Godavarman will apply to such land. A mangroves area on a Government land is liable to be declared as a protected forest or a reserved forest, as the case may be, within the meaning of the said Act of 1927; All mangroves lands irrespective of its area will fall in CRZI as per both the CRZ notifications of 1991 and 2011; if there is any violation of the CRZ notifications regarding mangroves area, it will attract penal provision under Section 15 of the said Act of 1986 which is attracted in case of the failure to comply with the provisions of orders or directions issued under the said Act of 1986

The destruction of mangroves offends the fundamental rights of the citizens under Article 21 of the Constitution of India.

In view of the provisions of Articles 21, 47, 48A and 51A(g) of the Constitution of India, it is a mandatory duty of the State and its agencies and instrumentalities to protect and preserve mangroves;

(ii)Under the Environment Protection Act, 1986 of India, notification was issued in February 1991, for regulation of activities in the coastal area by the Ministry of Environment and Forests (MoEF). According to which, the coastal land up to 500m from the High Tide Line (HTL) and a stage of 100m along banks of creeks, estuaries, backwater and rivers according to tidal variations, is called the **Coastal Regulation Zone**(CRZ). CRZ along the country has been divided into four categories. According to the Coastal Regulation Zone Notification 1991, no development is permitted on mangroves and other ecologically sensitive areas. But, in the year 2009, this Notification was amended to make an exception for Mumbai's new airport. We can see from the above facts that CRZ Notification was amended specifically for the continuation of the projects even though the environmental hazards it caused were evident.

[797] Section 2, Bare act,Forest conservation act,1980

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PIL Filed to stop Navi Mumbai Airport Work

A Public interest litigation was filed by NGO Vanashakti and its director Dayanand Stalin that sought the work to be stopped. Judges Abhay Oka and Pradeep Deshmukh sent notices to the Union Civil Aviation Ministry, CIDCO, Airports Authority of India and Maharashtra Pollution Control Board and asked them to respond to the PIL.[798]

As per the report, the petition said around 617 acres of forest land was given to CIDCO for the project. Out of this, approximately 350 acres is reserved as forest land, while 266 acres is covered by mangroves. To compensate for the damage caused to the environment, the authorities concerned were to declare the area bordering the upcoming airport as a mangrove sanctuary. However, the petition claimed that the condition was not adhered to and replaced with the Thane creek flamingo habitat, in a direct violation of the conditions of environmental clearance. It also accused the authorities of not complying with the original plan as the alternative site for migratory birds at the Sewri coastal wetland area has not been developed. The petition also claimed that the area between Karnala Bird Sanctuary and the proposed airport, was to be notified as a sanctuary, but it has not been done. Claiming further violations in the project, the petition said that the blasting of 92m of the hill area in Ulwe had begun without adhering to environmental rules.

[798] Abha Singh, Monday, Jan 28, 2019, 4:21pm, PIL against Navi Mumbai airport filed, http://www.asianage.com/metros/mumbai/220218/pil-against-navi-mumbai-airport-filed.html

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RESULTS AND ANALYSIS

(i) AGE

According to figure 1,it can be said that most of the participants in the survey belonged to the age group of 15-28 and 45 above both being 28.2%.

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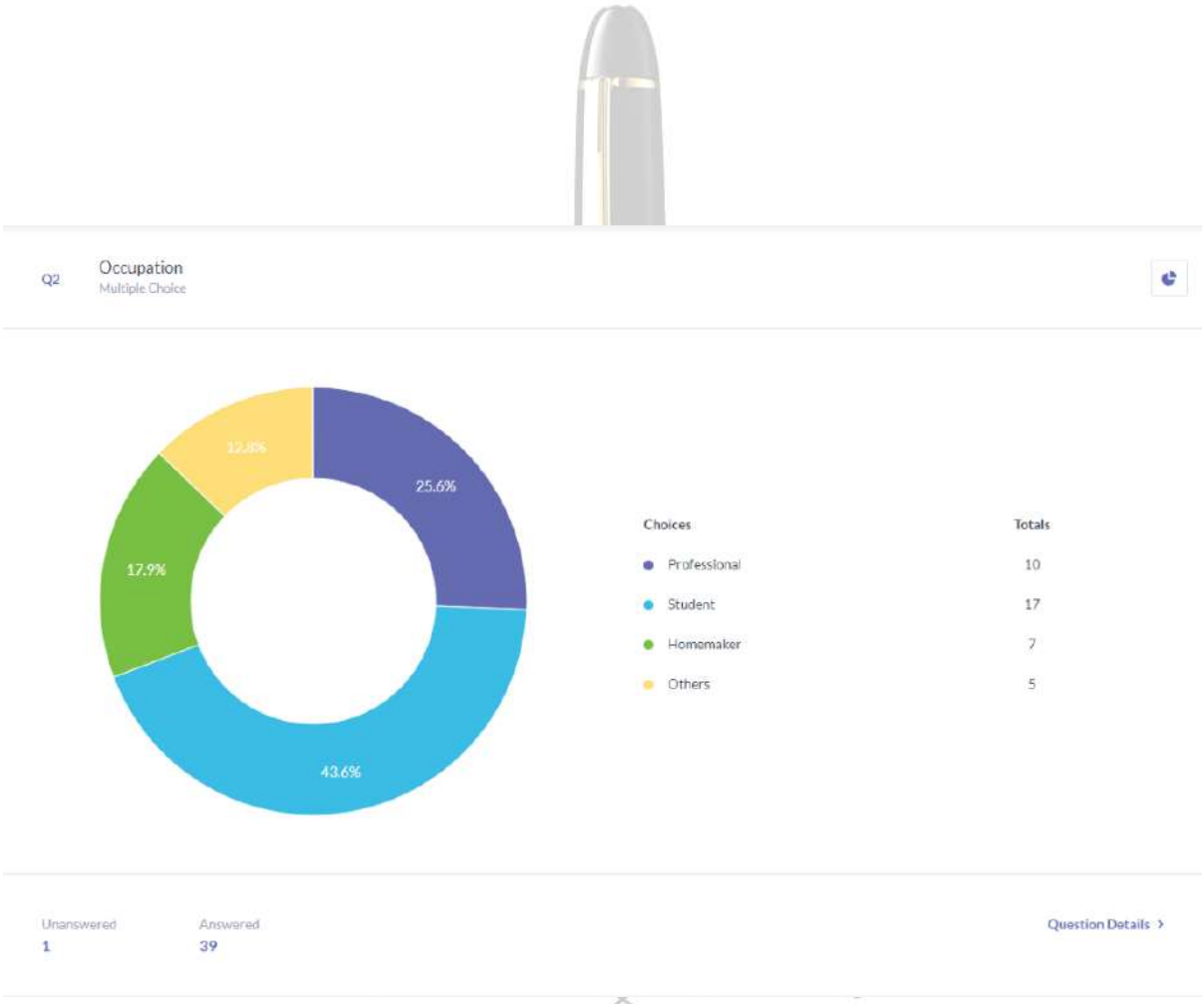

(ii) OCCUPATION

Most of the participants in the survey are either working professionals or students their percentages being 43.6% and 25.6% respectively.

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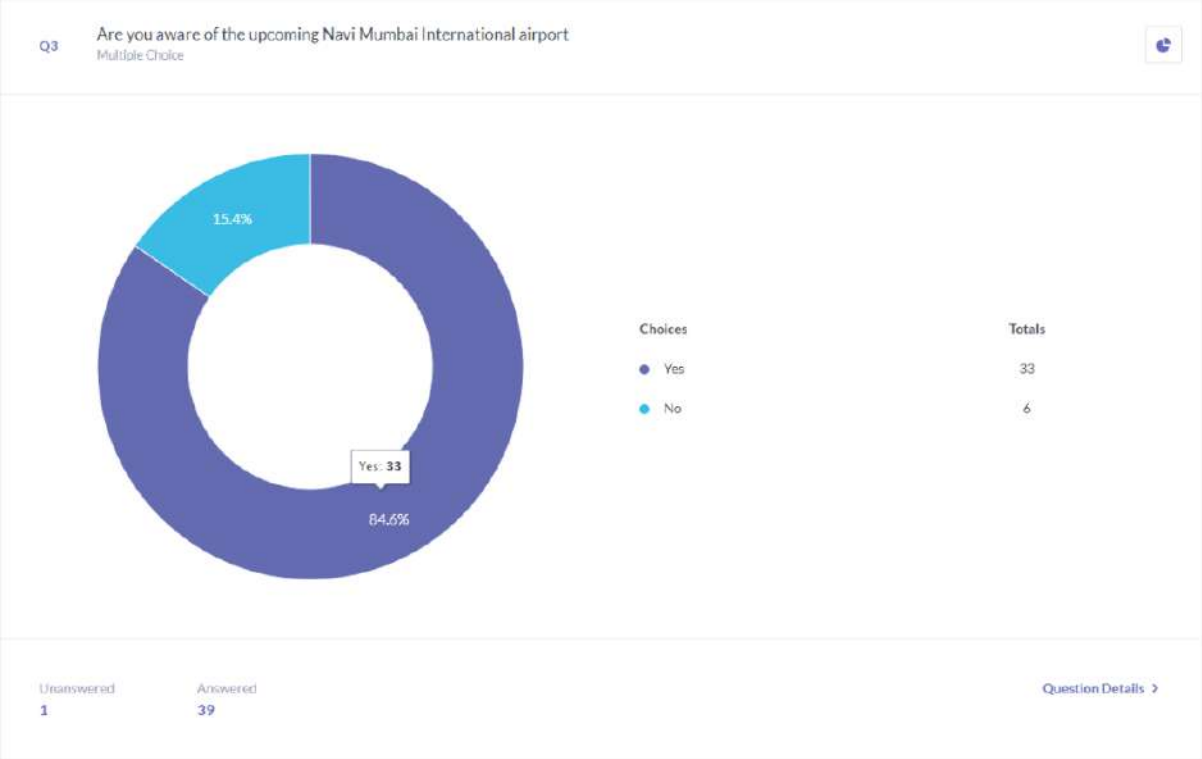

(iii) AWARNESS OF THE NAVI MUMBAI INTERNATIONAL AIRPORT

From figure 3,it can be established that since almost all the participants undertaking the survey were localites from Navi Mumbai, a good 84.6% were aware of the Navi Mumbai International Airport project.

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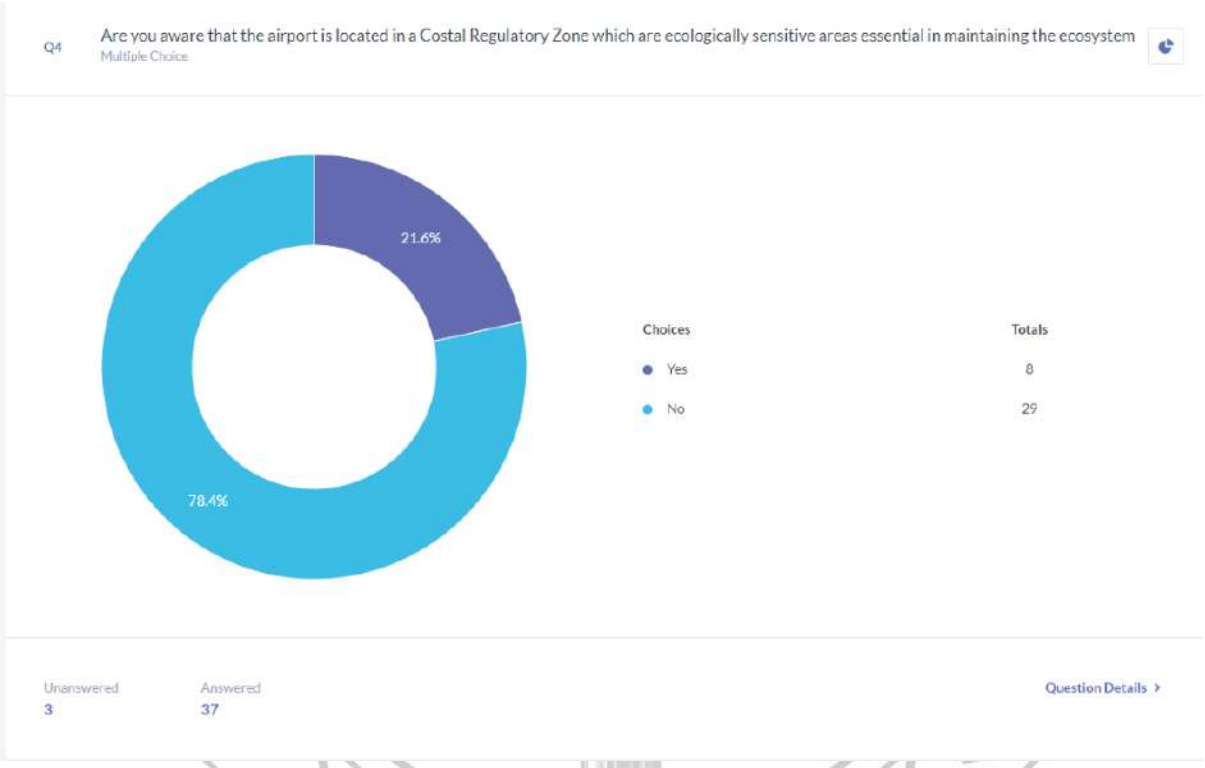

(iv) AWARNESS THAT THE SAID SITE IS A CRZ ZONE

From the pie chart in the figure 4 above, it can be clearly analysed that most of the participants in the survey were not aware that the site in which the project is upcoming, is a Costal Regulatory Zone. Only 21.6% Participants were aware of this. Initially, the project was not authorised sanction due to CRZ Notification 1991, but was amended specifically to give clearance to this project.

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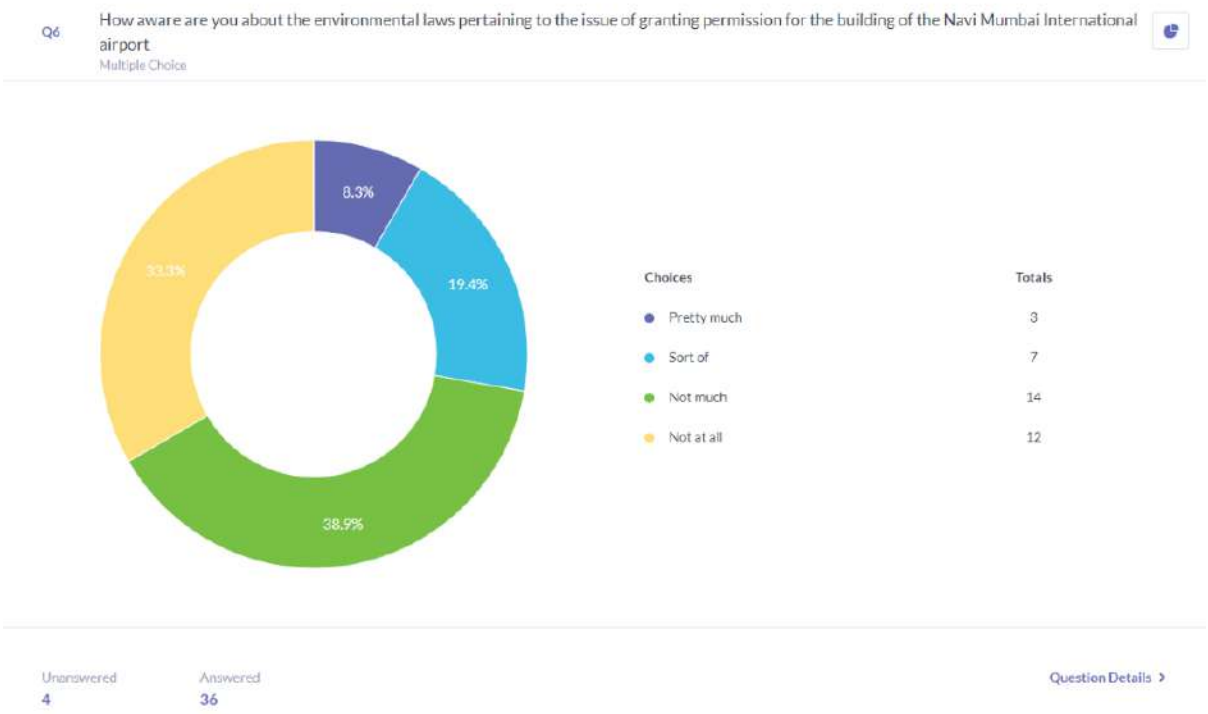
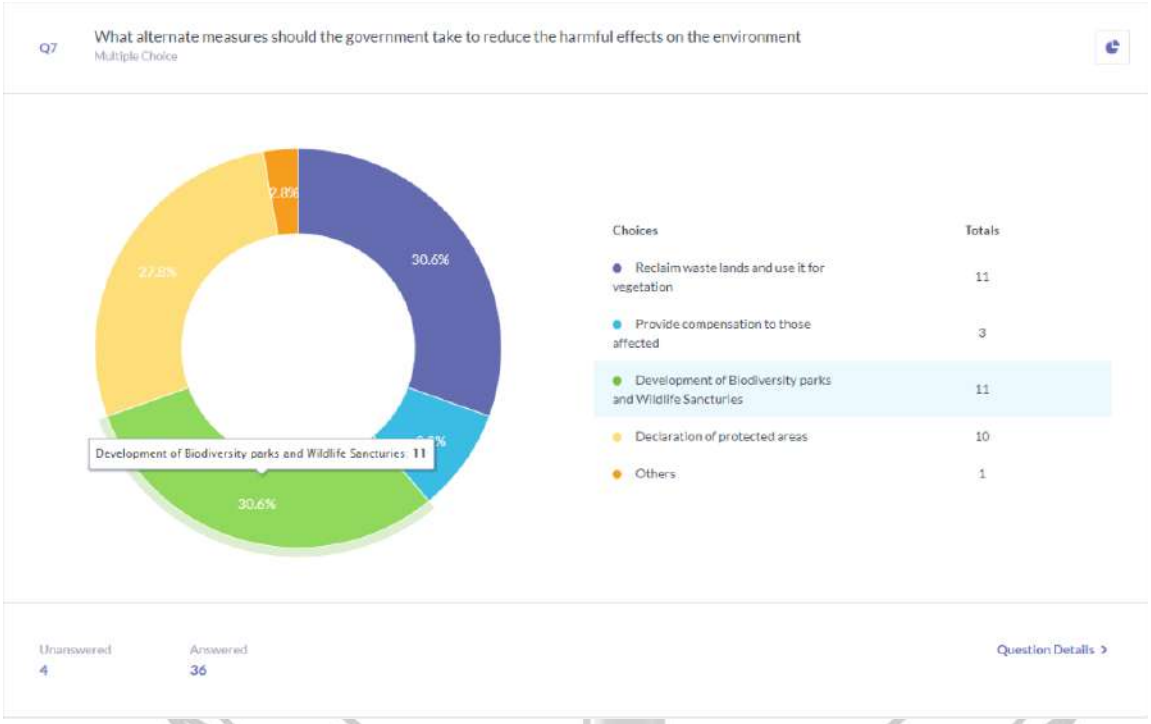
(v) Development > Environment?

From the above figure 5,it can be analysed that out of the survey a good number of 43.2% participants Disagreed to the fact that the Government should prioritize development over environment



(vi) AWARNESS OF ENVIRONMENTAL LAWS

When asked about the knowledge of environmental laws pertaining to the issue at hand, from figure 6,it can be analysed that a majority of the population said they are not much aware or not at all aware of the laws existing for the same, the percentages being 33.3% and 38.9% respectively. Only a mere 8.3% said they were pretty much familiar with the laws.



(vii) ALTERNATIVE REMEDIES

On the subject of alternative measures, it was analysed that the participants had various opinions on what remedy should be taken. 30.6% of the participants believed waste lands should be reclaimed and used to replant vegetation,and the same number of participants believed the government should develop Biodiversity parks and wildlife sanctuaries. Whereas 27.8% were of the view that there should be declaration of protected lands/areas.

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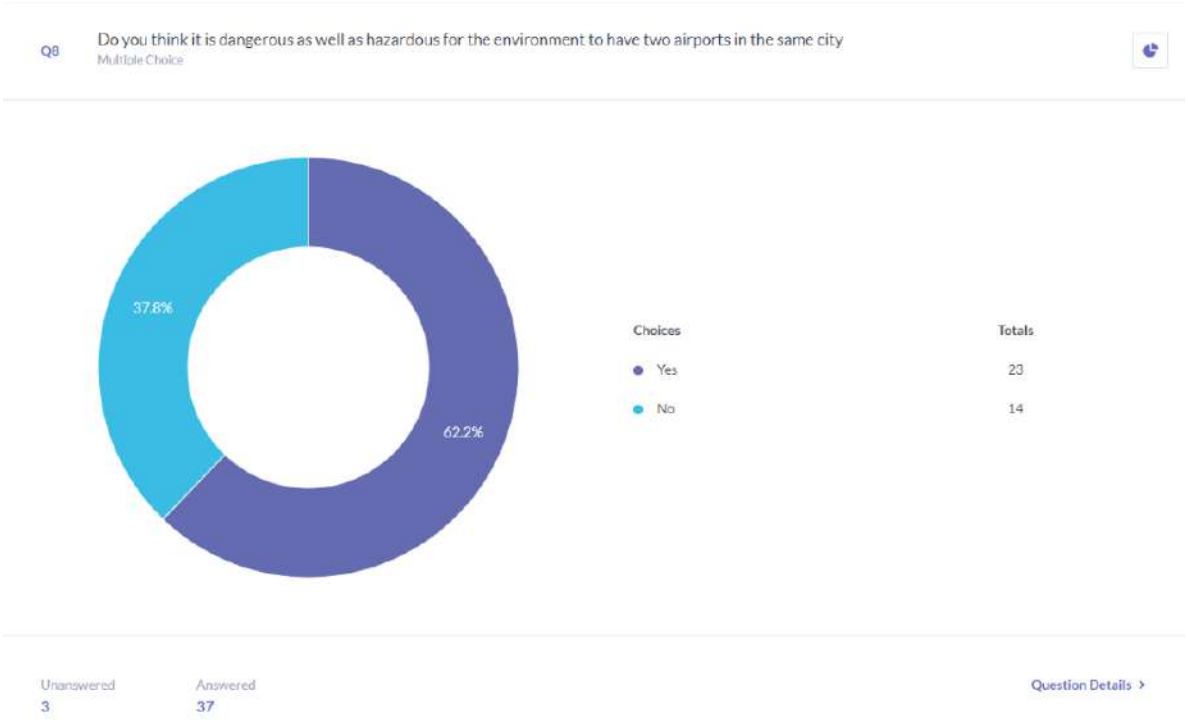

(viii) DANGER OF HAVING TWO AIRPORTS IN THE SAME CITY

When the participants were questioned if they think having two airports in the same city is a dangerous affair, 62.2% of them answered in the affirmative whereas 37.8% did not feel it would be an issue if there existed two different airports in the same city.

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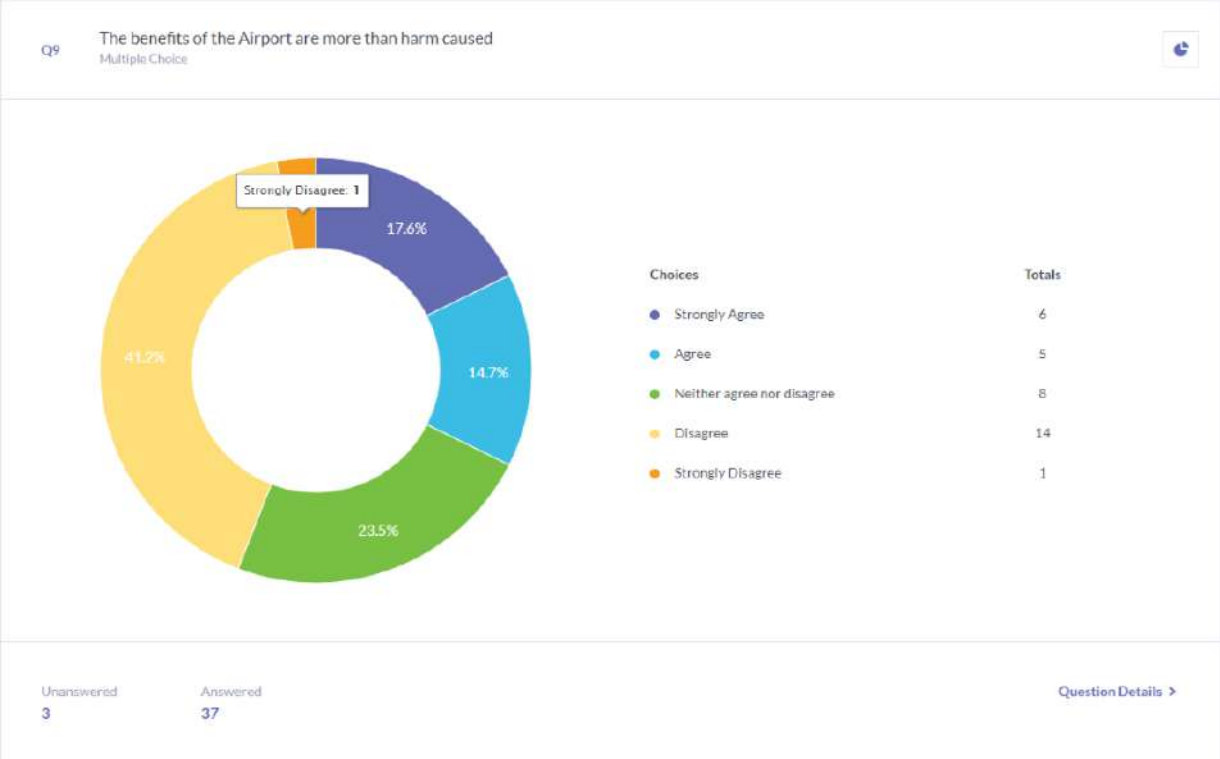

(ix) BENEFITS> HARM?

On the question of if the benefits of airport are more than the harm caused, it can be analysed from the figure that 41.2% of the participants believed the harm caused in building of the airport is more than the benefits whereas 14.7% agreed that the benefits of the airport outweighed the harm.

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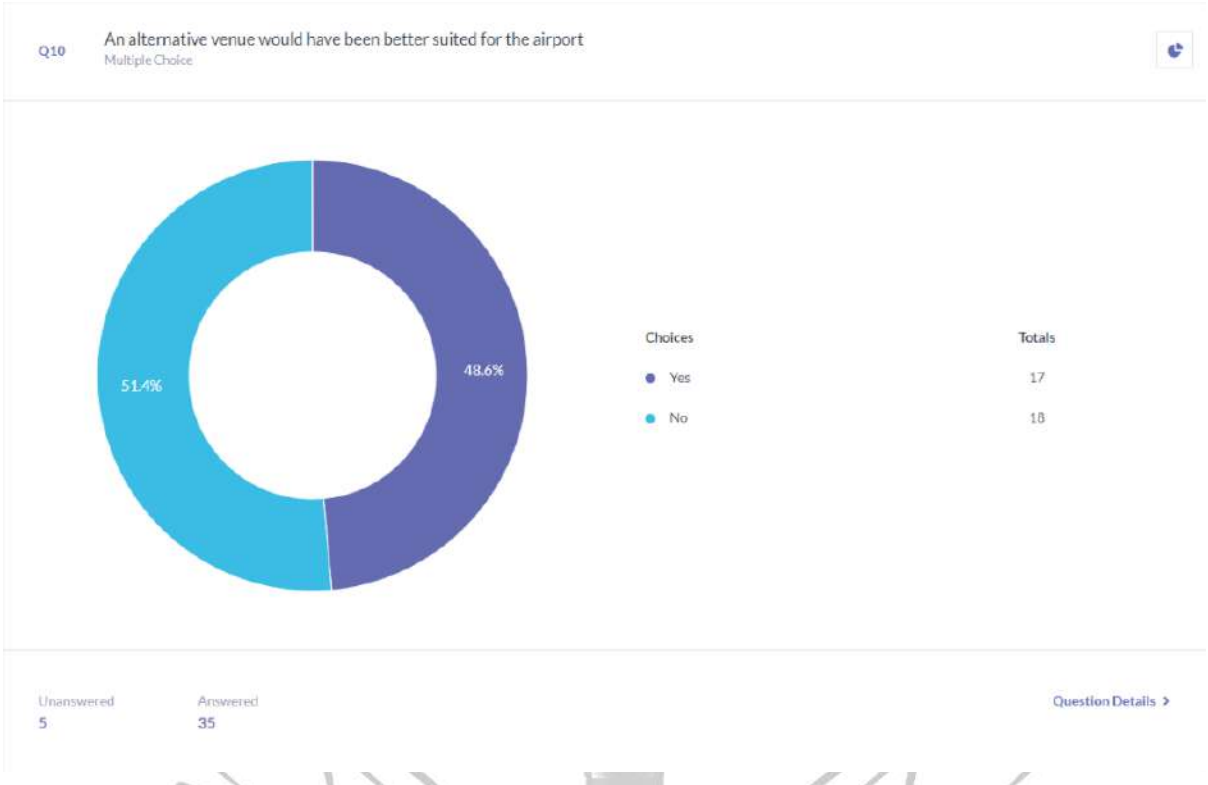

(x) ALTERNATIVE VENUE

When asked if the participants believed there existed a better venue to build the airport in Mumbai rather than in Navi Mumbai, 52.5% felt this was the right suited venue whereas 48.6% were of the view that some other venue should have been chosen.

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ENVIRONMENTAL ISSUES WITH BUILDING OF NAVI MUMBAI INTERNATIONAL AIRPORT AND THE RIO CONVENTION

The Rio Declaration on Environment and Development, often shortened to Rio Declaration, was a short document produced at the 1992 United Nations "Conference on Environment and Development" (UNCED), informally known as the Earth Summit. The Rio Declaration consisted of 27 principles intended to guide countries in future sustainable development. It was signed by over 170 countries. Principle 3 of the convention states "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[799] This correlates to the analysis done from our study as 43.7% of the participants believed development should not be given more importance than the environment which is somewhat similar to principle 3 of the convention. Principle 4 of the convention states "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[800] which is why taking preventive and precautionary measures to protect the environment from getting harmed in the case of building of the Navi Mumbai International airport is essential as it is in accord with the main goal of sustainable development. Finally, Principle 17 of the said convention states. "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[801] The following environmental impact assessment study was carried out before approving the project and all the measures were taken into consideration to be in compliance with the said principle. This shows that the development of this project can be related to a great extent to international conventions.

[799] http://www.unesco.org/education/pdf/RIO_E.PDF
[800] http://www.unesco.org/education/pdf/RIO_E.PDF
[801] http://www.unesco.org/education/pdf/RIO_E.PDF

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CONCLUSION

The objective of the study conducted to was to study the negative impact of the upcoming Navi Mumbai International airport on the environment mainly marshy lands and Rivers and to correlate the building of large projects like this in smart cities like Navi Mumbai and correlate it to sustainable development and environment conservation. For this I employed the use of an online questionnaire and other primary data. The results of this study show that majority of the people are concerned about the environment and are of the view that the government should prioritize environment over other developments but are not much aware of the existing laws and the contributions they as responsible citizens, can make to the environment. The study conducted also shows that people are apprehensive about having two airports in the same city so as to the amount of environmental damage it may cause and more than half believe some other site should have been chosen over this. Hence, this research paper shows that there exist a lot of people who care about environment and deeply believe in sustainable development and preserving the environment for future generations.

RECOMMENDATIONS

- The government should compensate for the mangroves lost during this project by reclaiming land and building a mangrove reserve elsewhere
- The government should make some arrangements for migratory birds mainly flamingos affected by the building of the airport
- Venue's with minimum environmental damage should be chosen for developmental projects
- People should be made more aware about sustainable development and environment laws

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GENDER JUSTICE: PROTECTION OF RIGHTS OF WOMEN

- **MILIND JAIN**

INTRODUCTION

[802]**Lord Denning- "**A woman feels keenly, thinks as clearly as man. She is in her sphere does work as useful as man does in his. She has as much right to her freedom to develop her personality to the full as a man. When she is married, she does not become the husband's servant but his equal partner. If his work is more important in the life of the community, hers is more in the life of the family. Neither can do without the other. Neither is above or under the other. They are equals".

According to reports of 2011 census we can say that 48% of the peoples in India are women of the total Indian population. India is not a developed nation but it is developing and India has represented in many international levels. India's leading emergence in politics and business internationally is drawing the attention globally. It tells that how the country is responding towards their own problems in the society, how the problems are been redressed of the people, if there is any human rights violation or any fundamental rights violation, and especially how the problems are been redressed of women in the society. As the country is evolving day by day the rights of women should also be evolved. Indian judicial system and Government has been trying to make a better place for women in the society.

This imbalanced system leaves all the women vulnerable. According to many other surveys conducted by Indian Government around 1000 households across the central- Indian states of Bihar, Jharkhand, Chhattisgarh and Uttar Pradesh in these last years it was revealed that people thought that it was acceptable to criticize and beat women if they ran away or just leave the job of unpaid care work. This violence continuously sets women back economically.

The rights given or provided in Constitution of India for both man and women are applicable equally but in practice the world including the developed nations are far away. In India we the

[802] The Due Process of Law, pp 194-195 (Butterworths, London) 1981

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humans have a very bad approach or thinking towards women, we only oppress them. Women in past were honoured and they were able to enjoy their position. During the Vedic period women were given an honoured position. In past days of India women were entitled to many gifts, Stridhana, that is property gifted to her by her parents and after her death the property is transferred to her other female heirs.

Although in past times there were some inhuman practices like Sati in some parts of India. But as the time passed and in the medieval period when British occupied India, some of the great persons tried to develop the legal status for women in India. One of the great person was Raja Ram Mohan Roy who tried to develop the legal status for women in India through passing some legislation. The Hindu Widows Remarriage Act 1856, The Child Marriage Restrain Act 1929, The Hindu Women Right to Property Act 1937 and the Hindu Women Right to Separate Residence and Maintenance Act 1946 and later some of the steps were taken by the government.

When India got Independence in 1947 the Government of India drafted Constitution of India as they also thought and realized that women should be given Status and Opportunities as same given to men in the society. The framers of the Constitution provided equal status and opportunities for women and special protection also. [803]Some of the Articles in which these are mentioned are-

- Article 14 – Equality before law
- Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
- Article 16- Equality of opportunity in matters of public employment
- Article 21-Protection of life and personal liberty

In various Articles women are given such protection by the framers of the Constitution. It was a very noble idea by them. But the principle of giving same equal status and opportunities to women remained on paper.

As India was Independent and was a developing nation, the world kept on changing as it is dynamic but India was still in its old norms and conventions. This was a scenario of tension in India which

[803] The Constitution of India Bare Act- P M BAKSHI

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was reflected in the cases of Supreme Court. Supreme Court tried to enforce Human Rights that time. As the time changed the new development in India was PIL which is Public Interest Litigation in the late 1970s and 1980s. The Indian Supreme Court issued series of decisions which changed the whole scenario of India. Through Public Interest Litigation Supreme Court addressed many human right issues including rights abuses suffered by women in past and in present.

The Supreme Court saw and observed that Public Interest Litigation is really a response to the need of the society specially for the women who were treated badly in the society from many years and centuries. A famous case for Public Interest Litigation is [804]**Vishaka vs State of Rajasthan 1997**. Supreme Court in its other judgement extended its approach to give equal status to women as desired by the Constitution of India.

GENDER JUSTICE IN INDIA

We can't say what is gender justice as it is not defined anywhere. But as the word says "gender justice" therefore we can say that it means equal treatment of both men and women. It is an important essential for the civilized society. As we have seen that no nation is developed without giving equal rights to women in the society. As it was well said by Mahatma Gandhi that – "Women are the companion of men, gifted with equal mental capacity. Ignoring them will be a big mess for the civilization". In India the importance of Gender Equality is enshrined in the Constitution. But then also they are deprived from the freedom.

In India we have seen and studied that in Ancient or Vedic period women were given equal status as is given to men but now the women are fighting for their rights and protection in a country like India where women were worshipped as a goddess, the crimes are committed against her in all sections of life. A woman is looked as a slave or a commodity in India. She is robed of her dignity and pride. She is only considered as an object for sexual enjoyment for males and reproduction of child.

Women only suffer due to two reasons, firstly due to their gender and secondly as they are not allowed to work so they are dependent upon men for their living. Therefore we can say that women suffer due to grinding poverty. In the modern time women are given opportunities to work in some places, education is also provided to them. But then they have to shoulder double responsibility as

[804] AIR 1997 SC 3011

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they go for work and they have to do all the house hold work. Now what to choose is the question or how to handle it. If she leaves the job then source of income will be less and will be depended on men, and if she leaves the household work then she will be exploited.

What are the causes that women suffer so much in the modern society also-?

1. Illiteracy
2. Economic Dependence
3. Caste restrictions
4. Religious prohibition
5. Lack of leadership qualities

These are some root causes for which women suffer so much exploitation in the modern society also.

In Indian Society the girls from their tender age are told to be dependent on men. They are told that after marriage there is no need to study or do job. In order to improve the condition of women in the Indian society, many steps were taken and many legislations were passed from the old time. Some of the legislations are –

- Abolition of Sati, 1829
- Widow Remarriage was made legal. 1856
- Female infanticide was made illegal, 1870
- Inter caste and inter community marriages were made legal, 1872
- Age of consent was raised to 12 years, 1891
- Women get rights to vote in madras province, 1921
- Child marriage restrained act was passed, 1929
- Women to get special rights to property, 1937
- Special marriage act was passed, 1954

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- Hindu marriage act was passed, 1955
- Dowry prohibition act, 1961
- Criminal law amendment act, 1981
- Commission of sati prevention act, 1987

Apart from these above-mentioned laws for the protection and equal status for women in India many other enactments were also passed pertaining to [805]industry containing special provisions for women such as-

- The workmen compensation Act 1921
- Payment of wages Act 1936
- Factories Act 1948
- Maternity Benefit Act 1961
- Minimum wages Act 1948
- Employees state insurance Act 1948
- Pensions Act 1987

CONSTITUTIONAL PROVISIONS

As we have read that the Constitution of India guarantees women the right and protection of them under the state. Here are some of the rights given by [806]The Constitution of India to women in brief-

- Article 14- States that the state shall not deny to any person (includes both men and women) equality before the law or the protection of the laws within the territory of India.

[805] LABOUR LAW- R K SINHA
[806] The Constitution of India- V N SHUKLA

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- Article 15- Prohibits the state to discriminate against any citizen on grounds only of religion, caste, race, sex, place of birth any of them. And permits the state to make special provisions for women and children.
- Article 16- Provides that there shall be equality for opportunity for all citizens and they shall not be discriminated on the basis of religion, caste, race, sex, place of birth in matters of public employment.
- Article 39(e) - Provides that the health and strength of workers, men and women, and the tender age of children are not abused and that the citizens are not forced for economic necessity to enter avocations unsuited to their age of strength.
- Article 51(A)(e)- Provides that it will be the duty of every citizen to renounce practices derogatory to the dignity of women.

CRIMINAL PROVISISONS

Apart from The Constitution of India there are some penal provisions for the women in India like Indian penal code. Some of the sections of [807]IPC protects the women from exploitation. Some of them are-

- Section 304B- Dowry Death- it states that if the death of women is caused by burns or bodily injury, or from any other circumstances within 7 years of her marriage. Such husband or anybody shall be punished with imprisonment not less than 7 years but may extend to imprisonment for life
- Section 498A- Cruelty- it states that if any signs of cruelty or harassment shown or inflicted in body of the women by the husband or anybody else. Then the husband will be punished with the term of 3 years and which may also be liable to fine. Although this section is read with section 113A of the Indian Evidence Act to raise a presumption regarding the abetment of suicide.

[807] Indian Penal Code- R&D

The above two sections are non-bailable, non-compoundable, and cognizance offence in India. The clear intention to make these sections is to quicken the proceedings of the court and provide justice to women on time without any delay

In the year 2013 a new Criminal Amendment bill was passed known as Criminal Law Amendment Act 2013. Four new sub sections were added in Section 354. Through this amendment many changes were shown and the trail was also speedy.

After so many changes the Indian Judicial System has done many challenging things for the women in India. One of the landmark cases is [808]**C B MUTHAMMA vs. UNION OF INDIA.** The facts of the case are as follows- the validity of Indian Foreign Service Rules of 1961 was challenged as it provided that any female employee should obtain a written permission from the government before her marriage is done so that at any time after the marriage the female employee should resign from the office or post. The Supreme Court held that unconstitutional and said that there is no difference between men and women. Both are equal. Another landmark case is [809]**AIR INDIA vs. NARGESH MIRZA.** In this case the Supreme Court has struck down the provision of rules which stipulated the termination of an Air hostess on her first pregnancy as it was arbitrary in nature and it was not fair in the notions of a civilized society. [810]**PRATHIBA RANI vs. SURAJ KUMAR & ANR 1985.** In this case the Supreme Court held that the Stridhan property of women should be placed with her only and she should enjoy the complete right over it. And the last but not the least, another landmark case by Supreme Court is [811]**GITA HARIHARAN Vs. RESERVE BANK OF INDIA (AIR 1999 SCC 228)** in this case the supreme court interpreted the section 6 of the Hindu minority and Guardianship Act 1956 and held that the mother can be and could act as a natural guardian of a minor child during the father's lifetime if he is not capable or not in charge with duties.

In spite of so much enactments and laws made and the cases by the Supreme Court they are unable to protect women from exploitation in the society and are unable to uplift their rights.

[808] http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=009791193000
[809] https://www.legallyindia.com/views/entry/sex-discrimination-and-the-constitution-vi-the-discontents-of-air-india-v-nargesh-mirza
[810] https://mynation.net/judgments/pratibha-rani-vs-suraj-kumar-anr-on-12-march-1985/
[811] https://www.law.cornell.edu/women-and-justice/resource/githa_hariharan_v_reserve_bank_of_india

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NEED OF GENDER EQUALITY IN INDIA

What and why should the citizens and the government of India should give equal status and equal opportunities to women in India?

As we have seen in the Constitution of India the principle of gender equality has been enshrined in the documents. In democracies that were established before India got independence, women were not having the power to vote. We can see that in United States of America and United Kingdom the right to vote for women was established very much before in the 18s and 1920s respectively. This also provides India to build up its strong legislation for gender equality.

While we can see from the above discussion that the Judicial System and Government has tried so much for the upliftment of women in the society but they were unable to do so. We are still a long way from achieving what can be termed as equality in the sphere of gender. The contact of Indian culture with British culture brought improvement in the status of women when Britishers were in India. Mahatma Gandhi has also tried to influence the position of women by inducing women to participate in Indian Freedom Struggle movement.

The development of women is of utmost faith in the society. It is of paramount importance and sets the pace for overall developments.

In the latest development we have seen the women are joining every field like sports, army, navy, air force, and even in cricket also. Therefore, we can say that in India the inequalities that were before has come down and women are joining every field.

WHAT CAN WE DO TO EMPOWER THE GIRLS AND WOMEN?

- Empowering girls require focused investment and collaboration. A single person cannot do this. Everyone together can make the difference. Providing girls with safety, good education and good skills to deal with risks they face in their daily life.

- All girls especially girls of adolescent age, need a platform to raise their voices for the challenges they face in everyday life and should also explore the solutions, talk about it to their and friends and family so that they can be ready for their future.
- [812]UNICEF India's 2018-2022. A special program has been developed in response to the identification of deprivations that Indian children face, including gender-based deprivations. Each program deals with the development of girls and women on a gender priority basis and on health basis. Some of the programs are – [813]health, nutrition, education, child protection, wash, social policy and disaster risk reduction.

Some of the measures are also taken by the Government of India, by Ministry of Women and child Development for gender equality in India.

MEASURES TAKEN BY THE GOVERNMENT FOR GENDER EQUALITY/ SOCIO ECONOMIC DEVELOPMENT/ EMPOWERMENT OF WOMEN

According to the survey conducted by the Indian Authorities and Government in 2011-12,[814] the workforce participation rate of male is 54.4% and female is 21.9%. Another survey was taken in 2015 by the Government in which the percentage share of [815]females in wage employment in non-agricultural sector during 2011-12 increased to 19.3% which is higher than 18.6% reported during 2009-10.

The Ministry of Women and Child Development has made following schemes for gender equality/ socio-economic development/ empowerment of women in India:

- Swadhar and short stay homes are provided to women for relief and rehabilitation.
- For Women working outside from their native places, safe accommodation like hostels are made for them to ensure a proper and better safety

[812]https://www.unicef.org/india/what-we-do/gender-equality
[813]https://www.unicef.org/india/what-we-do/gender-equality
[814]https://pib.gov.in/newsite/PrintRelease.aspx?relid=132945
[815]https://pib.gov.in/newsite/PrintRelease.aspx?relid=132945

- Support to training and employment program for women (STEP). This program is made to ensure a sustainable employment and income generation for poor women across the country.
- Rashtriya Mahila Kosh (RMK). This program deals with the finance services to make upliftment of poor women.
- National Mission for Empowerment (NMEW). This program deals with the overall development of women.
- Rajiv Gandhi National Creche Scheme for Children of Working Mothers. This scheme provides day care facilities for running creche of 25 children.
- One stop centre is created for women for support and assistance to women affected by violence.
- Scheme for universalisation of women helpline is created to provide 24 hours emergency response to women affected by violence.
- To strengthen the process of gender budgeting the Ministry is taking all the building measures for the officials of the State Governments by doing and organizing programs and workshops.

These are the all initiatives taken by the Government of India for helping girls and women of country.

Nowadays Women are going in every field. So some of the measures are taken by the Government of India to improve employability. For this a separate Ministry of Skill Development and Entrepreneurship has been created. The measures and step taken by them are –

- Equal Remuneration Act, 1973 has been created for providing equal payment to both men and women workers for the same works of similar nature without any discrimination.
- The Maternity Benefit Act, 1961. It regulates employment for women for a certain period before and after childbirth and provides maternity and other benefits.

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- Indra Gandhi MatritvaSahyog Yojana (IGMSY) has been created and implemented for pregnant and lactating women to improve health and nutrition.
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 has been enacted and implemented. This scheme protects women of any age working in an industry or in any working place form been sexually exploited and protects from sexual harassment at all workplaces.

REMEDIES FOR WOMEN

As we have seen that the Indian Judicial System and Government of India has taken many steps to destroy the inequalities between male and female, many of the laws and legislation's have been passed and enacted. Supreme Court in so many cases has given judgement which should be followed like guidelines by the citizens of India. But nothing is changed from many centuries. So, what are the remedies for women if something happens to them in the world of inequality? What a normal citizen can do to overcome with inequality? Government of India and Indian Judicial System can do extra to overcome with inequalities –

1. To treat everyone with respect and dignity as provided in The Constitution of India.
2. The women should communicate openly with their family, parents, friend about the things going in their life. And if anymore problem then the courts are open for them always and for anybody.
3. The citizens of the country should be respectful and should change their mindset about women and should treat them equally.
4. The women should participate in every program done by the Government so that they can be educated by their rights and duties towards the society.
5. The government should try harder to do something quickly
6. The laws should be stricter in nature so that if anybody tries to do something he should be thinking about it thousands of time

7. In each and every state the public servants should write the complaints about the problems faced by women even if the problem is small.
8. The women should be given special training to defend themselves from all these atrocities.

CONCLUSION

Till now what we have understood is that The Indian Judicial System and The Government of India have tried and were successful many times in bringing the justice to women in country. But due to some difficulties they also failed. In today's world where from wrestling to business the world has been revolutionized by the great and exceptional women leaders in the fields which were somehow completely was dominated by men.

But in spite of this today in a country like India the girls are being exploited on daily basis and men can't see the women growing stronger than men or equal to them.

This is the time for the whole country to come up together and should fight for the rights of women in the society. It's time to change the atrocities of every Indian citizen and should explain them the need of women in a growing nation.

Women in India spend around five hours of a day in some unpaid care work and on the other hand men devote only half an hour on average. This type of disproportionate burden of unpaid care work by women means that they don't get the chance to even do any paid labour work for their earning. It is high time that every child should be treated equally and should be given every opportunity required to grow her full potential.

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SPEEDY TRIAL AND CRIMINAL JUSTICE SYSTEM IN INDIA

- **ZAFAR KHAN**

Pendency for long trials operates as an engine of oppression: - Hon'ble Supreme Court of India

I. INTRODUCTION

The Criminal Justice system of a Country is designed to protect the general public from onslaught of criminal activities of group people or sections of the community and put them behind the bars in order to maintain peace and order. Effective Criminal Justice system, speedy trial and fast disposal of cases all are the hallmarks of good governance.[816] The Criminal Justice system consists of the police, prosecuting agencies, various courts, the Jails and a host of other institutions connected with the system. Presently, the Indian Justice system is facing the greatest challenges because of a heavy backlog of cases in the Courts and consequential delay in dispensing of the same. Therefore a need arises to delve into the present crisis of Indian Judiciary system in order to comply with the principles of the natural justice system and provision of our Constitution. As the Constitution of Indian specifically safeguards interests of accused by providing speedy trial and disposal of the cases emanates from Article 21 of the Constitution.[817] Similarly provisions of the Code of Criminal Procedure, 1973 provides that once the trial is commenced, it should be disposed of speedily. Even though procedures prior to commencement of trial, i.e. investigation, inquiry are included within the sweep of speedy trial, albeit the backlog of criminal cases is still very large in India Courts because of various factors and reasons. This article will give you idea about constitutional approach, statutory provision, and special court for speedy trial in India. Further the researcher will look for the reasons for delay in disposal of the cases, the American context of speedy trial, and the need to effectively use provisions of the Code of Criminal Procedure by the Magistrates so as to avoid inordinate delay in cases and concluded by giving suggestions and recommendations for the present problem.

[816] Department-Related Parliamentary Standing Committee On Home Affairs On The Code Of Criminal Procedure (Amendment) Bill, 2006, One Hundred And Twenty Eighth Report, 2006 (Malimath Committee Report)
[817] Law Commision Report On The Code of Criminal Procedure 1973, 154th Law Commission Report, 1996, (Justice K. Jayachandra Reddy Committee)

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II. CONSTITUTIONAL APPROACH

Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances. The

Hon'ble Supreme Court has observed in the case of *Hussaineara Khatoon v. Home Secretary,State of Bihar*[818]That right to life under Article 21 includes the right to speedy trial, only through which right to life can be attained.

Justice P.N. Bhagwati[819] observed that unlike the American Constitution speedy trial is not specifically enumerated as a fundamental right, it is implicit in broad sweep and content of Article 21 as enumerated in *Maneka Gandhi v. UOI*[820], where it was held that such procedure which does not ensure reasonable quick trail cannot be regarded as reasonable, just and fair procedure.

It may be pointed out that Supreme Court of India has enlarged the scope of speedy trial and categorically made it clear that this right flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial appeal, revision and retrial, whereas compared with the position in U.S., the right to speedy trial arises only after arrest or indictment.[821]

III. STATUTORY PROVISION: CODE OF CRIMINAL PROCEDURE

Though numerous provisions provided in the form of time limit in the Code of Criminal Procedure, 1973 to provide for an early investigation and a speedy and fair trial, in reality, due to various factors such as overcrowded court dockets, absence of prosecution motivation, defence tendency

[818] AIR 1979 SC 1377
[819] 1980 1 SCC 81
[820] 1978 1 SCC 248
[821] Pankaj Kumar v. State of Maharastra, AIR 2008 SC 3077

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to prolong the trial, speedy trial is yet an illusory goal. There are some provisions aims at curtailing the delay in investigation and trial of offences are as following:

A. Power of court's to quash proceedings:-

The Hon'ble Supreme Court in its recent decision in Surajul v. State of U.P.[822], observed that mere delay in completion of proceedings may not be itself as a ground quash proceedings of the trial if case is of a serious nature but having regard to the facts and circumstances of case , nature of offence, conduct of parties, and taking into consideration the reasons for delay, the Court may quash proceedings by exercising its power under Section 482 of CRPC in the interests of justice and to prevent abuse of process of the Court. The Court observe that while considering in to the issue of delay in trial the Courts ought to have take certain factors in its consideration, whether the prolongation was on account of any delaying tactics played by accused, the number of witnesses to be examined, the number of documents to be exhibited, the number of accused and several other factors and circumstances. There can be no empirical formula of universal application in such matters. Each case has to be judged in its own background and special features, if any. No generalization is possible and should be done.[823]

Therefore if the Justice demands while considering facts and circumstances of a particular case the Courts have power to quash proceedings in order to avoid inordinate delay for the speedy disposal of the case.

Similarly the Hon'ble Court in *Vakil Prasad Singh v. State of Bihar*[824]**,** emphasised the need for speedy trial and speedy investigation as both are mandated by letter and spirit of Code of Criminal Procedure*[in particular, Sections 197, 173, 309, 437(6) and 468, etc*.] And the constitutional protection enshrined in Article 21 of the Constitution.

Inspired by the broad sweep and content of Article 21 as interpreted by a seven-Judge Bench of this Court in *Maneka Gandhi v. Union of India* and in *Hussainara Khatoon v. State of Biha*r, the Court had observed that Article 21 of the Constitution of India confers right ot life and liberty and

[822] (2015) 9 SCC 201
[823] Ranjan Diwedi v. CBI, Through The Director General, AIR 2012 SC 3217
[824](2009) 3 SCC 355

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no person will be deprived his life and liberty except according to procedure establish by law. Such procedure must be reasonable, just and fair, mere semblance of procedure is itself in derogation with the constitution mandate in article 21.

The guarantee of a speedy trial is intended to avoid oppression and prevent delay by imposing on the court and the prosecution an obligation to proceed with the trial with a reasonable dispatch. The guarantee serves a threefold purpose:-

Firstly, it protects the accused against oppressive pre-trial imprisonment;

Secondly, it relieves the accused of the anxiety and,

Public suspicion due to unresolved criminal charges and lastly, it protects against the risk that evidence will be lost or memories dimmed by the passage of time, thus, impairing the ability of the accused to defend him or herself.

Stated another way, the purpose of both the criminal procedure rules governing speedy trials and the constitutional provisions, in particular, Article 21, is to relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice.

B. No outer limit for the conclusion of trial

With regard to fixation of time limit within which the trial is to be completed or the case is to disposed of, the Supreme Court is of the opinion that no outer limit can be provided for the conclusion of the trial because factors like the nature of offences, number of accused and witnesses and the workload in the particular court, means of communication, frequent strikes of advocates and several other factor and circumstances has to kept in mind before drawing such a deadline. On an earlier occasion the Hon'ble Court endeavoured to set a prescribed limit for the conclusion of trial, the same was overruled in subsequent decisions of the Court.

The Hon'ble Court in Ram Chandra Rao P. v. State of Karnataka,[825]. The Seven Judges

[825] 2002 4 SCC 578

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Bench overruled earlier decision of this Court in *Raj Deo (II) v. State of Bihar*[826], *Raj Deo Sharma v. State of Bihar*[827], *Common Cause, A Registered Society v. Union of India*[828] by observing that the time limit in these four cases was contrary to the observations of the Five Judges Bench in A.R. Antulay v. R.S. Nayak[829]

It was further observed that it is neither advisable, feasible nor judicially permissible to prescribe an outer limit for the conclusion of all criminal proceedings. It is for the criminal court to exercise powers under Sections 258, 309 and 311 of the Code of Criminal Procedure to effectuate the right to a speedy trial. In an appropriate case, directions from the High Court under Section 482 Code of Criminal Procedure and Article 226/227 can be invoked to seek appropriate relief.

C. Provisions of Code of Criminal Procedure Code ensures speedy trial

There are some provisions aims at curtailing the delay in investigation and trial of

Offences are as following:

Section 157(1) of the Code of Criminal Procedure Code, requires the Police officer to send a report to the magistrate for the commission of offence. Similarly section 167(1) provides that the investigation must be completed within 24 hours of the alleged offence has been reported. In cases where it appears that allegation against the accused has some substance and for the proper investigation police requires more time than the police officer may send police diary along with the accused to the magistrate for further custody.[830] At his stage Magistrate can extend the period of custody for further 15 days, which can further be extended to 60 or 90 days depending upon the gravity of the offence.[831] The accused becomes entitled to be released on bail on the expiry of the period of 60 or 90 days as the case may be.

If a case is triable by Magistrate is of Summon in nature, and the investigation for that offence is not completed within 6 months period, the magistrate shall proceed to stop such further

[826] 1999 7 SCC 604
[827] 1998 7 SCC 507
[828] 1996 4 SCC 33
[829] 1992 1 SCC 225
[830] Justice V.R. Krishna Iyer, 'The Indian Law *Dynamic Dimensions of The Abstract'* 2009, Universal law Publication, Delhi (2012).
[831] Section 167(2) of The Code of Criminal Procedure, 1973

investigation.[832] The investigation is allowed to go on beyond six months only if the investigating officer satisfies the magistrate that for special reasons and in the interest of justice the continuation of investigation is not completed within the prescribed time frame, the magistrate will not take cognizance of such offences.[833]

Section 173 (1) of Cr.P.C. requires the police officer to complete the investigation 'without unnecessary delay' and forward the report to the magistrate 'as soon as it is completed.

All the above mentioned provisions in Criminal Procedure Code pertain to the stage of investigation into an offence. These provisions, besides laying down in broad terms, certain time limits subject to which investigation is to be carried out, also put time limits upon detention pending investigation. Section 468 of Cr.P.C. also in a way imposes a time limit for completion of investigation as it debars courts from taking cognizance of certain, minor offences after expiry of certain period of limitation.

Similarly, Sec.309, proceedings shall be held expeditiously as possible and once the examination of witness commenced the same shall be held on day to day basis. As well as Section 356 of the Code mandates the Judgments shall be delivered immediately after the completion of trial proceedings.

Thus we can say that the Code of Criminal Procedure provides for speedy and fair trial through various provisions of the code, albeit these provisions are not obligatory and strict adherence to these provisions is not possible as they are subjected to peculiar facts and circumstances of each and every case.[834]

D. Concept of plea bargaining

The problem of delay and backlog is rampant in criminal cases. Various strategies and methods have been used in various jurisdictions to lessen the burden and ensure speedy disposal of cases. One such strategy is plea bargaining. The Criminal Law (Amendment) Act, 2005 (which came

[832] Section 165(5) of The Code of Criminal Procedure, 1973
[833] SARKAR, The Code of Criminal Procedure,Vol. 1, 10th Ed. 2014, LexisNexis.

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into force with effect from 5* July 2006) has inserted Chapter XXI-A in the Code of Criminal Procedure, 1973 that for the first time accords recognition to the idea of plea bargaining within the Indian Criminal Justice System.[835] For providing the Working details of the plea bargaining system, new sections 265A to 265L have been introduced with a view to providing for the qualifications for plea bargaining, the stage and procedure for making an application, the role of Court and the parties, the guidelines for mutually satisfactory disposition. The final disposition of the case by the court and its finality, the decoding of set-off benefit. The prohibition against use of plea bargaining depositions in any other proceedings and non-applicability of plea bargaining in juvenile justice proceedings, etc plea bargaining proceeding is a new technique for simplifying the rigor of the formal system as well as measure for the speedier disposal of cases. But this technique has immense significance from the point of view of the accused, who is accorded an option to bargain pleas within the existing system. Thus, the rules relating to plea bargaining have special value not only for the accused, but also for those who are responsible for operating the system at the ground level.[836]

IV. SPECIAL COURTS ACT FOR SPEEDY TRIAL

The State governments may establish special courts for the fast disposal of cases. The Special Courts may serve as an effective way to curtail the problem of long pendency of trial in some specific offences. For example, Fast track Courts has been established for the speedy disposal of rape cases but their numbers of very minimal. Recently in 2011 the State of Madhya Pradesh, established Special Courts for corruption cases, these are the few examples through which the State or central government may take inspiration from, and establish such required number of courts for the effective criminal justice system in India.[837]

V. CONCLUSION:

[835] TAKWANI, Criminal Procedure, 3rd Ed., 2011, Lexis Nexis Butterworths Wadhwa, Nagpur.

[837] KELKAR, Criminal Procedure, 6th Ed., 2012, Eastern Book Company.

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This article has discussed in depth the concept of Speedy trial and Criminal Justice System in India and its various stages that encompasses investigation, inquiry, trial and Role of plea bargaining in reducing the pendency of cases to the extent it is applicable to the subject matter. By foregoing discussions of provisions, cases of apex court and concepts related to Speedy Trial following trends emerge:-

1) Various factors like complicated procedures, access to Police station, faulty investigation and half knowledge of law by police officers caused delay and hence repugnant to cherished right of Speedy trial.

2) The Code of Criminal Procedure only encompasses duty upon state machinery to conduct investigation, inquiry and trial etc. But no accountability has been fixed on state machinery in case of its failure while performing duties assigned to it.

3) The right of Speedy trial is a fundamental right of the People, but no specific provision has been enacted by the legislature so as to give it as a constitutional or statutory recognition. The Supreme Court is also reluctant in setting a time limit for the trial and thus it gives excuse to the State while performing its duty.

4) Section 309 provides for examination of witnesses from day to day basis but no provision has been made in order to ensure protection and honour of witnesses or reimbursement to the travel expenses of witnesses who come from distant areas. The witnesses are often harassed and ill treated.

VI. SUGGESTIONS:

During the Research it was found that there no specific provisions in CRPC so as to provide speedy trial of cases. However some of the provisions are there but they are not explicitly cast duty upon Court for the speedy disposal of the cases. Therefore there are some suggestions which may be suggested to render justice in time:-

1) At present the investigation agency i.e. police is one of reasons for delaying time bound disposal of cases, many times the police officials are not well versed with the law there

effective modernisation of Police in modern and scientific methods may be helpful for this purpose.

2) The Fast track Courts or Special Courts are one of the resorts for speedy disposal of cases. There are provisions of Fast track Court in some cases like in case of rape. But their presence is very minimal in India; therefore more fast track courts may be established for tackling this problem.

3) Time limit must be fixed at each and every stage of criminal proceedings such as inquiry, investigation and delay, so that the state machinery may be made responsible for delay at any stage of the proceedings.

4) As compensation is awarded in case of failure of state machinery in protecting rights of citizens in the same line compensatory clause may entered in the Code so as to provide compensation for their sufferings and mental torture due to inordinate delay of trials.

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JOURNEY TO THE WORLD OF FEMALE CIRCUMCISION

A GRAVE CARNAL ABUSE

- **SARADA RASAGNYA OLETY & VISHNU PRIYA B**

ABSTRACT

In this era where we listen that laws are in favour of women there is yet another ignored area that has to be concentrated on is abuse against women. Till date the very first thing that comes in our mind when we hear abuse is domestic violence, rape or any such other thing. But there are some abuse activities women themselves are not aware of, one of such activities is Female Genital Mutilation. The very first message women receives about her body is that it is too fat or too slim too dark or too fair or is freckled, but for some women message is that they should cut their genitals and reshape their body just to gain social acceptance in a wider community. Yes, of course we read it right mutilation of their genitals, girls are just promised with a chocolate or a dessert and they are said it is okay we have gone through this you'll be fine and then at the end what she happens to see is a ton of pain and in an ambiguous state where she does not even know why she had to undergo this. There was a time when women were equated to goddess and it is now where women are being gravely abused. Women and abuse are so closely integrated that they seem to form two sides of the same coin, where one side denotes most commonly known offences like rape, murder, child marriage, prostitution etc, and the other signifies cruel acts like female genital mutilation which are submissive in nature. This is a globally common tradition performed against women, from infancy stage to an age of 15 years in many countries including India. This prevailing cultural practise is an epitome of injustice committed against women with no known health benefits. On the other hand, it is eminent to affect the female haleness as it is an intentional procedure carried out amidst different communities for non- medical reasons as a part of their custom. Moreover, FGM is said to have some immediate complications such as excessive bleeding, fever, shock, death, urinary, vaginal and menstrual problems. The intension behind this research is to enlighten

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the knowledge of people about such unjust carnal harassment of women and to create, spread awareness amidst the people regarding the ill effects of such acts on a women's well-being. Despite being Female Genital Mutilation recognized as a human rights violation around 200 million girls and women who are alive today have undergone this and as per 2015 census if the current rates exist more will be cut by 2030. There is a crucial need for a proper law and effective implementation of the same in order to stop this violation against females in the name of culture. It's high time that that we turn the pages to start a new era of equity and justice, as the time will never be just right for us to wait to bring about a change.

Keywords: female genital mutilation, abuse against women, global tradition, cultural practise.

1. INTRODUCTION

Around 1.5 million Muslim Bohra community is spread over the western cities in India, Pakistan, Vemen, east Africa, and some strewn parts of America and Australia. In India alone, the Bohra Muslim community is approximately around one million. India is now becoming a hub for female genital mutilation because of the recent legal action taken against FGM among Bohra's in Australia and USA. Female genital mutilation is also known as **Khatna Or Khafz** in the Muslim Bohra community, it is practised in the heart of Mumbai, where Bohra Muslim community has lived for decades and does not have any laws or provisions banning it. In the community, the clitoris part of a woman's vagina is also known as 'Haraam ki Boti' or 'source of sin' or more simply the 'unwanted skin'. The motive behind cutting this part of vagina is padded with centuries of patriarchy – if a woman knows the pleasure, she can receive through it, she might bring "shame" to the community. For the uninitiated, the clitoris has more nerve endings than anywhere in the female human body. Depending on how sensitive a woman's clitoris is, they either derive utmost pleasure or its stimulation can sometimes even lead to pain. The most interesting nugget of information is that of sole purpose of clitoris is to derive pleasure. No other male or female organ is designed only for pleasure This practise is mostly carried out by traditional circumcisers who often play other central roles, such as attending child births or untrained midwives or older woman

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in the community are usually the ones. Its generally carried out with a blade or a knife on girls aged anywhere between six and ten the motive is to get it over with before they hit puberty. Mostly girls end up getting unwanted infections and extreme pain, or just bleeding for days together because of women performing this lack training. In many areas health care providers perform FGM, due to the belief that the procedure is safer when medicalized. Khafd isn't mentioned in any religious text particularly and especially Quran but some devotees blindly follow Syedna, the main Bohra leader who has always encouraged devotees to continue this practise in both male and female in the name of obligation to attain religious purity.

2. METHODOLOGY AND RATIONALE

Female genital mutilation is catalogued into four main sorts

TYPE 1: It is known as **clitoridectomy** this is partial or full removal of the clitoris that is a small sensitive and erectile part of the female genitals, and in very rare cases, only the prepuce that is the fold of skin surrounding the clitoris

TYPE 2: The second type is known as excision this is the partial or total removal of the clitoris and the labia minora that is the inner folds of the vulva, with or without excision of the labia majora that is the outer folds of the skin of vulva

TYPE 3: The third type of FGM is ***Infibulation*** this is the narrowing of the vaginal opening through the creation of a covering seal. It is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of clitoris (clitoridectomy)

TYPE 4: This includes all other dangerous procedures to the female genitals for non- medical purposes example pricking, piercing, incising, scraping and cauterizing the genital area

2.1 Rationale: DE infibulation is a practise of cutting vaginal opening in woman who has been infibulated, which is necessary for improving health and well being and also to allow the intercourse or to facilitate reproduction. More than 3 million girls are estimated to be at risk for

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genital mutilation annually. The, practise is most common in western, eastern, north-eastern regions of Africa, the middle east and Asia, as well as among migrants from these areas therefore it is a global concern. The reasons for why female genital mutilation is carried out differ from one region to another as well as over time, and include socio cultural factors within the families and communities.

FGM is considered to be a social norm that is the pressure to confirm to what everyone does and have been doing and also the need to be accepted by the society and the threat of being rejected by the community, are strong motivations to follow the practise. In some communities, it is universally perpetuated and is unquestioned. It is often considered a necessary part of raising a girl and a way to prepare her for adulthood and marriage.

FGM is often motivated by beliefs about what is considered acceptable sexual behaviour and its only aim is to ensure premarital virginity and marital fidelity, it is considered that genital mutilation reduces libido and therefore believed that it would help her resist extramarital sexual acts, the fear of pain in opening it, and the fear that this will be found out is expected to discourage any further extramarital sexual intercourse, when it is believed that being cut increases marriage ability so it's more likely to be carried out. This is mainly in association with cultural ideals like femininity and the notion that girls are clean and beautiful after removal of body parts that are considered unfeminine or masculine, though no religious scripts prescribe the practise they often believe that it has religious support

3.CONTEMPORARY SITUATION IN INDIA

As mentioned before India has now become a hub for FGM that is because of the recent legal action taken against FGM among Bohra's in Australia and USA. In 2016, Australia sentenced three Dawoodi Bohra's to 15 months in prison under the country's female genital mutilation law. In 2017, the united states officials arrested two doctors for allegedly cutting the private parts of six girls, the trail is in process and in INDIA of 2018 still a law against female genital mutilation remains to be established.

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In 2018 when the Indian government declared that there was no data to support the existence of female genital mutilation in the country, but a small study showed around 75% incidence across the Muslim Bohra community, around 83 women and 11 men across 5 countries of India are included in the first ever study of *FGM* in India. This qualitative research was released in the month of February of 2018, it was conducted among the states of Gujarat, Madhya Pradesh, Maharashtra, Rajasthan, and Kerala. And one of the most recent issue of *FGM* mentioned in this report was in may 2017 when a 41year old lady took her daughter to the hospital because of heavy bleeding. While at the worldwide scale *FGM* is well documented with UNICEF study which estimated that at least 200 million girls in this ritual cutting and in India this ritual is veiled in secrecy. The Shia sect is a minority within India's Muslim population which is around 14.2% of the total population as per the last census. *WESPEAKOUT* was a coalition of Bohra women who were one of the petitioners to the court for laws against *FGM* it was campaign formed as a platform for survivors and the gained momentum after the conviction of three Bohra's accused of FGM in Australia in 2015 as a result of this countries such as UK and USA issued notices instructing not to perform khafd – the Arabic term for *FGM*. And as mentioned before the word of syedna that FGM is an obligation to attain religious purity, the **Central Board of Dawoodi Bohra Community** is a reformist faction containing more than 50,000 members around India that has opposed syedna's authoritarian leadership for decades. Although these reformists don't question religious principles and their board hasn't supported for campaign against FGM officially they mentioned that bohra woman refuse

to perform khafd on their daughters .As per the present scenario there is no law against FGM in India , people started questioning that how would they file complaints if there is no law supporting it. FGM, a harmful tradition has many serious implications on the health of women and girls. It includes both short term and long-term consequences which is impermissible in the outlook of female well- being and human rights. Its adverse effects on feminine health has led to its opposition by many. WHO is one such organization which is emphatically against female circumcision.

4.REPERCUSSIONS OF GENITAL DISFIGUREMENT

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1) *SEVERE PAIN:* Extreme pain is caused by cutting the nerve ends and sensitive genital tissue. Proper anesthesia is seldom used and is not always effective when used. The duration of healing is painful as well. Type 3 FGM is long-lasting, more comprehensive operation, which may result in more serious pain intensity and length. The healing period is also prolonged accordingly.

2) *EXCESSIVE BLEEDING AND SHOCK:* It may lead to hemorrhage if during the operation the clitoral artery or blood vessels are sliced. It might further lead to shock.

3) *INFECTIONS:* It can spread after the use of contaminated devices and during the healing period. These infections at time may cause genital tissue swelling.

4) *HUMAN IMMUNODEFICIENCY VIRUS:* Direct association between FGM and HIV prevails to be ambiguous, although the use of the same surgical tool without proper sterilization might boost the danger HIV among women who undertake female circumcision.

5) *URINARY TROBLE:* These may include urinary custody and urinary pain. This may be due to swelling of the tissue, pain or urethral injury.

6) *DEATH:* The ultimatum may be caused due to infections, impaired wound healing, improper scarring and hemorrhage due excess bleeding thus resulting in shock.

7) *PSYCHOLOGICAL CONSEQUENCES:* The mental strain suffered by the females as a result of a painful and hurtful process they undergo and the injuries they sustain in their genital organs is beyond one's imagination and might affect their psychological heath as well and this is why the women's who have encountered FGM describe it as the most traumatic event of their life. some studies have shown an augmented probability of post-traumatic stress disorder (PTSD), anxiety disorders and depression. The cultural significance of FGM may not protect against psychological complications.

8) *MENSTRUAL PROMBLEMS:* Result of vaginal opening which can lead to a painful menstruation(dysmenorrhea), irregular menses and menstrual blood flow difficulties, especially with women who suffer from type 3 female genital mutation.

9) *KELOIDS:* An excessive scar tissue formation was reported to be seen at the cutting site.

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10) *FEMALE SEXUAL HEALTH:* Removal of or harm to sensitive sex organ tissue, particularly the clitoris, could have an effect on sexual sensitivity and cause sexual issues like attenuated desire and pleasure, pain throughout intercourse, issue throughout penetration, attenuated lubrication throughout intercourse, reduced frequency or absence of sexual orgasm(anorgasmia). Scar formation, pain and traumatic reminiscences related to the procedure may cause such troubles.

11) *OBSTETRIC COMPLICATIONS:* FGM is related to the increased risk of obstetrical delivery, post- partum hemorrhage, recourse to episiotomy, difficult labor, medical specialty tears/lacerations, prolonged hospitalization due to extended labor. The risks increase with the severity of FGM.

12) *OBSTETRIC FISTULA:* A direct relationship between obstetric fistula and FGM is not yet proven. However, given the causative relationship between prolonged and obstructed labor and fistula, and also a well-known fact that FGM is additionally related to prolonged and obstructed labor it's reasonable to assume that each of the conditions can well be connected in women and girls who have encountered FGM.

13) *PERINATAL RISKS:* Obstetric complications may end up in a very higher incidence of baby revitalization at delivery and intrapartum miscarriage and death.

5.GLOBAL COUNTERACTS

International response to FGM:

Expanding on the work from earlier decades, in 1997, WHO issued a joint statement opposing the tradition of FGM in conjunction with the United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA).

Since 1997, extraordinary endeavours have been made to check FGM, through research, work within communities, and changes in public policy. Advancement at universal, national and sub-national levels incorporates:

- Wider universal contribution to stop FGM;

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- international monitoring bodies and resolutions that censure the practice;
- redefined legal systems and developing political support to end FGM (this includes a law opposing FGM in 26 countries in Africa and the Middle East, as well as in 33 other countries with expatriate populations from FGM practicing nations);
- the predominance of FGM has reduced in many nations and an increasing number of women and men from practicing communities are extending their support in ending this abusive practice.

Through research it is shown that, if practicing communities themselves choose to discard FGM, the practice can be abolished very swiftly.

In 2007, UNFPA and UNICEF initiated the Joint Programme on Female circumcision to hasten the abandonment of the cruel tradition

In 2008, WHO in conjunction with 9 other United Nations partners, proclaimed an announcement on the elimination of FGM to promote an increased advocacy for its abandonment, called: "Eliminating female genital mutilation: an interagency statement". This statement provided evidence collected over the previous decades about the practice of female circumcision.

In 2010, WHO publicised a "Global strategy to stop health care providers from performing female circumcision" conjointly with other key UN agencies and global organizations.

In December 2012, the UN General Assembly embraced a resolution to end female genital mutilation.

Developing on a past report from 2013, in 2016 UNICEF propelled an updated report documenting the commonness of FGM in thirty countries, including beliefs, attitudes, trends, programmatic and policy responses to the habit of FGM globally.

In May 2016, WHO together with the UNFPA-UNICEF joint programme on FGM released the first evidence-based guidelines on how to manage health complications caused as a result FGM. The guidelines were developed based on the systematic review of the best available evidence on health interventions for women who have undergone FGM.

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To guarantee the effective and efficient implementation of the rules recommended, WHO is developing tools for health-care workers to improve their knowledge, attitudes, and skills. Thus, helping health care providers in preventing and managing the complications of FGM.

5.1 Who Response On FGM:

In 2008, the World Health Assembly embraced a resolution WHA61.16 in order to put an end to the long-lasting custom of FGM, stressing on the need for concerted action in all sectors - health, education, finance, justice and women's affairs and like.

WHO endeavours to end female genital mutilation concentrates on:

- strengthening the health sector response: guidelines, tools, training and effective policy making coupled with its efficient implementation to ensure that the health professionals can provide medical care and counselling to girls and women who are the victims of FGM;
- building evidence: providing knowledge and spreading awareness among the public about the causes and ill consequences of the practice, including why health care professionals carry out such procedures, how to eradicate it, how to care for those who have experienced FGM.
- increasing advocacy: developing publications and advocacy tools for promoting the idea to discard the ill custom of female circumcision in the international, regional and local juncture.

6.India's Legal Scenario

This practice in prevalent in western India, particularly in states like Gujarat, Rajasthan, Maharashtra, MP etc. among the people belonging to the Dawoodi Bohra community. Recently, such practices have been reported to take place in certain parts of Kerala. When many countries like US, Australia, UK etc. have identified the ill effects of female circumcision and have introduced laws preventing such practices, India has not yet enacted a law addressing this issue. Interestingly in India the victims of FGM have themselves take to public forums and challenge the

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validity of the practice. In 2016 online petitions to abolish the practice of FGM has been raised by 17 survivors of the brutal custom from within the Dawoodi Bohra community.

The first legal step against this practice was taken in 2017 in the form of a public interest litigation filed to the SC challenging the practice by contending it to be violative of article 21, bodily integrity, security of a person, freedom from inhume treatment. The SC in response sought the response of 4 states and the central government. The court pronounced its last order stating that it awaited the response from 1 state with no further improvements or notifications till late. The, final verdict is awaited and is expected to be in the favor of the women as it has done in the case of Vishakha v. State of Rajasthan[838].

7. CONCLUSION

Yes of course India is unity and diversity and we Indians respect culture more than anything else. But, unwelcomed and unwanted sexual abuse and genital mutilation under the umbrella of culture is a grave abuse and a law should be established to protect women against such activities. FGM is a grave injustice done to young girls and women under the name of a religious practice across the globe. It has serious impacts on a women's physical and mental well-being. SC in the case of Sharaya Bano vs UOI[839] popularly known as the triple talaq case, held that triple talaq is violative of the constitution and is not protected under article 25 because it does not form the integral part of the religion. In other words, the pillars of the Islamic religion do not depend on the practice of triple talaq. Similarly, the practice of FGM which is a carnal abuse against women hidden under the name of religion with no known health benefits is violative of human rights and thus is against the constitution and hence a law must be enacted to abolish this practice to the earliest and save women. **"we are human beings; we make the traditions so we should have the right to change those traditions" – Malala Yousafzai.**

[838] Vaisakha v. state of Rajasthan
[839] Sharaya Bano v. UOI

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SOCIOLOGICAL DIMENSIONS OF TRAFFICKING AND PROSTITUTION IN INDIA

- **KRUTIKA PANDEY**

ABSTRACT

The problem of Prostitution in India is a very old age problem and with time there is increase in number of women and girl children indulging in prostitution. It shows that the law prevalent in recent times is not able to curb this evil profession predominant in India. Trafficking of children for sexual exploitation is a very important human rights issue where basic human rights are curtailed and children suffer from very serious kinds of abuses. Both the issues are inter-related and the factors which lead to the existence of such human rights issues are evaluated such as push and pull factors and the age old Indian culture.

1. FEMALE AND GIRL CHILD TRAFFICKING

Female and girl child Trafficking is considered as one of a very serious kind of abuses of human rights. In the recent times, the issue of trafficking in women and children has appeared to be a prominent social issue in various parts of the world. As trafficking is generally a borderless organized crime, due to which India & other South-Asian nations are now said to become an origin for these kinds of abuses. These countries also become transit point for traffickers and from here only they are transported to their destinations.[840]

Trafficking means the movement of children, women and men from one place to another. And the reasons behind such movement of body are force & coercion. These can also be moved from one place to another by means of deceiving and making fool of them as well as enticing the children. Deception is used on them in situations of their economic and sexual exploitation.[841] UN TIP Protocol also known as the Palermo Protocol ratified in November 2000 defines trafficking as: . . .

[840] Biswajit Ghosh, *Trafficking in women and children in India: nature, dimensions and strategies for prevention*, 13(5) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS,716–738 (2009).
[841] *Id. at* 719

"**when the transfer, receipt of persons, transportation, harboring or recruitment is done by means of threatening those persons & external force is used on them and different forms of fraud such as abduction, coercion, deception, receiving of payments or position of vulnerability or the giving or of the abuse of power or benefits to achieve the consent of a person having control over another person is used for the purpose of exploitation and 'exploitation' will include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or service, slavery or practice similar to slavery, servitude or the removal of organ**."[842]

The above given definition is the first definition of trafficking which has been accepted internationally and it came into existence on 25th December, 2003. The definition can be seen as a guiding rule for large scale conceptual understanding of the problem but it was contended that the definition was not focused on human rights instead it is devised mainly in the context of crime control.[843] The problem with the definition is that even though it talks about preventive measures, victim compensation, repatriation, etc. No protection from prosecution was given to prostitutes for the acts which they are forced to perform[844]. To develop a wider perspective on trafficking it is important to answer the questions of human rights and political economy of trafficking. Also, in the protocol no clear definition was provided of the term 'exploitation'.

Trafficking is an illegal act which is done with the intention of sexual and other forms of 'exploitation' and victim is never agreed to or gives their 'consent' to such kind of sufferings. Trafficking is different from physical movement of people the factors which differentiate the two are: nature of consent, the intention of the agency transporting people, and the end consequences of the movement.[845] All sex workers or prostitutes do not come into this business of prostitution by being trafficked but it is the fact that the women and girls which are trafficked are generally pushed into sex trade. The 'clandestine' prostitutes are not considered

[842] United Nations, Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, (United Nations, 2000), 3

[843]United Nations, Integration of the Human Rights Of Women And The Gender Perspective: Violence Against Women (New York: United Nations, 2000), 7.

[844]CHRISTIEN L. VAN DEN ANKER AND J DOOMERNIK, TRAFFICKING AND WOMEN'S RIGHTS 2-3 (2006).

[845] Sanjoy Roy, Chandan Chaman, *Human Rights and trafficking in women and children in India*, 1(5), JOURNAL OF HISTORICAL ARCHAEOLOGY& ANTHROPOLOGICAL SCIENCES,162-170 (2017)

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as matter of distress for the legal authorities making the law as they are the prostitutes which enter into the profession deliberately for money considerations which is wrong on the part of legal authorities as they should provide economic opportunities because women are entering into the profession not because they are willing to indulge into prostitution but because no other choice is available to her for earning money.

Human Trafficking in India can be divided into three groups[846]:

1. For commercial sexual exploitation
2. For exploitative labour, and
3. For other forms of exploitation like organ sale, begging, camel jockeying, etc.

Looking at the available records and reports on trafficking it can be observed that the trafficked women and children are forced into activities such as prostitution in brothels, massage parlors or beer bars, pornography, dancing, petty crimes, domestic help, begging, organ trade, drug trafficking and even trafficking. The current study is concerned with trafficking of women and girl child so, the focus of study will be on the first group. With globalization, the sex tourism industry is also flourishing with rise in the demand of cheap labour which is the reason for the trafficking of young women and girls. Woman is purchased like an object on the basis of physical beauty and virginity. Some clients only want girl children who are not infected by AIDS.

India from last four years has been seen as listed on the Tier 2 Watch List[847]in the Trafficking in Persons Report 2007 released by the United States Government for 'its inability to demonstrate expanding endeavors to handle this huge and multidimensional problem[848]'. The report has not just indicated out India to be a center point of trafficking, yet in addition reprimanded the Indian Government for not consenting completely with the base guidelines for the removal of trafficking. The issue of human trafficking in India is not exclusively of prime concern for the implementation of law and justice delivery agencies rather there is lack

[846]*Supra* note 1.
[847] It is argued that India had escaped the US list of worst human traffickers (Tier 3 Countries facing heavy penalties) for political considerations.(Last visited on 11 May, 2018) http:www.cnn.com/2007/US/06/12/human.trafficking/index.html
[848] UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT, June 2007, (Last visited on 11th May, 2018) http://www.state. gov/document/organization/82902.pdf

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of harmony among different government branches like police, welfare, health, women and children etc.[849]

2. CAUSES OF TRAFFICKING

The issue of trafficking in women and children is a very serious social issue as it affects their dignity and human rights. Trafficking can be said to be a gross commercialization and commodification of innocent human lives.[850]

The conceptual meaning of human trafficking refers to the criminal procedure of abusing human beings where they are treated as objects for making profit and once they are trafficked, they are subject to long term exploitation.[851]

Veerendra Mishra[852] in his book talks about the factors which lead victim into vulnerability by getting them involved in trafficking. He classifies factors into push and pull factors and also mentions that push and pull factors are not the only factors which determine the vulnerability but also there are multiple factors with different intensity. Push factors are the once which exist at the point of origin and pull factors works at the place of destination.[853] Both the factors are complementary to each other. Push factors are the social means which are widespread presence of caste and class structure and gender based discrimination which is what makes people vulnerable. Under the cultural context, unreasonable traditional practices like community based prostitution ex- *devdasi* which increases the chances of vulnerability. Economic factors include the unequal distribution of opportunities and wider gap between rich and poor compels people to fell into the hands of traffickers. Poverty has been linked with human trafficking patterns as poor socio economic conditions of families, poverty in connection with frequent, almost annual natural disasters like flood, which result into many difficulties such as no means of education, no income opportunities for women in rural areas. Also, not having knowledge about the actions of traffickers and the burden to collect money for dowry leads to sending daughters to distant places of work, dysfunctional family life, domestic violence against

[849] *Supra* note 1
[850] Sanjoy Roy, Chandan Chaman, *Human Rights and trafficking in women and children in India*, 1(5), JOURNAL OF HISTORICAL ARCHAEOLOGY & ANTHROPOLOGICAL SCIENCES, Pg 162-170
[851] P M Nair and Sanskar Sen, *A Report on trafficking on women and children in India 2002-2003*,1 INSTITUTE OF SOCIAL SCIENCES, NHRC & UNIFEM, INDIA, 440 (2004).
[852] VEERENDRA M., HUMAN TRAFFICKING- THE STAKEHOLDERS' PERSPECTIVE,400 (2013)
[853] *Supra* note 12.

women, low status of girl children, etc.[854] It can be observed from the available data that extreme poverty and other deprivation such as caste push people to fall into the trap of the traffickers. Once a women or girl gets into prostitution there are very less chances of her getting out of such an exploitative environment and it might happen that she develops intimate connections with the traffickers and follow their footsteps.

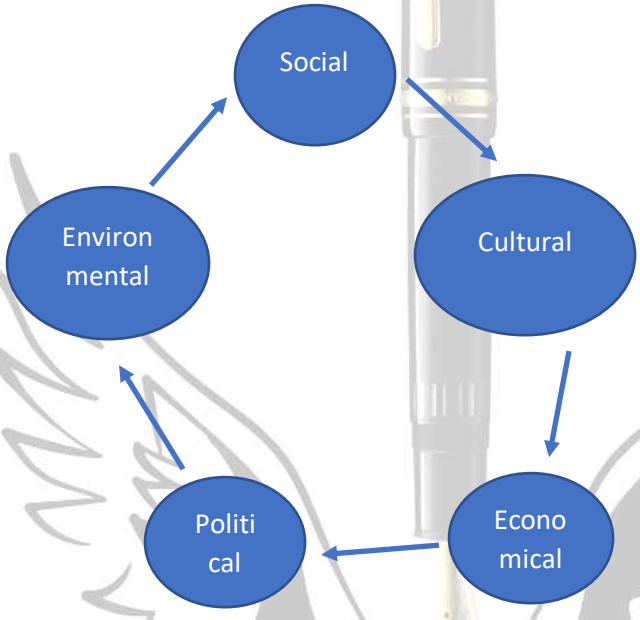

Fig. 3.1 Push Factors.[855]

The pull factors can be the promises made by traffickers of good employment opportunities, easy money, better pay and comfortable life also demand of young kids for adoption, expansion of sex industry leading to increase in demand for women, the misconception that having sexual intimacy with young girl's reduces the chances of HIV/AIDS and myth that sex with a virgin can cure HIV/AIDS and impotency lead to rise in the demands of young girls in the sex trade. Also, weak enforcement machinery and inordinate delay in justice delivery in a way helps traffickers to recruit women and children and make them part of sex trade industry.

[854] *Id*. at 321
[855] *Supra note* 11 at 167

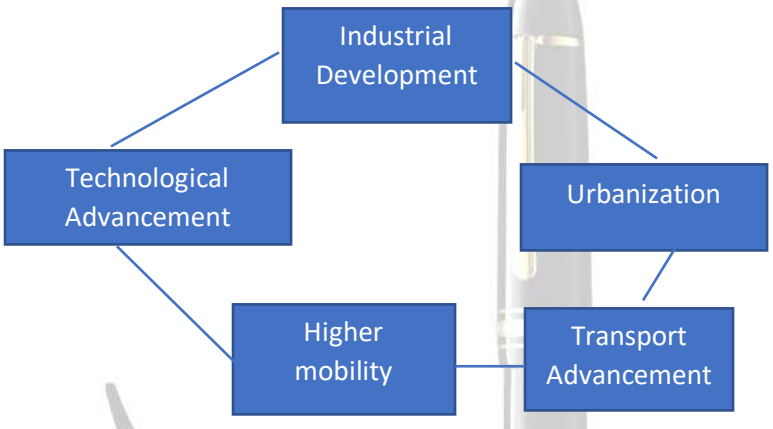

Fig. 3.2 Constituents of Pull Factors.[856]

Looking at the history of India, it can be said that trafficking in a way can be linked to child marriage. As child marriage makes trafficking easier as traffickers can send young girls from one place to another. Also, if we look at the traditional society, there is stigma attached to single women. If parents are not able to arrange the marriage of their daughter then it is said to be shameful for parents. In such situations, when traffickers contact the poor families with marriage proposals in which they were paid instead of demand for dowry the parents accept such offers happily and Thus, after marriage the girls are trafficked and sent to the destination for sexual exploitation.

As documented by the Human Rights Watch, the most common method used for trafficking of women and children is coercion in the form of debt bondage. Women are asked to work without any wages until they repay the purchase price advanced by their employers, amount which is far exceeding the cost of their travel expenses.[857] Women who already knew that they would be in debt, the amount is unexpectedly higher and arbitrary fines are also added with dishonest account keeping. Thus, in such situation the women do not have any option and employers take full advantage of women's vulnerable position as they are unknown to the surroundings,

[856] *Id.at* 167
[857] International Trafficking of Women and Children, Human Rights Watch Report, Feb,21st,2000 accessed on 11/05/2018, available at https://www.hrw.org/news/2000/02/21/international-trafficking-women-and-children

do not speak the local language and they fear from arrest and mistreatment by local law enforcement authorities.[858]

Based on a report of 1995 released by Human Rights Watch about the trafficking of people. This report was the outcome of the interviews of women and girls who were trafficked from Nepal to India. Many girls & women are sold by their relatives and even by their fathers and husbands, they are tricked by giving them false hopes of marriage. It was observed that the girls and women, who are trafficked by false marriage offers, are either sold by relatives or few of them were abducted and shifted to some other place. All the women & girls end up in the hands of traffickers who take them to brothels and later are sold in debt bondage.

3. PROSTITUTION

It is important to look at prostitution from a sociological point of view to understand its long term existence in the society and its causes. It is a global institution prevailing in every society in the world. It is considered by everyone as a disgraceful act though some societies have legitimized it whereas in others it is prohibited morally as well as legally.[859]

Female prostitution is considered as one of the oldest profession all over the globe. It is also one of the most hated profession in the society. Hated in the sense that people who indulge in it enjoy it but in society, they pretend it as an immoral practice. Depending upon the extent of its prevalence in the society prostitution as a concept has been defined differently by different social scientist. The definition of 'prostitution' given in the encyclopedia of social science which is considered as most broadly accepted definition defines prostitution "as the practice in which a female offers her body for promiscuous sexual intercourse for hire etc.[860]" However, a new definition has been devised for the word 'Prostitution' in the Government of India's "Prevention of Immoral Traffic Act-1987, which defines prostitution as "Sexual exploitation or abuse of persons for commercial purposes."[861]

Most women and girls choose prostitution as profession because of their poor economic background and no financial support from their family. The women involves into this type of

[858] *Id.* at 326
[859] Puja Mondal, Prostitution: Essay on Prostitution in India, (Last visited on 13th May, 2018) http://www.yourarticlelibrary.com/essay/prostitution-essay-on-prostitution-in-india-1190-words/35192
[860] Tulsing Sonavne, *Prostitution In Indian Society: Issues, Trends And Rehabilitation* ,(Last visited on 13th May, 2018)https://www.ugc.ac.in/mrp/paper/MRP-MAJOR-SOCI-2013-25158-PAPER.pdf
[861] *Id.* at 4

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profession so as to earn livelihood, whereas some are forced into this profession by family members.[862]

4. CAUSES OF PROSTITUTION:

1. CASTE

By looking at India's history it can be said that the caste system is the basis of social hierarchy in India. People belong to a particular caste as they are born into that caste and cannot change that caste though caste based discrimination is unlawful still it affects people. In India caste play a very important role as it regulates people's standing in the society, the opportunities available to them, and their relations with others in different social classes.[863]

Caste is considered as one of the reasons for which prostitution is still prevalent in the society because the existence of caste system emboldens the institutionalized discrimination by upper caste men on the lower caste women all across India and also in South East Asia[864].

In Ancient India, prostitution was not deliberated as an act which is immoral or undignified as it is regulated by state institutions but regulation is done by social institutions and it is in the hands of male dominated society. In medieval times, though most of the Mughal rulers were not in favor of prostitution but they regulated it through institutions and women were considered as part of society at large and enjoyed status within the society.

One of the oldest system of the Hindu society, The *Devdasi* (handmaiden of God) system in which unmarried young girls are dedicated to gods in Hindu temple which were considered as objects of sexual pleasure to temple priests and pilgrims, was observed as established custom in India in 300AD.[865] The records shows that in large Indian cities at different times i.e. from ancient to medieval and to British colonial India, prostitution was not considered as an undignified profession. The perceptions relating to the morality of prostitution started changing in the beginning of 1850s, which lead to rise in the criminalization of the practice.[866]

[862] Preeti Panwar, *Places in India where prostitution is main source of income*, (Last visited on 14th May, 2018) https://www.oneindia.com/feature/places-in-india-where-prostitution-is-the-main-source-of-income-1786111.html
[863] *Supra* note 19
[864] Kabir Sharma, *How the caste system forces dalit women into prostitution*, Last visited on (18th May, 2018) https://www.youthkiawaaz.com/2015/06/caste-and-prostitution/
[865] Divyendu Jha and Tanya Sharma, *Caste and Prostitution in India: Politics of Shame and of Exclusion*, 4(1)ANTHROPOLOGY,(2016), https://www.omicsonline.org/open-access/caste-and-prostitution-in-india-politics-of-shame-and-of-exclusion-2332-0915-1000160.pdf
[866] PRABHA KOTISWARAN, SEX WORK: 7ISSUES IN CONTEMPORARY INDIAN FEMINISMS (2011).

In *Devdasi* system, Young girls are married to goddess *Yellamma (Renuka)* and a ceremony is performed in which a red and white beaded necklace is tied around their necks which represent a life of bondage. Once this ceremony has been performed they tacitly become sex slaves of upper caste man and they cannot marry any man in their lifetime. Many times, priest convince the daughter's parents that dedicating their daughter will lead family members to be reborn as Brahmins in the next life.[867] Under the *Devdasi* system, when upper caste man and priest sleep with *devdasi* they call it as exercising god's desire.

Every year, More than 5,000 to 10,000 girls enter into the life of sexual subjugation and prostitution. Studies suggest that most of the girls and women in India's urban brothels comes from Dalit, lower caste, tribal, or minority communities.[868]

The existence of practices such as *Devdasi* and *Jogini* systems in India shows the connection between caste and forced prostitution. Both the systems are considered as religiously sanctioned sexual abuse.[869]

A study conducted in 2007 by Anti-Slavery International on the practice of ritual sexual slavery or forced religious 'marriage'. It found that 93% of Devadasi were from Scheduled Castes (Dalits) and 7% from Scheduled Tribes (indigenous) in India.[870]

There are certain communities in India where prostitution is practiced openly and families feel no disgrace for asking their daughters, sisters to indulge into prostitution. Some of the instances are:

1. *Nat* Community: The community is found at the *Natpura* village in *Hardoi* district of eastern Uttar Pradesh where Nat caste dominates. In this village, the children and mothers are living without any surname as they are not aware of the name of the fathers. This norm exist from last 400 years.[871]The women of this community belong to lower caste and thus lacking opportunities have accepted prostitution as their profession.

[867]*Supra* note 12.
[868]*Ibid.*
[869]*Forced Prostitution*, INTERNATIONAL DALIT SOLIDARITY NETWORK, (Last visited on 21st May, 2018) https://idsn.org/key-issues/forced-prostitution/
[870]B. Deepa and Suvarna Suni, *Devadasi System: Forced Prostitution By Dalit Women On The Name Of Religion*, 4(2)IMPACT:IJRHAL 5,(2016)
[871]*Supra* note 18

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2. *Bachara* Tribe of Madhya Pradesh: It is a matriarchal community in the western part of Madhya Pradesh and women here are said to be the descendants of royal courtesans[872]. Girl's fathers and brothers force her into prostitution. This tribe of MP makes a separate room in their houses to continue prostitution and this dreadful act is done inside the house.

Thus, there are many such small communities in India which still in the name of caste practices and religious traditions encourages prostitution. Looking at the practices prevalent in our society it can be said that caste and culture has played a very important role in maintaining such evil profession to exist in 21st century.

2. POVERTY

Poverty is also considered as one of the main reasons which lead women into prostitution. A woman who is economically helpless and has been abused by parents or enticed by a man and later she finds out that the man turn out to be a pimp or procurer and the woman is uneducated or have very low education level the option she will have in such a situation is to get indulged in prostitution to feed herself.[873]

One of the most prominent feature of India is material poverty. As projected, India's 40% population subsists in poverty which means 400 million people of India cannot fulfill their own basic needs such as food, clothing and shelter.[874] This is a very devastating and unimaginable statics. Inequality between gender and sex is not created by poverty instead it worsens already prevailing imbalances in power and it rises the susceptibility of those who are at the receiving end of gender justice. In a patriarchal society, the most affected section in families and societies are women and girl children. Sturdy gender biases against women are reflected by caste wars, political strife and domestic conflicts.

The lives of India's poor population are characterized by desperation. This desperate poverty is considered as the root cause of growing prostitution problem but it has been argued that in many countries which are well developed i.e. economically rich, having high standard of

[872] Shahana Yazmin, *4 Communities in India which practiced prostitution openly and considered it as tradition,*(Last visited on 14th May, 2018) https://www.vagabomb.com/Prostitution-Is-Considered-a-Tradition-in-Some-Parts-of-India/

[873]Pratil Goyal, *Prostitution in India: Understanding the conditions of prostitutes,* (Last visited on 14th May, 2018),available at : https://www.youthkiawaaz.com/2011/03/prostitution-in-india/

[874]*Supra* note 17.

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living, good educational as well as job opportunities and equality between men and women still the problem of prostitution remains unresolved. From this observation it can be concluded that prostitution exist not because of illiteracy or poverty but also because people like to be dominated by others and consciously choose this occupation.[875]

In India employment opportunities are very less and it is difficult to think of illiterate and semiliterate women getting employed easily thus, they find prostitution being a profession which allow them to earn money without any education. In cases of children involved in prostitution it is because of the helplessness of parents that they force their children to indulge in such an evil profession.[876]

3. PATRIARCHY

If we look at all stages of history the common feature that can be found is subordination of women by man and it is existent in large parts of the world, the amount and type of subordination depends upon the social and cultural environment in which a woman is positioned. The existence of patriarchy can be detected by looking back to the history of civilization. It is a historic creation which involves a process which took thousands of years to its completion. From earliest times, patriarchy appears as an oldest state. The fundamental origin of its existence was the patriarchal family which articulated and generated its rules and values.[877] From thousands of years women's life has been molded and governed under the umbrella of patriarchy which can be best described as 'paternalistic dominance'. It means that the existence of a relationship between the dominant groups is deliberated as superior to the subordinate groups which is inferior, dominance is governed by mutual obligations and reciprocal rights. It can be said that women contributed in the process of their own subjugation as from a very long period of time they have been psychologically shaped to believe that they are inferior to man. Caste hierarchy and gender hierarchy can be said to be a reason for the existence of patriarchal society. Thus, the existence of prostitution in the society can be linked

[875]Madhu Kishwar, *Legalize Prostitution?,* OUTLOOK (16th Dec, 2009), https://www.outlookindia.com/website/story/legalise-prostitution/263355, (Last visited on 25th May, 2018).
[876]Haveripeth Prakash, *Prostitution and its Impact on Society- A Criminological Perspective*, 2(3)INTERNATIONAL RESEARCH JOURNAL OF SOCIAL SCIENCE, 31-39,(2013).
[877]*Id.* at 34

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to patriarchy as women have been subjugated from very long time which shows that prostitution has been institutionalized in the name of religion or caste based practices and is shown as having received its blessings and it is the worst kind of moral and physical exploitation a society can impose on women.[878]

4. Social Factors

The Hindu culture of India demonstrates the view that women are considered as a commodity. In the society, woman who have had sexual experiences are considered as women of bad character also they are regarded as 'used goods' and are improbable to even marry[879]. In ancient times, if a woman is without a husband she is considered useless with no source of income and also cannot wear a *bindi*. She is even disadvantaged to cultural outcast. Thus, in such situation she is considered as suitable for prostitution. Women who are divorced or widowed are also considered useless and have no respect in society they are also challenged to this social stigma. Generally, women are forced into prostitution when cultural notions are combined with religion and poverty[880]. The process of considering women as an object and objectifying them and exercising control over them as a commodity shows how women are inferior to man and also these actions encourage prostitution.

5. The Enrooted Social and Legal Consequences of Trafficking and Prostitution on Human Rights:

Trafficking and Prostitution are considered as a very serious kind of human right abuses. The effect of both of them could be finely understood under two broad rubrics: social and legal. Sarcastically, society is considered as an arena where both good and bad deeds are judged with serious implications and without ones knowledge. Prostitution, as already evident, has been a serious concern related to women and children and it is prevalent since ages as an evil profession in Indian society. In India, Trafficking could be considered as a solid backbone for the prostitution industry. Therefore, society has played a vital role in administering this evil

[878]Amrit Srinivasan, *Reform or Continuity? Temple 'Prostitution' and the Community in the Madras Presidency*,183(2014), Last visited on 21st May 2018 at http://acceleratedmotion.org/wordpress/wp-content/uploads/2014/12/reform_conformity.pdf
[879] Ibid 17
[880] JORDAR BIWANATH, PROSTITUTION IN HISTORICAL AND MODERN PERSPECTIVES, INTER INDIA PUBLICATION, (1984).

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industry and concomitantly imposing its repercussions. Society in every case consider women as a culprit regardless of even most of the times of their situation as victims. Trafficking forces women and children into prostitution and they are never considered as a victim they are considered as the woman of low character and once they are named as prostitutes they are never seen as a respectable woman. Once a girl is trafficked the societies do not accept it like other human beings. These all societal mindset makes it difficult for children and women to live a happy life as already they have struggled so much to come out of the hands of traffickers and society again make them vulnerable by looking at them like criminals. This affects their basic human rights such as right to life, right to dignity etc. As in India the laws on trafficking are not stringent the children and women trafficked are abused and exploited and the child born out of a prostitute is not considered as a normal child. The child is always discriminated. The right to live a healthy life, right against violence, right against physical and sexual exploitation, right to have dignity are violated of women and children forced into trafficking and prostitution.

6. Conclusion:

Female and girl child trafficking and prostitution can be said to be interconnected as in most of the cases the evidence shows that women or girls end up into prostitution because of getting trafficked into another country or through inter-state trafficking in a country. Also, from the above study it can be observed that women and girl children are trafficked not by their own choice they are forced by family or coercion is used by traffickers or because of economic disabilities they end up into trafficking. Similar is the case with prostitution, women are forced into it on same grounds on which they get trafficked but the only difference is that in prostitution caste and religious traditions play a very important role. Thus, trafficking can be considered as one of the essential element which encourages prostitution. Also, it can be concluded that trafficking and prostitution are against the basic human rights as the abuses involved in both of them violates human rights. As sexual exploitation, physical abuses are against the human rights which are very basic to the survival of human kind.

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JOINT LIABILITY

- **PURVIKA JAIN**

HISTORY AND PRINCIPLE OF JOINT LIABILITY

1.1 History

According to Edward Coke, conspiracy was originally a statutory remedy against false accusation and prosecution by "a consultation and agreement between two or more to appeal or indict an innocent man falsely and maliciously of felony, whom they cause to be indicted and appealed; and afterward the party is lawfully acquitted". In ***Poulterer's Case***[881], , the court reasoned that the thrust of the crime was the confederating of two or more, and dropped the requirement that an actual indictment of an innocent take place, whereby precedent was set that conspiracy only need involve an attempted crime, and that the agreement was the act, which enabled subsequent holdings against an agreement to commit any crime, not just that originally proscribed.

1.2 Conspiracy to trespass

Here, nine students, who were nationals of Sierra Leone, appealed their convictions for conspiracy to trespass, and unlawful assembly. These persons, together with others who did not appeal, conspired to occupy the London premises of the High Commissioner for Sierra Leone in order to publicize grievances against the government of that country. Upon their arrival at the Commission, they threatened the caretaker with an imitation firearm and locked him in a reception room with ten other members of the staff. The students then held a press conference on the telephone, but the caretaker was able to contact the police, who arrived, released the prisoners, and arrested the accused. In this case the Court felt that the public interest was clearly involved because of the statutory duty of the British Government to protect diplomatic premises. Lauton J. delivered the judgment of the Court of Appeal dismissing the appeal from conviction[882].

1.3 Conspiracy to corrupt public morals and conspiracy to outrage public decency

[881] 77 Eng. Rep. 813 (K.B. 1611)
[882] Kamara v Director of Public Prosecutions [1974] AC 104, [1973] 3 WLR 198, [1973] 2 All ER 1242, 117 Sol Jo 581, 57 Cr App R 880,

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These offences were at one time tied up with prostitution and homosexual behaviour. After the Second World War, due to the fame of several convicts, the Wolfenden report was commissioned by government, and was published in 1957. Thereupon came the publication of several books, both pro and contra the report. Of these books we can isolate two representatives: Lord Devlin wrote in favour of societal norms, or morals, while H. L. A. Hart wrote that the state could ill-regulate private conduct. In May 1965, Devlin is reported to have conceded defeat.

The Street Offences Act 1959 prohibited England's prostitutes from soliciting in the streets. One Shaw published a booklet containing prostitutes' names and addresses; each woman listed had paid Shaw for her advertisement. A 1962 majority in the House of Lords not only found the appellant guilty of a statutory offence (living on the earnings of prostitution), but also of the "common law misdemeanour of conspiracy to corrupt public morals".[883]

In the case of ***Kruller (Publishing, Printing and Promotions) Ltd v. D.P.P.*** which was decided 1973 in the House of Lords,[884] the appellants were directors of a company which published a fortnightly magazine. On an inside page under a column headed "Males" advertisements were inserted inviting readers to meet the advertisers for the purpose of homosexual practices. The appellants were convicted on counts ofconspiracy to corrupt public morals, andconspiracy to outrage public decency.

The appeal on count 1 was dismissed, while the appeal on count 2 was allowed because in the present case there had been a misdirection in relation to the meaning of "decency" and the offence of "outrage". The list of cases consulted in the ratio decidendi is lengthy, and the case of Shaw v. D.P.P.is a topic of furious discussion.

1.4Conspiracy to effect a public mischief

In ***Withers v Director of Public Prosecutions***,[885] which reached the House of Lords in 1974, it was unanimously held that conspiracy to effect a public mischief was not a separate and distinct

[883] Shaw v. D.P.P. [1962] A.C. 220 (H.L.).
[884][1972] 2 All E.R. 898 (H.L.) and [1973]
[885] Withers v DPP [1974] 3 WLR 751, HL

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class of criminal conspiracy. This overruled earlier decisions to the contrary effect. The Law Commission published a consultation paper on this subject in 1975.[886]

1.5Conspiracy to murder

The offence of conspiracy to murder was created in statutory law by section 4 of the Offences Against the Person Act 1861.

1.6 Codification of penal code

The history of codification of modern criminal law in India generally begins from the advent of the British rule. However, its roots date back to the Vedic age and the rule of various Hindu and Muslim dynasties. The modern criminal justice system is based on English laws and practices. These practices are practical as well as contemporary. As a result, a major chunk of criminal laws that exist today still relies on the British-era laws.

1.7 Criminal law in the Vedic age

In ancient India, Hindu religious laws contained many provisions for governing criminal as well as civil matters. The Vedas, Shrutis, Smritis and even other documents like Manusmriti contain provisions regulating criminal law. The practice of codifying criminal offences existed in this period as well.These laws also contained detailed procedural rules and regulations for trials. There are some records which also show the existence of principles of evidence to govern these trials.

1.8 Criminal law in the Islamic age

With the advent of Islamic rule in India, criminal laws in several parts of the country saw major changes. Even prior to the Mughal rule, the Delhi sultanates had already introduced offences based on Islamic laws of Shariat. The main influence of these laws was Islamic religious texts like the Quran, Sunna, Hadis, Ijma, Qiya, etc.During the Mughal rule, the codification of criminal law of law became more sophisticated. Muslim criminal law came under three broad categories: crimes against God, crimes against sovereignty, and crimes against individuals.The law even divided modes of punishments into categories. These included death, dismembering of limbs, stoning, levy

[886]The Law Commission. Codification of the Criminal Law: Conspiracies to effect a public mischief and to commit a civil wrong. Working Paper No 63. 1975. para. 4 to 30

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of fines, confiscation of property, the punishment of exile, etc.After the British arrived in India, they initially decided not to interfere much with existing Muslim criminal laws. They implemented changes in a phased manner so as to not upset the locals.

1.9 Criminal law in the British period

When Warren Hastings introduced his Judicial Plan of 1772, he did not many any severe changes to substantive criminal law. In 1773, he slowly started changing rules of procedure and evidence in existing criminal laws. For example, he abolished the practice of allowing male relates of victims to pardon their killers.During this time, serious offences like homicide became crimes against the state instead of being private offences. This laid the foundation of the modern practice of the state prosecuting people who commit public offences.

From 1790 onwards, Lord Cornwallis extended the process of codifying criminal law. Major changes took place in the subject of sentencing. As a result, the process of levying punishments physically harming and dismembering convicts slowly started fading.Lord Wellesley made even more changes to the offences of murder and homicide in the early 1800s. For example, the law now made distinctions between intentional and unintentional killing.Furthermore, rules of evidence became stricter and the threshold of proof to indicate guilt increased greatly. In presidency towns like Madras, Bombay and Calcutta, the British made many changes keeping local conditions in mind.

1.10 Codification of Substantive Criminal Laws

According to the Charter Act, 1833, India's first law commission in 1834 recommended drafting of the Indian Penal Code. Lord Macaulay, who was the chairman of that law commission, spearheaded its drafting. The Code was basically a comprehensive enactment describing all major crimes in existence at that time.Despite several revisions over almost thirty years, the law did not come into force until 1860. It was only after the Rebellion of 1857 that the British decided to implement it.IPC has seen several amendments since it first came into existence. Although it largely relied on British laws and practices, many of its provisions are still the same.Even the Indian Evidence Act came into existence in 1872 under the guidance of Lord Macaulay. Its foundation was largely the British law of evidence, but it has seen many changes since then.

1.11 Codification of Procedural Criminal Laws

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Although the British had enacted a Criminal Procedure Code for India in 1862, modern procedural laws came much later. The Code of 1862 was amended and replaced many times later to make procedural laws modern.After Independence, the Law Commission made many recommendations to update CrPC. Some of these changes were the abolition of jury trials. The most important reason for these changes was to make the criminal procedure quick and effective. CrPC was finally enacted again by the Parliament in 1973, and it has been amended many times since then.

1.12 Indian Perspective

A person can be criminally liable for the acts of another if they are a party to the offense. For instance, the driver of the get-away car is guilty of the armed robbery of a store even though the driver never left the car, and the entire robbery itself was committed by others. The essence of vicarious liability in criminal law is that a person may be held liable as the principle offender that is the perpetrator of a crime whose actus reus is physically committed by someone else. It is believed that person merely performing the actus reus on the say of another is not innocent and thus is also made liable for the offence. The law sometimes focuses upon the relationship between the defendant and the performer of the physical acts and by virtue of that relationship; it attributes the acts of the latter to the former. It should be emphasised at the outset that this form of liability in criminal law is very much an exception rather than the rule. The concept of vicarious liability is mainly a civil law principle whereby an employer is made liable for the negligence or breach of duty of his employees.

IPC makes a departure from the general rule in few cases, on the principle of respondent superior.[887] In such a case a master is held liable under various sections of the IPC for acts committed by his agents or servants. Section 149 provides for vicarious liability, it states that if an offence is committed by any member of an unlawful assembly in prosecution of a common object thereof or such as the members of that assembly knew that the offence to be likely to be committed in prosecution of that object, every person who at the time of committing that offence was member would be guilty of the offence committed.[888]

[887]Gour Hari Singh, The Penal Law of India, Vol II, 11t Ed., 2000, pp 1467-1472
[888]Munivel vs. State of T.N. AIR 2006 SC 1761

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Section 154 holds owners or occupiers of land, or persons having or claiming an interest in land, criminally liable for intentional failure of their servants or managers in giving information to the public authorities, or in taking adequate measures to stop the occurrence of an unlawful assembly or riot on their land. The liability on the owners or occupiers of land has been fixed on the assumption that such persons, by virtue of their position as land-holders, possess the power of controlling and regulating such type of gatherings on their property, and to disperse if the object of such gatherings becomes illegal.[889]

Section 155 fixes vicarious liability on the owners or occupiers of land or persons claiming interest in land, for the acts or omissions of their managers or agents, if a riot takes place or an unlawful assembly is held in the interest of such class of persons.

Section 156 imposes personal liability on the managers or the agents of such owners or occupiers of property on whose land a riot or an unlawful assembly is committed. Section 268 and 269 explicitly deals with public nuisance. Under this section a master is made vicariously liable for the public nuisance committed by servant. Section 499 makes a master vicariously liable for publication of a libel by his servant. Defamation is an offence under this section.

1.13 Vicarious liability under Special Statutes

The doctrine of vicarious liability is more frequently invoked under special enactments, such as Defence of India Rules 1962, The India Army Act 1911, The Prevention of Food Adulteration Act 1954, The Drugs Act 1940, etc. A master is held criminally liable for the violation of rules contained under the aforesaid statutes, provided that his agent or servant, during the course of employment, committed such act[890]. In *Sarjoo Prasad v. State of Uttar Pradesh*[891] , the appellant, who was an employee, was convicted under the Prevention of Food Adulteration Act 1954 for the act of the master in selling adulterated oil.

1.13 Liability of Master

[889]In certain cases, a fellow criminal may be liable for the acts committed by the other accused on the principle of vicarious liability. Barker v. Levinson (1920) 2 All ER 823- a master isn't criminally liable for the acts committed by his agents or servants in the course of employment in case such acts are outside the general scope of tat employment.
[890] Chairman, Railway Board v. ChandrimaDas(2000) 2 SCC 465
[891]AIR 1961 SC 631. See also State of Orissa v. K Rajeshwar Rao AIR 1992 SC 240

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An innocent master is not criminally liable for acts of servants in case of cl 22, of the Motor Spirit Rationing Order 1941, but in the case of absolute prohibition under cl 27A the master is liable.[892]*RavulaHariprasada Rao v. State of Madras*[893]In this case, it was held that the licensed victualler was liable to be convicted although he had no knowledge of the act of his servant. In dealings with case, Blackburn J observed 'if we hold that there must be a personal knowledge in the licensed person, we would make the enactment of no effect.' The appeal was allowed in part, and while the conviction and sentence imposed on appellant on the first charge in both the cases were quashed, the conviction and sentence on the third charge in the second case were affirmed.

1.14 Liability of Corporations for Criminal Wrongs

Although it was early said that a corporation could not commit a crime," this view has been rejected. Argument has even supported the opposite extreme that a corporation should be held guilty of any crime if its human agents who commit it so act that their conduct is within the course of their employment as tested by the standards applied to tort liability. In determining whether this contention is justified, the problem first arises whether existing legal concepts permit the imposition of such extreme liability. Second, assuming criminal responsibility can be imposed, under what circumstances is it justified? A corporation can act only through its agents. And as the share-holders are the persons, punished when a corporation is convicted, corporate criminal liability is necessarily vicarious – the liability of shareholders for acts of their agents. Where criminal intent is immaterial, corporate criminal responsibility for the physical acts of agents has long been clear. It should be equally obvious that the distinction between physical acts and mental states of agents presents no logical barrier to imposing vicarious responsibility." Instead of regarding the problem as one of vicarious liability, however, the courts have stumbled over the theoretical difficulties of ascribing criminal intent to a corporation. It has been affirmed repeatedly that corporations by their very nature are incapable of committing such crimes as bigamy, perjury, rape, and murder. But courts have now progressed to the position of recognizing that corporations can be guilty of crimes involving criminal intent.

*HL Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has

[892]KD Gaur, Criminal Law: Cases and Materials, 4th Ed., 2005, p 180
[893]AIR 1951 SC 204

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hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[894]

State of Maharashtra v. Syndicate transport Co (P) Ltd.[895]In this case, there was an agreement that bus would be transferred in the name of the complainant, and would be run by the company on the hire purchase agreement till the satisfaction of the advance money.But the bus was not transferred to the complainant, as per the agreement. Consequently, the complainant moved to the trial magistrate who booked the company under sections 403[896], 406 and 420, for violating the terms and conditions of agreement. The company preferred a revision before the Sessions Court to quash the charge against the company. The Session's Judge was of the view that since a corporate body acts only through its agents or servants, the *mens rea* of such agents or servants can't be attributed to the company, and he referred it to High Court for quashing charges. Ned so as to makeWhile accepting the reference and quashing the charge, the Court sent back the case for trial in accordance with law. The court said that the scope within which criminal proceedings can be brought against institutions which have become so prominent a feature of everyday affairs' ought to be widened so as to make corporate bodies indictable for offences flowing from the acts or omissions of their human agents. Ordinarily, a corporate body like a company acts through its managing directors or board of directors or authorised agents or servants and the criminal act or omission of an agent including his state of mind, intension, knowledge or belief ought to be treated as the act or omission, including the state of mind, intension, knowledge or belief of the company.

Aligarh Municipal Board v. Ekka Tonga Mazdoor Union[897]

In this case court held that there is no doubt that a corporation is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent courts directed against them. A command to a corporation is infact a command to those who are officially

[894]HL Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. [1957] 1QB 159 at 172
[895]AIR 1964 Bom 195
[896]S.403 deals with- Dishonest misappropriation of the property, s.406-Punishment for criminal breach of trust and 420-Cheating and dishonestly inducing delivery of property.
[897]AIR 1970 SC 1767

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responsible for the conduct of its affairs. If, they after being apprised of the order directed to the corporation, prevent compliance or fail to take appropriate action, within their powers, for the performance of the duty of obeying those orders, they and the corporate body are both guilty of disobedience and may be punished for contempt.

1.15 Liability of state for acts of employees

In England, the state is not liable for the criminal acts committed by its servants. This is based on the doctrine *Rex non-potestpeccare* which means the King can do no wrong and that the king is not bound by a statute unless he is expressly named or unless he is bound by necessary implication.In India till 1967 the position was similar to that in England and the state was not to be proceeded against under the IPC or under any other statute. However, in *Superintendent and Remembrance of Legal Affairs, West Bengal v. Corpn of Calcutta*[898], a Full Bench of nine judges of the Supreme Court overruled its earlier decision in *Director of Rationing and Distribution v. Corpn of Calcutta*[899] and held that common law doctrine, which states that the Crown is not bound by a statute, save by express provisions or necessary implication, is not the law of the land after the Constitution of India came into effect. Both civil and criminal statutes apply to citizens and states alike. In the case of *Sahali v. Commissioner of Police*[900] also, it was held that with the evolution of strict constitutional regimes and law-sovereign immunity has been waived by most jurisdictions with respect to most subject matter.

1.16 Responsibilities of Licensees

It is well-settled I England as well as in India that a licensee is responsible for the acts of his employee done within the scope of his authority, although, contrary to the instructions of the licensee. In order to fix a licensee with a liability for the acts of his servants, personal knowledge of the licensee is not always necessary. Otherwise, the very purpose of the enactments granting licenses to persons of good character would stand defeated.[901]

[898]AIR 1967 SC 997
[899]AIR 1960 SC 1355
[900]1990 AIR 513
[901]Hari Singh Gour, The Penal Law of India, vol 1, 11th Ed., p 146

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In *Emperor v. MahadevappaHanmantappa*[902], the accused held a licence under Indian Explosive Act 1884, to manufacture gun powder. According to the licence, the manufacturing could take place in a building exclusively meant for that purpose and separated from any dwelling place, highway, street, public thoroughfare or public place by a distance of 100 yards. The accused lived in a village and constructed a building outside the village which complied with this condition and employed women to manufacture gun powder there. One day, the servant took the necessary material for the manufacture of the gun powder, went to the house of accused in the village and performed part of the process of manufacture there. At that time there was an explosion. The accused was charged with breach of conditions of his licence. The accused was held to be liable for the same, in view of the fact that what the servant did was in furtherance of her masters business and not in pursuance of any purpose of her own. What she had done was within the general scope of her employment and the breach of the condition of the licence was committed when she was so engaged.

1.16 Position in England

Under the English Common Law, the maxim was "The King can do no wrong" and therefore, the King was not liable for the wrongs of its servants. But, in England, the position of old Common law maxim has been changed by the Crown Proceedings Act, 1947. Earlier, the King could not be sued in tort either for wrong actually authorized by it or committed by its servants, in the course of employment. With the increasing functions of State, the Crown Proceedings Act had been passed, now the crown is liable for a tort committed by its servants just like a private individual. Similarly, in America, the Federal Torts Claims Act,1946 provides the principles, which substantially decides the question of liability of State.

[902]AIR 1927 Bom 209

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COMMON CAUSE (A REGD. SOCIETY) V. UNION OF INDIA.

- **DEYASHINI MONDAL**

ABSTRACT

One of the most debated topics of almost every country in this world is of the morality of euthanasia. It is worth noting that while some countries have completely legalized the concept of euthanasia, both active and passive, some have different views on both, some partially legalized it and others have completely banned the idea of right to die, even the mere practice of suicide is illegal.

Through this case comment I would like to bring forth the Writ Petition which was filed by the Common Cause society in the Supreme Court in order to legalize passive euthanasia and make it more accepting in the society and a feasible option for people who have become terminally ill and have reached vegetative state. This paper will also include the various precedents which were an important stepping stone to this landmark case. Also, my personal analysis and interpretations will be put forth here.

FACTS

Under Article 32 of the Constitution of India the NGO named Common Cause filed a PIL in the year 2005 for giving the citizens of India, the Right to die with dignity. The PIL was filed in the Supreme Court.

- The PIL was mainly about the plea for legalizing euthanasia in India.
- Initially, a number of letters were written to the Ministry of Health and Family Welfare, the Ministry of Law and Justice informing them about the urgent requirement of passive euthanasia.
- The petitioners did not receive any response from the government.
- After a number of attempts, the NGO finally decided to file the PIL.

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- The argument put forth by the petitioners was that when the right to live with dignity is a person's right until his death, so it can be extended to include a right to a dignified death as well.
- The technologies developed had given rise to such situations where the life of the patient was prolonged unnecessarily which eventually caused mental distress and agony to both the patient and his relatives.
- Further, the petitioners contended for the legalization of living wills where a person who is undergoing continuous pain and suffering will be given the right to authorize the family members to give instructions for the termination of the ongoing treatment.

ISSUES RAISED

The issues before the court were as follows:

1. Whether Article 21 of the Constitution which ensures the Right to Life consists of the Right to Die.
2. Can euthanasia be made lawful simply by legislation?
3. What is the difference between passive euthanasia and active euthanasia?
4. Can people be allowed to give 'Advance Directives', i.e. directives on medical treatment if they become incompetent or unable to communicate in the future?

RATIO DECIDENDI

It was decided by the bench in this case that a very vital part of the Article 21 of the Indian Constitution which states the right to life and personal liberty is that the individuals have the right to die with dignity. The law must permit its citizens the right to remove life support systems when they are in incurable coma or have become terminally ill. The judgement upheld the right of an individual who capable of giving consent, to issue an "advance directives and attorney authorization" which will give direction to the medical authorities to remove the life supporting treatments which he was kept under just for him to stay alive even when in vegetative state.

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The Court in this specific case similarly laid down appropriate propositions regarding the system for execution of *Advance Directives* and provided the recommendations thereof to give impact to passive euthanasia.[903]

RULE

While deciding the judgement for this case, the bench went through various provision of law, three of which are of most importance.

Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law[904]. It is worth noting that the Article starts in a negative tone where the word No has been used to show that no person is above the law and thus depriving someone of their personal liberty unless it is done through a valid procedure of law for valid reasons. Also, it clearly concludes that fundamental rights are enforceable against the State only. However, if a private person or entity if commits an act which deprives an individual of their liberty, no action can be brought against them under the given parameters of Article 21. If such a case arises, Article 226 could be the provision providing justice to the aggrieved party.

There have been various interpretations of the Article 21 in many important landmark judgements. All these interpretations have widened the ambit of Article 21 to include not only the mere breathing of person as life but also provide meaning, purpose and dignity to that existence.

Section 306[905] states that if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. *Section 309*[906] states that Whoever attempts to commit suicide and does any act towards the commission of such offence, shall he punished with simple imprisonment for a term which may extend to one year [or with fine, or with both.

ANALYSIS

A. The Bench's analysis of Euthanasia

[903] Law Times Journal. 2020. *Common Cause Vs. Union of India - Law Times Journal*.
[904] Article 21 of the Constitution of India, 1949.
[905] Section 306 of the Indian Penal Code, 1860.
[906] Section 309 of the Indian Penal Code, 1860.

The question of whether the attempt to commit suicide should remain an offence or be abolished as under Section 309 of the Indian Penal Code. The Court abolished the Section and it was no longer a part of IPC in the case of P. Rathinam v. Union of India[907].

However, in the case of Smt. Gian Kaur v. State of Punjab[908]in the year 1996, the above judgement was overturned by the five judge-bench headed by Justice J.S. Verma where it was observed that Article 21 spoke only of the Right to Life and the Right to die did not come under this ambit. It was also held that both assisted suicide and Euthanasia were unlawful and was against the crux of Article 21 of Indian Constitution.

Next in the year 2011, was the very famous case of Aruna Ramachandra Shaunbaug V. Union of India[909] where the court observed that active euthanasia is illegal all over the world unless there is a special legislation permitting it and passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained. Guidelines for the same were formulated as a result of this case.

The bench had derived the right to die with dignity from the privacy-autonomy-dignity matrix within the guarantee under Article 21 as expounded by the nine-judge bench of the Apex Court in Justice K.S. Puttaswamy (Retd) vs Union of India[910]. It upheld the right of an individual, who is capable of consent, to issue "advance directives and attorney authorizations" to allow for withdrawal of futile treatment or life support technology, if the patient is terminally ill or in a permanent vegetative state

B. Comparative Jurisprudence

The bench has tried to acquire inspiration from the laws and precedents of other countries in order to pass a judgement in this case. One of the first cases which the judges looked into was the case of Airedale National Health Service Trust v Bland[911] where the House of Lords tried the libertarian and the utilitarian methods to approve passive euthanasia where the patient is in complete vegetative state. They also dissected a case of assisted dying as on R(on the application of Pretty)

[907] P. Rathinam v. Union of India, 1994 AIR 1844
[908] Smt. Gian Kaur v. State of Punjab, 1996 AIR 946
[909] Aruna Ramachandra Shaunbaug V. Union of India, AIR 2011 SC 1290
[910] Writ Petition (Civil) No. 494 of 2012
[911] Airedale National Health Service Trust v Bland, [1993] 1 All ER 821

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v Director of Public Prosecutions[912] where the libertarian approach was taken along with the autonomy of the patient. They have also referred to the decisions of the U.S. Supreme Court in Cruzan v. Director, Missouri Department of Health [913], wherein the Court upheld patient autonomy by declaring that in order to oblige the physician to end life support, the State would require a "clear and convincing evidence" of the patient's desire to do so.

Another case referred to was the case of Schloendorff v. New York Hospital Trust[914], which was used to conclude that the autonomy of the patient could be the gateway for the patient to direct the removal of life-support. The jurisdiction of countries like Netherlands and Belgium have very specific guidelines regarding passive euthanasia where, only when the treatment is proving to be futile and the suffering of the patient is unbearable and no alternatives are helping the patient, then only can passive euthanasia be permitted.

C. The procedure and Safeguards as declared by the Bench for the Issuance of Advanced Directives and Attorney Authorizations

It was observed by the bench that only a person in sound mind and in a position to communicate can give consent for euthanasia. There must be two witnesses for the same process. If the doctor feels it is against his ethics and is unable to perform the act, he can appoint a medical board to perform the same. If the board denies as well, the patient and his family can file a writ petition in the high Court under Article 226.[915]

In countries like the Netherlands, the use of advanced directives has been there for a very long time. Given the limited medical resources and scarcity of health care in India, there is ahigh risk that these directive authorities could be misused. It is also kind of difficult to interpret as to when a patient's consent could be considered a valid consent and when the revocation could be considered a valid one. The court could have laid out a procedure where there could be psychiatric consultation for better evaluation of the patient's state of mind.

[912] R(on the application of Pretty) v Director of Public Prosecutions, [2001] UKHL 61
[913] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)
[914] Schloendorff v. New York Hospital Trust, 211 N.Y. 125 (1914)
[915] Article 226 of the Constitution of India

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Euthanasia has brought forth various controversies and has also begin a bunch of concerns mainly based on the moral, legal, ethical, social and religious approach. It has given rise to two groups in regard to its view points among the common people. First, it is the regional group which believes life to be a divine life and should be lived to the fullest and in no way promotes euthanasia of any form.

The second condition is the requirement of consent. The fact that a terminally ill person can give informed consent is hard to interpret. Therefore, there have been many campaigns in the past, some against euthanasia and some supporting. However, after this case, laws have been laid in favour of it. Though this concept opposes the religious belief but is considered beneficial for the society. This has led to a clash between law and religion. In such cases of unreasonable and unjustifiable practices, law prevails over religion.

It can therefore be concluded that the judgement was in the right direction. Individuals who have reached the vegetative state and are undergoing persistent pain and suffering in addition to which medications are showing no signs of improvement of the patient, it only prolongs their life, giving them no liberty to decide how to live it. Not giving them the right to die in a dignified manner increases their sufferings.[916]Hence the decision of the Court is applaudable which gave individuals the right to die in the most dignified manner as a fundamental right when they can no longer bear the pain and anxiety.

Judgement

It was held by the Supreme court in this case that everyone had the right to die with dignity. It allows the removal of life-support systems for the patients who are terminally ill or are in permanent vegetative state. A living will was also allowed by the court for the individuals who decided against artificial life support.[917]

The various propositions and procedures that need to be followed for the execution of the Advanced Directives and additionally provided the guidelines to give effect to passive euthanasia these guidelines shall prevail until the Parliament brings any sort of legislation against it were laid down in this judgement

[916] http://lawtimesjournal.in/common-cause-vs-union-of-india/
[917] Common Cause (A Registered Society) v. Union of India, Writ Petition (Civil) No. 215 of 2005.

INSIGHTS

The Article 21 of the Constitution of India lays down the provision of Right to Life which is considered to be the most important and intensifying provision of our Constitution. This is a very diverse right which can be and has been interpreted in many ways. This Article is one of the most basic fundamental rights which has been conferred to the citizens of India which protects them from any harm to their life as no one other than them has rights over their life. In many instances the judicial system of the country has interpreted the Right to Life to include other rights like the Right to Livelihood, Right to Wholesome Environment, Right to human dignity, Right to Shelter and many more.

According to this Article, every human being has the right to everything which he requires to live a quality life so that he can avail the various opportunities which will eventually improve his lifestyle.

However, the question is whether the Right to Life as enshrined in Article 21 included the Right to Die. The definition of Life under this Article doesn't simply mean living or physical act of breathing.

Meaning of term "life" is defined in Munn v. Illinois, Field, J. termed the Right to Life in the following lines:

"By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with outer world."[918]

CONCLUSION

The Court has followed the doctrine of proportionality wherein the bench has balanced two facets of Article 21. While on one hand it compels the state to preserve human life, on the other it also assures individual autonomy to take decisions about their body. A measured analysis has been carried out by the Court on the topics of social, ethical, economical and philosophical aspects of

[918] Munn v. Illinois, 94 U.S. 113

this issue. When a person's life has lost all meaning, an exception to the sanctity of life was carved out which would allow the person to no longer prolongate his life at his best interest.

Common Cause recognises a constitutional right to die with dignity. But the territories it traverses are much wider. It is clear that the derivative of right to life with dignity is right to not live under particular circumstances Secondly, it also tries to address the issues of dignity attached with right not to live or right to die. Thirdly, the court appears to have gone through a *tour de force* of comparisons with international standards (euphemism for global north), despite being aware of the fact that the idea has to be ultimately situated in socio-economic milieu of India. It must also be noted here that, unlike in the case of P. Rathinam, in Common Cause the court was well aware of narrow confines of discourse in other jurisdictions. But, at the same time, it is still a discourse that hinges upon available medical care in India in contradistinction to the west[919]. At the end, it will result into putting fewer premiums on human lives in India.

[919] https://journals.sagepub.com/doi/full/10.1177/2277401718787956

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LOK ADALAT AS AN ADR MECHANISM IN INDIA

- **IDHIKA A AGARWAL**

1) INTRODUCTION TO THE ADR MECHANISM IN INDIA

Alternate Dispute Resolution, in its simplest sense means settling a dispute without any litigation proceedings or without going to court. In the olden time, the number of litigation cases saw a significant rise and with only a limited number of resources[920] and adjudicators to handle the dispute, the Malimath Committee Recommendations and the 129th Law Commission Report suggested the "amicable resolution of disputes". This lead to the ADR mechanism becoming more and more important as the days passed by. In today's time the parties prefer to use ADR due to various reasons listed below. The legislature continues its efforts to popularise ADR by the increased use of Section 89, Civil Procedure Code, which provides for:

(a)Arbitration- in this the party presents its arguments to a third party (arbitrator) and is used as a substitute to court proceedings when confidentiality is a prime objective. It is a structured and formal process[921] which has the potential to easily replace a normal court proceeding.

(b)Conciliation- the third party (conciliator) has a similar role to that of a mediator however he may be a legal expert and thus, provide valuable legal inputs throughout the dispute. Furthermore, he isn't supposed to take sides or give opinions or participate in reaching the outcome like a mediator.

(c)Judicial Settlement (Lok Adalat)- Court of the people where cases pending in the court or at pre-litigation stage are settled. This shall be dealt with in detail in the following paragraphs.

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[920] Ameen Jauhar, *Hearing the 'Little Guy' - Litigant Involvement to Promote Alternative Dispute Resolution Mechanisms in India*, 15 Socio-Legal Rev. 29 (2019). (SCC OnLine).
[921] NSW Government, Communities & Justice, *Alternative Dispute Resolution*, http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/types_adr/catscorporate_conciliation.aspx.

(d) Mediation- a third party (mediator) is involved, however, he refrains from giving any advice or opinion and just assists the parties to identify the dispute. He doesn't have an active role in the decision/ outcome of the resolution.

Referral to ADR is also mandatory in a civil suit.[922] Legal Service Authority Act, 1987 and the Arbitration and Conciliation Act, 1986 facilitate making access to justice easy for matters of family dispute, commercial disputes and other disputes between the parties. Hence, Mediation and other forms are a positive step towards the expansion of access to justice so as to inhere the complete notion of justice.

2) OVERVIEW OF LEGAL SERVICES AUTHORITY ACT, 1987 OF INDIA

The Legal Services Authority Act, 1987 is committed to provide free and good quality legal services to the weaker sections of society to ensure that no citizen is denied of the fundamental opportunities for securing justice solely by reason of economic or other disabilities. It also aims to organize Lok Adalats to safeguarding the operation of the legal system promotes justice on the basis of equal opportunity.

Origin of Lok Adalats- The Legal Services Authorities Act, 1987 established Permanent Lok Adalats in India under Section 22 B and are defined in Section 22 A. It is a method of pre-litigation settlement.[923] It highlights the state's approval to the idea of using alternate dispute resolution mechanisms different in form and substance from the formal courts. It is in furtherance of the legislative efforts to make use of this technique prescribed in Sec. 89 of CPC.

As an alternative dispute settlement mechanism, the unique Indian institution called Lok Adalat has, as expected, received statutory status.[924] Matters should be referred to the Lok Adalat in accordance to Section 20 of the Legal Services Authorities Act, 1987.[925]

[922] Afcons Infrastructure Ltd. v. Cherian V Constructions Pvt. Ltd., 2010 8 SCC 24.
[923] Section 22 C; Chapter VI, The Legal Services Authority Act, 1987.
[924] K. Gupteswar, *THE STATUTORY LOK ADALAT : ITS STRUCTURE AND ROLE*, Journal of the Indian Law Institute, Vol. 30, No. 2 (April-June 1988), pp. 174-183.
[925] Kamalamma v. Honnali Taluk Agricultural Produce Ltd., (2009) SCC OnLine Kar 744.

Need of Lok Adalats- Access to justice has been held to be a fundamental right,[926] not only in India but also according to the International Covenant on Civil and Political Rights (ICCPR),[927] Universal Declaration of Human Rights (UDHR),[928] the United Nations Convention on the Rights of the Child (UNCRC)[929] and the Constitution of other Countries.[930] The right to justice is also fundamental to the rule of law and so while drafting our Constitution we have made social justice an inalienable claim on the state (Article 39-A).[931] Legal Aid was also ensured through the "Committee for Implementing Legal Aid Scheme" (CILAS). It is also in furtherance of the International Human Right Law. The term 'access to justice' is most commonly used to ensure that every person is able to invoke the legal processes for the legal redress irrespective of their social and economic capacity.[932]

Earlier, the Indian Judiciary was not very open to the idea of legal aid ass observed in cases like *Janardhan Reddy v. State of Hyderabad*[933] and *Tara Singh v. State of Punjab*[934] but this position has changed now. It is deemed to be one of the basic rights[935] and it is now entrenched firmly in the Legal Services Authorities Act, 1987.[936]

3) CONSTITUENT BENCH OF THE LOK ADALAT

To resolve the disputes and achieving the objective of the Lok Adalat, the panel members need to act as mediators, conciliators, negotiators or arbitrators. A bench of the Lok Adalat generally consists of 3 people[937]

[926] Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81; Article 39A, Constitution of India, 1950; MH Hoskot v. State of Maharashtra, (1978) 3 SCC 544; Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401.
[927] Part II, Article 2, ICCPR.
[928] Article 8, UDHR, 1948; Article 10, UDHR, 1948.
[929] Principle A.6, Guidance Note of the Secretary General, *U.N. Approach to Justice for Children*, September 2008, https://www.unicef.org/protection/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf
[930] Article 34, South African Constitution, 1996; Sixth Amendment, U.S. Constitution, 1791; Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's,* Osgoode Hall Law Journal, Volume 22, Number 1 (Spring 1984).
[931] Article 39-A, Constitution of India, 1950.
[932] A.K. Sikri, J. and Shreya Arora, *Mediation: New Dimension of Access to Justice,* Nyaya Deep the Official Journal of NALSA, Vol. XII Issue 3 July 2011.
[933] Janardhan Reddy v. State of Hyderabad, 251 SQ 17.
[934] Tara Singh v. State of Punjab, AIR 1951 SC 411.
[935] Raymond v. Honey, 1983 AC 1 (1982 (1) All ER 756).
[936] Justice M. Jagannadha Rao, *Access to Justice*, 16, http://www.delhihighcourt.nic.in/library/articles/Access%20to%20justice.pdf
[937] https://nalsa.gov.in/lok-adalat.

i. A presiding officer

ii. Lawyer/advocate

iii. Social worker/person of great influence in the town

4) NATURE OF CASES BEFORE BENCH

There are 3 types of cases that can be filed before the Lok Adalat[938]

(i) Any case pending before the Court

(ii) Any dispute not brought before the court but is likely to be filed by the court

(iii) Compoundable offences

Only Criminally Compoundable offences could be tried in a Lok Adalat. Such offences are classified in Section 320, CrPC.[939] Such offences are private in nature and not very serious. The complainant can enter into a settlement and receive gratification[940] without the permission of the court and drop all charges against the accused in return. Majority of the cases are related to theft in the Taluk and District Level of the Lok Adalat. The court has also allowed to take Offence under Section 138, Negotiable Instruments Act, 1881 to be heard by the Lok Adalat in compliance to the guidelines set out in *Damodar Prabhu Case*.[941]

5) USE OF ADR BY BENCH

The main methods of ADR are mediation, negotiation, conciliation and arbitration and Lok Adalat is a fine blend of all of these. The main method incorporated was the conciliation since, the panel members draw up conclusive terms of the settlement after listening to the detailed discussions and

[938] Section 19(5), Legal Services Authorities Act, 1987.
[939] Section 320, Criminal Procedure Code, 1973.
[940] Javerbai v. Smt. Maria Bemvinda Da Costa, AIR 1971 Goa 46.
[941] Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663.

viewpoints of both parties.[942] The panel generally aims at an amicable resolution of the dispute and thus facilitate the conflict management like a mediator but also provides viable options and professional legal expertise alongside thereby resembling a conciliation settlement.

6) CONCLUDING REMARKS

In the Lok Adalat, the people, be it the complainant or the accused, both have a great amount of respect for the panel sitting before them. They were very grateful for such a platform. All the proceeding are supposed to be very fast and hassle free from the point of view of both the parties. Furthermore, the only documentation needed in most situations was any government ID Proof. Thus, it has less technicalities than the normal court.

It is also said that the present system of administration of justice is less responsive to meet ends of justice. Certain advantages of Lok Adalat are :

i. Less formal proceedings- The Lok Adalat becomes a favourable option due to absence of the typical court formalities like in a normal trial.[943] It promotes access to justice extensively.

ii. Less technical procedures- They are not distressed with rigorous practices. The procedure is laid down in the Legal Services Authorities Act, however the main focus of the panel is the disposal of cases rather than the strict compliance of the court procedures.[944]

iii. Inexpensive and Expeditious- The lack of focus on formalities ensures speedy redressal of disputes.[945] Furthermore, the summary nature of proceedings and the absence of appeal ensures economic friendly and fast disposal. Is also reduces the lawyer costs since legal representation is not a mandate and all the more, limited amount of time is required to be spent by the lawyer.[946]

[942] Anurag Agarwal, *Role of Alternative Dispute Resolution Methods in Development of a Society: 'Lok Adalat' in India,* IIMA, Novemebr 2005.
[943] Spain R. Larry, *Alternative Dispute Resolution for poor: Is it an alternative?* 70 ND Law Rev. 269 1994.
[944] Kim Rocha Couto, *Dispute Resolution through Lok Adalats,* KLE Law Journal page 61 (Manupatra).
[945] 76 N.Y.U L. Rev 1771 200; Observation of Justice Ramaswamy.
[946] 1985 Wis. L. Rev. 1366.

iv. Participatory- The parties are free to approach the authorities. The parties mould their remedies which would help in the eventual amicable settlement of disputes.[947] Such a settlement would be reflective of the party's own consent.[948] Since the willingness of the parties is an important factor, they have an option to discontinue at any time during the process. Furthermore, the literal translation of Lok Adalat is people's court and thus, great emphasis is given to the parties.

v. Transparency- other ADR resolutions are carried out in private and are confidential in nature, but the Lok Adalat is open to public and in presence of the concerned parties.

vi. Amicable Settlement of disputes- the Lok Adalat also aims to reach a win-win situation for both the parties such that the relationship of both the parties is not affected. It delivers a decision to the satisfaction of both parties and their lawyers.[949]

vii. Legal Experts- The panel consists of a presiding officer, advocates or even sometimes a social worker or an influential person of the town. Thus, it comprises of the immense legal knowledge of a judge as well as an advocate to reach a solution.

viii. Finality- No appeal is allowed on an award of the Lok Adalat. This highlights the intention of the legislature to end litigation reached through the consensus of the parties. It also gives the award a formal enforceability like that of a decree[950] of a court.

However, it is also observed that people do not consider the award of the Lok Adalat with as much importance as they treat a court's decree. Furthermore, in certain instances, people tend to just withdraw proceedings, thereby defeating the entire purpose of administration of justice. They prefer to settle at a lower compensation than what they actually deserve just to get rid of the proceedings. The objective of the courts are to ensure the correct party wins, the Lok Adalat aims at a win- win situation, thereby with an ability of causing slight injustice to an innocent party.

The Lok Adalat handles the similar nature of cases that a normal court does, thereby not providing any new remedy or new way to access justice. Even though the Legal Services Authority

[947] Spain R. Larry, *Alternative Dispute Resolution for poor: Is it an alternative?* 70 ND Law Rev. 269 1994.
[948] Agarwal Nomita, *Alternative Dispute Resolution,* Nyaya Deep, January 2006, pg. 71.
[949] Patel Girish, *Crippling Lok Adalats, Combat Law*, Vol. 6 Issue 6, December 2007, pg. 53.
[950] Section 96(3), Code of Civil Procedure, 1908 (consent decree).

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(Amendment) Act, 1994 increased the jurisdiction of the Lok Adalats to "any matter",[951] cases that need strict punishments and reprimands etc, cannot be entertained in Lok Adalat.

Every experiment like the Lok Adalat is bound to have advantages as well as drawback. It only becomes important to weigh which side is heavier. In the case of Lok Adalats, the advantages are immense as compared to the disadvantages. Lok Adalat, though available to everyone, is discretely targeted towards the weaker section so of the society. When the use the facility of Lok Adalat, the purpose is fulfilled. Since, the burden of courts is reducing by such a measure, the same is beneficial and shall be implemented.

[951] Section 19(5) (ii), Legal Services Authority Act, 1987.

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MARITAL RAPE: AN EVIL THAT NEEDS TO BE CRIMINALISED

- **SHRUTI CHAUDHARY**

Rape is one of the most devastating forms of violation of a woman's privacy and nobility. Due to increase in the number of rapes in the country, some laws were amended in 2013 on the recommendations of the Justice J.S. Verma Committee Report. However, the non-criminalisation of marital rape remains one of the biggest disasters that exist in the criminal law of India. Marital Rape has not been criminalised as in India, as it is believed that in a marriage, there is implied consent. And our society is mistakenly hit by the bizarre concept where sex and marriage seem to have some kind of togetherness and it is often believed that marriage is rather a sexual contract. What people fail to understand is that rape is still rape even though the parties are in the relation of husband and wife. Many developed as well as developing countries have done away with the exception of marital rape in their penal statutes and this has been recommended in India as well by the Law Commission and the report of Justice Verma Committee[952] but no material action has been taken as yet. It is the need of the hour for marital rape to be criminalised as it leads to a violation of Fundamental Rights of women.

INTRODUCTION:

Marriage in Indian society is considered as a sacrament; it is the very foundation of a stable family and a civilised society.[953] However, it has given birth to sexual cruelty and various forms of brutality by the husband. Marital rape is one such brutality. Rape is understood as an act of having sexual intercourse with a woman without her consent. What is non-understandable is that "Why should marital rape be different?" It is just like rape. There is one difference and that is a horrible truth - "A rape is generally a one-time occurrence, but marital rape allows the offender to make the victim suffer over and over again and the perpetrator here is not a stranger but the husband."

[952] Justice J.S. Verma, Rape and Sexual Assault, Report of the Committee on Amendments to Criminal Law (Jan.23, 2013), http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.
[953] Prof. Kusum, *Family Law I* 105-06 (Lexis Nexis 3rd ed., 2003).

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Just because the man who is doing it is the woman's husband doesn't mean he can't destroy her integrity. Her consent is her own and nobody else's, not even her husband's. The whole concept of Marital Rape is not recognised in India because the women are known to be the property of the husband and their own independent identity is not recognised. In short, Marital Rape is a non-consensual act of violent subversion by a husband against the wife where she is physically and sexually abused. Marital rape can be more agonizing and abusive than stranger rape. It is suffering at the hands of a spouse, who is actually supposed to be a source of trust and care, produces feelings of betrayal, subjugation, depression, loneliness, diffidence, sorrow, disappointment, and isolation in the woman. It can be defined as any forceful and vigorous intercourse or penetration (anal, vaginal or oral) by the husband obtained by force, threat of force or when wife is unable to consent.[954]

The spousal exemption to rape statutes is a significant legal issue and is a grave emotional trauma for a woman. The issue of marital rape in India, has shown a giant ambiguity in the country's criminal law and judicial law. The fact that there is acceptance of unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is doesn't give consent indicates the status of women in our society and within the very institution of marriage. Women in India are brutally bound by societal shackles, marital rape being the harshest and the unlawful one. Rape is a crime against one of the most basic and cherished human rights particularly, the fundamental right to life enshrined in Article 21 of the Constitution.[955]

In a patriarchal society like India, women are taught and expected to follow the husband and are supposed to fulfil his needs. A man forcing himself upon his wife is seen as if he is claiming his conjugal rights and the wife is his shattel. This anomalous concept comes from the very notion that when a man comes home tired after a day's work then the wife must not refuse him the pleasure. The problem here lies with the fact that a woman's labour at home and the workplace is ignored. She becomes a bare object of pleasure for the husband. Her integrity, hard work, choice – right word being the consent, are nowhere recognised or considered. It seriously needs to be perceived that introducing the concept of marital rape under Indian system is the urgent need of the hour to secure women rights in the largest democracy.

[954] Berger R.K, *Wife Rape: Understanding the response of the Survivors and Service Providers*, (1st ed., 1996).
[955] INDIA CONST. art.21.

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Today where on one hand the country is crying for equality, respect, security, safety of the womenfolk, on the other hand, it is not recognizing her right to say NO. The reasoning that it would destroy the family norms seems so pathetic and ugly and saying that courts would be flooded with false cases of marital rape is even beyond a worse argument. Why can't we understand the gravity of this offence? We need to believe that the steps may be taken to ensure that provisions of such law must not be misused. But altogether denying to encompass marital rape under penal laws would do much more harm than good to families and to societies at large. It needs to be put into the minds of males, rather the whole society that a woman is not an object and marriage is not a license to have sex anytime, anywhere at their wish and rape whether committed with wife or with any stranger girl, it still remains rape only.

THE LAW AND CONTRADICTIONS:

Under Hindu marriage act, 1955[956] one of the **'conjugal duties'** of the wife is to provide sexual satisfaction to her husband, a very archaic thought congruent to the thoughts of a patriarchal society.

Section 375 of Indian Penal Code[957], defines the Offense of Rape stating that a man is said to commit "rape" if he —

- penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person; or
- inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her do so with him or any other person; or
- manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her do so with him or any other person; or

[956] Hindu Marriage Act, Act No. 25 (1955).
[957] Indian Penal Code, Act No. 45 (1860).

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- applies his mouth to the vagina, anus, urethra of a woman or makes her do so with him or any other person, under the circumstances falling under any of the seven descriptions mentioned under the act.

Followed by two Explanations and two Exceptions, in this issue only Exception 2 is a seriously problematic issue, as it says –

"*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*"[958]

The Exception to this clause was clearly given but it was never elucidated why such a discriminatory clause was added to it. The Government answered this in the most vague way possible, by saying- "Exception 2 (to Section 375 IPC) deals exclusively with private affairs of husband-wife based on traditional social structure and hence can't be said to be unconstitutional and in violation of Articles 14 to 21 of the Constitution of India". The actual purpose with which this law was enacted could be extracted out of the UK and the US as at that point of time it was considered that the stature of women was politically, economically, socially, culturally, humanly and sexually inferior to that of the men. These infirmities brought forth the doctrine that on marriage, the rights of the women were inferior to the rights of her husband. She was supposed to worship only and only her husband. We can consequently recognize that how the conception of marital rape exception is endowed in an entire set of unfair and discriminatory practices that rationalized repudiation of a woman's recognition and liberty, and confined her political, economic, social and sexual status in her husband. This whole concept now stands null as our society is much more progressive and understanding and defined by the ideals of equality between men and women, which is exactly why marital rape should be criminalised.

The Constitution under Art.51A (e)[959] mentions that it is the fundamental duty of all citizens of India to condemn practices that are deprecatory to the pride and respect of a woman. Thus the legislative structure should construct an amendment under Section 375 of IPC and rescue married woman from the evil of unwilling sexual intercourse at the hands of their husband.

[958] Exception 2, Section 375, Indian Penal Code, Act No. 45 (1860).
[959] INDIA CONST. art. 51A, Cl. e.

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The Justice Verma Committee[960] in 2013 mentioned in its report that the Exception to Section 375 needs to be revoked right away. Even Cruelty under Section 498A of IPC limits itself to Mental and Physical abuse and the occurrences of Sexual Abuse often go unpunished. However under section 376-B[961], sexual intercourse with one's own wife without her consent under a decree of judicial separation has been made punishable by up to 2 to 7 years of imprisonment. But the question remains unanswered- what about those married women who are not separated?

THE MINDSET:

Today, India's priority is economic reforms and we may have brought new fiscal policies, new economic strategies, but we fail to bring the much needed change in the freedom and rights of women. Our society is on the verge of transformation and we always say that there will be better tomorrow, but we can't have this better tomorrow unless we start to believe in the idea of a Better Today and start working towards that. The issue of marital rape is not new: it was always there but just like the practices of Sati and Dowry, it also needs at least some legal and social backing. It would be practicable only then that we have a better greater future. Crime and society are interlaced in a mess so dense that it will take a responsible understanding of society to make a bold declaration as to what constitutes an offence and what doesn't. The subject of marital rape in this backdrop, will call for a thoughtful but composed approach, and the premier stride in that guidance is to acknowledge the emergence of the convention of marriage itself.

The Centre, states that marital rape cannot be considered as a crime in a country, where culture and traditions hold a greater position as it keeps the institution of marriage above the bodily integrity of women. Later, the Supreme Court also ruled that a man forcibly having sex with his minor wife between the ages of 15 to 17 years of age, should not be regarded as rape. The Centre said that the exception in Section 375, is to 'save the institution of marriage'. It is so heart-breaking to look at the statement of the Minister for women and child development, Maneka Gandhi regarding marital rape. She said "It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the

[960] Justice J.S. Verma, Rape and Sexual Assault, Report of the Committee on Amendments to Criminal Law (Jan.23, 2013), http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.
[961] Indian Penal Code, Act No. 45 (1860).

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society to treat the marriage as a sacrament, etc." So, primarily, Marriage in India is, kind of a sexual contract since it offers the man implied consent to have sex in perpetuity with his wife. It fortifies the man's "possession" rights over the wife. This refuses the woman any right over her own body, its sexuality and its reproductive function. Denying to criminalise marital rape is to welcome that sexual force against a woman without her consent, so long as it is within a marriage, will be endorsed by the society and the government. If women are to exercise control over their lives, they have to have the right to say no to their husbands without being socially penalised for it. The anathema of the 'wifely duty' and the 'conjugal right' are evils that must end because marital sex, as all sex, must always be, with mutual willingness and enjoyment.

This whole idea is such a misconception for the respected minister as well as the government or anyone who thinks such way. First, it's an affirmation of patriarchy's vapid old argument that since marriage is a sacrament, marital rape is inconceivable. Second, it's furnished by the preposterous claim that factors like poverty, illiteracy and social customs stand in the way of recognising and punishing — the crime of spousal rape. In other words, a husband may force his wife to have sex with him, and beat her into submission if she is unwilling, because some ridiculous entrenched feudal, traditional and patriarchal attitudes quietly permit the husband that he has the freedom to do so — because, well, she's not just his wife but his property too. And since when did poverty, illiteracy and regressive social backwardness become valid reasons for not enacting must-needed progressive laws? Social acceptance of a wrong cannot be the reason for the state to hinder at outlawing it. If that were so, we would still be looking at our widows burning towards the funeral pyres of their dead husbands. And, yes, marriage is a sacrament. But it is a sacrament between two partners who are equal and thus, deserve to be treated equally. It does not give any right to one to commit sexual violence on the other. Merely because the wife has given her consent to have sexual intercourse inside marriage, a woman cannot lose her liberty to determine WHEN she wants to have intercourse and IF she wants to have it on a particular day or not. Marriage only sanctifies consensual sex between two individuals. It certainly does not sanctify rape. A husband forcing himself upon his unwilling wife is as much an act of rape as it is when a stranger assaults and violates the dignity of a woman. Yes, poverty or illiteracy or age old traditions and customary beliefs could keep a lot of women silent and prevent calling out husbands who torment them. But there should a law for those who want to punish their violators. The word will appear and spread

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and awareness will arise. As more victims raise their voices and seek relief, a day will come when the rapist-husbands will be afraid the next time he even thinks of sexually abusing his wife.

Our society needs to be rational enough to put the absurd thinking away and actually believe in the norms of equality. They really need to open their eyes.

A much bigger and another important question is how can we mould the patriarchal social norms and customary beliefs? In the NFHS survey[962], for example, 54 per cent women said it is fair to say that violence by husband is justified. Clearly, the law alone cannot transform the thinking. But a reform is an essential need of the hour, be it today or be it tomorrow. Even if we amend the clause of Section 498A[963], by adding Sexual Abuse in it, there may be a considerable improvement resulting out of it. As it is well-said that 'Even a Mountain can't be moved unless one starts to pick the small Stones.'

Today, while unwilling sexual intercourse between a husband and a wife is recognized as a criminal offense in almost every country of the world, *India is one of the thirty-six countries where marital rape is still not criminalised.*[964] All these countries recognised the reality that rape within marriage is yet another materialisation of the subjugation of women in society. It's a violation of women's right to autonomy with regard to her body, a right which is absolute even in the marriage. Rape is a strike on a woman's fundamental human rights. No matter who is the perpetrator, rape must be penalized. It really is as simple as that.

We live in a country that promises equality for both men and women. Then, why should the women be subjected to such atrocities where their consent holds no value, especially on their own body? WE NEED A CHANGE, IMMEDIATELY.

MARITAL RAPE AND VIOLATION OF HUMAN RIGHTS:

Human beings, by integrity of their being human have some unassailable rights, known as 'human rights', or fundamental rights in India. These rights are inviolable immaterial whatever may be the

[962] National Family Health Survey, 2015-16.
[963] Indian Penal Code, Act No. 45 (1860).
[964] https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12

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circumstance. Women should be given equal respect and chance to enhance her identity even after marriage as it is clearly prescribed by our constitution under ***Article 21***[965] and ***19(a)***[966].

In the case of ***Bodhisattwa Gautam v Subhra Chakraborty***[967], the Supreme Court ruled that rape is an offence that is against basic human rights and a violation of one of the victim's most cherished of fundamental rights - the right to life and personal liberty constituted in Article 21 of the Constitution.[968]

When a person is charged for causing any kind of physical or mental injury to his/her spouse under domestic surroundings, then why it is not done when it is related to their sexual relationship. It is also against the Hindu religion, tradition and values or any religion for that matter, that a husband rapes his wife by exercising coercion, fear, pressure and threat. Sexual intercourse in conjugal life is a normal course of behaviour but it must be based on consent of both the parties. No religion may ever take marital rape as lawful as the purpose of a good religion is not to propagate hate or cause loss or harm to anyone.

A marriage does not mean that women are required to become slaves. Thus, women are not supposed to lose human rights because of marriage. As long as a person lives as a dignified human being he/she has absolute authority to exercise natural fundamental human rights. To agree that the husband has a right to rape his wife after the marriage is to deny the acknowledgement of independent existence of a woman, her right to live with self-dignity and right to self-determination. Any act which results in non-existence of a woman not recognising her individual identity, adversely affects her self-respect, infringes upon her right to independent decision making and depicts her like a slave and treats her like an object or property. To coerce women to use a part of her body against her consent is a serious violation of her right to live with integrity and it is an exploit of her human rights. The Constitution has guaranteed the human beings the right to privacy and right to live with dignity. Therefore, it cannot be said that marital rape is permissible.

STRATEGY TO CRIMINALISE RAPE:

[965] INDIA CONST. art. 21.
[966] INDIA CONST. art. 19, Cl. a.
[967] Shri **Bodhisattwa Gautam** v Miss **Subhra Chakraborty,** 1. S.C.C. 490 (S.C.:1996).
[968] INDIA CONST. art. 21.

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Studies have been conducted all around the world showing that health diseases caused by marital rape include HIV and some other sexually-transmitted diseases, vaginal bleeding or infection, pain during sex, urinary tract infection etc. The physical violence associated with marital rape can also lead to complications during pregnancy, resulting in health problems for both women and their off-springs.

To fight this perpetrating menace of marital rape, following steps need to be taken. First of all, marital rape needs to be recognised. Marital rape is a common but a hugely under-reported crime. A study was conducted by the Joint Women Programme, an NGO and it found that one out of seven married women had been raped by their husband at least once since they have been married. They frequently do not report these rapes because there is no law to support them. There are various risk factors associated with marital rape. These include early age of marriage, lack of societal and legal support and lack of acquaintance with the husband. We need to understand that it is as heinous as murder or any other heinous crime in a court of law.

Also, to say that the convention of marriage will be jeopardized by a law to criminalise marital rape is to either underestimate the very real love and bond that hold good marriages together despite many differences, or to accept that sexual abuse and force is so common in marriages that no man can be controlled by such a law. A marriage in which a husband rapes his wife is already demolished. It may be one of the objectives of matrimonial laws to hold marriages together but it cannot override the fundamental premise behind a law in general and that of criminal law in specific, which is to safeguard and conserve the bodily dignity of a human being. Thus, concealing justice and repudiating equal protection for sustaining marriages, at best, can be an illegitimate goal of law. The law should not motivate coerced inhabitation and should not guard a raping husband.

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a part as a signatory, has observed that this type of discrimination against women breaks the postulates of equality of rights and honour for human dignity. Further, the Commission on Human Rights has also recommended that marital rape should be criminalized.

The instant need is criminalization of marital rape under the IPC. Section 375 of IPC needs to be amended by the legislature. Also, Section 376E could be added to describe the punishment

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specifically for marital rape as recommended in 172nd Law report.[969]. Not just this, the wife should have an alternative of getting to file for of divorce if the offence of marital rape is proved to have happened by her husband. But, just a statement of a conduct as an offence is not sufficient. Something more substantial is required to be done for making the judiciary and the police aware and prudent. There is also a requirement to instruct the masses about this crime, as the real purpose of criminalizing marital rape can only be fulfilled if the society recognizes and confronts the prevailing myth that rape by one's partner is insignificant. Societal obloquy and the chauvinistic and isolationist attitude of the people should change. Rape is rape and a marriage cannot be a defence for committing such an offence. The foremost step to stop such an offence is to empower and educate the women to stand up against such inhumane acts would abolish the existing marital rape exemption. It is time that, not only women but every responsible citizen should start raising voice against such injustice.

CONCLUSION:

Efficient laws should be enacted, like criminalizing marital rape. Both men and women, from all arenas should come together and participate in raising awareness among the public that marital rape is a crime. The initiation should direct towards greater investment in health, legal and rehabilitation services for people affected by domestic violence including sexual violence. The judiciary in India, by enacted the much needed laws can bring a legal reform and lead the way towards the principles of equality by inspiring women to take lead and report cases against the abuse and violence they face every-day and help bring a change in the way marital rape is perceived in the society. Marital rape needs to be recognised. The conventional notion of "marital reclusion" is disruptive of women's freedom and bodily dignity. It is this very idea that makes it so gruelling, even today, to get marital rape criminalized and domestic violence prosecuted.

The main motive is that the first essential pre-requisite for any legal amendment or enactment on this front to be sufficiently successful is that a noteworthy quota of social change requires to be controlled in the mankind. The deeply rooted communal notions of patriarchy should be done away with so as to accredit the suitable environment for any legal restorative to really assist the hapless

[969] Justice J.S. Verma, Rape and Sexual Assault, Report of the Committee on Amendments to Criminal Law (Jan.23, 2013), http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.

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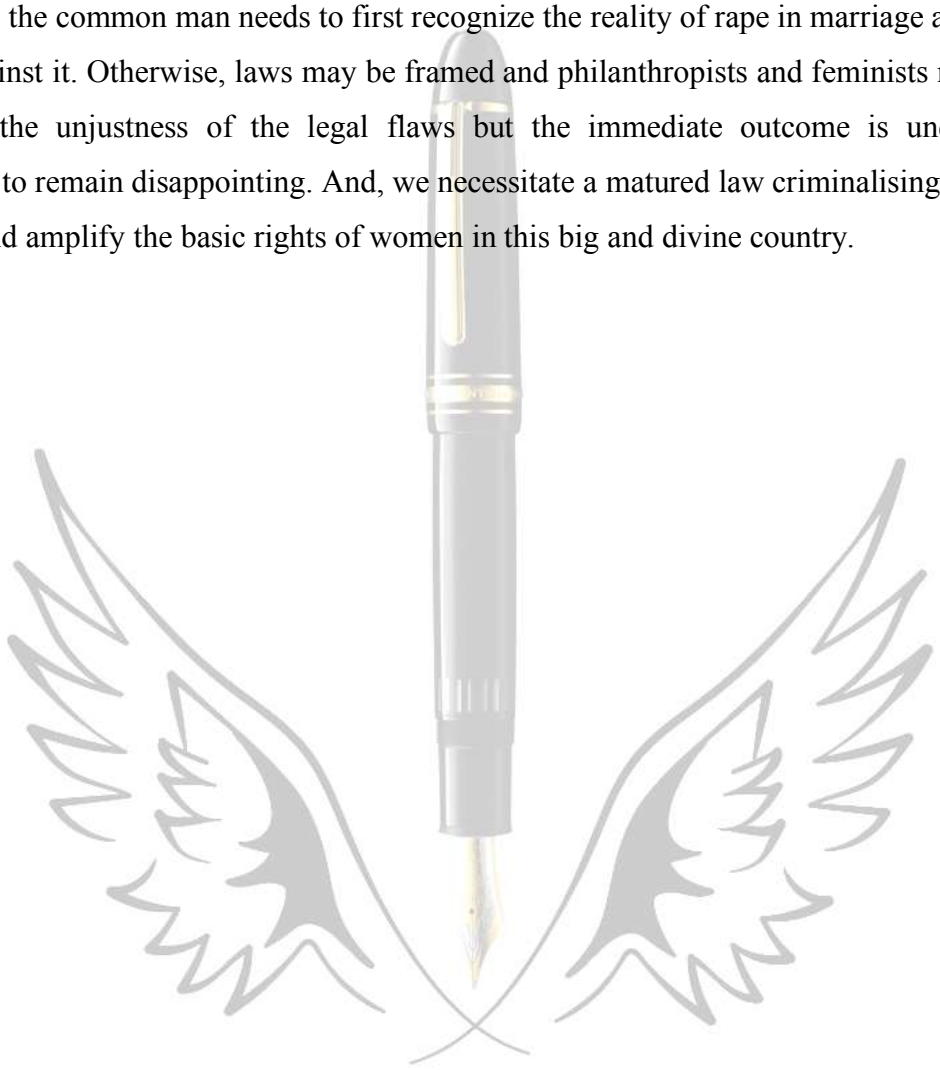
victim. The legal aspect is not the sole inadequacy, but the whole society varying from the noble judiciary to the common man needs to first recognize the reality of rape in marriage and then take a stand against it. Otherwise, laws may be framed and philanthropists and feminists may keep on protesting the unjustness of the legal flaws but the immediate outcome is unquestionably guaranteed to remain disappointing. And, we necessitate a matured law criminalising marital rape to shield and amplify the basic rights of women in this big and divine country.



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ADMISSIBILITY OF MAPS AS EVIDENCE IN INTERNATIONAL DISPUTES

- **ASTHA NAHAR**

ABSTRACT

Maps are an important source of evidence in international law, however, the limitations that maps serve are of far greater importance and must be looked into consideration. To determine the location of the boundary, courts have often looked into the relevancy of maps and the kinds of maps that can be admitted in the courts of law. However, even official maps have been looked at with a reserve when it comes to the admissibility of these evidences. Several cases such as the Palmas Island Case or India v. Pakistan (Rann of Kutch Arbitration) have analysed the relevancy of maps as an evidence in international boundary or territorial disputes. Thus, the broad functions of maps are being analysed in the present article, including using evidence for both proving questions of facts as well as proving the existence of a legal obligation through treaty provisions. This paper will consider the role of maps as evidence to establish legal facts, legal principles as well as the frailties of the using maps in the court of law.

Keywords*:* Evidence, maps, relevancy, facts.

INTRODUCTION

Maps are vital proof and an important source of evidence in International Law, yet they have constraints in terms of how they create certainty in dispute settlement. International Courts have often, in the past, applied maps as if they were flawless. Some courts have, however, have not accepted maps as an undisputed source of proof since maps are results of decisions, mistakes and suppositions, and they can create severe implications in international relations if taken into consideration as a primary source of evidence. Using Maps as evidence in International Law,

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mainly boundary disputes, has not always been uniform or consistent. Further, it has given rise to a lot of arguments regarding their meaning and the effect that it creates in dispute settlement.[970]

To determine the location of a boundary, international or national, courts have been unwilling and doubtful in admitting maps as a primary source of evidence, regardless of its authority or designation. It is often argued that maps are not objective scientific instrument, but are rather creations of human who try to assert authority[971], and are often for subjective or political purposes.[972] It is also argued that they only appear to be scientific instruments, but in reality, are not appearing by themselves[973], but are imperfect models that represent realities for certain purposes, only to fulfil political needs of a country or to intentionally response to a given question. Thus, for whatever need the map is used, it has to be deliberated upon and evaluated in order to accept it without any reasonable doubt of it being inaccurate or erroneous.

Ian Brownlie had previously observed that maps serve various functions[974], including preparatory work, interpretation and other forms of proof of facts. Further, he also classifies maps as serving the purpose of proving something, fact or law. Thus, the present article, apart from considering the role of maps as evidence in international boundary disputes, will also consider the role of these documents as proving questions of facts and of law. Thus, it will examine maps as a fact or a law or a fact satisfying conditions of law.[975]

Maps as Evidence: Facts, law or mere hearsay?

Relevancy of Maps as evidence in proving facts in International Law

While the use of maps as an evidence in international relations can be traced in the previous chapter, they however, function in a very simpler manner. They can be used to prove facts, or establish legal relations or even, creating a new law. The use of map as an evidence can be as a fact, or law or even a fact that establishes a law.

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[970] *Certain Non-Cartographical Evidence*, 17 REP. INT'L ARB. AWARDS 252 (1980).
[971] JW Crampton, *Maps as Social Constructions: Power, Communication and Visualization*, 25 PROG HUM GEOG 691 (2011).
[972] JB Harley, *Deconstructing the Map*, 26 CARTOGRAPHICA 1, 9 (1989)
[973] MH Edney, *Theory and the History of Cartography*, 48 IMAGO MUNDI 185, 188 (1996).
[974] IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS 156-61 (1998).
[975] William Thomas Worster, *Maps Serving as Facts or Law in International Law*, 33 CONN. J. INT'L L. 279, 281 (2018).

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Maps as an evidence, can prove facts such as the existence of placement of a geographical area[976], watershed or an island.[977] In many cases, maps were used to establish such kinds of facts.[978] Many cases have also used maps to establish facts that are not in issues, but while proving such facts, the existence of some other fact would impeach a witness.[979] Thus, these instances show where and how maps have been used as an evidence in order to prove a fact that is or is not in issue. International courts have assessed maps as evidences through adopting maps in a very cautious and limiting tactic.[980] The ICJ, in several instances, has been very reluctant to use maps as a primary source of evidence and uses it only as a secondary evidence, which can be easily contradicted by the other, as in the Rann of Kutch Arbitration case.[981] In this case, and as argued in many others, maps is argued to be a mere hearsay evidence, which is not based upon original scientific survey or as adopted by the officials in charge of many a map through the process adopted by the official government of the country.

However, there are cases where the ICJ has considered maps as an evidence and has admitted it in the court based on its evidentiary value and has admitted it on merits, though its precise value is still in question.[982] There are some situations where maps have been accepted as primary evidences and are being regarded to being highly significant, for example when a map received a very high degree of publicity[983]. Thus, maps can serve as evidence, however it can only be done so with caution and relied upon only in case of full accuracy.

Maps as evidence in International Boundary Disputes

The courts have been reluctant to place much evidentiary value to maps in deciding international as well as national boundaries, regardless of its value and authority. This is more noticeable when maps show territories that are of less knowledge to the people or that are inaccurate or the ones that are drawn to promote a country' claim and political views. Even official maps are being

[976] Land & Maritime Boundary between Cameroon & Nigeria (Cameroon v. Nigeria), Preliminary Objection, I.C.J. 1, ¶ 30 (1998).
[977] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, I.C.J. 61, ¶ 184 (2009).
[978] Frontier Dispute (Burk. Faso/Mali), Judgment, 1.C.J. 554 (1986); The Minquiers & Ecrehos Case (Fr./U.K.), Judgment, l.C.J. 4 (1953)7; Land & Maritime Boundary between Cameroon & Nigeria, supra note 7.
[979] Prosecutor v. Stanislav Galid, IT-98-29-T, 455 (2003).
[980] Indo-Pakistan W. Boundary (Rann of Kutch) (India v. Pak.), 17 R.I.A.A. 1, ¶¶ 83-88.
[981] Ibid.
[982] Maritime Dispute (Peru v. Chile), Judgment, 2014 ICJ Reps., ¶ 148.
[983] Decision Regarding Delimitation of Border Between Eritrea and Ethiopia (Eri./Eth.), 25 R.I.A.A. 83, T¶ 3.23-3.24

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viewed by reserve by international courts while deciding a boundary dispute. This is specially so when a map forms the basis of a negotiation while deciding a boundary dispute. The same is the case when a map is prepared which is in derogation or inconsistent with a treaty provision.

The main cases that deal with such situations and provide for a precedence that decides on the relevancy of maps as evidence in international boundary disputes are the cases of *Palmas Island* and well as the *Runn of Kutchh case*. The Palmas island case was a dispute between the United States and The Netherlands who both had claimed sovereignty over the Territory of Palmas Island, the USA arguing that it belonged to them through the Treaty of Peace with Spain of December 10, 1898, and The Netherlands over the prolonged exercise of state authority. In the case, USA had submitted over a thousand maps out of which only three showed resemblance to the territory being occupied by the Dutch. The rest of the maps very categorically showed that the territory belonged to the USA. The arbitral award, however, ruled that the Palmas Islands was a part of the Dutch territory and following terms were discussed:

"If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be. The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also of modern, even official or semi-official maps seem wanting in accuracy."[984]

Further, authenticated maps have also been used as evidence, but as described to be of 'slight significance'[985] when no administrative control is exercised in demarking the boundaries on the maps. Instances of maps being not admitted as evidences, even though highly ancient, authoritative and acceptable throughout the world, are highly traceable in international boundary disputes. Maps, however, that are in derogation of a treaty provision, cannot be regarded to have any evidentiary value and it derogates the very existence of the treaty and renders the maps as an invalid evidence in the courts of law.

[984] Island of Palmas Case (Netherlands, USA), REPORTS OF INTERNATIONAL ARBITRAL AWARDS, VOLUME II pp. 829-871, 4 April 1928.
[985] Guatemala-Honduras Boundary Arbitration: The Counter Case of Guatemala 285 (1932).

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During the course of proceedings in Minquiers and Ecrehos case of 1953 between the United Kingdom and France[986], emphasis was placed on cartographic evidence as both the sides that included maps as evidence for solving their boundary disputes. It was argued that the Atlas shown by the United Kingdom should be regarded as significant and that such an evidence must be taken into account by the court. In territorial disputes, maps serve a very useful purpose, and thus, they called for court's attention to other neutral or technical maps. Other country's maps, such as Italy, Sweden, Hungary, Germany etc. were shown. This is was considered to be relevant, given their neutral nature. The court thus held that:

"the evidence supplied by maps is not always decisive in the settlement of legal questions relating to territorial sovereignty. It may however constitute proof of the fact that the occupation or exercise of sovereignty was well known. A searching and specialized study would be required in order to decide which of the contending views in respect of maps should prevail. At any rate, maps do not constitute a sufficiently important contribution to enable a decision to be based on them. I shall not take the evidence of maps into consideration."

However, several cases show that maps as an evidence can be relied upon. In the Frontier Land case, the courts decided whether the two plots of lands belonged to Belgium or Netherlands. The applicant's map carried considerable weight.The court took into accounts maps that were signed by the members of the both the countries and thus concluded that:[987]

"This map, signed by the members of the respective Commissions, of its very nature must have been the subject of check by both Commissions against original documents and surveys."

India too, heavily relied on maps in the India v. Pakistan Rann of Kutch Arbitration Case. In the case, questions related to surveys and maps were one the main issues of the case. Not just maps, sketches were also submitted to the court and thus, inevitably, the question of the evidentiary value arose during the proceedings of the case. The Counsel for India had argued that the maps were conclusive evidence in India's favour and must be accepted by the court. Pakistan, however, described the maps as not being free from error and thus, leading the maps to not be accepted by the court. It stated that maps were mere statements by the drafter of the maps and must be taken only to that account and not as a conclusive proof. Further, it states that "maps are mere hearsay

[986] Minquiers and Ecrehos case (United Kingdom v. France), I.C.J. Rep. 47 at 71 (1953).
[987] Case Concerning Sovereignty over certain frontier land (Belgium/Netherlands), I.C.J. Rep. 209, 225-226 (1959).

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evidences, unless they are based on original survey of the natural features depicted by the map."[988] A lot of focus was on the accuracy and integrity with which the cartographer must have portrayed the facts when he drew the maps. However, India's counter-argument to this was that the maps that were relied upon by India were official maps produced by the expert department of the Government of India, who has the sole duty to survey and draw maps, thereby saying that they were not mere hearsay evidence but were backed and corroborated by scientific surveys and an authoritative value attached to it. Further, it also argued that the maps had stood the test of time for nearly a century and had been accepted by most the countries, thereby rendering it neutral and thus, being supported by other documentary evidences.

FRAILTIES OF MAPS AS EVIDENCE IN INTERNATIONAL LAW

As discussed in the previous chapter, maps are considered to be crucial evidences in international law in some cases. This, however, is not free from limitations. Maps, as argued in many cases, are not objective pieces of information but are rather subjective in nature. Thus, maps must be evaluated before using them as evidences in the courts of law, national or international.

Many reasons can be traced why a depiction of a map may get away from reality. First, the map drafter may have his/her own personal bias or he might be careless or indifferent to scientific process.[989] There might be a chance that the person may deliberate a false reality due to its political affiliations or unconscious biases. There might also be the possibility of the map maker being an inappropriate authority, who is not authorised to make a map. Such a map is rarely taken into consideration while corroborating evidences. There is a long history of maps being produced by organisations that are private, even when some maps are produced by the government bodies or international organisations.[990] These maps, thus, are rarely taken into consideration as they represent fictionalised version of reality with its objectives sometimes being mixed or compromised to maintain a certain narrative.[991]

[988] William Thomas Worster, *The Frailties of Maps as Evidence in International Law*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, 9, 570–589 (2018).
[989] JK Wright, *Map Makers are Human: Comments on the Subjective in Maps*, M Dodge, R Kitchin and C Perkins (eds), THE MAP READER: THEORIES OF MAPPING PRACTICE AND CARTOGRAPHIC REPRESENTATION (2011).
[990] Case Concerning the Frontier Dispute, *Supra note* 18 at 584.
[991] UN Geospatial Info Sec (formerly Cartographic Sec), South Asia, UN Map No 4140 Rev 4 (December 2011).

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Another aspect to be taken into consideration is the concept of Google maps, often used as digital evidences in the courts. Recent cases in the ICJ have accepted Google maps as an evidence to establish a fact or fact in issue. But Google too, sometimes, takes into consideration state demands to omit secret locations from its database.[992] Most famous of these are the maps in USSR that omitted churches and showed mosques instead.[993]

Even when the drafter is careful in its cartography and mapping a map, there is a possibility that the drafter might not use good sources to draw the map. Maps, very often, are drafted keeping in mind the ancient maps, without doing a new survey of the area before drafting a map. Poor judgment on behalf of the drafter is also a reason of poor or inaccurate mapping. Further, even when a drafter exercises scientific, impartial approach with quality materials, the reality is still not depicted positively. Errors are still made by the drafter, in spite of using the best resources and diligence.

Just like treaties and literature, maps are not a static document. They are too subject to interpretation and one's skill of reading a map. Maps, being a binding text, are also subject to the provisions of VCLT and it can be applied to maps as well.[994] The above analysis thus shows that maps are not the passive, scientific documents that they were supposed to be in the ancient era. They, similar to treaties and conventions, are subject to interpretation, and show a much more difficult relationship between the object, drafter and the reader.[995] Even when it is largely accurate and free of errors, they expose only a limited set of facts, through inconsistent method, which is later open to interpretation.

CONCLUSION

The Principle applicable to the use of maps in international disputes constitutes that there has to be a collateral or a corroboration of evidences that are coupled with the existence of the map, for it to be admissible as an evidence in the court of law. Tribunals have been uncertain in admitting

[992] J Johnson, *Google's View of D.C. Melds New and Sharp, Old and Fuzzy*, The Washington Post 22 July (2007) Available at: http://www.washingtonpost.com/wp-dyn/content/article/2007/07/21/ AR2007072101296.html.
[993] EF Schumacher, *On Philosophical Maps, in A Guide for the Perplexed*, Harper Perennial (1977).
[994] Pros. v Ayyash, et al., Case No. STL-11-01/I/AC/R176bis, Interlocutory decision on the applicable law, para. 26
[995] A Korzybski, *Science and Sanity*, INSTITUTE OF GENERAL SEMANTICS, 58 (1933).

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maps as an evidence, rarely stating that they are primary or original. They have applied stark tests in studying maps and have regarded them as secondary evidences or of a frequent hearsay character.

Maps may be hearsay or maps may not be hearsay, but what is necessary to be considered is that those maps that are drawn by authorised persons, on the ground, through surveys and inspections, must not be considered as mere hearsay. Hearsay may be maps that are often derived from books or secondary sources that more often show a rough sketch of what the position is.

A key to understand maps that is not all maps are equal in the point of significance. Admitting a map depends on the facts and circumstances of a situation and corroboration of evidence that is coupled with the map that is submitted. Historical works and maps cannot create a title but they can, where all direct information is fragmentary, can be of a greater value through the principle of general belief in the pre-established claim of title in the ancient era.

Often a map is an evidence of a fact in issue, but they have a far greater role to play in international law and international relations between countries. They help in establishing legal relations and not just prove a fact that is in issue. In consequence, through the cases discussed above, maps may be regarded as strong evidence of what they reason to show. They may or may not be termed as admissions, may or may not be considered as binding and have a force of its own.

However, while assessing a map in the court of law, its legal character must be considered because of its limitations that arise from both its scientific and political nature. Careful attention must be paid to the risks involved in relying on a map and the fact that it purports to prove. A map can depict geographical features in a particular way, and can thus alter the existence of a fact and depict reality in a different way than it actually is.

The process by which a map is drafter, certain geographic features are depicted in a particular way, and by applying certain methods of depicting the same, the visual representations of reality may feedback and influence that reality. Through this process, views on interpretation are triggered and the application of legal norms are thus changed, depending on the facts and circumstances of the case.

While this article attempted to analyse the points of evidentiary value of maps in disputes, it cannot give a full list of situations where a map can or cannot be admitted in the courts of law as an

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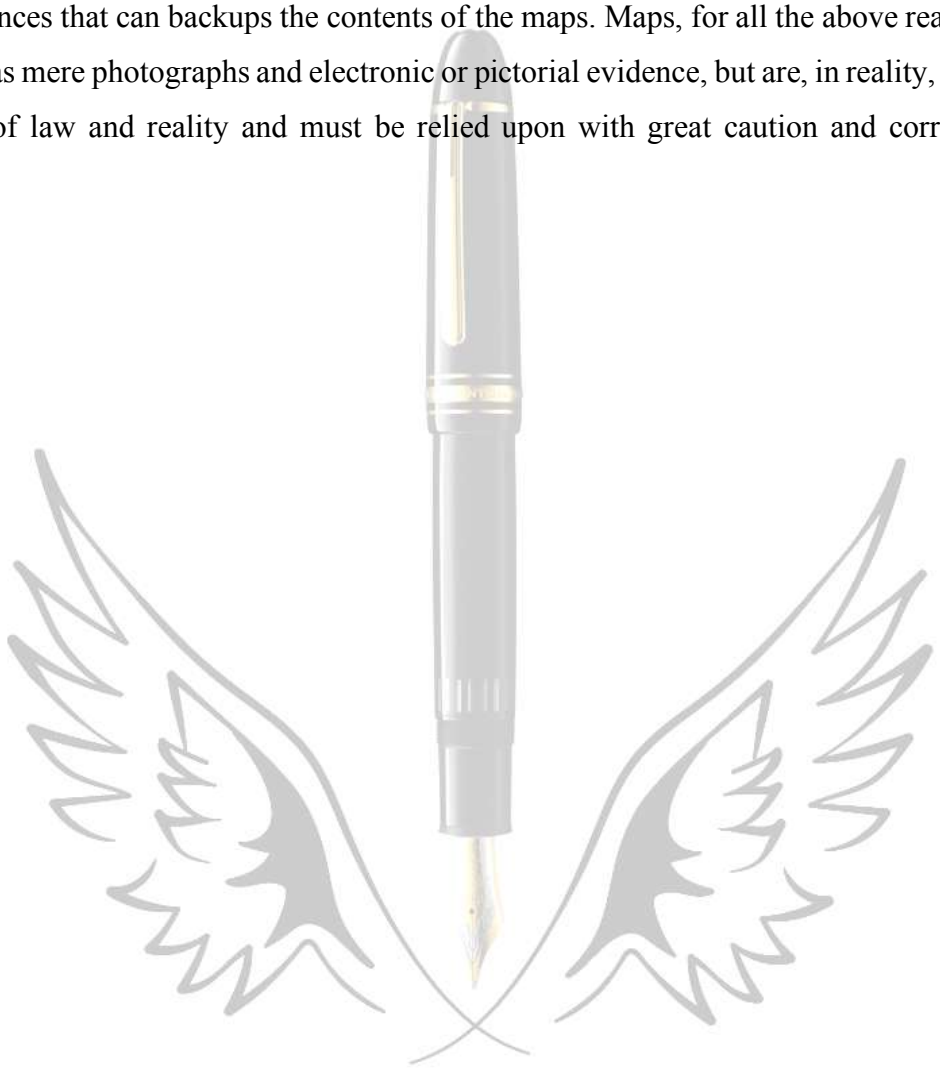
evidence to prove a fact or a law. The same can only be known through pleadings, reports and other evidences that can backups the contents of the maps. Maps, for all the above reasons, cannot be viewed as mere photographs and electronic or pictorial evidence, but are, in reality, multifaceted structures of law and reality and must be relied upon with great caution and corroboration of evidence.



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THE IMPORTANCE AND NEED OF UNIFORM CIVIL CODE: NEED FOR INDIA

- **CHARUL MISHRA**

INTRODUCTION

India has variety of family laws. The Christians have their Christians Marriage Act 1872, the Indian Divorce Act, 1869 and the Indian Succession Act, 1925. The Jews have their uncodified customary marriage law and in their succession matters they are governed by the Succession Act of 1925. The Parsis have their own Parsi Marriage and Divorce Act, 1936, and their own separate law of inheritance contained in the Succession Act which is somewhat different from the rest of the Succession Act. Hindus and Muslims have their own separate persona laws. Hindus law has by and large been secularized and modernized by statutory enactments. On the other hand Muslim law is still primarily unmodified and traditional its content and approach. The law is communal as each community or religious group has its own distinct law to govern national relations. It is also personal insofar as each person carries his own aw wherever he goes in India. The family law is partly statutory and partly non-statutory. The present-day family law is thus a maze. There is no lex loci in India in matters of marriage, succession and family-relations.

To achieve uniformity of law, its secularization and making it equitable and non-discriminatory, the Constitution contains Art.44 of the Directive Principles of State Policy which runs as follows; "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

The human rights of women in India have always been related with the personal laws which include social institutions like marriage and family. Certainly, it is the personal laws which lay down the legal outlines of the status of women in these social institutions. Unlike the west, India is distant from being a homogenous nation-state and is a home to one of the most diverse and variable melange of a population. It is culturally diverse, linguistically diverse, socially and

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religiously diverse. Thus they associate and create a mash up of an extremely vibrant but difficult to handle masses.

In such a situation, a formula of a uniform personal law is presented and uniformity is given as a solution to unwrap all the repressive evils that have crept inside our existing personal laws. UCC as envisioned under our Indian Constitution is time and again hailed to be the cure for all the social problems faced by the Indian women. The Indian Supreme Court has been continuous in reminding the legislature the glorious promise of a uniform civil law which was deferred to the future by the makers of our Constitution.

The principle of UCC basically involves the question of secularism. Secularism is a principle which needs to be examined at great length. There are various versions of secularism and it is on the stand of all these interpretations, the UCC is both glorified and criticised. Some factions of our society consider the UCC anti-secular while some regard it as an omen of communal harmony and secularism. Lastly, the question of the human rights of Indian women looms large in the background of the UCC. Hence, it is needed to be understood whether uniformity in personal laws will definitely lead to the equal status of women in the society or would just remain a communal agenda.

HITORICAL DEVELOPMENT OF UNIFORM CIVIL CODE

The discussion regarding the uniform civil code dates back to the colonial era. The British applied personal law only for individual matters. Initially they made trade law, criminal law but it was the charter of George II 1753 and famous regulation of 1772 by Warren Hastings where they mentioned specifically that Hindu and Muslims were to be governed by their own personal law.

Uniform civil code And the Constituent Assembly debate:

The debate regarding uniform civil code in was also seen in the parliamentary debate wherein the views were divided as it received strong opposition from Muslim fundamentalists like poker sahib and members from other religion but, was supported by chairman of the drafting committee Dr Babasaheb Ambedkar along with journalists like G. S Iyengar and K. M munshiji amongst others. Thus as a compromise, the makers of the Indian Constitution contemplated a Uniform Civil Code

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which would govern the personal laws. And therefore Article 44 was added in the PART IV as a directive principle of state policy making it necessary for the state to ensure and secure a Uniform Civil Code for the citizens of the country throughout the territory of India. The main aim of the Article 44 is to gradually achieve equality for all.

The draft article (article 35) was first discussed on 23rd November 1948. The members from the Muslim community were the first one to put up their point of view. They though rejected the idea of UCC, did not reject it completely. They felt that it was not the right time to implement UCC as there was a huge disruption in the nation due to partition. They further justified that they were not speaking on behalf of the Muslim community alone but all the communities as a whole. For this they proposed amendments to article 35 to exclude personal law[996]from it. The amendments proposed by them are as follows[997] :

Mohd. Ismail sahib – 'Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such as laws[998]'

Naziruddin Ahmed. 'provide that the personal laws of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such a manner as the Union legislature may be determined by law.[999] The members wanted to defend the personal laws from the proposed UCC. In this context MahboobAli Ali Baig sahib said: 'my view of Article 35 is that the words "CIVIL CODE" do not cover strictly personal laws of a citizen. Anyhow to clarify the position that article 35 does not affect the personal laws, I have given notice to the amendments[1000].

K.M. Munshi did not accept the view of those Muslim members who were of the view that there was a dispute between article 19and article 35[1001].K.M. Munshi questioned the view that enactment of UCC would be tyrannical to the minorities. According to him the whole object of the Article was to" unify the personal laws of the country".[1002] Dr Ambedkar was of the view that the amendments were not required and although he defended the rights of the different communities

[996] Constituent Assembly Debates,Vol.VII,Tuesday Nov.23,1948
[997] Constituent Assembly Debates,Vol.VII,Tuesday Nov.23,1948
[998] CAD (November 23,1948),p.540-541 (Mohd.ismail Sahib-Para 6)
[999] CAD(November 23,1948),p.541(Nsziruddin Ahmed Para-3)
[1000] CAD(November 23,1948),p.543(MahboobAli Baig Sahib Bahadur,Para-3)
[1001] CAD(November 23,1948),p.547(K.M.Munshi,Para-2)
[1002] CAD(November 23,1948),p.547(K.M.Munshi,Para-3)

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UCC was to be implemented. He stated that the only sphere which did not have uniform law was that of marriage and succession; rest all the areas of civil law were in uniform nature.[1003]

Judiciary and the Uniform Civil Code:

It was in the case of ***Mohd Ahmed khan v. shah bano begum***[1004]*that* the Supreme Court for the first time directed the parliament to frame the UCC. The supreme court held that "It is also a matter of regret that Article44 of our constitution has remained a dead letter".in spite of section 127 of Cr PC (which states that if a woman has received a certain amount under personal law, she would not be entitled for maintenance under section 125 of Cr PC, 1973 after divorce).the Muslim women was given maintenance if the amount received by her in the form of 'dower' is not enough for her sustenance. However this judgement was criticised by various Muslim fundamentalists and still was considered to be a liberal interpretation of law. However the central government later passed a Muslim Women's (protection of rights on divorce) act was passed in 1986 which denied rights of maintenance under section 125 of Cr Pc. Thus autonomy of a religious institution prevailed over women's rights. Later on the Supreme Court upheld the shah bano judgement and act was abolished. The Shah Bano case highlights the need for a uniform law which addresses the core need of a woman in distress.

The second instance in which the judiciary directed towards Article 44 was in the case of ***Sarla mudgal v. union of India***[1005] wherein kuldip Singh, J. held that succeeding government have been entirely negligent in their duty of implementing the constitutional mandate under Article 44. Therefore, a fresh look must be taken at article 44 of the constitution. R.M. Shahi, J. also said that "Ours is a Secular Democratic Republic. Freedom of religion is the core our culture. But religious practices, violative of human rights and dignity are not autonomy but oppression".

In ***Bai Tahira v. Ali Hussain Fissali Chowthia*** [1006]Iyer J. Asserts that the cultural autonomy is not a complete abomination to national unity. Religious practices cannot be upheld by sacrificing the human rights. Also seen in the case of ***lily Thomas etc. v. Union of India***[1007]the court held that though the uniform civil code is desirable the time was not right and the decision of same should

[1003] Dr B.R. Ambedkar, the Annihilation of cast: the annotated edition.
[1004] AIR 1985 SC 945
[1005] AIR 1995 SC 153
[1006] AIR 1979 SC 362
[1007] AIR 2000SC1650 at 1668.

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be left to the Law commission which may examine the same in consultation with the Minorities commission. Bombay high court in the case of ***Pragati Varghese v. Cyril George Varghese*** [1008]struck down the section 10 of the Indian Divorce Act, 1869 as being violative of the gender equality. Thus it is safe to say that although judiciary upholds UCC it is of the opinion that there is still scope for improvement.

CURRENT STATISTICS REGARDING IMPLEMENTATION OF UNIFORM CIVIL CODE

Under the Hindi Law, in the year 1955 and 1996, the Hindu women could enjoy any right equal to man be in any situation due to patriarchal nature of the society. Even after the codification of law, the laws still consist some discriminatory laws which exist even today. For example, a Hindu Woman is not a coparceners in Hindu coparceners except in a few states like Andhra Pradesh, Maharashtra, Karnataka and Tamil Nadu. And In consequence she is not entitled to the share in the Coparcenary. Thus, even the codification of the Hindu law did not result into complete gender inequality. The Supreme Court of India in **Seema v. Ashwani Kumar**, has directed "all states in India to enact rules for compulsory registration of marriages irrespective of religion, in a time bound period. This reform has struck a progressive blow to check child marriages, prevent marriages without consent of parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women, and for checking the selling of young girls under the guise of marriage. The consequences of non-registration of marriages has created a large number of abandoned spouses in India deserted by non-resident Indians who habitually reside abroad. However, implementation of the same is still undermined"[1009].

When it come to the Muslim law, the Holy Quran gives equal rights to the women and the men and places women in a respectable place. But there are few aspects where the women are rendered to the position of inferiority and insecure. For example. A Muslim man can marry four times while a woman cannot do so. Women are not even allowed to divorce their husbands but the husbands are given such right, i.e. divorce his wife by pronouncing Triple Talaq which is highly discriminatory. The Supreme Court of India on *Vishwa Lochan Madan v. Union of India and*

[1008] Air1997 BOM 349
[1009] (2006 (2) SCC 578)

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others, "issued notices to the central government, State governments, All India Muslim Personal Law Board (AIMPLB) and Darul Uloom, an Islamic seminary, in the matter of the existence of parallel Islamic and Shariat Courts in the country, which are posing a challenge to the Indian judicial system. A direction from the court was also sought to restrain these organizations from interfering with the marital status of Indian Muslim citizens or passing any judgments, remarks, fatwas or deciding matrimonial disputes amongst Muslims. Till recently, the matter was still pending final adjudication in the Supreme Court of India and no conclusive final decision stands reported on the said issue by the Supreme Court."[1010]

Uniform Civil Code: Need of the Country in the present Scenario

The personal laws in India are a result of a secular state and thus it gives the citizens' rights to follow any religion they want and thus these personal law govern matters relating to public affair. Uniform civil code is an offer to replace these existing personal laws with a common single law which is codified and followed by the citizens from all the communities throughout the territory of India. The idea of UCC is not to eradicate varied religious practices but simply to reduce rigidity of religions while providing for a society which can share more common grounds between communities. UCC has always been about bringing the different society together so that all can enjoy the equal position in the society and as such, is the fundamental in a democracy.

Article 44 of the constitution of India entails the state to secure for the citizens of India a uniform civil code throughout the territory of India.as India is a secular country, there exists no uniform family related law in a lone legislative book for the citizens which is accepted by all the religious communities. The question is not of minority protection or even of national unity, it is simply one of treating each human person irrespective of gender as well as religion with the dignity they deserve; something which the personal laws have failed to do so far.

The preamble resolves to constitute a 'Secular Democratic Republic' which in result means that there shall be no state religion and the state shall not discriminate on the basis of the religion. The personal laws of each religion which are comprised of separate elements and is instituted on distinct ideologies, the uniform civil code will not only change the entire perception of how families are governed but also fill the voids in various religious laws and thus it must strike a

[1010] (2014) 7 SCC 707

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balance between the protection of fundamental rights and religious principles of different communities .Marriage ,divorce, Succession, etc. can be the matters of a secular nature ,which the law can regulate. Therefore, a uniform codified law will subsume all religions in relation to the personal laws governing different communities, should be necessitated.

ADVANTAGES OF UNIFORM CIVIL CODE

India has multiplicity of family laws. The Christians have their Christian marriage act 1872, the Indian divorce act, 1869 and the Indian succession act, 1925. The Jews have their uncodified customary marriage law and their succession matters they are governed by the Succession Act of 1925. The Parsis have their own Parsi Marriage And Divorce Act, 1936, and their own separate law of inheritance contained in the Succession Act which is a little different from the rest of the Succession Act. Hindus and Muslims have their own separate personal laws. Hindu law is modified and is made into statutory enactments. While, Muslim law is primarily unmodified and traditional its content and approach. This diversity in personal laws creates a state of non-uniformity. There is no lex locus in India on matters of marriage, succession and family relations. It is confusing for a ordinary person to understand the idea behind these personal laws. With a view to achieve a uniformity of law, its secularization and making it equitable and non-discriminatory, the constitution contains Art.44 of the directive principles of state policy which runs as follows "the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'[1011]The main objective of this uniform code is to bring stability in the socialistic and political pattern of living.

PROMOTES SECULARISM

Secularism means absence of religions but it is very different from India secularist point of view. In India, secularism does not mean absence of religions but it means demarcating religion out from social institutions. Secularising India has to begin with a uniform civil code which would ensure that people of all religions would be treated equally. Since religion covers and impinges on every

[1011] Art 44 , constitution of India, 1950

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civil law whether its birth, death, marriage, divorce with the help of a uniform civil code there will be equality among people and a unification of laws could mean unification of our country.

The main objective of Article 44 as a directive principle of state policy in the constitution of India is to promote the creation and implementation of UCC in India. It states that the state shall endeavour to all the citizens a uniform civil code throughout the territory of India. This right does not mean to violate the fundamental right of article 25 and article 26 which gives the people the right to religion and managing religious affairs but article 44 is based on the concept that there need not be a connection between religion and civil law related to marriage, divorce, maintenance, succession and inheritance in a civilised society. Since these matters are secular in nature they can be enacted and governed through a uniform law. This law can hence be termed as personal law. The preamble of our constitution clearly states that India is a sovereign, socialist, secular state. But the citizens of India do not enjoy real secularism without the implementation of UCC.

GENDER EQUALITY

If a uniform civil code is created across the nation, India can be able to abolish gender discrimination to a great extent. The present personal laws of all religions, i.e., Hindus, Muslims, Christians, parsis, etc are male dominated and all laws related to marriage, inheritance, succession put the burden on the women. Sometimes, men might also face inequality. For example, in muslim marriage the groom has to give the bride *meher* , while in hindu marriage the concept of *kanyadan* objectifies women as some object to be given away. This shows gender inequality. For inheritance and succession the women face a lot of problems with regard to property. Both men and women face inequalities in all religions. A uniform civil code can make sure that women of all religions are wedded properly with respect and men are given similar basis required for giving alimony to women.

Marriages can be conducted in a way the people of different religions want them to be which does not oppose the public policy but such methods will not be an essential for a marriage to be valid. Some kind of registration or ritual accepted by all religions has to be essential for a valid marriage. A uniform civil code can also make sure that women of different religion are given equal property to that of the men in case of inheritance or succession. For example, daughters and sons of Muslim family are given equal succession rights. There can also be some similar basis of such succession or inheritance.

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In ***Mohammad Ahmed Khan v. Shah Bano Begum***[1012], popularly known as Shah Bano's case, the Supreme Court held that "It is also a matter of regret that Article 44 of our Constitution has remained a dead letter." Though this decision was highly criticized by Muslim Fundamentalists, yet it was considered as a liberal interpretation of law as required by gender justice. Later on, under pressure from Muslim Fundamentalists, the central Government passed the Muslim Women's (Protection of rights on Divorce) Act 1986, which denied right of maintenance to Muslim women under section 125 Cr.P.C. The activist rightly denounced that it "was doubtless a retrograde step. That also showed how women's rights have a low priority even for the secular state of India. Autonomy of a religious establishment was thus made to prevail over women's rights."[1013]

In ***Sarla Mudgal (Smt.), President, Kalyani and others v. Union of India and others,*** [1014] Kuldip Singh J., while delivering the judgment directed the Government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter and held that, "Successive governments have been wholly remiss in their duty of implementing the Constitutional mandate under Article 44, Therefore the Supreme Court requested the Government of India, through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and endeavour to secure for its citizens a uniform civil code throughout the territory of India."

The situation regarding the personal laws for Christians in India was different. In their case, the courts seemed to be bolder and took a progressive stand in terms of gender equality. For example, in 1989, in ***Swapana Ghosh v. Sadananda Ghosh***[1015], the Calcutta High Court expressed the view that sections 10 and 17 of the Indian Divorce Act, 1869, should be declared unconstitutional but nothing happened till 1995. In 1995, the Kerela High Court in ***Ammini E.J. v. Union of India***[1016], and Bombay High Court in ***Pragati Verghese v. Cyrill George Verghese***[1017], struck down section 10 of Indian Divorce Act, 1869 as being violative of gender equality.

[1012] (1985) 2 SCC 556
[1013] Amita Dhanda & Archna Prashar, Engendering Law: Essays in Honour of Lokita Sarkar, 137 (1999).
[1014] AIR 1995 SC 1531
[1015] AIR 1989 Cal. 1.
[1016] AIR 1995 Ker 252.
[1017] AIR 1997 Bom 349.

In September 2001, a poor Muslim woman, Julekhabhai, sought changes in the divorce provisions in Muslim law as well as that polygamy should be declared illegal. The Supreme Court asked her to approach Parliament, refusing to entertain the petition. Julekhabhai had sought equality with Muslim men, requesting court to declare that "dissolution of marriage under Muslim Marriage Act, 1939, can be invoked equally by either spouse". It also requested the court to strike down provisions relating to "talaq, ila, zihar, lian, khula etc", which allowed extra-judicial divorce in Muslim personal law[1018].

The Article 44 of the Constitution of India requires the state to secure for the citizens of India a Uniform Civil Code throughout the territory of India. As has been noticed above, India is a unique blend and merger of codified personal laws of Hindus, Christians, Parsis and to some extent of laws of Muslims. However, there exists no uniform family related law in a single statutory book for all Indians which is universally acceptable to all religious communities who co-exist in India. A lot of the animosity is caused by preferential treatment by the law of certain religious communities and this can be avoided by a uniform civil code. It will help in bringing every Indian, despite his caste, religion or tribe, under one national civil code of conduct .Most predominately it will focus on women empowerment. Everyone will be treated equal and it promotes the true nature of secularism.

NATIONAL INTEGRATION

A uniform civil code will boost the national integration in our country. Even though our country has diverse cultural values a unified law with irrespective of caste, creed, gender, etc will promote national integration. Same laws for the whole country will not develop the feeling of biasness among people. All citizens are considered to be equal when dealing with criminal law and other civil laws except for personal laws. With the formation of uniform civil code, the people will share a same set of personal laws. There will be very less situations where the issues or matters of importance can be politicised and also few situations where discrimination or concessions or special privileges will be enjoyed by a particular community on the basis of their religion and personal laws. It will integrate our nation irrespective of any social discrimination like religion, caste or gender. UCC can be a tool of integration more effective than from the time since

[1018] Nilanjana Bhandari Jha, "Does India really need a Uniform Civil Code?" from website of Times of India, visited on 3-4-2010.

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independence. UCC can also be helpful during emergency; it can be a good tool to keep the country united. A uniform civil code will be a much better tool of governance than any personal law as everyone will follow the law like people of India follows our constitution. Governance on matters of marriage, divorce, succession, inheritance, maintenance will reduce case pendency in courts as a proper procedure related to such matters will clear out the confusion that might prevail. A country that will be united will develop faster.

EVERY NATION HAS IT

A uniform civil code is a symbol of a modern state and a progressive country. A state away from caste and religion related politics show how healthy and strong the democracy is and it also shows the good relation between the people and the representatives. India's economic growth has been very high but if we consider the social development of our country, it is lagging behind and has not happened. Socially and culturally India has not developed even though our diversity shows rich culture but the fights and politics show how unable our country is on the matters of protecting such culture. India is at a point where it is not even modern or traditional. UCC can help India be a developed nation.

Once the UCC is implemented in India, it will go through another social reform. UCC will bring parity between different caste and class of people. Scheduled castes and schedule tribes will also be governed under the UCC and there will be no special laws for them, this can be a sigh of unification of our country. For example, in India, Muslim women are denied personal laws with respect to marriage, divorce etc. where else, various Muslim nations like Pakistan, Bangladesh, Turkey, Morocco etc. women enjoy codified personal laws. So after the implementation of UCC Indian women [especially Muslims, Christians etc.] will also enjoy a codified personal law. Therefore, it can be a stepping stone towards another social reform across the country.

REDUCE VOTE BANK POLITICS

The implementation of uniform civil code will also reduce the vote bank politics that exist in our country. Most political leaders indulge in this during elections. They do not ask for the vote on the basis of their ideologies and beliefs but on the basis of the religion and caste the party supports. So if all the religions are governed under the same laws then the will be very less chance of vote

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bank politics as their will be very few minorities from whom the politicians can exchange their vote. Not having UCC can be detrimental to the Indian society.

GOAN CIVIL CODE AND ITS IMPEMENTATION

*"True Secularism is always in a need of Uniform Civil Code."*Article 44 of Indian Constitution states that, "*The state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India"*

Implementation of Uniform Civil code in Goa:

As seen in various reports given by the human rights Committee, the major section of the Indian Society is deprived of its basic rights and is facing discrimination in various spheres of life. And the most Ironical fact is that there is discrimination in the laws itself such as discrimination based on gender in the different personal laws of various religious communities. For Example, a Hindu woman cannot adopt a child without the permission of her husband while this is not similar in other personal laws like there is no adoption right available in Muslim Law. The Supreme Court of India has also recommended in many landmark judgements that there is a dire need of Uniform civil Code in our Country.

However the religious Communities have been rejecting the implementation of Uniform Civil Code taking the defence of Article 25 of Indian Constitution. Against the implementation of UCC, the matters like marriage, divorce, adoption and succession reflects the religious beliefs and sentiments but it clearly failed to accomplish the fact that Article 25 clause 2 clearly states that all the secular activities are outside the purview of the protection of article and it has been clearly stated by the Supreme Court that the matters related to the marriage, succession etc. are clearly the secular activities which are being related to the religion. Women are suffering a lot due to flaws in the personal laws which could be seen from the cases piled up in the courts regarding cruelty and discrimination. Unlikely, GOA, the smallest state of India, has Implemented Uniform Civil Code in its state and they call it GOA CIVIL CODE.

Goa became part of India through Goa Daman and Diu administration act, 1962 in the year 1961. The Parliament of India Authorised the Portugal Civil Code, of 1867 in Goa which shall be amended as per the necessary requirements and shall be repealed by competitive legislature. Later on, there were many amendments done after its implementation.

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In 1981, Government of India appointed a personal law committee to determine if personal laws could be implemented in the state but it failed to do so. Recently, the Parliament passed the Goa Succession Act, 2012. The State of Goa provides an example for the rest of the country of how equal rights can be provided to both men and women without hurting the sentiments of any religion or any particular section of the society.

How the implementation has been worked out in the Goa Civil Code:

The Uniform civil code in Goa is a progressive law that allows equal division of income and property regardless of gender between husband and wife and also between children. Every birth, death and marriage has to be compulsorily registered. For divorce there are severe provisions. Muslims that have their marriages registered in Goa cannot take more than one wife or divorce by pronouncing "talak" thrice. During the course of marriage all the property and wealth owned or acquired by each spouse is commonly held by the couple. Each spouse in case of divorce is entitled to a half share of the property and if one dies the ownership over half of the property is retained by the other.

According to the Uniform Civil Code even if the children (both male and female) have got married and left the house, the other half has to be divided equally among them. Thus the parents cannot disinherit the children totally as they can dispose only half of the property in a will and the rest has to be compulsorily and equally shared amongst the children. Taking cognizance of this, we must enact a uniform code for the entire India as well.

The Unique feature of the Goa Civil Code is:

1. It is in consonance with Article 44
2. Certain provisions in which Goa Civil Code is far the better than the existing personal laws.
3. The marriage is a contract in the court of law that means that the women is provided with the security. The woman also get the equal share of the property that means she also gets financial security
4. Promotes monogamy for all.
5. Even after the divorce, the property is divided into half.

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Though, The Goa Civil Code also have few loopholes, but then too, the ultimate goal is to have better laws because we do not promote an ideal society but a better society.

UNIFORM CIVIL CODE: AN OBLIGATION UNDER INTERNATINAL LAWS AND DOMESTIC LAWS

Harris says "International law is a law of coordination, but not subordination. It is usually regarded as a law between, but not above several states." International treaties are those treaties which are entered between two or more nation-states or between nation states and the inter-governmental organizations. And there are many intergovernmental organizations are established by the treaties of the two or more states. Example- NATO. Based on the treaty, decided whether it is binding on the state or not. All the treaties must be registered with the UN treaty Collection under Article 102 of Unites States Charter.

India adopted everything regarding relationship between International laws and internal laws as emanated by the British practice. India, while adopting any law, follow Indian Constitution, while making which, the Constitution framers were inspired by the Charter of UN Organization which is also reflected in the Preamble of Indian Constitution- Part I to Part IV especially. Article 51(7) of constitution provides about the Promotion of International peace and Security.

The Case of In re, ***Berubari Union***[1019] it was held that "Any country has to follow the obligations of the treaty which they entered into and ratifies. The court may order to implement the international treaty if it is not inconsistent to the domestic laws of the state as given in the case ***Gramophone Co. of India Ltd. V. Birendra Bahadur Panday***.[1020]

In ***Keshavananda Bharti v. State of Kerela***[1021], C.J. Sikri said that "In case the language of the domestic law is not clear, then the Court must rely on the International Law i.e. the parent authority based on which the domestic law was enacted". Hence, if there is any inconsistency between International and the domestic law, the international would be interpreted in such a way that the it would protect the interest of both the laws which is taken as a principle in the case of ***Krishna Sharma v. State of West Bengal***.[1022]

[1019] AIR 1960 SC 845
[1020] 1984 SCR (2) 664
[1021] (1973) 4 SCC 225
[1022] AIR 1954 Cal 591

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Now, coming back to the basic principle of International Law, if a state sanction an international instrument, it becomes legally bound to follow and implement its provision. Accordingly, Since India has ratified the International Covenant on Civil and Political Rights, 1966 and the International Convention on the Elimination of all forms of Discrimination against women, 1979, is bound to enforce the relevant and ensure the relevant provisions and ensure the gender equality under national laws. However, the women in India are still been discriminated under Hindi, Muslim and Christian law and are suffering the gender inequalities in the matters of marriage, succession, divorce, and Inheritance. So as step towards gender just code, the personal laws need some reforms which are to be looked not only in the compliance of the Indian Constitution, but also to the compliance of International Law.

There is an International method of monitoring the proper compliance of the provisions of Personal Law with the International laws by the state named as the Committee on the Elimination on the Discrimination of the Women. The prevalence of discrimination of women under the personal laws has been openly accepted by India in the periodic report before the United Nations Committee on the Elimination of the discrimination against the women. "The personal laws of the major religious Communities has traditionally marital and family relations, with the government maintaining the policy of non-interference in such laws in the absence of the demand for a change from individual religious communities."[1023] The committee expected India to comply with all the provisions with the said International instrument it ratified. But after examining the report, they came to a result that steps have not been taken to reform the personal laws of different religious and ethnic groups, in consultation with them, so as to confirm with the international Instrument. And they warned India that "the government's policy of non-intervention perpetuates sexual stereotypes, on preference and discrimination against the women.[1024]

The Committee also "urged the government to withdraw its declaration to Article 16, paragraph 1 of the Convention and to work with and support women's groups as members of the community

[1023] 1 United Nations, *Report of the Committee on the Elimination of Discrimination Against Women,* Supp No 38, A/55/38, 22nd Session 17 Jan -4 Feb 2000 and 23rd Session 12-30 June 2000, General Assembly Official Records, New York, 2000 at 8

[1024] 1 United Nations, *Report of the Committee on the Elimination of Discrimination Against Women,* Supp No 38, A/55/38, 22nd Session 17 Jan -4 Feb 2000 and 23rd Session 12-30 June 2000, General Assembly Official Records, New York, 2000 at 8

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in reviewing and reforming these personal laws.[1025] And the government was expected "to follow the Directive principles in the Constitution and Supreme Court decisions and enact and religious may adopt."[1026] After considering the third periodic report of India, the human rights committee, which is for the monitoring of the International covenant on the Civil and political rights, in its meeting had observed in India that the women in India are still not freed from the discrimination and expressed their concern that the women are subjected to their religion which follow different religious norms that are to be followed by them and which do not follow the principle of equality in respect to marriage, divorce, maintenance, and inheritance. The inequality due to the religious rules due to which there is violation of rights against equality and non-discrimination under the constitution of India. Taking this in mind, the human rights committee didn't wanted this to continue and wanted the government of India to strengthen its laws and so that the women can enjoy their rights without any discrimination.

In beginning, the Uniform Civil Code was discussed in the Constituent Assembly debates in 1947 and was provided as a directive principle by the sub-committee on fundamental rights and clause 39 of the Draft directive principle of state policy provided that the state shall endeavour to secure for a citizens a Uniform civil code. But, there were many arguments put forth by the different personal laws of communities based on the religion which kept back India. From the advancement of nationhood. Later, it was advised that UCC must be applied within the period of five to ten years.[1027] The chairman of the drafting committee of the Constitution, DR. BR Ambedkar has said, "We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in IPC and the CPC. The only province the civil law has not been able to invade so far is marriage and succession…. And it is the intention of those who desire to have Article 35 as a part of Constitution."[1028]

[1025] India's Declarations to CEDAW. With regard to Art. 5(a) and 16(1) of the Convention on the Elimination of all Forms of Discrimination against Women, "the Government of the Republic of India declares that it shall abide by and ensure this provisions in conformity with its policy of non-interference in the personal affairs of any community without the initiative and consent."
[1026] 1 United Nations, *Report of the Committee on the Elimination of Discrimination Against Women,* Supp No 38, A/55/38, 22nd Session 17 Jan -4 Feb 2000 and 23rd Session 12-30 June 2000, General Assembly Official Records, New York, 2000 at 8
[1027] B. Shiva Rao (ed.), The Framing of India's Constitution Select Documents Vol. II, The Indian Institute of Public Administration (IIPA), New Delhi, 1968 Debates of 14, 17-20 April 1947.
[1028] Lok Sabha Secretariat, Constituent Assembly Debates Vol. III %%! (23 Nov. 1948)

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India's binding obligation under International also attracted many legal experts. Satyabrata Rai Chowdhuri, rightly observed in 2003-[1029] "Since differential treatment for any religious group is violative of UN covenant on Civil and Political rights and the Declaration on the Rights to Development adopted by the World Conference on Human Rights, it is hoped that Parliament will frame a common civil code without further delay, divesting religion from social relations and personal law." The nationhood of country is symbolized by one Constitution, a single citizenship, one flag and a common law applicable to all citizens and India's obligations under international law and requirements of various International instruments relating to the human rights of women such as the Universal Declaration of Human Rights. 1948 and The declaration on the Elimination of Discrimination Against Women, 1967, also demand that even of one rules out Article 44 the Union of India cannot evade its international obligations to make laws to remove all discrimination against women.[1030] For this reason, twenty seven years ago, The Equal remuneration act. 1976 was enacted for the benefit of all the working women. "The next logical step is to make a law to secure equal rights to women. An Equal Rights Act would largely achieve the objective common civil code. In the alternative, parallel reform of each personal law to give effect to the human rights declared by the United Nations would help the emergence of a common pattern of personal laws, paving the way for a uniform code," and a beginning could be made in that direction but it seems that the parallel will is lacking"[1031]

SUGGESTIONS

For maintaining national integrity and bringing about social reforms UCC can use these essentials in laws of marriage, divorce, maintenance, inheritance and succession.

Marriage and Divorce:

The personal laws of the religions contain various essentials of a valid marriage. The code should have the basic essentials required for a valid marriage. The code should also include the concept of monogamy which prohibits from marrying more than once if the spouse is living. Polygamy often discriminates against women and violates their human rights. So monogamy should be a

[1029] Satyabrata Rai Chowdhuri, "A Common Civil Code: It is a Constitutional Obligation" The Tribune 30n July 2004 at 10.
[1030] Jyoti Rattan, "Uniform Civil Code: a Legal Obligation under International Law and Domestic Law.
[1031] P.P. Rao "Uniform Civil Code is a Necessity: An Optional Common Law can be Enacted" The Tribune 6 August. 2003 at 10

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valid condition of marriage instead of bigamy not for the reason that is a part of Hindu personal law nut it goes along with article 21 of the constitution.[1032] And also basic human values. The next condition which can be taken into consideration should be the age limit in order to curb child marriages. The minimum age limit for a man should be 21 years and for a female should be 18 years. Some Punishment should also be prescribed for any person who violates this provision including the relatives who get involved in acts of child marriage which has a poor effect on the society. The registration of marriage should be compulsory. A valid marriage will be said to have solemnized when the man and the woman sign their declaration of eligibility before registrar and consent of both the parties must be taken irrespective of any discrimination. This can help to eradicate the confusion regarding validity of marriage. The manner and procedure of divorce should be laid down specifically. The grounds enumerated in the code should be reasonable and procedure prescribed should be according to the principle of natural justice and not opposing public policy in any way. Also the provision of divorce must state that mutual consent is necessary for the invocation of the provision.

Succession and Inheritance:

This is an important area under personal law which is surrounded by a number of problems and disputes. There is no distinction between joint family property and self-acquired property under Muslim law but it exists in Hindu law. The Hindu undivided family (HUF) under Hindu law provides for the running of business and own agricultural lands. Under the UCC, such institution of like of the HUF, peculiar to the Hindus, has to be abolished. There are many other provisions which should be considered. Equal shares should be given to the sons and daughters from the property of the father, whether self -acquired or joint family property. There should be no kind of discrimination based on sex related to the matters of inheritance. The provisions of the Hindu Succession (Maharashtra Amendment) Act, 1994 can be taken as a guiding principles wherein the daughter of a coparcener shall by birth become the coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive the right to claim by survivorship and shall be subject to same liabilities as the son. Provisions for inheritance of the property of mother, which she has self-acquired or

[1032] Article 21 of The Constitution of India 1949: Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

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acquired through her father or relatives must be enumerated. The provision relating to the Will should be in consonance with the principles of equity. There should be limited limitations imposed on the extent to which the property can be bequeathed, the persons to whom such property by will for religious and charitable purpose.

Maintenance:

Maintenance laws are different for different religions. Apart from the personal laws, a non-Muslim woman can claim maintenance under section 125 of code of criminal procedure. Apart from the maintenance of wife, there should also be provisions for the maintenance of mother, father, son and unmarried daughter under various personal laws. The UCC must be quite flexible with this category, a husband should maintain the wife during the marriage and also after they have divorced for some period of time if she non-working. The amount of alimony should be decided on the account of the income of the husband, the status and the lifestyle of the wife. The son and daughter should be take equal responsibility to maintain their parents. The reason for this is that if she claims equal share of the property of her parents, she should share the duty to maintain her parents equally. Thus based on these fundamental principles, an unbiased and fair UCC can be framed which will be in consonance with the Constitution.

CONCLUSION

Rather than top-down approach for a self-confined code, caution lies in bottom-up approach in policymaking through building the consensus on uniformity. After all, all these directive principles were interpreted to have constituted the building blocks of state policy and the same is written in clear and clear language in headline of the chapter (part IV) itself. Application of state policy in the law-making process constitutes public policy of India. The equivalent is also mentioned in the Constitution; the fundamental law of the land. Taken together, UCC may also be referred to have constituted as public policy for the state to follow for better governance of the state rather than reducing the same into a code in literal sense of the term amongst the whirlpool of widespread dread; in the given context of vigilantism followed by remedial course through alternative to stick in literal sense of the term. Thus, despite juridical potential, codification cannot get imposed by the right-wing regime since the same ought to defeat democracy; while the same constitutes a basic feature of the Constitution. In the given situation, the principle of uniformity may get inserted with slow yet steady approach- through amendments in laws for the time being in force rather than as

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standalone part of legislation in itself. The practice appears in rage since long back, e.g. the Special Marriage Act, 1954 got enacted thirty years after the Indian Succession Act, 1925 to follow the same legacy and thereby create space for those willing to get adhered to uniformity without much argument for the codification. The section of the nation against the implementation of UCC contends that in ideal times, in an ideal State, a UCC would be an ideal safeguard of citizens' rights. But India has moved much further from ideal than when the Constitution was written 50 years ago. But to conclude, we think that citizens belonging to various religions and denominations follow different property and matrimonial laws which is not only an affront to the nation's unity, but also makes one wonder whether we are a sovereign secular republic or a loose confederation of feudal states, where people live at the whims and fancies of mullahs, bishops and pundits.

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AMENDABILITY OF INDIAN CONSTITUTION: WHAT CONSTITUTES THE BASIC STRUCTURE

- **ARPITA MITTAL & ARUSHI MALHOTRA**

ABSTRACT

Purpose/Research Objective – The purpose of this paper is to understand the "Basic Structure Doctrine" by analysing various case laws. The objective is to highlight the issues posed by the various decisions and look at the inconsistencies over the decades.

Approach – The research is doctrinal and while analysing various cases which pronounced judgements on this issue, we have also viewed research papers and scholarly articles and brought to light the opinions and issues which highlight the differences in various opinions and help in understanding the Basic Structure.

Statement of Problem- The Constitution of India is a comprehensive text which tells us how the country would function and what its ideals are. The importance and dynamic nature of amendability of Constitution has also been scrutinized. However, the power to amend such a textual document lies in the hands of the Parliament. The question which stands is whether such a power could lead to its abuse and what restrictions are enough to curb such an abuse. The paper also discusses the instances where the Parliament has made attempts to make its amendability powers limitless and thus is arbitrary. There is absurdity due to the lack of unanimity as to what the 'Basic Structure' is. This appears to be an obstacle for the future decisions to be made by the courts when it comes to infringement of provisions included in the basic structure. The paper goes on to further discuss the validity of Ninth Schedule.

Research Questions-

- What constitutes the "Basic Structure" of Indian Constitution
- Whether the Parliament can abuse its power to amend the Constitution under Article 368
- Whether the Supreme Court has made sufficient efforts to define and elucidate what cannot be amended in the Constitution

INTRODUCTION:

Constitution, which is the 'General Will' of the people, is a document which fundamentally characterises the position and power of various organs of the State. The way a nation operates does not remain constant and therefore, laws framed during a certain period may not be suitable to the other period as the circumstances and position of a nation changes constantly. Apart from being the basic law of the land, it is a method by which the other laws are framed as per the necessity of the nation. Thus, it becomes necessary to have tools to establish a process through which the document, which lays down the fundamental law of the country can be changed and made suitable to the new era. These changes are brought by using various methods as given in the constitution and the various interpretations of judgements by the Judiciary. For this purpose the makers of the constitution inserted Article 368 so that the laws are amended in a proper and just manner. It is the supreme deed of Independent India and Living Document of Nation. [1033]

REQUIREMENT OF CONSTITUTIONAL AMENDMENTS

[1033] *Samira A Runja, Silent Features of Constitution of India, Volume-7 | Issue-3 | March-2018, https://www.worldwidejournals.com/paripex/recent_issues_pdf/2018/March/March_2018_1520252970__79.pdf*

The sine qua non for the Amendment of the Constitution can be emphasized as follows:

• If there had been no provision for the amendment, the people and the leaders would have adhered to some extra constitutional means like revolution, violence and so on thereby diluting the very constitution per se.

• Provisions for amendment of the constitution is made with a view to overcome the obstacles which may be run into in future in working of the constitution.

• It is also essential in order to fix loop holes at the time when constitution was made.

• Ideals, primacy, and perception of the people vary greatly generation to generation. Amendment is desirable in order to incorporate these.

Amending the Constitution of India is the process through which India's supreme law can be altered. This established procedure can be seen in our Constitution in Part XX, Article 36. This is to ensure the timely concurrence with the current situation and keep a check on the arbitrary power of the Parliament.

Constitution must be amended with the needs and development of the country, but with abundant caution for salvaging the basic rights of people. Amendment is a safety valve provided to the constitution and if it is not provided, it may cause the blasting of the entire structure and if any political party commands thumping majority in the parliament, they can amend the constitution even denying the basic rights. Hence there should be protection of fundamental rights from encroachment.[1034]

1034*Raveendran Nair and Legesse Tigabu Mengie, The Scope and Ambit of Amendment of the Constitution; a Comparative study of the constitutions of India, USA and Ethiopia, (Vol. 06, Issue, 04, pp. 7610-7616, April, 2016)*

https://www.journalijdr.com/scope-and-ambit-amendment-constitution-comparitive-study-constitutions-india-usa-and-ethiopia

However, we can witness a tussle between the Parliament and the Supreme Court where the Parliament wishes to have tremendous power to alter as they deem fit, but the Supreme Court on the other hand tries to keep a control over it.

PRECEDENTS

The question of amendability of Fundamental Rights first arose in the case of Shankari Prasad v. Union of India[1035] where Article 31-A and 31-B which were added under Article 368 and were challenged as being unconstitutional. It was observed to be violative of Right to Property which was then a part of Fundamental Rights. The Supreme Court held that it was well within the purview of the powers of the Parliament to amend the constitution, including the fundamental rights.

The issue again arose with similar judgement in the case of Sajjan Singh v.State of Rajasthan[1036] which said that the words "amendment of the constitution" include amendability to all the provisions given in the constitution. The five judge bench of the Supreme Court also pointed out that the Parliament could assume the power to amend the Fundamental Rights even if it was ultra vires under Article 368.

In the historical judgement in the case of Golakhnath v. State of Punjab[1037] the above aforementioned judgements were again brought under analysis and the eleven bench gave the decision that Parliament cannot amend any provision of Part III of the constitution by a majority of six judges. However, three dissenting judges reaffirmed the decision of Sajjan Singh and Shankari Prasad.

1035 *Shankari Prasad v.Union of India, AIR 1951 SC 458.*

1036 *Sajjan Singh v.State of Rajasthan, AIR 1965 1 SCR 933.*

1037 Golakhnath v. State of Punjab, (1967) 2 SCR 762

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ANALYSIS

Questions brought into highlight through these cases-

- Amending power of Parliament
- Supremacy of constitution
- Basic Structure of constitution
- Separation of Power

The landmark judgement which aimed to answer all the above mentioned issues was Keshavananda Bharti V. State of Kerala[1038] in which the core question about the power of Parliament was answered and provided the best explanation as to the scope and definition of the word Amendment which would include any alteration or change. A writ petition was filed to challenge the validity of Kerela Land Reforms Act 1963 which was later amended in 1969 and 1971. After the amendment in 1971the Act was placed in the 9th schedule by the 29th amendment when the writ petition was pending. The petitioner was also allowed to challenge 24th, 25th and 29th amendment. All the judges were of the view that the 24th amendment is valid, and that by virtue of article 368 Parliament has the power to amend any or all of the provisions of the Constitution including those related to Fundamental Rights of citizens. The constitutional legitimacy of amendments was challenged before a full bench of the Supreme Court including 13 judges. It said that the Parliament could amend any part of the Constitution as long as it did not hamper the basic structure of the Constitution and the judgement given in

the Golaknath case was erroneous. It stated that "Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic

1038 His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., (1973) 4 SCC 225

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structure' or framework of the Constitution." Each judge however had his own views as to what constituted the basic structure. Out of 13 judges, only six agreed that Fundamental Rights to be a part of Basic Structure. However, rest of the seven judges held that the power to amend article 368 is subject to certain implied and inherent limitations. The point to notice is that there was no unanimity on what was actually the basic structure.

Sikri, C.J. explained that the concept of basic structure included:

• supremacy of the Constitution

• republican and democratic form of government

• secular character of the Constitution

• separation of powers between the legislature, executive and the judiciary

• federal character of the Constitution[1039]

This structure could be observed to be based on the basic principle which was pointed out by him ,i.e., the dignity and freedom of the individual and this cannot be destroyed by any form of amendment .

Shelat, J. and Grover, J. added two more basic features to this list:

• the mandate to build a welfare state contained in the Directive Principles of State Policy

• unity and integrity of the nation[1040]

Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features:

1039 supra (SCC) 366, paras. 292-93.

1040 supra (SCC) 454, para. 582.

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• sovereignty of India

• democratic character of the polity

• unity of the country

• essential features of the individual freedoms secured to the citizens

• mandate to build a welfare state

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

• sovereign democratic republic

• parliamentary democracy

• three organs of the State[1041]

To begin with what constitutes the basic structure, the court found the following features to be fundamental and therefore, non-amendable-

- Supremacy of the Constitution
- Republican and Democratic form of Government
- Secular character of the constitution
- Separation of powers between legislative, executive and judiciary
- Federal character of the Constitution

The case where the Supreme Court had the opportunity to practically apply Keshvananda Bharti's ruling regarding the non-amendability of the basic features was Indira Nehru Gandhi v. Raj

1041 supra (SCC) 637-38, para.1159.

Narain[1042]. The question of validity of Clause 4 in the constitution which was the thirty ninth amendment arose. There were three things which formed to be part of this amendment-

1) To withdraw election of the Prime Minister and few other Union officials from the scope of judicial process.
2) To void the High Court decision declaring Indira Gandhi's election to the Lok Sabha as void.
3) To exclude the Supreme Court's jurisdiction to hear any appeal.[1043]

This Amendment prima facie appeared to be destroying the basic feature of the Constitution since it would encroach upon the judicial process. The contention was maintained by Supreme Court and it declared Clause 4 to be unconstitutional.

It was also opined by Justice Chandrachud that the Principle of Basic Structure was applicable only to Constitutional Amendments and not ordinary Legislations. CJ Ray stated "The theory of basic structure is an exercise in imponderables. Basic structure and basic features are indefinable."

The Parliament being against such a decision was further trying to assure that such an instance is not repeated in the future and thus, the law minister expressed his opinion that the Supremacy of Parliament should be asserted when it comes to the amendability of the Constitution. To achieve this objective two new clauses were added in Article 368 through the 42nd Amendment. They went to the extent of trying to revive the Constitutional Amendments which were previously held invalid. Moreover, the Parliament also tried to drop the idea of the amendments being challengeable on the ground that "it has not been made in accordance with the procedure laid down by this article." This would mean that no constitutional amendment can be challenged in a Court on any ground whatsoever.

1042 *Indira Nehru Gandhi v. Raj Narain, 1975 SC 2299.*

1043 M.P. Jain, Indian Constitutional Law- 8th ed. ¶ 1744

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To justify the new amendments to Article 368, the Law Minister argued that:

1- There is no such thing as a 'basic feature' which needs to be protected from amendment and

2- Where there is a constitutional amendment, the 'supremacy of the Parliament' has to be considered.

These assertions made by the Law Minister appear to be unreasonable as there are provisions in the Constitution which need special protection as they form the essence on which our Constitution was formulated.

As for the second assertion made, the supremacy of the Parliament would actually mean supremacy of the executive government because the government which forms the majority and is backed by 2/3rd of the members could make any alterations to the provisions of the Constitution as it deems fit. The other democratic countries also do not support the idea of ultimate power being in the hands of one government and this is the essence of 'constitutionalism' as envisaged by the makers of our Constitution.

As we observe what is written in our Preamble, the law making power rests in the hands of the People ultimately.[1044] If we scrutinise the statement mentioned above by the Law Minister, it is implying that if a party comes in majority to the Parliament then the law making will be subject to the personal interest of that party and not the nation as a whole.

Minerva Mills Limited v Union Of India[1045] again attempted to define the Basic Structure of our Constitution. The petition was filed in the Supreme Court to challenge the constitutional validity of Clauses 4 and 5 of Article 368 introduced by Section 55 of the 42nd Amendment. The newly introduced Clause 4 in Article 368 sought to deprive the courts of their power to call in question or consider the validity of any amendment of the constitution made by the Parliament. Clause 5 attempted to transgress the amendability power of the Parliament by empowering the Parliament to exercise its constituent power without any "limitation whatsoever". The court in this connection

1044 *Preamble : We the People of India in our Constituent Assembly… do hereby adopt, enact and give to ourselves this Constitution.*

1045 *Minerva Mills Limited v Union Of India, 1980 3 SCC 625.*

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stated that "Depriving the courts of power of judicial review will mean making the Fundamental Rights a 'mere adornment' as they will be rights without remedies. A 'controlled' Constitution will become 'uncontrolled'."

This was a direct attack on the very foundation of the Constitution as it would allow the Parliament to invade the rights of the citizens and eventually the country would cease to be a democracy. If such an amendment was allowed, it could be seen to be a repetition of the undemocratic circumstances which were previously observed during Emergency period proclaimed by the government under Indira Gandhi.

The amendments were of the nature that they "virtually tore away the heart of the basic fundamental freedoms"[1046] Therefore, they were held to be null and void.

Waman Rao V Union of India[1047] was the case where the first two issues addressed the question of basic structure-

1) Whether in enacting article 31A (1) by the way of constitution amendment, the Parliament transgressed its power of constitutional amendment.

2) Whether article 31A (1) gives sufficient protection to the laws included under it from being challenged on the alleged ground of fundamental rights namely Articles 14, 19 and 31.

To understand the issues at hand, the Supreme Court put light on the first amendment, where the government can acquire the property of the people, through which it introduced Article 31A with retrospective effect. Article 31B of Indian Constitution states that the amendment, i.e., provisions of Article 31A are immune from review under Indian judiciary and cannot be nulled on the basis that they might violate the fundamental rights mentioned in Articles 14, 19 and 31 of Indian Constitution. Four judges in the bench held that such an amendment did not hamper the Basic Structure of the Constitution and aimed at reducing the economic and social disparity. The

1046 Supra, chapters XXXIII, section A and XXXIV, ¶ A

1047 Waman Rao v Union of India, 1981 SC, ¶ 271

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objective behind such amendments was to abolish the zamindari system. Hence, taking away a fundamental right is not material evidence to conclude that the basic structure is being infringed upon.

Raghunath Rao v Union Of India[1048] was where the court observed that the Constitution is the Supreme law of the land and all the three organs of Government namely Executive, Legislative & Judiciary have derived their powers from the Constitution where their functions have also been defined. It has been reiterated in the case that the Judiciary is responsible to uphold the validity of the Constitution. Any amendment made in the Constitution should only be done to give more clarity and meaning to the comprehensive document. There should be no loss of originality nor should it defy the basic rights of the citizens. The Supreme Court added that "unity and integrity of India" and the principle of equality contained in Article 14 constitute the Basic Structure of the Constitution. Any amendment which is ultra vires or transgresses the capping of the basic structure shall not be a valid amendment.

In I.R. Coelho v State of Tamil Nadu[1049] the question which arose was whether an Act or Regulation which gives the impression of being against the Fundamental Rights can be reviewed if included under the Ninth Schedule which was a result of 31-B. The nine judge bench which was led by Justice Y K Sabharwal upheld the previous judgement and unanimously decided that such an Act or Regulation can be reviewed even if it is a part of Ninth Schedule.

LITERATURE REVIEW:

Throughout history there have been various discrepancies as to define the power of the Parliament and what shall constitute to be the non-amendable part of the Constitution. Hence, we see that the question of composition of the Basic Structure shall always remain open ended and ambiguous. In

1048 Raghunath Rao v Union Of India, 1993 SC 1267, 1287

1049 I.R. Coelho v State of Tamil Nadu, 2007 2 SCC 225.

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an article named The Ninth Schedule decision: **Time to define the Constitution's Basic Structure written by Madhav Khosla**[1050], we observe an attempt is made to bring the troubling questions of constitutional significance to light. The article discusses the decisions of Kesavananda Bharati case and IR Coelho. It expresses the concerns about the future of the Basic Structure doctrine and wishes to exhaustively define the same. It also mentions about the solution presented by Ramaswamy Iyer who argues that the Parliament should itself enact and define what the Basic Structure doctrine is. However, the author disagrees with this solution because he believes that there shall be no consensus as to what provisions of the Constitution would constitute the basic structure.

Nonetheless, we must not consider the entire solution to be impractical since during the drafting of the Constitution, the consensus was difficult to reach by the constituent assembly, yet we see that India has the lengthiest and most comprehensive constitution of all nations. It has been observed that the constituents of basic structure have been dubious and therefore have been changing from case-to-case. Thus, it becomes imperative for the law-making body of our nation i.e., the Parliament to decide as to what the Basic Structure would be. While it is important to do so, the Parliament is required to keep in mind that it does not take away or abridge the power of the Judiciary. If this is done then we shall see an increase in the accuracy of the decisions which are connected with the basic structure doctrine.

A strong critique regarding Article 31B which was incorporated to remove the hardships and ensure that Part III is not removed in its entirety from the Constitution. It does come across in the first instance that 31B was enacted to protect the land reform legislations, as also mentioned in the Research Paper-**Belling The Cat which was written by Karishma D. Dodeja**.[1051] However, we must also take it be a law which came into existence to prevent the government from using its

1050 Madhav Khosla. "The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure." Economic and Political Weekly, (vol. 42, no. 31, 2007, pp. 3203–3204. JSTOR, www.jstor.org/stable/4419864. Accessed 5 Feb. 2020.)

1051 Dodeja, Karishma D. "BELLING THE CAT: THE CURIOUS CASE OF THE NINTH SCHEDULE IN THE INDIAN CONSTITUTION." (National Law School of India Review, vol. 28, no. 1, 2016, pp. 1–17.) JSTOR, www.jstor.org/stable/44283661. Accessed 6 Feb. 2020.

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powers in an 'arbitrary and abusive' manner. The author provided with two alternative ways in which the effects of Ninth Schedule can be contained:

i) repeal Article 31B , validate land reform laws under Article 31A and insert a separate schedule in the Constitution containing such protected laws; and

ii) amend Article 31B to include an indicia of the nature of laws that can be protected under the said provision.

Such a solution which seems to be too harsh was put forward by the author since the provision provided in the Ninth Schedule made it a 'dumping vessel' to protect the agrarian law legislation. If we look at its actuality, we can basically put any of the State or Union legislation in the Ninth Schedule. To find a placebo effect to this problem, the Supreme Court in the Ninth Schedule judgement provided for two categories of statutes: the 'preferred' (Ninth Schedule) statutes which will have limited immunity and 'non preferred statutes' which will be subject to the full rigour of constitutional rights and freedom.[1052] Such distinction does not seem to be of much help since the statutes can still be evaluated differently, had the distinction not been made. Thus, the basis of putting a provision in the Ninth Schedule is unclear and therefore, unsatisfactory. This is the reason why we see a number of advocates and analysts criticise the Coelho decision and call the Ninth Schedule to be a constitutional 'dustbin'.

Brooding Omnipresence to Concrete Textual Provisions: IR Coelho judgment and Basic Structure Doctrine written by Kamala Sankaran[1053] has dwelled on hierarchy of fundamental rights and emphasised that in the case of M. Nagaraj & Others v Union Of India & Others[1054]

1052 https://timesofindia.indiatimes.com/edit-page/Constitutional-Dustbin/articleshow/1359898.cms

[1053] Sankaran, Kamala. "FROM BROODING OMNIPRESENCE TO CONCRETE TEXTUAL PROVISIONS: IR COELHO JUDGMENT AND BASIC STRUCTURE DOCTRINE." (Journal of the Indian Law Institute, vol. 49, no. 2, 2007, pp. 240–248.) JSTOR, www.jstor.org/stable/43952108. Accessed 7 Feb. 2020.

[1054] M. Nagaraj & Ors v Union of India & Ors, 2006 8 SCC 212.

the court stated that the basic structure need not be found in constitutional text alone. The entire paper has briefed us about the facts of different cases without any probable or viable solution. It goes on to discuss that some of the fundamental rights are termed as core and a few as non-core. However, upon reading the Nagaraj case, we observe that only some of the core values have been discussed. However, nowhere the mention of non-core values have been made. In conclusion, the paper says "One must also dwell on some issues that could have been raised but were not." But the difficulty that readers might come across is the absence of addressing any issue.

Hence an attempt in this scholarly article also does not adequately suffice to fulfil the need of answering the questions regarding the questions of the Basic Structure.

CONCLUSION AND RECOMMENDATIONS:

Although it has been agreed in various cases that the Parliament does not have the power to amend the Constitution's basic structure and that the basic structure if infrangible, we have also seen the difficulty faced by the courts to decide what the basic structure actually means and consists of. While it has been opinionated by many researchers that the basic structure should be well defined, we are of the opinion that the ambit should always remain open ended so that the basic structure becomes inclusive instead of being limited by their scope. Although the basic structure needs to be inclusive, it is also required to follow a set pattern i.e., the provisions that have already been declared as part of basic structure should remain to be same- the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements. There should be no ambiguity as to what is 'already' the part of basic structure.

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CORPORATE INSOLVENCY LAWS & RESTRUCTURING PROCEDURES: AN OVERVIEW

- **TUSHAR**

ABSTRACT

Corporate Restructuring is an inorganic business strategy where one or more aspects of a business are redesigned to improve commercial efficiency, manage competition effectively, drive faster pace of growth, ensure effective utilization of resources, and fulfilment of stakeholders' expectations. It serves different purposes for different companies at different points of time and may take up various forms. Restructuring typically occurs to address challenges or it can be driven by the necessity to make financial adjustments to its assets and liabilities. Mergers, amalgamations, acquisitions, compromises, arrangement or reconstruction are various forms of corporate restructuring exercises. The purpose of each of these restructuring exercises may be different but each of these exercises attempts to bring in more efficiency in the system.

Corporate Restructuring process in India is governed by the Companies Act, 2013, the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and various other regulatory laws such as the Income Tax Act, 1961, the Competition Act, 2002, the Foreign Exchange Management Act, 1999, the Indian and State Stamp Acts and Insolvency and Bankruptcy Code, 2016. Chapter XV of the Companies Act, 2013 (comprising sections 230 to 240 regulates compromises, arrangement and amalgamations.

INTRODUCTION

The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous. The term **"insolvency"** notes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a restricted sense

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to express the inability of a party to pay his debts as they become due in the ordinary course of business. The word "**bankruptcy"** the condition of insolvency. It is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor's assets are then evaluated and used to pay the creditors in accordance with law. Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debtor is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion. The term insolvency is used for individuals as well as organisations/corporates. If insolvency is not resolved, it leads to **bankruptcy** in case of individuals and **liquidation** in case of corporates.

INSOLVENCY AND BANKRUPTCY CODE 2016

The Insolvency and Bankruptcy Code Bill was drafted by a specially constituted "Bankruptcy Law Reforms Committee" (BLRC) under the Ministry of Finance. The Insolvency and Bankruptcy Code was introduced in the Lok Sabha on 21 December 2015 and was subsequently referred to a Joint Committee of Parliament. The Committee submitted its recommendations and the modified Code was passed by Lok Sabha on 5 May 2016. The Code was passed by Rajya Sabha on 11 May 2016 and it received the presidential assent on 28 May 2016. The Insolvency and Bankruptcy Code, 2016 consolidates the existing framework by creating a single law for insolvency and bankruptcy. The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify. The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in five Parts. Part II deals with insolvency resolution and liquidation for corporate persons whereas Part III lays down procedure for insolvency resolution and bankruptcy for individuals and partnership firms. Part IV of the Code makes provisions for regulation of Insolvency Professionals, Agencies and Information Utilities and Part V includes provisions for miscellaneous matters.[1055] The Code also has eleven Schedules

[1055] Press India Bureau, "Insolvency & Bankruptcy Code is success story of India's economic reforms" August 02, 2019.

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which amends various statutes. The Insolvency and Bankruptcy Code, 2016 provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (IBBI). The Insolvency and Bankruptcy Board of India was established on 1st October 2016. It is a unique regulator which regulates a profession as well as processes under the Code. Its role includes overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities. The Board is responsible for implementation of the Code that consolidates and amends the laws relating to insolvency resolution of **corporate persons, partnership firms and individuals** in a time bound manner.[1056] The Board is empowered to frame and enforce rules for various processes under the Code, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy.

Section 188(2) of the Code provides that the Board shall be a body corporate having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.[1057] As per section 189(4), the term of office of the Chairperson and members (other than ex officio members) shall be five years or till they attain the age of sixty-five years, whichever is earlier, and they shall be eligible for reappointment.

SARFAESI ACT

When a borrower, who is under a liability to pay to secured creditor, makes any default in repayment of secured debt or any instalment thereof, the account of borrower is classified as non-performing asset (NPA). NPAs constitute a real economic cost to the nation because they reflect the application of scarce capital and credit funds to unproductive uses. The money locked up in NPAs are not available for productive use and to the extent that banks seek to make provisions for NPAs or write them off, it is a charge on their profits. High level of NPAs impact adversely on the financial strength of banks who in the present era of globalization, are required to conform to stringent International Standards. The public at large is also adversely affected because bank's

[1056] Rajan Raghuram, "The Indian Economy: What Got us Here," *O.P. Jindal Lecture*, Brown University 2019
[1057] Toje Jose, "What is Insolvency and Bankruptcy Code 2016" *Indian Economy. Net* October 17, 2016

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main source of funds are deposits placed by public continued growth in NPA portfolio threatens the repayment capacity of the banks and erode the confidence reposed by them in the banks.

The banks had to take recourse to the long legal route against the defaulting borrowers beginning from filling of claims in the courts. A lot of time was usually spent in getting decrees and execution thereof before the banks could make some recoveries. In the meantime the promoters could seek the protection of BIFR and could also dilute the securities available to banks. The Debt Recovery Tribunals (DRTs) set up by the Govt. also did not prove to be of much help as these get gradually overburdened by the huge volume of cases referred to them. All along, the banks were feeling greatly handicapped in the absence of any powers for seizure of assets charged to them. All these issues gave the passage for evolution of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) is a unique piece of legislation which has far reaching consequences. This Act is having the overriding power over the other legislation and it shall go in addition to and not in derogation of certain legislation. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 enacted with a view to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mismatch and improve recovery by exercising powers to take possession of securities, sell them and reduce non- performing assets by adopting measures for recovery or reconstruction. The said Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured assets and take over the management of the business of the borrower. With increasing levels of non-performing or stressed assets in the Indian financial services sector, reforming the debt recovery and bankruptcy framework has been a key focus area for the Indian government. The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016 was introduced by the Minister of Finance, Mr. Arun Jaitley, in Lok Sabha on May 11, 2016. It seeks to amend four laws: (i) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), (ii) Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI), (iii) Indian Stamp Act, 1899 and (iv) Depositories Act, 1996.

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Following the recent enactment of the Insolvency and Bankruptcy Code, 2016 (Bankruptcy Code), the Indian parliament has passed the Enforcement of Security Interests and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Act, 2016 to improve the efficacy of Indian debt recovery laws. The amendment act introduces a number of changes to the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (SARFAESI Act) and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act). These changes will however come into effect as and when the government issues appropriate notifications in the Official Gazette to implement the relevant provisions of the amendment.

DEBT RECOVERY ACT – 1993

Recovery of Debts [and Bankruptcy]1 Act, 1993 was passed by the Parliament of India, with a view to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions, [insolvency resolution and bankruptcy of individuals and partnership firms]2 and for matters connected therewith or incidental thereto. It extends to the whole of India except the State of Jammu and Kashmir. It shall be deemed to have come into force on the 24th day of June, 1993. Sub-section 1(4) provides that [Save as otherwise provided, the provisions of this Act]3 shall not apply where the amount of debt due to any bank or financial institution or to a consortium of banks or financial institutions is less than ten lakh rupees or such other amount, being not less than one lakh rupees, as the Central Government may, by notification, specify.

The Act provides a procedure that is distinct from the existing Code of Civil Procedure in order to ensure a speedy adjudication. The Act also provides for the setting up of a separate set of tribunals to hear such matters and these tribunals are termed as Debt Recovery Tribunals (DRTs). With a view to help financial institutions recover their bad debts quickly and efficiently, the Government of India has constituted thirty three Debt Recovery Tribunals and five Debt Recovery Appellate Tribunals all over the country. Each Debts Recovery Tribunal is presided over by a Presiding Officer. The Presiding Officer is generally a Judge of the rank of District and Sessions Judge. A Presiding Officer of a Debts Recovery Tribunal is assisted by a number of officers of other ranks,

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but none of them need necessarily have a judicial background. Therefore, the Presiding Officer of a Debt Recovery Tribunal is the sole judicial authority to hear and pass any judicial order.

Each Debts Recovery Tribunal has two Recovery Officers. The work amongst the Recovery Officers is allocated by the Presiding Officer. Though a Recovery Officer need not be a judicial Officer, but the orders passed by a Recovery Officer are judicial in nature, and are appealable before the Presiding Officer of the Tribunal. The Debts Recovery Tribunals are fully empowered to pass comprehensive orders like in Civil Courts. The Tribunals can hear cross suits, counter claims and allow set offs. However, they cannot hear claims of damages or deficiency of services or breach of contract or criminal negligence on the part of the lenders.

The Debts Recovery Tribunals can appoint Receivers, Commissioners, pass ex-parte orders, ad-interim orders, interim orders apart from powers to review its own decision and hear appeals against orders passed by the Recovery Officers of the Tribunals.

The recording of evidence by Debts Recovery Tribunals is somewhat unique. All evidences are taken by way of an affidavit. Cross examination is allowed only on request by the defense, and that too if the

1. Substituted for “Due to Banks and Financial Institutions” by the Insolvency and Bankruptcy Code, 2016, w.e.f. a date yet to be notified.
2. Inserted by the Insolvency and Bankruptcy Code, 2016, w.e.f. a date yet to be notified.
3. Substituted for “The provisions of this Act” by the Insolvency and Bankruptcy Code, 2016, w.e.f. a date yet to be notified.

Tribunal feels that such a cross examination is in the interest of justice. Frivolous cross examination may be denied. There are a number of other unique features in the proceedings before the Debts Recovery Tribunals all aimed at expediting the proceedings.

Any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned,

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or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

TYPES OF CORPORATE RESTRUCTURING

Organizational Restructuring may involve creation of new departments to serve growing markets or downsizing or eliminating departments to conserve overheads. A company may undertake restructuring to focus on a particular market segment leveraging its core competencies or may undertake restructuring to make the organisation lean and efficient. This type of restructuring affects employees and involves layoffs or collaboration with third parties to upgrade skills and technical know-how.

Financial restructuring is the process of reorganizing the financial structure, which primarily comprises of equity capital and debt capital. There may be several reasons (financial and non-financial) that trigger the need for financial restructuring. Financial restructuring is undertaken either because of compulsion (to recover from financial distress) or as part of company's financial strategy. Financial restructuring is done for various business reasons such as to overcome poor financial performance, to gain market share, or to seize emerging market opportunities. Financial restructuring undertaken to recover from financial distress involves negotiations with various stakeholders such as banks, financial institutions, creditors in order to reduce liabilities.

Debt restructuring is the process of reorganizing the whole debt capital of the company in negotiation with bankers, creditors, vendors. Debt capital of the company includes secured long term borrowing, unsecured long- term borrowing, and short term borrowings. Debt restructuring involves a reduction of debt and an extension of payment terms or change in terms and conditions. Debt restructuring is more commonly used as a financial tool than compared to equity restructuring. Restructuring includes alteration of repayment period, repayable amount, the amount of instalments, rate of interest, roll over of credit facilities, sanction of additional credit facility, enhancement of existing credit limits, compromise settlements.

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CONCLUSION

The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous. The term insolvency is used for individuals as well as organisations/ corporates. If insolvency is not resolved, it leads to bankruptcy in case of individuals and liquidation in case of corporates. The Insolvency and Bankruptcy Code, 2016 is a consolidated legislation providing for insolvency resolution process of individuals, partnership firms, Limited Liability Partnerships and Corporate. The Code offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals.

The Code facilitates time-bound process for insolvency resolution and liquidation. It proposes to repeal and amend a number of legislations. The Code also introduces new regulator "Insolvency and Bankruptcy Board of India" (The Board). The adjudication process in relation to Corporates and LLPs would be under National Company Law Tribunal and in relation to individuals and partnerships under Debt Recovery Tribunal. This chapter also covers overall scheme of the Code, salient features of the Code and important definitions.

In organizational restructuring, the focus is on management and internal corporate governance structures. This makes the firms to change the organizational structure of the company for the betterment of the business. Financial restructuring is the reorganization of the financial assets and liabilities of a company in order to create the most beneficial financial environment for the company. IBC does not restrict the form and manner of a resolution plan. A plan could involve the purchase of the equity or assets of the corporate debtor, the infusion of additional debt, the de-merger of debtor's businesses, financial "haircuts" taken by creditors, or the extinguishment of some liabilities. In case the Resolution Plan drawn-up by the Resolution Applicant envisages any relief or concessions from any State/ Central Government/ Authority, it is restricted only to the extent the same is permissible under the respective laws/ statutes/ policies.

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INDIAN CASTE SYSTEM AND SOCIAL ENGINEERING OF ROSCOE POUND: A PHILOSOPHICAL STUDY

- TARANNUM VASHISHT

ABSTRACT

Man is a social animal, therefore society is an essential prerequisite for his survival. Society is vitally composed of a set of individuals. It provides a context in which individuals interact with each other and helps in shaping their personalities. An individual from his birth has some desires, which change and multi plicate through his lifetime. Society provides an arena in which these desires can be satisfied. With increasing desires they started to be at loggerheads with each other, which resulted in conflict. These conflict of interest due to competing desires of individuals gave birth to a novel concept. This concept was christened by Roscoe Pound as Social Engineering. According to him, law tries to strike a balance between these interests. This article aims at understanding the notion of law as a means of resolving this conflict of interest. Most importantly how this concept of social engineering given by R. Pound applies to the dilution of caste system in India, with specific reference to 'The Annihilation of caste' by B.R. Ambedkar.

INTRODUCTION

Roscoe Pound was of the firm belief that sociological jurisprudence should aim at forming social facts as the basis of conceptual understanding and interpretation of law. Roscoe Pound tried to juxtapose law, engineering and sociology. He was of the view that social engineering was the task of modern law. He gave a tripartite meaning to law, these are, first it signifies the legal order, i.e., the ordering of human conduct through the systematic application of the force of politically organized society. In this sense it is called a regime of social control. Secondly, it means the sum of the authoritative grounds for judicial and administrative decisions in such a society. Thirdly, it may mean what is called the "judicial process." A fourth meaning can be added since the term

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"law" can be, and often is, used to mean all three of the other meanings just mentioned.[1058] When "science of law" is talked about, the second meaning is used to denote it. It is largely in this sense that legal scholars use this term. Roscoe Pound's writings highlight essentially different aspects of the definition of law which were considered important by him. Broadly, the three important aspects are as follows. Firstly, as a regime, law is defined as a highly specialized form of social control in a politically organized society exercised through the systematic and orderly application of the force of such a society.[1059] From still another point of view, which might aptly be called the origin, law is defined as experience developed by reason and reason tested by experience; it is experience organized and developed by reason, authoritatively promulgated by the lawmaking organs of society and backed by the force of that society.[1060] Finally, viewed with regard to its end, law is defined as a task of social engineering designed to eliminate friction and waste in the satisfaction of unlimited human interests and demands out of a limited store of goods in existence.[1061] It is in this sense that this article seeks to understand social engineering. Roscoe Pound is of the view that law provides a context for social adjusting. A method for finding a middle ground for conflicting and overlapping interests. Law precisely is a compromise made due to impositions made by an authoritative figure, in a self interested society. Law was considered a catalyst of free society, where everyone seeks their personal development.

SOCIAL ENGINEERING BY ROSCOE POUND

Social engineering essentially refers to the belief that human nature and personality can be manipulated into social structures by social forces. This initially was considered the core concept of sociology to create a consolidated and less fragmented society. This concept of social engineering is now increasingly being attached to a new understanding, which is reactionary and anti- libertarian. It is believed that this process is now used to as a tool for manipulation of the masses for the selfish benefits of the capitalists or the elites. Mass media is considered as an important tool of social engineering to achieve this end. Social engineering in the sociological

[1058] Pound, "A Comparison of Ideals of Law" 47 *Harvard Law Review* 1-2 (1933).
[1059] Pound, "My Philosophy of Law" 249 *Credos Of Sixteen American Scholars* (1941).
[1060] Linus J. McManaman, "Social Engineering: The Legal Philosophy of Roscoe Pound" 33 *St. John's Law Review* 16 (1958).
[1061] *Ibid.*

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context implies predefined social change and development. Its major product being effective formulation of popularly supported social action.

Roscoe Pound defined a procedure for social engineering in the society by segregating different interests into three broad categories and attempting to strike a balance between them, which according to him was the purpose of law. According to Pound, "Law is social engineering which means a balance between the competing interests in society," in which applied science are used for resolving individual and social problems.[1062] For this purpose it should be taken into account that which classified interests can be legally recognized, what would be the procedure for delimiting the boundaries of these interests and the means by which law would recognize them. Also, most importantly, the valuation of these interests.

Roscoe Pound drew an analogy between the task of a lawyer and an engineer. The aim of a lawyer being continuous efforts for building of a structured society which fulfils the aspirations and interests of the maximum with minimal resources. He made a division of interests into the following categories-

1) Private Interests- This includes personality, domestic relations which include family, marital interests etc. and interests of substance like property, employment, freedom of association etc.
2) Public Interests- This essentially means interests of a politically active society, encompassing protection of state, protection of state as a guardian, for protection of territorial boundaries, water bodies, sea shores etc.
3) General Social Interests Of the Society- This includes social safety and security, public health, social economy, social and religious institutions, protection of general morals of the society, maintenance of social harmony, conservation of resources, ensuring general progress of the society and maintaining individual interest in a social setup.

According to Pound, all societies of the world have some common Judicial postulates on which their ordering rests. These are basically the implicit assumptions which are followed from the very inception of the society. He conceptualized five basic postulates-

[1062] Dr. B N Mani Tripathi, *Jurisprudence Legal Theory* 49 (Allahabad Book Agency, 16th end., 2017).

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1) It can be assumed by a man that he would not be inflicted upon by any intentional external aggression by any other person in a civilized society.

2) It can be assumed that what they have discovered would be appropriated by only them. The things that they have created investing their own labor and skill would be their own.

3) The people that they would deal with would act in good faith and would be naturally good towards them and would reasonably expect from them. Also people would take into consideration the sentiments of others.

4) It is assumed that people would take into consideration that they are not inflicting injury upon others in carrying out their endeavors in a civilized society.

5) In a civilized society, it is assumed that if people maintain things or enjoy some services, which though harmless to them, have the potential to injure the interests of others, would keep them in their safe custody, taking due care that no such harm is made.

These postulates, as admitted by Roscoe pound himself are not exhaustive and may evolve with time. Although they do form a strong base for fomenting a cooperative society. They provide ample guidelines for a civilized society and aim to balance idealism and reality.

Thus, social engineering, as propounded by R. Pound seeks to create an adjustive and inclusive society by, minimizing the continuing conflict of interest that inexhaustibly stays in every society. This concept of social engineering is applied to various concepts in contemporary society. An attempt has been made to apply this concept to the system of bifurcation of society based on castes in India.

CASTE SYSTEM IN INDIA

Caste system refers to the division of the society on the basis of socially bifurcated groups. This bifurcation can have varied origins, which give this system distinct meanings in different societies. In the Indian context, this system is age old, originally based on occupational structures. The earliest known written text, which is believed to have given foundation to this tradition in India is Manusmriti. This text stringently divides the societal structure of India into four categories, which are considered to be the four main castes. Besides these are various jatis which couldn't fit into

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these above mentioned castes. With the passage of time this system evolved to become a hierarchical system, with Brahmins being the highest category, yielding the maximum powers and shudras, the fourth category occupying the lowest position in this social stratum. The fourth category became highly oppressed being subject to the scorn of the society. This group was named ‘ untouchables’. A number of intellectuals emerged from this category of people, the most famous one being Dr. B.R. Ambedkar.

Dr. Bhim Rao Ambedkar, wrote the famous undelivered speech, which was later published as, ‘The Annihilation Of Caste’. He was invited to give a speech by Jat Pat Todak Mandal at its annual conference. When Dr. Ambedkar sent his speech, some parts of it were found to be highly objectionable by the organizing committee. Especially the parts where Vedas were actively criticized by him. The committee accepted the speech with some changes, but this was completely unacceptable to Dr. Ambedkar. He bluntly refused to change even a comma, with the consequence of which the annual conference was annulled. Hence this speech remained undelivered. However, Dr. Ambedkar determined to enlighten the masses, got it published as a book, which was highly appreciated by many notables, while also being criticized by many, one of them being Mohandas Karamchand Gandhi.

‘The Annihilation Of Caste’, considered caustic by many is, according to me a magnanimous opus.

This book does not give detailed descriptions of the humiliation that the shudras, especially ‘untouchables’ were forcefully subjected to in every sphere of life. Rather it gives an insight into the educational and economic backwardness of the ‘untouchables’. The forceful denial of right to education, occupation and to live with basic human dignity. They were forced those tasks of manual labor which no other social group was ready to perform. Economically deprived they were forced to live a miserable life of virtual slavery. Above all they were deprived of the basic human necessities as well, including the right to safe drinking water. All members of that group were subjected to social persecution too. As a result of which this became a vicious cycle of unending oppression.

This flawed system of social segregation in India has deep rooted historical roots. This can be traced back to the time when the dharmashastras and dharmasutras were written by the brahmins. The most stark example of this is the infamous Manusmriti. These ‘holy books’ gave explicit recognition and legitimization to this ultimate system of oppression. The worst consequence of

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this was that it stringently shaped the mindset of the common population who blindly followed this system. The naive and unaware population did not take this into account that the perpetrators of this system, the brahmins, made it so as to suit their selfish interests. Over the centuries this system was followed and it became an almost inextricable part of the hindu society of India. The logic which gave birth to this system was questioned for the first time by Dr. Ambedkar in this thought provoking book.

DR. B.R. AMBEDKAR AND THE ANNIHILATION OF CASTE

Dr. Ambedkar refused to accept the basis of the caste system as occupation, reasoning it to be fundamentally flawed. He demarcated the boundary between division of labor and division of laborers. It was the latter that he considered to be the case, while talking about the Indian context. The former being based on skill and right to choice while the latter being based on the fallacious understanding of purity of blood. This latter part gave birth to a number of fallacies in the human society like inefficiency, uncompetitiveness, subjugation of one group at the behest of the other. Most importantly, it gave birth to the concept of pollution, which was the epitome of this oppressive policy. Dr. Ambedkar was of the view that this understanding of the upper castes that they were of 'pure blood' was a mere delusion. He quoted various examples to successfully prove his point. He argued vehemently that this division of castes into watertight compartments, fulfilled no aim but that of making a corporate human life impossible. Hence, caste had no scientific basis. This system of caste is ethically deplorable to the society. This division of castes serves as the main hindrance to the emergence of a cooperative society and consolidated public view. This system of castes as in the hindu society, prevents the development of the feeling of nationalism as people of different castes showcase no collective responsibility towards their society as a whole. Their society then becomes limited to their caste specific arenas. This increasingly catalytic process of creating a fragmented society can be halted only by the process of inter caste marriages.

DISMANTLING OF THE CASTE SYSTEM

Their is an urgent need to exterminate this phenomenon of caste system in the hindu society. All reform consists in a change in the notions, sentiments, and mental attitudes of the people towards

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men and things. It is common experience that certain names become associated with certain notions and sentiments which determine a person's attitude towards men and things.[1063] Dr. Ambedkar argues that he is opposed to this division not for the sentiments but because of the impracticability and the fundamentally flawed reasoning on which this concept is based. He says that the concept of chaturvarnya is completely different, and more importantly opposed to that of castes in India. It is apparent from the above discussion that this system of division is fallible, but there are some major hindrances which come in the way of its successful demolition. These are -

1) How would the people who have acquired a higher status by birth be convinced to leave their position and accept a stratum based on their worth. Moreover, what would be the mechanism of breaking over four thousand sub castes which have emerged from these four main castes, and establishing four Varnas based on their worth.

2) How would this abolition be legally and socially sanctioned. A system, with its archaic inception is not easily done away with by the society.

3) How are the other categories of people who do not fit into this system of chaturvanya, most importantly women, be integrated into the society.

It should also be taken into consideration that this system of stringent division is not the one followed in other religions and cultures, and hence can't be taken as a defense by the brahmins of the hindu society. It is apparent that caste system cannot be the basis of societal morality and foundation of the nation. Hence, this fourfold division of hindu society should be erased from their memories. However, the supreme question remains how are we to abolish this age- old social order. Rejecting all other ideas, Dr. Ambedkar was of the firm view that the real solution to this problem was only inter caste marriages. He said in his speech, The 'Annihilation Of castes'- *"I am convinced that the real remedy is intermarriage. Fusion of blood can alone create the feeling of being kith and kin, and unless this feeling of kinship, of being marriage. Fusion of blood can alone create the feeling of being kith and kin, and unless this feeling of kinship, of being kindred, becomes paramount, the separatist feeling—the feeling of being aliens—created by Caste will not vanish. Among the Hindus, inter-marriage must necessarily be a factor of greater force in social life than it need be in the life of the non hindus. Where society is already well-knit by other ties,*

[1063] Dr. B.R. Ambedkar, *The Annihilation Of Caste* (Dr. Ambedkar Foundation, New Delhi, 2014).

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marriage is an ordinary incident of life. But where society is cut asunder, marriage as a binding force becomes a matter of urgent necessity. The real remedy for breaking Caste is intermarriage. Nothing else will serve as the solvent of Caste."[1064] He was of the view that the these processes of inter dining and inter marriages were in direct contravention to the hindu dogmas, and were the most appropriate place to hit for dissolving this caste system. This accompanied by the destruction of the belief of the public in the shastras, who legitimize and sanctify this hierarchical system of castes.

SOCIAL ENGINEERING AND THE CASTE SYSTEM

For the successful completion of this aim of destruction of caste system in the contemporary Indian society the phenomenon of Social engineering of Roscoe Pound may be applied. This society that is created by the hindus is in contravention with the judicial postulates propounded by R. Pound, which he assumes exists in every "civilized society". These assumptions according to him give foundation to a harmonious society and are necessary for peaceful coexistence of individuals. It can thus be deduced from this reasoning that either the hindu society does not qualify as "civilized society" as described by R. Pound, or that due to some pivotal defects in their conception this society is sooner or later bound to fall. Hence to rectify this problem, the concept of social engineering has to be applied to caste system in India. This would essentially be carried out by the process of inter- caste marriages. This aim can be fulfilled by providing legal and social benefits to people indulging in inter caste marriages. This would balance the interests of competing castes and hence, the society would fulfill the criterion of a civilized society with a strong foundation and shared interests, which would constantly drive for both common and personal interests.

[1064] *Ibid.*

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BIOTERRORISM: AN ATTACK AGAINST MANKIND

- **TANISH GUPTA**

ABSTRACT

Bio-terrorism is the threatened use of bio-agents; viruses, bacteria, toxins or other agents to cause illness or death in people, flora and fauna. Since most bioterrorism agents are zoonotic in origin, there is high possibility of bioterrorism involving animals and veterinarians and livestock owners may be the first to diagnose the early cases of a bioterrorist act, as livestock can be sentinels of such an exposure[1065]. Biological engagement in war of conflict is the intentional use of this threatened biological toxics and to create disease and death in humans, livestock and plants, with an intention to war, and use as a terrorist attack is credit to various rare features. These bio-agents are is classified into 3 categories likely A, B & C. on the bases of there transmission type and there spreading rate along with mortality rate[1066]. When these agents are used as a weapon to spread terrorism, there are various ways to spread them like aerosol sprays, explosives or food and water contamination. Biological weapons can strike all suddenly without any prior indication and can last for long period of time. Current concerns with respect to the utilization of natural weapons result from the expanding number of nations that are occupied with the fast increment of such weapons and their stockpiling by terrorist organization. This the time that every nation needs to co-operate and develop a bio-defence and to educate the target population about the precautions and protective measures that are required to be taken during such assaults.

Keywords: bioterrorism, biological weapon, bio-defence, public health.

INTRODUCTION

Terrorism is the unlawful use of power or roughness against person, animals or property to indicate a government or civilian population to gain political or social aims and bio-terrorism is the use of

[1065] Lane, Clifford H and Anthony S. Fauci. 2008. Microbial Bioterrorism. In Harrison's Principles of Internal Medicine, New York: McGraw Publishers.
[1066] Centers for Disease Control and Prevention (CDC). Bioterrorism Overview 2006.

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biological agents by terrorist groups to produce weapon which cause mass death and disease among general population, animals and plants[1067]. Use of bio-weapons is not a brand-new concept it has been used for more than 100s of years and the proof of it been used lies in the past. In ancient Rome, Roman soldiers used to throw faeces to spread infection and to debilitate enemy combatants. In medieval times, rats infected with bubonic plague were released to infiltrate enemy cities. In 14th century, to poison the drinking water, 'cadavers' were dropped into enemy wells. During World War 1, German scientist Anton Digler used a microbiological agent to infect horses and mules bound for England. In 1942, U.S. President Franklin D. Roosevelt authorised a bio-weapons program under George W. Merck, who is considered as the biological warfare's Dr Robert Oppenheimer (the inventor of the atomic bomb). The Japanese Cult Aum Shinrikyo which targeted the subway system in Tokyo in 1995 was trying to obtain Ebola virus as a potential biological weapon.[1068] Impact of bio-attacks defend on many factors: agents used, the sum being spread, the dispersal strategy, the climate conditions, the prior invulnerability of the uncovered populace, and how rapidly the assault was identified. Common characteristic observed in these agents include: the capacity to be scattered in aerosol of 1-5 mm particles, which can enter the distal bronchioles, the capacity to convey these vaporizers is straightforward technology, and whenever delivered from an air source can taint enormous no. of populace and the capacity to spread disease, panic and fear. Aerosols agents are able to case high morbidity and mortality rate but it does not mean other agents can't, even non-aerosolized attacks, such as the anthrax attack can result in morbidity and mortality.[1069] These attacks are were hard to trace since they are tasteless and odorless and only come to notice by the symptoms to infected persons. Enclosed places provide an ideal target particularly with the crowed places but no. of terrorist acts worldwide has decreased over the past few years and the increase in their lethality is of great concern[1070]. The

[1067] Centers for Disease Control and Prevention (CDC). Bioterrorism Overview 2013.

[1068] Moran, Dina Fine. 2014. Weaponized Ebola: Is It Really a Bioterror Threat? Scientific American, September 25, 2014.

[1069] Rebmann, T., Wilson, R. and LaPointe, S. (2009). Hospital infectious disease emergency preparedness: A survey of infection control professionals. Am. J. Infect. Control, 37: 1-8.

[1070] Association for Professionals in Infection Control and Epidemiology. (1999). Bioterrorism Readiness Plan: A Template for Healthcare Facilities. USA: APIC.

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Biological attacks are very different from nuclear attack, chemical attacks cause maximized damage immediately were as the bio attack case slow damage but spread at large.[1071].

The biological weapons are attributed to following features:

- **Low production costs** - called the "poor man's atomic bomb"[3] / "poor man's weapons of mass destruction". (5a). for atomic bombs, conventiona] weapons & nerve-gas weapons, the cost per causality would be approximately $2000, $800 & $600 however, for Bio-Weapon, the cost would be about $1 per causality.
- **Easy access to a wide scope** of terror delivering biological toxins
- **Non -detection** by daily check system and easy movement.
- **High fatality**: biological poisons are among the most poisonous agents known for example the amount of Botox in the spot of an 'I' is sufficient to execute 10 individuals. Bio-Weapons have the additional bit of leeway of devastating an adversary while leaving his infrastructure flawless as goods for the winner.

Recently, with advancements in technology, bioweapon diseases have been known to spread faster and prove much more difficult to control and eradicate than the historical ones. In any case, bioterrorism readiness mitigates potential negative results, and is required by healthcare services and general wellbeing directing offices as a feature of a far reaching emergence executives program. Detailing a huge healthcare, general wellbeing, and emergence board reaction is the need of great importance[1072]. The main objective of this paper is to review the historical perspectives, potential exposures due to various microbes and their metabolites, which may induce significant risk upon health care due to bioterrorism and to highlight what needs to be done to prevent and reduce morbidity and mortality arising from bioterrorist actions.

CATEGORIES OF AGENTS USED AS A WEAPONS

As mentioned above the bio-agents are classified into 3 categories: A, B & C. **Category A**: agents that can be easily spread for human to human and can result in high mortality rate and have the

[1071] Raghunath D. Biological Warfare: bioterrorism, in: XXIV National congress of Indian Association of Medical Microbiologists.2000; Patil cs (Ed)
[1072] Carlisle, P.A. (2005). Strategic Studies Institute, US Army War College, 2005.

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capability for major public health impact. The spread of this agents can cause a cumbersome situation and require unique action for public health preparedness. category B: agents in this classification are anything but difficult to spread. They bring about moderate morbidity rates and low mortality, and require explicit improved demonstrative limit and disease surveillance. Category C: these agents are rising and could be built for mass spread later on as a result of their accessibility. They are anything but difficult to deliver and spread. They were conceivably connected to high mortality and death rates, and significant health impact.[1073]

The biological weapons are easy and cheap to produce rather than any other agent of destruction. Not only this but they are able to cause death or disabling disease whose impacts could last for many year and can also be given pace if got aerosolized to large geographic area. However, only a few are easy to prepare and disperse as shown in Table1. Zoonoses of offensive biological warfare programs have included the causative organisms of anthrax, plague, tularemia, glanders, Q fever[10741075]

Groups	Diseases	Agents
A	Anthrax	*Bacillus anthracis*
	Botulism	*Clostridium botulinum* toxin
	Plague	*Yersinia pestis*
	Smallpox	*Variola major*
	Tularemia	*Francisella tularensis*
	Viral hemorrhagic fevers	*Filoviruses and Arenaviruses*
B	Brucellosis	*Brucella spp.*
	Epsilon toxin	*Clostridium perfringens*
	Food safety threats	*Salmonella* spp., *E.coli*O157:H7, *shigella*
	Glanders	*Burkholderia mallei*
	Melioidosis	*Burkholderia pseudomallei*
	Psittacosis	*Chlamydia psittaci*
	Q fever	*Coxiella burnetiid*
	Ricin toxin	*Ricinus communis*
	Staphylococcal enterotoxin B	*Staphylococcus spp.*
	Typhus fever	*Rickettsia prowazekii*
	Viral encephalitis	*Alphaviruses*
	Water safety threats	*Vibrio cholerae, Cryptosporidium parvum*
C	Emerging infectious diseases	*Nipah virus* and *Hantavirus*

Table1: Major Categories of biological agents with probability to be used as bio-weapons[1076]

The Properties of an Ideal Biological Weapon

[1073] Centers for Disease Control and Prevention (CDC). Bioterrorism Overview 2013.
[1074] Noah, D.L, Naoh, D.L. and Crowder, H.R. (2003). Biological terrorism against animals and humans: a brief review and primer for action. J. Am Vet. Med. Asso., 221: 40-43.
[1075] Pal, M. (2007). Zoonoses.2nd Ed. Satyam Publishers, Jaipur, India
[1076] Centers for Disease Control and Prevention (CDC). Bioterrorism Overview 2013.

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A biological weapon can be more destructive than any chemical bomb. The analysis of biological weapons clearly shows the impact that a potent agent could have. The biological attacks are designed to cause fear among target population either by inducing illness, disability or killing large no. of people. These potent agents are extremely toxic, preferably communicable among humans, highly infectious, easily stored and dispersed, and hard to track origin, easy to grow and produce desired effects.[1077] Where these agents cause disease in humans, flora, and fauna, there are very few agents that are able of being used as biological weapon. 'Eitzen' describes the features that make a biological agent a potential weapon.[1078] Preferably, a bio-weapon is easy to produce because there are very easily available and are cheap to produce but to develop a bio- attack towards sensitive targets or population, large number of biological agents are required. Thus, it can be considered, to target population it is necessary to have quite many bio-agents or toxics. Also, the ideal Bio-Weapon must have a high capacity to weaken the influenced or, on the other hand, be exceptionally deadly. It is appropriate to select an agent with an incubation period relying upon whether quick or deferred impacts are required. Other important features of Bio-Weapon is the way of transmission, hence, the ease of spread with a suitable way of delivery. There also come the need the factor of stability of the agent, especially when large quantity is preserved for a longer period of time.[1079]

Generally, biological agents can be forth listed as per certain features that define the danger to health : **Infectivity**: The capability of a toxin to embed and increase in the host; **Pathogenicity**: The capacity of the toxin to cause a sickness in the wake of embeddings into the host; **Transmissibility**: The capacity of the toxin to be transmitted from a contaminated body to a solid body; **Ability to neutralize**: Its way to have preventive tools and remedial purposes.[1080]

Mode of Delivery and Method of Dissemination of Biological Weapons

[1077] Misra, C., Mukesh, S. and Thakur, V. (1995). Glanders: an appraisal and its control in India. Ind. Vet. Med. J., 19: 87-98

[1078] Eitzen, E.M. (1997). Use of biological weapons. In Zajtchuk, R. & Bellamy, R.F. (Eds.), Textbook of Military Medicine: Medical Aspects of Chemical and Biological Warfare. Office of the Surgeon General. U.S. Department of the Army, Washington. D.C., pp. 437-450.

[1079] Kortepeter, M.G. & Parker, G.W. (1999). Potential biological weapons threats. Emerg. Infect. Dis., 5:523-527.

[1080] North Atlantic Treaty Organization (NATO) (1996). .NATO Handbook on theMedical Aspects of NBC Defensive Operations AMedP-6(B).Part II -Biological. U.S. Department of the Army, Washington DC.

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Biological agents might be conveyed in either wet or dry structure. Dry powders made out of little particles will in general have better dispersal attributes, and have advantages in storage. Dried agents require an increased level of technology to produce them, in spite of the fact that freeze drying or splash dries innovation has been accessible in industry for quite a long while. Most commonly, delivery techniques utilized are aerosolized agents. The specialist can be scattered by joining a splash gadget to a moving movement. A mechanical insecticide sprayer designed to be mounted on an airplane is a model. A line of discharge would then happen while the sprayer is working. This is known as a line source and is showered opposite to the bearing of the wind, upwind of the proposed target region. Up to a specific range, anybody downwind of such a line source would hypothetically be in danger.[1081] The range that the toxic agent depends on many factors, including wind speed and course, air security, and the nearness of reversal conditions; and on characteristics of the agent itself. biological agents can be spread by spraying them into the air, by tainting creatures that carry the sickness to people and by contaminating nourishment and water. potentially, several human pathogens could be used as weapons. In any case, general public health specialists have recognized just a few as having the capability to make mass contamination leading to civil issue. There are many causes why biological weapons are more capable than any other agent to cause mass disruption.

A perfect biological agent would be effectively spread in the outside by using off-the shelf gadgets, for example, modern sprayers or different kinds of airborne delivering gadgets. Pressurized canned products biological agents are scattered into the air, framing a fine mist.[1082] The Bio-Agents are most effective if disseminated as an aerosol, this system creates an invisible cloud with particles ranged between 0.5-10 mm in diameter, which can last for a longer time. The particles range being respirable can cause a predominantly inhalation hazard since the particles are capable of settling deep down in the lungs. Biological warfare agents may be used to contaminate food or water systems or supplies. Heat destroys most pathogens and toxins; thus, to be effective most agents would have to be used on food that will be served raw or added after the food is prepared and presented for serving.

[1081] Centers for Disease Control and Prevention (CDC). Bioterrorism Overview 2013.
[1082] Zilinskas, R. (2003). Terrorism and biological weapons: Inevitable alliance, Persp. Biol. Med., 34: 44-72.

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Standard water purification methods may well inactivate many pathogens and some toxins. However, chlorination will not inactivate many spores and commercial filtration will be largely ineffective against spores, cysts, viruses, and many bacteria. Filtration will be all but useless against toxins unless something like activated charcoal is used. Biological warfare agents have been delivered by covert injection. Some agents (like ricin) are lethal when injected. The possible modes of Bio-Weapon attack in any operational environment will vary significantly with location, depending on the nature of the delivery system employed, the time of day, the weather conditions, and the local geography[1083].

Routes of Exposure of Biological Weapons

Biological toxins can be transmitted through different ways. The transmission modes are: **parenteral;** agents that are transmitted through body fluids or blood, **airway**; agents that are emitted by penetrating individuals, which can then be inhaled by surrounding people. **Contact**; through which the agents present on the surface of the infected organism can infect another body. **Oral-fecal route**: through articles, nourishments or different things defiled with the feces of contaminated patients, or through sexual contact [1084].

- **Respiratory System**

Inward breathing is most dangerous, breathed in, looks like influenza side effects yet advances to fluids in lungs and respiratory failure. The body is generally powerless against this course of presentation in view of the large surface zone and gas exchange capacity of the lungs; because of the susceptibility of mucous membranes to infection; and in light of presence of phagocyte cells that, if ineffective in devastating a pathogenic microorganism, may rather carry it to the lymph system where it might multiply and cause most biological agents influence the lungs, Unlike vapors, airborne particles of a specific size are aggregated after some time in the respiratory system[1085]

- **Skin and Mucous Membranes**

[1083] Pinson, L., Johns, M. and Ackerman, G. (2013). Ricin Letters Mailed to President and Senator. National Consortium for the Study of Terrorism and Responses to Terrorism
[1084] La Placa, M. (2010). Principles of Medical Microbiology. Esculapio, Lahore.
[1085] Steffen, R. (1997). Preparation for emergency relief after biological warfare. J. Infect., 342: 127-132.

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Cutaneous, skin, least harmful, enters through scraped spot or cuts, causes tissue injury with dark scab. The presence of wounds, injuries or skin rashes may change this essentially and permit even biological agents to enter the body by this course. As a rule, "the thinner, more vascular, and moister the skin, the more prone it is to penetration". High relative moistness advances skin entrance. Fluid spills and vaporizers cause a risk for skin entrance that can be many deliveries. If there should be an occurrence of improvised gadgets, a bigger portion of agent will be in the spills and a littler part will generally request of extent higher than from vapors. Spills will happen for the most part around the purpose of be aerosolized.[1086]

- **Digestive System**

Gastrointestinal, ingesting contaminated meat or water, sickness, stomach agony and bleeding, fever, heaving, can be treated with anti-infection agents or antibiotics at an early stage. Biological weapons can enter the stomach related system in polluted food or drinking water, by hand-mouth contact in the wake of contacting tainted surfaces, or by gulping of respiratory bodily fluid after an aggregation of bigger airborne particles in the nose/throat and upper airways. Of all introduction courses this is the most effortless to control, given that the tainted sources are known[1087].

Microbial Forensics

A new Forensic discipline has come up, dedicated to analyzing evidence from a bioterrorist attack, bio-crime or un-intentional micro-organism / toxin release for attribution purposes.[1088] Microbial forensics has come up with some prominent disclosures. Like, 'sequencing of intensified viral fragments from the dental specialist and the affected patients supported the alleged transmission of HIV from a Florida dental specialist to a few patients.'[1089] Recently, using many points, Variable Number Tandem Repeat (VNTR) analysis, the Aum shinrikyo b. Anthracis bioterror strain was recognised as the veterinary vaccine strain, Sterne '34f26'.

Significance of Microbial Forensics:

[1086] Polhuijs, M., Langenberg, J. and Benschop, H. (1997). New method for retrospective detection of exposure of biological weapons: application to alleged Sarin victims of Japanese terrorists. Toxic.Appl.Pharma., 146: 156-161
[1087] Idib.
[1088] Budowle B. Genetics and attribution issues that confront the microbial forensics field, forensic science international.2004
[1089] Centers for disease control and prevention, morbid. Mortal.

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It will help law enforcement to recognize the wellspring of the evidence sample. evidence can remain to the investigation of judges in the court just as national choice and strategy creators.

- Forestalls and deter bio-crime and distinguishes culprits
- Having a solid and steady reaction plan may dishearten probably a few terrorists / mongers.
- Cases in which infected individuals have deliberately contaminated others may well end up in court.
- A significant advantage, in any case, is that a great part of the result would likewise be relevant to following characteristic tracing natural out-break of disease.

Biodefence:

Major challenges are:

- Proper collection of specimens at site
- Recognizing that an attack is occurring and prompt management of the disease
- Analysis of specimens.
- Validation -- quality assurance and control Important Measures & Handling of Such Disasters: Preventive measures:

1. Develop full international cooperation on dealing with this problem.
2. Educate at risk populations
3. Coordinate the monitoring of the potential producers and users of bio-weapon
4. Continue to improve on Bio-Weapon monitoring techniques and apparatus.
5. Stockpile Bio-Weapon fighting supplies.

Discovery of Bio-Weapon is a major issue except if it is a reported occasion by the terrorist yet this may not be always and it might be an undercover rate; commonly there might be scams only in such circumstances it might turn out to be important to identify and analyze such an attack correctly. Such assaults can be handled only by the means of awareness. It can be directed into urgent management or any other mass disaster management. It will involve a multidisciplinary

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approach involving health departments of the governments, private health care providers, local administration, epidemiologists and media people and there should be effective communication between these groups. There should be proper lab facilities to identify and confirm form the samples that should be properly preserved to prevent the spread of the disease from the samples. Triple packing method is advised and there should not be any leakage. Visitors should be strictly restricted to visit the patients in the hospitals. Contamination of the patient and condition should be considered in the case of gross contamination and used garments ought to be taken care of insignificantly and should be placed in an impervious pack. Proper arrangements should also be made to control mass number of cadavers. During died body examination, on such cases all standard precautions should be taken to prevent the spread of the disease and relatives should be instructed to take precautions while cremating or burying them. Usually there is panic, horror and anger against the state and terrorists. There is fear of infection and social isolation, leading to demoralization of the public. Such an event should be handled with all precautions by trained psychiatrists, social workers and volunteer religious and NGOs by providing psychological support. Simultaneously, nervousness in the social health care providers should likewise be dealt with and they should be appropriately instructed to ensure themselves. This fear can be extraordinarily reduced in the event that they are normally participating in the disaster drills held routinely. Individuals should be appropriately educated through the media about the highlights of the features, its method of spread, safety measures to be taken and when and where should they look for clinical advice. This will greatly reduce the anxiety, fear and misunderstanding in the target population who usually in such cases attribute nonspecific symptoms to an attack of bio-terrorism. We should create and apply bio-safety precautions and preventions in institutions. Dealing with potentially harmful and dangerous agents, which can be used as an weapon to terrorism. We have to prepare emergency plans to deal with the bio-terrorism attack and there should be unity between various agencies involved in dealing such situations. We should have good working relations with the media to avoid panic and horror.[1090]

Need For "Next-Generation" Approaches to Biodefense.[1091]

[1090] Centers for disease control and prevention, morbid. Mortal

[1091] Biosecurity and bioterrorism: biodefense strategy, practice, and science volume 1, number 3, 2003

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Firstly, assets should be designated to allow assessment of rising bio-technologies that may energize a bio-weapon specialist improvement and organize dangers introduced by that agents' proposals from knowledge experts with respect to Bio-Weapon agents should be viewed as when determining research priorities. Significantly, these appraisals should be founded essentially on foreign technologies capabilities.

Second, a governmental supported setting for tentatively approving biotechnology threats evaluations should be built up. A large number of their discoveries of risk appraisal research should not be published straightforwardly;[1092] nonetheless, open trust in this case could be kept up by building up an autonomous board of bio-science specialists answerable for supporting and inspecting research at the facility.

Third, some governmental bioscience research funds should be directed to advance improvement of cutting-edge frameworks for ecological location, clinical diagnostics, prophylactics, and therapeutics. Scientists should be pressurized on recognizing poisons dependent on the presence of a board of indicators, keeping in see that such poisons most likely would contain hereditary material from variety of life forms, including people, microscopic organisms, and viruses. Successful implementation of a national biosecurity strategy will require integration of a variety of independent efforts across the government, bioscience research, and medical / public health communities.

Conclusion and Recommendations

Biological weapons have not been frequently utilized all through mankind's history, and their adequacy to be utilized as a war weapon has not been totally confirmed. Since common diseases represent an incredible hazard for human wellbeing, as in the event of contamination with Influenza virus, where there is a contribution of enormous populace, generally attributable to simple spread, a risk of its utilization as a Bio-weapon can't be underestimated. There has been a continual facination with biological weapons by countries in the only remaining century, an addiction that proceeds even today. Especially where territorial authority (or opposing it) might require unusual weapons, Bio-Weapon's stay a significant danger.

[1092] Epstein G. Controlling biological warfare threats: resolving potential tensions among the research community, industry, and the national security community. Critical reviews in microbiology 2001

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With zoonoses as the most probable irresistible ailments to be utilized by bioterrorists to create Bio-Weapon's, human and veterinary medication can profit by cross-coordinated effort. As obstacles between animal species breakdown, it grows the information base of human and veterinary medication. Incorporating veterinary and human general wellbeing observation endeavors is basic in managing bioterrorism. This effort will require improved correspondence and collaboration. A planned and cohesive effort by researchers, human services suppliers, veterinarians, and disease transmission experts is expected to control the worldwide effect of bioterrorism. Therefore, we suggest that there should be an improvement of mass awareness before, during and after such an attack. The individuals should be instructed with respect to potential presentation of a biological weapon, and different advances that are required to be taken to check our profile guard abilities and guarantee adequate assurance from developing dangers. The central government should give crisis medical coverage inclusion during a bioterrorist attack.

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EFFECT OF COMPULSORY LICENSING ON INTERNATIONAL TRADE AND COMPETITION POLICIES.

- ANKITA BANERJEE & ADITYA DWIVEDI

INTRODUCTION

Ever had a creative idea or some thought about some invention? Well if you decide to pursue it, it shall be considered to be your original work. Interesting right? These works can be treated similar to any other property in one's possession and that such person has the right of ownership of the same. They are known to be Intellectual Property of a person and these rights are protected by various Intellectual Property Laws. Well not be worried about people duplicating your work you have the sole right over your original works. Also with the clause that it should be legally registered or in unregistered should be well known to public at large and shall be considered to have a well reputed goodwill.

With cross-border trade booming and foreign goods becoming more and more popular in today's generation strict rules of IPR has to be implemented for the protection of new and creative ideas. If the government does not ensure protection to such intellectual properties, it may lower the morale and may result drastically on the creativity of the developers and hamper with the innovations that are yet to come into existence. The first ever major and significant step taken by India in the field of IPR protection came in the year 1995 when India became a member of "the World Trade Organization" (WTO) and thus turned into a signatory of "the Trade Related Aspects" of "the Intellectual Property Rights" (TRIPS) Agreement which set out to guarantee least principles of IP guidelines by the entirety of its individuals.

With the developing economy still having its relapse, along with poor enforcement of the rights and the courts taking forever to decide upon any issue and therefore, lacking behind in implementing the required regulations. As far as the responsibility of the Indian Government is concerned, it has lacked on its part to rightfully enforce the laws regarding licensed innovation rights and ensure the interests of its residents, as found on account of Compulsory Licensing.

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The "author through this paper would discuss the" need to protect intellectual property rights, its loop holes and flexibilities like compulsory licensing, with relation to international trade and also discussing India's take on the same by analysing the current IPR laws. With the same line of thought the paper further focuses on the relationship of compulsory licensing and competition policies. One must be able to conclude the current scenario of Indian law being at par with the international standards and get an idea of what or how we can implement the laws laid down by WTO and WIPO.

CHAPTER ONE: INTELLECTUAL PROPERTY RIGHTS"

It "can be said that the intellectual property" is nothing but the creativity of any person including but not limiting to inventions, literature, artistic and dramatic concepts. As stated earlier Intellectual Property is not much different from any general Property hence the rights received are also similar i.e. it gives the owner of the property a complete package or rights, responsibilities and benefits arising out of the same product which might have been a thought that created and solidified.[1093] These rights "qualifies the proprietor for keep others from utilizing, messing with the item without the earlier authorization" of the said proprietor, who in turn can legally sue any such person to stop them to stop any kind of usage and also get himself compensated for any loss or damages incurred.[1094]

These are not limited to any one type if Intellectual Property but to all of them which can be classified into the following types:[1095]

"PATENTS"

Patent in simple words is said to be a select right given to the designer to any innovation or item or procedure. The rights incorporates the option to choose how or whether the said development can be utilized by others.

[1093] Dubai Customs, Dubai Customs, https://www.dubaicustoms.gov.ae/en/IPR/Pages/WhatIsIPR.aspx (last visited March 17, 2020).
[1094] WORLD TRADE ORGANIZATION, WTO, https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm (last visited Mar 17, 2020).
[1095] Types of intellectual property, WIPO, https://www.wipo.int/about-ip/en/ (last visited Mar 20, 2020).

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"COPYRIGHT"

A "right given to the creator of any original work in the fields" of, including but not limited to artistic, literature, drama, etc. few examples can be stated as, books, films, music, etc.

"TRADEMARK"

Any sign, logo, picture, combination that can be used to distinguish one product from another can be said to be a trademark. This includes both goods and services. This concept is dated way back when artisans used to put their 'mark' on their works to prove originality. No-a-days trademarks can be of various kinds, for example names, symbols, catch phrases, etc.

"TRADE SECRET"

This segment of IPR is said to include those secret data which might be sold or authorized. It is the most precious piece of information to the firm. For example;

- "KFC's delectable mystery mix of various herbs and flavours."
- "Coca-Cola's formula for their world famous signature drink."
- "Google's search algorithm."

"GEOGRAPHICAL INDICATION"

Any good that has a special relation to a place of are famous for originating and possessing specific quality, a reputation, a characteristic that are essentially attributable to a particular place and are renowned for the same are said to have geographical indication of so and so place. For example, Darjeeling Tea, Cuban Cigars, Champagne from France, tequila from Mexico.

"INDUSTRIAL DESIGN"

A modern structure establishes the decorative or tasteful part of an article. A structure may comprise of three-dimensional highlights, for example, the shape or surface of an article, or of two-dimensional highlights, for example, examples, lines or shading. For instance, Mini Cooper, Vespa Scooters, iPod/iPad/iPhone or iMac, and so forth.

1.2. "LOOP-HOLES/ FLEXIBILITIES IN IPR LAWS"

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The domain of intellectual property is quite vide, covering various novel ideas, innovative creations, unique designs and also new methods of developments, along with literary and artistic works, etc.[1096]

Though our law makers try to frame and establish a complete set of rules and regulations they unintentionally leave out a certain aspects of law. These gaps are usually exploited by people and hence forming loopholes. Parliament usually bring amendments to bridge these gaps and at times they are successful too. The "international law related to intellectual property rights" are "functioning quite well to achieve the IPR Compliance" among the developed nations but the same cannot be said in the developing nations. The developing nation's lack of administration in implementing the required IPR laws and acts for example laws related to "piracy" and many more.[1097]

As one considers certain "issues for developing countries," it "is necessary for one to keep" in mind that IPR is a limited right. An intellectual property owner receives a limited set of rights i.e. ownership, royalty, licensing, assignment, etc.

"India will be unable to take full advantage of the transformative benefits of a strong IP system unless and until it addresses gaps in its IP laws and regulations," "Kilbride said in his interview"[1098] on the event of the "main commemoration of turning out of India's driven IPR strategy", he also added that "The IPR policy is a good start – especially because it prioritises empowering local entrepreneurs – but it is only useful to the international community if India is willing to put further policies into place to address the systemic issues that the international community is most concerned about,".[1099] He also observed that "And though we believe that in certain respects India falls short of the minimum IP standards set forth in TRIPS, that is really not the point,".[1100]

[1096] Kopal Tewary, Abuse of Intellectual Property Rights - Misuse of IPR iPleaders (2018), https://blog.ipleaders.in/abuse-of-intellectual-property-rights/ (last visited Mar 20, 2020).
[1097] Read "Global Dimensions of Intellectual Property Rights in Science and Technology" at NAP.edu, NATIONAL ACADEMIES PRESS: OPENBOOK, https://www.nap.edu/read/2054/chapter/32#361 (last visited Mar 20, 2020).
[1098] Press Trust of India, INDIAS IPR POLICY A GOOD FIRST STEP, NEEDS TO ADDRESS GAPS INDIA TODAY (2017), https://www.indiatoday.in/pti-feed/story/indias-ipr-policy-a-good-first-step-needs-to-address-gaps-925318-2017-05-13 (last visited Mar 27, 2020).
[1099] Pti, 'India's IPR policy a good first step, needs to address gaps' The Economic Times (2017), https://economictimes.indiatimes.com/news/economy/policy/indias-ipr-policy-a-good-first-step-needs-to-address-gaps/articleshow/58654934.cms (last visited Mar 27, 2020).
[1100] Supra 8

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In May, 2016 the much awaited national IPR policies were announced. It laid down seven particular objectives;[1101]

- Create IP mindfulness,
- Stimulate age of IPR,
- Have solid and compelling IPR laws,
- Modernize and fortify IP organization and the board,
- Commercialise IP,
- Strengthen implementation,
- Reinforce settling component.

IP "Laws generally provide exclusive rights to the creator" but, one major loophole is in the form of an exception known as licensing, assignment or transfer of other such rights which is are legal and for the benefit of the society and to ensure that essential products are "available to the" consumers at a "reasonable and affordable price". A license is completely different of a concept that assignment. In case former case, the owner/creator authorizes "any third party to use the protected work" or "creation but the ownership rights rests solely" with the owner/creator. Whereas in the latter case the assignee receives the rightful owner of that certain interest or part of which is assigned to him through a transfer of rights from the owner to the assignee.

The license can be of two kinds, namely, voluntary and compulsory.

1.3. "WHAT IS COMPULSORY LICENSING?"

Whatever you wish to call it, flexibilities or loopholes compulsory licensing is one of the most common right provided to a "third person by the government, without the consent" of the owner of "the intellectual property" to "make use of such intellectual property."[1102]

[1101] FE Online, HERE'S WHY FLAWS IN NATIONAL IPR POLICY MUST BE FIXED THE FINANCIAL EXPRESS (2016), https://www.financialexpress.com/opinion/heres-why-flaws-in-national-ipr-policy-must-be-fixed/362475/ (last visited Mar 27, 2020).

[1102] WORLD TRADE ORGANIZATION, WTO, https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm (last visited Apr 17, 2020).

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In a layman's language, one can say that one person seeks the permission to use another person's intellectual property and benefit from the same, through legal methods but "without seeking the rights" of such "property holder's consent."[1103] The person who seeks to use such intellectual property has to pay a certain amount of fees for such usage. To understand better, let's talk about a hypothetical situation, say, mr. X owns the patent to producing a particular medicine, now another person mr. W seeks to manufacture the same medicine using the same technology that mr. A has the patent of. So mr. W, can approach the concerned authority and with permission he can manufacture the said medicine "without the consent" or "authorization of the patent owner". This allowance or right provided by the respective government provided to the person other than the patent holder is known as compulsory licensing, where in the patent holder has no say if and when the government thinks necessary to extent compulsory licensing rights to any third person.[1104]

These flexibilities are provided by every municipal government and are internationally set in by "the world trade organization (WTO)" through "the Trade Related Aspects of Intellectual Property Right agreement (TRIPS)."[1105] These are existing since 1995 when the TRIPS agreement took effect and all the member countries has incorporated the same in their domestic laws to ensure implementation of IP Laws are at par with the international standards.[1106]

1.4. "NEED FOR COMPULSORY LICENSING"

As per the guidelines provided n the trips agreement, that says the government grants an intellectual property right to any person for his creativity of innovation in certain pre-determined fields.[1107] Therefore it is the right of the government to suspend or terminate such any protection given to any creator, when ever needed or it deems fit.

There "are situations where the protected intellectual property is" not utilized to its fullest potential or is not able to benefit the society at large because the license or right to manufacture such a product rets with the owner of such intellectual property, and he is not willing to share his secrets

[1103] Dealing with compulsory licensing in India, RSS, https://www.iam-media.com/dealing-compulsory-licensing-india (last visited Apr 17, 2020).
[1104] Sandeep K. Rathod, Compulsory Licenses on Pharmaceutical Patents in India, SSRN Electronic Journal (2016).
[1105] Article 31 of TRIPS Agreement. https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm
[1106] Supra 11
[1107] Itpc, COMPULSORY LICENSES MAKE MEDICINES AFFORDABLE (2020), https://makemedicinesaffordable.org/en/strategy/compulsory-licenses/ (last visited Mar 17, 2020).

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with rest of the group. In such case, the government may "authorize a third party to manufacture" so "and so product for the benefit of the" society.

Although TRIPS do regulate on what grounds compulsory licensing can be issued to any third person, but it does not put any limitation on the same. Different nations have various interpretation when it comes to adapting and implementing TRIPS Agreement. Not many utilize mandatory permitting to dodge against serious conduct to energize the exchange of innovation or perhaps to just address unnecessary estimating of medication.

CHAPTER TWO: LEGAL TAKE ON COMPULSORY LICENSING"

For the universe to run smoothly there are a certain laws and principles ought to be followed. One wrong act and the whole balance can be thrown out. Humans are not perfect. In today's world jealousy and envy drives a person to commit acts he is not very proud of. To ensure the balance and makes sure every society runs smoothly they establish some ground rules, certain principles. These principles may be based on moral, good conscience, faith, trust and positivity.

We initially discussed meaning of IP laws, its whole existence, its loopholes and their needs. In this chapter we are going to discuss the flexibilities and their laws in details.

To begin with a general idea that Compulsory permit can be allowed by the legislature got its own utilization or for the utilization of any outsider due legitimate thinking. Compulsory licensing tends to a situation where the government of a country is willing to allow another person to manufacture an already protected item or utilize a licensed procedure without the assent of the person to whom it was initially patented and even in certain circumstances plans to use such patented product or invention for itself. The government may do so if it thinks it is necessary for the benefit of the society and the well-being of its citizens.

The Indian Government has lacked on its part to rightfully enforce the laws regarding licensed innovation rights and ensure the interests of its residents, as found on account of Compulsory Licensing. Now we learn that these flexibilities apply in two segments of the intellectual property law, namely Patents and Copyright.

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2.1. IN PATENTS ACT, 1970

When talking about India, this is rare situation as the government has taken necessary. All things being equal, sections 84 to 98 of the Patents Act, 1970 arrangements with mandatory authorizing. The act permits any individual to apply for mandatory permit inside 3 years from the date of the development licensed by presenting that the protected innovation isn't satisfactory or not accessible to the general population at a sensible expense.[1108] The controller then upon fulfilment will solicit the candidate to outfit duplicates from the application to the patentee and the equivalent will be promoted in the official periodical.[1109] Any person may oppose to such licensing application, the controller will offer a chance to be heard to both the candidate just as the individual contradicting such application. Well if the focal government is fulfilled that there is a circumstance of "National Emergency" or that that there is a circumstance of 'extraordinary earnestness' it can allow the issue of necessary permitting by distribution in the official newspaper.[1110]

On March 2012, "the first ever compulsory license" in India "was granted to the" company "Natco Pharma Ltd." to manufacture and sell an anti-cancer drug called the 'Sorafenib Tosylate (generically known as Nexavar) that was initially patented by the **'**Bayer AG' **"**used for the treatment of liver and kidney cancer."[1111] Facts proved that the said product was sold at a very expensive rate and not available easily to the cancer patients in time as the drug was not manufactured but were being imported to India. "The bayer's challenge was fruitless" and the choice of the patent office to give necessary permitting was maintained by the protected innovation investigative board just as the "High court" on the following grounds:

a) Inadequate supple of the patented drug

b) High price of the said product

c) Non-working of the protected medication in India

[1108] Section 84 of the Patents Act, 1970.
[1109] Section 92(1) of the Patents Act, 1970.
[1110] Section 97 of the Patents Act, 1970.
[1111] The Anatomy of a Compulsory License: Natco Pharma Ltd. v. Bayer Corp. (Indian Patent Office), PATENT DOCS, https://www.patentdocs.org/2012/03/the-anatomy-of-a-compulsory-license-natco-pharma-ltd-v-bayer-corp-indian-patent-office.html (last visited Apr 7, 2020).

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Later the Supreme Court dismissed the SPL by bayer against the order of the High Court as this Nexavar case came to be known as the "first case ever in India" to "be granted the compulsory license."

Although in few cases the application compulsory licensing was rejected due to lack of evidence as "required under section 84 of the Patents act." In a matter "concerning Dasatinib, a compulsory" licence application submitted by "BDR Pharma was dismissed" due to the application being not in compliance with the requirements under Section 84(6) with patentee Bristol Myers Squibb.[1112] The controller general dismissed the application and held that the terms 'effort' and 'reasonable', as referenced in Section 84(6). Essentially, in the case of LEE Pharma the application for the medication Saxagliptin, claimed by Bristol Myers Squibb (later doled out to AstraZeneca), was dismissed as LEE Pharma had neglected to give evidence and fulfil the "requirements set out in Section 84(1) of the act."[1113]

2.2. IN COPYRIGHT ACT, 1975

In many countries the copyright laws allows the concept of compulsory licence of copyrighted works for specific uses to be allowed. Basically necessary permitting give that copyright proprietors may just exercise the elite rights allowed to them under the copyright law with a specific goal in mind and through a specific framework.[1114]

In India similar to the case in patent, if "any work is withheld from the public" then one can look up for remedy in the Copyright Act, say sections 31 to 32 of the same.[1115] In certain situations where the "owner has:"

- "Refused to republish or permit some other generation of his/her work."

[1112] Indian Patent Office Rejects Compulsory Licensing Application: BDR Pharmaceuticals Pvt. Ltd. Vs Bristol Myers Squibb, IIPRD Blog - Intellectual Property Discussions (2013), https://iiprd.wordpress.com/2013/11/13/indian-patent-office-rejects-compulsory-licensing-application-bdr-pharmaceuticals-pvt-ltd-vs-bristol-myers-squibb/ (last visited Apr 10, 2020)

[1113] Vikas Dandekar, INDIA REJECTS COMPULSORY LICENSE APPLICATION OF LEE PHARMA AGAINST ASTRAZENECA'S SAXAGLIPTIN THE ECONOMIC TIMES (2016), https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/india-rejects-compulsory-license-application-of-lee-pharma-against-astrazenecas-saxagliptin/articleshow/50652935.cms (last visited Apr 15, 2020).

[1114] Gervais, Daniel (2010). Collective management of copyright and related rights (Second ed.). Wolters Kluwer. p. 43. ISBN 978-90-411-2724-2

[1115] Compulsory Licensing under Copyright Law, IIPTA (2017), https://www.iipta.com/appropriating-copyrighted-workis-legal/ (last visited Apr 17, 2020).

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- "Refused to permit the exhibition of his work out in the open."
- "Refused to permit any correspondence of the work to general society."

"The copyright board, with sensible thinking and subsequent to giving satisfactory chance to the proprietor/maker" to be heard and with "legitimate enquiry is fulfilled that the work has a place with the open information and is" important, may then "direct the enlistment centre of Copyrights to give a mandatory permit to the complainant to republish the" work, communicate or impart in any way it considers fit.[1116]

Compulsory licensing is not only restricted to already published works, but it also cover unpublished works.[1117] Also in cases where the author/creator is unknown or dead, any other individual may move to the copyright board seeking the permission to publish such work.

In a leading case of "Entertainment Network (India) Ltd." v. "Super Cassette Industries Ltd."[1118] Where "Radio Mirchi was playing a music which was copyrighted by Super Cassette Industries" and the "latter petitioned for perpetual directive." While the suit was pending, "Radio Mirchi FM" administrators petitioned for an application before the copyright board for award of "necessary permit under area 31(1)(b) of the copyright act." The supporter were of the view that since a "permit had just been given to AIR and Radio City," there were "no grounds on which a permit to Radio Mirchi ought to be" denied.[1119] The "court was rather than the sentiment" that "compulsory licensing" can be allowed just when "access to any work has been totally denied" to people in general. Be that as it may, "as such permit was at that point conceded to AIR and Radio" City, it was held that the "music was not completely banned" from the open consequently the "contentions of the said supporters were outlandish" and henceforth "liable for infringement" of copyright.[1120]

[1116] Section 31 of Copyright Act, 1975
[1117] Section 31A of the copy right, 1975
[1118] Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. 2008 (37) PTC 353 (SC)
[1119] Angela Dsouza, COMPULSORY LICENSING OF COPYRIGHT IN INDIA INTEPAT IP (2019), https://www.intepat.com/blog/copyright/compulsory-licensing-copyright-india/ (last visited Apr 8, 2020).
[1120] Supra 26

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"CHAPTER THREE: INTERNATIONAL LAWS"

As worldwide exchange and speculation have developed, so has the acknowledgment by the world's country of dynamic rivalry strategies, national and universal. "Over the past few decades", several changes has been made to the intellectual property laws, many of which were results of intersection of IP laws with international trade. Apart from those, implementing numerous international trade agreements played quite a role in the development of the IP laws as a whole.

The author through this chapter wishes to study in detail all the international laws and regulations and how they helped in developing the intellectual property laws as we know them today.

3.1. INTERNATIONAL TRADE LAWS (WTO)

All the appropriate rules and regulations that handles various forms of trade among the nations are overlooked "by the World Trade Organization" (WTO). "Most of the countries have" gone to becoming a member to this international organization for smooth and fait trade policies. As said, WTO over looks various forms of trade i.e. exchange products and ventures or some other sort of cross-fringe exchange. Also one fragment is commitment to "Trade-Related Aspects of Intellectual Property Rights" also called the "TRIPS Agreement."

"During the Uruguay Round" held in "the year 1986-94," the "intellectual property rules" were "introduced for the first time." It was only then the "TRIPS Agreement was negotiated."

With "the introduction of such agreement" and standards every signatory nation was required to raise their laws "relating to Intellectual Property Rights" and "implement the international rules" into their municipal statutory framework. It was a sudden and drastic change if asked, most of the nations were facing problems and before such changes could show any success, it arguable showed a negative impact. Due to this access to essential medicines and other items became difficult in "many of the under developed" and "developing countries," because they lacked the equipment as well as their local economy was not capable of producing such advanced and technical products.

3.2. "UNDER THE TRIPS AGREEMENT"

The "TRIPS legitimatizes the concept" of "compulsory licensing" and "grants permission" to use it in certain circumstances. The WTO through the TRIPS agreement oversees the IPR in international trade. "Article 31 of the TRIPS understanding" sets out the "terms and conditions

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allowing" the "grant of compulsory licenses by any authority" to a third person. Although the basics have been laid out by the agreement but the decision majorly relies on the realities and conditions case to case. The applicant has to show its failed attempts at trying to negotiate with the property owner requesting for a voluntary licensing along with the offer to pay adequate consideration for the same.

Although article 31 of the said agreement lists down all the possible grounds any person to apply for compulsory licensing, the member nations are at freedom to impose any other ground they may deem fit or necessary.

The Doha Declaration[1121] clearly specifies that all the members are at liberty to grant compulsory licensing, along with the right to list out any grounds in addition to the ones mentioned in the TRIPS. The

Declaration certified the sovereign right of governments to take measures to ensure general wellbeing, including the utilization of necessary permitting and equal importation, and permitted "least developed nations" (LDCs) not to allow or "implement pharmaceutical" item licenses until in any event 2016.[1122]

3.3. "COMPULSORY LICENSING" AND "COMPETITION POLICIES"

Any common man can put 2 and 2 together and conclude that issuing compulsory licensing with hamper the competition law of any sector. Well, this is where the two of them intersects.[1123]

The basic idea of granting compulsory license is that when in critical situations of necessity and public interest, the respective authorities ensures that the intellectual property reaches the public, ones who are in need.[1124] There are products which the needy person could not get hold of whatever be the reason, be it the price of the product, or the availability or for safety purposes.

[1121] Doha Declaration on TRIPS and Public Health of 2005

[1122] COMPULSORY LICENSING AND THE ANTI-COMPETITIVE EFFECTS OF PATENTS FOR PHARMACEUTICAL PRODUCTS: FROM A DEVELOPING COUNTRIES' PERSPECTIVE, (2009), http://www.cuts-citee.org/pdf/Compulsory_Licenses_and_anti-competitive_effects_of_patents.pdf (last visited Apr 10, 2020).

[1123] Legal Service India, COMPULSORY LICENSING - BRIDGING THE CHASM BETWEEN COMPETITION POLICY AND INTELLECTUAL PROPERTY LAW LEGAL SERVICE INDIA, http://www.legalserviceindia.com/article/l275-Compulsory-Licensing-.html (last visited Apr 15, 2020).

[1124] Koren Wong-Ervin, OECD Competition Committee Roundtable on Licensing of IP Rights and Competition Law (June 6, 2019), SSRN ELECTRONIC JOURNAL (2019).

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Granting such licenses will eventually at some point lead to its interference with the competition laws of a country. After all, you cannot have compulsory licencing and competitive strategies going hand in hand. There are bound to be consequences, therefore we need to focus on the relationship that will balance of competitive policies and IP laws. "Additionally, compulsory licensing can also" be "implemented as a solution for unfair competitive" scenarios. Where the compulsory licensing is permitted due to matters of national defence or with a view of public interest to "maintain anti-competitive situations". "It is of importance that every nation" brings about peaceful and appreciable agreement between the "competition laws and the IP laws," so that they work hand-in-hand. Till what extend the competition laws can be allowed to interfere with the "granting of compulsory licensing" is "of the main concern."

"Competition Policies and the Intellectual Property law" can be said to have a symbiotic relationship by the financial matters of advancement and a perplexing trap of legitimate standards that tries to adjust the extension and impact of every strategy.[1125] The "selective rights presented by patent insurance" "over pharmaceutical items" and "the concentrated structure of the market," "as referenced above," "without anyone else don't comprise negations of rivalry law." Be that as it may, they are very "prone to have anti-competitive impacts." For instance, "for the most part having" an imposing "business model option to give a decent" or "administration is continually enticing" for "the correct proprietor" and "this is frequently trailed by maltreatment of the right." Such maltreatment can happen in various manners, including over the top estimating, purposeful constrained "market access to give space for high evaluating" and "applying specific advertising rules that bargain get to." The same issue will be dealt by the author in the following chapter.

CHAPTER FOUR: HARMONIZING IPR AND COMPETITION LAWS

When talking of compulsory licensing, the first sector to it to be generally used is the Pharmaceuticals. "The issue of unauthorized access to patented pharmaceuticals" has always been a hot topic for debate, followed by the "existence of the TRIPS Agreement and the global trade" laws.[1126] Many times, many scholars suggested the idea of compulsory licensing to combat this

[1125] Supra 31
[1126] Cpi -, - & Cpi, EXCESSIVE PHARMACEUTICAL PRICES AS AN ANTICOMPETITIVE PRACTICE – REVIVING COMPULSORY LICENSING IN COMPETITION LAW & ANTITRUST COMPETITION POLICY INTERNATIONAL (2018),

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problem. The relationship between IPR and various competition policies has always been complicated. “Given the solid connection between them”, “IPRs and competition laws” have substantial interface in their guideline of different issues of the business world. Quickly, their interface can be seen from two primary aspects:

(i) “the effect of IPRs in moulding the controls of rivalry law,” and

(ii) “The use of rivalry law on the post-award utilization of IPRs.”

One “must ensure the smooth functioning” of IP Laws and “the competition laws” to go hand-in-hand. Apart from the respective IP laws, the Competition Act of 2002 also “plays an important role in governing the conduct of compulsory licensing.”[1127] As one can simply understand the “approving or allowing an outsider to make use, or sell an ensured protected innovation without the proprietor's assent” is cruel and disturbs the rules and regulations set somewhere near by the “competition act.” Therefore to prevent abuse of powers the competition authority in India awards authorization to move the permit to serious proprietors in accordance with some basic honesty, however under the need of great importance.

The weight of this is said to be on the national specialists, as they ought to analyse the exchange of the permit understanding and inspect the counter serious impacts emerging from such understandings. In India, only 2 authorities have been vested with the rights to grant compulsory licensing, i.e. the IP authority and the competition commission.[1128] There has not been any case till date that has seen “the Competition Commission of India” (CCI) “decide on any case of licensing.” The “Supreme Court of India”, with its different choices has held that the advancement of monetary productivity by the device of reasonable rivalry that should run corresponding to purchaser inclinations.

4.1. “AS PER THE TRIPS AGREEMENT”

https://www.competitionpolicyinternational.com/excessive-pharmaceutical-prices-as-an-anticompetitive-practice-reviving-compulsory-licensing-in-competition-law-antitrust/ (last visited Apr 8, 2020).

[1127] COMPULSORY LICENSING OF IPR: INTERFACE WITH COMPETITION AUTHORITY , 1 INTERNATIONAL JOURNAL FOR LEGAL DEVELOPMENTS & ALLIED ISSUES (2015), http://thelawbrigade.com/wp-content/uploads/2019/05/aprajita.pdf (last visited Apr 18, 2020).

[1128] Supra 35

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The "competition related arrangements in the TRIPS Agreement" were especially affected by the setting in which the Agreement was closed.[1129] The incorporation of rivalry arrangements filled a particular need.[1130] Compulsory licensing is a loophole in the competitive policies, one can agree upon. To ensure that this loophole is not exploited, the TRIPS agreement acknowledges "that some authorizing practices or conditions" relating "to protected innovation rights which" limit rivalry may "adverse effect exchange" "and may "obstruct the exchange and scattering of innovation."[1131]

The article 40 is referred of the TRIPS Agreement for the purpose of detailed understanding of the same. It clearly states member nations may embrace and implement any provisions it deems necessary reliably with different "arrangements of the Agreement," fitting "measures to prevent" or "control any practices" in the allowing of authorized "Intellectual property rights which are oppressive and against serious" in nature.[1132]

4.2 "ANTI-COMPETITIVE EFFECT"

Rivalry in the pharmaceuticals and medication segment is unavoidably connected to the IPR issues. When a drug, invention of the process of manufacturing it has been patented, the owners holds a monopoly over the market. Such imposing business model is regularly abused by organizations holding the prevailing situation by valuing their licensed items at monopolistic benefit augmenting levels.[1133] To control these troubles, and guaranteeing access to moderate prescriptions is urgent. In such dire circumstances measures like the compulsory licensing is a way out. It regulates such against serious conduct just as re-establishes the serious parity of the market, while regarding the standard of advancing development.[1134]

Section 4 of the Competition Act, 2002 ensures that the dominant holder shall not be selfish and refuse to grant license, in cases of need. Such a refusal may cause hindrance which might not be

[1129] WORLD TRADE ORGANIZATION, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Apr 18, 2020).
[1130] Mor Bakhoum & Beatriz Conde Gallego, TRIPS and Competition Rules: From Transfer of Technology to Innovation Policy, in TRIPS PLUS 20 529–559 (2016), https://scigraph.springernature.com/pub.10.1007/978-3-662-48107-3_16 (last visited Apr 8, 2020).
[1131] Article 40(1) of the TRIPS Agreement.
[1132] Article 40(2) of the TRIPS Agreement.
[1133] Supra 31
[1134] Supra 31

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affordable. With respect to the "IPR/competition interface," mandatory permitting can be conceded on the grounds of the presence of:[1135]

(i) a refusal to permit and

(ii) Anti-serious activities of IPRs by patent holders.

A "Refusal to license is held as a ground for" allowing "a compulsory licensing has been implemented in" the "domestic laws of many countries", "such as, the patent laws of" China[1136], Argentina[1137] "and" Israel[1138]. Patent holders could likewise mishandle their privileges to square powerful or downstream development, or passage of conventional adversaries. "Accordingly, compulsory licensing" is the answer for every one of these "issues as it will have an" enemy of serious impact available, "therefore adjusting the opposition and reasonable exchange."

CONCLUSION

India still being a developing nation has tried its best to implement the provisions of TRIPS, but it is still facing a lot of challenges while executing the same.[1139] Dues to these setbacks and alleged violations of IPR, India has been on the "priority watch list" of "the USTR".[1140] No doubt brining a country's municipal law up to the internationally set standards is a huge task but India is leaving no chance and surely will succeed.

A country's legal framework consists of different laws and statues, each having to fulfil the international standards in each sector of law. We noticed compulsory "licensing in Intellectual Property Laws and the" Competition Laws "have a more complicated" relation than one could

[1135] Supra 31
[1136] Liguo Zhang, Compulsory license in China, 39–42 (2013), http://www.techmonitor.net/tm/images/d/dc/13jan_mar_tech_transfer.pdf (last visited Apr 18, 2020).
[1137] Carlos M. Correa, INTELLECTUAL PROPERTY RIGHTS AND THE USE OF COMPULSORY LICENSES: OPTIONS FOR DEVELOPING COUNTRIES, TRADE-RELATED AGENDA AND DEVELOPMENT AND EQUITY (T.R.A.D.E.) WORKING PAPERS (1999), https://www.iatp.org/sites/default/files/Intellectual_Property_Rights_and_the_Use_of_Co.pdf.
[1138] QUESTIONNAIRE ON EXCEPTIONS AND LIMITATIONS TO PATENT RIGHTS, https://www.wipo.int/scp/en/exceptions/replies/israel.html (last visited Apr 18, 2020).
[1139] Marie D. Mesidor, Intellectual Property Rights in Competition Law: Compulsory License Issues in Developing Countries, SSRN Electronic Journal (2013).
[1140] Pti, INDIA REMAINS ON USTR'S 'PRIORITY WATCH LIST' FOR IPR VIOLATIONS @BUSINESSLINE (2019), https://www.thehindubusinessline.com/economy/india-remains-on-ustrs-priority-watch-list-for-ipr-violations/article26952379.ece (last visited Apr 18, 2020).

have imagined. The not only interfere in each other's spheres but also are co-dependent on each other. "In India," The "Competition Act, 2002" gives greater chance and gives a superior methodology under the hands of CCI for conceding the mandatory permit to any outsider without the assent of the proprietor.[1141] "Compulsory licensing" ought to be suggested as an enemy of serious healing fix used in situations where the selective administration is contestable and some other cure can't get turned to.

[1141] Supra 35

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CONSTITUTIONAL SHORTCOMINGS OF THE PERSONAL DATA PROTECTION BILL, 2019

- **MOHAMMAD MISHAL & VANSHIKA GAHLOT**

ABSTRACT

Privacy jurisprudence in India has often come under fire for not keeping up with technological advancements. In the Puttaswamy judgement which recognized privacy as a fundamental right, the necessity for legislation protecting the privacy of citizens was highlighted. Ostensibly with this objective in mind, the government has tabled The Personal Data Protection Bill, 2019 in the Parliament. This paper will critically analyse the new Bill against established law in this field. When tested against the constitutional test laid down in the Puttaswamy judgement, the grave misgivings in context of the object of the legislation and violation of rights is evidently established. As the world moves towards an escalating paradigm of privacy violations, we test whether the central government is really doing justice to its professed objectives. The excessive delegation of power to a single arm of the government is addressed in detail over the course of this paper. The chilling effect engendered by a feeling of being watched, the self-censoring under the eyes of a watchful big brother and the fear of exercising one's own freedoms as a result of such legislation is also addressed. We write this in pursuance of our duty, especially as students of law, to be watchful of a State that tries to have an ever-greater role in the private lives of citizens.

INTRODUCTION

The importance of privacy jurisprudence to any legal system came in the light of the excesses of the United States government post 9/11. The US government, in a frenzy following the terrorist attacks, passed laws like the PATRIOT Act[1142] and other inter-agency measures including the

[1142] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 18 U.S.C. §§ 2712 (2001).

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formulation of the Department of Homeland Security which facilitated mass surveillance. It led to serious privacy violations owing to large scale collection of America citizens' personal information ranging from monitoring emails to credit card records. The excesses on part of the US government in the decade that followed were publicly regretted even by the Congressman who sponsored the PATRIOT Act.

In India too, the need to protect one's personal data is gathering more attention. However, privacy jurisprudence in India is largely a subject of judicial interpretation. Very little has generally been done by our legislature to enable or protect the rights of our citizens in the time following the actual drafting of the Constitution. In *KS Puttaswamy v Union of India*[1143], the Supreme Court read into Article 21 the right to privacy of an individual, in keeping with a longstanding judicial tradition of expanding the scope of Article 21 with respect to one's rights. This expansion is often necessitated on part of our Hon'ble Supreme Court due to the lax nature in which our Legislature handles issues of this nature. While the definition of privacy invites debate, the necessity of its protection is without question.

The judgement also highlighted the importance of informational privacy as "a person's control over the dissemination of material that is personal to her and disallowing unauthorized use of such information by the State."[1144] The court confirmed that a paradigm of digital privacy exists in India and citizens can have a reasonable expectation of privacy with regards to their personal information as well. In this context, THE PERSONAL DATA PROTECTION BILL, 2019 (The Bill)[1145] which was tabled in the Parliament in December 2019 plays a crucial role. It is the first attempt by the legislature to bring about a law focussing on one's informational privacy in a wider context.

In the limited scope of the paper, we will examine the common trends that help test the Bill against constitutional standards keeping in mind the judicial interpretation of our right to privacy.

THE PERSONAL DATA PROTECTION BILL, 2019

The Personal Data Protection Bill is the first proposed legislation in India that addresses the digital handling of personal data of persons within the purview of Indian jurisdiction. To that end, it is

[1143] Justice K.S. Puttaswamy and Ors v. Union Of India and Ors(2018) 4 SCC 651 [hereinafter Puttaswamy].
[1144] *Id.*
[1145] The Personal Data Protection Bill, Lok Sabha, No. 373 of 2019 (2019) [hereinafter PDP].

landmark legislation in our digital paradigm. This section will provide a basic introduction of the provisions of this Bill and then it would be analysed critically against the established privacy doctrines in India.

The most important terms mentioned in the Bill are as follows:

1) Data Principal - the natural person to whom the personal data relates.[1146]
2) Data Fiduciary - any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of the processing of personal data.[1147]
3) Data Protection Authority (Authority) – is established under section 41(1) of the Bill.[1148] Powers of the authority are highlighted in the scrutiny of the bill which follows.
4) Personal data - data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling.[1149]
5) Processing - any operation or set of operations performed on personal data, and may include operations such as collection, recording, organisation, structuring, storage, adaptation, alteration, retrieval, use, alignment or combination, indexing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction.[1150]

TEST DERIVED FROM THE PUTTASWAMY JUDGEMENT

[1146] PDP, *supra* note 4, § 1(14).
[1147] PDP, *supra* note 4, § 1(13).
[1148] PDP, *supra* note 4, § 1(5).
[1149] PDP, *supra* note 4, § 1(28).
[1150] PDP, *supra* note 4, § 1(31).

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The judgement established a three-pronged test of necessity, legitimacy and proportionality against any government program involving violation of privacy.[1151] In order to maintain its constitutionality the legislation which causes violation of privacy must effectively stand against this test. The various provisions of the bill that lead to such privacy violations have been tested against the same in the subsequent chapters.

THE TEST OF NECESSITY

The necessity 'stage' of this test requires formulating the legislation in a manner such that there must not be any less restrictive alternative available for the same. It implies the need to frame a legislation aimed at achieving its objective with least violation of fundamental rights.[1152] This doctrine has been named the test of Narrow Tailoring. It assumes vital importance in instances where the state's proclivity to infringing rights is higher, as is the case when it comes to privacy. The primary objective of the bill is to protect the right to privacy of individuals by establishing a trust based relationship between them and the entities processing data.[1153] However, it is subject to the restrictions in the nature of exemptions to such right allowed to government agencies in national interest. In seeking to achieve this national interest, the related provisions have been arbitrarily framed which unnecessarily place the right to privacy on a lower pedestal. These provisions owing to which bill fails to pass this test of necessity or narrow tailoring have been summed up as under.

1. Section 35 gives a wide array of reasons to the Central Government to exempt any of its agencies from the provisions of this Bill including the requirement of the data principle's consent to process their data.[1154] These reasons include "the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, and for preventing incitement of any cognizable offences"[1155]. On the pretext of these, the

[1151] Vrinda Bhandar et al., *An Analysis of Puttaswamy:The Supreme Court's Privacy Verdict*, 11 IndrAStra Global 1, 4-5, (2017), https://www.ssoar.info/ssoar/bitstream/handle/document/54766/ssoar-indrastraglobal-2017-11-bhandari_et_al-An_Analysis_of_Puttaswamy_The.pdf?sequence=1.
[1152] Grutter v. Bollinger 539 U.S. 306 (S.Ct. 2003).
[1153] PDP, *supra* note 4.
[1154] PDP, *supra* note 4, § 35.
[1155] *Id.*

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government can process an individual's personal data without his or her consent. The Justice Srikrishna Draft of this Bill had initially provided for an exemption only on grounds of security of the State.[1156] No rational classification is provided for why the ambit of exemptions has been increased to allow almost unfettered access for the state to process personal data. When an agency of the Central Government is exempted from 'all provisions of this Act', the door towards bulk surveillance is wide open as an agency of the government will be able to force any data fiduciary to hand over personal data under the wide scope of Section 35.

Additionally, the only safeguards available here are recording the reasons for the same in writing[1157] unlike the pre-requisite of proportional action as laid down in the Draft Bill of Justice Srikrishna.[1158]

A further violation of the right to privacy is licensed because Government surveillance programs like CMS & NATGRID, which aim at mass surveillance on the pretext of national security, will also be enabled by the bill and consequently has a free hand to operate.[1159] A privacy legislation in order to prevent the abuse of power by the government in the implementation of such schemes has been the expectation. Whereas, the bill is quite contrary of the same owing to the wide scope and lack of safeguards under section 35[1160] which facilitates data processing at the whims of the executive. It is already an established principle under India's privacy jurisprudence that bulk surveillance cannot be justified even to serve a legitimate purpose.[1161]

Even Section 36(a) allows for certain exemptions when personal data is processed 'in the interests of prevention, detection, investigation and prosecution of any offence or any other contravention

[1156] *Key Changes in the Personal Data Protection Bill, 2019 from the Srikrishna Committee Draft*, DEFENDER OF YOUR DIGITAL FREEDOM (Nov. 12, 2019, 10:58 AM), https://sflc.in/key-changes-personal-data-protection-bill-2019-srikrishna-committee-draft [hereinafter Srikrishna Draft].

[1157] PDP, *supra* note 4, § 35.

[1158] Srikrishna Draft, *supra* note 15.

[1159] Goutam Das, Personal Data Protection Bill to burden firms with long-drawn, expensive compliance process, BUSINESS TODAY (Dec 11, 2019, 07:18 PM), https://www.businesstoday.in/current/economy-politics/data-protection-bill-to-burden-firms-with-long-drawn-expensive-compliance-process/story/391902.html.

[1160] Maria Xynou, *India's Central Monitoring System(CMS): Something to worry about*, THE CENTRE FOR INTERNET SOCIETY (Jan 30, 2014) , https://cis-india.org/internet-governance/blog/india-central-monitoring-system-something-to-worry-about.

[1161] PUCL v Union of India, (1997) 1 SCC 301 [hereinafter PUCL].

of law for the time being in force'[1162]. The Srikrishna Draft had included a test of legality, necessity and proportionality before allowing for this exemption.[1163] The current draft excludes this test and expedites the abuse of power by the government solely based on its discretion.

Thus section 35and section 36(a) are not narrowly tailored to aim at rational surveillance of data by the government for valid reasons without abuse of power and unnecessary violation of fundamental rights.

2. Another nail in the coffin of fundamental rights violation is that of flawed checks and balances. The Data Protection Authority of India is to be established under Section 41 of the Bill.[1164] The authority assumes the power of demanding and adjudicating reasons for acquisition of data by the data fiduciaries. When read with section 35, the authority decides whether the processing of data by the government without the principle's consent on the pretext of 'the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, and for preventing incitement of any cognizable offences' is valid. The Selection Committee for this Authority, as provided under Section 42(2) only contains members from the executive without any judicial representation.[1165] The inherent arbitrariness of vesting the executive and adjudicating power within the same body is clear violation of rule of law, an essential feature of the fundamental right to equality guaranteed under article 14. A bill that becomes potentially inoperable in its only objective while simultaneously allowing for arbitrariness by way of executive discretion would certainly struggle to pass a narrow tailoring test since the executive possess the power to violate one's right to privacy on any pretext without being answerable to any independent authority.

THE CHILLING EFFECT

[1162] PDP, *supra* note 3, § 36(a).
[1163] Payaswini Upadhyay, Personal Data Protection Bill Fails to deliver the Promise of Privacy, THE QUINT (Dec. 15, 2019, 10:54 AM), https://www.bloombergquint.com/law-and-policy/personal-data-protection-bill-fails-to-deliver-on-the-promise-of-privacy-experts-say.
[1164] PDP, *supra* note 3, § 41(1).
[1165] PDP, *supra* note 3, § 42(2).

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Coupled with the above violations of the right to privacy, "there are different kinds of privacy harms that may result from surveillance, like disruption of valuable activity, and the chilling of socially beneficial behaviour like free speech".[1166]

Although the Aadhaar judgement[1167] did not find the Aadhaar card to be unconstitutional, the minority opinion of Justice Chandrachud gave credence to the idea that a single database with all-encompassing access to various aspects of one's identity is inherently vulnerable to exploitation. The same being true in a digital paradigm with a data principal potentially ignorant of how his own data is being processed heralds the vision of a dystopian future where expression itself could be construed as an act of subversion.

The dissenting view of J Subba Rao in Kharak Singh[1168] makes reference to the chilling effect an apprehension of surveillance can have on one's freedom of movement and expression. He was of the opinion that the freedoms guaranteed under Article 19 and Article 21 cannot operate in a 'shroud of surveillance cast upon him.' Such an apprehension would invite inhibitions in an individual of being watched and recorded. This could work as a virtual gag order on his person.

Right to privacy has also been "linked to decisional autonomy with respect to the intimate and personal choices."[1169] These personal choices can effectively be exercised only when people do not operate under an assumption that their data lies safe with certain fiduciaries who have consensually obtained their data. Any apprehensions of their personal information being available to the government from such fiduciaries would further have a chilling effect over their right to personal choices, hence autonomy. Even the acquisition of such data by third parties has been declared unlawful by the Supreme Court since a reasonable expectation of privacy rests on a document.[1170] However, the bill provides a loophole for the same where government agencies can be exempted on grounds pertaining to public interest as specified under section 35.

TEST OF LEGITIMACY

[1166] Daniel Solove, *I've Got Nothing to Hide*, 44 SAN DIEGO L. REV. 745, 758 (2007).
[1167] Puttaswamy, *supra* note 2.
[1168] Kharak Singh v State of UP, (1964) 1 SCR 332 [hereinafter Kharak Singh].
[1169] District Registrar & Collector Hyderabad v Canara Bank, (2005) 1 SCC 496.
[1170] *Id.*

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Every State action has to be legitimate i.e. it needs to serve a real and proper objective.[1171] If an act of the State does not, in effect, serve a discernible and legitimate goal, it is liable to be challenged on those grounds. The purpose of having a legitimate goal is to get it fulfilled. It is then incumbent to test the efficacy of surveillance itself and see whether even on a purely utilitarian scale, it serves a legitimate purpose.

Since the bill allows processing of data by the government without laying down any restrictions, the government agencies derive the power for both targeted as well mass surveillance. This section of the paper elaborates upon the inefficiency of mass and targeted surveillance when carried out in consonance with the bill. Further hindrances on account the costs incurred for the same also follow.

MASS SURVEILLANCE

Mass surveillance if attempted by the government would possibly fail to curb criminal activities. The American model of surveillance pays testimony to the same. Revelations about the mass surveillance implemented in the United States were made by the whistle-blower, Edward Snowden. An important take-away from his revelations is that broad surveillance did not help American law enforcement agencies to predict or prevent future crimes. In fact, practices involving large scale processing of data necessarily view surveillance in relation to damage control after crime rather than delve into research to understand the social causes of crime.[1172] This is especially true in an almost universally neoliberal paradigm as ours.

However, the obvious benefit of mass surveillance is a huge repository of collected data to help solve a crime that has already occurred, but this is not equivalent to identifying and preventing crime or terrorist attacks, which would be a substantial enough advantage to consider justifying mass surveillance. This assertion is substantiated with the example of the Boston Marathon bombings of 2013.[1173] The NSA was actively engaged in mass surveillance at the time, but failed to prevent this crime. Russia issued warnings about the culprit before the attack but the American

[1171] Puttaswamy, *supra* note 2.
[1172] David Lyon, *Surveillance, Snowden and Big Data,* 1 B.D. & S. 1, 6-7 (2014).
[1173] JENNIFER STISA GRANICK, AMERICANSPIES:MODERN SURVEILLANCE, WHY YOU SHOULD CARE AND WHAT TO DO ABOUT IT221-24 (1st ed. 2017) [hereinafter Jennifer S.G. on Surveillance].

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government failed to find any conclusive proof from huge surveillance database built up by domestic American agencies over the years. Even after the attack, their database failed to provide any relevant information to convict the guilty party.[1174] Thus the notion of mass surveillance as a way to deter crime is certainly questionable.

TARGETED SURVEILLANCE

Kharak Singh v State of UP[1175] was one of the first cases to consider the question of Privacy viz-a-viz targeted surveillance. The question before the Court was about a routine practice under the UP Police Regulation that included surveillance of people with a history of criminal cases against them. The Court upheld that targeted and rational surveillance is permissible exclusively against people whose anti-social proclivities had been established. Hence, mere suspicion cannot be a ground for targeted surveillance.[1176] However, broad and vague surveillance tests under section 35, coupled with the lack of redressal mechanism makes targeted surveillance prone to abuse. The executive can easily process the personal data of an innocent individual without any accountability unbendingly violating the Supreme Court's Verdict. Such processing can lead to wide ramifications presenting not just privacy threats but also the gag effects as already discussed above. Conclusively, a legislation which unnecessarily costs innocent individuals their privacy and other associated fundamental rights is in no way an efficient mechanism to achieve the state's legitimate aim.

COST-BENEFIT ANALYSIS

Another way to test the legitimacy of state action is a cost-benefit analysis. It has been routinely found by law enforcement agencies in the US that "the enormous amount of spending in the US on anti-terrorism measures far outweigh the benefits gained".[1177] This is due to the fact that even when a vast amount of resources are used for building a comprehensive database of personal data,

[1174] *Id.*
[1175] Kharak Singh *supra* note 28.
[1176] R M Malkani v State of Maharashtra, (1973) 1 SCC 471.
[1177] Michelle Cayford& Wolter Pieters, *The effectiveness of surveillance technology: What intelligence officials are saying,* 34 THE INFORMATION SOCIETY 87, 89 (2018) [hereinafter Effectiveness of surveillance].

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the targeted mining of this does not get any easier within that framework. A report published by the Vienna Centre for Social Security found risk profiles to be 'notoriously imprecise' while also showing that a substantial amount of leads generated were false positives.[1178] The paper asserted that even the huge amount of data processed by algorithms end up at human desks who act as 'bottlenecks in the process leading from intelligence to practical action.'[1179] Bureaucratic/administrative discretion ends up virtually cancelling out the expediency of data processing that we give up our privacy for.

The problem of cost is pressing in the operation of this Bill in one more way. Section 22 of the Bill provides for a 'Privacy by Design' policy which data fiduciaries may get certified by the Authority and publish on both their respective websites.[1180] This process will likely be time-consuming and costly. Each data fiduciary having to get their privacy policy certified would be cumbersome. The Authority would be flooded with this policy and forced to open cells all over the country to work on certification. There would be a mass requirement of competent but temporary staff. The costs involved in this also make it harder to trust the legitimacy of this Bill.[1181]

TEST OF PROPORTIONALITY

The test of proportionality necessitates the legislation to be within the realm of reasonableness. In order to pass the test of proportionality, it needs a favourable balance between the advantages gained by the legislation as against the disadvantage incurred by enacting it.[1182] That is the legislation must be aimed at efficiently achieving its objective with minimum disadvantages pertaining to violation of fundamental rights, excesses in terms of power delegated in the executive and others. This has to be established by proper utilization of the state's power be it legislative or executive to attain its legitimate objectives.[1183]

[1178] Dr. Reinhard Kreissl, *Terrorism, Mass Surveillance and Civil Rights*, CEPOL ANNUAL EUROPEAN POLICE RESEARCH AND SCIENCE CONFERENCE, Doc. No. 8at 1-3 (12th Sess. 2015), https://www.cepol.europa.eu/sites/default/files/26-reinhard-kreissl.pdf.
[1179] *Id.*
[1180] PDP, *supra* note 3, § 22.
[1181] Effectiveness of surveillance, *supra* note 35.
[1182] Abhinav Chandrachud, *Wednesbury Reformulated: Proportionality and the Supreme Court of India*, 13 OXFORD U. COMMONWEALTH L. J. 191, 191-208 (2013).
[1183] Om Kumar v. Union of India, (2001) 2 SCC 386.

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Following are some of the sections of the bill that do not conform to a test of proportionality:

1) Section 6 of the Bill allows for the collection of such personal data as is necessary for the purpose of processing it.[1184] A standard of proportionality is not available here, which means over-collection of data could happen.[1185]

2) Section 6 when read with Section 12 further infringes the proportionality test. Section 12 provides for the processing of personal data to carry out functions of the State without the data principle's consent. These include the 'provision of any service or benefit to the data principal from the State'[1186] and in accordance with any law passed by the Parliament or State Legislature.[1187] Collection of personal data under section 6 takes place as per what the executive deems 'necessary'[1188] for further processing. This discretion as already mentioned expedites over-collection of data which the government can process without the data principle's consent on the pretext of section 12. Thus, it would be possessing access to more information that might actually be necessary in providing benefits or required under any legislation.

3) The shortcomings of Section 35 read with Section 41 which permits a wide scope of grounds for the government, to process personal data without consent, coupled with a flawed redressal mechanism which has been extensively discussed in the previous chapter, also fails the test of proportionality in a spectacular fashion. The arbitrariness inherent in these sections causes more interference with one's right to privacy than what might be required in compelling state interest.[1189]

4) Section 33 and Section 34 deal with the restrictions on cross-border transfer of personal data. Section 33(1) lays down that "Sensitive personal data" may be transferred outside India, but it will continue to be stored in the country.[1190] However, "critical personal data"

[1184] PDP, *supra* note 3, § 6.
[1185] Amber Sinha et al., *The Centre for Internet and Society's comments and recommendations to the: The Personal Data Protection Bill*, THE CENTRE FOR INTERNET AND SOCIETY (Jul. 28, 2018), https://www.medianama.com/wp-content/uploads/Centre-for-Internet-and-Society-Submission-India-Draft-Data-Protection-Bill-Privacy-2018.pdf.
[1186] PDP, *supra* note 3, § 12(a)(i).
[1187] PDP, *supra* note 3, § 12(b).
[1188] PDP, *supra* note 3, § 6.
[1189] Gobind v. State of MP, (1975) 2 SCC 148.
[1190] PDP, *supra* note 3, § 33(1).

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"notified" by the central government "shall be processed only in India"[1191]. These sections exceed the demand of proportionality dualistically. First, the lack of precision with regards the procedure and mode of storing sensitive personal data in India enables its misuse by public authorities.[1192] Second, notwithstanding the fact that Central government reserves the right to notify critical personal data, it allows itself to permit the cross-border transfer of said critical data if it deems such transfer does not "prejudicially affect the security and strategic interest of the State"[1193]. Thus, no specific criteria have been laid down for the classification of 'critical personal data" thus leaving the decision at the Central government's discretion.[1194] While we cannot assert data localization is inherently wrong, the freehand given to the executive in this matter is disproportionate. If the same provisions – in the interest of sovereignty – were to be debated and voted upon in Parliament, the same would become a matter of public record. In such a situation, the citizens would be wise to the attitude of the government towards cross border data processing. The excessive delegation of decision making to the executive greatly hampers the Bill against a test of proportionality. A more reasoned approach to localisation is required in a better version of the Bill.

THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967 IN TANDEM WITH THE BILL

The UAPA has long been identified as one of the earliest and most draconian examples of executive intrusion into our basic freedoms in independent India.[1195] The Unlawful Activities (Prevention) Amendment Act, 2019 was passed in Parliament in August.[1196] Under this amendment, the central government empowers itself to designate any individual or organization

[1191] PDP, *supra* note 3, § 33(2).
[1192] Estelle Massé, *India's Data Protection Bill: Further work needed in order to ensure true privacy for the next billion users*, accessnow (Feb 24, 2019), https://www.accessnow.org/cms/assets/uploads/2020/02/Access-Now-Analysis-Indias-Personal-Data-Protection-Bill-2019.pdf [hereinafter DATA PROTECTION ANALYSIS].
[1193] PDP, *supra* note 3, § 34 (2).
[1194] DATA PROTECTION ANALYSIS, *supra* note 52.
[1195] Anushka Singh, *Criminalising Dissent: Consequences of UAPA*, 47 E.P.W.14, 14-15 (2012) [hereinafter CRIMINALISING DISSENT].
[1196] Roshni Sinha, *Bill Summary: The Unlawful Activities (Prevention) Amendment Bill 2019*, PRS LEGISLATIVE RESEARCH (Jul. 12, 2019),https://prsindia.org/sites/default/files/bill_files/Bill%20Summary%20-%20UAPA.pdf.

as a terrorist without any judicial oversight. The definition of unlawful activities and terrorist activities is so vague that the executive can easily label individuals as threats to national security and processes their data without their consent on the pretext on section 35.

Under UAPA, the definition of "unlawful act" does not even include a physical act of violence, which greatly widens the scope of those who can be charged under it.[1197] This includes any action taken by an individual or association (whether by committing an act or by words, either spoken or written, or by visible representation or otherwise), (i) which is intended, or supports any claim to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India.[1198]

One can even be penalised for 'unintentional' or 'unintended' disaffection under this act. Section 15 of the Act defines terrorist activity as 'whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in people or any section of the people in India or in any foreign country.'[1199] The admission of intercepted communications in a paradigm where the government will have complete impunity with respect to the interception of communication is unimaginably dystopian.

The power to designate individuals as terrorists is a potent tool that could be used to silence voices by attaching a permanent stigma to one's person and activities.[1200] As stated, in the context of this Bill, such a designation could be used to process an individual's data without his consent or knowledge and with complete impunity by any agency of the government so empowered. This completely arbitrary power to digitally strip a person and inventory every aspect of his personality is left to the discretion of an executive operating under no oversight. Just the knowledge of this situation would force people into silence lest they bear the brunt of arbitrary state action. The

[1197] CRIMINALISING DISSENT *supra* note 55, at 15.
[1198] Unlawful Activities (Prevention) Act, No. 37 of 1967 (1967), § 2(o) [hereinafter UAPA].
[1199] UAPA, supra note 58, § 15.
[1200] ANI, *Second Plea in SC Challenging Amendments to UAPA act*, THE ECONOMIC TIMES (Aug. 24, 2019, 04.12 PM), https://economictimes.indiatimes.com/news/politics-and-nation/second-plea-in-sc-challenging-amendments-to-uapa-act/articleshow/70817752.cms?from=mdr.

UAPA, as it currently operates, already allows the government to arbitrarily crackdown on dissent. Working with the Bill that allows the government to not even inform a data principal that his data is being processed, no citizen can feel truly free from the prying eyes of the State. Our privacy rights jurisprudence going all the way back to J Subba's dissent in Kharak Singh[1201] has stressed on the importance of Article 19 and Article 21 rights coming with a reasonable expectation of not being constantly watched. It is in that context we should refer to what is undoubtedly one of the most monumental dissenting opinions in India's judicial history. He wrote, "The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like."[1202] His emphasis on 'freely' as contained in Article 19(1)(d)'s right of free movement stressed specifically on how the awareness of being watched undoubtedly curbed that right.[1203] This Bill would be another step in the Central Government's long march towards a totalitarian surveillance state. The silencing of media and curbing of dissent are necessarily facilitated by legislation that lets the government remove checks on its own excesses. In a world where our citizens get charged with UAPA just for using Social Media, we simply cannot afford the mistake of letting such legislation pass and sleep on the dawning of a police state.[1204]

CONCLUSION

The makers of our constitution envisioned a country that would uplift every citizen to allow the enjoyment of freedoms promised to them. In our march forward as a nation, great advances have been made in rights jurisprudence, often at the hands of the judiciary and seldom that of the legislature. Our Constitution makers may not have foreseen a digital future where the privacy of personal data would be among the most important things to be protected. The Supreme Court nevertheless has held that an obligation to protect our privacy is incumbent on the State.

[1201] Kharak Singh, *supra* note 28.
[1202] Kharak Singh, *supra* note 28.
[1203] Gautam Bhatia, *State Surveillance and The Right To Privacy in India: A Constitutional Biography*, 26 STUDENT ADVOCATE COMMITTEE 127, 131 (2014).
[1204] Prashasti Awasthi, *J&K Police Lodges FIR Against Kashmir People Accessing Internet via VPN*, THE HINDU BUSINESS LINE (Feb. 18, 2020), https://www.thehindubusinessline.com/news/national/jk-police-lodges-fir-against-kashmir-people-accessing-internet-via-vpn/article30850846.ece.

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From the critical examination of the Data Protection Bill, 2019 it is evident that it fails to satisfy the constitutional test laid down the Supreme Court as it is unnecessary, illegitimate, and disproportionate in its infringement of rights. Even when read in tandem with the UAPA, the bill curbs dissent which forms the basis of any democratic setup. If passed, this Bill would cement the reality of a police state that has long been coming.

In an Indian market neck-deep in digital consumer culture, even processing data publicly available would give the State a comprehensive identity roll of people. The extent to which they can manipulate private lives with access to all personal data in such a paradigm is beyond unimaginable. Big Brother does not stop watching you just because his face is radiant with a grin. If such draconian measures pass under the parliament's watch, without so much as a voice of dissent, it would be great disservice to the people of this nation.

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INSANITY DEFENCE: A LOOPHOLE FOR CRIMINALS IN INDIA

- AYUSH SRIVASTAVA & ADITI SHARMA

ABSTRACT-

The research paper proposes desired shape for insanity defence, while duly acknowledging the bygone day's concept of insanity as a defence. This literary work mainly focuses on the concept of Mc Naughten rule, relevance of **S.84 of Indian Penal Code, 1860,** along with its elements. Although the concept as enshrined in S.84 of IPC is substantial but in the leitmotif of concomitant scenario it needs to be post scripted as it is equipped with certain loopholes in Indian Legal System.

"Insanity Defence" is a tool in Criminal Law to save an alleged from the accountability of a crime. It is to be acknowledged that this is a legal concept and therefore simply suffering from a mental disorder is not sufficient to prove insanity. The burden of proof lies on the alleged to supply the Court with evidence similar to that of "preponderance of the evidence" as in the civil case.

This research paper focuses on the concept of insanity in law and how it has become a loophole in modern judicial system.

Key Words: Mc Naughten Rule, S.84 of Indian Penal Code, Insanity defence, Loopholes.

INTRODUCTION-

On one hand where the Indian Penal Code, 1860 provides for punishment for different offences there on the other hand it also mentions some general exceptions. All the offences defined in the Code are subject to these general exceptions. As S.6 of Indian Penal Code, 1860 states that- "Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained

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in the Chapter entitled "General Exceptions", though those exceptions are not repeated in such definition, penal provision, or illustration."

For example, 'accident in doing a lawful act (S.80)'; 'act of a child under seven years of age' (S.82); 'Communication made in good faith' (S.93) IPC, are all general exceptions. But among these there is one exception which is used more frequently i.e. defence of insanity or defence of 'Act of a person of unsound of mind'.

"Aristotle pointed out that some misconduct was morally excusable when it was the result of what lawyers would nowadays call a mistake of fact; and that the insane as well as the sane could be mistaken in this way."[1205]

The human soul is composed is composed of reason, spirit and appetite. When his power of reasoning is lost, he loses his faculty for making a correct judgment or distinguishing between right and wrong. But all the types of insanity recognized by the medical experts do not serve as defence under IPC. Only legal insanity plays role as a good defence under IPC.

The defense of insanity is provided u/s 84 of Indian Penal Code. Insanity or unsoundness of mind is accepted as a defence because 'actus reus' (physical act) and 'mens rea' (guilty mind) are the two very basic elements to constitute a crime. But an insane person can never have a guilty intention as his mental health is incapable of differentiating good or bad. This is the basic reason contended by different jurists.

Plato also says that a madman is himself punished by his illness. In nutshell a maxim defines it all i.e. **'Actus non facit reum nisi mean sit rea'** which means that 'an act does not make a person guilty unless done with guilty mind or criminal intent'."

The defence of insanity is not at all a new concept but existed since ancient Greece and Rome. Latter this concept was legally recognized by the House of Lords for the first time and was from then known as Mc Naughten rules. Mc Naughten rules have also laid down the foundation of S.84 of IPC.

[1205] The Annals of the American Academy of Political and Social Science Vol.477, The Insanity Defense (Jan.1985), pp. 25-30.

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Centuries have passed since this defence has being incorporated in S.84. Though medical science and psychiatry has suggested many signs to discover the state of mind of the defendant and there have other progress in the foreign jurisdiction, but there has been no reform in the concept of insanity defence in context of India which is the need of new era.

MC NAUGHTEN RULE AS GENESIS OF S.84 OF INDIAN PENAL CODE-

The Defence of insanity as stated in S. 84 of IPC, 1860 is developed by Common Law of England. Though it existed since many centuries but it got its statutory recognition only since the last three centuries. It should be pointed out here that earlier there were various tests to judge a person as an insane such as the 'Wild Beast Test', the 'Irresistible Impulse Test', 'Durham Test' and the 'Substantial Capacity Test'. All these four tests acted as the roots of the Mc Naughten rule formulated by the House of Lords in the famous case of **R. vs. Daniel Mc Naughten**[1206] . In that case, the defendant was accused of murder of Edward Drummond who was the Private Secretary of the Prime Minister of England Sir Robert Peel. The defendant misapprehends the deceased as Sir Robert Peel. The defendant contended that at the time of the incident he was suffering from an insane delusion, that Sir Robert Peel had injured him and he was the only reason of his entire problem and therefore shot Drummond who was then coming out of from the PM's office, misapprehending him to be Sir Robert Peel. In the above mentioned case the defendant's plea of insanity was accepted and he was given the benefit of Defence of insanity.

There were five questions and their answers which are now regarded as the Mc Naughten Rule. After summarizing the rules goes as follows:

"Every man is to be presumed to be sane, and…that to establish a Defence on the ground of insanity, it must be clearly established that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, he was doing what was wrong"[1207]

"After summarizing the rule the following propositions may be drawn:

[1206] 1843 8 Eng Rep 718.
[1207] Criminal Law- Cases and Materials 7th ed. 2012.

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i. Every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his crimes, until contrary be proved to the satisfaction of the jury or the court.

ii. To establish defence on ground of insanity it must be clearly shown that at the time of committing the act, the accused was laboring under such a defect of reason from disease of mind that he did not know that what he was doing was wrong.

iii. If the accused was conscious that the act was one which he ought not to do and if that act was at the same time as contrary to the law, he would be punishable.

iv. A medical witness who has not witnessed the accused previous to the trial should not be asked his opinion whether on evidence he thinks that the accused was insane.

v. Where the criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as he would have been on the facts as he imagined them to be."[1208]

From the prodromal it is perspicuous that Mc Naughten's rules stress on "understandability of right and wrong" and intellectual rather than a moral or effective definition dominated in its possession formulation.

*Analyzing S.84 of Indian Penal Code, 1860- S.84 of Indian Penal Code, 1860 provides that "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Therefore, the following are the essentials of S.84 of Indian Penal Code, 1860:

i. At the time of commission of the offense.

ii. The accused must be incapable of knowing the nature of the act or that he is doing what is wrong or contrary to the law.

[1208] Mishra S.N, Indian Penal Code, Central Law Publications, Twenty First Edition, Pg. 201.

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iii. Such incapability must be because of unsoundness of mind.

It must be noted that the foundation of S.84 of IPC rests upon the first two propositions which are eventually the answers of 2nd and 3rd questions given by the House of Lords.

INTEGRANT OF INSANITY DEFENCE IN INDIA-

By splitting S.84 of IPC, 1860, we can gather three basic ingredients, for the Defence of insanity in India. It has to be established that the accused was 'incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law' because of the reason of 'unsoundness of mind' 'at the time of doing it'.

Therefore, the following are the essential ingredients of S.84 of IPC:

1. '**Incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to the law'-** This ingredient can be understood by the very basic fact that to constitute a crime 'actus reus' i.e. the guilty act and 'mens rea' which means guilty mind are required. Another Latin maxim states that 'Actus Non Facit Reum Nisi Mens Sit Rea' meaning thereby that an act does not make anyone guilty unless there is a criminal intent or a guilty mind, and it is well established that 'a madman has no will'. [Furiosi nulla voluntas est].

The accused would be liable for his act if he had senses to (i) understand the nature of the act or that (ii) he is doing what is wrong or (iii) what is contrary to law. The accused is not protected if he knew that what he was doing was wrong, even if he did not that it was contrary to law or the vice-versa[1209].

Under S.84 of IPC, it is not every mental derangement that exempts an accused person from criminal responsibility for his acts, but the derangement must be shown to be one which impairs the cognitive faculties of the accused i.e. the faculty of understanding the nature of his act in its bearing on the victim or in relation to himself i.e. his own responsibility.

[1209] Mishra S.N., Indian Penal Code, Central Law Publications, Twenty First Edition, Pg. 201

But if at the time of the offence the accused, because of insanity, was incapable of knowing that his act is 'wrong' or 'contrary to law' he would be protected from any criminal liability u/s[1210] 84 IPC.

"The word 'wrong' is interpreted to mean a moral wrong and not a 'legal wrong' since S.84 uses the alternative phrase 'contrary to law'".[1211]

2. **'Unsoundness of Mind'-** To establish the plea of insanity under S.84, first of all it is necessary to set up that the accused was incapable of knowing the nature of the act because of 'unsoundness of mind'. The above written expression i.e. 'unsoundness of mind' has not been defined in any section of Indian Penal Code, 1860. But in **Jai Lal vs. Delhi Administration**[1212] it was held that-"The term unsoundness of mind symbolizes a state of mind in which accused is incapable of intending the nature of his act or that he is incapable of knowing that he is doing is wrong or contrary to law.

"It is only 'unsoundness of mind' which consistently impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility.[1213]

To understand this term i.e. 'unsoundness of mind', first of all it is essential to know the meaning of insanity as both the terms are treated to be corresponding to each other by the Court. **Stephen** in his book "**Stephen: History of Criminal Law**" defines insanity as "Insanity means a state of mind in which one or more functions of feeling, knowing, emotion and willing is performed in an abnormal manner or is not performed at all by reason of disease of the brain or nervous system.[1214]"

Giving an example Stephen says that if a person cuts off a sleeping man because 'it would be great fun to see him looking for it when he woke up', it would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act.[1215]

"The term insanity as used in the special plea in a criminal case, means such abnormal mental a criminal case, means such abnormal mental condition, from any cause, as to render the accused at

[1210] Under Section
[1211] Pillai P.S., Criminal Law, Lexis Nexis, 14th Edition.
[1212] AIR (1964)
[1213] Kader Hasyer Shah, (1896) 23 Cal 604, 607
[1214] Stephen: History of Criminal Law [Volume II, p. 130]
[1215] Stephen: History of Criminal Law [Volume II, p.166]

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the time of committing the alleged criminal act, incapable of distinguishing between right and wrong and so unconscious at the time of the nature of the act which he is committing, and that the commission of that act will subject him to punishment."[1216]

But the mere fact that the accused was conceited, odd, irascible and his brain is not quite alright, or that the physical and mental ailments from which he suffered had rendered his intellect weak and distressed his emotions and satiate in certain unusual fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behavior or that behavior is queer are not sufficient to attract the provisions of S.84[1217].

Moreover, not all the types of insanities are circumscribed within S.84. Medical insanity is of many types but is different from legal insanity. "The insanity, for the purpose of S.84, should be of such a nature that it completely impairs the cognitive faculty of the mind, to such an extent that he is incapable of knowing the nature of his act or what he is doing is wrong or contrary to law.[1218]"

It is only the legal and not the medical insanity that absolves an accused from criminal responsibility.[1219]

3. **'At the time of doing it'-** One of the main points to be highlighted under this section is that the law is concerned only with insanity that existed at the time of committing the offence[1220].

Also in the case of **State of Madhya Pradesh vs. Ahmadulla[1221]**, the Hon'ble Apex Court held that- "The crucial point of time for deciding whether the benefit of S.84 should be given or not is the material time when the offence takes place."

The existence of unsoundness of mind prior to the commission of the offence or after the commission of the offence is neither relevant nor per se sufficient to bring his case within the

[1216] Oborn vs. State, 143 Wis, 249, 268, 126 N.W. 737, 745 (1910).
[1217] Surendra Mishra vs. State of Jharkhand , AIR 2011 SC 627, (2011) 11 SCC 495
[1218] Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat, AIR 164 SC 1563.
[1219] Hari Singh Gond vs. State of Madhya Pradesh AIR 2009 SC 31 (2008) 16 SCC 109.
[1220] Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat, AIR 1964 SC 1563 (1964) Cr LJ. 472 (SC).
[1221] AIR 1961 SC 998, (1961) 2 Cr LJ. 43 (SC)

exception provided by S.84, though it may be taken into consideration for the purpose of deciding whether the accused was insane.[1222]

The entire conduct of an accused right from the time of immediately before the commission of the offence up to the time the sessions proceeding commence becomes relevant in ascertaining as to whether the plea of insanity raised by the accused is genuine, bonafide or an afterthought[1223].

In **Sheralli Wali Mohammad vs. State of Maharashtra [1224]** it was held that…. It must be proved clearly that, at the time of the commission of the acts, the appellant, because unsoundness of mind, was incapable of either knowing the nature of the act or that the acts were either morally wrong or contrary to law. The question to be asked, is whether there is evidence to prove that, at the time of the commission of the offence, he was striving under any such incapacity? On this question, the state of his mind before and after the commission of the offence is relevant.

Further, in the case of **Jai Lal vs. Delhi Administration [1225]** the accused was a schizophrenic who was treated and cured. He stabbed a ½ year old child, as a result of which he died and also that person injured the others. A plea of insanity was raised as a defence. But the Hon'ble Apex Court took into consideration his subsequent behavior, as he had hid the knife, also locked himself in the house to prevent arrest and attempted to run away from back door. He also tried to dispense the crowd by throwing bricks from the roof.

The Hon'ble Apex Court held that the nature of evidence required to establish the existence of insanity at the time of commission of the offence depends on the facts and circumstances of each case.

Moreover, the Hon'ble Apex Court held in the case of **State of Madhya Pradesh vs. Ahmadulla [1226]** that "…. The burden of proving which lies on the accused in order to entitle him to the exemption provided under S.84 of Indian Penal Code, 1860."

<u>Understanding the battle between Legal Insanity and Medical Insanity-</u>

[1222] Ratan Lal vs. State of Madhya Pradesh, AIR 1971 SC 778, (1971) Cr LJ. 654 (SC)
[1223] RAJU V.B., Indian Penal Code, Eastern Book Company, Fourth Edition, 1982.
[1224] (1973) 4 SCC 79:1972 Cr LJ. 1523.
[1225] AIR 1969 SC.
[1226] AIR 1961 SC 998, (1961) 2 Cr LJ. 43 (SC)

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"Under **S.84** of IPC, legal test of mental illness has been laid down but nowhere in the statute there is a precise definition of the terms such as '**unsoundness of mind 'or' insanity, therefore have they carried** a different meaning in different contexts and describes varying degrees of mental disorders."[1227]

A man with mental illness cannot be exempted from criminal responsibility because there exists a chasm between legal insanity and medical insanity and courts are concerned only with legal insanity.

To simply differentiate the two, a person suffering from a mental illness is called 'medically insane' and in the scenario of legal insanity person suffering from mental illness also losses his reasoning power at the time of the commission of the crime.

Legal insanity denotes or precludes the state of mind of a person at the time of the commission of the crime and hence is purely legal concept.

BURDEN OF PROOF AND PROOF OF INSANITY-

In all cases where previous insanity is set up, it is most important to consider the circumstances which have preceded, attended and followed the crime, whether there was deliberation and preparation for the act, whether it was done in a aspect which showed a desire to hideaway; whether after the crime the offender showed consciousness of guilt; and made efforts to avoid detection; whether after his arrest he offered false excuses and made false statements.

Burden of Proof that the mental condition of the accused was, at the crucial point of time such as described by S.84 of IPC, lies on the accused who claim the benefit of this exemption[1228].

In the case of **Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat[1229]** the Sessions Court had rejected the plea of insanity of the appellant and charged him u/s 302 of IPC for murdering his wife. The appellant went to the Supreme Court after the decision of the Sessions Court was upheld by the High Court. The Hon'ble Supreme Court held that:

[1227] Hari Singh Gond vs. State of Madhya Pradesh. AIR 2019
[1228] AIR 1961 SC (998), Ahmadullah AIR (1974) SC 216, 1975 Cr. LJ.
[1229] AIR 1964 SC 1563.

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i. "There is no conflict between the general burden to prove the guilt beyond reasonable doubt, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity.

ii. The doctrine of burden of proof in the lexicon of the plea of insanity may be stated in the following propositions-

- The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the precondition, mens rea, and the burden of proving that always reposes on the prosecution from the onset to the edge of the trial.
- There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S.84 of IPC; the accused may rebut it by placing before the court all the pertinent evidence- oral, documentary or circumstantial, but the burden of proof upon him is so higher than that which reposes upon a party to civil proceedings.
- Even if the accused was not able to settle convincingly that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may boost a reasonable doubt in the mind of the court as regards one or more of the innards of the offence, including mens rea of the accused and in that situation the court would be denominated to acquit the accused on the ground that the general burden of proof resting on the prosecution was not exercised."[1230]

In **Jai Lal vs. Delhi Administration**[1231] it was held by the Hon'ble Supreme Court that the prosecution is discharging its burden in the face of a plea of insanity, has merely to prove the basic fact and to rely upon the normal presumptions and the inference in such manner as would go to establish his plea.

[1230] www.indiankanoon.org
[1231] AIR 1969 SC

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"The burden of proving the existence of circumstances bringing the case within the purview of S.84, therefore, lies upon the accused[1232].

But where in midst of the investigation, previous history of insanity is disclosed, it is the obligation of an honest investigator to subject the accused to medical examination and place that evidence before the Court and if this is not depleted, it creates a deliberate infirmity in the prosecution case and the well-being of doubt has to be given to the accused.[1233]

However, evidence may also be produced as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental conditions, his family history and so forth.[1234].

Moreover though u/s 105[1235] of Indian Evidence Act, the burden of proving the existence circumstances bringing the case within the purview of S.84 lies on the accused, yet that burden is not equivalent to that on the prosecution as the prosecution has to prove the charges beyond the reasonable doubt "but the burden of proof upon the accused is no higher than one which rests upon a party to civil proceedings"[1236].

There is no issue between the general burden which is always on the prosecution and which never shifts and the special burden which rests on the accused to make out the defence of insanity.[1237]

[1232] State of Madhya Pradesh vs. Ahmadulla, AIR 1961 SC 998
[1233] Siddhapal Kamala Yadav vs. State of Maharashtra , AIR 2009 SC 97
[1234] State of Maharashtra vs. Govind Hhatarba Shinde.
[1235] S. 105 [Burden of proving that case of accused comes within the exceptions]- When a person is accused ofany offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code or within any special exception in the IPC or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.
[1236] Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat, AIR 164 SC 1563.

[1237] Shivraj Singh vs. State of Madhya Pradesh, 1975 Cr LJ. 1458

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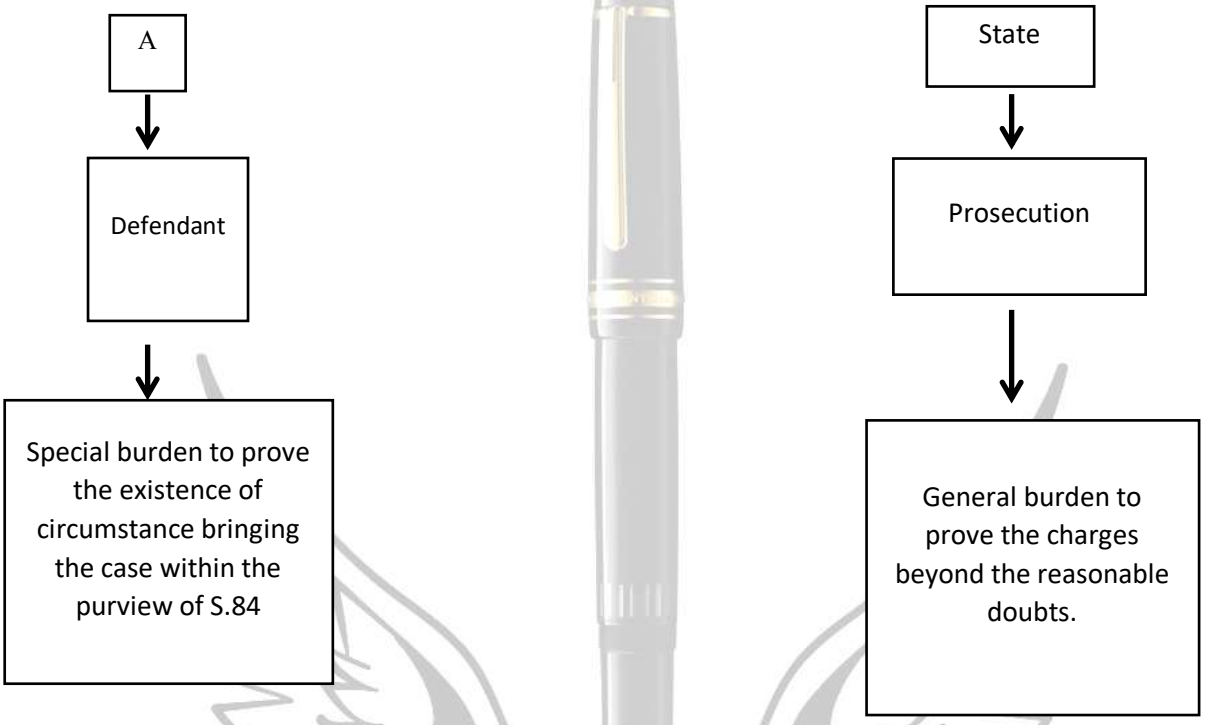
For example- 'A' is accused of murdering 'B', by the reason of unsoundness of mind. Then:



Discrepancies in the S.84 of IPC-

- **The Law Commission miserably failed at this point-** The Law Commission of India even admitting the fact that the expression 'unsoundness of mind', compared to the expressions 'disease of mind' and 'mental deficiency used in Mc Naughten Rules, is somewhat 'vague and imprecise', failed to see any worth in proposing changes in S.84 of IPC.[1238]

- **Insanity Defence is not accepted in all jurisdictions-** Not every country accepts insanity defence and some have abolished it. For example United State of America's constituent states such as Montana, Idaho, Kansas and Utah have banned insanity defence. In Victoria the defence of insanity has been replaced by the defence of 'mental impairment' after the introduction of Crime (Mental Impairment and Unfitness to be Tried) Act, 1997.

[1238] Law Commission of India, 'Forty- Second Report: the Indian Penal Code', Government of India, 1971, p.93.

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In Canadian Law "the new provisions also replaced the old insanity defence with the current mental disorder defence".[1239]

- **It is misemployed in many cases-** To know whether the accused was sane or insane, at the time of the occurrence, is not at all easy and this is why the defendants take privilege of the defence of insanity as the benefit of doubt is given to the accused.

A study was undertaken with the objectives of estimating the success rate of insanity pleas in Indian High Courts and determining the factors associated with the outcome of such insanity pleas. The data was collected from the websites of 23 High Courts of India using the keywords 'insanity' and 'mental illness' and the judgments delivered between 01/01/2007- 31/08/2017 were retrieved. Information regarding nature of the crime, diagnosis provided by the psychiatrist as an expert witness, documents used to prove mental illness, and the judgment pronounced by the High Court were retrieved. A total of **102** cases were examined from **13** High Courts and the result was out of **102** cases courts convicted the accused in **76** cases (74.50%), thereby rejecting the insanity defence. The High Courts acquitted the accused u/s 84 of IPC in **18** cases (17.65%)[1240].

From the above mentioned records it is crystal clear that Insanity pleas in India had a success rate of about 17% only.

- **Extra-financial burden on the State-** Medical examinations by the specialists to investigate whether the accused was sane or not at the time of offence incur a lot extra-financial burden on the State and moreover, many of these medical examinations fail.
- Wastage of time of courts- Many defendants falsely claim the defence of insanity as it is very difficult to examine whether the defendant was able to understand the nature of his act or not, at last many of them fail to take the defence. This is simply the wastage of time.
- **There may be tussle between Medical Experts-** Since, there is a lot of difference in legal insanity and the insanity in medical field therefore there may be a battle between the medical experts to understand what is required in the case. Some Medical Experts also have different views on this point.

[1239] Pilon, Mailyn (2002), Mental Disorder and Canadian Criminal Law, Government of Canada.
[1240] Ramamurthy P, Chathoth V, Thilakan P., How does India decide insanity plea? A review of High Court judgments in the past decade.

N. Morris (Professor, Criminologist, Advocate and Mental Health Reformer) in his literary work[1241] clearly mentioned that – "By the extra-ordinary language of a special defence, we have not selected those who commit criminal acts and are most psychologically disturbed, nor do many people think we have. Therefore, special defence of insanity is psychologically false."

He further states that 'social adversity', with its generations of destroyed families, is much more criminogenic than psychosis, and is even more unavoidable for the child born to an impoverished inheritance. Therefore, he made it clear that defence of insanity is morally false classification. It is pretentious to think that anyone has sufficiently sensitive caliber to make the delicate moral judgments.

- **Changes across other countries:** In England the branch of criminal law has undergone a significant change. The Mc Naughten Rules are no longer dominant in England.

"Under S.2 of the Homicide Act, 1957, if two Psychiatrists certify that the homicidal act of the accused was influenced by abnormal condition of his mind though not amounting to legal insanity within the meaning of Mc Naughten Rules, still he cannot be convicted of murder, but his offence will be regarded only as a manslaughter which is equivalent to culpable homicide not amounting to murder under the IPC, 1860. It is hoped that the Indian Law too would be changed on this score with due regard to the modern developments in the field of psychology of criminal behavior[1242]

- **Insanity Defence is barred with no limits-**

There have been cases where accused has been acquitted second time by taking the plea of insanity. Therefore insanity plea acted as a dorsum for him again and again.

The Bombay High Court's division of Justice Bhushan Gavai and Sarang Kotwal acquitted Ilyas Shaikh on the ground of insanity for the offence of murdering his building's watchman in the year 2007. Prior to this Ilyas Shaikh had similarly been acquitted by a trial court for the murder of another man in the year 2001.[1243]

[1241] Morris N., THE FUTURE OF IMPRISONMENT, University of Chicago Pr, (1974).
[1242] Ratanlal and Dhirajlal, The Indian Penal Code, Lexis Nexis, 35TH Edition, 2017, p.119.
[1243] Thomas Shibu, Times of India, Mumbai City, 11/07/2018, 6:11 IST.

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From the above instance, it is crystal clear that the defence u/s 84 IPC, is not equipped with any sort of limitations. A man can be acquitted number of times, despite the fact he kept committing the offence provided that the offence should be endorsed by the plea of insanity.

Plato in his literary work recommended that- "If anyone be insane, let him not be seen openly in the town, but let his kinfolk watch over him as best as they may, under penalty of a fine."[1244] Such a rule however does not means that mad people who do serious harm- or their kin- were exempt from the usual consequences. Whatever they might be, it was an attempt to prevent harm.

CONCLUSION-

It is further comprehended that the most direct way of bringing persons who are guilty of criminal act under criminal justice system, even though they are insane is by abolishing the insanity defense.[1245]. States need not to amend state codes, they need to enact a Criminal Mental Procedures Act that applies to all persons who are accused of crime but are incapable of undergoing trial due to mental impairment. The act would provide the full procedure of hearing coupled with the most important aspect i.e. right of full and effective treatment. If the insanity defence would be left as it is then there will be always a chance of two-part verdict. When the defendant raises the defence of insanity then the court needs to have a look on the fact that whether the state has proved beyond reasonable doubt that the defendant committed the prescribed and alleged act or not. The second aspect which should be looked into by the Courts will be whether the defendant realized the nature and quality of the act or not. As a result of which the verdict would be guilty but not responsible by reason of insanity. It would be morally as well as legally wrong to prevent detention of non-dangerous persons who are mentally ill to the persons who were excused from the responsibility for a crime by the reason of insanity. The persons who need treatment must be classified as offenders and must also be subjected to criminal justice system. The onus of proving the trait of being non-dangerous will be on the defendant as a condition of release.

It is suggested that there should be a more deep interpretation of the expression 'mental insanity' to avoid various controversies that arise in understanding the 'mental disease'. S.84 of the Indian

[1244] Plato: *The Laws (circa 350 B.C.).*

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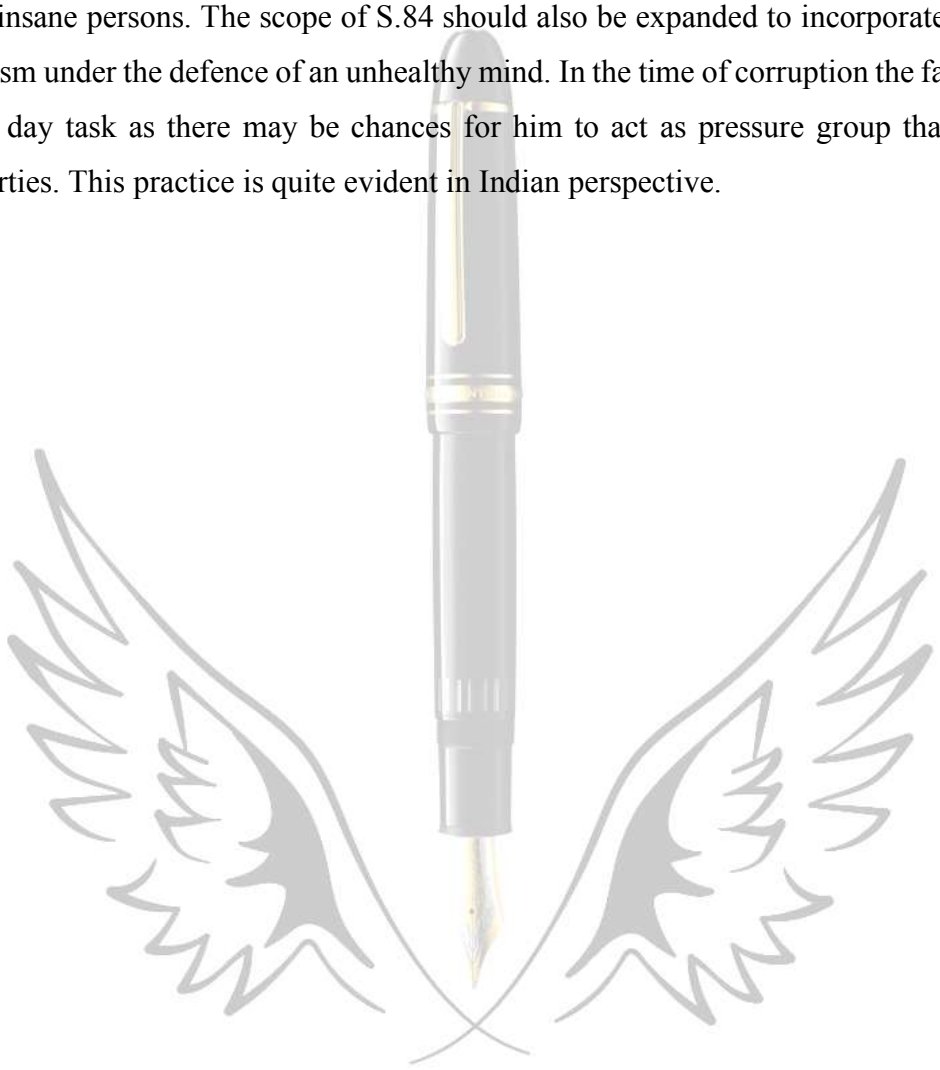
Penal Code should be amended to incorporate the defence of diminished responsibility for murdering insane persons. The scope of S.84 should also be expanded to incorporate the defence of automatism under the defence of an unhealthy mind. In the time of corruption the false evidence is a day to day task as there may be chances for him to act as pressure group that funded the political parties. This practice is quite evident in Indian perspective.



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AUTOPSY AND IT'S PRINCIPLE: AN OBJECTIONAL STRATERGEM IN THE SOCIETY

- **SANGRAM KESARI SAHU & POOJA JHA**

INTRODUCTION

Autopsy is an indispensable investigation tool that has been used for centuries in the world. It is of two kinds: clinical or academic and forensic or medico-legal autopsies. Forensic autopsy is medico-legal study of cases of unnatural and unexplained deaths. This practice is still under the umbrella of fallacies, myths and emotions by the lay people as well as by many physicians.

In India, as per law, forensic or medico-legal autopsy is approved out without the consent of the relatives. In such a situation, the response of relatives can vary critically, ranging from objection to approval. Investigation into the knowledges of the next of kin will help both family and forensic specialists to deal with the borderline situations that are so often bump into. A newly expressed opinion states that autopsy is not somewhat that should be performed as a favour to the family, but it should be something to which the family has a right, of which they ought to be informed.

Currently, a greater emphasis is being positioned on the active participation of patients and their families and relatives; it is period that the attitudes and feelings of the families with respect to autopsies are explored. The experiences of deceased family members will impart the forensic fraternity on how to handle an autopsy. Therefore, the contemporary study was deliberated with an objective to analyse and determine deceased family member's attitudes toward medico-legal investigation and forensic autopsy. The supplementary objective was to determine factors swaying autopsy refusal by relatives of the deceased.

SCOPE OF RECOMMENDATION OF AUTOPSY:

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1. In circumstances where death may be due to unnatural causes, the adequate authority, accompanied by one or more medico-legal (forensic) experts, bound to investigate the death scene and incident properly, solid examination of body and decide whether there is a need to do autopsy.

2. Autopsies or post-mortem examination must be carried out in all cases where there is doubt regarding the manner of death and in all obvious or suspected non-natural deaths where involvement of a third party cannot be ruled out, also if there is a delay between suspected causative events and death, in particular in the following situations:

   a. The death is associated with police action.

   b. Homicide.

   c. Sudden unexpected death with uncertain manner of death, including sudden infant death.

   d. The death is by apparent intoxication by alcohol, drugs, or poison, unless a significant interval has passed (while hospitalized), and the medical findings and absence of trauma are well-documented.

   e. Suspected medical malpractice and neglect of doctors.

   f. Accidents either due to transportation, occupational, domestic hazards.

   g. In case of mass genocide with no reason to find out cause of death.

   h. Death due to police/ military activities or in custody, etc.

I. Scene investigation

a. General Essence

   1. In cases of suspicious unnatural death, the physician must first of all attend the deceased one then the corresponding competent authorities in accordance to Indian laws should decide whether post mortem is needed to be carried out by forensic experts or not.

   2. In some cases, it should be performed with the consent of relatives.

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3. The forensic expert has to roll down through the actual case and should do the detail research on every aspect. Every deviation from following essence has to be documented very well.

b. Examination of Deceased(body)

The sharing of responsibilities from forensic experts to police differ from region to region but here in this article we are dealing about India.

1. Role of Cops

   a. Done by Police not less than the rank of a head constable;

   b. Graph the identities of all person at the scene;

   c. Photograph the body as it is;

   d. Make pretty sure that all important findings are noted and collected from that scene like weapons, blood stains, clothes etc for further examination;

   e. In an agreement with the medico-legal expert, obtain identification of the body and other pertinent information from scene witnesses, including those who last saw the decedent alive, where available;

   f. Preserve all necessary biological findings;

   g. Try to preserve the integrity of scene and surrounding so that it cannot be misused by someone else;

   h. Make inquest report (punchnama);

   i. Handover dead body to forensic expert for further research.

2. Role of Medico-Legal Expert

   a. The expert must be informed about everything regarding the case;

   b. Ensure that photographs of all matter are taken;

   c. Record the position of body in relation to manner of clothing and also the body decomposition, rigor mortis and hypostasis state should be taken into consideration;

d. Examine blood stains, depth and manner of invasion in body;

e. Proceed for overlook examination of body;

f. Record core temperature of body, the strength of rigor mortis and other relevant findings in order to estimate the time since death.

g. After examination the body should be moved to cold storage in supine position.

II. Identification of Body:

Some identification methods:

a. Finger prints;

b. Dental marks;

c. Genetic identification;

d. Nail marks;

Uncertain identification methods:

a. Visual identification;

b. Physical features;

It is appropriate to take biological samples from the deceased in order to assist genetic identification. Measures shall be taken in order to avoid contamination and guarantee appropriate storage of biological samples.

III. General Considerations:

1. Medico- legal autopsies must be performed with regard to medical ethics and thereby respecting dignity of deceased.
2. Before beginning post-mortem examination, the following aspects must be noted:
    a. First record time, date and place of autopsy;
    b. Record name(s) and the function of person performing autopsy;

c. Examine and record clothing and worn accessories such as jewellery, and should verify the correspondence between injuries on the body and damage of clothing or worn accessories.[1246]

3. Where appropriate, imaging methods are to be carried out.

4. Where appropriate, before beginning the autopsy, body orifices are to be swabbed for the recovery and identification of biological trace evidence.

IV. Autopsy procedures:

a. External Examination

1. Initially examination of exterior things like clothing and worn accessories must be examined and clearly described.

2. The signs of previously done surgical interventions and resuscitation processes must be recognized very well.

3. Further it includes:

   a. Age, sex, height, estimated weight, colour, and special characteristics such as tattoos, scars, keloid marks etc.

   b. Inspection of skin especially posterior and downward regions such as under the bust lining of breasts or under the scrotal sac.

   c. Careful analysis of scalp, hair, nails, natural orifices of body, eyes, colour of skin etc.

   d. Also check around the nuchal region i.e., under the occipital region and neck to find out whether there are any abrasions, wounds, bruising, any bumps, or any other malformations.

[1246] Retrieved from https://www.sgrm.ch/inhalte/ForensischeMedizin/Durchfuehrung_Rechtsmed_Obduktion_01.pdf (Visited on April 24,2020)

e. Inspect the torso for any marks of abrasions, wounds, penetrations, scars, any pigmentation around nipples, areolae over breasts.

f. Coordinated inspection of genital to find out any mutilations.

g. Examination of extremities to find out oedema, abrasions, cuts, injection marks and scars, bulging etc.

h. Inspection of under finger nailbeds to find out skin cells, blood stains etc.

b. Internal examination

1. Complete internal examination is done by forensic experts by dissecting chest, abdominal and pelvic organs, if necessary, brain too.

2. The internal examination starts with a deep Y shaped incision made from shoulder to shoulder meeting at the breast bone and extending all the way down to the pubic bone in case of men and in case of women the Y-incision is curved around the bottom of the breasts before meeting at the breast bone.[1247]

3. After this skin is peeled of and detailed examination of body cavities is done by determining the anatomical boundaries, intactness of membranes, colour and texture of mucosal lining, gas presence like pneumothorax or ascites in abdomen etc.

4. Organs examination must be ruled out by following principles of pathological anatomy.

5. In case of detailed analysis:

a. Head: opening of skull and assessing the layers of cranium, cerebrospinal fluid, blood vessels, meninges.

b. Torso: detailed study of torso must be done for determining pneumothorax and whole gastrointestinal tract dissected to figure out the cause of death in case of poisonings.

[1247] Retrieved from https://emedicine.medscape.com/article/1718019-overview#a2 (Visited on April 24,2020).

c. Skeleton: better analysis of bones, cartilages in spine, rib cage are part of autopsy procedure to rule out death in case of stabbing or other cause that provides depth of insertion into osseous regions.

6. Other procedures:

a. In case of gas embolism for example in drowning case the gas volume in heart and lungs with pre- autopsy imaging procedures are calculated.

b. Where needed full extraction of the dedicated organ and detailed analysis of its anatomy and histological findings is done.

c. If there are any doubt of neck trauma first of all brain and thoracic organs are removed before dissection of neck to ensure detailed bloodless dissection.

7. Sampling:

This is performed by the procedure: Every sample must be clearly labelled with Name of Deceased, Date of Birth, the date and time of sample collection and the sample site. A post mortem reference number may also be appropriate.

8. After post mortem examinations:

a. The organs are either put back into the body or incinerated.

b. The chest flaps are closed and sewn back together.

c. The skull cap is put back in place and held there by closing and sewing the scalp.

The funeral home is then contacted to pick up the deceased.

V. Autopsy protocols or certificate:

Autopsy report is the product of the post mortem anatomic examination and a complete assessment and integration of the patient's clinical data brought together to provide a purposeful accounting of this information.

In report the following are to be mentioned and subscribed:

a. Examination, date, time, place, attendant, assistant mentioned;

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b. Autopsy face sheet;

c. External examination;

d. Internal examination;

e. Toxicology and lab results;

f. Evidence of injury;

g. Post mortem changes;

h. Features of identification;

i. Summary and comments;

j. Cause of death;

k. With signature of both forensic experts and consent of deceased one which is to be written in a neat, clean legible and permanent form with a hard paper copy even if soft copy is preserved.

Survey:

The cross-sectional survey was directed at the Department of Forensic Medicine, MM Institute of Medical Sciences during the period of May 2011 to April 2012. The study population comprised of relatives or family members of the deceased. The inclusion standards were that an autopsy should be performed at the MM Institute of Medical Sciences and that the relatives or family members of the deceased were available. A list of the discourse and contact number was prepared for all the cases on whom autopsy was performed during 2010 to 2012. A sample of 200 research subjects was randomly chosen from the list with the help of a casual number generator.

All the 200 randomly selected family members or relatives were loomed by the author (a postgraduate student from the Department of Forensic Medicine). From 2 to 4 months after the autopsy was conducted, a postgraduate student who had experience with the grieving process and with grief counselling visited several households of the deceased to conduct a verbal interview and also through the telephone number if available, an advance appointment was made with a suitable respondent. Out of total eighteen families could not be outlined and contacted and hence they were

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excluded from the study. Of the 182 families of the total with whom the author could make contact, 17 of them did not consent for participation in the study and were again excluded from the study. Lastly, 165 study subjects participated in the study. Among them one hundred and fifteen family members or relatives accepted that they were not willing for autopsy (referred to Group A) and that it was coercible and forcefully conducted against their wish, and the remaining 50 family members or relatives were of the opinion that autopsy was conducted with their wish and consented hereby referred to (GroupB).

Written and informed consent was obtained in their respective local language from every study subject before conducting each and every interview. All such families and relatives were explained about the nature and purpose of the study and were dually requested to participate in the study. To obtain consent, the said author read the contents of the consent information sheet to each respondent, who was also given the opportunity to ask the questions. It took on the average of 20 min to complete each interview.

Role of Judiciary in Determination of Autopsy:

In accordance with the code of ethics for the Medical Council of India, all health care benefactors are required to respect and honour the dignity of every person. According to the Indian Medical Association, even after death of a particular person, a person needs to be treated as a living entity until his body mixes with the five basic elements of nature.

The Right to Life is recognised under Article 3 of the 1948 Universal Declaration of Human Rights and also under Article 6 of the 1966 International Covenant on Civil and Political Rights. The "right to life" is enshrined in our Constitution of India in Article 21, which says: "No person shall be deprived of his life or personal liberty except according to the procedure established by law." The scope of Article 21 has been prolonged over the years in various judgments of the Supreme Court by adding different dimensions of the right to health of an individual.

The Right to Life is also construed as the right to live with human dignity. In the precedent ***Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi & Ors*** dated January 13, 1981, the Supreme Court of India had held that "The right to life includes the right to live with human dignity."

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It's not only the living person who deserve our respect but the dead too deserve dignity. A dead person has all the right to be treated with dignity as demonstrated by the right to a decent burial or cremation. A dead person has the right to remain undisturbed and unharmed.

In the mentioned Section 297 of the Indian Penal Code penalizes anyone trespassing on a burial place or on places of sepulchre. It says: "Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulchre, or any place set apart from the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

In the 2018 judgement of ***Common Cause vs Union of India*****,** the apex court held that the right to life and liberty as envisaged under Article 21 of the Constitution of India, is meaningless unless it comprehends individual dignity. The right to live with dignity also embraces the smoothening of the process of dying in case of an incurably ill patient or a person in a persistent vegetative state with no hope of recovery.

Also, tissues or the organs of a dead person can be garnered as defined under the Transplantation of Human Organs and Tissues Rules, 2014. For most of the organs and tissues, the time between death and the donation should be 12 to 36 hours. However, tissues can be treated and stored for an extended period of time. The maximum time span between recovering organs or tissues and transplantation is as follows for various parts: Lung (4-6 hours); heart (4-6 hours); liver (24 hours); pancreas (24 hours); kidney (48-72 hours); corneas (7-14 days); bone (5 years); skin (3-5 years) and heart valves (5-10 years). A dead body is said to be living as long as organs can be harvested and it also deserves to be treated with respect and dignity. Except for the cornea, other organs can be harvested for donation when such a person has been declared brain dead. The vital organs of the body such as the heart, lungs, liver, intestine and kidneys are to be kept viable for some time if such brain-dead person is kept on a ventilator to maintain oxygenation of the organs so that they remain viable till they are harvested. The patient needs to maintain blood pressure, gastrointestinal functions, urinary functions and reproductive functions as the life force resides in each one of us.

Therefore, a living person has the right to live with dignity so does a dead body with retrievable organs and tissues. Also, with respect to cadaveric dissections, certain protocols have to be maintained. These include:

- Every dead body which is donated to a medical college needs to be treated with respect and dignity.
- No dead body should be allowed to put on hold on the grounds of its non-payment.
- Dissection of the human cadaver is regarded as fundamental part of training of doctors and is important to cultivate in medical students respect for the cadaver. While being taught the study of anatomy, they can also be taught "humane" qualities which forms an essential part to make a medical student a good doctor later on. These cadavers should be treated as once living persons, like us, and therefore, should to be respected.
- Disrespecting the said cadaver would also mean disrespecting the family of the dead person.
- After the said have been studied by medical students, cadavers are usually buried without any rituals. But the funeral service for the used cadavers with all rituals as an act of respect should be adhered.
- All medical students should bound to follow IMA cadaveric rituals which include the cadaveric oath on the first day when he/she is in the dissection hall.[1248]

CONCLUSION

Here, we came to a justified conclusive statement that all deaths due to unnatural causes and deaths that are believed to be natural in certain societies of our nation where they don't know the medical cause of death, must be subjected to an inquest or autopsy by a medico-legal expert. In case of unknown bodies as well as victims of sexual violence autopsy can give valuable information in

[1248] Retrieved from https://www.indialegallive.com/health/autopsies-respect-cadavers-too-66037 (Visited on April 25,2020).

identifying the victim or the culprit. Experts must be aware of the legal issues regarding post mortem performance to avoid liability against themselves and healthcare organisations that employ them. And experts must lock in their mind about their welfare like organ trafficking, they must not play with the deceased family which is against our law. For forensic autopsies, care must be provided by abiding administrative regulations. And for the sake of justice all medical fraternities must give respect to the sacred deceased one. It is important to note that autopsies can also provide peace of mind for the widow family in certain situations. Regardless, autopsies must be performed with clear and transparent transferrable of details regarding death with the consent of the relatives whose oath is very much needed. Therefore, autopsy should be encouraged in all communities regardless of religion on all unnatural death for the check and balance of justice.

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RIGHTS AND THE MORAL CODE

- BEETHALPREET KAUR

ABSTRACT

India, a culturally driven country most often sidelines the Constitution if in conflict with the rigid line of thought prevalent in the society, under the name of moral policing. It seldom recognizes the violations of fundamental rights under ART. 19(1) (a-g) along with Art.21 following a grave and convenient misinterpretation of the Penal Code sections 292- 294. People fall a prey to this policing from a very early stage in their lives, beginning from their families, educational institutions, so-called patrons of Indian culture, as well as the two pillars for the Constitution that is administration and at times Judiciary. This paper further analyses the current state of India's Moral Policing and its effects on the victims, which is almost the entire population of the Country following with few suggestions.

Keywords: Culture, Fundamental rights, moral policing, Art. 19 & 21, Indian Penal code, Sections. 291-294, victims, Judiciary.

INTRODUCTION

Legality and culture do not always go hand in hand. India, the second most populated country in the world, is a home to a multi-cultured society upholding the tag of "Unity in diversity."[1249] However, the legal principles, along with the fundamental rights, are often looked down upon when in conflict with the rigid more so unreasonable cultural norms. Indian Constitution under Art. 19 and 21 guarantees its citizens freedom ancillary to life and dignity, but, the country also

[1249] Abhinav Jaiswal & Manvi Singh, Moral Policing in India (April 3, 2020, 10:17 PM) https://amity.edu/UserFiles/aibs/59afArticle-V%20(Page%2050-53).pdf

shelter people violating these legalities under the name of so-called Patrons of culture.[1250] The diced term, Moral Policing, holds its importance, as the protector of "Indian Culture" from the western ideals. This concept of moral policing is deep-rooted in the Indian society and often takes place most covertly. This social-ill ranges from slut-shaming a person to being shammed for having a behaviour similar to that of an opposite gender.[1251] Moreover, this violation is committed not only by the government bodies but educational institutions, orthodox vigilante individuals and groups.[1252]

CONSTITUTION AND LEGALITIES

Exploring rights under Art. 19:

Art. 19 guarantees six freedoms Indian citizens, namely:

a) to freedom of speech and expression;

b) to assemble peaceably and without arms;

c) to form associations or unions;

d) to move freely throughout the territory of India;

e) to reside and settle in any part of the territory of India; and

g) to practise any profession or to carry on any occupation, trade or business[1253]

Although it is very important to note that the freedoms guaranteed under Art.19 (1) (a-g) protects citizens from state action and any violation of these freedoms by private conduct of an individual doesn't come under its purview. [1254]

[1250] Abhijeet Deshmukh, Moral Policing, (April 6, 2020, 7:06 PM), https://www.youngbhartiya.com/article/moral-policing
[1251] Meghna Mehra, Decoding The Culture Of Moral Policing At School Level, (April 1, 2020, 11:30 AM) https://feminisminindia.com/2019/10/31/decoding-culture-moral-policing-school-level/
[1252] D.K. Singh, In Karnataka's Mangaluru, 'Hindutva warriors' want to swap rowdy vigilantism for votes, (April 1, 2020, 10:00 PM) https://theprint.in/politics/mangalurus-moral-police-take-a-break-with-an-eye-on-polls/54816/
[1253] INDIAN CONST, art. 19 § cl. a-g.
[1254] M.P Jain, Indian Constitutional Law 1052 (8th ed. LexisNexis 2018)

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Citizens need to recognize their rights most often they fall prey to the orthodox thinking of the government bodies.

In the case of 24-year-old Sreelakshmi Arackal, a student from Kannur, who decided to spend the evening with her male friends at Shankumukham beach had to experience moral policing by miscreants and the police. Such actions are often depicted by these bodies to be under the permissible restrictions of Art. 19(2) to (6).[1255]

This socio-economic values are exemplified in the landmark case of Director General of Doordarshan v. Anand Patwardhan[1256] where a film was prevented from being aired on

Doordarshan due to the unreasonable standard of morals, to which the Supreme Court came to the conclusion that the filmmaker had the right to convey his perception on the oppression of women, flawed misunderstanding of manhood and evil communal violence.[1257]

ART. 19 AND THE ENTERTAINMENT INDUSTRY:

The entertainment industry faces more moral policing than we can imagine, however in retrospect Indian film industry possesses certain bias for symbolism, being a conservative country, it holds its own definition of obscene. The culture driven country is more often in contradiction with the upcoming new minds trying to pave a way to a more tolerate and openminded society. Although, there is a very thin line between the necessary and unnecessary interventions by the public or even non-government organisations. This dimension is highly unexplored to what are the ambits under which the entertainment industry should be held accountable as the restrictions mentioned under art.19 (2) are left to the interpretation of the courts.

Cinema and movies have an intricate connection with Art.19(1)(a) however when a film is banned, it does not only affect the freedom of speech and expression of the director or producer, it affects the economic aspects of many people which are also guaranteed under Article 19(1)(g) of the

[1255] Shainu Mohan, When police themselves take to moral policing, The New Indian Express, (April 7, 2020, 9:10 AM) https://www.newindianexpress.com/cities/kochi/2020/feb/14/when-police-themselves-take-to-moral-policing-2103082.html
[1256] AIR 2006 SC 3346
[1257] M.P Jain, Indian Constitutional Law 1055 (8th ed. LexisNexis 2018)

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Constitution. Film making, distribution and screening are essential aspects of films business, if the film is banned, it affects all those aspects which defiantly falls under Article 19(1)(g). In many cases violent groups ransack theatres in protest against the screening of certain films. It definitely affects the property of the theatre hall owners. [1258]

Moreover, affects the business and commerce of the owners as well as the film being screened in the theatre.[1259]

In the Padmavat case a member of the Karni sena went on record by releasing a statement:

"We won't tolerate any distortion of history and if any romantic relationship is shown between queen Padmavati and Alauddin Khilji, we will burn cinema halls screening the film. Our members are trained in handling a large array of weapons ranging from swords to AK 47 guns. We won't let anyone dishonour Padmavati and insult the people of Rajasthan," said Karni Sena member Jai Rajputana Sangh"[1260]

There have been many cases against the unreasonable censoring by the CBFC, to quote one of the most prevalent case: Udta Punjab movie case, in which 97 cuts were suggested by the CBFC however 96 of them were rejected by the Court. Moreover, the Indian Bollywood movie "Jab Harry met Sejal" CBFC's then chairperson Pehlaj Nehelani had presented concerns with the use of the word "Intercourse" in the film, also passed an absurd comment to a news channel:

"You take voting from the public and I will clear the word (intercourse) on the promo and the film also. I want one lakh votes and I want to see that India has changed and Indian families want their 12-year-old kids to understand the meaning of this word (intercourse),"[1261]

Violations under Art.19(d)

[1258] Subhradipta Sarkar & Archana Sarma, Banning Films or Article 19(1)(A) - Film laws in India, Legal Service India, (April 10, 2020, 5:30 PM) http://www.legalserviceindia.com/articles/fban.htm
[1259]The Indian Film Industry Paradox, Delloitte.(April 4, 2020, 11:09 PM) producersguildindia.com/Pdf/Screen_Density_creative_first_draft_v4_SP.pdf
[1260] Ria Das, Show Padmavati Before Release Or We Will Burn Theatres: Karni Sena, shethepeople,(April 12, 2020, 6:18 PM) https://www.shethepeople.tv/news/near-padmavati-release-karni-sena-threatens-burn-theatres
[1261] Jab Harry Met Sejal: Will clear word 'intercourse' if get 1 lakh votes in favour, says CBFC chief, Hindustan Times,(April 15, 2020, 1:20 AM), https://www.hindustantimes.com/bollywood/jab-harry-met-sejal-will-clear-word-intercourse-if-get-1-lakh-votes-in-favour-says-cbfc-chief/story-98BddaAEoApAe8y1tYYDDM.html

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Couples and Valentine's day have always been considered as a threat to Indian Culture. Moreover, the in many states certain orthodox organisations take matters into their own hands also most often police intervention isn't an alien concept to Indian youngster crowd.

Organisations like Bajrang Dal have always been keen on terrorising couples under the vile of culture, the members of the organisation even resort to marrying young couples in states.[1262]

Activist of Bharat Sena even resorted to marrying off two dogs in order to condemn Valentine's day[1263]. Such acts are not limited to orthodox organisations, certain conservative police officers even resort to the acts of instilling the moral code. In 2011, Gaziabad Police station launched "Operation Manju"[1264] to catch hold of young couples strolling around, more so due to this moral instillation disguised in a police costume also people being unaware of their rights, leads to harassment and violation of the rights under Art. 19(d) and Art.21 of the Indian Constitution.

Although, the Uttar Pradesh Government launched an "Anti-Romeo Squad" in order to curb the cases of eve teasing in the society, the operation was highly misinterpreted, and couples were harassed under the name of law.[1265]

The essence of cultural standards is so deep rooted in our society that at times we fail to understand the difference of law from that of the moral code. India still is a culturally conservative nation which holds resistance to the change in the thinking of the society. The concept of moral policing is often misapprehended by the public and this lack of awareness paves the way to violation of rights. These rights aren't always violated by the government bodies or orthodox organisation.

[1262]P.Pavan Kumar, Bajrang Dal activists perform wedding of young lovers in Hydrabad, Mumbai Mirror, (April 14, 2020, 3:19 AM) https://punemirror.indiatimes.com/news/india/bajrang-dal-activists-perform-wedding-of-young-lovers-on-valentines-day/articleshow/67991600.cms

[1263] Bharat Sena Marries off Two Dogs to 'Condemn' Valentine's Day, Social Media Confused, News 18, (April 19, 2020, 3:16 PM) https://www.news18.com/news/buzz/bharat-sena-marries-off-two-dogs-to-condemn-valentines-day-social-media-confused-2499645.html

[1264] Lalit Kumar, 'Moral police' beat up Meerut girls, The Times of India, (April 20, 2020, 10:00 AM) http://timesofindia.indiatimes.comhttps://timesofindia.indiatimes.com/india/Moral-police-beat-upMeerutgirls/pmredirectshow/1339622.cms?curpg=1&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[1265] UP's 'Anti-Romeo Squads' Are Doing the Opposite of What They're Supposed To, The Wire, (April 22, 2020, 11:18 PM) https://thewire.in/women/ups-anti-romeo-squads-are-doing-the-opposite-of-what-theyre-supposed-to

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Most often rights enshrined under Art.21 of the Indian Constitution, are been violated from very early stages in a person's life that it often goes unnoticed.

EXPLORING RIGHTS UNDER ART.21

Art. 21 The Constitution of India:

Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.[1266]

The constitution does not grant in specific and express terms any right to privacy as such. Right to privacy is not enumerated as a Fundamental Right in the Constitution. However, such a right has been culled by the Supreme Court from Art. 21 and several other provisions of the Constitution read with the Directive Principles of State Policy.

In Govind v. State of Madhya Pradesh[1267], Mathew J observed:

"Assuming that the Fundamental Rights explicitly guaranteed to a citizen have penumbral zones and that right to privacy is itself a Fundamental Right, that Fundamental Right must be subjected to restriction on the basis of compelling public interest."[1268]

Right to Privacy thus acquired a constitutional status[1269] and thus implied that all citizens have the right to privacy in his own family, marriage, procreation, motherhood, childbearing and education.[1270]

However, even though the "Right to be let alone"[1271] isn't recognised by Indian society that often. [1272]

[1266] INDIAN CONST, art. 21
[1267] AIR 1975 SC 1378
[1268] M.P Jain, Indian Constitutional Law, 1219- 1220(8th ed. LexisNexis 2018)
[1269] R Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264
[1270] M.P Jain, Indian Constitutional Law, 1219- 1220(8th ed. LexisNexis 2018)
[1271] Jane Roe v Henry, 410 US 113
[1272] M.P Jain, Indian Constitutional Law, 1219- 1220(8th ed. LexisNexis 2018)

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ASPECTS TO RIGHT TO LIFE AND PRIVACY CHALLENGED IN VARIOUS INSTITUTIONS:

- *Educational Institution:*

Most often due to our extreme neglect we fail to recognise that people are subjected to moral policing during their time in an educational institution. It isn't an alien concept that in most conservative institutions girls and boys are instructed to sit separately, girls have an extensive dress-code also are been treated like a distraction to guys. Being expelled from class for a dress-code violation, is a very appropriate example for moral conduct being valued more than education.[1273] Moreover, teachers in such institutions have an unreasonable interference in the personal lives of the students. This moral policing isn't limited to just students, teachers also fall a prey to this vicious cycle, in Tiruvananthapuram A pre-primary teacher at a government school in Kottakkal district of Kerala has alleged that the school authorities did not let her rejoin service after her maternity leave as she gave birth to a child in just four months of marriage.[1274]

These conservative institutions are entitled to shape the minds of the youth, the clear distinction between a fundamental right of an individual and one generation enforcing their moral code, isn't been taught to the students. Schools are often kept out of charges even after their unapologetic violation of the fundamental rights of individuals.

- *Moral policing and Abortion rights*:

India's Union Cabinet recently amended the Medical Termination Act[1275], which was a move in the right direction, allowing women or her partner rather than focussing on the marital status of

[1273] Meghna Mehra, Decoding The Culture Of Moral Policing At School Level, (April 1, 2020, 11:30 AM) https://feminisminindia.com/2019/10/31/decoding-culture-moral-policing-school-level/
[1274] Primary teacher expelled for delivering child after 4 months of marriage in Kerala, Mirror Now,(April 24, 2020, 11:45 PM) https://www.timesnownews.com/mirror-now/crime/article/primary-teacher-expelled-for-delivering-child-after-4-months-of-marriage-in-kerala/439525
[1275] The Medical Termination Of Pregnancy Act, 1971

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the person. However the legislature is adopting towards a more reformative ways and moving towards an unorthodox revolution of laws, the society isn't currently in the position to accept the situation.[1276] Regarding religion, the deriver of moral code of conduct, abortion is considered a sin. The struggle of women to have a safe abortion in this country still continues. In 1994, the United Nations International Conference on Population and Development recognised women's right to make reproductive decisions.[1277]

A 31 year old lady, Savita Halappanavar, died from septicaemia-an infection she contracted after she was denied an abortion as it was illegal to terminate the pregnancy with the foetus having a heartbeat ripple the devastating effect of the restrictive law.[1278]

If there is a possibility of a potentially handicapped or malformed child within a 20-week gestational period, according to the MTP Act a woman can terminate the foetus. U/s 3 of the act[1279], abortion is allowed if there is a risk to the life to the woman bearing the child or cause grave physical or mental injury or a substantial risk that after the birth of the child, it would suffer physical or mental abnormalities. The current law does not recognise a woman as an individual with autonomy over her own body, also violating the fundamental rights under Art. 21 of the Indian Constitution, thus it has been a matter of debate in the Country.[1280]

In a case where The Supreme Court refused a 26-week pregnant HIV-positive rape survivor the permission to abort her foetus[1281], is an indicator that Indian women are still denied the right to life. The fact that after a child is born no court or the government takes hold of the responsibility

[1276] Marge Berer, Abortion Law and Policy Around the World, (April 23, 2020, 2:38 AM) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473035/

[1277] United Nations, Report of the International Conference on Population and Development,(April 7, 2020, 4:30 PM), https://www.un.org/en/development/desa/population/events/pdf/expert/27/SupportingDocuments/A_CONF.171_13_Rev.1.pdf

[1278] Rashmi Mabiyan, India's 'Conditional' Right to Abortion, Healthworld.com,(April 24, 2020, 12:30 AM) https://health.economictimes.indiatimes.com/news/policy/indias-conditional-right-to-abortion/69686368

[1279] The Medical Termination Of Pregnancy Act 1971§ 3

[1280] Rashmi Mabiyan, India's 'Conditional' Right to Abortion, Healthworld.com,(April 24, 2020, 12:30 AM) https://health.economictimes.indiatimes.com/news/policy/indias-conditional-right-to-abortion/69686368

[1281]Dr. Bhavish Gupta & Dr. Meenu Gupta, Marital Rape: - Current Legal Framework in India and the Need for Change, timesofindia.com, (April 26, 2020, 1:30 AM) https://timesofindia.indiatimes.com/india/supreme-court-rejects-plea-of-hiv-rape-survivor-to-abort/articleshow/58602950.cms

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of a sustainable life for the child, also by doing the same denies a woman the right to her body, by not allowing her to make the decision of whether or not to continue the pregnancy.

- *Moral Policing in Indian households:*

Moral Policing in Indian households is a phrase that goes hand in hand it is in my opinion that Indian households are the root of this evil in the society. Almost every person residing in an Indian household is a victim to the gender stereotypes. Females, however, subtly, are raised to be submissive and most often independent nature is often frowned upon, on the other hand males are raised to assume the dominant nature even against their will, infesting violent behaviour. Children belonging to the transgender have a completely different upbringing in India, most often considered not deeming fit for the usual educational and other aspects similar to a male or female offspring. Conservative households and moral policing go hand in hand which also is a root cause of domestic violence. The social construct of Indian society is to ignore domestic violence and also the subtle discrimination often moral policing goes unnoticed as well as supressed.

It very important for citizens to recognize their fundamental rights in order to protect and raise an intellectually aware progressive society.

INDIAN PENAL CODE AND MORAL POLICING

In both language and law, the definition of obscenity is vague. As per Cockburn C.J., in R. v. Hicklin[1282] the test of the obscenity is whether the matter in question is too deprave and corrupt those whose minds are open to such immoral influences. Moreover, Justice Brennan laid down a sharp distinction between obscenity and sex, which however is not often abided by most people in the society.

Stating:

[1282] (1868) L.R. 3 Q.B. 360

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"The portrayal of sex, e.g. in art, literature and scientific works is not itself sufficient reason to deny materially the constitutional protection of freedom of speech and press."[1283]

Moral Policing is dealt with in the Indian Penal Code u/s. 292-294. The 3 sections deal with a completely separate area of obscene acts, where s. 292 deals with sale of obscene books etc.[1284], s. 293 deals with sale of obscene objects to children[1285] and s.294 deals with obscene acts as well as songs.[1286]

Sec. 292 of the Indian Penal Code[1287] has a mention of the word, "obscene", however hasn't been defined anywhere in the Penal Code. A balance has to be struck between freedom of speech and expression and public decency and morality when the latter is substantially transgressed the former must give away.[1288]

The subject matter of sex, intimacy, sexual orientation, gender orientation etc. have always been assumed as a threat to decency and morality.

The concept of obscenity is very subjective and thus varies from person to person. If sex in itself considered as obscene the no books can be sold except religious. Art is a depiction of society and an expression of a person also most often acts as "trendsetter" in the society. However, in India sex is treated as a taboo, which due to the moral code of conduct results in most students being denied sex education in their early years making them more vulnerable to sexually transmitted infections, unplanned pregnancy, unknown importance of "consent" which leads to increase in rape cases and also disoriented sex can lead to disturbing cases of violence and injuries to the people engaging in the intercourse.

[1283] 2 Dr. Hari Singh Gaur, Indian Penal Code 817, (15 ed. Law Publishers (India) Pvt. Ltd. 2018)
[1284] Indian Penal Code 1980 § 292
[1285] Indian Penal Code 1980 § 293
[1286] Indian Penal Code 1980 § 294
[1287] Indian Penal Code 1980 § 292
[1288] 2 Dr. Hari Singh Gaur, Indian Penal Code 818, (15 ed. Law Publishers (India) Pvt. Ltd. 2018)

Courts play an important role in determining the line between indecent and obscene which in the case of M' Gowan v. Langmuir[1289] was illustrated as:

"for a male bather to enter the water nude in the presence of ladies would be indecent, but it would not necessary be obscene. But if he directed the attention of a lady to a certain member of his body his conduct would be obscene."[1290]

Section 292 of the IPC marks out what shall be deemed to be obscene-

i) If it is lascivious;

ii) It appeals to the prurient interest; and

iii) It tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. [1291]

Section 294[1292] talks about as to what are "obscene acts" moreover acts such as indecent exposure of person, sexual intercourse, indulgence in unnatural offences u/s. 377[1293] (now repealed) were to be punishable under the act. Although after the passing of a landmark judgement of the Supreme Court of India regarding the decriminalization of LGBTQ+ relationships[1294], society fails to accept the judgement. Also, the society takes hardly any recognition of the judgment legalising live-in-relationship.[1295]

Indian society has unreasonable standards of moral code and at times it overpowers the progressing mechanism of the society most often it due to the lack of acceptance along with tolerance. It is very important for each and every citizen to recognize their rights along with other's rights.

CONCLUSION

[1289] 1931 S.C. (J.) 10
[1290] 2 Dr. Hari Singh Gaur, Indian Penal Code 820,(15 ed. Law Publishers (India) Pvt. Ltd. 2018)
[1291] 2 Dr. Hari Singh Gaur, Indian Penal Code 821-822,(15 ed. Law Publishers (India) Pvt. Ltd. 2018)
[1292]Indian Penal Code 1980 § 294
[1293] Indian Penal Code 1980 § 377
[1294] Navtej Singh Johar v Union of India, (2018) 10 SCC 1
[1295] Indra Sarma vs V.K.V. Sarma, AIR 2014 SC 309

Moral Policing is a social evil which is constantly been fed by the society's orthodox past been carried forward. It is very important to note that moral policing in any form is a violation of fundamental rights. Indian Legal System and the Constitution, although, have progressive prospects, but often remain a theory, also the concept is quite unexplored by the Indian Judiciary and not acted upon by concerned authorities due to lack of awareness. It is very important for citizens to recognize their rights so as to claim it. Also, citizens need to differentiate between customs and rights, inorder to achieve a more progressive state in the world as well as it would be a great step towards deconstructing the gender stereotype as well as increasing more opportunities along with creating a safer environment every citizens in the country.

SUGGESTIONS

Education plays an important role in framing the society, thus it is very important for Government to have strict rules for educational institutions so as to prevent violation of educational ethic by the administration and teachers, enabling the students to focus more on education rather than abiding by the outdated moral code. Such action would enable breaking most gender stereotypes as well as cultural inequalities paving a way to a more secular and equalist environment. Strict action must be taken groups or individuals acting as the moral police in the society, creating a safer environment for individuals. Awareness plays an important role in making people aware of their rights and hence, more awareness programs must be introduced. Along with awareness, more deterrent laws must be formulated in order to uproot moral policing because however subtly curbing the fundamental rights of an individual is a violation of The Constitution of India, more so holding back the progress of the nation.

It is a prerequisite of a progressive society to embrace the fundamental freedoms and right as well as abide by the law, thus enabling a sustainable, tolerant and a well-functioning environment.

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THE SUBJECTIVE CONTROVERSY: UNBRIDLED JUDICIAL TENDENCIES

- RISHI RAJ MUKHERJEE & ANUPARNA CHATTERJEE

ABSTRACT

The Indian judicial system is reputed for its ability to remain sangfroid while simultaneously indulging in rodomontade as far as its objectivity is concerned. Despite meticulous efforts to implement unanimity and uniformity in its decisions, the judgements rendered by the judiciary tend to cast aspersions on its stance of neutrality. A plethora of reasons have caused the judiciary to be ironically regarded as a travesty of justice- from the multiplicitous nature of reasoning pursued while dealing with identical cases, to vulnerability to external influences and undisguised subjectivity, this paper extrapolates instances from reality to lend credence to the notion of judiciary containing fissures of biasness incongruous with the very lofty purpose of the institution. By analyzing judgements delivered in cases of sexual offenses, capital punishment and examining allegations of influence by externalities such as media organizations, this paper attempts to bring forth a comprehensive vignette that is considerate of the prejudiced dispensations towards both the victim and accused. It examines the verisimilitude of the farrago of contentions against it and through a careful exposition of all the condemnations against the system's objective reputation, the paper appraises the extent of its biasness with the intention to ascertain the dependability of such assertions of partiality.

Keywords: Judiciary, Judicial Prejudice, Capital Punishment, Sexual Offence, Media.

"The judiciary perpetuates a breath of state structure. If it fails to purify and justify itself; consequently, all of its systems, evince a collapse. Indeed, it embraces only the destruction."

- *Ehsan Sehgal*

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I. INTRODUCTION

Anyone familiar with the mechanisms of the Indian judicial system will at once recognize the gargantuan task faced by the supposedly 'objective' organ of the government. The hierarchy of courts in India are all privy to the incessant conundrum of aligning themselves with the just cause but doing so under the constraints set up by the law. This often creates an unwanted but inescapable dichotomy of judgements delivered by the courtrooms. On one hand, we have judges striving to respect the word of law but interpreting it in a way that benefits those who have been rendered disadvantaged by the violations of the very norms dictated by said law. However, once this curtain of permissible altruism has been lifted, one gets to witness the darker half of the mechanism that is the country's judicial system- one gets to witness rampant prejudice, erosion of all those values that the original makers of the Constitution had enshrined in the Preamble intending it to be a diktat for all those who would tug at the strings of power in the landscape of Indian governance.

The concept of prejudice has remained a cornerstone of human evolution. It lies embedded within the psyche of most individuals- a natural inclination to instantaneously impugn members of another race, religion, caste, gender, nationality. Essentially, prejudice refers to a preconceived notion that is not based on reason or any actual experience. This enables the initiation of social categorization or the creation of an 'us' versus 'them' psychology which further disintegrates the social fabric. The word 'prejudice' itself is taken in society with a negative connotation but the fact is as human beings we can't be free from prejudices and stereotypes in the first place. Intentionally or just unconsciously, each of us have and do practice certain actions which are not exactly fair and just, and is prejudiced in some manner or the other. The negative connotation attached to the word is due the instances of oppression and suppression of certain groups in history due to these prejudices. History is rife with instances of prejudice being meted out; often by the exploitation of the gradient of power pervasive in a particular social setting. From the oppression of people of color in the United States of America that is still prevalent to this date, to the genocide of German Jews during The Second World War, to the subjugation of lower castes by Brahminical supremacy or communal strife between Hindus and Muslims in India, there is no dearth of prejudiced relations existing in society.

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With prejudice being a concept with far reaching influence, it is not astounding to realise that it has infiltrated the government as well. The Dalits feeling alienated owing to the suppression they experience because of their identity as lower caste Hindus[1296] or the administration's failure to condemn mob lynching against Muslims[1297]-all point to a darker truth about the top brass of the country. However, the very nature of a judiciary's composition allows one to expect that it might be free from such corrosive tendencies. Despite ensuring conditions where optimal neutrality may be preserved yet regrettably the reputation of the judiciary has been maligned by allegations of prejudice.

II. CONTEXT OF INDIAN JUDICIARY

Indian Judiciary has rarely been the centre stage of public intrigue outside of the intense deliberation sparked by the judgements rendered by them- that role has been reserved for its more politicized brethren i.e. the executive and the legislature. However, that dynamic shifted when on January 18th 2018, four distinguished judges enthroned in plastic chairs revealed to a confounded Indian media that they had suspicions that the Chief Justice had acted in breach of the respect that is accorded to his honorable position by acting in a prejudiced manner.[1298] Although their chief contention was with him acting in contravention to his duty as Master of Roster and failing to diligently delegate cases- the shocking statement was indicative of an inevitable taint on the Judiciary's reputation. It was another brutal reminder that even the alleged epitome of judicial integrity in the country is just as vulnerable as its inferior counterparts. It revealed that the stench of bias and prejudice was not only idiosyncratic to the district and state units of the judiciary but also its supposed paragon of fairness.

However, this attack on its reputation is not a novel one. When one tries to inspect the several strands of law over which the judiciary commands control in terms of dispute resolution, it is not surprising to uncover that that it has been accused of acting on the basis of prejudice in several

[1296] India's Dalits still fighting untouchability - BBC News https://www.bbc.com/news/world-asia-india-18394914
[1297] Opinion | As India's Muslims are lynched, Modi keeps silent Nilanjana Bhowmick - https://www.washingtonpost.com/news/global-opinions/wp/2017/06/28/as-indias-muslims-are-killed-modi-keeps-silent/
[1298] Judges on India's supreme court accuse the chief justice of bias https://www.economist.com/asia/2018/01/18/judges-on-indias-supreme-court-accuse-the-chief-justice-of-bias

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instances. This paper thereby attempts to establish a few key factors that influence the judiciary's ability to be completely impartial. It seeks to identify and subsequently expound on those influences that subvert the expectancies of the judiciary as an unbiased institution. It looks at factors like subjectivity in cases of sexual offenses, discrepancy of the judge delivering the verdict, the time it takes for a case to go through several phases before finally reaching the final judgement, and finally the arbitrary rationale provided as the justification for the judgement. In examining these factors, the paper tries to determine if they can sway the decisions arrived at by the judiciary as well as arrive at a conclusive determination about the extent of the influence.

III. FACTORS INFLUENCING JUDICIAL PRONOUNCEMENTS

There are various factors which can influence the decision or verdict given by the judiciary. One must understand that these factors are not permanent or in a water tight compartment, these factors vary along the lines of different nations, communities, social and economic status of the people etc. We must always remember the fact that the judges delivering the verdict are also human beings made of flesh and blood like each one of us, and there exists a lot of empirical literature to suggest that no human is free from bias or certain stereotypes. The way a person grows conditions him in a certain way and streamlines his thinking process. The social, economic, cultural and environmental conditions that a person grows up in is directly responsible for the thinking process and actions and decisions that a person takes in his life. However, difficult it may be for us as humans to accept that there is no free will, but the research and statistics point towards the claim that indeed human beings aren't the sovereign masters of their own decisions; rather they are a product of the conditions and the situations that has shaped their lives. The following factors are in no way a criticism on the judiciary or the esteemed judges but rather another perspective of how judgements are delivered and its inter disciplinary connections.

- **The Subjective Outlook in Cases of Sexual Offenses**

For the individual, uninitiated with the circumstances under which the judiciary operates, the concept of a prejudiced judicial system may induce skepticism. However, to the ignorant, the

reality of the existing evil in our system may seem bleak especially when the constant ignominy of the disadvantages masses in lieu of their identity becomes apparent.

When it comes to sexual violence, this subjective outlook reveals itself without much coaxing. Sexual violence in India is constitutive of social and political disorder in India.[1299] The Partition of India is oft recalled for its deep reaching repercussions on the political and social anatomy of India. But it also bore witness to thousands of women on both sides of the border being abducted, raped, even killed (estimates vary between 25000 to 29000 Hindu and Sikh women and 12000 to 15000 Muslim women)[1300]. In such a context, where a certain section of society has been reduced to a state of farcical power, the burden falls upon those institutions avowed to protect the interests of people, to adjudicate in their favour. An important aspect where this malicious tendency tends to rear its ugly head is in the case of complaint credibility. Although the Supreme Court had clearly ruled against the corroboration of testimony to prove the veracity of victim's case in the case of *Rameshwar Vs State of Rajasthan*[1301] wherein it was established that it was wholly unnecessary to transplant that concept into Indian society '*because of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile.*', this principle was blatantly overlooked in the execrable judgement of the Supreme Court in the case of *Tukaram Vs State of Maharashtra*[1302]. The regressive tactics adopted during the case sparked decries of the Indian Judicial system from several spheres of life and was considered to be an extraordinary decision sacrificing human rights of women under the law and Constitution[1303] and inimical to the very status of womenfolk in the country. In the case of *Tukaram Vs State of Maharashtra*[1304], the judiciary had interpreted the existing substantive law in the favour of the accused where the rules of corroboration and past sexual history of the victim was interpreted in a way to besmirch the very reputation of the victim.

[1299] Sexual Violence, Discursive Formations and the State
Veena Das-Economic and Political Weekly-1996
[1300] Community, State and Gender: On Women's Agency during Partition
Urvashi Butalia-Economic and Political Weekly- 1993
[1301] (2000) 10 SCC 300
[1302] (1979) 2 SCC 143
[1303] Baxi, U., Dhagamwar, V., Kelkar, R. and Sarkar, L. (1979), 'An Open Letter to the Chief Justice of India', Supreme Court Cases
[1304] (1979) 2 SCC 143

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When the judgements which tend to upend the balance of power in the hands of the accused are juxtaposed, some key myths about the victim lie exposed. The first is the stereotypical image associated with the victim. Those called upon to adjudicate the plight of the women suffering from sexual abuse often have preconceived notions of how the victim should conduct herself and expect her to act in accordance with their standards of victim behaviour. In the case of *Raja Vs State of Karnataka*[1305], while acquitting the appellants for gang rape, Justice Amitava Roy had held that-

"*Her post-incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and a devastated state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc.…Her confident movements alone past midnight, in that state are also out of the ordinary…The medical opinion that she was accustomed to sexual intercourse when admittedly she was living separately from her husband for 1 and ½ years before the incident also has its own implication."*

This automatic invalidation of crime committed against a woman due to her behaviour rejects the notion that every woman can be harassed in favour of curating a typical victim.

There is also the revelation of a deeply sexist attitude that acts as impediment to impartial adjudication and tends to portray women as commodities or liabilities scouring for eligible men to attach themselves to. As seen in the case of *Jagannivisan Vs State of Kerala,*[1306] where the bench comprising Justice M Puncchi and Justice K J Reddy while deliberating upon whether a purported case of forced sexual assault to the prosecutrix fell under the ambit of consensual sex, remarked-

"*There is evidence on the record that the appellant had been employed in Dubai and presumably had mastered a handsome income when compared to persons working in his home state. He was a bachelor and obviously an attractive catch for girls in his brotherhood to be bonded in matrimony…It would rather be safe to lean in favour of the appellant and accord him the benefit of doubt*."

[1305] (2016) 10 SCC 506
[1306](1995) Supp 3 SCC 204

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Another practice adopted is to grossly undermine the gravity which the situation commands. In *Bharwada Vs State of Gujarat*[1307], the Court had reduced the sentence of a convict who had been accused of multiple accounts of rapes by victims ranging from 10 to 12 years old. The reasons given for this decision were that he had already been embarrassed in society, lost his source of employment, and the prospect of him finding an eligible match for his daughter had been reduced considerable. Such a decision belies the serious nature of the offence and defies the expectation that such an accused would be punished appropriately.

- **From the Perspective of the Accused**

It is pertinent to understand that in order to truly attain a comprehensive outlook on the issue of bias, one needs to adopt a view that accommodates the arbitrariness doled out to the accused as well. Simply, viewing the situation from the victim's perspective is not sufficient to enable our understanding of the perils of power. A microcosmic view of the affair would be succinctly encapsulated by a perspective or an understanding that is indulgent to the sufferings of both the victim and the accused.

The bias towards the accused can have manifold embodiments. Having the disadvantage of an already tarnished reputation, the slightest shred of innuendo can cause his metamorphosis from an individual merely suspected of committing a crime to an execrable criminal with no hope of redemption. The accused teeters on a tightrope where one false move can desecrate all chances of amelioration from conviction. In this aspect, the role of the media is undeniable as well as crucial. The media, often regarded as the fourth pillar of democracy, has the unenviable role of distilling the important events and presenting in a way that is palatable to the general public while at the same time maintaining an aura of impartiality. However, the idealistic nature of the vocation often leaves them susceptible to indulgence in partisanship which is not only inimical to the interests of the masses inured to reliance on these outlets to assist them on formulating their own opinion but becomes dangerous to the interests of those who lives may be materially affected as a result of partiality by the media. In order to market a story, the media may sensationalize an event to foment public interest which in turn is detrimental to public interest.

[1307] (1983) 3 SCC 217

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- **Arbitrary Rationale**

The Judiciary is not just expected to resolve disputes and deliver verdicts but also to connect the dispute to the existing laws and statutes and bring out the logic or the rationale behind the judgement or verdict thus delivered by the court. There are instances in many lower court judgements and even some judgements of the apex court that the verdict is delivered but the manuscript of the judgement fails to highlight exactly on what basis of rationale was the verdict given. This is suspected in the case of Binayak Sen, who was a medical practitioner as well as the general secretary for People's Union of Civil Liberties (PUCL) in the state of Chattisgarh. He later was charged with facilitating communication through letters between individuals who nursed Maoist sympathies one of whom was incarcerated. In reality, Sen was there to check up on the prisoner's health and inquire into his complaints of human rights violations. Additionally, no subversive material was found in the letters yet he was denied bail by the Supreme Court without being given any logic behind that decision.[1308]

A recent example of this was seen in the Aadhaar Case, *K.S. Puttaswamy* v. *Union of India*[1309], where the court had to strike a balance between the right to privacy and protection of citizens along with the supply of their welfare benefits and subsidies. The fundamental issue before the court was whether the State could attempt to ensure access to welfare benefits and subsidies to protect one's dignity, by overriding one's right to privacy and dignity. The court decided that for welfare benefits, people must have a 'reasonable expectation of privacy' and held the Aadhaar to be valid. Weighing the right to privacy against one's right to access food, shelter and employment, the court held that *"inroads into the privacy rights"*[1310] by compelling biometric authentication "was minimal", when compared with the larger public interest of preventing leaks in the distribution of benefits and subsidies. This seeming assertion is backed by no reasoning other than that the State is not committing a worse infringement by tracking beneficiaries' movements or profiling them.[1311]

[1308] Misplaced Priorities and Class Bias of the Judiciary
Prashant Bhushan- Economic and Political Weekly- 2009
[1309] WRIT PETITION (CIVIL) NO 494 OF 2012
[1310] *Ibid*
[1311] Aadhaar verdict: SC's majority judgment lacks consistency in logic and reasoning- Firstpost.com

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"And, if the right to education being a fundamental right under Article 21A is the reason it is not a subsidy or service, then the right to food being a fundamental right under Article 21 would imply that even food and employment could not be characterized as a subsidy or service. Yet, the court holds that the invasion of privacy for providing food, employment and related subsidies and benefits was justified as it "enlivens" the fundamental right to life and personal liberty under Article 21."[1312]

- **The Media Hype**

The fourth pillar of democracy has been time and again been accused of losing its credibility and being puppets of various lobbies and ministers. It is astonishing that how money and muscle power sways the spines of even the most honest and upright man of integrity. The hype that the media creates is a force to reckon with. Though what happens in the world isn't supposed to affect what happens inside the court but time and again, we have seen judgements and decisions getting swayed by public emotion and media hype. A lot of pop culture dramas have also been inspired from this like 'The People vs O.J Simpson', 'Provoked' (based on the Kiranjit Ahluwalia case), 'Rustom' (based on the Nanavati case) etc. Unfortunately, this detrimental practice is often glorified in such movies and drama series. The very reason why juries in other countries are kept in complete isolation, out of the influence of any kind of print or visual media is so that they have an unbiased clear perspective and deliver a fair verdict. If the media didn't have any affect then such provisions wouldn't have been implemented to keep the jury in isolation. In today's world, where the media openly points a judge to be leaning towards a particular ideology or political party, media influence is undeniable in case of delivering verdicts.

When an accused is unfairly represented in the media, it has a probability of unconsciously coloring the judgement of those who are in a position to determine his fate. Not only that, it also puts into jeopardy the concept of 'innocent until proven guilty' since it places the accused in a position where his reputation has been severely maligned insofar as he is labelled as a criminal before his official indictment. A similar sentiment was echoed in the 200th report of the Law Commission which opined that inordinate scrutiny by the media of a suspect or an accused has the

Malavika Prasad, 29 September, 2018
[1312] *Ibid*

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possibility of prejudicing a fair trial or characterizing him as the person responsible for said crime which ultimately acts as a hindrance to the administration of justice[1313]. Even former Chief Justice of India, Y. K Sabharwal had remarked on media trials in 2006 saying that, *'If this continues, there can't be any conviction. Judges are confused because the media has already given a verdict'.*[1314] A vivid example of such an unfair fate allocated to a person can be seen in the case of *M. P. Lohia Vs State of West Bengal*,[1315] where a woman had committed suicide in Calcutta while living in her parents' house but a case had been filed against the husband and her in-laws alleging dowry death. The husband, in return, had submitted several documents to prove that the woman was a schizophrenic psychotic patient. While the trial was yet to commence, the Courts rejected the plea of bail. The Supreme Court granted interim bail but harshly condemned two articles in a magazine for their biased reporting of the allegations made by the parents while deliberately overlooking her schizophrenic personality saying that the said articles '*would certainly interfere with the course of administration of justice*'.

This influence of the media can extend to the digital sphere as well. Justice A K Sikri expressed his concerns about the challenges faced by judges post the advent of social media, saying that – '*But today what is happening is that when an issue is raised, a petition is filed, (and) even before it is taken up by the court, people start discussing what should be the outcome. Not what 'is' the outcome, (but) what 'should be' the outcome. And let me tell you from my experience here that it has an influence on how a judge decides a case.*'[1316]

- **Discrepancies of the part of the Judicial Bench**

Although all of the above cited instances point to a very apparent tradition of thought where there are lucid patterns of partial thinking that relegates the accused to a position of undeserved sentencing there is another hitherto unexamined method of demonstrating bias which is

[1313] Law Commission of India, 200th Report on Trial by Media: Free Speech versus Fair Trial Under Criminal Procedure Code (August,2006)
[1314] Media on trial - Times of India
Sudhanshu Ranjan - https://timesofindia.indiatimes.com/edit-page/Media-on-trial/articleshow/1460248.cms
[1315] 2005(2) SCC 686
[1316] Judging is under stress in digital era, says Justice AK Sikri
Press Trust of India - https://www.indiatoday.in/india/story/judging-is-under-stress-in-digital-era-justice-ak-sikri-1452748-2019-02-10

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multiplicity of judgements pertaining to cases of similar nature. This bias refers to cases operating under similar facts but meting out disparate judgements owing to the individuality of the judge delivering the verdict and his opinion of the accused. Its bias lies in the dissimilar nature of treating perpetrators of like crimes. This can adeptly adduced by looking at cases of capital punishment and its intricate relationship with the 'rarest of rare' doctrine. The judicial discrepancy here takes a huge toll as the life and death of the accused is dependent on the composition of the judicial bench. The whole debate about the effectiveness or morality of capital punishment is a very balanced one when based on principle arguments. At the same time, delving into the practical aspect of the viability of capital punishment takes a hit as the argument of judicial bias or prejudice is taken into picture. If a man's life, no matter how grave a crime he has committed, is to hang by the thread of the composition of a merciful bench then it's problematic and far from the principles of justice, equity and good conscience.

The capital punishment or the death penalty is a relic of colonial rule in India which can be traced back to the mock trial and consequent hanging of Maharaja Nanda Kumar by a kangaroo court set up by Warren Hastings in 1775[1317]. The practice later proliferated as a common deterrent against mere misdemeanors during the British regime. However, its current functioning within the Indian legal framework is owed to the watershed decision that was arrived at in the case of *Bachan Singh Vs State of Punjab*[1318]. The decision facilitated the punishment of death penalty but mandated that it must be awarded only in '*rarest of rare cases where the alternative (punishment) is unquestionably foreclosed*'. It was adjudged by the apex court that capital punishment can be considered as a viable recourse only when all other options have been exhausted and the accused is considered to be beyond any form of recourse or rehabilitation and deleterious to the interests of society. Although the judgement was hailed as a judicial success which immaculately balanced state and individual interests, the issue with this severe, irreversible form of punishment was expressed by Justice Bhagwati, who in delivering his minority judgement of the case, opined, '*the question may well be asked by the accused: Am I to live or die depending on the way in which the Benches are constituted from time to time?*'. The fact that most countries of the world have done away with death penalty but India clings on to it is disturbing in the first place but notwithstanding that, the above mentioned incongruity can be clearly evidenced by illustrating two cases both of

[1317] 'The First Impeachment: An Insight into the First Great Supreme Court', *India Today*, 2011.
[1318] (1980) 2 SCC 684

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which included the rape and subsequent killing of minor girls. In the first case of *Mohan Anna Chavan Vs State of Maharashtra*[1319], the accused was sentenced to death for the rape and murder of two minor girls. On the other hand, in the case of *Sebastian Vs. State of Kerala*[1320], the accused was sentenced to life imprisonment for the kidnapping, rape, and murder of a child. Both the accused had previous convictions for sexual offence and the nature of the crimes were also identical, the only distinction in their fates being the composition of the benches delivering their verdict. While in one case, it was decided that the nature of the crime was sufficient to warrant entry into the 'rarest of rare' category, the sentiment was not shared in the second case where the punishment of death sentence was nullified in favour of lifelong incarceration. The lack of proper and comprehensive guidelines to determine what would fall into the category of 'rarest of the rare' is an overwhelming obstacle that the judiciary and the lawyers struggle to overcome. In such circumstances, the propensity of the judges tends to be chief determinant of the nature of sentencing to be received by the accused. This dilemma is validated in the case of *Swami Shraddhananda Vs State of Kerala*[1321] where the statement '*The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench*' encapsulates the suspicions revolving the efficacy of the death penalty in so far as uniformity is concerned and acts as a disparaging tale of differential treatment that can affect two similar convicts in materially separate ways which in a convoluted sense can be treated as an instance of bias arising from differing predispositions in relation to interpretation of an established doctrine. The most concerning aspect is the fact that there is no objectivity in this matter and there is no established framework to regulate and ensure equity and justice in such matters. There is clearly no paucity of evidence to show a prejudiced attitude of the judiciary in relation with cases.

IV. CONCLUSION

[1319] MANU/SC/7863/2008
[1320] (2010) 1 SCC 58
[1321] AIR 2008 SC 3040

The factors discussed above should not be considered as the only factors but are definitely the most common and prevalent factors affecting the judgements delivered by the courts. After the detailed analysis presented above which is effectively corroborated with pertinent case laws, one question remains regarding the fairness and sanctity of the revered judiciary. The authors here have just shown the trend over the past decades in the judicial pronouncements which indicate a certain bias or rather, leaning trend. This trend, as discussed earlier, can't be attributed or taken as a shortcoming on the part of judiciary as a whole, but rather a more holistic approach must be taken to acknowledge such a trend which is existing and have effective amendments and guiding frameworks to reduce such trends and make the Judiciary even more fair and just. A country's success as a whole does indeed depend on the kind of adjudication and law enforcement mechanisms it has and thus certain steps are coveted on the part of the Law Commission of India to address the aforementioned issues and start a discourse regarding the same to bring out effective changes to the system.

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COMPENSATORY JUSTICE IN CRIMINAL JUSTICE SYSTEM: EFFICACY OF VICTIMS' COMPENSATION SCHEME

- SALONI MAHESHWARI & SNEHA RAO

INTRODUCTION

"Capable, generous men do not create victims, they nurture victims."- Jullian Assange

One of the main roles of the judiciary is to punish crimes and to ensure rehabilitation of criminals in order to ensure smooth functioning of the society. A strong criminal justice system is the cornerstone of a well working state which does not violate its own citizen's rights. Crimes under various statutes are construed to be crimes against the welfare of the society and thus in the view of punishing the criminal, often the focus of the judiciary shifts from the victim who has suffered either a loss or a trauma or any kind of injury. This shift in focus is nothing but the beginning of injustice being served to the victim who approached the judiciary with the idea of gaining justice.

It can be perceived by any person that in the Indian judiciary system, the victim is the forgotten part in any case which is reported to the functionaries and the criminal becomes the main character. A very basic principal of law in India is that an accused is not guilty until proven so and the entire onus of proving the guilt lies on the prosecution. The criminal's mindset, his protection, his punishment, his rights are all that are concerned, and the victim reaches a position where he or she has no say and simply must hope for the system to favor them.

If the court then comes to a decision that no crime has been committed or that the criminal is not guilty of any crime, then there is no question of the existence of a victim. A victim cannot exist if a crime has not been committed. Under these circumstances, the court may acquit the person accused of the charges.

This leaves the victim or the person facing loss, injury or any type of trauma unsatisfied and vulnerable to more damages.

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CONCEPT OF COMPENSATION

The idea of restoring the damages caused to any person by either the State or by the person causing the damages is a concept that has existed for a long time in the Indian judiciary. The modern states in order to ensure the safety of the victims are coming up with various schemes in order to compensation the victim for the losses faced. Various countries have taken up the scheme of payment of compensation to victim of crime and have set up a fund for payment of compensation to crime victims in Canada, Australia, New Zealand, United Kingdom, under the control of a board. India too came up with a similar victim compensation scheme which has been adopted by almost all states and union territories.

EVOLUTION OF CONCEPT OF COMPENSATION

If it is glanced at the history of the world, it would be unveiled that every most of the legal systems of the world has somewhere or the other, a provision for compensation to the victims. The earliest reference of this concept was made under the Hammurabi code of ancient Babylonian. The same is quoted below:

"If a man has committed robbery and is caught, that man shall be put to death. If the robber is not caught, the man who has been robbed shall formally declare what he has lost…and the city…shall replace whatever he has lost for him. If it is the life of the owner that is lost, the city or the mayor shall pay one maneh of silver to his kinsfolk."[1322]

The concept of compensation can also be found among the Greek, Roman and German people. It was reported among the ancient Germans that "Even homicide is atoned by a certain fine in cattle and sheep; and the whole family accepts the satisfaction to the advantage of the public weal, since quarrels are most dangerous in Free State".

In the contemporary world, New Zealand was the first country to inculcate the victim compensation scheme in its legal framework. The first piece of legislation in the world to put this scheme into proper legal framework was, The New Zealand Criminal Injury Compensation Act, 1963.

[1322] (October 15,2019) https://www.academia.edu/14255108/Victims_Compensation_An_Overview

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The same was followed by the Great Britain and Victim Compensation Programme, 1964 was inaugurated. Since then, the victim compensation programme of Britain has become the oldest and largest.

The Victim Compensation Programme began in the United States of America with the first state being California in the year 1966, followed by New York and Hawaii in the year 1967, Maryland and Massachusetts in the year 1968, New Jersey in the year 1976 and it went on after that.

The initiation of the Victim Compensation Scheme throughout the world can be summed up in the following chronological order

- 1963 – New Zealand
- 1964 – Great Britain
- 1966 – California
- 1967 – Georgia, Hawaii, New York, New South Wales
- 1968 – Maryland, Massachusetts, Queens Land
- 1969 – Italy, South Australia
- 1970 – Western Australia
- 1972 – Alaska, State of Victoria
- 1977 – France, Oregon, Montana
- 1978 – Connecticut, Indiana, Kansas, Florida
- 1979 – Texas
- 1984 - Philippines

A bill was drafted by the World Society of Victimology to protect the victims of crime.

The “Declaration of basic principles of justice for victims of crime and abuse of power” was finally adopted by the UN General Assembly in November in the year 1985. This declaration gave

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worldwide acknowledgement to the campaign against victimisation. It is only due to this declaration that victims across the world have received a right to be compensated against the crime committed towards them, even when there are no specific regulations in this regard in that country.

LEGISLATIONS IN REGARD TO VICTIM COMPENSATION IN INDIA-

The term 'Compensation' means amend for the loss incurred in order to make things equivalent, to make amends for loss, recompense, remuneration or bay. It is counter balancing of the victim's sufferings and loss that result from victimization. The rationale or basis for compensation may be the following three perspectives:

1. As an additional type of social insurance.
2. As welfare measure i.e. another facet of Government/ Public assistance of the unprivileged.
3. A way of meeting an overlooked Government obligation to all citizens.

Law is an ever-changing dynamic in the modern society and it needs to be so due to the changing circumstances. Punishing criminals may do justice to the society but compensation for the damage and loss incurred is the true way that a victim attains justice. Laws have been developed and amended over and over in order to ensure that the victim is duly compensated in cases where the court finds that compensation laid down in that statutes is insufficient the Court at its discretion awards an adequate amount.

Special laws as well as General laws regarding compensation have been laid down. The General Law concerning compensation to the victims is the Code of Criminal Procedure, 1973 whereas the Special Laws include Motor Vehicles Act, 1988, The Scheduled Castes and Scheduled Tribes Atrocities (Prevention) Act, 1988, Protection of Human Rights Act, 1993, The Workmen Compensation Act, 1923, The Fatal Accidents Act, 1855, The Probation of Offenders Act, 1958, Personal Injuries (Emergency Provisions) Act, 1962, Personal Injuries (Compensation Insurance) Act, 1963.

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- **Under The Code of Criminal Procedure, 1973[1323]**

1. **Section 250** authorizes a Magistrate to direct complainants or informants to pay compensation to people accused by them without reasonable cause.
2. **Section 357** enables the court imposing a sentence in criminal proceedings to grant compensation to the victim and to order payment of cost to the prosecution.
3. **Section 357 A** enables the court to decide the quantum of compensation and when the compensation awarded under Section 357, recommendations can be made under this section.
4. **Section 357 B** says that the compensation provided must be in addition to fine provided under Section 326 A or Section 376 D of Indian Penal code, 1860.
5. **Section 357 C** mentions that free of cost treatment must be provided to such victims in the hospital.
6. **Section 358** empowers the court to order a person to pay compensation to another person for causing police officer to arrest such other person wrongfully.
7. **Section 359** enables the court imposing a sentence in non- cognizable cases to grant compensation to the victim and to order payment of costs incurred in prosecution.
8. **Section 482** empowers a higher court to exercise its inherent power in the interest of justice whenever the victim approaches a higher court to claim compensation.

- **Workmen's Compensation Act, 1923[1324]**

As per this Act, a personal injury caused to a workman by accident arising out of and in the course of his employment, the employer shall be liable to pay compensation in respect of any injury which results in total or partial disablement for a period exceeding 7 days and death caused by an accident.

[1323] Code of Criminal Procedure,1973

[1324] Workmen's Compensation Act, 1923

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The Act also lays down the process of determination of payment of compensation and enlisted the injuries deemed to result in permanent partial disablement, the occupational diseases and the compensation payable.

- **Indian Railway Act, 1989[1325]**

This Act provides for compensation under Sec. 124 in the event of an accident due to collision of trains, derailment or other accident to a train causing death of a passenger dying as a result of such accident, and for personal injury and loss, destruction, damage or deterioration of result of such accident, and for personal injury and loss, destruction, damage or deterioration of goods owned by the passenger and accompanying him in his compartment or on the train, sustained as a result of such accident.

- **Motor Vehicles Act, 1988[1326]**

This act has time and again been redefined by the Courts in their decisions since it mainly deals with compensations regarding accidents and injuries caused as well as lists down fines in case of the same.

INITIATIVE TOWARDS VICTIM COMPENSATION BY GOVERNMENT OF VARIOUS STATES

- **Government of Tamil Nadu**

[1325] Indian Railway Act,1989

[1326] Motor Vehicles Act,1988

The first state in India to make headway towards the incorporation of Victim Compensation scheme in the system is Tamil Nadu. A Victim Assistance fund was formulated by the state in the year 1995 to provide financial aid to the victims of crimes such as murder, rape, grievous injuries etc. It was basically done to help the dependents of the only bread winners of the family.

This scheme has been amended from time to time such as in the year 2013, 2015 and 2018.

The victims eligible to receive compensation under the "Victims Assistance Fund" are bound to cooperate with the police and prosecution. The relief may not be granted to those victims or legal heirs when the victim is charged before in a cognizable offence. There has been formulation of 'Tamil Nadu Fund' in the year 2013 for the same. There is also a 'Women Victims Compensation Fund' under the Tamil Nadu Victim Compensation Scheme. [1327]

- **Government of Andhra Pradesh**

The same was followed by the Government of Andhra Pradesh. The state set up a relief and rehabilitation fund named 'Women Victim Compensation Fund'[1328] to provide help to the women who were affected by the atrocities such as rape, sexual harassment, dowry etc.

- **Government of Maharashtra**

Steps have also been taken by the Government of Maharashtra in this regard. A notification was issued in the year 2014, regarding the creation of Victim Compensation Fund in the state of Maharashtra.[1329] This compensation fund was created to provide aid to victims who suffered loss of life, permanent disability and survived acid attack.

Victim Compensation Schemes have also been formulated by other states such as Orissa and Delhi in this regard.

[1327] (October 15,2019) http://www.stationeryprinting.tn.gov.in/gazette/2018/40_III_1a.pdf

[1328] (October 15,2019) https://wcd.nic.in/sites/default/files/Final%20VC%20Sheme_0.pdf

[1329] (October 15,2019) https://www.maharashtra.gov.in/Site/Upload/Acts%20Rules/English/Victims

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- **Government of Odisha**

A Victim Compensation Fund has been created for the state of Orissa under a notification issued in the year 2012. This Victim Compensation Fund has been created to provide aid to victims who have suffered loss or injury and requires rehabilitation.[1330]

- **Government of New Delhi**

A similar scheme called Delhi Victim Compensation Scheme, 2011 has also been formulated under a notification issued in the year 2012. This Scheme has been created to provide aid to victims who have suffered injury due to various offences such as Rape, Murder, and Permanent Disability etc.[1331]

SUPREME COURT'S JUDGEMENTS ON VICTIM COMPENSATION

The Hon'ble Supreme Court of India has laid down the guidelines under which the compensation must be provided to the abused victims in several cases. A few of the notable cases are mentioned below:

- **In Kasturi Lal vs. State of U.P.[1332]**

In this case, a material distinction was made between when the tortious liability of the state arises and when it does not arise. It was held that the tortious liability of the state does not arise when damage is caused to the injured party while performing any sovereign function delegated by the government. The state is immune from liabilities under this circumstance to pay damages to the injured party and cannot be held liable for the same.

- **In Nilabati Behara vs. State of Orissa[1333]**

[1330] (October 15,2019) http://oslsa.in/wp-content/uploads/2016/08/victim%20compensation%20scheme-New.pdf

[1331] (October 15,2019) https://dslsa.org/delhi-victim-compensation-scheme-2015/

[1332] Kasturi Lal vs. State of U.P, AIR 1965 SC 1039

[1333] Nilabati Behara vs. State of Orissa, AIR 1993 SC 1960

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According to the facts of the case, a person was taken into police custody for interrogation and was found dead on a railway track near the police station the next day. It was held that sovereign immunity cannot be applied here as it was a case of violation of fundamental rights. It was directed by the court to the State to pay compensation of Rs. 1,50,000 to the deceased's mother and further a sum of Rs. 10,000 as costs within 3 months, by holding that it is a clear case for award of compensation to the petitioner for the custodial death of her son. It was observed by the Hon'ble Supreme Court in this case that "A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defense of sovereign immunity being in applicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defense being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Art. 32 and 226 of the Constitution."

- **In Sebastian M. Hingoray V. Union of India[1334]**

In the present case, a writ of Habeas corpus was filed before the court to direct the 21st Sikh Regiment to produce two persons those were taken by them to their camp, who were reported to be missing since then. The authorities failed to produce those two persons. It was held by the Hon'ble Supreme Court that this was a case of death under custody of legal authorities. Therefore, it was held that exemplary costs instead to fine can be imposed in this case. The wives of both these persons were granted Rs.1, 00,000 as compensation for the deceased persons.

[1334] Sebastian M. Hingoray V. Union of India, AIR 1984 SC 1026

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- **In Sarla Verma vs. Delhi Transport Corporation[1335] and in Rajesh vs. Rajbir Singh[1336]**

A detailed procedure as to the calculation of the future fines in the case of Motor Vehicle accidents has been laid down by the Hon'ble Supreme Court in these cases. There is also a mention of how this amount must be shared between the dependents of the deceased person.

- **In Ankush Shivaji Gaikwad vs. State of Maharashtra[1337]**

The Hon'ble Supreme Court in the present case has dealt in detail regarding the Victim Compensation Scheme. The court has also dealt with the responsibility of the Criminal Courts under Section 357 of Code of Criminal Procedure, which confers a mandatory duty upon the courts to apply its mind while deciding the amount of compensation in every criminal case. compensation in every criminal case.

- **In Manohar Singh Vs. State of Rajasthan[1338]**

It was held by the Hon'ble Supreme Court while deciding the above case that "We find that the Court of Sessions and the High Court have not fully focused on the need to compensate the victim which can now be taken to be integral to just sentencing. Order of sentence in a criminal case needs due application of mind. The Court must give attention not only to the nature of crime, prescribed sentence, mitigating and aggravating circumstances to strike just balance in needs of society and fairness to the accused, but also to keep in mind the need to give justice to the victim of crime. Despite legislative changes and decisions of this Court, this aspect at times escapes attention. Rehabilitating victim is as important as punishing the accused. Victim's plight cannot be ignored even when a crime goes unpunished for want of adequate evidence. Just compensation to the victim must be fixed having regard to the medical and other expenses, pain and suffering, loss of earning

[1335] Sarla Verma vs. Delhi Transport Corporation, (2009) 6 SCC 121

[1336] Rajesh Vs. Rajbir Singh, (2013) 9 SCC 54

[1337] Ankush Shivaji Gaikwad Vs. State of Maharashtra, (2013) 6 SCC 770

[1338] Manohar Singh Vs. State of Rajasthan, AIR 2015 SC 1124

and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other."

VICTIM COMPENSATION SCHEME IN VARIOUS COUNTRIES

- **U.S.A.**

The Victim Compensation Scheme of U.S.A. has proved to be a revolution as per the way

Victims are treated and construing to their needs. This revolution has bought along with it changes at all fronts.

An attempt was made in the year 1965, at federal level, to inculcate compensation schemes and draft legislation for the same. But this could not happen till 1982. In 1982, it was reported that almost two-third of the states of America had Victim Compensation

Schemes in some form or the other.

Currently, compensation in provided to the victims from the Crime Victims Funds[1339] regulated by the VOCA. This fund is the major source of aid to the victims throughout USA.[1340] This fund is not financed by the tax received but instead by the fines that are paid by the offenders to the US Government.

- **United Kingdom**

The Victim Compensation Scheme was introduced in UK in 1964 for the first time. The

Scheme was laid down to protect the victims of crime and as a way of acknowledgement to show sympathy and obligation towards the victims.

The Compensation Scheme of 1964 was provided a legal footing when Criminal Injuries Compensation Scheme was formulated in the year 1995.

[1339] (October 13,2019) https://www.ovc.gov/about/victimsfund.html

[1340] States in USA maintain their own funds from general revenue, fees, charges assessed against the offenders.

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At present, the Criminal Injuries Compensation Scheme, 2012[1341] deals with state compensation to be awarded to victims of crimes of violence in England, Scotland or Wales[1342]. The scheme is funded by government and it provides compensation to the blameless victims of violent crime. The scheme is administered by the Criminal Injuries Compensation Authority (CICA[1343]).

- **Australia**

The Compensation Scheme in Australia is State based. Every State has its own statute in this regard. All the seven states follow almost the same eligibility requirement, which is reporting to the police and filing an application to the court where the crime has taken place.

Most states pay compensation between $ AUS 15,000 to $ AUS 60,000 which covers medical expenses, lost wages, mental health counseling etc.

- **Germany**

In Germany, the Ministry of Work and Social order regulates the Germany Crime Victim Compensation Scheme. To be eligible to receive the compensation, an application must be made to the court within a year and crime must be reported to the police.

There is no maximum limit as to the grant of the compensation. It is decided on case to case basis.

- **Japan**

The National Public Safety Commission regulates the Japan's Crime Victim Compensation Programme. To be eligible for the compensation, a report must be made to the police regarding the offence committed and include victims who have suffered serious injuries and legal dependents.

[1341] (October 14, 2019) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/978010851 2117.pdf
[1342] Northern Ireland which forms a part of UK has its own compensation scheme.
[1343] The CICA is an executive agency of the Ministry of Justice, UK. The members of the staff of CICA are employed by the Ministry of Justice.

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The decision is notified to the claimant within five weeks and the compensation is provided in another two weeks' time. The maximum limit of compensation is 10,790,000 Yen for Bereaved Family Benefit and 12,730,000 Yen for Incapacity Benefit.

CRITICAL ANALYSIS

There has been a change in the way that Victims are construed in the society and thus there have been changes made in the way that compensation is awarded to them. It nevertheless concludes that the amount of compensation paid across various states is different and thus a basic change in order to bridge the gap in this deficiency is much needed.

Administrative mechanism must be strengthened to attain relief through procedures that are 'expeditious, fair, inexpensive and accessible', something which the existing system does not completely cater to at present. To quote the words of the Supreme court, no compensation can be adequate nor can it be of any respite for the victim but as the state has failed in protecting such serious violation of a victim's fundamental right, the state is duty bound to provide compensation, which may help in the victim's rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

RECOMMENDATIONS

- A solid legislation must be formulated to provide compensation to the Victims.
- Adequate budgetary allocations must be made by the Government of India.
- Funds must be provided to the State Governments for the proper implementation of the scheme.
- Amendments must be made in the Code of Criminal Procedure,1973 to define a specified time period within which the compensation must be provided to the victims.
- To reduce the financial burden of the Public Exchequer, concept of Plea Bargaining must be pursued.

- As provided under the US scheme, compensation must be provided from the funds

received from fines paid by offenders and not from the tax income.

CONCLUSION

It is thus fairly understood that when a crime is committed, it is the society that is harmed and is in jeopardy. But often it is forgotten that crime does not end with the criminal punished but when a victim is compensated for their loss. The Indian judiciary must focus on that aspect being of utmost priority when it comes to giving sentences and must always aim for the better of the victim and the society and not just society at large **city** shall replace whatever he has lost for him. If it is the life of the owner that is lost, the city or the mayor shall pay one maneh of silver to his kinsfolk."

The concept of compensation can also be found among the Greek, Roman and German people. It was reported among the ancient Germans that "Even homicide is atoned by a certain fine in cattle and sheep; and the whole family accepts the satisfaction to the advantage of the public weal, since quarrels are most dangerous in Free State".

In the contemporary world, New Zealand was the first country to inculcate the victim compensation scheme in its legal framework. The first piece of legislation in the world to put this scheme into proper legal framework was, The New Zealand Criminal Injury Compensation Act, 1963.

The same was followed by the Great Britain and Victim Compensation Programme, 1964 was inaugurated. Since then, the victim compensation programme of Britain has become the oldest and largest.

The Victim Compensation Programme began in the United States of America with the first state being California in the year 1966, followed by New York and Hawaii in the year 1967, Maryland and Massachusetts in the year 1968, New Jersey in the year 1976 and it went on after that.

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ABUSE OF FORENSIC EVIDENCE IN CRIMINAL TRIALS

- **PRIYAL DHANDHUKIA & ANSH AGAL**

INTRODUCTION

Forensic science is among those sciences which forms the most important branch of science when it comes to detecting any kind of crime or a wrongful act. Forensic science plays a major role in finding the accused person. This is done by going into depth of any crime scene and not just the crime scene, but also the related locations and the people even closely related to the crime taken place. This study is unique in itself that it can detect the most unexpected things. But these evidences which form a crucial part of the incident are also perishable in nature. These form the most helpful part of investigation, but also can be very easily tampered and destroyed. Which can put the investigating team and the victim at a complete loss.

In order to avoid the loss of evidence, officers follow various protocols while they store and preserve evidences to take them to the laboratory for further tests and examinations. These protocols followed are scientific processes and are well studied because slightest of alteration can lead to a wrong person being held as an accused. Therefore, not only the victim, but also the accused person is also at a loss if the forensic evidence is mishandled. Forensic evidence contamination has become a topic of debate everywhere because there have been many well-known cases, in which, mishandled forensic evidences have delayed the rightful judgement of the court and resulted in unreasonable extension of the trial. Misuse, mishandling and tampering of forensic evidences, though are different by nature but result in the same thing, that is, loss of essential part of evidence which had the power and capability of leading the investigating officers to the actual culprit of the criminal act done.

Solving any kind of criminal case, i.e. from murder cases to rape cases is an art because it requires an in-depth study of every aspect related to it. This art can be perfectly

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mastered only when any officer studies forensic evidences in depth in addition to the other factors of the case. This category of evidences being sensitive in nature are commonly prone to being abused. These evidences can be abused by being misused, mishandled or even tampered. Investigating officers have a huge range of protocols which are to be adhered to in order to not alter these sensitive and very crucial evidences during the process of seizure.

For the longest time, Indian Criminal Justice system has suffered due to the lacunas that are present in conducting the forensic tests and seizing the physical evidences. Therefore, this article aims at observing these lacunas very meticulously and laying down suggestions after deeply analysing various landmark cases. New laws, guidelines and developments, keeping in mind the present conditions, in the field of forensic science and new ways to handle the sensitive evidences have to be charted out to attain a better Indian Criminal Justice System. This article will also highlight the importance of the forensic evidence as stated above in more detail and will also show why and how the forensic evidence helped to find out some crucial aspects of the landmark cases being discussed here.

Importance of Forensic Evidence in Criminal Trial

There are several forensic tests which are conducted by forensic experts in order to find out who the real culprit is. Mostly suspects from the crime committed have to go through these tests including the victim. These tests include – Fingerprint test, Brain mapping, Narco-Analysis, Autopsies, Forensic Carbon-14 Dating, etc. These tests form a major part of the investigation because many decisions and analysis to be done by the investigators are dependent on the results of these tests. Forensic evidence holds immeasurable amount of importance in any criminal trial. It is said to be the better half of any criminal investigation done by any officer. Best of the best investigating officers cannot be relied upon with their research and finding until he/she has a copy of forensic evidences and the test results conducted by the forensic experts. The study conducted in 2011 by Supreme Court and Hugh court shows that DNA profiling has played an essential role in solving 47 cases. Out of which, 23.4% decisions were given by Delhi

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High Court alone. DNA evidence had been used in 4.7% murder cases and 2.3% rape and murder. Observing this, over a decade, that the Indian Courts have placed immense amount on reliance on the testing of forensic evidences when it comes to delivering justice under the criminal trails. Considering the present scenario of India in terms of reliance on forensic evidences, which has fallen to a great extent. The percentage of registered cases have come to total of 5-6% which referred to FSLs and Finger Print Bureau.

This shows, there are modifications required in this field in order to improve the current situation of India. This is to say that India has to persevere to improve techniques and ways of storing and preserving forensic evidences to avoid tampering of evidences. This critical requirement is also to monitor the acute falling of conviction rate.

Over time the courts have expressed their unwillingness to put reliance on the forensic evidences because there exist countless number of lacunas which have been successful in overturning the subject-matter of the case in itself. The reasons for the non – reliance altogether is diverse in nature. It initially started from the unprofessional handling of physical evidences which included improper collection, preservation (as stated above), leaving out of essential clue evidences, non – maintenance of custody. This was also, followed by negligent handling of blood smaples by the working staff of laboratories, mixing up of two or more blood samples as well as misnaming them. One of the major loopholes was, not sending the suspects, witnesses, victims and the accused person for medico-legal test. Or the slightest delay in conducting the test might lead to the fading and simply losing of crucial evidences.

However, courts have started to place reliance on the forensic evidences because of the result seen by the judges in some of the well-known cases. For instance, in the case of **Tandoor Murder Case (1995) Delhi,** Naina Sahni was murdered by her husband Sushil Sharma.

He fired three shots of bullet at her. He did this because he had suspected his wife of having an extra-marital affair. After having shot her, Sushil Sharma took his wife's body to a restaurant where he attempted to burn her body in a tandoor. Later, Police took his blood-stained clothes, after which they took Sahni's Parents blood samples and sent them

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for DNA Test. According to the lab report, *"Blood sample preserved by the doctor while conducting the post mortem and the blood stains on two leads recovered from the skull and the neck of the body of deceased Naina are of 'B' blood group."* Confirming that the body was that of Sahni, the DNA report said, *"The tests prove beyond any reasonable doubt that the charred body is that of Naina Sahni who is the biological offspring of Mr. Harbhajan Singh and Jaswant Kaur."* The real culprit, who was Sushil Sharma was known to the world solely on the basis of the forensic evidence. This finally restored the belief of the Indian courts into the authenticity of Forensic evidences.

Misuse and Mishandling of Forensic Evidences

After a detailed observation on the importance of forensic evidences in a criminal trial, now we will understand about what happens if these evidences are misused and mishandled. The whole purpose of relying on forensic evidence will be nullified if anyone misuses or mishandles any kind, shape and form of forensic evidence. Therefore, we will now look at some landmark cases where the forensic evidence helped to prove some factors beyond reasonable doubt and ultimately, helped crack the case.

1- The Aarushi Talwar – Hemraj Murder case

This case serves as one of the most appropriate examples of misuse and mishandling of forensic evidences. In most of the cases CBI investigation and reports are considered to be reliable and most accurate, but unfortunately in this case it was not. The police force, other officials as well as the CBI were found to be negligently handling the forensic evidences in this case. The Uttar Pradesh Police force was criticized on not responsibly sealing the crime scene as soon as they arrived. The forensic team came on record and informed that when they arrived at the crime scene, i.e. the house where murders took place, there they found that many people, including the media and the relatives of the victim were moving freely in the apartment. This resulted in the contamination of the crime scene. Not letting the people move around and not allowing them to touch anything which was essential as evidence was the duty of police.

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Talwars further asked for a DNA Touch test for the palm prints that were found beside the dead body of Hemraj on the terrace their building and for the palm print on the Scotch Whiskey bottle which belonged to Aarushi Talwar's father. The CBI consulted J. Nagaraju for the same, who is a molecular genetics scientist (and director of the Centre for DNA Fingerprinting and Diagnostics, which conducted the DNA testing for the Aarushi case). He blatantly refused to conduct any such test and stated that this test would not render any new and fresh evidences in this case. Without being provided with any further explanations, Aarushis parents were denied the DNA Touch test by the order passed by the Supreme Court of India.

Everything lying in the house were meticulously looked at by the forensic experts. Huge amount of confusion was created by the police officer in charge on the day of investigation and the CBI in the court with respect to the purple pillow cover and the bloodstain found on it. At first, the report submitted by CBI's Central Forensic Science Laboratory in New Delhi and the Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad to the trial court stated that, the DNA found on the pillow cover is of Hemraj. However, later in the lower court, the CBI had argued that the CDFD had committed a "typographical error" by saying the purple pillow was Krishna's, when in fact, it was Hemraj's. Three year later, after submitting the report, CDF stated in the High Court that the report submitted earlier was tampered and had to be altered. They stated that the exhibits were interchanged.

That's when the Talwars produced two photos taken by CBI to the Court. On carefully observing both the photos, it came to a conclusion that the exhibits were tampered because there were a lot of things with did not add up. There were various evidences which were left open without properly labelling and packaging them. The CDFD had failed to put their seal on most of the forensic evidences. at first, it was told to the court that the purple pillow was seized from Hemraj's room and that it was his pillow. However, later it was stated by Superintendent of Police R S Dhankar that he had erroneously said that the purple pillow was Hemraj's. whereas, the pillow was seized from Aarushi's room.

After realizing that Forensic Science was the end of the road, the Joint-Director Arun Kumar took the road of Narcoanalysis. Nothing suspicious was observed while performing Narcoanalysis on Nupur and Rajesh Talwar. They also showed no knowledge of the crime. Thereafter, CBI turned

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to Hemraj's Nepali acquaintances. Tests like Narcoanalysis, brain mapping and polygraph are the ones which are declared "illegal" by the Supreme Court of India. These tests cannot be conducted on any person(s) whether that person is an accused, suspect or a victim. However, it can be conducted only by attaining the consent of whoever it has to be conducted on. In this case, it was however shown to the court that three men were fed with misinformation and were asked leading questions to get to the answered desired by the CBI officers.

2- The People of the State of California v. Orenthal James Simpson

A double murder that happened on the night of June 12, 1994 in which Nicole Brown Simpson, ex-wife of O.J. Simpson and Ronal Goldman, an acquaintance of Nicole's were brutally stabbed repeatedly about thirty times. Ronald had come to return Nicole's sunglasses which is when this unfortunate incident took place. O.J. Simpson, at that, time was on a flight from America to Chicago. Police called Simpson the next day at a Hotel in Chicago and informed him about the incident. He did not show much grief on his face when he was told about the double murder. Thereafter, a full-scale police investigation was kick-started.

For the longest time, Simpson was looked at as the primary suspect. After days of arguments and long stretching of the trial, Henry Lee, the defence forensic expert stated that there were a bunch of evidences which were not looked into before concluding that Simpson was the accused person in this case. It was so stated that during the investigation, no one noticed that there was blood on the pair of socks seized from Simpsons bedroom. Defence experts observed that the blood was smeared on those socks while they were lying flat not while someone was wearing them. It was also observed that the Police forensic technicians had left the evidences in an overheated van and had not labelled and packed the forensic evidences and samples.

This is where the jury tossed out crucial evidences of the case. Need for highly trained technicians and qualified trainees was expressed in order to avoid contamination and tampering of evidences like so. Amidst the on-going process of the trial, a unique criticism was taken up which was about the vial of blood taken from Simpson. That blood sample was taken by Police Detective Philip Vannatter the day after the killings were discovered. Furthermore, instead of putting the vial of blood as evidence in front of the other officers, he put it into his pocket and proceeded to Simpson's

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home where criminalists were collecting evidence. This was unacceptable in the court of law was stated so by the jurors.

SUGGESTIONS

There are many loopholes in the Indian Criminal Justice system which need upliftment from its tradition way of conducting forensic and physical evidences tests. Following are some of the suggestions which if incorporated in the system will lead to prevention of misuse, mishandling and tampering of evidences. these suggestions also include some inputs of the Malimath Committee.

1. Guidelines to be laid down for the Investigation officers to be followed while following their protocols while conducting investigation at a particular crime scene. This should include insertion of certain sections/ provisions in the Code of Criminal Procedure (CrPC) and the Indian Evidence Act which are to be especially followed by the Police Officers. These may include keeping detailed records of all the processes conducted during the trial in the area of forensics. E.g. if the police use some blood samples from a suspect and it turns out later that those blood samples do not match, even then this should be recorded.

2. A database with all the DNA history of all the history sheeters should be stored chronologically. This will help is preservation of time while the most heinous of the crimes have to be dealt with in the future. Moreover, an accurate result will be obtained by the forensic experts when it comes to matching it with some new DNA for their database. But there should be some rules relating to such types of databases, such as taking the permission to run a DNA Scan from a particular authority because if not, then the police can misuse this power.

3. The already existing Forensic laboratories should be improved by instilling improved equipment and provisions for Research and Development in the laboratory itself. Obsolete equipment's should be discarded and should be replaced by more developed machinery. More laboratories should be built so that transferring of evidences which are perishable in nature to places which are far away and have advanced technology will be avoided. Also, more and more

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regional and sub regional branches should be opened with at least the basic functions of a forensic laboratory so that the police can get faster results and this may in turn, even save lives sometimes.

4. There should also be a provision of a detailed report of each and every forensic evidence ever collected to be submitted to the court during the trial. The importance of this suggestion is that all the forensic evidence will be on record and as we saw in the Simpson case, the chances of tampering with the evidences will be minimal.

5. The government should create special programmes with incentives to attract more and more in the field of forensic science due to the shortage of experts and a greater number of colleges should be opened to train such people.

CONCLUSION

Therefore, the Aarushi Talwar – Hemraj double murder case and the O.J. Simpson case form the crux of understanding as to why the forensic evidences are so much important. Having observed as to how much difference even a minute blood droplet can make in the case which changes the pattern of investigation and the motive of any person involved in the case. Forensic evidences always have been a very sensitive part of any kind of criminal investigation and are the major sources through which any officer can get to the actual culprit. More and more medical practitioners and doctors should be encouraged to take up medico-legal work.

This is because, India has over time seen a drastic fall in the number of professionals who are ready to do this work. Pending cases in the court lie in their files, untouched, because of the unavailability of doctors and qualified experts in this field. As a result, tampering and mishandling form a prominent part when it comes to abuse of evidences in a criminal trial. Well trained doctors, medical experts and technicians are need of the hour and hence, form a crucial organ of the criminal justice system of India.

If we look at how the Aarushi Talwar case was solved and how the police officer gave an erroneous statement, then we come to know that minute and very small mistakes in the area of criminal investigations can cost that investigation heavily and therefore, forensics should be one of the

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primary area of reliance of the police investigations to solve any case. Because as we already know, a criminal or a suspect can completely destroy circumstantial evidences, but he cannot always wipe away all the forensic evidences as well .

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POST COMMUNICATION BLOCKADE : HUMAN RIGHTS VIOLATION IN KASHMIR

- **ABHISHEK ANAND**

CHAPTER:1

INTRODUCTION:

In the early hours of 5 August 2019, the authorities in Indian-administered Jammu and Kashmir (J&K) State imposed a curfew on the entire territory of J&K and deployed several thousand Indian army troops and J&K police across all 22 districts without any prior announcement. In addition, on the evening of 4 August 2019 the Indian government imposed a blanket communication blockade across J&K. People woke up the next day with the entire region being under a military and communication clampdown.

At around noon on 5 August, the Indian government, led by the Bharatiya Janata Party (BJP), introduced a bill in the upper and lower houses of the Indian parliament to abrogate Article 370 of the Indian constitution. Article 370 had guaranteed 'special status' to J&K State since 1949 and prevented any person who did not have a state subject certificate from acquiring immovable property in J&K. The abrogation of Article 370 by the Indian government is inconsistent with earlier rulings by the Supreme Court of India, which declared that Article 370 could not be abrogated without the approval of the J&K State's Legislative Assembly[1344].

A majority of Indian parliamentarians voted in favour of the BJP's decision to repeal Article 370 and to pass a second piece of legislation, the Jammu and Kashmir Reorganisation Act of 2019, which led to the split of the existing state of J&K into two Union Territories, Ladakh and J&K, under direct control of New Delhi. This move is part of the Indian government's plan to ensure the

[1344] Frontline, Kashmir: Murder of insaniyat, 30 August 2019, https://frontline.thehindu.com/coverstory/article29049528.ece?homepage=true.

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complete annexation of J&K, in a belief that such developments would lead to an end of the decades-long conflict.

This pivotal constitutional change was preceded by mass panic and tension in the Kashmir valley. The reports of additional troop deployment, the leaking of several government orders suggesting a "deterioration of law and order situation in the near future in Kashmir" and asking domestic tourists and Amarnath pilgrims "to leave Kashmir immediately" added to the extremely tense situation.

What follows is a partial summary of the main human rights violations that have been reported since 5 August 2019. Due to the ongoing communication blockade over the entire Kashmir valley, no information could be obtained from remote districts, including in South Kashmir, and little or nothing is known about the situation in these areas. The ongoing communication clampdown has also prevented journalists and human rights activists from assessing and providing extensive reports on the situation on the ground.

INDIA: END COMMUNICATION BLOCKADE IN JAMMU AND KASHMIR WITHOUT FURTHER DELAY

Today completes three months of the unprecedented communication blockade in Jammu and Kashmir, India. The Asian Forum for Human Rights and Development (FORUM-ASIA), CIVICUS, the International Federation for Human Rights (FIDH), and the World Organisation Against Torture (OMCT) urge the government of India to immediately restore internet and mobile phone connections in Indian-administered Jammu and Kashmir. We are deeply concerned over the wide-ranging impact on the enjoyment of basic human rights caused by this continuous restriction on communications.

Internet shutdowns, of which there have been dozens in Indian-administered Jammu and Kashmir since the beginning of the year, have significant consequences, negatively impacting the economy, education, access to health care and emergency services, press freedom, freedom of expression, and the right to engage in political decision making. This is particularly grave given the context,

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in which the government of India, on 5 August, 2019, revoked the autonomous status of the State of Jammu and Kashmir and bifurcated the State into two Union Territories. With the suspension of communications, people have effectively been denied the right to make informed political opinions and to express themselves regarding these decisions.

Although limited landline connections were reportedly restored across Jammu and Kashmir on 13 September 2019, access to those connections remains limited. No enforceable law in India permits such unprecedented and prolonged internet shutdown without any valid justification. Moreover, freedom of expression is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party, and under Article 19 of the Indian Constitution.

A petition filed before the Supreme Court of India noted that the communication shutdown had fueled "anxiety, panic, alarm, insecurity and fear among the residents of Kashmir" and created hurdles for journalists to report on the situation in the region. In a statement on 22 August 2019, five UN human rights experts expressed deep concern over the shutdown and called it "inconsistent with the fundamental norms of necessity and proportionality.'

There have also been reports of hundreds of detentions of political activists, human rights defenders, community leaders, and others, including children between 9 and 11 years of age, under the draconian Jammu and Kashmir Public Safety Act (PSA) of 1978, which permits preventive detention without charge. The communication blockade has also impeded access to legal aid.

FORUM-ASIA, CIVICUS, FIDH, and OMCT strongly believe that this prolonged restriction on communication, coupled with arbitrary mass detentions, denial of freedom of expression and access to information, is unnecessary and disproportionate to the situation and will further lead to a deterioration of human rights and basic freedoms. We urge the government of India to end the communications blockade immediately and to adopt remedial measures to undo the damage done so far in Jammu and Kashmir. We reiterate our call to the government of India to resort to peaceful democratic means and refrain from use of brute force.

CHAPTER:2 WHAT IS ARTICLE 370[1345]

Union Home Minister Amit Shah has announced the scrapping of Article 370 of the Constitution, which provides a special status to the state of Jammu and Kashmir.

History

In October 1947, the then Maharaja of Kashmir, Hari Singh, signed an Instrument of Accession that specified three subjects on which Jammu & Kashmir would transfer its power to the government of India:

[1345] Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything in this Constitution,

(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify Explanation For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948 ;

(c) the provisions of Article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to sub clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify: Provided that the recommendation of the Constituent Assembly

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1. Foreign affairs

2. Defence

3. Communications

In March 1948, the Maharaja appointed an interim government in the state, with Sheikh Abdullah as prime minister. In July 1949, Sheikh Abdullah and three other colleagues joined the Indian Constituent Assembly and negotiated the special status of J&K, leading to the adoption of Article 370. The controversial provision was drafted by Sheikh Abdullah

What are the provisions of Article 370?

Parliament needs the Jammu & Kashmir government's approval for applying laws in the state — except in cases of defence, foreign affairs, finance, and communications.

The law of citizenship, ownership of property, and fundamental rights of the residents of Jammu & Kashmir is different from the residents living in rest of India. Under Article 370, citizens from other states cannot buy property in Jammu & Kashmir. Under Article 370, the Centre has no power to declare a financial emergency in the state.

It is important to note that Article 370(1)(c) explicitly mentions that Article 1 of the Indian Constitution applies to Kashmir through Article 370. Article 1 lists the states of the Union. This means that it is Article 370 that binds the state of J&K to the Indian Union. Removing Article 370,

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which can be done by a Presidential Order, would render the state independent of India, unless new overriding laws are made.

Explanation:

Article 370 of the Indian constitution gave special status to Jammu and Kashmir—a state in India, located in the northern part of Indian subcontinent, and a part of the larger region of Kashmir, which has been the subject of dispute between India, Pakistan, and China since 1947[1346]—conferring it with the power to have a separate constitution, a state flag and autonomy over the internal administration of the state. The government of India revoked this special status in August 2019 through a Presidential Order and the passage of a resolution in Parliament.

The article was drafted in Part XXI of the Constitution: Temporary, Transitional and Special Provisions. The Constituent Assembly of Jammu and Kashmir, after its establishment, was empowered to recommend the articles of the Indian constitution that should be applied to the state or to abrogate the Article 370 altogether. After consultation with the state's Constituent Assembly, the 1954 Presidential Order was issued, specifying the articles of the Indian constitution that applied to the state. Since the Constituent Assembly dissolved itself without recommending the abrogation of Article 370, the article was deemed to have become a permanent feature of the Indian Constitution.

This article, along with Article 35A, defined that the Jammu and Kashmir state's residents live under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to resident of other Indian states.As a result of this provision, Indian citizens from other states could not purchase land or property in Jammu & Kashmir.

On 5 August 2019, President Ram Nath Kovind issued a constitutional order superseding the 1954 order, and making all the provisions of the Indian constitution applicable to Jammu and Kashmir based on the resolution passed in both houses of India's parliament with 2/3 majority.

[1346] *Akhtar, Rais; Kirk, William, Jammu and Kashmir, State, India, Encyclopaedia Britannica*, retrieved 7 *August* 2019 (subscription required) Quote: "Jammu and Kashmir, state of India, located in the northern part of the Indian subcontinent in the vicinity of the Karakoram and westernmost Himalayan mountain ranges. The state is part of the larger region of Kashmir, which has been the subject of dispute between India, Pakistan, and China since the partition of the subcontinent in 1947."

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Following the resolutions passed in both houses of the parliament, he issued a further order on 6 August declaring all the clauses of Article 370 except clause 1 to be inoperative.

In addition, the Jammu and Kashmir Reorganisation Act was passed by the parliament, enacting the division the state of Jammu and Kashmir into two union territories to be called Union Territory of Jammu and Kashmir and Union Territory of Ladakh. The reorganisation took place on 31 October 2019.

Change of status of Jammu and Kashmir

On 5 August 2019, the Home Minister Amit Shah introduced the Jammu and Kashmir Reorganisation Bill, 2019 in the Rajya Sabha to convert Jammu and Kashmir's status of a state to two separate union territories, namely Union Territory of Jammu and Kashmir and Union Territory of Ladakh. The union territory of Jammu and Kashmir was proposed to have a legislature under the bill whereas the union territory of Ladakh is proposed to not have one. By the end of the day, the bill was passed by Rajya Sabha with 125 votes in its favour and 61 against (67%).The next day, the bill was passed by the Lok Sabha with 370 votes in its favour and 70 against it (84%).The bill became an Act after it was signed by the president.

The two union territories came into existence on 31 October 2019.

WHAT IS Article 35A of Constitution?

Article 35A allows the Jammu and Kashmir legislature to define permanent residents of the state. It was inserted through the Constitution (Application to Jammu and Kashmir) Order, 1954, which was issued by President Rajendra Prasad under Article 370, on the the advice of the Nehru-led Union Government.)

When the J&K Constitution was adopted in 1956, it defined a permanent resident as someone who was a state subject on May 14, 1954, or who has been a resident of the state for 10 years, and has lawfully acquired immovable property.

So under this clause no outsider can own property in J&K or get a state job.[1347]

CHAPTER:3 KASHMIR SITUATION:

- **Prayers forbidden**

Ongoing restrictions also had a negative impact on the local community's right to worship. On the occasion of the Muslim festival of Eid on 12 August, authorities barred people in Srinagar and in various other districts from gathering in large numbers and allowed prayers only in small mosques in the region. At Heff-Shermal Village in Shopian, which is considered a militant stronghold, armed forces prohibited prayers at all 11 mosques in the village[1348]. A strict curfew remained in place until late afternoon on the first day of Eid, with hardly any movement of people. J&K authorities have also prohibited Eid prayers at major mosques of the Kashmir valley, including two of the holiest, the centrally located Jamia Masjid Mosque and the Hazratbal Mosque in Dargah.

- **Right to health threatened by blockade**

1. For patients suffering from chronic disease, reaching hospitals and contacting doctors, has become an exhausting task
2. Across Valley hospitals, people are unable to inform their families about the death of loved ones or new additions to their families
3. With prepaid mobile services and internet still down, doctors can't talk to each other, find specialists or deliver critical information to patients

[1347] //economictimes.indiatimes.com/articleshow/70507788.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[1348] Interview with locals, 12 August 2019

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Healthcare services in Kashmir have been badly affected due to the communications blockade and lack of public transport. For patients suffering from chronic disease, reaching hospitals and contacting doctors, has become an exhausting task

Despite the Indian government's attempt to promote the supposed long-term economic "benefits of the revocation of Article 370",[1349] the numerous restrictions imposed in J&K have led to immediate violations of the local population's right to health.

Four weeks after the start of the clampdown, local residents reported a shortage of essential medicines, and baby formula. While the government denied that such crisis was unfolding, the J&K's Department of Information and Public Relations admitted to having made baby formula available after it was in shortage for two days[1350].Chemists reported that they were running out of medicine stocks. A doctor reported that some patients, who were undergoing critical treatment, did not have access to ongoing medical procedures and treatment, threatening their lives. He was detained by the police shortly after he made those statements. International media reports have suggested that there is immense pressure on doctors working in tertiary care hospitals in Srinagar to hide the actual statistics about casualties. The relatives are even being denied death certificates of the deceased.[1351]

- **Education**

The severe clampdown in the Kashmir valley has also led to tensions within the Kashmiri student community studying in various universities and colleges across India, as the students have been unable to reach out to their families back home in the Kashmir valley. Estimates put the figure of Kashmiri students studying in India at over 30,000 and these students have appealed to the government to allow them to reach out to their families under lockdown in Kashmir. On 11 August,

[1349] Scroll, Raids at night, handbills by day: Army siege in South Kashmir escalates after special status revoked, 27 August 2019, https://scroll.in/article/935245/raids-at-night-handbills-by-day-army-siege-in-south-kashmir-escalates-after-specialstatus-revoked.
[1350] Scroll, Raids at night, handbills by day: Army siege in South Kashmir escalates after special status revoked, 27 August 2019, https://scroll.in/article/935245/raids-at-night-handbills-by-day-army-siege-in-south-kashmir-escalates-after-specialstatus-revoked.
[1351] 2 Independent, Ghosts of Kashmir: Indian authorities refusing to issue death certificates for civilians killed in clashes, say families, 26 August 2019, https://www.independent.co.uk/news/world/asia/kashmir-india-death-certificates-jammuprotests-violence-modi-a9079371.html.

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the J&K authorities said they were setting up 300 phone booths at landmark points in all parts of the Kashmir valley to facilitate students who wanted to return to J&K[1352]. People had to wait for hours in queues to access the phones set up in government offices, only short calls were allowed, and the conversations were monitored. While landline communications have been largely restored in the Kashmir valley, the mobile and internet connectivity remains severely limited[1353].

- **No relaxation in sight**

Meanwhile. most Kashmiris are observing the Muslim festival of Eid-al-Adha amid a security lockdown and lack of connection with others.

Speaking to DW on condition of anonymity, an official in Kashmir's administration said that his colleagues were "closely monitoring the situation and had yet to decide when the communication will be restored."

The official added that there was an increased likelihood of phone lines being restored, but without prior announcement about when it would be done.

Kashmir has been in a state of lockdown , when the Indian government under Prime Minister Narendra Modi decided to abolish Article 370 of the Indian constitution that gave Kashmir, a former kingdom, autonomy over its affairs and a separate constitution.

The Indian government also abolished Article 35A, which differentiated between ethnic Kashmiris and people who settled from elsewhere in India and was aimed at preserving the region's culture and demography. The law prevented settlers from buying property, contesting in elections and availing facilities in educational institutions.

[1352] India Today, 300 special telephone booths being established for communication in J&K, 11 August 2019, https://www.indiatoday.in/india/story/300-special-telephone-booths-being-established-for-communication-in-j-k1579794-2019-08-11.

[1353] India Today, Waiting for the phone in Kashmir: Of conversations, long queues and tears, 13 August 2019, https://www.indiatoday.in/india/story/kashmir-situation-jammu-clampdown-restrictions-communications-blackoutphone-booth-1580360-2019-08-13.

Advocates of the two laws have said that abolishing them could expose the valley to unwanted changes, including damaging its fragile ecology, allowing businessmen from outside the area to invest and expand and creating conflict with indigenous communities.

- Online shopping sites like Amazon have stopped delivering items to buyers in the valley, leaving hundreds of delivery boys jobless. Irfan Ahmad, a 20-year-old resident of Srinagar who worked for a local warehouse dealing in online goods, said he has been doing odd jobs since the internet blockade.

CHAPTER:4 COMMUNICATION BLOCKADE CRIPPLES MEDIA IN KASHMIR

Restrictions on movements and communication blackout in Indian-administered Jammu and Kashmir, is frustrating journalists in the region.

The Muslim-majority region is facing a communication blackout since Aug. 5 when India stripped the region of special provisions guaranteed by the country's constitution.

With internet access, mobile phone services remaining suspended and no access to the wires, just a few local newspapers are published. Journalists representing national and international media are dependent on the government's media facilitation center in Srinagar, which has an internet, but no Wi-Fi access.

"The communications blockade has indeed adversely affected the ground reporting. In the absence of internet and telephones, including the mobile phones, journalists are finding it difficult to verify and cross-check information,"[1354]

Further, reporters are unable to get playbacks to check their edited stories or even to receive phone calls from their offices for fact checking. It appears that the information blockade was meant to prevent stories from Kashmir going out,"

[1354] Ishfaq Tantry, general secretary of Kashmir Press Club narrates difficulties to report stories from Kashmir.

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An independent journalist, Safwat Zargar, said the newsgathering became a major casualty in the communication blockade. The blockade has crippled reporters representing the print and online media outlets. Even though it has hit TV reporters also, but they manage to communicate through outside broadcasting vans, to connect to their offices. First and major casualty is the news-gathering and inability of journalists to reach to the government and their sources for confirmation

Local media experiences a much more difficult situation. As many as 180 English and Urdu daily newspapers have been publishing from Srinagar, the summer capital of Jammu and Kashmir. Just five of them are publishing due to restrictions and in the absence of access to the wires.

They (journalists) are unable to bring out full editions, unable to access and process information about day-to-day happening, unable to move freely, and above all afraid to even question the crippling atmosphere," two Kashmir-based journalist bodies said in a joint statement

Journalists continue to face severe restrictions in all the processes of news-gathering, verification and dissemination, the free flow of information has been blocked, leaving in its wake a troubled silence that bodes ill for freedom of expression and media freedom," the report said.[1355] The report said the communication blockade and the ban on the internet have not only caused unimaginable and inhuman problems for all citizens but has brought the media to a standstill.

Since the communication blockade was imposed in the region on Aug. 5, the Club took up the issue with the government authorities concerned on several occasions, urging them to restore mobile phones, internet and telephone landlines to journalists and media outlets, including newspapers and also to the Club itself. But all these efforts have proved futile, as these services have not been restored to journalists till date,"[1356]

After the statement, the government added four new computers to the media facilitation center. They also restored mobile phones of selected government and police officials. But did not lift the blockade or ease restrictions on the media.

[1355] A report named "News Behind the Barbed Wire" on Kashmir information blockade released by the Network of Women in Media
[1356] An independent journalist, Safwat Zargar, said the newsgathering became a major casualty in the communication blockade

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Indian authorities, however, claimed that on 1st September the daytime restrictions on public movement across Jammu and Kashmir have been lifted in 90% of the region.

CHAPTER:5 CUT OFF KASHMIR RESORTS TO PRIMITIVE COMMUNICATION METHODS:

People in India-administered Kashmir are being forced to communicate with notes and human couriers after New Delhi cut the region off from the rest of the world by shutting down internet and telephone services.

Barricades manned by police and paramilitary officers dot roads across India-administered Kashmir, discouraging residents from going out even for medical reasons. In Srinagar, the capital of the region, spools of concertina wires have been placed next to most roads.

These measures have been taken by the Indian government in an attempt to keep protesters off the streets after New Delhi removed Indian-administered Kashmir's semiautonomous status and placed the region under its direct control.

Use of mobile phones and internet has increased in recent years in Kashmir. During previous security crises, electronic modes of communication were cut off by authorities, and the communication bans were isolated to districts.

However, the current shutdown is on a different scale. Even fixed-line phones have been blocked, and residents are now struggling to get and pass on information. They are anxious about the well-being of the friends and loved ones, many of whom live outside the region.

Handwritten notes

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Cut off from the world, some people are reverting to old techniques of passing notes and human couriers. A 50-year-old Srinagar resident told DW that he had received a handwritten note from his daughter, who works in New Delhi, through a human courier. The note was brief: "I am doing fine. Do not worry about me. Take care at home," it said.

Another person left a word of mouth message with a traveler heading in the direction of his home, but remained unsure whether it had arrived.

People are slowly beginning to get frustrated by the lack of news from friends and family. "If they were planning to starve people to death like this, why did not they just kill all the people here and grab the land," said Shakeel Ahmad, an ambulance driver at the region's main tertiary care hospital, referring to the Indian government.

"For the last 30 years, the world believed that there was terrorism and believed all the narratives that India built. It was all a lie. Is the world blind, now that people are starving? Where are the human rights groups? Where is the UN? We have lost faith in all of them,"

CHAPTER:6 WHAT HAPPENED WHEN SUPREME COURT HEARD 14 PILS ON ARTICLE 370, LOCKDOWN IN JAMMU AND KASHMIR

The Supreme Court asked the Centre and the Jammu and Kashmir administration to reply to the pleas seeking the removal of several regressive restrictions in the state, including the communications blockade after the abrogation of Article 370.

If a citizen wants to travel to any part of the country, you cannot stop him" observed the Supreme Court of India on Wednesday, even as it allowed restrictions on communication and travel in Jammu and Kashmir to continue for now.

Even as the newly formed Union territory of Jammu and Kashmir entered the 24th day of the communication lockdown, the Supreme Court heard a set of petitions challenging the abrogation of the special status of J&K under Article 370.

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A total of 14 PILs over various aspects of the current situation in Kashmir came up for hearing before a bench of CJI Ranjan Gogoi, Justice SA Bobde and Justice S Abdul Nazeer.

The pleas can be divided into three types of petitions:

Pleas against communication lockdown

Two petitions also addressed the communication lockdown in Kashmir as a violation of fundamental rights of citizens.

While Anuradha Bhasin of the Kashmir Times has flagged the issue of freedom of the press being violated, social activist Tehseen Poonawala has pointed out that essential services including ambulances, police and fire services are also not accessible due to the curfew situation and communication blockade.

The bench has, for now, adjourned this issue for a week asking the government to respond on the issues raised in the petitions.[1357]

However, as the situation in Kashmir remains tense, the lack of orders and observations from the bench on the communication lockdown and restrictions on press freedoms has drawn sharp criticism from all quarters

The Habeas Corpus cases

CPIM General Secretary Sitaram Yechury and Jamia law graduate Aleem Syed had approached the apex court in habeas corpus writ petitions.

Syed, a 22-year-old law graduate, had claimed that he has been trying to get information about his family in Anantnag, but has not been able to contact anyone since the announcement of the communication shutdown on August 4. He claimed that he had even tried to contact the local administration to get news about the status of his family, but the "entire Valley seemed to be under detention."

[1357] October 1, 2019 12:55 IST NewsIndia What happened when Supreme Court heard 14 PILs on Article 370, lockdown in Jammu and Kashmir

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Sitaram Yechury, on the other hand, had said that all attempts to contact CPIM former MLA MY Tarigami had failed since August 5 and the party was not even aware of where its politburo member was being kept under detention. He also claimed that Tarigami is suffering from illness and may need to be brought to Delhi for treatment.

During arguments in court, Solicitor General Tushar Mehta alleged that Yechury's plea for access was a "political case." "It is not a personal visit, it's a political visit. If he is allowed to go there it will endanger the situation," said the SG, adding that Tarigami as a "Z category protectee cannot be said to be missing."

The bench did not accept the contention.

"We are permitting the petitioner [Sitaram Yechury] to travel to Srinagar," said the bench. A similar order was also passed for Syed to allow him to visit his family, Syed, to allow him to visit his family under police assistance, in Anantnag. However, the bench restricted the political leader from making any political statements or holding any meetings while in Jammu and Kashmir. "If the petitioner is found to be conducting any activity other than meeting his party member it will be considered a violation of the Court order," noted the court. Syed and Yechury are xpected to travel to Srinagar

Article 370 cases

10 petitions before the bench have raised legal challenges to the amendment of the Constitution and changes to the special status of Jammu and Kashmir. The pleas have been filed by a variety of persons, including lawyers, artists, bureaucrats and politicians. The petitions have alleged that the Article 370 amendment could not have been done without the concurrence of a duly elected Constituent Assembly in Jammu and Kashmir.

The decision to substitute the "Governor" as the authority to recommend and ratify proposals to change the legal status of the State, according to the petitioners, was "illegal and unconstitutional."

Former Home Ministery-appointed interlocutor for Kashmir, Radha Kumar, retired air vice Marshal Kapil Kak and other retired bureaucrats and ex-military personnel in their plea, raised the

issue that fundamental rights of the Kashmiri citizens have been effected without the "sentiments of the people being considered."

The court has for now not passed any orders on the petitions but has issued a notice to the government to respond to the pleas by October.

CHAPTER:7 UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS SUPREME COURT HAS BEEN SLOW TO DEAL WITH KASHMIR PETITIONS'

The United Nations High Commissioner for Human Rights issued a statement expressing concern at the continuation of communication blockade and restriction at Kashmir.

"We are extremely concerned that the population of Indian-Administrative Kashmir continues to be deprived of a wide range of human right and we urge the Indian authorities to unlock the situation and fully restore the rights that are currently being denied." [1358]

The UN body also highlighted the manner in which the Supreme Court has been delaying adjudication on the petition relating issues of violation of human rights of people in Kashmir.

"The Supreme Court of India has been slow to deal with the petitions concerning habeous corpus, freedom of movement and media restrictions. The Jammu and Kashmir State Human Rights Commission, the State Information Commission and the State Commission for protection of Women and Child Rights are among key institutions being wound up, with the new bodies to replace them yet to be established."

The United Nations High Commissioner also said that major political decisions about the future status of Jammu and Kashmir have been taken without the consent, deliberation or active and informed participation of the affected population. Their leaders are detained, their capacity to be informed has been badly restricted, and their right to freedom of expression and to political participation has been undermined.'

"The undeclared curfew imposed by the authorities in the region was lifted from much of Jammu and Kashmir valley, preventing the free movement of people, as well the hampering their ability

[1358] Statement issued by the spokesperson of UN high commissioner for Human Rights at Geneva on 29 oct 2019.

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to exercise their rights to peaceful assembly, and restricting their rights to health, education and freedom of religion and belief."

On August 22, the UN body told the Indian Government that the information blackout in Jammu and Kashmir is a form of collective punishment on the people there and is inconsistent with the fundamental norms of necessity and proportionality.

CHAPTER:8 KASHMIR MARKS 100TH DAY OF COMMUNICATIONS BLOCKADE

A communications blockade imposed by the Indian government in disputed Jammu and Kashmir will be 100 days old on 12-11-2019, the longest in the insurgency-ridden region.

On the night of Aug. 4, hours before abrogating 76-year-old legislation granting autonomy to the Muslim-majority state, the Indian government blocked phones and the internet and deployed tens of thousands of soldiers "for maintaining law and order".

A few thousand landline phones were declared operational in early September and postpaid mobile phone services were restored on Sept. 14. Text messaging was restored the same day but was withdrawn hours later. Broadband and mobile internet services remain suspended.

In the Kashmir valley alone, with a population of about 7 million, there are 2.6 million prepaid cellphone subscribers and 4 million postpaid users.

Local authorities frequently order service providers to suspend mobile internet services whenever they apprehend anti-government demonstrators to apparently prevent these demonstrations from escalating into regionwide unrest. Besides the ongoing communications blockade, the internet has been shut 64 times since January this year either in troubled areas or the entire state.

Indian authorities have justified the communications restrictions by saying separatists might use social media to trigger anti-government agitation. The Indian government has been criticized for the blockade both at home and abroad.

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Journalists have been affected the most. To access the internet, they have to rely on 10 desktop computers installed in one of the rooms of the government Information Department dubbed the "Media Facilitation Centre".

On Oct. 3, on the 60th day of the shutdown, journalists held a demonstration inside the Kashmir Press Club and displayed placards that termed the government internet facility the "Media Monitoring Centre".

"It seems the internet blockade has been pushed into the realm of normal. Nobody even speaks about it now," said a journalist who works for an international news agency. He spoke on the condition of anonymity because he is not authorized to speak to the media.

CHAPTER:9 CONCLUSION:

At around noon on 5 August, the Indian government, led by the Bharatiya Janata Party (BJP), introduced a bill in the upper and lower houses of the Indian parliament to abrogate Article 370 of the Indian constitution. Article 370 had guaranteed 'special status' to J&K State since 1949 and prevented any person who did not have a state subject certificate from acquiring immovable property in J&K. The abrogation of Article 370 by the Indian government is inconsistent with earlier rulings by the Supreme Court of India, which declared that Article 370 could not be abrogated without the approval of the J&K State's Legislative Assembly

Partially restored communications have not returned the situation to normalcy. Public transport continues to be off the roads, impeding access. Earlier , several women silently protesting with placards in Srinagar were arrested which included former Chief Minister of J&K, Farooq Abdullah's sister Suraiya Abdullah and his daughter Safia Abdullah Khan. News reports indicate most of the detained politicians are held under Section 107 of the J&K Code of Criminal Procedure (CrPC). The J&K CrPC, however, will be repealed after 31st October and replaced by the central legislation indicating a limbo-like situation for those detained under this provision.

"Right after the abrogation of Article 370 of the Indian Constitution, Prime Minister Modi in his address to the country had said, 'More than 1.5 crore people of Jammu & Kashmir were deprived

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of the benefits of laws that were enacted for the benefit of the people of India.' Then, why are the people of Jammu & Kashmir deprived of their right to liberty and security and freedom from arbitrary arrest and detention – a right enjoyed by all citizens of India?" added Aakar Patel.

In most of the cases, lawyers and family members of the detainees are not informed of the grounds of arrests and the whereabouts of their clients and relatives. Non-sharing of critical information with the detainees' family members and lawyer constitutes a serious violation of the detainees' right to a fair trial. It effectively prevents them from seeking an independent judicial review on the lawfulness of their detention.

Indian authorities, however, claim that daytime restrictions have been lifted in 90% of the region.

India and Pakistan both hold Kashmir in parts and claim it in full. China also controls part of the contested region, but it is India and Pakistan who have fought two wars over Kashmir.

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UNRECOGNIZED CRIMES AGAINST WOMEN IN INDIA

- **MUSKAN PAHUJA**

ABSTRACT

Shall we consider that all the women are safe by just looking at the lives of women who live in a safe environment and have bodyguards to protect themselves? Shall we consider that all the women are equally capable and empowered by just looking at a few successful women?

India stands at rank 133 out of 167 countries in Women, Peace and Security Index (2019) which was carried out by Georgetown Institution for Women, Peace and Security[1359].

It is said that there is enough legislation to safeguard women and only some women are willing to register an F.I.R. This paper highlights on the crimes that the laws of India do not even consider crimes these are the crimes that are not identified, detected, or known and not given deserved attention or notice. Those crimes which are crimes in fact but still they are not. Crimes like Female Genital Mutilation aka Female Genital Circumcision and Marital rape are still not recognised. This paper endeavours to show the pitiable state of women who do not know to whom to report because if the crime is not recognised then the police cannot file an F.I.R. The case is treated as if no crime has been committed, no one has suffered and no one has done any wrong.

Keywords:- unrecognised crimes, female genital mutilation, marital rape.

FEMALE GENITAL MUTILATION (FGM)

FGM i.e., Female Genital Mutilation is the removal of the whole or some part of external female genitalia done for non-medical reasons. It is such a heinous act that is hardly heard of in India as it is only performed by Bohra Community (a sect of Shia Muslims), where this is practised as a tradition and is referred to as Katna or Khafz. However, no other Muslim community performs such tradition nor does the Quran have any reference to it. It is not a Muslim Tradition. It has its

[1359]Nirandhi Goswami, India ranks 133 out of 167 countries in Women, Peace and Security Index(Nov. 6,2019) https://yourstory.com/herstory/2019/11/india-ranking-countries-women-peace-security-index

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origin mainly in Africa, Egypt and Yemen. This is done on girls between 1-10 years of age and sometimes on an adult or married women. This is mainly divided into 4 types by WHO. They are:-

TYPE 1: Partial or total removal of the clitoral glans.

TYPE 2: Partial or total removal of the clitoral glans and the labia minora (the inner folds of the vulva), with or without removal of the labia majora.

TYPE 3 / Infibulation: Narrowing of the vaginal opening with the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora.

TYPE 4: All other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization.

In India, it is restricted to Type 1. It is not done for any medical purpose but mainly because to restrict sexual lust of women. They believe that when a women's urge is moderated then it eradicates many sins from the society. This is practised to maintain the bond between husband and wife. The main reason they give is that most of the man are merchant so they have to travel a lot because of this there is a chance that a woman may go for an extramarital affair if Katna is not performed on her, which is truly a misconception. It's mainly done in the name of tradition and in the name of faith. The reason that it is still prevalent is because of religious heads like Syedna who claims that "It must be done. If it is a man, it can be done openly and if it is a woman it must be discreet. But the act must be done. Do you understand what I am saying? Let people say what they want… What do they say? That this is harmful? Let them say it, we are not scared of anyone."

It does not have any health benefits but only disadvantages like pain, genital sores, excessive bleeding, tetanus, sexual disorder, etc. It can also lead to difficulty in deliveries, urinary infections and even sepsis said Dr Meghana Reddy J, a gynaecologist at Columbia Asia Hospitals Whitefield,

Bengaluru[1360] It has hardly been spoken of because of the fear of ostracization, social boycott, and exclusion from society and another thing which stops them from complaining is that they don't want to drag their loved ones into jail. This practice is done surreptitiously in a clandestine manner to all the girls.

But women have started to talk about it at least in the anonymous name. An online survey was conducted by Sahiyo (NGO) that concludes that 80% of the 400 respondents had gone through the process of khatna. 2 online petitions have been filed till now. In 2011 by Tasleem that was only able to receive only 2000 signatures. In 2017 by Speakout campaign also started its online petition to end FGM in India[1361]. But still, it didn't receive the expected response. In 2015 Mansooma Ranalvi in her interview with NDTV said that she was circumcised when she was 7[1362]. In her Article, she writes " Women, according to this belief, are not allowed to love, they have no right over their bodies; they have no right to enjoy sex, and are considered a source of temptation". There is a short movie also by Priya Goswami 'a pinch of skin' that shows the reality of circumcision.

INTERNATIONAL RECOGNITION AND INDIA

UNFPA and UNICEF initiated a joint programme in 2007 on FGM/C. In 2008, WHO with 9 other United Nations partners issued a statement called: "Eliminating female genital mutilation: an interagency statement" that provided evidence of the practice of FGM of the previous decade.UN General Assembly adopted a resolution to end female genital mutilation[1363]. It violates Article 12 of the UN Convention on the Rights of the Child of which India is a signatory and India is also a signatory to UN Universal Declaration of Human Rights. UN Convention on the Rights of Child states in Article 2 that " States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities,

[1360]Reshma Ravishankar, Curbing women's sexual desire through genital mutilation:Reality of khatna in India, THE NEWS MINUTE (Feb. 08, 2018, 02:50 PM), https://www.thenewsminute.com/article/curbing-women-s-sexual-desire-through-genital-mutilation-reality-khatna-india-76125
[1361] https://www.change.org/p/end-female-genital-mutilation-in-india
[1362] Rina Chandran, No evidence of FGM, India government tells court, appalling activist, REUTERS (Dec. 29,2017,01:32 AM) https://www.reuters.com/article/us-india-women-religion/no-evidence-of-fgm-india-government-tells-court-appalling-activists-idUSKBN1EN0QB
[1363] https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

expressed opinions, or beliefs of the child's parents, legal guardians, or family members." India ratified to all the article of UNCRC on 11th December 1992.

A CASE IN AUSTRALIA

In 2015, 3 persons were convicted by the Supreme Court of Wales for carrying out FGM. This case was mainly looked at by Indians as the members hailed from India. The three persons mother, midwife and the senior clergy (Shabbir Vaziri) were convicted for carrying out circumcision on 2 sisters aged 6 and 7 years old in the year between 2010- 2012. This was a landmark judgement as it was the first case in which a mother and nurse of Bohra Community were prosecuted[1364].

In 2017, a petition[1365] was also filed by Adv. Sunita Tiwari in India for recognition of FGM which was presided by Justice Deepak Mishra, Justice Khanwilkar and Justice Chandrachud but it was later transferred to the constitutional bench to decide the case.[1366]

Justice Mishra said on FGM that "why women have to undergo this practice to make themselves favourable to their husbands. He observed that the practice lacks "gender sensitivity"

The female genital mutilation violates the rights of women in many ways. It violates Section 3(b) of Protection of Children from Sexual Offences, which criminalises penetrative sexual assault. Right to privacy and bodily autonomy is also intruded as it involves a person's genitals. Right to live with dignity and respect also includes the right to live a normal life without deformity. It also infringes Article 39 of the constitution. Article 51A(e) which provides that to renounce practices derogatory to the dignity of women; is also been overlooked. It does not infringe the religious rights because even that is subject to health. This practice is not essential as Dawoodi Bohras living in UK and Australia has stopped performing this practice. . At most, it is against social and moral ethos.

[1364] Bridie Jabour, Australia's first female genital mutilation trial: how a bright young girl convinced jury, THE GUARDIAN (Nov. 13,2015,6: 28 GMT) https://www.theguardian.com/society/2015/nov/13/female-genital-mutilation-trial-young-girl-convinced-jury-australia

[1365] *Sunita Tiwari v. Union of India* (W.P. (C) No.286/2017)https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/411/FGM.pdf

[1366] *Sunita Tiwari v. Union of India* (W.P. (C) No.286/2017)https://www.scobserver.in/court-case/ban-on-female-genital-mutilation

It is an irrevocable crime because a woman is not going to get what she loses after Katna. It deprives her of her sexuality, a natural thing she got. It does not have any coherent reason to let this continue. It is only in practice because of religious gurus like Syedna and it has been fixed in the minds of Bohras as a doctrine that needs to be followed without looking into the consequences. It should not be considered as a religious practise because religion accepts human beings as a creation of God and therefore no one should be given the right to tamper the creation of God. Abortion is considered as a wrong as it tempers with the creation of God. The same way a woman is a creation of God then why to temper with her body. No one should be given a right to take away anything from her body.

MARITAL RAPE

Rape is an unlawful sexual intercourse and a person is said to commit 'rape' when he compels the other to indulge in sexual intercourse in which that person's consent is absent. Marital rape is sexual intercourse by spouse with his better half without her assent or by compel or danger. However, IPC does not recognize Marital rape as a crime because of the exception 2 in the Section 375 and therefore treats women as a property of the husband. Since ages, women have been prey to patriarchal society and in Manu's code women were treated like Shudras and in his opinion, they are just chattel that can be treated as the property as he says in his code:- Her father protects (her) in childhood, her husband protects (her) in youth, and her sons protect (her) in old age; a woman is never fit for independence. Neither by sale nor by repudiation is a wife released from her husband;

Marital rape in cotext of U.K.

These both countries relied on the same doctrine that women are the asset of her husband as it was enunciated by Sir Matthew Hale's Historia Placitorum Coronæ

"the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up to her husband, consent which she cannot retract". Which was considered as if a women gives consent to marriage then she also gives irrevocable consent to sexual intercourse to her husband"

In the case of "R v R [1991] UKHL 12 for the first time recognized marital rape.

Lord Keith :-

The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

R's appeal was accordingly dismissed, and he was convicted of the rape of his wife.

India is one of the 36 counties of the world where marital rape is legal[1367]. Even Nepal and Bhutan explicitly criminalise marital rape. It is illegal in all the 50 US States.

The only difference between a rape and marital rape is that the perpetrator is a husband in the latter and a stranger or a known person except the husband in the former. Because of this, the IPC gives an implied right to a husband that he can get his wife indulge into sexual intercourse without her consent. Does this means that marriage gives an implied right to the husband to enter into sexual intercourse without the consent of his wife? Doesn't it treat women like a property? What will happen of that woman who is raped by a person who is supposed to protect her?

167th report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several members felt that marital rape has the potential of destroying the institution of marriage. They consider that institution of marriage is so pios that assigning marital rape as a crime will destroy its sanctity. But they don't understand that sanctity will be there only

[1367] India Today Web Desk, Marital Rape in India:36 countries where marital rape is not a crime, INDIA TODAY (March 12, 2016 04:06 PM) https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12

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if they respect, understand, and equally treat each other. .If a woman complaints of sexual abuses by his husband even to her acquaintances it is considered not as a social wrong but as a matter between a husband and his wife. Justice Verma Committee recommended removing the exception to Section 375 but was rejected.

And it has to be understood that rape effects every women equally whether she is married or not, or who the perpetrator is. It affects her mentally, physically and emotionally. She may face Post-traumatic stress disorder (PTSD), Depression, dissociation, bruising, broken or dislocated bones, bleeding, fear, loss of control , muscle tension, changes in sleeping patterns, sexual dysfunction, etc. however the effects varies from person to person. It have deeper consequences as it destroys the trust and a woman cannot imagine such a thing at her own house. Even married women may actually find it *more* difficult to escape because they are not just tied with a knot of marriage but also financially. They are dependent on their husband for food,shelter ,clothing and other basic necessities because of which they feel resistant to report.

When a stranger does it, he doesn't know me, I don't know him. He's not doing it to me as a person, personally. With your husband, it becomes personal. You say, this man knows me. He knows my feelings. He knows me intimately, and then to do this to me - it's such a personal abuse. (Finkelhor & Yllo, 1985)

Statistics

No real stats is available as police don’t record the complaint because of absence of law in this regard. “We don’t have documentation because police don’t record the complaints and the data data can come only when it becomes a law. But even if one woman comes forward, it is still an issue.” Indira Jaising

In 2015 at NGO Sneha’s crisis councelling centre in Mumbai of 664 cases in which women complained of domestic violence, 159 also reported inter alia marital rape. According to Dilaasa’s domestic violence data, 60% married women report sexual violence and the most form being forced sex.

The third National Family Health Survey showed that majority of sexual violence reported by women was within marriage through which the degree of sexual violence in wedlock can be inferred.

VIOLATIONS

Right to privacy

" Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard"[1368]

In this case even a easy virtue women was granted right to privacy but a married women was kept out of the arena. It violates bodily integrity and the dignity of a woman

"Every generation has the right to interpret the constitution in contemporary terms. This generation has chosen to interpret the right to life as the guaranteed right to autonomy, which includes sexual autonomy, which alone can make them truly human, capable of taking responsibility for themselves. The goal of all law is to sustain live not to support its destruction. We are in search for a new constitutional morality."Indira Jaising[1369]

Right to Equality

Article 14 reads as Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

However exception 2 of S.375 discriminates just on the basis of marital status with reagard to the rapist, even when the victim may face the same consequences and such a classification is ipso facto arbitrary.

Sree Kumar vs. Pearly Karun "Inter course by a man with his wife during separation- Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment

[1368] State of Maharashtra v. Madhukar Narayan Mardikar, A.I.R. 1991 S.C. 207 (India)
[1369] Lawyers Collective, Speech as on 19 Jan to Justice Verma Committee by Indira Jaising : Indira Jaising (July 22, 2015)https://lawyerscollective.org/2015/07/22/speech-as-on-19-jan-to-justice-verma-committee-by-indira-jaising-indira-jaising/

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of either description for a term which may extend to two years and shall also be liable to fine." Section 376A of IPC.

This section still not takes cognizance of marital rape when wife is not separated and also discriminates on the basis of punishment in context of rape.

Rape is unlawful because it lacks the consent that is the most necessary thing to make it lawful. As this is the essence which lacks in marital rape also, having similar consequence on the victim. "A sexual assault is an invasion of bodily integrity and a violation and self-determination wherever it happens to take place, in or out of marriage bed…. Compulsory sexual intercourse is not a husbands right in marriage, for such a right gives lie to any concept of equality and human dignity."[1370]

SUGGESTIONS

1. The main purpose is to recognize the crimes which are prevalent as they are not rare but are just discussed rarely.
2. Women should also be given financial assistance that can also be done by providing employment.
3. To remove the major hurdle that is to change the attitude of society towards women and that of parents.
4. Publicise the free legal aid providers which work exclusively for women.
5. International treaties should be implemented effectively.
6. There is a need to bring radical change which can be done by educating them right from the school level.
7. The acts or rules which go against the rights of women or which lead to gender inequality should be amended.

[1370] BROWNMILLER SUSAN , AGAINST OUR WILL: MEN WOMEN AND RAPE, (New York: Bantam Books, 1975), p. 422

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RIGHT TO WATER AS A HUMAN RIGHT

- **PULAK SYMON & SIVASHRITA BHARDWAJ**

ABSTRACT

In India, prior to the enactment of the Water Act, 1974, there was no legislation in force to deal with issues relating to water pollution and the rights attached to the use of water. The Easementary Act, however, talked about Riparian Right which is an easementary right to flowing bodies of water. The states in the upstream had upper riparian rights and those in the downstream had lower riparian rights. The states next to the flowing body of water were known as riparian states. It's a known fact that we have a right to pollute water bodies to the extent that our right doesn't encroach upon anyone's right to enjoy clean water. Along these lines, the upstream states weren't allowed to pollute the water bodies to such an extent that the downstream states got affected. This is the precursor to the present day Water Act, 1974. This is an aspect of right to water. If we look closely, this is also a Human Right- every citizen is entitled to use the water bodies and pollute it to the extent that it doesn't adversely affect someone else's rights. In this paper, the authors have tried to explain the right to water from the Human Rights' perspective. The idea behind the paper is to understand why we need water as a human right and also how making it a human right will make water accessible to everyone. Also, will water as a human right also focus on quality and quantity of water? This paper also deals with the Governmental limitations with providing access to clean and safe water to the citizens and how the law keeps up with providing the human right of water to the citizens. The authors have tried to answer questions like what is the relevance of linking human right and water. Why do we need such a right? Are there any benefits? What is the stand of India with regard to water as a human right? Is there a way to stop the water crisis and find a wholesome solution to make water as a human right?

Keywords: rights, water, Human Rights, India, judicial trend, privatization.

INTRODUCTION

The world population has tripled which has subsequently led to a rise of global demand for water, which has increased six-fold. The sources of water are being polluted by big industries by draining out untreated chemical wastes into them. Also, the underground water level is depleting due to overuse. Nearly around 14,000 - 30,000 people die every day from contagious water related diseases. Statistically speaking, if the present trend continues, two third of world's population will be living with serious water shortages or no water at all. The United Nations has realized these concerns and has identified 2003 as the *International year of freshwater* to reassert the UN Millennium Declaration goal "to stop the unsustainable declaration of resources". There should be cohesion between social wellbeing and environmental health. Active participation of all sectors of National and International society is critical for planning and managing the basic needs of water. Right to water should basically mean right to access. Right to access should mean feasibility of quality and quantity water to meet human needs.

UNDERSTANDING RIGHT TO WATER AS A HUMAN RIGHT

Even though "Right to food" is declared to be a "human right" by WHO to protect the rights of the people from hunger, insecurity of food, and malnutrition, more than a billion people are still undernourished, and around 25,000 people die every day out of hunger. Going along the same lines, water is extremely important for survival as well- people can die without water. Keeping this in mind, is the debate of whether acknowledging "water as a human right" worthwhile? As it is, water is anyway an integral part of various fundamental rights and the proper execution of recognizing right to water as a human right requires the political will of a state.

A mere drop of water is so powerful that it can either clean the world by quenching its thirst or contaminate it by bringing death. It has been actively encouraged by various human right institutions that in the absence of "right to water" various other rights like "right to life", "right to development" and so on cannot be recognized to their fullest extent. There are various academic debates that revolve around enhancing the application of sustainable development which aims to allow unrestricted access of water and provide quality water to every household. The debates about

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it are highly satisfactory and accepted globally but the practical usage of these ideas is not much of a success.

The whole idea of linking water as a human right is to understand the emerging approach which is linked to sustainable development. It is a right based approach with its roots connected to the equity principle. The present understanding of human rights with environment is not complicated. The key component here is *environmental protection* which also establishes a relationship between human rights and sustainable development. The growth of an economy cannot stand alone; it has to go hand in hand with the protection of the environment: protection of human health, living standards and most importantly cohesion with the environment.

Human rights cannot be achieved where the quality of the environment is at stake. Every human has a right to a safe and pollution free environment. Without it, humans cannot fully enjoy their other rights. It has been declared that Cape Town has zero water availability and is the first dry town at present in the world. Also, after water, air is the most polluted substance that is vital to the people. The problem needs attention as it damages the standard of human lives.

Even though efforts are being taken by various countries in adopting environmental laws in their constitutions, stricter measures are needed to be implemented. The Executive Director of UNEP, Klaus Toepfer stated, "People who are destroying or polluting our natural environment are not only committing a crime but are also violating human rights".[1371]

The indirect legislations on the protection of environment, various non-binding agreements on the present water crisis are not much of help to combat the menace. Given the grave situation, what will help now is recognizing water as a human right and passing required legislations for the same. The benefits of recognizing right to water as a human right can be:

It will help in stricter implementation of laws and will force various countries to recognize right to safe and clean drinking water as a human right. It will make government directly accountable to ensure that all their citizens have access to quality and ample quantity of water.

It is noted by Sir Richard Jolly (UNDP) that emphasizing human right on clean and safe drinking water has done more than valuing its importance. It grounds the importance basing on social and

[1371] Klaus Toepfer, 57th Session of the Commission of Human Rights, 'The Right to Water' in 2001.

economic rights as well as ensuring access and identifying the obligation of State parties. He also states that "any human right poses three obligations that includes obligation to respect, obligation to protect, obligation to fulfill". Thus, by recognizing right to water as a human right, States will be obligated to respect, protect and fulfill their commitments with respect to protection and preservation of water bodies.

If right to water is recognized as a human right, it will aid in focusing and solving the conflicts over the usage of shared watercourses with an integrated and cooperative approach. At present, nearly 3000 shared water basins are at conflict according to the United Nations. The issues revolve on the stream of water being either upstream or downstream (because that helps in determining the riparian rights). The most difficult cases involve the competition on scarce resources found in the water bodies.

Recognizing right to water as human right will help in shifting policies that will eradicate poverty as well as enhance sustainable development. It can be estimated that the present urban population will double in the next 25 years which leads to concern over meeting the basic human needs. Reliance on water supplies is failing to meet the demands as developing countries do not have enough economic resources to invest. This calls for reintegrating water use in consonance with keeping up with environmental well-being as well as ecological health.

INDIA'S STAND TOWARDS RIGHT TO WATER AS A HUMAN RIGHT

India's access to water is in a dismal state as it affects the lives of many people. In India, nearly 76 million people lack access to fresh water due to which various illness such as diarrhoea has affected people. States like Rajasthan have been facing water scarcity for many years now. Recently, cities like Chennai have started facing water scarcity as well. It is estimated that within a few years, Chennai will run out of ground water. The Government has been taking baby steps in combatting this issue. Needless to say, they aren't enough.

The Indian Constitution does not state much about access to water as a fundamental right but by applying Article 21 various courts have interpreted "right to life"[1372] to include "right to water". The Indian Courts have taken steps to recognize right to water as right to life. In a recent case of 2004, the Mumbai High Court has held that right to water is a fundamental right and the slum

[1372] Article 21, The Constitution of India.

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dwellers who have illegally occupied huts cannot be deprived of their fundamental right to water[1373]. There are various legislations in India, the primary being the Water (Prevention and Control of Pollution) Act, 1974 which check and control pollution of water through various guidelines and restrictions. The Government of India in the political level has also taken up various initiatives to provide clean water but it lacks clear holistic human right approach and can be seen rather just as a piecemeal approach.

In India, as per the statistics, 85% of the rural population and 50 % of the urban population depends on ground water as the main source of water supply.[1374] In the State of West Bengal, the access to ground water has become a grave concern as arsenic and fluoride have contaminated 38% of the groundwater level, thereby creating inhumane conditions to have access to clean and safe water.

Rural population depends on surface water which the Joint Monitoring programme of WHO has declared contaminated. The key cause of detoriating water quality is the faecal contamination of water and it has also been reported that one third of the rural population uses contaminated water in their day to day activities.[1375]

Providing access to safe and clean water to people has become a business for some now-a-days. People in urban areas with the pipeline services have access to safe water but in various places, situation is severe and people have to rely on informal ways to get access to safe and clean water. There are 'water mafias' who sell water at a spiked price that is sourced illegally from the municipal water supply. In Delhi, especially in the resettlement sites, where the people cannot collect water from the Delhi Jal Board, they have to rely on the water ATMs which means that they must be financially sound to purchase water. In Kolkata, informal vendors supply water to the slums from public taps for which they charge one rupee for each litre.

Right to safe and clean water also affects right to sanitation as they are interlinked. One of the objectives of the Swacch Bharat Abhiyan, which is a major project for making India clean and pollution free, is zero open defecation. This means, no citizen should defecate in the open, thereby implying that every citizen must have access to toilets and restrooms. For this project to succeed,

[1373] Pani Haq Samiti v. BMC.
[1374] Available at www.who.int/water_sanitation_health/monitoring/water.pdf, last accessed on 28th April 2020.
[1375] Bain R, Cronk R. Faecal Contamination of Drinking water in Low- and Middle-Income Countries: A Systematic Review and Meta-Analysis.

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it needs a lot of water. Thus, both of these rights are being affected due to non-availability of usable water and must be addressed and measures must be taken to achieve to the said human rights. It has also been understood that the water quality becomes below standard rural and tribal areas (as they lack proper settlements) whereas in urban areas, formal residences are given better quality services as compared to informal settlements. But this unfair treatment and the amalgamation of factors will end up in a multiplying effect. For example, disabled people who do not have access to proper sanitation facilities suffer a lot. Similarly, females suffer more than males as lack of proper sanitation affects their menstrual hygiene.

The Government has failed in providing access to safe and clean water in the rural areas which make up 67.5% of the total population. Access to piped water from the municipality is given to only 31% of rural people. Rest of the people have to get water from various sources like tube wells, bore wells, rivers, and lakes etc. which, in most cases, do not have clean water. As a far reaching implication, women who have to travel long distances to fetch drinking water have seen to be easy targets for criminals. There are sexual violence cases on women in the hilly terrains of Manipur where women went to fetch water. If looked at from this perspective, lack of access to water puts the safety of women in jeopardy, thereby giving rise to a number of cases. This, again, apart from being a criminal issue is also a human right issue.

Due to various dams, railways, industrial projects in the rural areas, villagers' only source of water supply gets affected as the water gets polluted because of the chemicals released into the water bodies. For instance, various villages near the Thoubal Multipurpose dam have stopped using the river as the chief source of drinking water and are having to rely on paid water from the various adjoining villages.

THE APPROACH OF THE INDIAN JUDICIARY

Clean water has become the need of the hour. The judiciary has taken various bold steps through various judgments bolstering the right to water as a human right.

The Constitution of India does not provide express provisions relating to the right to water but it has provisions on protecting the environment. Some of the provisions which deals with it are:

Article 21 of the Constitution of India deals with "right to life". It can be seen that the domestic courts have set a benchmark via various judgments by recognizing 'right to water' as 'right to life'. This, when extended, makes right to water a human right.

There is a mention of the word 'environment' in the Directive Principles of the State Policy. It needs to be emphasized here that the directives enlisted in Articles 39, 47, and 48A are not for just a protectionist policy but are also measures initiating protection of the polluted environment. Also, under Article 51A, it's a Fundamental Duty of every citizen "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures".[1376]

Article 262[1377] of the Constitution of India deals with the interstate dispute of river water. It is stated that the Supreme Court or any domestic Court cannot exercise jurisdiction on it.

Various judicial decisions have interpreted 'right to water' as a human right. With the enactment of the Environment Protection Act, 1986 and Prevention and Control of pollution Act, 1974, and the Water Act, 1974, the issue of water pollution has been addressed and further contamination and pollution is being checked.

The apex court held in the landmark case of *Narmada Bachao Andolan v. Union of India*[1378] that "it is the State's duty to protect and provide safe drinking water to all its citizens".[1379] The Court realised the need of safe drinking water for the people and said that it is a part of right to life as enshrined in Article 21 of the Constitution.

In 1984, in the *Bandhua Mukti Morcha v. Union of India*[1380], it was held that "the right to access safe and portable water is guaranteed under Article 21 of the Constitution".[1381]

[1376] Article 51A (g), The Constitution of India.
[1377] Article 262 (1) of the Constitution of India reads as "Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter State river or river valley".
[1378] (2000) 10 SCC 664.
[1379] *Id.*
[1380] AIR 1984 SC 802.
[1381] *Id*.

In *A.P Pollution Control Board II v. Prof. M.V. Nayudu*[1382] it was held by the apex Court that safe drinking water is the first importance in a country.

It was held in the *Vellore Citizen Welfare Forum v. Union of India*[1383] that "the constitutional and statutory provisions are the safeguards to protect the rights of the citizens in accessing fresh air, clean and safe water as well as pollution free environment".[1384]

The Supreme Court realised that even after 60 years of Independence, the right to safe and clean water is not accessible by every citizen. This is stated in the case of *Voice of India v. Union of India*[1385] wherein the Court mentioned that special executive attention should be given so that everyone has access to their fundamental right of clean water.

Judiciary is actively dealing with various cases to solve this problem. India being a developing country does not have much revenue to spend on preservation of water and the doubling of population in the recent times has created problems. It is time that strict measures are incorporated and access to proper water is provided as it will help the country to meet with the commitments of Sustainable Development Agenda of 2030.

THE MODERN TREND OF PRIVATIZING WATER

Over the years supply of water has turned out to be a new business which is underpinned by the term "market environmentalism". The idea behind it is "to bring a positive environmental outcome through introduction of markets, organisations".[1386] This idea has been propounded by various academicians and policy makers during this vulnerable situation where water insecurity as well as environmental insecurity is taking a toll on human lives.

Many theorists propose that the only solution to water insecurity is market environmentalism. They believe that using market techniques for example, increased pricing of water, will help minimise the use of water consumption and this will lead to creating a balance between the ecosystems.

[1382] (1999) 2 SCC 718.
[1383] AIR 1996 SC 2718.
[1384] *Id*.
[1385] MANU/SC/0877/2010.
[1386] Anderson and Leal, Free Market Environmentalism, 2001, page 23.

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There are opponents to this theory who are against the idea of privatization and pricing of water. They believe that market environmentalism is nothing but the repetitions of a capitalist trends of "accumulation by dispossession".

There are five trends of market environmentalism, namely:

Privatization of ownership and management

Commercialization of water management organization

Environmental valuation and pricing of water

Marketization of exchange mechanisms

Neo liberalization of governance

One of the prime justifications of privatizing water is that nearly one billion people all over the world still fight for access to safe and clean water.[1387] Proponents of market environmentalism argue that privatization can help to meet various challenges like human water security, underinvestment, overstaffing, and unresponsiveness to the need of the poor. It is argued by the private companies that it is unethical to not allow them to work if they can work better than what the government is performing with such failure, particularly with providing access to safe and clean water to the poor.

In India, privatization of water started in the year 1997. Water as a private commodity has been in existence in India for a long time now. There are companies like Radius Water Limited that have bought rights of rivers like the Shivnath River (presently in Chhattisgarh). The idea behind the State government to sell the rights of the river is to stop the water woes of providing water to the industries. State governments and various other local bodies appreciate and assist the private parties to take part in the water and sanitation process by inaugurating various opportunities like JNNURM and UIDSSMT under public private partnership.

The acceleration drive to privatize water was started in the year 2002 when Government of India adopted various reforms suggested by International Financial Institutions like World Banks and

[1387] Gilbert, Water under pressure, 2012.

Asian Development Banks and allowed private bodies to participate through the National Water policy.

Even though privatization has its boon but it attaches with it a saga of failures. There are various private companies in India that have failed to provide quality water services. For example, JUSCO, a flagship company of the TATA group, being the largest water supply developer, has failed to deliver services in various states. Even the Mysore city corporation has penalized the company for various lapses in its water project.

CONCLUSION

Water is a quintessential substance in our life. It can also be termed as the 'elixir of life'. Safe and clean water is still a dream for many people in the country. The poor don't even know tha there is a right to water that they are entitled to. They are devoid of their basic human right to water. Even though there are various legislations and judgements claiming water as a human right, half of the population is still suffering the menace of water scarcity. It is time that stricter policies are enacted and proper monitoring is done. It is necessary to understand the scenario of where lapses are made in not providing their right to water. Government should make it their prioritized goal (like sanitation) to provide safe water to every household, irrespective of the kind of area. This will help in the better development and nurturing of people which will ultimately lead to a better and safer environment for all and economic development. People should also be aware about their right to water. Sensitization campaigns should be organised to teach the uneducated about what water to take for their daily uses. This will help to prevent various diseases like diarrhoea and various water borne diseases.

Also, privatization of water is necessary but there should be limits to it so that the private companies do not start dictatorial rule on people by increased prices, undermining water quality and not being accountable to the consumers.

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UNCONSTITUTIONALITY OF EXTRAJUDICIAL EXECUTIONS

- SWASTIKA MUKHERJEE & SOHOM NANDI

ABSTRACT

This article revolves around the extrajudicial execution by the public officials who rather than hawking for the evidences has shot dead their suspects in the first innings, and therefore such execution has taken a formation of a bedrock of Indian Constitution for decades. In the name of securing the integrity and security of the nation, thousands of innocent lives are being executed, by such public officials thus disturbing the norms of Indian democracy which has been protected under our written constitution. Constantly living in an environment of fear, hostile system and powers that lies with the gun and failure of the State to safeguard rights of its citizens has made Justice a farfetched idea and thereby it has weakened faith in the Criminal Justice System in the minds of the common people.

INTRODUCTION

The Indian Judiciary being an important support system for the preservation of the Rule of Law and in the delivery of justice, luxuriate in taking the honour and liability of acting as the custodian and the conscience keeper of the Constitutional vision, ideology and the cherished goals prescribed for the State. Controversial and critics have alleged that the police create fake encounters as opportunities to kill suspects. Many a time, it has been duly observed that for the sake of their own benefits like promotion and others many police officers tends to execute such fake encounters. Instances of fake encounters, the extrajudicial execution by the police in exercise as a right to their self-defence in the post-independence period, are reported well in media and are well glorified by public at large. The law permits police officers to kill someone escaping by committing an offence punishable with death or life imprisonment but several times it has been detected that encounter killings are also executed by police although the above foresaid condition are not fulfilled.

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The law enforcement agencies are expected to uphold the spirit of the law at all times. Therefore, the theory that those who cannot be taken care of within the law should be dealt with outside the law is preposterous and, not to mention, has no place in the world of law enforcement. The worrisome part is the threat to put an alleged criminal or an ordinary suspect in a "crossfire" situation as part of some ulterior motive. This kind of execution or These killings have remained where they are without any form of legal apparatus for justice."

UNDERSTANDING THE ARTICLES IN DEPTH WHICH ARE RELEVANT TO EXTRAJUDICIAL EXECUTIONS

ARTICLE 14

Article 14 read as "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". In **State of West Bengal v. Anwar Ali Sarkar[1388],** Chief Justice Patanjali Shastri held that, *equality before law is corollary to equal protection of law and violation of either would automatically violate the other one*. Now, equality before law is an aspect of Rule of Law. In **Indira Nehru Gandhi v Raj Narayan[1389]**, the Supreme Court held that *the rule of Law embodied in Article 14, is a basic feature of the constitution, and thereafter it cannot be destroyed even by 368th Amendment.* Encounter killings should be examined independently as they affect credibility of Rule of Law. The demand for the instant killing of the accused from all corners of the country created the public opinion for the abandonment of the rule of law (Article 14) that appears to have led to this kind of fake encounters. Although the Bench clarified that they were aware of the difficult and delicate task that the police are expected to perform in tackling crime, it emphasised that even criminals should be brought to equity by following the rule of law.

ARTICLE 20(3)

[1388] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75
[1389] Indira Nehru Gandhi v Raj Narayan, 1975 Supp SCC 1

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Clause (3) of Article 20 read as that "No person accused of any offence shall be compelled to be a witness against himself." This principle is based on the maxim "nemo teneteur prodre accussare seipsum", which essentially means "NO MAN IS BOUND TO ACCUSE HIMSELF."

The Fundamental Right ensured under Article 20(3) is a defensive umbrella against tribute impulse for individuals who are accused of an offence and are constrained to be a witness against themselves. The arrangement acquires from the Fifth Amendment of the American Constitution which sets out that, "No person shall be compelled in any criminal case to be a witness against himself", same as referenced in the Constitution of India epitomizing the standards of both English and American Jurisprudence. This libertarian provision can be associated with a basic element of the IPC dependent on the lines of Common Law that, "an accused is innocent until proven guilty" and the burden is on the prosecution to establish the guilt of the accused; and that the accused has a privilege to stay quiet which is dependent upon a lot more extensive right, against self-incrimination.

The inclination of Indian lawful framework shows distrust of the police framework. This is the explanation admissions of a charged is just acceptable whenever recorded by a Magistrate as per an intricate methodology to guarantee that they are made voluntarily. protection is additionally accorded by the provisions of The Indian Evidence Act. This protection is accessible to each individual including people as well as organizations and consolidated bodies.

ARTICLE 21

Article 21 reads as: "No person shall be deprived of his life or personal liberty except according to a procedure established by law."

Right to life is undoubtedly the most fundamental to our very existence as all other rights add quality to the life. In the case of **Kharak Singh v. State of Uttar Pradesh**[1390], it was held that *the meaning of "life" is more than mere animal existence therefore the provision embodied in art 14 does not allow any destruction of organ or body parts of a human being which the soul communicates with the outer world*. Even State cannot violate right to life and obligation to follow

[1390] Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295 (India)

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procedure prescribed by the law for criminal investigation which is embedded in the Constitution under Article 21 as the Right to Life and Personal Liberty. It is fundamental, non-derogable and is available to each and every individual. In **Bandhua Mukti Morcha v. Union of India**[1391], Bhagwati J, stated that it is *the fundamental right of everyone in this country to live with human dignity free from exploitation*. killing of suspects in fake encounter by the police is clear violation of the right to life guaranteed in Article 21 of the constitution and the defence of sovereign immunity does not apply in most of such cases.

INTROSPECTIVE AND CRITICAL ANALYSIS ON HOW THE EXTRAJUDICIAL EXECUTION CASES VIOLATES THE ABOVE MENTIONED ARTICLES OF THE INDIAN CONSTITUTION

In the landmark case of **Peoples' Union for Civil Liberties vs. The State of Maharashtra**[1392], observing the expanding maltreatment of state power as Fake experience occurrences, PUCL a non-political association documented a PIL in the Bombay high court for determining procedure to examine encounter cases in the nation. Not happy with High Court decision the case went to Apex Court on a special leave appeal (SLP).

The principle conflict of the petitioners was that it is conceivable that a portion of the people who were shot dead were criminals, however there are additionally some who were honest and to demonstrate a similar they featured the instance of Aby Sayma assumed name Javed who was a casualty of the experience stage oversaw by the police as claimed by them. PUCL presented that in each experience where the criminal sought to be arrested died and all that the police said was that the criminal slaughtered had attempted to assault the cop and was along these lines destroyed and announced dead at the medical clinic. Additionally, it was presented that the encounters violate the right to life ensured under Article 21 of the Constitution and therefore it is important to coordinate an independent inquiry into these incidents.

'The Supreme Court inter alia dealt with the determination of procedure to investigate encounter cases and held that the need to lead independent investigations concerning extra-judicial killings

[1391] Bandhua Mukti Morcha v. Union of India, 1984 (3) SCC 161
[1392] Peoples' Union for Civil Liberties vs. The State of Maharashtra, CDJ 2014 SC 831

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and to have legitimate guidelines exhorting the equivalent is critical. The court additionally perceived the way that the Police in India has a troublesome and sensitive task upon themselves to perform as a result of the solid nearness of wrongdoing in the nation'

The Supreme Court in the above mentioned case observed that: "*Article 21 of the Constitution of India guarantees 'right to live with human dignity'. Any derogation of human rights is viewed diligently by this Court as right to life is the most precious and crucial right guaranteed by Article 21 of the Constitution. The guarantee by Article 21 is available to every individual of the society and even the State has no authority to violate that right."*

Article 21 of the Constitution of India stipulates that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. It means that if the procedure established by law is followed, deprivation of life or personal liberty is not in violation of Article 21 of the Constitution of India.

In the ongoing **Hyderabad encounter case**, the angle that must be seen is with respect to whether there are conditions justifying appropriateness of Section 46(3) of the CrPc. On the off chance that such conditions exist, executing of all the four charged by the police is by keeping due procedure set up by law as mulled over under Article 21 of the Constitution and can't be treated as a fake counter.

The Supreme Court in the said case watched: "*We are not unmindful of the way that police in India needs to play out a troublesome and sensitive task, especially, when numerous hard-core criminals, similar to, extremists, terrorists, drug peddlers, smugglers who have sorted out packs, have taken solid roots in the public arena yet then such criminals must be managed by the police in a proficient and powerful way in order to carry them to equity or justice by adhering to rule of law. We are of the view that it would be helpful and successful to structure suitable rules to re-establish confidence of the individuals in police power or force. In a society governed by rule of law, it is basic that extra-judicial killings are appropriately and independently investigated with the goal that equity or justice might be done."*

Rule of law is the fundamental principle of governance of any civilised liberal democracy. Article 21 of the Constitution of India stipulates that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. It implies or indicates that if

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the procedure established by law is followed, deprivation of life or personal liberty is not in violation of Article 21 of the Constitution of India. This essentially implies that an individual's personal liberty or life can be taken away if there is a procedure established by law and otherwise not.

At the point when an individual is claimed to have carried out a crime, the police have the ability to enlist a FIR under Section 154 of the Criminal Procedure Code (CrPc) and initiate investigation. During the time spent conducting investigation, the investigation officer has the ability to arrest the accused. Section 46 of the CrPc specifies with regards to how an arrest must be made. Sub-Section 3 of Section 46 considers that nothing in the Section gives a right to cause the death of an individual, who isn't accused of an offense punishable with death or imprisonment for life. It impliedly indicates that a right to cause demise of an individual is given to the cop in the event that an individual is accused of an offence punishable with death or with imprisonment for life when he is attempting to evade the arrest.

The landmark case of **Satyavir Singh Rathi, Assistant Commissioner of Police and Ors. V. State**[1393] through Central Bureau of Investigation is in such manner,where the police had encompassed a vehicle and fired indiscriminately at it till two of the inhabitants inside were dead, and the third was grievously hurt. For the situation, the court had held the police personnel punishable under Section 302 of the IPC and dismissed their guard as they had seen it not as in accordance with good faith or in due discharge of their obligation. The court condemned the state government for not starting any examination of the case.

Thus it can be well understood the due process of law was not adhered to in this case. A person's personal life and liberty can only be taken away or deprived of only in accordance with the procedure established by law as per article 21 of the Indian constitution. Indiscriminate firing by the police without adhering to the procedure established by law is clearly violative of article 21 of the Indian constitution and also contradictory to the principle of rule of law.

Prof. Dicey's Rule of Law revolves around the supremacy of law which is free from any kind of arbitrariness. No provision in the Indian law directly authorizes an official to encounter a criminal irrespective of the grievousness of the crime committed by that person. The police should always

[1393] Satyavir Singh Rathi, Assistant Commissioner of Police and Ors. V. State, 1997 (42) DRJ 565

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be held liable under the law for their acts and in no way can the heinousness of the crime committed by the accused can provide a defence to them. According to this concept of Rule of law, Constitution is the result of ordinary law of land and therefore the Court while commenting on this aspect of Rule of Law, observed in the case of **Nandini Sundar v. State of Chattisgarh**[1394] that "*it is the primary responsibility of every organ of the State to function within the four corners of constitutional responsibility*". Moreover, Dicey's first principle of the rule of law was that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct violation of law established in the ordinary legal manner before the ordinary courts of the land' And hence the laws under which people are condemned should be passed in the correct legal manner and that guilt should only be established through the ordinary trial process. Natural justice being an expression of English common law, and involves a procedural requirement of fairness and one of its fundamental principle includes Audi alteram partem that is There is an obligation on the part of the deciding authority to give notice to an individual before taking any legal action against him. In this cases of extrajudicial executions, the suspect is executed well before he has been heard in the trial process or given a chance of proving himself innocent of the crime he has been alleged of.

One of the well-known case in regard to this extrajudicial encounters includes the case of **Sohrabuddin Sheikh fake encounter case**[1395], where Sohrabuddin was found to be associated with a terror group. The police claimed that the group had some collaboration with the Pakistani spy agency ISI, who was out to assassinate Modi, the then chief minister. On the day of capturing Sohrabuddin, the police alleged Sheikh fired at the police when they tried to capture him, leaving them with no option except to shoot him dead. In **Maneka Gandhi v. Union of India**[1396] that supreme court held that *for deprivation of right to life and personal liberty under Article 21 there must two ingredients that is supremacy of law and the procedure establish by such law must be just, fair and reasonable.* Moreover, Sohrabuddin was shot dead by the police before even giving him a chance of fair trial and thus violating the principles of Natural Justice. However, the witnesses present at the spot of this fateful event claimed that it was murder and obviously a fake encounter which the police wrapped the entire story to be their act of private defence. The

[1394] Nandini Sundar v. State of Chattisgarh, 1997 (42) DRJ 565
[1395] "Sohrabuddin Encounter Case: All 22 accused acquitted". The Times of India. 21 December 2018. Retrieved 21 December 2018.
[1396] Ibid.

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judgment, when read as a whole, gives a clear understanding that the Learned Judge was bent upon acquitting the accused by totally disregarding evidence, oral and documentary, placed before him. His way to go is to reject more or less everything that is inconvenient and to make a farcical story of the killings by the accused in holding that there was no evidence to link the accused to the wanton killings.

Another case is the case of **Ishrat Jahan case**[1397],the case which was likely to be buried without any court proceedings. After finding the suspect to be linked with few of the terrorist who plotted to kill the then chief Minister of Gujrat, the police shot the suspect to death and again enveloped the whole fake encounter as their act of private defence. The judge said that since the government has not sanctioned their prosecution, their discharge pleas are allowed and proceedings against them will be dropped in the case.

In **Munshi Singh Gautam v State of MP**[1398], the court held that *the exaggerated adherence to and emphasis on the foundation of confirmation past each sensible uncertainty by the prosecution, now and again in any event, when the prosecuting offices are themselves fixed in the dock, overlooking the ground real factors, the reality circumstance and the strange circumstances of a given case, as in the current case, often results in miscarriage of justice and makes the justice-delivery system suspect and fragile*.

"In **Prakash Kadam vs Ramprasad Vishwanath Gupta**[1399], 2011, the Supreme Court observed that extra-judicial executions by the COP are nothing but cold-blooded murders, and those committing them must be given capital punishment, treating them in the category of 'rarest of rare cases'. In paragraph 26 of that judgment, it was observed "*Trigger happy policemen who think they can kill people in the name of 'encounter' and get away with it should know that the gallows await them."* the police should bear by the basic principle that a person is innocent until proven guilty. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they des There is a presumption that an accused is innocent until proven guilty"

The legal burden of proof rests on the prosecution to prove that the accused is guilty of the offence by adducing credible evidence and proving the same before the court of law. The criminal justice

[1397] Desai, Darshan (9 July 2013). "Ishrat killing a fake encounter, says CBI". The Hindu. Retrieved 13 February 2016.
[1398] Munshi Singh Gautam v State of MP, 2005 (9) SCC 631
[1399] Prakash Kadam vs Ramprasad Vishwanath Gupta, (2011) 6 SCC 189

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administrative system in India is based on this principle. Now, article 20(3) of the Indian constitution speaks about self-incrimination which is a right of the accused. The guarantee of presumption of innocence bears a direct link to the right against self-incrimination. Now what happens in the scenario of extra judicial executions is that when the police officer assumes that the suspect is guilty but there is no such evidence that can be used against him then the police personnel, if he fails to extract confession from the accused kills him cold bloodedly and as a result it is contradictory to the guarantee of presumption of innocence. In this way the police use the mode of fake encounters as an opportunity to kill suspects against whom there is no evidence to prove the guilt.

The court observed in **Om Prakash & Ors vs State Of Jharkhand & Anr**[1400] on September 26, 2012: "*Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to state terrorism*."

"Moreover, the outcome of the **Ishrat Jahan**[1401] **and Sohrabuddin Sheikh fake encounter case**[1402] throws a gloomy light on the capacity of India's criminal justice system – police, prosecution and judiciary – to secure equity for wrongdoing in which the accused are powerful politicians in the society and persons in uniform. The problem is not the fact that there are certain members of the general public who have been given the duty to safeguard everyone else and given firearms to do so, the issue is the enlargement of that duty into an entitlement of being able to take steps not legitimized by the government or the law in the name of protection of the general public regardless of whether it amounts to the killing of an innocent or not.

"Article 21 of the Constitution guarantees the Right to Life and Personal Liberty except according to procedures established by law. It means that every person has the right to be heard in a fair trial and obviously with the procedure establish by law and through means of circumstantial evidences and other evidences to come to a conclusion that is judgement obviously after the Judge reached the final verdict, before he is being punished or convicted of a crime that he is being charged of. Fake or staged encounters authorizes the police officials to play the role of a judge and executioner

[1400] Om Prakash & Ors vs State of Jharkhand & Anr, (2012) 12 SCC 72
[1401] Ibid.
[1402] Ibid.

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and leads to a direct violation of Article 21 as the procedure established by law is not followed in such a case".

These encounter killings are instrumentally designed knowing that the targets are people who do not possess the capital nor influence to activate the Justice system. In another case of **Olga Tellis and others v. Bombay Municipal Corporation and others**[1403]**,** 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 important that the procedure prescribed by law for depriving a person of his fundamental right must conform the norms of justice or equity and fair play.*

CONCLUSION

Police personnel totally avoid and dodge the lawful methodology or procedure, as they truly mean knocking off somebody without a preliminary trial. Thus, such encounters are absolutely unconstitutional. There might be a situation wherein an innocent person might be a victim of such extra-judicial execution. In a general sense fake encounters affect the society as a large because you never know that you might be the next person to be shot down by the police as a suspect irrespective of the fact that you were innocent.

Fake encounters also indicates the lack of faith or trust in the Indian judicial system and is obviously not the way to go forward. Police themselves cannot be acting as the investigator and judge at the same time.

Cops regularly legitimize or justify encounters by saying that there are some feared lawbreakers and dreaded criminals against whom nobody will set out to give evidence, thus the best way to manage them is by fake encounters. The issue, in any case, is this is a perilous way of thinking, and can be abused or misused. Take an example, if a businessman wants to banish a rival businessman, he can give a bribe to some unethical policemen to bump off that competitor in a fake encounter after having him declared a terrorist.

[1403] Olga Tellis and others v. Bombay Municipal Corporation and others, 1983 3 SCC 545

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We would like to conclude by saying that fake encounters are clearly unconstitutional and clearly violates rule of law and mainly article 21 of the constitution of India. The judiciary needs to take precautionary measures against this as someone cannot take law in his/her own hands.

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ANALOGY BETWEEN SYRIA AND ANIMAL FARM

- **SAMARTH AGARWAL**

COMPARISON BETWEEN ANIMAL FARM AND SYRIA

Animal Farm by George Orwell is biting satire of totalitarianism which was written in the wake of World War II and published during the rise of Soviet Russia. The theme of animal farm resonates with the situation in various countries. For the purpose of this assignment, an effort has been made to draw similarities between the Animal farm and Syria.

There are a no. of similarities between Animal farm and Syria which have discussed below:-

1. **Rewriting of Laws by the Government**- Changing the laws when it fights the rulers is a commonality between both Napoleon and the president of Syria. In Animal farm, the Seven Commandments that were established during their independence were reconfigured by the pigs to satisfy their needs and justify their behaviour. For example, One of the Commandments that stated, "No animal shall sleep in a bed" was amended to "No animal shall sleep in a bed with sheets" by the pigs so that they could live in the farmhouse and sleep in the beds. Similarly, in Syria, several laws and regulations have been imposed by the government to restrict the access of organisations to help the citizens and ensure that the humanitarian response benefits the abusive state apparatus.[1404] The Syrian govt. has time and again rewritten laws for its personal gains by withdrawing the access or shutting down the humanitarian organisations if the govt. feels threatened.

2. **Adopting Blame Game Technique**- Blame game has been a tactic used by both Napoleon and the President of Syria for escaping the liability from what has happened in their

[1404] Sara Kayli, Rigging the System: Government Policies Co-Opt Aid and Reconstruction Funding in Syria, HUMAN RIGHTS WATCH (July 28, 2019, 4:54 pm), https://www.hrw.org/report/2019/06/28/rigging-system/government-policies-co-opt-aid-and-reconstruction-funding-syria.

country. In Animal farm, Napoleon blames Snowball for everything wrong that happens on the farm, thus making Snowball a villain in the eyes of the other animals. For example, One day, the windmill topples due to a heavy storm. Napoleon blames Snowball for the falling of the windmill by sabotaging it rather than accepting that the walls of the windmill were thin due to which it fell. Similarly, in Syria, time and again the Syrian government has pointed the finger of blame and hypocrisy at western countries, thus trying to come out with clean hands. For example, the Syrian government accused Western nations of economic warfare and sanctions during Syria's fuel crisis without accepting its own economic malfunction and corruption.[1405]

3. **Shortage of Food-** Another commonality between the Animal farm and Syria is the shortage of food. In Animal farm, as time passes, food grows scarce and all animals receive reduced rations. For example, in the bitter, stormy winter month of January, the Animals fall short of food and began to go hungry. Similarly, the long-running civil war, large-scale hostilities, mass displacement and depressed economy are the primary reasons for the food shortage faced by Syria. According to the nationwide Food Security and Livelihoods Assessment conducted by WFP in 2019, there are 7.9 million people who are unable to meet their food needs and a further 1.9 million people at risk of food insecurity.[1406] The condition is so poor in Syria that many families are forced to cut down from three meals per day to two and purchase food on credit.

4. **Intimidating the citizens**- Napoleon uses violence in Animal farm for achieving various means and ends, like consolidation of power, creating fear in other animals, manipulating

[1405] Aron Lund, The blame game over Syria's winter fuel crisis, THE NEW HUMANITARIAN, (March 5, 2019, 1:09 am), https://www.thenewhumanitarian.org/analysis/2019/03/05/blame-game-over-syria-s-winter-fuel-crisis.
[1406] Lisa Schlie, Food Shortages, Hunger Growing in War-Torn Syria, WFP, (January 18, 2018, 02:50 PM), https://www.voanews.com/world-news/middle-east-dont-use/food-shortages-hunger-growing-war-torn-syria-says-wfp.

their behaviour and eradicating chance of potential opposition to his leadership. For example, Napoleon assembles all the animals and force four pigs who had questioned him to confess that they have secretly been taking order from Snowball and orders the dogs to rip the pigs' throat out. The situation is same in Syria where President Bashar al-Assad led government has time and again been accused of indulging in "Indiscriminate and disproportionate aerial bombardment, shelling and using chemical weapons which has caused mass civilian causalities with the view to spread terror among the citizens and intimidate them. For example, in 2018, Dozens of Syrian were choked to death after an alleged chemical attack done by the Syrian govt to threaten its people.[1407]

5. **Shutting the Protesters**- Napoleon in Animal farm did not forgive its dissenters and ensured that they suffer for the wrong that they had committed by protesting against the ruler. The three hens who had attempted a rebellion over the eggs, a goose who had secreted six ears of corn, a sheep who was urged by Snowball to urinate in the drinking pool and two other sheep who had murdered an old ram confessed their crimes however, Napoleon did not forgive anyone and ordered the dog guards to kill them. Similarly, in Syria, the security and intelligence services, Mukhabarat have tortured and ill-treated hundreds of protesters, dissenters across the country since mid-March 2011. For example,[1408], Muhammad Habbas, a peaceful protester was tortured for 12 days until he wrote a fictional confession to planning a bombing.

6. **Imposing Restrictions on citizens**- In Animal farm, not only were the animals restricted by the seven commandments, but were also restricted in several other ways like restriction to sing "Beasts of England" and to have full rations. Similarly, in Syria, a lot of restrictions are imposed on the citizens by the govt. Although the Constitution provides for freedom of

[1407] Anne Barnard, Inside Syria's Secret Torture Prisons: How Bashar al-Assad Crushed Dissent, THE NEW YORK TIMES (May 11, 2019, 15:10), https://www.nytimes.com/2019/05/11/world/middleeast/syria-torture-prisons.html.
[1408] Syria: Rampant Torture of Protesters, HUMAN RIGHTS WATCH (April 15, 2011 10:05PM), https://www.hrw.org/news/2011/04/15/syria-rampant-torture-protesters.

religion[1409], the Government restricts this right and discriminates on the basis of religion. For example, the Jehovah's Witnesses face severe discrimination by the Government. Homosexuality is also a crime in Syria and a person is prohibited to have such relations.[1410] Right to freedom of movement is also absent in Syria and the Syrians cannot leave the country without an "exit visa" granted by the authorities. The press and internet censorship in Syria are extensive and all the websites criticising the govt are banned by the govt.

7. **Class stratification by the Government-** Animal Farm is a classic example on development of class tyranny and human tendency of maintaining and re-establishing class structures. In Animal farm, the division between intellectual and physical labour became a new set of class divisions and the pigs or the "brainworkers" as they claimed themselves to be, manipulated the society to their own benefit. Similarly, in Syria, the seeds of class divisions have been intentionally sowed by the regime of Bashar al-Assad. The govt has always targeted the economic infrastructure in non-government controlled areas where the civilians live and have ensured a better life filled with all amenities in the government-controlled parts of the country.[1411] Just like the pigs in animal farm, the govt has neglected the common people and have been apathetic towards their economic destruction due to the bombarding while ensuring regular salaries and services to the govt officials.

8. **Use of Propagandist-** In Animal Farm, the silver-tongued pig Squealer abuses language to justify Napoleon's actions and policies to the proletariat by whatever means seem necessary. For example, When Napoleon changed his mind about the windmill, Squealer told the animals that their leader had used his apparent opposition as a manoeuvre to oust the wicked snowball and serve to advance the collective best interest. Similarly, in Syria,

[1409] Article 35, The Constitution of Syria, 2012.

[1410] Article 520, The Syrian Penal Code, 1949.

[1411] Mark Mackinnon, Syrian class divisions growing during civil war, helping Assad regime, THE GLOBAL AND MAIL (June 23, 2015, 13:54 pm) https://www.theglobeandmail.com/news/world/syrian-class-divisions-growing-during-civil-war-helping-assad-regime/article25061620/.

the govt has used propaganda since the beginning of the conflict and its official govt news agency, Syrian Arab News Agency has often referred to the FSA and ISIS as "armed gangs" or "terrorists". Abdullah al-Omar, one of the primary govt's propagandists, claims to have worked to fabricate, make deceptions and cover up for Bashar al-Assad's crimes, on his instructions. He said that his major job was to discredit defectors from the Syrian government and also highlight Bashar al- Assad as hero.[1412]

9. **Analogizing secret police with dogs-** Dogs are symbols for the Mukhabarat, the secret police of Syria. In Animal farm, the dogs are raised and controlled by Napoleon. They are the pigs' bodyguards who intimidate and threaten the other animals to make sure that the pigs get what they want. For example, when Napoleon convenes all animals in the yard, the nine huge dogs can be seen ringed about him and growling at the other animals. They also follow the orders of Napoleon and tear out the supposed traitors' throats. Similarly, in Syria, the Mukhabarat is under the control of Bashar al-Assad. It is alleged that nearly 20 percent of the Syrian population has links to the secret services, one of the most notorious and brutal in the region. The Mukhabarat is infamous for monitoring and harassing the Syrian exiles at anti-government protests all over the world and also threating their families back in Syria.[1413]

10. **Authoritarian rule-** Orwell's portrayal of authoritarianism makes *Animal Farm* allegorical to the modern authoritarian regimes. In Animal farm, Napoleon is most directly modelled as a dictator, who betrayed the democratic principles on which he rode to power. The behaviour of Napoleon and his henchmen highlights the Authoritarian and totalitarian aspect of their rule. For example, Napoleon by killing the protesters showed the other animals on the farm that any form of disobedience will be dealt with brutally.

[1412]Ivan Watson, Raja Razak and Saad Aedine, Defecting Syrian propagandist says his job was 'to fabricate', CNN (October 10, 2012, 12:15 am), https://edition.cnn.com/2012/10/09/world/meast/syria-propagandist-defects/.

[1413] Michele Kelemen, Syrian Exiles Fear Long Reach Of Secret Police, NATIONAL PUBLIC RADIO (October 3, 20115:16 PM), https://www.npr.org/2011/10/03/141014954/syrian-exiles-fear-long-reach-of-secret-police.

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11. Similarly, Syria, although classified as a parliamentary republic is actually considered an authoritarian government. The Syrian president controls all three branches of government and its dominance in state institutions is essentially assured by the Constitution.

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DESIGNER BABIES: A BOON OR BANE TO MANKIND?

- **PRACHI TYAGI**

INTRODUCTION

If a couple is given an option to design the traits of their baby, which couple would deny such an option? Every parent wants the best for their child, they would want their child to be perfect be it physically, mentally or emotionally. This option looks 'dreamy' but due to the advancement in the field of biotechnology, this dream of designing your baby could be achieved. There have been certain cases where after using appropriate techniques such babies have taken birth successfully, commonly known as 'Designer Babies'.

The scientific fact that the genes present in human cells determine the characteristics of a living organism, including the color of the eyes, the shape of the head and various other traits, was first observed by Gregor Mendel.[1414] Thereafter, the said fact was confirmed by the scientists in the 20th century and they observed that if genes could be altered through human intervention, then the traits or characteristics of an organism could also be altered.[1415] Hence, the term 'Genetic Engineering' came into existence to signify such alteration of the genetic properties of living cells.

Adam Nash is known as the world's first designer baby who was conceived in 2000, through the process of In-vitro fertilization (IVF) and Pre-implantation Genetic Diagnosis (PGD) so that he could donate his blood to his sister, who was born with Fanconi Anaemia, which is a rare and fatal genetic disease.[1416] Hence, designer babies are those babies whose genetic properties are modified to eliminate any particular defect but other than replacing such defected genes, parents may also design their baby by selecting or enhancing particular biological traits in their child, however, this raises certain ethical and legal issues which are discussed further in the paper. In-vitro Fertilisation

[1414]Gerald Coleman, 'Genetic Engineering: Should Parents Be Allowed to Design Their Children' (1991) 34 Howard LJ 153
[1415] ibid.
[1416]Roger Dobson, ' "Designer baby" cures sister' (*NCBI*, 28 October 2008) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1173444/> accessed 11 April 2020

(IVF) is a type of Assisted Reproductive Technique (ART) which is used in case, either or both the parents are infertile to conceive a baby. Under this technique, fertilization of the sperm and the egg takes place outside the body, usually in a laboratory dish or Petri dish, thereafter, the resulting embryo is implanted in the woman's uterus. In 1978, first IVF baby, Louise Brown, took birth successfully[1417] and just after 67 days, the first IVF baby of India, Kanupriya Agarwal (Durga) was born.[1418] Whereas, few people contest that the first IVF baby of India is Ms. Harsha and she was born in 1986[1419], hence, who is the first IVF baby of India is still debatable and unresolved. As biotechnology is rapidly growing and changing day by day, the IVF technology has advanced to a stage that can help reproduce Designer Babies. One of such techniques is Pre-implantation Genetic Testing (PGT), this method is used to diagnose and prevent any genetic defects or disorder in the embryos which are created through IVF before the said embryo is implanted in the woman's uterus.[1420]

However, there is another method that is preferred for creating Designer Babies, i.e., 'Gene editing'. It is a type of genetic engineering which involves the use of molecular scissors for adding, cutting, removing or replacing base pairs of DNA to modify the genome leading to changes in physical traits like, genetic disease or eye color or height, etc.[1421] Therefore, a specific site is targeted unlike other genetic engineering methods and the said method has proved to be successful on a wide variety of diseases. To prevent and treat diseases in human, gene therapies are developed which involves the use of gene editing and they are divided into two types: i) germline therapy, wherein, DNA in the reproductive cells is changed and such change is passed on to the next generations; and ii) somatic therapy, wherein, non-reproductive cells are targeted and it only affects the person who has received such gene therapy.[1422]

[1417] 'World's first "test tube" baby born' (*History*, updated on 28 July 2019) <https://www.history.com/this-day-in-history/worlds-first-test-tube-baby-born> accessed 12 April 2020

[1418] 'India's first test tube baby doctor was mired in controversy'(*Deccan Herald*, 4 October 2010) <https://www.deccanherald.com/national/indias-first-test-tube-baby-doctor-was-mired-in-controversy-98435.html> accessed 12 April 2020

[1419] ibid.

[1420] 'Preimplantation Genetic Diagnosis:PGD' (*American Repugnancy Association*)<https://americanpregnancy.org/getting-pregnant/preimplantation-genetic-diagnosis/> accessed 15 April 2020

[1421] Roli Mathur, 'Ethical Considerations in Human Genome Editing–An Indian Perspective'(2018) 20 Asian Biotechnology and Development Review 47

[1422] 'What is genome editing?' (*NHGRI*, last updated on 15 August 2019)< https://www.genome.gov/about-genomics/policy-issues/what-is-Genome-Editing> accessed 7 April 2020

Various technologies have been developed to perform genome editing and the ones which are most commonly used are explained below:

i) Zinc Finger Nucleases (ZFNs): This technique was discovered in the 1980s and ZFNs are composed of an engineered nuclease (Fokl) which is fused to zinc finger DNA-binding proteins that facilitate targeted editing of the genome by creating double-strand breaks in DNA at user-specified locations.[1423] ZFNs are capable to increase the length of the DNA recognition site and consequently increase specificity, however, it was observed that while the specificity increased with ZFNs, it was not perfect, as the 3-base pair requirement made the design more challenging.[1424] Accordingly, some more issues needed to be addressed for efficiently editing the genome. However, ZFN was used to disable CCR5 on human T-cells, a major receptor of HIV and also, ZFNs have been used to edit tumor-infiltrating lymphocytes as a treatment strategy for metastatic melanoma.[1425]

ii) TALENs Gene Editing: This technique was developed in 2011, however, TALENs are structurally similar to ZFNs as both methods use the Fokl nuclease to cut DNA and require dimerization to function, however, the DNA binding domains differ.[1426] TALE proteins are composed of a central domain responsible for DNA binding, a nuclear localization signal, and a domain that activates the target gene transcription and such DNA-binding domain consists of monomers, each of them binds one nucleotide in the target nucleotide sequence.[1427] Monomers are tandem repeats of 34 amino acid residues, two of which are located at positions 12 and 13 and are highly variable, and they are responsible for the recognition of a specific nucleotide.[1428] But this process

[1423] 'What is ZFN Technology?' (*Merck*)< https://www.sigmaaldrich.com/life-science/zinc-finger-nuclease-technology/learning-center/what-is-zfn.html> accessed 7 April 2020
[1424] Amanda Mah, 'Genome Editing Techniques: The Tools That Enable Scientists to Alter the Genetic Code' (*Synthego*, 1 May 2019)< https://www.synthego.com/blog/genome-editing-techniques> accessed 7 April 2020
[1425] Mah (n 11)
[1426] ibid.
[1427] A.A. Nemudryi, K.R. Valetdinova, S.P. Medvedev and S.M. Zakian, 'TALEN and CRISPR/Cas Genome Editing Systems: Tools of Discovery' (NCBI, 2014) < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4207558/> accessed 8 April 2020
[1428] ibid.

was also time and cost-intensive, possessed certain design restrictions and it also displayed decreased editing efficiency in heavily methylated regions.[1429]

iii) CRISPR-Cas9 Gene Editing: Scientists, in 2012, discovered an easier and faster way for genome editing, i.e, CRISPR-Cas9. It is a two-component system consisting of a guide RNA and a Cas9 nuclease, which cuts the DNA within the ~20 nucleotide region defined by the guide RNA.[1430] CRISPR may pass on the genetic changes to the next generation. As mentioned above, there are several methodologies for genomic editing, however, CRISPR/ Cas9 has been found by many to be quite economical, easy, time-efficient and also has a higher degree of accuracy. However, there is immense potential for its misuse, which may result in unethical and controversial outcomes.

BENEFITS

The development of Designer babies is a blessing for those couples whose one child is suffering from a genetic disorder, such as, leukemia, etc. and to protect his/her life they can reproduce another child after modifying the genes of such baby who will be able to help the ailing sibling as happened in the case of the first designer baby of the world, Adam Nash (already mentioned above). It is also beneficial for the couple to protect and prevent their unborn babies from any genetic disorder which runs in their family[1431] and might also act as a ray of hope for the couples who aren't able to reproduce a child because of some complications. In a study conducted by the researchers from the Broad Institute of MIT and Harvard, it was concluded, that new gene-editing technology could correct up to 89% of genetic defects, including diseases like sickle cell anemia.[1432] There are certain other benefits that designer babies reproduced through gene editing has, such as, the process shall eventually eradicate the death-causing diseases like cancer from the world and the future generations may become naturally immune to such diseases. For instance, CRISPR has been considered useful by the scientists for cancer therapeutics involving genetic

[1429] Mah (n 11)
[1430] Mathur (n 8)
[1431] Sarah Morandin, 'Designer Babies' (*Venngage*, 2017) <https://infograph.venngage.com/p/206990/biotechnology-designer-babies> accessed 18 April 2020
[1432] Antonio Regalado, 'EXCLUSIVE: Chinese scientists are creating CRISPR babies' (*MIT Technology Reveiw*, 25 November 2018)< https://www.technologyreview.com/2018/11/25/138962/exclusive-chinese-scientists-are-creating-crispr-babies/> accessed 18 April 2020

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editing as the said technology can locate and kill offending cells.[1433] Hence, this technology of creating designer babies could help to push lifespan of human beings. Some people argue that genome editing could be used to reduce inequality, if, for instance, genome editing is used to enhance the intelligence of those who otherwise might not achieve academic success, hence, there would not exist any biasness or no one would be judged based on intelligence.[1434] UK's first designer baby, Jamie Whitaker, he was labeled as a 'savior sibling' as one of the main purposes for his birth was to save his brother, Charlie Whitaker. Charlie was diagnosed with Diamond Blackfan Anaemia, it is a disease that prevents a person from making red blood cells. The Whitakers used PGD, in combination with IVF, to select an embryo that matched Charlie's blood type, as a result of which, Jamie was born. Charlie received a stem cell transplant, using stem cells obtained from Jamie's umbilical cord when he was 12 and was finally relieved from the pain.'[1435]

As CRISPR is the newest technology in the field of gene-editing, it has proven to be substantially more efficient, affordable, simpler and faster way to modify the human genome than all the previous technologies. CRISPR can permanently remove the disease from the bloodline, so these crippling diseases would not affect future generations.[1436] Not just for developing designer babies, the researchers have found that such a technique could be used for new advancements in the other areas of medical science, such as, to help improve the health of plants and animals.[1437]

CONCERNS

Genetic engineering could be possibly divided into two distinct forms: i) positive genetic engineering, which means to use genetic technologies to correct genetic defects and ii) negative genetic engineering, which means to use genetic technologies to enhance human capabilities or traits, such as, eye color, height, etc.[1438] The latter form is less acceptable because a natural

[1433] Natalie Regoli,' 26 Designer Babies Pros and Cons' (*ConnectUS*, 17 January 2019) <https://connectusfund.org/26-designer-babies-pros-and-cons> accessed 18 April 2020
[1434] Leila Foulon and Carolyn Neuhaus, 'SEX-SELECTION, GENOME SELECTION, AND DESIGNER BABIES'(NYU School of Medicine)<https://med.nyu.edu/highschoolbioethics/sites/default/files/highschoolbioethics/Sex%20Selection%20PGD%20and%20Designer%20Babies.pdf> accessed 19 April 2020
[1435] ibid.
[1436] Fawzaan Hashmi, 'Necessity or Vanity: Designer Babies, CRISPR, and the Future of Genetic Modifications' (2019) 7(11) International Journal of Scientific Research and Management B-2018 <http://ijsrm.in/index.php/ijsrm/article/view/2419> accessed 18 April 2020
[1437] Medha Singh,' Designer Babies: What Is It And Is It Ethical?' (Mom Junction, 29 November 2019) <https://www.momjunction.com/articles/designer-babies_00395977/> accessed 18 April 2020
[1438] Coleman (n 1)

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characteristic is being modified just to satisfy the personal choice of the parents, for instance, in 1996, a well-known case of using PGD for the selection of the sex of the embryo to fulfill the wish of a couple of a balanced family and not to address a specific medical condition took place. A couple, Monique and Scott Collins intended to undergo IVF as their first two children were boys and the couple wanted a daughter in the family.[1439] There have been similar instances as that of Collins' case, which has raised questions on the concept of 'Designer Babies' and such moral, ethical, social, religious, human rights, legal, and economic issues, shall be discussed hereinafter one by one.

i) Moral and Ethical Issues: Designer Babies or gene-editing techniques provides parents with an option to discard an embryo that has a disability. The said act degrades and devalues the lives of disabled people and expresses the thinking that their disability is a disease, hence, this contradicts the moral principle that all life is valuable and dignified.[1440] Also, when parents select traits for their designer baby, it turns their child into a commodity, rather than a subject of unconditional love and this has been regarded as an undesirable and immoral practice.[1441] This may impact the pious relationship between parents and children. A recent study by the Wellcome Sanger Institute illustrated that the use of CRISPR can lead to extensive genetic damage in the target genome. If CRISPR is used, unexpected mutation can also pass on to the next generation and this process is an irreversible one. Also, it is possible that in the future, parents or doctors will be able to manipulate the traits such as the gender, height, or intelligence of the babies, according to their wishes. In essence, it will allow science and not nature to guide the evolution of the human race.[1442] The individuality will be lost eventually, as most parents would want their children to be highly intelligent, athletic, creative, etc., hence, children would be designed on a similar pattern having all the same character traits.[1443]

[1439] Sarah Ly, 'Ethics of Designer Babies' (The Embryo Project Encyclopedia , 31 March 2011) <https://embryo.asu.edu/pages/ethics-designer-babies> 16 April 2020
[1440] Foulon and Neuhaus (n 21)
[1441] ibid.
[1442] Foulon and Neuhaus (n 21)
[1443] ibid.

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ii) Social and Economic Issues: If the technology of designer babies becomes a realistic and accessible medical practice, then it would create a division between those that can afford the service and those that cannot. Therefore, people who are wealthy would be able to afford the selection of desirable traits in their offspring, while those of lower socio-economic strata would not be able to access the same options.[1444] As a result, economic divisions may grow into genetic divisions, with social distinctions between designer and non-designer babies.[1445]

iii) Religious Issues: According to some people, genetic engineering is a form of 'playing God'. From a religious point of view the phrase, 'playing God' means that the idea of altering human genes so that a child will have certain characteristics as per the liking of another creates a very uncomfortable feeling among people who believes that there is a divine being who controls the human existence.[1446] God has destined each human being to perform some earthly task, thus, manipulating human genes would interfere with the divinely appointed task for each human life and it would amount to a violation of divine order.[1447] Some people have a religious belief that the embryos that are destroyed because they have the wrong tissue type have full human status and the sanctity of life covers all human life from the embryo stage, so they are against such gene-editing techniques.[1448]

iv) Human Rights Issues: Every person who takes birth in this world has an implied right to give his consent or not on any act done upon him, but a baby on whom such gene-editing techniques are applied he cannot consent to have its body altered. Since he or she cannot consent, some people argue that it is unethical and against human rights to subject him or her to the genome-editing procedure. Also, characteristics or abilities of the child is chosen by his parents, the child loses autonomy over his own life.[1449] There is also a fear that if such techniques are allowed to be used, they would be used not

[1444] Ly (n 26)
[1445] ibid.
[1446] Coleman (n 1)
[1447] ibid.
[1448] BBC, 'Gene therapy and genetic engineering' <https://www.bbc.co.uk/bitesize/guides/zmqxvcw/revision/7> accessed 20 April 2020
[1449] PLAYING GOD: THE ETHICS OF DESIGNER BABIES' (KeepCalmAndTalkLaw,16 November 2018) <http://www.keepcalmtalklaw.co.uk/playing-god-the-ethics-of-designer-babies/> accessed 20 April 2020

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only to cure illness but also to try and eradicate certain vulnerable groups in society such as those who belong to certain ethnoreligious groups like Judaism, homosexuality, transgendered, LGBTQ+.[1450]

v) Legal Issues: Gene editing could lead to an interesting set of lawsuits, such as, in 2014, a court in England held that the mother of a child born with fetal alcohol spectrum syndrome due to the mother's heavy drinking during pregnancy is not guilty of causing harm to the child.[1451] Therefore, if designer babies become a reality, we may see many more lawsuits with children suing their parents for the decisions made when the child was in the womb.[1452] The potential creation of a designer baby brings forth certain intellectual property rights issues, such as, whether a human gene is patentable and if the answer is yes, and the gene patent is granted, the patent holder gets an exclusive right to state how the gene can be used, including in research.[1453]

ANALYSIS OF THE EXISTING LEGAL FRAMEWORK

The International Bioethics Committee (IBC) constituted by UNESCO released a report in 2015 on '*Updating Its Reflection on the Human Genome and Human Rights*' and while acknowledging the therapeutic value of genetic interventions, stressed that the process raises serious concerns, especially if the editing of the human genome should be applied to the germline by modifying genetic or hereditary traits.[1454] The report also stated that, a new genome-editing technique called CRISPR-Cas9 makes it possible for scientists to insert, remove and correct DNA simply and efficiently and could cure genetic diseases, however, the report also addressed five ethical principles and societal challenges: i) Respect or autonomy and privacy, ii) Justice and solidarity, iii) Understanding of illness and health, iv) Cultural, social and economic context of science, v)

[1450] ibid.
[1451] Nishith Desai Associates, 'Are we ready for Designer Babies?' (June 2019) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Designer_Babies.pdf> accessed 20 April 2020
[1452] ibid.
[1453] Nishith Desai Associates (n 38)
[1454] 'UN panel warns against 'designer babies' and eugenics in 'editing' of human DNA' (UN News, 5 October 2015<https://news.un.org/en/story/2015/10/511732-un-panel-warns-against-designer-babies-and-eugenics-editing-human-dna> accessed 18 April 2020

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Responsibility towards future generations.[1455] In the round table meeting of UNESCO held in 2018, experts' opinion was that before carrying out any human-genome editing, benefit-risk assessment should be made to assure that it is safe to use.[1456]

Due to the pros and cons of Designer Babies, there are different perspectives towards gene editing in many countries. Some accepted it while others debate over it. Views of certain countries shall be discussed below:

USA: In the United States, there is no federal-level regulation as Congress barred federal funding from going to embryonic research in 2005, which has prevented the creation of a robust system of regulation.[1457] Although, the National Institute of Health (NIH), which is a part of the U.S. Department of Health and Human Services, published guidelines the, '*NIH Guidelines for Research Involving Recombinant or Synthetic Nucleic Acid Molecules*' in 2016 which stated that the NIH would not entertain proposals for germline alterations, involving a specific attempt to introduce genetic changes into the reproductive cells of an individual, to change the set of genes passed on to the individual's offspring.[1458] However, it would consider proposals involving somatic cell gene transfer. In 2017, the National Academy of Science (NAS), published a report titled, '*Human Genome Editing Science, Ethics and Governance*' which states that given both the technical and societal concerns, there is a need for caution in any move towards germline editing.[1459] The Report recommends that germline editing research trials might be permitted but should only be done for compelling reasons for treating or preventing serious disease or disabilities and under strict oversight.[1460] In 2019, a congressional committee voted to continue a federal ban on creating genetically modified babies in the United States. The ban prohibits the Food and Drug Administration (FDA) from considering any proposals to try to use genetically modified embryos to try to establish pregnancies.[1461] Some scientists oppose the ban because it bars them from conducting the studies necessary to determine whether one day it might be safe and effective to

[1455] n 36
[1456] Mathur (n 8)
[1457] Karnik Hajjar, 'Designer Babies Pose Novel Challenges to Regulation' (BTLJ Blog, 27 December 2019) <https://btlj.org/2019/12/designer-babies-pose-novel-challenges-to-regulation/> accessed 21 April 2020
[1458] Nishith Desai Associates (n 38)
[1459] ibid.
[1460] ibid.
[1461] Rob Stein, 'House Committee Votes To Continue Ban On Genetically Modified Babies' (NPR,4 June 2019) <https://www.npr.org/sections/health-shots/2019/06/04/729606539/house-committee-votes-to-continue-research-ban-on-genetically-modified-babies> accessed 20 April 2020

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create genetically modified babies.[1462] The existing regulatory structures of the US, are inadequate for assuring ethical and effective research into gene editing and gene therapy.

UK: The UK law currently allows somatic cell gene therapy but it is subject to certain conditions. However, English law prohibits the alteration of an embryo in any way. In 2011, the UK government commissioned Human Fertilization and Embryology Authority (HFEA) to study mitochondrial gene replacement therapy (MRT) and assessed it in terms of efficacy and safety. The HFEA permits research projects on embryos with a license, provided the embryo is not kept for a period of more than 14 days and not transferred into the womb of a woman.[1463] Therefore, it is lawful in the UK to create and use genome-edited human embryos in research, under strict licensing conditions, however, it is still illegal to use gene-edited human embryos for reproductive purposes. The Human Fertilization and Embryology Authority granted a license in 2016 to scientists in London to alter genes that are active in healthy human embryos in the first few days after fertilization and this approval represents the world's first research project on genetic editing endorsed by a national regulatory authority.[1464] In July 2018, the Nuffield Council on Bioethics, the ethics body of the U.K., published a report titled '*Genome editing and human reproduction: social and ethical issues*', and concluded that the changing of the DNA of an embryo could be 'morally permissible', if it is in the future child's interest and does not lead to societal division.[1465] Hence, it is observed that the UK laws are more expansive and inclusive to allow for research on designer babies.

CHINA: There is no legislation that regulates genome editing or engineering of human embryos. However, guidelines called the '*Ethical Principles and Conduct Norms of Human Assisted Reproductive Technologies*' prepared in 2001, by the Ministry of Health of the People's Republic of China lay down certain ethical principles for human-assisted reproductive technologies as well as guidelines for practitioners.[1466] The guidelines prohibit the manipulation of the gene in a human gamete, zygote or embryo for reproduction, hence, the prohibition in gene manipulation is limited

[1462] ibid.
[1463] Nishith Desai Associates (n 38)
[1464] ibid.
[1465] Ian Sample, 'Genetically modified babies given go ahead by UK ethics body' (The Guardian, 17 July 2018) <https://www.theguardian.com/science/2018/jul/17/genetically-modified-babies-given-go-ahead-by-uk-ethics-body> accessed 21 April 2020
[1466] Nishith Desai Associates (n 38)

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to reproduction and does not extend to research.[1467] Taking advantage of this loophole, Chinese scientists have reportedly conducted gene editing experiments and the first gene-edited babies of the world were developed by the Chinese scientist, He Jankui. However, recently, in the latest draft of the civil code of China, provisions relating to gene editing have been added which puts all medical and scientific research related to human genes and embryos under stricter regulation.[1468] Hence, this could be considered as a small step by China for regulating genome editing on human embryos.

INDIA: In India, the research follows *ICMR National Ethical Guidelines for Biomedical and Health Research involving Human Research, 2017* which prohibits 'eugenic genetic engineering for changing/selecting/altering genetic characteristics and creating so-called designer babies…' and *National Guidelines for Stem Cell Research, 2017* which provide all the necessary guidance for cellular research including gene editing or modification, human germ-line engineering and reproductive cloning.[1469] Though, India does not have any specific law that explicitly prohibits the genetic editing of germlines but the guidelines prohibit research related to human germline gene therapy and research involving the implantation of human embryos after in vitro manipulation, at any stage of development, into the uterus in humans or animals. Gene modification is permitted, to the extent, it is done through in-vitro studies and thoroughly reviewed by the Institutional Committee for Stem Cell. Such studies can only be conducted on spare embryos, germ-line cells or gametes. Further, the genome modified human embryos should not be cultured beyond 14 days of fertilization or formation of the primitive streak, whichever is earlier to ensure that these embryos should not have a possibility of being inserted into the womb.[1470] Hence, the guidelines prohibits any research that may lead to the creation of designer babies, although the said guidelines are not backed by law but there are still sanctions attached to disobeying the guidelines. Violation of existing ICMR guidelines amounts to professional misconduct, hence, it is quite likely that doctors involved in any research involving genetic editing for the creation of designer babies may lose his/her license to practice. Moreover, the Delhi High Court in the case of *Roche Products*

[1467] ibid.
[1468] Zhang Zhouxiang, 'Viewpoints: Adding gene-editing in draft civil law' (ChinaDaily.Com.Cn, 20 April 2019)< https://www.chinadaily.com.cn/a/201904/20/WS5cbae1ada3104842260b7533.html> accessed 21 April 2020
[1469] Nishith Desai Associates (n 38)
[1470] Nishith Desai Associates (n 38)

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India Pvt Ltd v Drugs Controller General of India[1471] stated that, '54. As regard binding nature of the guidelines, it is a well-settled principle of law that the guidelines are in the nature of the directions issued by the government and till the time the said guidelines and directions are not in contradiction but are mere addition to the already existing rules and regulations, it cannot be said that the said guidelines are not having legal validity and are not required to be adhered to being non-binding in character'. Hence, the guidelines have no force of law, however, if a professional association believes that it is unethical to intentionally breach the guidelines, then the guidelines may be enforced through a coercive order of the professional association.

Recently, in 2019, ICMR in consultation with the Department of Biotechnology and the country's apex drug regulator, the Central Drugs Standard Control Organisation drafted '*National Guidelines for Gene Therapy Product Development & Clinical Trials'*, which prohibit the use of gene editing to induce unnatural advantages like enhanced physical functions or selection of particular traits to create designer babies and also, all such applications(gene augmentation techniques) are prohibited unless scientific or ethical justification can be provided which is acceptable under socio-ethical norms and the laws of the land.[1472] The guidelines also propose setting up of an independent body of experts in biomedical research and gene therapy called Gene Therapy Advisory and Evaluation Committee (GTAEC) that will oversee scientific and ethical evaluations of proposed therapies.[1473] These guidelines will be useful in preventing a situation like the one in China where a loophole in the regulatory framework allowed a scientist to alter the genetic makeup of the zygote of a pair of twins.[1474]

CONCLUSION

Recently, a need has been felt by the scientists, at a global level, for adopting an international framework to govern future research in the area of human germline gene-editing. It appears that He Jiankui's work is not just the beginning as reports have shown that there may have been several

[1471] 2016 (66) PTC349 (Del)
[1472] 'National Guidelines for Gene Therapy Product Development & Clinical Trials'(2019)< https://www.icmr.nic.in/sites/default/files/guidelines/guidelines_GTP.pdf> accessed 22 April 2020
[1473] ibid.
[1474] Anonna Dutt, 'Gene editing: Medical board drafts new laws' (*HindustanTimes*, 28 July 2019) <https://www.hindustantimes.com/india-news/gene-editing-medical-board-drafts-new-laws/story-WXR5RjSoMWPDcnhu9yZOtK.html> accessed 22 April 2020

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unmonitored Chinese clinical trials of CRISPR on humans and also, monitored trials are being conducted in the U.S. and Europe on CRISPR disease treatments using somatic cells. Hence, the time has come where the scientific community should join hands and take stringent steps to regulate genetic engineering related or CRISPR, research and trials.

The 2017 Guidelines of ICMR suggests that any research effort put towards the creation of Designer Babies in India would be considered unethical, however, it is not illegal because the ICMR guidelines are not backed by legal sanction. Nonetheless, the criticisms against the creation of designer babies are not so much against the science itself, as they are against our inability to resist our urge to misuse science. India has taken a step further in the regulation and acceptance of Designer Babies by drafting '*National Guidelines for Gene Therapy Product Development & Clinical Trials, 2019',* however, India should work towards drafting a stringent legislation that regulates research into, and application of the research for the creation of Designer Babies, as the same would provide a binding effect. The legislation may consider having the following provisions: i) governmental control on the laboratories where such research can take place and the legislation should specify that research on germline gene editing to create designer babies must only take place in laboratories controlled by the government, or laboratories that have supervision of a government-appointed ethics committee; ii) approval of the central body appointed by the government before implanting an edited germline embryo and this body can consist of members from the scientific community, the society, NGOs and the government itself; and iii) any research outside the purview of legislation should be made a cognizable, non-bailable criminal offence.[1475]

Not just a stringent legislation regulating Designer Babies is required, there are certain other factors which are important to be noted at this time to implement CRISPR in an influential and ethical way: i) investment for spreading the knowledge of CRISPR; ii) national governments should educate citizens, the insurance industry, and patients about the cost, risks, ethical considerations and possibilities of CRISPR technology; and iii) close coordination among geneticists, biologists, medical ethics experts, religious thinkers, economists, educationalists, and policymakers.[1476]

[1475]Dutt (n 61)
[1476] Hashmi (n 23)

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Although, there is tremendous potential in germline gene editing and its application to unlock the gates to a more glorious future for the human race, however, it is also clear that it is a sensitive subject and needs to be approached with caution. The use of the technique in China on fetuses without supervision has brought negative media coverage and cast doubts on funding/ support of ethical and controlled experiments.[1477] In India, the present circumstances are not favourable for germline gene editing or designer babies, although, India has taken a step forward by introducing 2019 draft guidelines which provides a silver lining that the situation could change with the framing of some stringent and binding legislation.

[1477] Nishith Desai Associates (n 38)

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REGIONALISM: A LIMITATION TO DEVELOPMENT OF KASHMIR

- KOMAL RAJENDRA CHAVAN

In India, conflict between national consideration and regional necessity is one of the problematic factors of constitutional jurisprudence and of public policy in India. National unity is a paramount social value that envisages equal treatment of all citizens. Any country if desires economic development shall have social justice through which development can be achieved. There are two approaches/ ideas of justice. The traditional idea revolves around just men and the modern idea talks about just society. How the 'just society' can be developed? Plato has given answer to this by rightly prescribing different duties for different groups or classes of citizen whose fulfillment would be instrumental in building up just social order.[1478] Article 51A of Constitution of India prescribes fundamental duties which include "to uphold and protect sovereignty, unity and integrity of India".[1479] This duty has been imposed on all citizens. Any excessive regional aspiration would be a threat to unity and integrity of India and hence it would be contrary to Constitutional duty imposed on citizens.

Regionalism means a feeling of loyalty to a particular region of the country and its desire to be more independent in social, economic and political factors. Superiority is given to regional and autonomous identity over national identity which poses a threat to national integrity. Regionalism can be both positive and negative. Positive regionalism build's brotherhood and commonness on the basis of language, religion, region and love towards one's culture. It maintains a balance between regional identity and national identity. Whereas, excessive attachment to one's region in preference to the nation may be termed as Negative Regionalism which poses a threat to the unity and integrity of the It gives internal security challenges by the insurgent groups, who propagate the feelings of regionalism against the mainstream politico-administrative setup of the country.

[1478] O.P. Gauba, *Dimensions of Social Justice*, Published by National Publishing House, Delhi First Ed. 1983
[1479] Article 51A , The Constitution of India, 1950.

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Constitution of India has provided for various fundamental rights, Directive Principles and Fundamental Duties, to achieve the aims of Liberty, Equality and Fraternity which ensures National Integrity. History of Indian independence has witnessed a transition of power; it was a difficult task to maintain national integrity. It was necessary to balance the national integrity with regional autonomy. As a result of which, special status given to some princely states became inevitable. However, constitutional guarantee to such states cannot be overlooked. Thus, as a consequence to this, Art.370 and 371 were added to the Constitution of India. In Kashmir, demand for an independent state and impact of Article 370 of the Constitution of India, has given rise to Negative regionalism.

Regionalism and special status given to Kashmir has proved to be an obstacle in social development of the State. Growth of Kashmir has always been at a slow-pace. It created problems as to restriction on trade, commerce & intercourse. Problems of Unemployment and Poverty, terrorism, religious conflicts, finance, education, and agricultural development were a major concern. Though, the Govt. after passing of the State Re-organization Bill, 2019 and revoking of Article 370, has diluted negative regionalism, 'suffering' of the Kashmiri people need to be addressed for bring up a positive social change in the State. Hence, suiting to the constitutional ideals of fraternity and welfare for all, the state policies should be revised unless they already comply with emerging standards.

Thus, the researcher in this present paper tries to establish a relation of regionalism and social transformation and its impact on development of Kashmir.

CONCEPT OF REGIONALISM.

Conceptual Analysis of Regionalism

Region as a social system, reflects the relation between different human beings and groups. Regions are an organized cooperation in cultural, economic, political or military fields. Region acts as a subject with distinct identity, language, culture and tradition. Regionalism plays important role in building of the nation, if the demands of the regions are accommodated by the political system of the country. In such political setup, there always remains a scope of balanced regional development. The socio-cultural diversity is given due respect and it helps the regional people to practice their own culture. Regionalism is an ideology and political movement and as a process it

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plays role within the nation as well as at an international level. Positive and Negative regionalism have different meaning and have positive as well as negative impact on society, polity, diplomacy, economy, security, culture, development, negotiations, etc.

Regionalism is the study of behavior that emphasizes the geographic region as the unit of Analysis. Regionalism means a part of nation state marked by homogeneity in respect of Language, culture and community of economic and other interests.[1480]Regionalism describes situations in which different religious or ethnic groups with distinctive identities coexist within the same state boundaries, often concentrated within a particular region and sharing the strong feelings of collective identity. [1481]Regionalism stands for the love of a particular region or an area in preference to the nation or any other region. Regionalism is consciousness of and loyalty to a distinct region with a homogeneous population.[1482]

Regionalism is founded on base of several grounds/ factors towards which a person has affection and love which supersedes National Spirit. Those factors include economic, political, religious, and linguistic and even sub regional movements in the general frame of regionalism.

Regionalism can be broadly divided into two types- Positive Regionalism and Negative Regionalism. In negative regionalism, it refers to a process in which sub-state actors become increasingly powerful; power devolves from central level to regional governments. These are the regions within country, distinguished in culture, language and other socio-cultural factors. Regionalism doesn't means defending the federal features of the constitution. Roots of regionalism is in India's manifold diversity of languages, cultures, ethnic groups, communities, religions and so on, and encouraged by the regional concentration of those identity markers, and fueled by a sense of regional deprivation. Regionalism has remained perhaps the most potent force in Indian politics ever since independence (1947), if not before. It has remained the main basis of many regional political parties which have governed many states since the late 1960s. Regionalism could

[1480]Dr. Sanmathikumar, *Regionalism vs Nationalism – In India,* International Journal of Humanities & Social Science StudiesVolume-III, Issue-V, March 2017, Page No. 120-128Published by Scholar Publications, Karimganj, Assam, India, 788711

[1481] Navnita C. Behera, *Contested spaces of State and Identity politics: Re-visiting the relationship of Jammu and Kashmir with India.* From Understanding Contemporary India Ed. By AchipVanaik and Rajeev Bhargava, Published by Orient BlackSwanPri. Ltd. 1st Ed. 2010.

[1482] Merriam-Webster dictionary.

have flourished in India, if any state/region had felt that it was being culturally dominated or discriminated. Regionalism is often seen as a serious threat to the development, progress and unity of the nation. It gives internal security challenges by the insurgent groups, who propagate the feelings of regionalism against the mainstream politico-administrative setup of the country. Regionalism definitely impacts politics as days of collation government and alliances are taking place. Regional demands become national demands, policies are launched to satisfy regional demands and generally those are extended to all pockets of country, hence national policies are now dominated by regional demands.[1483] Regional economic inequality is a potent time bomb directed against national unity and political stability. The economic growth of India has been fluctuating since independence. The states have been unable to do the adequate land reforms and the feudal mentality still persists. The political activities in the backward states were limited to vote bank politics and scams. The level of infrastructural development, such as- power distribution, irrigation facilities, roads, modern markets for agricultural produce has been at back stage. Low level of social expenditure by states on education, health and sanitation are core for human resource development. Political and administration failure is source of tension and gives birth to sub-regional movements for separate states which weaken the confidence of private players and do not attract investors in the states.

REASONS FOR GROWTH OF REGIONALISM IN INDIA

a. **Low rate of economic growth**
b. **Socio-economic and political organization of states**
c. **Lower level of infrastructural facilities in backward states**
d. **Low level of social expenditure by states on education, health and sanitation**
e. **Political and administration failure**
f. **"Son of the soil"** doctrine explains a form of regionalism, which is in discussion since 1950. According to it, a state specifically belongs to the main linguistic group

[1483] Dr. Sanmathi Kumar, Regionalism vs. Nationalism – In India, International Journal of Humanities & Social Science Studies (IJHSSS), Volume-III, Issue-V, March 2017, Page No. 120-128

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inhabiting it or that the state constitutes the exclusive homeland of its main language speakers, who are the sons of the soil or local residents.

NATIONALISM VIS-À-VIS REGIONALISM

Nationalism is a sense of identity with the Nation. It is a belief, creed or political ideology that involves an individual identifying with or becoming attached to one's Nation. Nationalism involves the national identity, by contrast with the related construct of patriotism, which involves the social conditioning and personal behaviors that support a state's decisions and actions. It is the political belief that some groups of people represent a natural community which should live under one political system, be independent of others and have the right to demand an equal standing in the world order with others. Nationalism is generally defined as a sentiment or a condition of mind of a group of people sharing some things in common. A.E.Zimmerman views "Nationalism as a sentiment to share the glories of the past, to have done great deeds together, to have a common will in the present and a desire to do more in the future".[1484] C.J.H .Hayes views "Nationalism is a modern emotional fusion and exaggeration of two very old phenomena, Nationality and Patriotism[1485]. Usually the positive regionalism – controlled regionalism contributes in developing nationalism and national spirit but once it exceeds the limits of over-sympathy and sharp semi-regional aspirations it becomes hindrance in way of nationalism. In India regionalism is posing serious threat on nationalism. The power of regional identities over linguistic unity is also seriously challenged in India. These identities are partly based on historical and cultural factors and partly grown out of political frustration and a sense of backwardness.

IMPACT OF REGIONALISM ON DEVELOPMENT OF SOCIETY.

There is intrinsic relation between Regionalism and Social Development. If a particular region is deprived of its equitable development then it gives rise to negative regionalism. And due to such regional unrest, further, social development is hampered. It is vicious cycle. First will understand what social development means. Social development can be better understood if it is construed as social justice as securing social justice is ultimate aim[1486]. Any country if desires economic

[1484] Supra 3.
[1485] Ibid.
[1486] O.P. Gauba, *Dimensions of Social Justice*, Published by National Publishing House, Delhi First Ed. 1983

development shall have social justice through which development can be achieved. There are two approaches/ ideas of justice. The traditional idea revolves around just men and the modern idea talks about just society. How the 'just society' can be developed? Plato has given answer to this by rightly prescribing different duties for different groups or classes of citizen whose fulfillment would be instrumental in building up just social order. Article 51A of Constitution of India prescribes fundamental duties which include upholding and protecting sovereignty, unity and integrity of India". This duty has been imposed on all citizens. Any excessive regional aspiration would be a threat to unity and integrity of India and hence it would be contrary to Constitutional duty imposed on citizens. A society can be developed when we speak of 'economic growth with social justice', we use the term 'social justice' in a distributive sense, implying thereby that the benefits of economic growth are justly distributed among various sections of society, particularly so that they percolate to the lower strata of society.[1487]Process of Social development cannot be divorced from process of securing social justice. Creation of more educational, recreational and employment opportunities. These can be considered as litmus paper for testing the social development. When a particular region due to political reasons is deprived of social justice and social development the regionalist thought acquires a space. If the same deprivation continues the regionalism can become serious threat to integrity and unity of nation. The separatist movement or regional aspiration diverts the resources of nation. They are expected to be utilized for social development but they are exploited by the hullabaloos of regionalist ideology.

REGIONALISM IN INDIA WITHIN CONSTITUTIONAL FRAMEWORK

Formation and development of Dominion of India -

The Constitution of India enshrines Principles of Equality, liberty and Fraternity which are the foundational concepts for development and welfare of Individual. For welfare of individual, welfare of society as whole and prosperity of State is necessary. Already we have discussed the concepts of nationality, regional aspirations and regionalism.

To understand and analyze the provisions under Indian Constitution it is necessary to understand how India has formed. While leaving India, British Government outline a policy to forms dominion of India .To formulates the policy Lord Cripps was along with 2 other members were sent to India.

[1487] Ibid.

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In1946 after deliberation mainly with Indian National Congress and Muslim League Cabinet Mission Plan was declared and finalized. A British Cabinet Mission consisting of Lord Pethick-Lawrence, Sir Stafford Cripps and Mr. A. G. Alexander arrived in India on March 23, 1946, in order to find a solution for the 'problem of India'.[1488] On 25th May, Mission issued a Memorandum dated May 12,1946, Treaties and Paramountcy.33 Paragraph 5 reads:

"When a new fully self-governing or independent Government or Governments come into being in British India, His Majesty's Government's influence with these Governments will not be such as to enable them to carry out the obligation of Paramountcy...His Majesty's Government will cease to exercise powers of Paramountcy. This means that the rights of the State which flow from their relationship to the Crown will no longer exist and that all the rights surrendered by Paramount power will return to the States. Political arrangements between the States on the one side and the British Crown and the British India on the other will thus be brought to an end. The void will have to be filled either by States entering into a federal relationship with the successor government or Governments in British India, or failing this, entering into particular political arrangement with it or them."

It was made further clear by Cabinet Mission that,

British Government could not and will not in any circumstances transfer Paramountcy to an Indian Government.[1489]

On June 3, 1947 plan for transfer of power was declared by His Majesty's Government. The plan provided that the Muslim majority areas in British India should constitute the Dominion of Pakistan and the Hindu majority areas the Dominion of India.[1490]Only small paragraph was dedicated to clarify the position of Princely States.

[1488] 30Adarsh Sein Anand, KASHMIR'S ACCESSION TO INDIA, Journal of the Indian Law Institute, Vol. 6, No. 1 (Jan.-Mar., 1964), pp. 69-86 (Published by: Indian Law Institute, Delhi) , https://www.jstor.org/stable/43949788 Last Accessed: 30-08-2019 06:40 UTC
[1489]Cmd. 6835- Cabinet Mission Plan Papers.
[1490] Ibid.

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"His Majesty's Government wishes to make it clear that the decisions announced above (about partition) relate only to the British India and that their policy towards Indian States contained in Cabinet Mission Memorandum of 12th May, 1946 remains unchanged" [1491]

It is evident to note that though the Partition of India was on Communal Basis Princely states were independent to decide to which dominion they shall accede. It was necessary to restrict the Independence of rulers because if 564 of them have chosen to remain independent without acceding to any of Dominion would have led to chaos. They were given choice to enter into any of the Dominion or enter into suitable political arrangements with them or it.

When implementation of the plan in the statement of June 3 commenced, as part of the partition machinery, in order that each Dominion Government should have an organization to conduct its relations with the princely states, a State department in each Dominion was set up.[1492]

Lord Mountbatten, the Governor-General of India, addressing the Chamber of Princes on July 25, 1947 told assembled Princes and their representatives that legally they were independent but he advised them to accede to one or the other Dominion before the transfer of power to ensure the continuance the existing relationship, keeping in mind the ' geographical contiguity' of their states.[1493] He told them that they (the Rulers) free to accede to either Dominion or that they alone had the power to take a decision for their States but he advised them that there were certain "geographical compulsions" which could not be evaded. [1494]A state could accede to either Dominion by executing an instrument of Accession signed by the Ruler and accepted by the Governor- General of the Dominion concerned. Legally the interest of India or Pakistan in a particular State had no relevance; the decision whether to accede or not and to which Dominion were not only independent of such considerations but an exclusive right of the Ruler.40 In Dominion of India, accession was to be made under section 6 of the Government of India Act, 1935, as adapted by Section 9 of Indian Independence Act, 1947.

Need for incorporation of fraternity and National Spirit in Constitution.

[1491]White paper on Indian States, Published by President's Secretariat New Delhi, 1950,
[1492]White paper on Indian States, Published by President's Secretariat New Delhi, 1950, at p. 32-33.
[1493]
[1494]Kessing's Contemporary Archives, August 9-16, 1947, at p. 8765

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Under the above circumstances it was very much necessary to develop national spirit amongst the princely states who have decided to accede to Dominion of India. Otherwise it would have been resulted in chaos and ultimately disintegration of India. To protect the national integrity and at the same time to maintain regional autonomy, while drafting Constitution, Quasi-federal scheme was adopted. To understand the regionalism first will understand how fraternity is incorporated under Constitution of India.

Fraternity is one of the goals to be attained by India and it has been guaranteed under Constitution of India. There is substantial clarity as to the role of fraternity within the Indian Constitution. In particular, the sentiments of Dr. B.R. Ambedkar prove useful in providing ample clarity as to the need and function of fraternity. Dr. Ambedkar was of the view that owing to the socially tense situation due to religious, linguistic and caste based differences, the constitution should strive towards the creation of unity amongst citizens.[1495] Dr. Ambedkar also saw the promise of fraternity as a means of improving relations between different castes and religious communities.[1496] Additionally, it has been argued that a certain degree of ambiguity is desirable in perambulatory principles, as it allows for judicial craft making the Constitution suit the needs of a changing social order.[1497]

First express provision we come across is in Preamble which ultimately used as instrument for interpreting the provisions of Constitution.

a. Preamble

The Preamble to the Constitution primarily serves three interpretative functions. First, it may be implemented to interpret the Constitution itself. Second, the Preamble may be used to interpret statutes framed under the Constitution. Third, the Preamble may be used to justify and elucidate the application of international human rights treaties, for domestic purposes.[1498]

Expressly word Fraternity can be read in Preamble. It is one of the goal strived to be achieved through this Constitution. The position of word in sentence plays vital role and fraternity comes

[1495] B. Shiva Rao, Framing of India's Constititution, Volume IIIat p. 510 (2004).
[1496] Ibid.
[1497] Ibid.
[1498] C.f. Smaran Shetty &TanayaSanyal, *FRATERNITY AND THE CONSTITUTION: A PROMISING BEGINNING IN NANDINI SUNDAR V. STATE OF CHATTISGARH*,Published in NUJS LAW REVIEW 4 NUJS L. rev. 439 (2011) at p. 453.

with the goal -"to promote among them all FRATERNITY assuring the dignity of the individual…"[1499]

The goal itself clarifies that we are bound to be integrated and oneness amongst all has to be preserved. It is also clear from the wording that this provision is to protect the dignity of the individual.

From above discussion it can be construed that under Indian context and from Constitutional point of view Integrity is the rule and preserving/ promoting regionalism is an exception.

b. Fundamental Duties

Article 51-A was inserted by 42nd Amendment Act, 1976. Constitution of India undertakes to protect the rights of citizen by providing and ensuring those rights under Part III. Also, Part IV implies / directs the state to legislate on several subjects. To emphasize the duties of citizens Art. 51A was inserted.

The diversity and regional aspirations may lead to insurgency and disintegration which will hamper national spirit. Therefore under Article 51A three duties are casted on Citizens they are as under –

- to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;[1500]

- to uphold and protect the sovereignty, unity and integrity of India;[1501]
- to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;[1502]

[1499] The Constitution of India, 1950.
[1500] Article 51A(a) The Constitution of India, 1950.
[1501] Article 51A(c) The Constitution of India, 1950.
[1502] Article 51A(e) The Constitution of India, 1950.

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These three fundamental duties are to be followed by all citizens of India. Analysis of these three provisions makes it clear that even though we are having several diversities the constitution strives to protect the integrity. Regional aspirations are not given protection under these parts.

But several States signed Instrument of Accession under several special conditions. Either political or social conditions were prevailing in those states and therefore indirectly they were given protection.

c. PART XXI TEMPORARY TRANSITIONAL PROVISION

As we have discussed several States were given special protection under Chapter XXI. It was made clear that these provisions are for temporary period. The aim behind inclusion of these provisions was to extend special protection towards several States. Though this promotes and protects regional aspirations it was necessary for complete inclusions of these States in India. Special conditions were prevailing in those states. Article 370 was inserted to extend special protection to Kashmir. Other states like Assam, Meghalaya, Mizoram, Sikkim, Nagaland, Andhra Pradesh and Goa.

If we look at the States most of them are North-East State. Tribal customs are given Para-mount importance. They have distinct ethnical and regional identities and therefore in furtherance of complete integration it was necessary to provide them, initially several concessions and special protections. These protections are mainly focused on giving these states more autonomy than other States of India. Indirectly this has promoted regionalism and so Issues like Kashmir arose. These provisions are reflecting state-protected regionalism. As we have already discussed to develop the nationalism, regionalism plays positive role. For integration of states or for better development of states constitution of India provides for special status to above states which ultimately preserves the autonomy of states. Will discuss now how this positive aspect of regionalism does has affected growth and development of states and has contributed for increase in sub-regional identities.

Asymmetrical Federal Structure under Constitution of India.

Though there has been no reference to asymmetric federalism in Constituent Assembly or any other historic document the nature of Indian Constitution can be traced by its provisions and

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it'sworking. Asymmetric constitutional arrangements typically arise either in response to demands from mobilized nationality groups, or a new entity is guaranteed certain privileges or protections at the time of joining an existing federation. The need for providing asymmetric federal structure arises with the fact that various ethnic, linguistic groups co-exist in a society.

The heterogeneous structure paves the way for incorporating asymmetric provisions. In simple words several units in federation are given more autonomy to retain its diverse nature. Self-governance and preservation of ethic difference is the base-line or foundation on which several protections are extended. The asymmetrical features of the Constitution are part of a single legal order, which permits differential treatment of regions and groups.[1503] Article 370 is representative Article of such asymmetric federal structure of Indian Constitution.

Forms of Regionalism in India

Regionalism in India appears in four forms, e.g. demand of the people of certain areas for separate statehood, demand of people of certain Union Territories for full- fledged statehood, demand of certain people for favorable settlement of inter-state disputes, and the demand of the people of certain areas for secession from the Indian union.

- Instances where regionalism in India has created problems/ affected development.

    a. Linguistic reorganization of states

Demand of people of certain areas for separate statehood like the demand for Bodoland, Gorkhaland, Vidarbha, Telangana. After the 1956 reorganization of states within in India, there is continues demand for separate statehood in various parts of the country. This lead to rise in the number of Indian states from 16 in 1956 to 29 in 2016. .

Demand of people of certain union territories for full-fledged statehood like the case of Delhi has affected the development of Union Territory. Some union territories have been putting demand for the grant of full statehood. For Ex: In 1971 Himachal Pradesh got the states of state and there after Manipur, Tripura, Mizoram, Arunachal Pradesh and Sikkim got full statehood. The demands for full state hood also reflect the presence of regionalism.

[1503]C.f. Sujit Chaudhary; Khosala; Mehta, the Oxford Handbook on Indian Constitution, (Published by Oxford University Press. First Ed. 2016, New Delhi) at p. 541.

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b. Khalistan

The movement was initiated in Punjab for cessation of Punjab from India where Sikhism was the religious attribute behind such thought.

c. Reorganization of States – 2000

In 2000, the Government of India, pursuant to legislation passed by Parliament during the summer, created three new states, Chhattisgarh, Uttaranchal, and Jharkhand, reconstituting Madhya Pradesh, Uttar Pradesh, Bihar, respectively. Both the ruling BJP and the opposition Congress party supported the formation of the states. The basis for creating the new states is socio-political and not linguistic.

d. Inter-state Disputes.

The boundary disputes between Maharashtra and Karnataka over Belgaum, Assam and Nagaland over Rangama reserved forest in the Rangapani area, between Assam and Meghalaya over Langpity and there is inter-state water disputes for instances, the disputes between Punjab and Haryana over the distribution of Ravi-Beas and Sutlej water. The disputes among the states like Gujarat, Rajasthan, Madhya Pradesh and Maharashtra over the sharing of the Narmada waters. The disputes among states like Karnataka, Kerala and Tamil Nadu over the Cauvery waters etc.

The regionalism in India has always been stood in between the development of States. Due to several political compulsions though we have adopted asymmetrical federalism which contributes as a factor for boosting regional aspirations, the constitutional framework strives to balance the situation.

Regionalism: A Limitation to social development in Kashmir.

Effects of Regionalism on Development.

We have seen that regionalism has direct connection with development. So it becomes important to understand the impact of regionalism on social development. The first and foremost impact of regionalism is Developmental plans are implemented unevenly focusing on regions to which heavy weight leaders belongs are benefitted, hence unrest is generated among rest of the regions. Secondly, Law and order is disturbed, agitations with massive violence take place and ultimately government is compelled to take harsh steps; hence wrong signals are emitted about government

authorities. Regionalism also becomes hurdle in the international diplomacy. Among the various social divisions in contemporary era, regional divisions have probably raised some of the most complicated issues. Inter- provincial relations have profoundly affected the course of events in the state.[1504] In turn every political development has influenced inter provincial relations. The regional identity of a place promotes regionalism among its inhabitants. Secondly, the inter- regional physical barriers , long distances between the two regions inaccessibility, climatic variations and sharp socio – cultural differences between two regions hinder the process of interregional interactions and emotional integration among the people of such regions. Thirdly, the spatial distribution of human attributes such as ethnicity, language, religion, culture, caste, ideology etc. in a regional pattern over an area gives its inhabitants a sense of distinct identity.[1505]

Impact on Kashmir

Kashmir's social disengagement from the Indian civil society can easily be seen through easy illustrations. One will find that the most comprehensive work on Kashmiri music has been done by a Polish scholar. The finest work on Kashmiri carpets has done by an American while the classic on shawls has been authored by a Swiss national. An Irishman has documented the Kashmiri language. Not to speak of the British who has done masterly work on Kashmiri folk tales. Indian scholarship is conspicuous by its absence.[1506] Kashmir has to become an Independent Economic entity, it is important to take steps that welcome the maximum possible investment of private capital and entrepreneurship in the state. Unfortunately the incentives available to private investors have not been as attractive in other states, which meant that Kashmir failed to generate sufficient capital from the private sector. Unlike rapid movement towards Privatization in other parts of the country, most of the existing large and medium scale industries are state owned. The effect of disturbed situations and insurgency in the state has a diverse attack upon the citizen building institutions like education sector. Insurgency from past years has now brought the education sector

[1504] Supra 3.
[1505] Supra 26.
[1506] Navnita C. Behera, *Contested spaces of State and Identity politics: Re-visiting the relationship of Jammu and Kashmir with India.* From Understanding Contemporary India Ed. By AchipVanaik and Rajeev Bhargava, Published by Orient BlackSwanPri. Ltd. 1st Ed. 2010.

at stake and risk [1507] in 2015 the extensive tension got emerged in the valley again. It was marked as a new phase of tension in the valley as 2015 unrest of Kashmir which not only attacked the mind of students but left them paralyzed. The year 2016 marked 130 days of unrest and shutdown. [1508]24 schools were put into ashes and some of the schools and colleges were destroyed. The education sector took painful hiccups due to months of long strike and agitations. The young children stayed at homes for at least 4 months according to the survey and reports reveal that since July 8th 2016 educational institutions functioned for only 80 days out of 197 working days report by that means they remain blocked by 59.39% of functioning days. We can clearly assume the rate of loss in education, loss of interest among students, loss of good future, and cut off from rest of the world due to banned communications, loss of teachers and other educational faculties as being wage less time to time and loss of state economy.[1509]

[1507]Manu Sharma, Shoaib Mohammad, The Impact of Insurgency on Education Sector in Kashmir: Issues and Concerns, International Journal of Recent Technology and Engineering (IJRTE) ISSN: 2277-3878, Volume-7, Issue-6S5, April 2019

[1508]Ibids

[1509]Retrieved from <https://www.hindustantimes.com/india-news/since-july-2016-kashmir-s-schools-and-colleges- stayed-shut-on-60-of-working-days/story-1FlfmjKN23a8osHATOIaFM.html>

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Sector-wise list of Selected indicators

Education					
S.no	**Indicator**	**Units**	**2014-15**	**2015-16**	**2016-17**
1	Total expenditure on Education sector (Capital)	Rs in crore	1831.42	2337.87	NA
2	Average area coverage per school	Sq km	3.81	3.82	3.88
3	Average population per school	No.	518	531	552
4	Dropout Rate - Primary	-	NA	6.93	10.30
5	Dropout Rate - Upper Primary	-	NA	5.36	10.20
6	Gross Enrolment Ratio - Sec	-	66.29	66.81	NA
7	Gross Enrolment Ratio - Upper Sec	-	59.33	58.6	NA
8	Gross Enrolment Ratio - Primary	-	NA	98.26	98.70
9	Gross Enrolment Ratio - Upper Primary	-	NA	97.17	97.86
10	Teacher Pupil Ratio- Primary	-	21	15	22
11	Teacher Pupil Ratio- Middle	-	10	8	11
12	Teacher Pupil Ratio- Sec	-	13	14	13
13	Govt spending on education sector as %age of GSDP	%	1.86	1.99	NA
Agriculture &Allied					
1	Total expenditure on Agriculture sector (Capital)	Rs in crore	210.21	311.89	NA
2	Contribution of agriculture sector to GSDP	%	16.20	19.12	19.48
3	Govt spending on agriculture sector as %age of GSDP	%	0.21	0.27	NA
4	Gross area irrigated as %age of gross area sown	%	43.67	44.75	42.30
5	Net area irrigated as %age of net area sown	%	42.78	47.21	44.39
6	Cropping intensity	%	157.71	153.67	155.49
7	Cultivable area as %age of reported area	%	35.76	35.92	35.51
8	Area sown under commercial crops as %age of gross area sown	%	14.41	14.51	16.34
9	Area sown more than once as %age of net area sown	%	58.97	53.67	55.49
10	Net area sown as %age of reported area	%	31.37	31.21	31.31
11	Total cropped area per capita	Hect	0.09	0.08	0.08
12	Area under fruits and vegetables as %age of gross area sown	%	9.16	9.33	11.22

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	Tourism				
1	Total expenditure on Tourism sector (capital)	Rs in crore	107.74	117.13	156.04
2	Govt spending on Tourism sector as %age of GSDP		0.11	0.10	0.12
	Industry				
1	Total expenditure on Industry sector (Capital)	Rs in crore	131.41	153.44	114.14
2	Govt spending on industry sector as %age of GSDP	%	0.13	0.13	0.09
3	Year wise trend of Employment generation in SSI units	Nos	5806	6425	5419
4	Year wise trend of Employment generation in Large and medium scale units	No	0	3769	413
5	Year wise Export of handicrafts goods	Rs in crore	1287	1059	1151
6	Year wise %age increase in Value of export of goods to Pakistan through LoC Trade	INR crore	46.39	24.66	(-) 16.86
7	Year wise %age increase in Value of Import of goods to Pakistan through LoC Trade	PAK Currency (in crore)	57.9	4.41	1.35

Capital Expenditure figures provided by Planning, Development & Monitoring Department

After careful analysis of Economic Survey of State of Jammu and Kashmir for the year 2017 it becomes much clear that in educational and industry sector there are unusual shifts in expenditure and GSDP share.

Educational Sector – Dropout rate of Primary and Upper Primary has increased.

Teacher Pupil Ratio has also been varied in the three years.

Industry Sector – Total Capital expenditure has been declined in 2016-17 compared with 2015-16.

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As we have already seen in year 2016-17 almost 130 days Jammu and Kashmir was under distress and situation was not under control as militants and insurgency groups were more active. The direct result can be traced from above economic survey.

Impact on Jammu and Ladakh

As already discussed regionalism gives rise to sub-regional identities and disturbances. Same has happened about Kashmir. The inflow of finance from Central Government has always been diverted to Kashmir. Every Developmental project has been initiated and constructed in Kashmir valley. This has given rise to sharp conflicts between Kashmir Valley and Jammu and Ladakh. The conflicts were so strenuous that at different juncture of time 4 committees were constituted to resolve the problem. These were the Gajendragadkar Commission (1967), the Qadri Commission (1972), the Sikri Commission (1979), and Wazir Commission (1981). The commission constituted in 1967 and 1979 were to look into the complaints of the people of Jammu and recommend measures which could rectify the regional imbalances and harmonies in inter- regional relations. However, what were most significant were the observations of the Gajendragadkar Commission that "the main cause of irritation and tension was the feeling of political neglect and discrimination from which certain regions (Jammu and Ladakh) of the state suffer. Even if all the matters are equitably settled, we feel that there would still be a measure of discontent unless the political aspirations of different regions are satisfied". It's yet another significant comment was that "although the Jammu and Kashmir state has been a single political entity for over hundred years, it cannot be denied that geographically, ethnically, culturally and historically it is composed of three separate homogeneous regions namely Jammu, Kashmir and Ladakh.In order to look into the grievances of Jammu region, the central government appointed a commission of inquiry, the Sikri Commission which after making a thorough study of the prevailing situation in the state agreed that "there existed discrimination and favoritism in the field of development, employment and education in the context of different regions, which was giving rise to irritations and tensions among the people of state"[1510]Justice Janaki Nath Wazir Commission submitted its report in 1984. It suggested craving out of three districts in Jammu and one district in Kashmir. According to the report this decentralization would increase inflow of funds to Jammu and representation

[1510]Mamta Sharma and Natasha Manhas, The Story of Neglect of Jammu Region: An Analysis, International Journal of Scientific and Research Publications, Volume 4, Issue 10, October 2014

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(quantitative) can be increased by such move. It was 2006 when the recommendations were implemented with modification and equal districts in Kashmir and Jammu were created. This did not stand fruitful. Over 90 percent of the state's tourism budget is spent in the valley every year. Despite the fact that the number tourists who visit Jammu region every year is 10 times more than those going to the Kashmir valley. The Jammu region is inadequately represented in the state Civil Secretariat with just four commissioners cum secretaries out of about 35 and 10 percent in the rest of services. The proportion of Kashmiries and Jammuites in the regional services of Kashmir and Jammu is approximate 99:1 and 30:70 respectively. The youth of Jammu and Ladakh virtually find no employment in the 12 corporations whose headquarters are in the valley with 100 percent of their employees from Kashmir. These corporations include Jammu and Kashmir Forest Corporation, Jammu and Kashmir Agro Industries Corporation, Jammu and Kashmir State Road Transport Corporation, Jammu and Kashmir Handloom Development Corporation, Jammu and Kashmir State Financial Corporation, Jammu and Kashmir Tourism Corporation, Jammu and Kashmir Minerals Development Corporation, and Jammu and Kashmir Industrial Development Corporation and Jammu and Kashmir Horticulture Produce and Marketing Corporation.

CONCLUSIONS AND RECOMMENDATIONS

Conclusion

Firstly, it is clear from the above discussion that Regionalism has two aspects- Positive and Negative. In a positive way it supports the development of State and in negative way it hampers the national spirit. It can also be concluded that most of the serious problems of change in our country are the result of challenging of political power though increasing regionalism.

Secondly and more particularly Regional aspirations in Kashmir have contributed in underdevelopment of Jammu and Ladakh. This is why both have been declared as Union Territory by State Reorganization Act, 2019. But it is also evident to note that Regionalism is not the only factor for hampering overall development in Kashmir.

Recommendation

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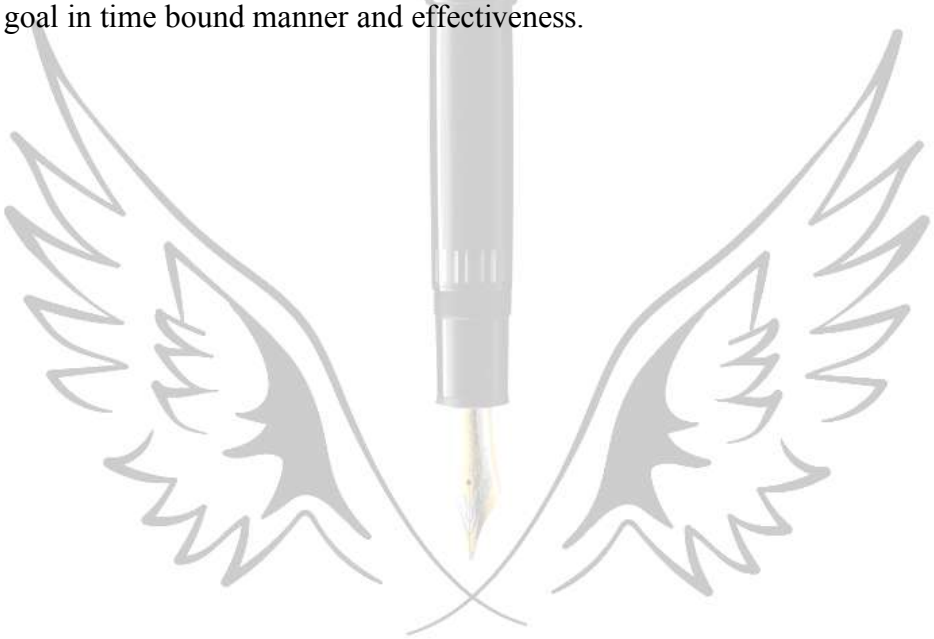
Though Jammu and Ladakh have been declared as Union Territories, the Government considering the fact that demand was for separate state shall declare a time-bound development road map and confer the Status of full-fledged state to these states in a time bound manner. Otherwise it would give rise again to regional aspirations and regionalism will prevail over development.

Secondly, to analyze the overall problems faced by the Kashmir a committee shall be established which would be mainly entrusted with responsibility of understanding development issues arose because of regional forces.

Thirdly, a separate development Board for Jammu , Ladakh and Kashmir should be constituted to achieve the goal in time bound manner and effectiveness.



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ABUSE OF PRO- WOMEN PROVISIONS IN LAWS IN INDIA

- YUV RAJ SAINI & ADITI VIVEK MISHRA

ABSTRACT

Introduction

Purpose

The researcher seeks to determine whether pro-women provisions that are present in Indian legislations are abused by women and their legal representatives. Furthermore, the author aims to analyse whether such pro-women provisions are fulfilling their aim of the eventual establishment of a safe and sound society for women. Lastly, the author aims to come up with a solution to this problem of abuse and misuse of pro-women provisions in laws.

Research Methodology

The present research uses the survey method of research as a primary source. The Researcher has relied upon legislations, case laws and numerous articles as secondary sources.

Findings and Interpretation

The Supreme Court's recent modification of the procedure to be followed by the police in complaints under Sec. 498A has given rise to debate regarding whether such pro-women provisions are being misused or abused. The research conducted by the author shows that there is abuse of such provisions, at least in the lower courts and the only viable solution to this problem seems modification of the laws after they have been passed and their weaknesses have been exposed.

Research Limitations

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The survey that this research has relied upon has been conducted upon advocates who practice law in one district of the state of Punjab in India. Therefore, the samples used as the primary source for this particular research are limited to that particular region.

Originality

The research through the present paper seeks to determine whether pro-women provisions of Indian legislations are abused or misused and, if they are, then what is the solution for the same.

KEY WORDS

Pro-women, 498A, IPC, abuse, legislation.

RESEARCH METHODOLOGY

The following methods of research have been used in this paper:

1. **Survey methodology of research:** Based on the responses to a survey or surveys prepared by the author to determine the opinion or practice regarding a particular theme.
2. **Doctrinal methodology of research**: Mainly focused on case laws and legislations.
3. **Analytical methodology of research**: Based on identifying the problem, analysing the same and then coming to a solution on the basis of the analysis.

For this research paper, the author has relied upon a survey as the primary source and upon cases and legislations as secondary sources.

REVIEW OF LITERATURE

Unfortunately, there is a dearth of good literature that covers pro-women legislation. There aren't many papers that discuss pro-women legislations, and research on the abuse or misuse of such laws is almost non-existent. There are however, some articles that do touch upon this topic, albeit in an insufficient manner.

In an article named '*Gender Analysis and Social Change: Testing the Water*'[1511], the author has talked about the need for equality in society. He has written about bringing social change in order to cater to the important need of bringing the female sex up to par with males. The article writes about how political philosophy over the years has side-lined women and given the reins of power to men instead. The paper also talks about the role economic liberalism can play in bringing women into the mainstream. However, there is one major drawback of this article: the author has failed to mention any sort of feasible solution which can be implemented to improve the day to day lives of disadvantaged women who have not been given adequate opportunities. An even more pressing drawback of this article is that the author has failed to mention any of the atrocities that women have been subjected to over the years. The paper fails to even mention the fact that women have not just been side-lined over the years but have also had atrocities committed against them for centuries.

In another article, called 'Protecting Women against Violence?'[1512], the author has analysed various so-called 'pro-women' legislations that had been passed to protect women against a culture of violence. Her analysis, however, contained only criticism. She states that in the name of feminist jurisprudence, Indian lawmakers have passed mostly defective laws over the years and when confronted about the weaknesses of their legislations, they hail these laws as being the first stepping stone towards women's empowerment. The article is also critical of the fact that none of these 'pro-women' legislations were up to the mark in terms of the demands that were made by the various women's campaigns. These laws also ignored many of the recommendations that had been made by the Law Commission. The major drawback of this article is not something that has been missed out on by the author but the fact that it is an aged one. Because of this limitation, none of the laws passed in the 21st century have been analysed. Research that analyses more recent pro-women legislation is very much required.

A research paper titled '*The Condition of Women in Developing and Developed Countries*'[1513], the author has drawn a comparison between countries where 'pro-women' laws are present and

[1511] Carol Bachi, Gender Analysis And Social Change: Testing The Water, 61-68, (UNIVERSITY OF ADELAIDE PRESS) (2010)
[1512] Flavia Agnes, *Protecting Women against Violence? Review of a Decade of Legislation, 1980-89,* vol. 27, no. 17, *ECONOMIC AND POLITICAL WEEKLY*, WS19–WS33 (1992).
[1513] Michelle Fram Cohen, *The Condition of Women in Developing and Developed Countries*, vol. 11, no. 2, *THE INDEPENDENT REVIEW*, 261–273 (2006).

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countries where there are no such laws or they are less in number. The author has made a comparative analysis in which she states that there is more upliftment in countries where laws for the protection are present as compared to countries that do not provide their female citizens with adequate legal protection. Although the analysis carried out by the author is commendable, the consequent result which comes out of it is unfortunately very obvious and it exposes the biggest drawback of this paper: the author fails to tell the readers what kind of 'pro-women' laws are more beneficial than others. Had the author analysed this, the result of the research would have been more rewarding as it would have not only told us that what kind of legislations are beneficial for women, but how such legislations should be framed, implemented etc. to reap maximum benefit.

It is thus quite apparent that although there is literature present on the topic of 'pro-women' legislation, there are still many gaps that need to be filled. One of these is the exploitation, misuse and abuse of such laws by women themselves or by their legal representatives, mostly as a result of lax laws being passed in the name of upliftment of women. Carrying out research to throw more light upon such occurrences is the chief aim of this research paper.

INTRODUCTION

The Indian justice system is based on the principle of presumption of innocence,[1514] but some legislations and their implementation work in a manner contrary to it. One of the fundamental problems with the Indian legal system has been that legislations that are usually aimed at benefiting a certain group of people are executed and employed in a manner that is so overboard that it may even end up going against the very principle that it stands for. A perfect example would be the Indian reservation system, which was supposed to be for the upliftment of those sections of society that had been side-lined from mainstream Indian society for generations. Instead, the system has now become a source of exploitation, of a mostly gullible citizenry, for the purpose of vote-bank politics.[1515] A similar predicament, although not exactly the same may be facing the Indian legal system in the field of pro-women legislation. The passing of such laws is primarily based on the

[1514] Pramila Agrawala, *Indian Judiciary and Natural Justice*. Vol. 25, no.3/4, THE INDIAN JOURNAL OF POLITICAL SCIENCE, 282–291 (1964).
[1515] Sudha Pai, *Politics of Preferential Treatment*, vol. 40, no. 35, ECONOMIC AND POLITICAL WEEKLY, 3828–3832 (2005).

principle of equality and their chief aim is the establishment of a society where parity exists between both genders and there is no discrimination, in any sphere of life, based on sex.

Legislations that can effectively be termed as being pro-women contain provisions that are extreme.[1516] This extremity makes the passage of such laws counter-productive because instead of bringing about equity or even equality, they lead to more disparity among the two sexes. This is because such extremity usually means that men are targeted by such provisions. The presence of such extremity also means that there are numerous instances of such laws being misused. Thus, instead of helping women come to parity with the opposite sex, these laws are actually misused against the latter to terrorise them.[1517]

Although there are surely numerous cases where such laws actually do help women in need by providing them a way-out from a life of exploitation and abuse, the number of instances where such laws are misused are also too many to ignore.[1518] The author's main aim with this research is to determine whether there is a significant exploitation of existing pro-women laws. In simpler words, whether such laws are doing more harm than they good and whether, if the answer is in the positive, there are any solutions to curb such exploitation.

NEED FOR PRO-WOMEN LEGISLATION

The first and foremost question that needs answering before we can move further is whether there is an actual need for any sort of pro-women legislation at all, the answer to which is a simple 'yes'.

The need for pro-women laws is most pressing in a society like India, where ancient customs still prevail in the ordinary lifestyle of most citizens. Women have been subjected to all kinds of abuse over the ages. Domestic violence, sexual assault, lack of opportunities in terms of education and employment and lack of freedom in general are just some of the problems that women still have

[1516] A. Kumar, *A demand for a National Commission for Men in India: A rationale and its possible consequences*, NEW MALE STUDIES: AN INTERNATIONAL JOURNAL, 76-80 (2018)
[1517] Randeep Ramesh, *Dowry law making us the victims, says India's Men's Movement*, THE GUARDIAN (UK) (Dec. 13, 2007), https://www.theguardian.com/world/2007/dec/13/india.randeepramesh1.
[1518] Harish V. Nair, *Inside the new 'legal terrorism': How laws are being abused to settle personal scores*, MAIL ONLINE. (Nov. 30, 2013), https://www.dailymail.co.uk/indiahome/indianews/article-2516150/Inside-new-legal-terrorism-How-laws-abused-settle-personal-scores.html.

to face in the Indian society in the 21st century.[1519] It goes without saying that for a majority of men, these are privileges that have been taken for granted for generations.

Many of these problems, like the lack of complete freedom for women, can only be cured over a period of time with proper education for the masses and by sensitizing men with the problems that women have to face on a daily basis because of such discrimination.[1520] No law on its own can guarantee a complete change when it comes to such problems.

The other problems that are faced by most women, however, require stringent laws from the government if they are to be curbed. Such problems include domestic violence, sexual harassment, sexual assault etc. The solution to such offences is nothing but the presence of laws which ensure that there is punishment for the perpetrators.[1521] Just patiently waiting for the society to become liberal with the passage of time and by even consciously sensitizing men, such offences against women can never be completely stopped. The solution to these problems is always immediate. Such laws, though, need to be well quipped and well implemented to be successful in fulfilling their aim: which is to not only to provide women with protection but to also establish a society in which both sexes are on an equal footing.[1522]

To sum up, there is, without any doubt, a need for good pro-women legislation that is certainly deterrent in nature with regard to offences against women, but which is not so extreme that it is actually counter-productive towards the establishment of a society where both sexes are at parity.

RESULTS: ABUSE OF PRO-WOMEN LEGISLATION

The following provisions of the Indian Penal Code can be termed as being pro-women:[1523]

1. Section 498A, which deals with cruelty to women by her husband or by her husband's relatives.

[1519] N. Jayapalan, *Status Of Women In Hindu Society, Indian Society And Social Institutions* 145 (ATLANTIC PUBLISHERS AND DISTRIBUTORS) (2001).
[1520] Kalyani Menon-Sen, A.K. Shiva Kumar, *Women In India: How Free? How Equal?* (UNITED NATIONS DEVELOPMENT) (2001).
[1521] Deepak K. Upreti, *India is Home of Unspeakable Crimes against Women*, DECCAN HERALD (Nov. 14, 2011), https://www.deccanherald.com/content/197720/india-home-unspeakable-crimes-against.html.
[1522] Mark Suzman, *Convention for the Elimination of All forms of Discrimination Against Women*, UNITED NATIONS. (Apr. 29, 2014), http://www.un.org/womenwatch/daw/cedaw/.
[1523] Sanjay Bhartia, *Pro Women Laws Being Misused,* THE TIMES OF INDIA (Jan. 26, 2008, 03:55 PM), https://timesofindia.indiatimes.com/india/Pro-women-laws-being-misused/articleshow/3165918.cms.

2. Section 376, which deals with the punishment for the offence of rape.
3. Section 354, which deals the offence of outraging a woman's modesty intentionally by assault or using criminal force (mostly used in cases of eve teasing).[1524]

For the purpose of this paper, the author conducted a short research wherein a small survey was distributed to advocates practicing in the lower courts (District Courts) and their responses (20 in number) were recorded. The survey contained their opinions as well as their experiences relating to these three 'pro-women' laws. The research was carried out in a limited regional area (the district of Rupnagar in Punjab), and the subjects whose answers have been recorded are advocates who deal with cases from that region only.

Advocates practicing in a district court were preferred as a sample for this paper because it is in the district courts that cases involving the afore-mentioned provisions are filed. For this reason, advocates who have to deal with such cases on a regular basis are the most suited to answer the survey pertaining to such pro-women laws.

The subjects were initially asked to give their opinion about whether they think pro-women laws, specifically pro-women provisions under the IPC, are prone to being misused by women. To this, almost 40% of the subjects answered 'Yes', and a little less than half of them answered 'Maybe.' If these responses were to be put into words, then almost half the lawyers who filled the survey are of the opinion that pro-women provisions of the IPC, like Sec. 498A, are prone to being misused by women by way of filing false complaints.

[1524] Indian Penal Code, 45 of 1860

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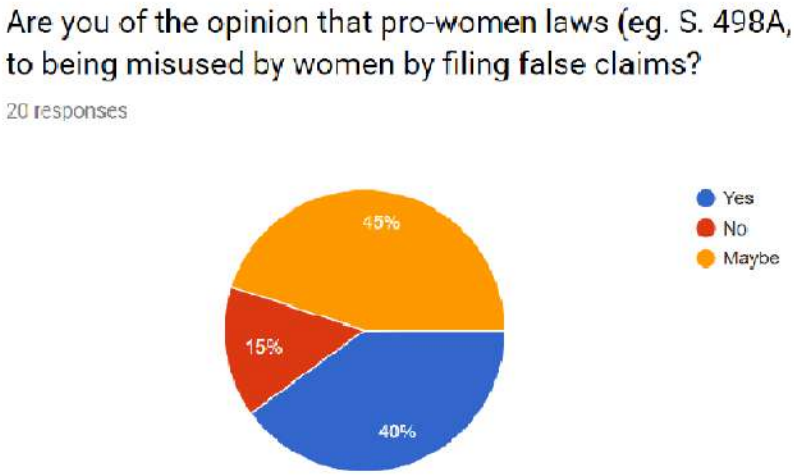

The second question was whether they had ever encountered any case concerned with pro-women provisions or laws that were based on false claims. To this, 70% of the subjects answered 'Yes', while 5% answered "Maybe". Thus, only 25% of the subjects were sure that the men that were accused in such cases had actually committed the offences they were accused of committing.

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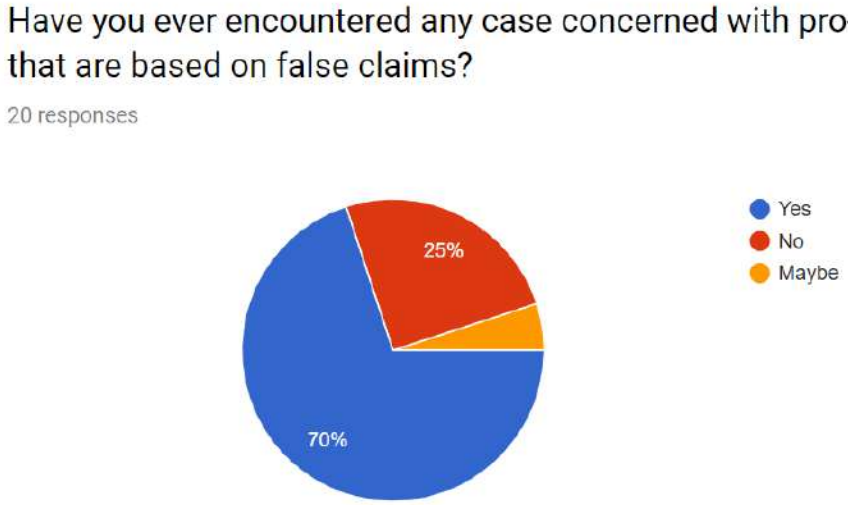

When asked which of the three provisions are abused the most in their experience, 60% chose Section 498A. They were also asked how many cases based on 498A, in their opinion, were based on false accusations. 15% said 'More than half the cases' while 40% chose 'half the cases.'

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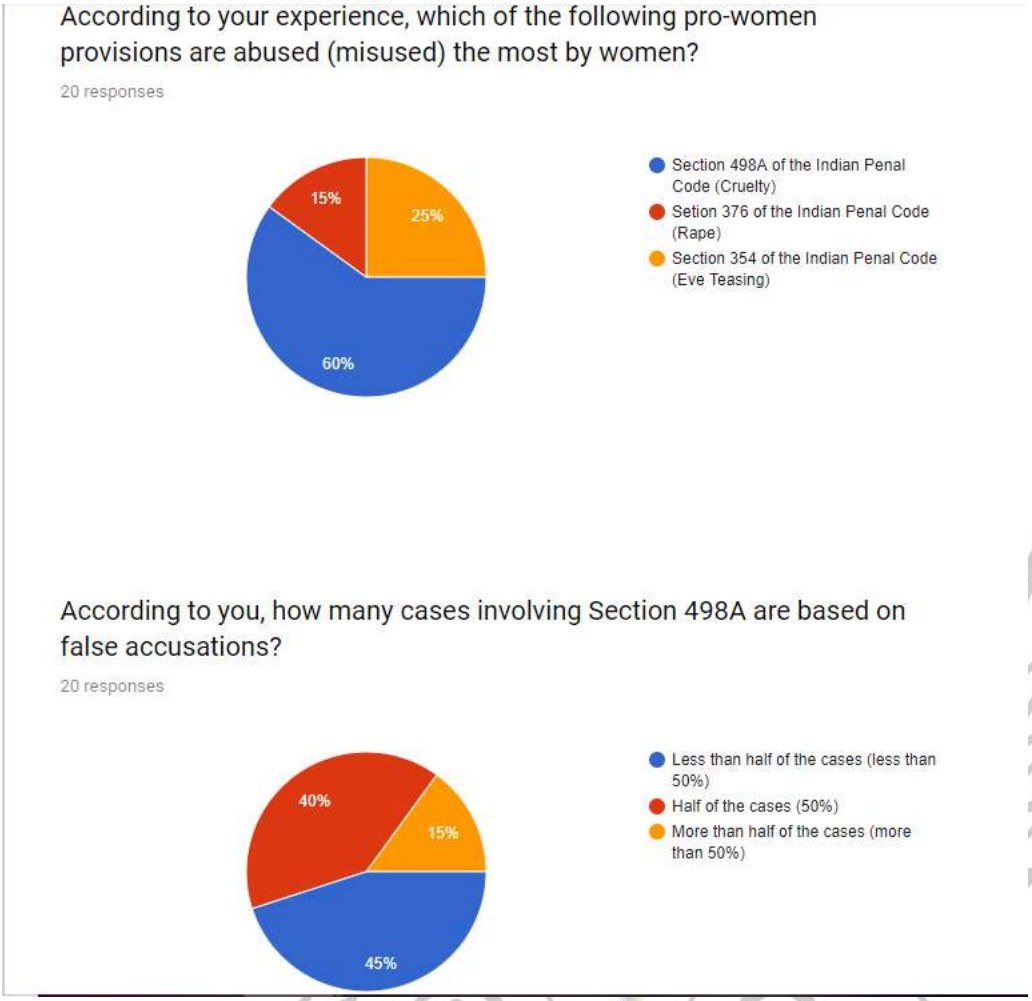

Another question that was part of the survey was whether, according to the subjects, such abuse of these provisions is prevalent only in their region or all over India. To this 50% of the subjects chose the latter.

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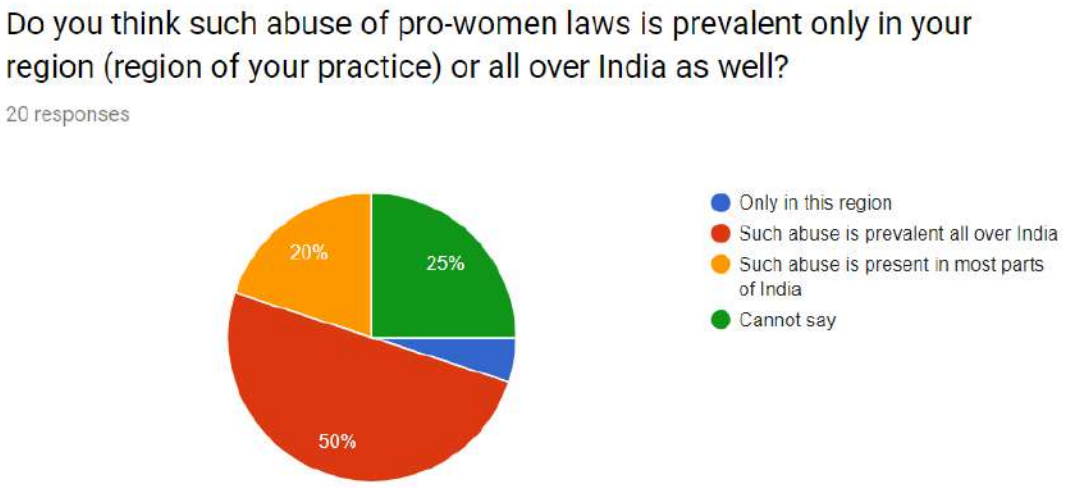
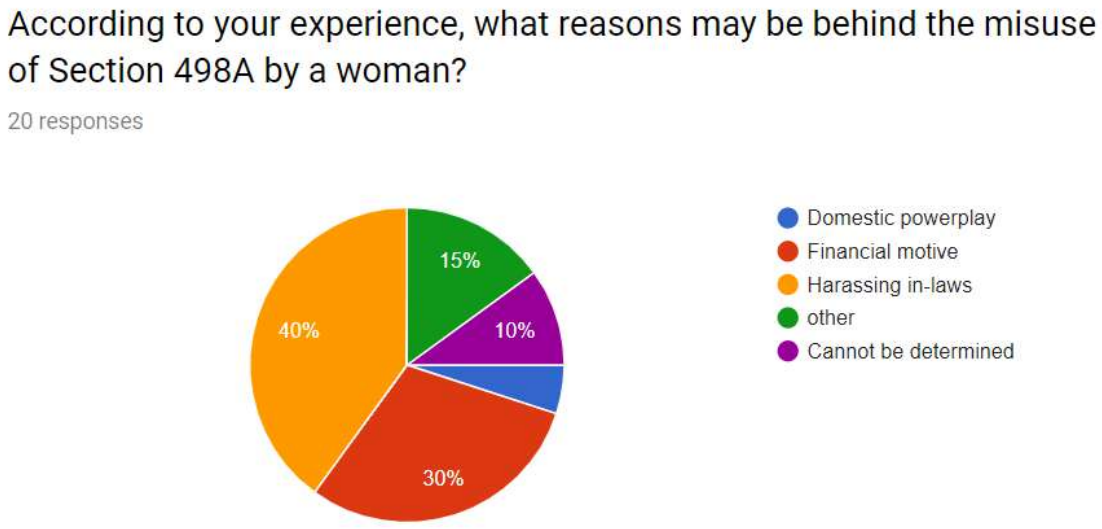


Thus, from this research it is obvious that pro-women provisions in the IPC are being misused by women or at least by their legal representatives. These laws are being used, not only to help women who actually require the protection of law, but for ulterior motives as well. When asked what the reasons for the abuse of such provisions were, the subjects chose the options of harassing in-laws (40%) and financial motive (30%) as their answers.



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Even apart from this study, a culture of misuse of such laws and provisions is certainly prevalent. An indicator of the same would be the fact that the Supreme Court recently had to bring about a few changes in the procedure that is used to handle complaints pertaining to Sec. 498A. The procedure initially directed police officers to arrest, without any investigation, people against whom a complaint under Sec. 498A was made. This was changed by the apex court to include investigation by officials to determine whether the complaint is a genuine one or not.[1525]

As far as Section 498A is concerned, there is the possibility for the girls' side to register false complaints against husbands and their relatives. As per data provided by the National Crime Records Bureau, in India, a total number of 99,135 cases in 2011, 1,06,527cases in 2012 and 1,18,866 cases in 2013 were registered under Section 498A for cruelty by husband or his relatives. After police investigation, 10,193 in 2011, 10,235 in 2012 and 10,864 cases in 2013 were found to be false or suffering from mistakes of fact or law. Under the existing rules, if a dowry harassment case is proved wrong or it is proved that the law was misused, a penalty of only Rs 1,000 is imposed. The amendment, however, provides for Rs 15,000 fine.[1526]

It was held in the case of Sushil Kumar vs. Union[1527] of India that "merely because the provision is constitutional and intra vires, does not give a licence to unscrupulous persons to wreak personal vendetta or unleash harassment." No law is perfect in its absolute sense. Every law that exists has complaints which are genuine and others that are made just to harass the accused by attempting to circumvent the existing legislation. Even if the accused is acquitted the social taboo attached to a court case and possible incarceration until the accused is proven guilty is inescapable. In order to avoid such situations, the courts should make sure that the existing legislations do not enable such a scenario. The courts can do this by keeping in check the language used in the legislations. Ambiguous language leads to lawyers giving new and different interpretations befitting their cases and waste the time of the court and resources. The second possibility is a narrow approach of the legislation may lead to genuine cases not being heard in the court of law.

[1525] Rajesh Sharma v. The State of Uttar Pradesh, 201 (8) SCALE 313
[1526] Pramila B, *A Critique on Dowry Prohibition Act, 1961.*, vol 76, Proceedings of The Indian History Congress, 844-50 (2015)

[1527] Sushil Kumar vs. Union (2005) 6 SCC 281

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The three sections that this paper focuses on are Section 354, 376 and 498A of the Indian Penal Code. The language used in Section 354 and 376 leaves no scope of ambiguity in determining whether the accused is guilty of the crime or not. Section 354 mentions assault and use of criminal force to outrage a women's modesty where assault can be physical, verbal or even gestures. A women's modesty is her womanhood and intention to defile the same is at the crux of determining the offence.[1528] Section 376 draws out the punishment for rape to be a minimum of 7 years which may extend to life and rape is clearly defined in Section 375 of IPC. Section 498A deals with violence faced by women after marriage. This section aims to protect a woman who has been subjected to cruelty at home. However, the definition of cruelty does not encompass all possible cruelties a woman is subjected to, leading to ambiguity. Hence discussing about the scope of cruelty becomes important.

AMBIGUITY OF THE DEFINITION

The following paras show how the definition of cruelty in the section has not been defined. While the scope of cruelty is wide and women face different forms of cruelty, a clear definition can help bifurcate the perpetrators from the innocent men.

Another significant problem with Sec 498A is that its definition of cruelty is vague and limited and does not include all forms of violence experienced by women within the home. While the text of Sec 498A contains one part that specifically addresses cruelty as harassment for dowry, the ambit of the section is meant to be much wider than that as it seeks to address all forms of cruelty that cause grave injury or danger to life, limb or health whether mental or physical.

Domestic violence in Sec 498A is therefore articulated in terms of "cruelty" and cruelty is defined to mean:

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

[1528] State of Punjab v. Major Singh, 1967 AIR 63

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to 'meet any unlawful demands for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. [1529]

Women experience violence at home in varied forms which is not limited to physical abuse. Women's real-life experiences show that they face abuse in the form of physical, mental, verbal, psychological and also sexual. Sexual violence particularly needs to be recognised as a form of cruelty not only because of its high prevalence within marriage but also because the definition of rape within Sec 376 IPC specifically excludes marital rape as an offence. Section 498A does not address these different forms of violence specifically, and addresses "cruelty" very generally, as any act that is likely to drive the woman to commit suicide or to cause grave injury or danger to life, as mentioned earlier. As a result, it often is at the discretion of the police officer to assess whether the sexual abuse or verbal and psychological abuse faced by a woman from her husband or in-laws would qualify as cruelty under Sec 498A or not.[1530] The drawback to this practice is the possibility of a collusion between the complainant and the police officer or a personal prejudice against the accused which may send him behind bars.

SOLUTIONS (CONCLUSION)

The solution to such kind of misuse or abuse of laws that are meant to be for the protection and upliftment of women is certainly not the scrapping of such laws.[1531] As it has already been established in a previous section that there is an unquestionably need for such laws, getting rid of such laws is definitely not an option.

In the author's opinion, the only viable solution for curbing the abuse of pro-women laws is amending the laws post-implementation. Certainly, a more convenient answer to this problem would be the implementation of a better law, but expecting such a solution is not practical. No law is perfect, and the challenged double when the law aims at not only protecting a certain section of a society but also indirectly trying to uplift it by way of empowerment.

[1529] Indian Penal Code, 45 of 1860
[1530] Jayna Kothari, "Criminal Law on Domestic Violence: Promises and Limits." *Economic and Political Weekly* 40, no. 46 (2005): 4843-849. http://www.jstor.org/stable/4417395.
[1531] Julian Rivers, *Law, Religion and Gender Equality*, Vol. 9, Issue 1, ECCLESIASTICAL LAW JOURNAL, 24-52 (2007)

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In September 2018, the Supreme Court revised its earlier order which provided for setting up of a committee to deal with dowry harassment complaints by protecting the provision of pre-arrest.[1532] The court's opinion is that the misuse of Sec. 498A to harass the other side is also causing social unrest in India.[1533] The apex court had said, in an earlier judgment, that anticipatory bail should be granted to husbands and their relatives. The chief aim here was protection of harassed husbands and their relatives, who are not remotely connected to matrimonial cruelty.

The Supreme Court had earlier passed an order according to which no action was to be taken by the police against anyone about whom a complaint had been made, without the submission of a report by a Child Welfare Committee.[1534] This provision has now been done away with and the investigation will now be conducted directly by the police. However, the provisions of anticipatory bail will still be present. The rationale that has been given by the court is that a balance needs to be struck between the rights of the two parties. The court said:

"*There should be gender justice for women as dowry has a chilling effect in marriage on the one hand, and on the other hand, there is right to life and personal liberty of the man.*"[1535]

The author is of the opinion that a similar approach needs to be adopted when it comes to curbing misuse of any kind of law. It needs to be understood that the abuse of any kind of law is inevitable; loopholes can be and are found in all laws. It is also easy to criticise the provisions of a particular law in hindsight, especially with access to numerous statistics. Thus, the only feasible approach to curb abuse of laws, especially pro-women laws, is by amending or modifying these statutes to fill in the gaps that may have been left by the original legislation. Striking the balance between the interested parties, is therefore, the only attainable solution. The fact that this approach would be more in-sync with the goal of achieving parity amongst the two sexes is an added bonus.

[1532] Jangveer Singh, *'Misuse' of anti-dowry law: Supreme Court modifies earlier order on Section 498A, leaves decision to arrest on police,* FIRST POST (Sep. 14, 2018 02:12 PM), https://www.firstpost.com/india/supreme-court-takes-note-of-misuse-of-section-498a-says-family-welfare-committees-not-needed-in-dowry-cases-5183621.html
[1533] Shrutisagar Yamunan, *SC modifies its Order on Dowry Harassment Cases,* THE TIMES OF INDIA (Sep. 14, 2018, 05:29 PM), https://timesofindia.indiatimes.com/india/supreme-court-takes-note-of-misuse-of-section-498a-makes-it-bailable/articleshow/65805285.cms
[1534] Rajesh Sharma & Ors. v. State of U.P., AIR 2017 SC 3869
[1535] Murali Krishan, *Supreme Court modifies its judgment on safeguards against misuse of Section 498A IPC, scraps no arrest rule,* BAR & BENCH (Sep. 14, 2018), https://barandbench.com/breaking-supreme-court-modifies-judgment-safeguards-misuse-section-498a-ipc/

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JUVENILE DELINQUENCY IN INDIA

- **VIRALI JOISHER**

Juvenile delinquency refers to the antisocial or criminal activity of the child (below 16 years of age for boys and 18 years for girls) which violates the law. In true context, that same activity would have been a crime if it was committed by the adult.

Juvenile delinquency is a gateway to adult crime, since a large percentage of criminal careers have their roots in childhood causing serious problems all over the world. Today, it has become a topic of great concern and needs to be discussed at a serious note. The complexity grows as we go into the statistical data of developed countries when compared to the still developing ones. A total of 44284 crimes were committed by the juvenile offenders during 1978 which showed an increase of 0.6% over 1977. It has been noted that theft and robbery add to a major percentage of these crimes. Murder, rape, dacoity, burglary, kidnapping are a few more that add to the rest of it. On the basis of the available statistics, an inference can be drawn that these crimes are on the increasing path.

The term 'juvenile' has been defined in clause (h) of Section 2 of the Juvenile Justice Act, 1986. The term 'delinquency' has been defined in clause (e) of section 2 of the Juvenile Justice Act, 1986.

Who is a Juvenile?

- A juvenile can be defined as a child who has not attained a certain age at which he can be held liable for his criminal acts like an adult person under the law of the country.
- The term 'juvenile in conflict with the law' refers any person below the age of 18 who has come in contact with the justice system as a result of committing a crime or being suspected of committing a crime.
- As per data compiled by the National Crime Records Bureau, the incidents of juvenile crime have constantly increased between 2010-2014

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- There has been 7.2% rise in juvenile crimes between 2015-16. Maximum number of cases under crime against children were reported in Uttar Pradesh, Maharashtra and Madhya Pradesh

Difference between a Juvenile and a Minor:

Though in common language we use both the terms interchangeably but 'juvenile' and 'minor' in legal terms are used in different context. The term juvenile is used with reference to a young criminal offender and the term minor relates to legal capacity or majority of a person.[1536]

Social communities are grappling with one of the more complex social issues thriving today i.e. the issue of juvenile delinquency. Its prevalence has not diminished despite of several initiatives in the past, in fact it has intensified and broadened. Juvenile delinquency should be considered to be the nature of behavioural imbalance. While it can be said that juvenile delinquency originates from the internal and individual impetuses of people, but juvenile delinquency also takes effect from social and environmental factors as well. Therefore, delinquency is the result of multiple factors, i.e., biological, psychological, social, and environmental factors.

The issue of juvenile delinquency is rather significant especially due to the sensitivity of the spectrum of the ages of the delinquents and that the children and juveniles in each community are the institutional investment of that particular group. There exists a substantial correlation between the prosperity of society and how the children of that community are raised. So if due attention is not paid to the roots of juvenile delinquency at the present time, not only will we be wasting competent resources of the community, and jeopardizing the individual and social health of other members of the community; but we will also be unknowingly encouraging delinquency in adulthood as well.

FACTORS CAUSING JUVENILE DELINQUENCY:

Physical Factors:

[1536] Namit K Srivastava, JUVENILE CRIMES IN INDIA AND THE LAW, (APRIL, 19, 2020, 10:50 PM), https://www.indiacelebrating.com/social-issues/juvenile-crimes/

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1. Malnutrition. 2. Lack of sleep. 3. Developmental aberrations Sensory defects. 5. Speech defects. 6. Endocrine disorders. 7. Deformities. 8. Nervous diseases. 9. Other ailments. 10. Physical exuberance. 11. Drug addiction. 12. Effect of weather.

The bodily condition of a child may affect his behavior in one or more of three ways. First, it may be the direct cause of delinquent behavior. Secondly, it may form a handicap to the child's achievement or favorable relationship with other children and adults, as in the case of malnutrition and defects. Delinquency may result as an attempt on the part of the child to compensate for these disabilities. Thirdly, bodily conditions such as certain developmental aberrations and physical exuberance may supply a superfluity of energy which finds outlet in delinquency.

Mental Factors:

1. Mental defect. 2. Superior intelligence. 3. Psychoses. 4. Psychoneuroses. 5. Psychopathic constitution (including emotional instability). 6. Abnormalities of instinct and emotion. 7. Uneven mental development. 8. Obsessive imagery and imagination. 9. Mental conflicts. 10. Repression and substitution. 11. Inferiority complex. 12. Introversion and egocentrism. 13. Revengefulness (get-even complex). 14. Suggestibility. 15. Contra-suggestibility. 16. Lethargy and laziness. 17. Adolescent emotional instability. 18. Sex habits and experiences. 19. Habit and association.

Mental factors, like physical factors, may determine delinquent behavior in one or more of three ways: (1) Delinquency may be the direct response to, or expression of, a particular mental state, for example, obsessive imagery. (2) Delinquency may be the expression of certain impulses or emotions left uncontrolled or stimulated by a special mental condition; or it may be a symbolic representation of such impulses. (3) Delinquency may be an attempt at adjustment or compensation for certain mental peculiarities.

Home Conditions:

1.Unsanitary conditions. 2. Material deficiencies. 3. Excess in material things. 4. Poverty and unemployment. 5. Broken homes. 6. Mental and physical abnormalities of parents, or siblings. 7. Immoral and delinquent parents. 8. Ill-treatment by foster parents, step-parents, or guardians. 9. Stigma of illegitimacy. 10. Lack of parental care and affection. 11. Lack of confidence and frankness between parents and children. 12. Deficient and misdirected discipline. 13. Unhappy

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relationship with siblings. 14. Bad example. 15. Foreign birth or parentage. 16. "Superior" education of children.

Home conditions can only be indirect causes of delinquency. They react upon the child's mind and body altering his mental and physical condition which in their turn determine his behavior. The conditions in the home and the family relationships which influence more particularly the mental life of the child are perhaps even more important as causes of delinquency than factors which affect mostly the physical condition of the child. Coming from the same home environment one child may become delinquent while his brother may become a great thinker or reformer. The reason for this is no doubt partly to be found in the difference between the native endowment of the two children, but it may also be in the fact that the home conditions "apparently the same" for both children were by no means the same. The actual physical, economic and social part of the situation may have been identical for each child, but the psychological part quite different. One child may have received more praise and encouragement from his parents, have excelled more at games and have been idolized by his playfellows or younger brothers and sisters. One boy may have been surrounded by a halo of success and approval and the other boy by a shadow of failure, incompetence and parental disappointment.

School Conditions:

1. Inadequate school building and equipment. 2. Inadequate facilities for recreation. 3. Rigid and inelastic school system, "the goose-step." 4. Poor attendance laws and lax enforcement. 5. Wrong grading. 6. Unsatisfactory teacher. 7. Undesirable attitude of pupil towards teacher. 8. Bad school companions and codes of morals.

School conditions, like the home conditions, may be considered as indirect causes of delinquency, although in either may be found the chief source of the trouble. It is the effect which these conditions have upon the particular child's mind and body which actually causes delinquent behaviour.

Neighbourhood Conditions:

1. Lack of recreational facilities. 2. Congested neighborhood and slums. 3. Disreputable morals of the district. 4. Proximity of luxury and wealth. 5. Influence of gangs and gang codes. 6. Loneliness, lack of social outlets. 7. Overstimulating movies and Shows.

Neighborhood conditions may determine a child's behavior just as home and school conditions may do, through their effect upon the child's mental attitude and physical condition.

Occupational Conditions:

1. Irregular occupation. 2. Occupational misfit. 3. Spare time and idleness. 4. Truancy. 5. Factory influences. 6. Monotony and restraint. 7. Decline in the apprenticeship system.[1537]

The environment of the child who is engaged in some wage-earning occupation offers a further source for external causes of delinquency.

HISTORY OF LEGISLATION FOR JUVENILE DELINQUENCY IN INDIA:

In India, the first legislation dealing with children in conflict with law or children committing crime was the Apprentices Act, 1850. It provided that children under the age of 15 years found to have committed petty offences will be bounded as apprentices.

Thereafter, the Reformatory Schools Act, 1897 came into effect which provided that children up to the age of 15 years sentenced to imprisonment would be sent to reformatory cell.

After the Independence, with an aim to provide care, protection, development and rehabilitation of neglected or delinquent juveniles, our Parliament enacted the Juvenile Justice Act, 1986. It was an Act which brought uniform system throughout the country.

Section 2(a) of the Act defined the term 'juvenile' as a "boy who has not attained the age of 16 years and a girl who has not attained the age of 18 years".

Later on the Parliament enacted the Juvenile Justice (Care and Protection) Act, 2000 which raised the age bar to 18 years for both girl and boy.

PRESENT LEGISLATION:

The Juvenile Justice (Care and Protection) Act, 2000 lays down that juvenile in conflict with law or juvenile offenders may be kept in an 'Observation Home' while children in need of care and

[1537] K. M. Banham Bridges, Factors Contributing to Juvenile Delinquency, Journal of Criminal Law and Criminology, Volume 17, Issue 4, Page 534-573 https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=2038&context=jclc

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protection need to be kept in a 'Children Home' during the pendency of proceedings before the competent authority.

A juvenile can be detained only for a maximum period of 3 years irrespective of the gravity of offence committed by him and he will be remanded to 'Special Home'. The Juvenile Justice (Care and Protection) Act, 2000 provides immunity to the child who is less than 18 Years of age at the time of the commission of the alleged offence from trial through Criminal Court or any punishment under Criminal Law in view of Section 17 of the Act.

The purpose of this new Act was to rehabilitate the child and assimilate him/her in mainstream society. The rationale is that a child still has the possibility of getting reformed due to his/her tender age and lack of maturity and it is the responsibility of the State to protect and reform the child.

PROVISIONS IN THE CONSTITUTION OF INDIA:

Constitution in Part III has provided Fundamental Rights for its citizens in the same manner in its Part IV it has provided Directive Principles of State Policies (DPSP) which acts as general guidelines in framing government policies. Constitution has provided some basic rights and provisions especially for the welfare of children. Like: –

1. Right to free and compulsory elementary education for all the children under the age of 6 to 14 years. (Article 21A)
2. Right to be protected from any hazardous employment under the age of fourteen age. (Article 24)
3. Right to be protected from being abused in any form by an adult. (Article 39(e)).
4. Right to be protected from human trafficking and forced bonded labour system. (Article 39)
5. Right to be provided with good nutrition and proper standard of living. (Article 47)
6. Article 15(3) of the Constitution of India provides special powers to State to make any special laws for the upliftment and the betterment of children and women.

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Therefore, the law makers while drafting the Juvenile Act, 2015 has consider all the necessary provisions laid down by the Constitution so that child's rights are protected in all the possible ways.

This is for the same reason that Chapter IV of the Act lays down the provisions for betterment of the juveniles and has focused on the Reformation and Rehabilitation of Juveniles in all the possible circumstances.[1538]

CONCLUSION:

Factors contributing to delinquency are thus to be found not only in the mental and physical make-up of the individual, but also in his present and past environments. Unwholesome influences and difficult situations encountered in early childhood are probably as important causal factors of delinquency as are present conditions. They may even be more important. In searching for the root causes in any given case of delinquency, prior to treatment, it is therefore absolutely necessary to make a thorough investigation of the past and present life of the individual and of his mental and physical make-up. It is probable that this cannot be undertaken by one person; for it will involve making an extensive survey of past and present home conditions, past and present school, neighbourhood, and occupational conditions, besides making complete mental and physical examinations of the case. These latter also include delving into the earlier life of the individual.

In conclusion, it must be discussed that whether we as a society want to have a justice system based on retribution and punishment or a system which is reformative and assimilative for the juvenile offenders. The State as well as the society has a responsibility towards our children in the sense that they would not become wayward and remain in the social mainstream; hence, 'care and protection' must be the main motto while amending the Juvenile Justice (Care and Protection) Act and not punishment.

[1538] Purti Vyas, An Analytal Study of Juvenile Justice System in India, (April, 19, 2020, 10:51 pm), https://blog.ipleaders.in/juvenile-justice-system-india/#_ftn2

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DO WE REALLY RESPECT OUR CONSTITUTION?

- PRAFULLA SHRIPAD LELE

We all are facing an unprecedented period of Health-emergency which has a far-reaching impact on our social, economical and political structure. We are compelled to think about revisiting our structures and systems due to COVID-19 as the numbers of patients are increasing and Maharashtra, unfortunately, has failed to flatten the curve. During this period of social and health emergency Maharashtra is moving towards one constitutional crisis. It relates with the Post of Chief Minister.

The Chief Minister of Maharashtra assumed the office on 27th Nov., 2019. Article 164(4) of Constitution of India, 1950 gives a privilege to minister to assume office even if he/she is not the member Legislature. Now, Maharashtra, being a state having State Legislative Assembly as well as State Legislative Council, Article 164(4) has to be read in that context. So the Minister shall become member of either of the House of Legislation within consecutive six months from the date on which he assumes the office. It is well settled preposition of law that the provision applicable to minister is applicable to Chief Minister also. That means Chief Minister of Maharashtra had six consecutive months to become Member of either of the House. Therefore, Chief Minister of Maharashtra has to become member before 28th May, 2020.

On 11th April, 2020 name of Uddhav Thakarey has been recommended to the Governor of Maharashtra for being nominated to Legislative Council so that Chief Minister will become member of either of House within six consecutive terms as mandated by Article 164(4). Reminder and re-recommendation was sent on 28th April, 2020. Now, the Governor has nominated Uddhav Thakarey to Legislative Council. The first question was whether the Governor had discretion to accept the name of nomination or not. The answer is no. He has to abide by aid and advice of Cabinet headed by Chief Minister.

Here it becomes necessary to understand and analyze several provisions and powers of the Governor. Article 171(3) (e) read clause (5) of the same article empowers the Governor to nominate a person having special knowledge of or practical experience of literature, art, sports ,

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science ,co-operative movement or social work, to Legislative Counsel. A careful reading of Constituent Assembly Debates pertaining to question of nomination makes it clear that such provision has been incorporated to give voice to such intellectuals and experts who otherwise cannot contest election. Such representation would be necessary for having their guidance in their respective expertise area. The purpose under Government nominations under Article 171 (3)(e) of the Constitution is to use talents of such persons in the State as have achieved distinction in various fields and whose experience and advice may be of value to the State Legislature, but who have neither the time nor inclination to contest election.[1539] On this backdrop let us analyze the current situation.

Therefore it is very much clear from above preposition that the Nomination clause cannot be used as "stop-gap arrangement" for a member to avoid the constitutional mandate of six consecutive months for becoming member of either of the House.

Let us consider several other facts regarding the membership of CM. Bye-election on one post was held in Month of Jan. 2020 for one vacant seat in Legislative Counsel. The seat fell vacant as the MLC contested Assembly election and was elected to State Legislative Assembly. This was a fair opportunity to become member of either of the House. We cannot decide the time on which party shall contest the election. But a small point is there was fair opportunity available. Probably due to some political compulsions or due to discretion of party and / or coalition CM was waiting for election which was going to be conducted in month of March which has to be postponed. Here it is interesting to take note of one observation made by Hon'ble Supreme Court, the judge has rightly pointed out that minister shall become member as early as possible and shall not wait till last day of 'privileged' six months.

Secondly, though the name has been advised for nomination it is interesting to note that the post of nominated member became vacant due to resignation of the member. The term of that nominated post will end on 6th June, 2020.[1540] That means the remaining term of post is less than one year. Many experts are referring to Section 151A of the Representative of Peoples Act, 1951. The relevant section envisages that no by-election would take place for a vacant post if the remaining period of that post falls short of one year. The question is whether this provision is applicable to

[1539] V. Venkateswar Rao (V.V. Rao) v Government of Andhra Pradesh, 2012 (6) Andh LJ 435 (DB).
[1540] http://mls.org.in/pdf/Retired.pdf

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Nominated posts also. On the backdrop of intent of founders of constitution to incorporate the nominated posts in Council, it is very much clear that the provisions are for greater cause and procedure adopted has to be followed for it. Even if we consider the above provision does not apply to nominated posts, are we brave enough to face the question of constitutional morality and parliamentary propriety? In simple words the CM will become member of the Council and even if the term of post will end on 6th June 2020, he will get more six months to be become member of either of House. This is nothing but finding via-way to the constitutional mandate. India is democratic republic. We have adopter Westminster's parliamentary form of Government. The cardinal principle of such kind of Governments is to have Prime Minister elected directly or indirectly. Like in U.K. it is the convention that prime minister should be member of House of Commons and not House of Lords. Even if we do not adhere to this kind of strict practice, at least we shall assume that person holding such important post like CM or PM shall be elected and not nominated. This may sound vague contention but it is based on Parliamentary Propriety. It was observed in S.R. Chaudhary v. State of Punjab[1541] that if a person is not 'elected' within consecutive six months then to confer him minister-ship is derogatory, improper, undemocratic and invalid. The word elect has to be emphasized. Way back it as observed by Allahabad High Court,[1542] that "every member of Council of Ministers, which is collectively responsible to the legislation, is expected under the constitution to enter by election and not by backdoor of nomination." The Preamble declares India as Sovereign but where does the sovereignty lie? The sovereignty vests in people. It is reflected through the representatives elected, either directly or indirectly. Election to Council of States or State Legislative Councils is conducted indirectly but at least the representatives of people are involved directly in such indirect elections.

Even though the via-way of nomination has been utilized for saving the post of Chief Minister it is undermining the constitutional spirit and parliamentary propriety.

Someone may accuse me of political bias by saying that I am ignoring the fact that we are in some emergent situation whereby elections cannot be conducted for Legislative Council and therefore use of bypassing the constitutional mandate in extraordinary situation is justified. I have deliberately dedicated first paragraph of article to this unprecedented situation, to make the readers

[1541] AIR 2001 SC 2707.
[1542] Har Sharan Varma v. Chandra Bhan Gupta and Others, AIR 1962 ALL 301.

aware that keeping this situation in mind I am writing the article. **Health pandemic cannot override constitutional principles and constitutional spirit.** The Parliamentary democracy is circumscribed by Constitutional Provisions, Conventions and Parliamentary propriety. For Parliamentary democracy to evolve and grow certain principles and policies of public ethics must form its functional base. [1543] We expect that even in such emergent situation State (as encompassed in Article 12) has to be abide by Constitution and shall not violate the Provisions, I don't find any reason to exempt the Chief Minister. Constitution is the supreme document which is political in nature when it deals with Composition, Powers, functions of executives and legislators. The oath which is administered to Chief Ministers and Ministers is nothing but assurance of abiding the Constitution and respect the constitution. The oath is also part of Constitution.[1544] So if the whole Cabinet tries to find bypass to constitutional mandate and subvert the constitutional spirit it becomes a serious question of law as the whole Cabinet is not following principles which, on oath, they have agreed to respect and follow.

What could be a better solution then? Obviously due to this emergent situation we have to select better from the worst options. One possible option would be resignation from the post. Any other person from MahaVikas Aghadi can assume the office of Chief Minister with a clear understanding that such post has been given as a stop-gap arrangement. Such person can prove majority .When I say "by proving majority" it is not necessary to prove it on floor of house and it is well settled law regarding Article 164(4). After the situation is normalized , Uddhav Thakarey can contest election to either of the House and can again become Chief Minister. I am fully aware of the fact that this option is also against the constitutional spirit but due to extraordinary situation it becomes better from worst options, as by resignation itself at least there would be no breach of oath and respect towards parliamentary conventions will also be reflected. At least there would be no gross misuse of Constitutional Provision.

[1543] AIR 2001 SC 2707.

[1544] Third Schedule, the Constitution of India, 1950.

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PRINCIPLE OF NON-ARBITRARINESS: POLICE POWERS

- **KAVYA JHA**

INTRODUCTION

The object of this paper is to study the principle of non arbitrariness under Article 14 of the Indian Constitution, with focus on police powers. The scope of the paper is limited to the specific principle, and does not elaborate upon the larger picture of the concept of equality under Article 14.

Various sources have been used for the completion of this paper, which is a qualitative research work. Articles, books, case laws have all been cited, all in the 20th edition of the Bluebook format. Some short forms, such as Art. For Article and Const. For Constitution have been used.

The first chapter first explains the concept of fundamental rights and Right to Equality under Article 14; it is descriptive and technical. The second chapter deals with the principle of non arbitrariness, what it is, how it developed and whether it is a standalone test or a corollary to the reasonable classification test. The third chapter deals on arbitrary state action with focus on police powers. The conclusion seeks to provide some solutions that are deemed fit.

AN OVERVIEW OF ARTICLE 14

4.1 The concept of Fundamental Rights

A fundamental right can be defined as "a right derived from natural or fundamental law."[1545] It is a "significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications."[1546] The concept of fundamental

[1545] *Fundamental right*, Black's Law Dictionary, (11th ed. 2019).

[1546] *Id.*

rights can be traced back to natural law philosophers such as John Locke, who developed the concept of inalienable natural rights which cannot be infringed upon by anybody, not even the State.[1547] This concept can be translated into the modern concept of fundamental rights. These rights are so essential to an individual's existence that they can never be interfered with.

The concept of Fundamental Rights in India has been taken from the United States of America, specifically, the 14th amendment made to the U.S. Constitution.[1548] These rights have been enshrined in Part III of the Constitution of India,[1549] from Articles 12 to 35. The need for having Fundamental Rights was so pertinent, that during the framing of the Constitution, the Constituent Assembly did not feel the need to discuss it.[1550] Thus, the Constitution grantees six fundamental rights, namely the Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights, Right to Constitutional Remedies.

4.2 Right to Equality: Article 14

Right to Equality is covered under Articles 14 to 18 of the Constitution. While equality is defined as "the quality of being equal; esp., likeness in power or political status,"[1551] political equality is defined as "the sharing of governmental decisions in such a way that… the preference of each citizen is assigned an equal value."[1552] In the right to equality, Article 14 is the most weighty, and the courts have given it a "highly activist magnitude" recently.[1553] It is a basic feature of the

[1547] John Locke and Peter Laslett, *Two Treatises of Government* (1988).

[1548] U.S. Const. Amend. XIV.

[1549] INDIA CONST. Part III.

[1550] M.P. Jain, *Indian Constitutional Law* (8th ed. 2018)

[1551] *Equality*, Black's Law Dictionary (11th ed. 2019).

[1552] *Political equality*, Black's Law Dictionary, (11th ed. 2019).

[1553] *Supra* note 7.

Constitution.[1554] Yet, it is not a free standing provision. Articles 14 and 21 together cover myriad features of life.[1555] Articles 14, 19 and 21 are collectively known as the "golden triangle."[1556]

The bare provision of Article 14 states 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."[1557] The objective of Article 14 is to secure equality of status and opportunity to all persons. It guarantees both equality before the law and equal protection of laws. On the one hand, the former is a negative concept and refers to "the notion that all persons are subject to the ordinary law of the land administered by ordinary law courts".[1558] It is parallel to the second corollary of the Dicean Rule of Law in the United Kingdom.[1559] The latter, a corollary to the former,[1560] is a positive concept and means that "the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances."[1561] Therefore, equals cannot be treated as unequals and unequals cannot be treated like equals. Further, the Article is an embodiment two principles: the principle of non-discrimination and the principle of non-arbitrariness. It acts as a bulwark against arbitrary and discriminatory state action. The court has held that equality and arbitrariness are antithetic, and in fact, they are sworn enemies.[1562] This paper focuses on the principle of non-arbitrariness.

PRINCIPLE OF NON ARBITRARINESS

[1554] M Nagaraj v. Union of India, (2006) 8 SCC 212.

[1555] Reliance Energy Limited v. Maharashtra State Road Development Corporation Limited, (2007) 8 SCC 1.

[1556] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[1557] INDIA CONST. Art. 21.

[1558] *Equality before the law*, Black's Law Dictionary, (11th ed. 2019).

[1559] Wade & Phillips, *Constitutional & Administrative Law*, 87 (1977).

[1560] Shankar Narayana, *Rethinking Non-Arbitrariness*, NLUD Student Law Journal, 4 (2017).

[1561] *Equal protection*, Black's Law Dictionary, (11th ed. 2019).

[1562] E. P. Royappa v. State of T.N., (1974) 3 SCC 3.

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Before discussing the constitutional concept of non arbitrariness, it is quintessential to understand the ordinary meaning of the term arbitrary. Arbitrary is defined as "based on random choice or personal whim, rather than any reason or system."[1563] Black's Law Dictionary defines it as something that depends on individual discretion, "a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures."[1564] Article 14 strikes at the root of arbitrary state action, including administrative as well as legislative state action; it protects from arbitrary laws as well as arbitrary application of laws.[1565]

5.1 Development of the Principle

In 1972, a writ under Article 32 was filed in the Supreme Court by a member of the Indian Administrative Service challenging the constitutional validity of his transfer form the post of Chief Secretary to the Deputy Chairman of State Planning Commission and later to Officer on Special Duty, both of which were inferior to his initial post. He also claimed that it was violative of Article 14. Although the bench rejected the petition unanimously, Justice Bhagwati famously stated in his judgement that:

"Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14..."[1566]

This 1974 judgement was followed by the 1975 Emergency period and the infamous ADM Jabalpur case[1567], after which India's democracy felt slaughtered and the citizens lost faith in the

[1563] *Arbitrary*, Oxford English Dictionary, https://www.lexico.com/en/definition/arbitrary.

[1564] *Arbitrary*, Black's Law Dictionary, (11th ed. 2019).

[1565] State of West Bengal v. Anwar Ali Sarkar, 1952 SCR 284.

[1566] *Supra* note 18.

[1567] A.D.M. Jabalpur v. S. Shukla (1976) 2 SCC 521.

judiciary.[1568] In this context, the decision in the Maneka Gandhi case[1569] came to be seen as the seminal case for the development of constitutional jurisprudence regarding fundamental rights in India.[1570] In this case, it was reiterated that "Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment." Other famous cases strengthening the the principle of non-arbitrariness in the concept of equality are Ajay Hasia v. Khalid Mujib,[1571] Bachan Singh v. State of Punjab[1572] and R.D. Shetty v. International Airport Authority[1573] wherein the Court has reiterated the relationship between equality and arbitrariness being negative.

The principle of non arbitrariness is still relevant, and is being used in recent judgements passed by various courts of India. The most relevant example is the Shreya Singhal Case,[1574] wherein the Supreme Court struck down Section 66-A of the Information Technology Act on the ground of being vague. This case shall be discussed in detail in the next chapter. The courts are continually defining this principle. In the recent controversial case of Rajbala v. State of Haryana,[1575] wherein the constitutional validity of the Haryana Panchayati Raj (Amendment) Act, 2015 was upheld, the court declared that statues cannot be declared unconstitutional on the ground of being arbitrary, but on the ground of unintelligible differentia.[1576] Thus, though a well established constitutional doctrine, its meaning is still developing in its practical usage.

[1568] Zia Mody, *10 Judgements that Changed India* (2013)

[1569] *Supra* note 12.

[1570] *Supra* note 6.

[1571] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722.

[1572] Bachan Singh v. State of Punjab, (1982) 3 SCC 24.

[1573] R.D. Shetty v. International Airport Authority, (1979) 3 SCC 489 at 511.

[1574] Shreya Singhal v. Union of India, (2015) 5 SCC 1.

[1575] Rajbala v. State of Haryana, (2016) 2 SCC 1.

[1576] *Supra* note 6.

5.2 A Standalone Test?

The principle of non arbitrariness has been called a "beleaguered doctrine"[1577] and has faced criticism by various jurists for not being a new concept but a reassertion of the reasonable classification test. While the reasonable classification is known as the "old" test of equality, and the arbitrariness test is now the "new" test, the old test has not been discarded. For instance, in the Rajbala case of 2016, the Supreme Court went back to the reason cable classification test.

The reasonable classification test has two requirements. Firstly, the classification should not be "arbitrary, artificial or evasive," and should be based on intelligible differentia, some substantial distinction. Secondly, the differential should have a rational or reasonable nexus with the object sought to be achieved by the statute in question.[1578] This test was repeatedly used after its inception in the Anwar Ali Sarkar case,[1579] so much so that by 1960, the Supreme Court labelled it as "platitudinous."[1580] Further, it was feared that the over use of the test would lead to the withering away of the doctrine of equality.[1581] The nexus test was criticised by jurists and a need was felt to add a positivist angle to the doctrine of equality. It was in this context that the arbitrariness test was formulated in the Royappa case.[1582]

The new doctrine of equality, i.e. the principle of non arbitrariness, also has various critics. One major criticism is that it is not a standalone test, and doesn't differ from the nexus test. The old

[1577] Shivam, *Arbitrariness Analysis Under Article 14 with Special Reference to Review of Primary Legislature*, ILI Law review (2016).

[1578] *Supra* note 6.

[1579] *Supra* note 21.

[1580] *Special Courts Bill*, 1978, *Re*, (1979) 1 SCC 380, 423.

[1581] V.K. Sircar, *The Old and New Doctrines of Equality : A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness*, (1991) 3 SCC (Jour) 1.

[1582] *Supra* note 18.

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doctrine, at its core, checks essential whether the law is arbitrary in checking for intelligible differentia and a rational nexus.[1583] The old test incorporates the doctrine of rationality and reasonableness. For eg, in one of the easy cases of the doctrine, the judge had stated that "the classification should never be arbitrary"[1584]. In the Rajbala case, Justice Chelameshwar rejected the arbitrariness doctrine, yet noted that the object sought to be achieved cannot be said to be "irrational" or "illegal" or "unconnected" with the scheme and purpose of the Act or Part IX of the Constitution.[1585] Legally, rationality and arbitrariness are opposite.[1586] Arguably, there is an overlap between the two doctrines, but they are not identical.

One of the major critics of the new doctrine is H.M. Seervai, who asserts that "the new doctrine hangs in that air because it propounds a theory of equality without reference to the terms in which Article 14 confers rights to equality."[1587] Jagdish Swaroop, another legal scholar, says that "Article 14 is not really a guarantee against arbitrariness... classification would be arbitrary if it does not follow and is contrary to the norms laid down by the Supreme Court in regard to classification."[1588] It has also been laid down by the Supreme Court that "if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. …No enactment can be struck down by just saying that it is arbitrary…"[1589]

Thus, the new and positivist arbitrariness doctrine cannot be considered to be a standalone doctrine. It is in furtherance of the old doctrine of reasonable classification. Both tests have loopholes, and should be used in a mutually inclusive manner.

[1583] *Supra* note 16.

[1584] Charanjit Lal Chowdhury v. Union of India, 1950 SCR 869.

[1585] *Supra* note 31.

[1586] *Supra* note 16.

[1587] H.M. Seervai, Constitutional Law of India, 1 (3rd ed. 1983).

[1588] Jagdish Swaroop, *Constitution of India*, 1 (2013).

[1589] State of AP v. McDowell & Co, (1996) 3 SCC 709.

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ARBITRARY STATE ACTION: POLICE POWERS

It has now been established that any arbitrary state action will be contrary to Article 14, and will be struck down as unconstitutional. State action includes both legislative and executive state action. Thus, it encompasses administrative action, including police action.

Police has not been defined under any particular legislation in India. Black's Law Dictionary defines it as "the governmental department charged with the preservation of public order, the promotion of public safety, and the prevention and detection of crime."[1590] It is interesting to note that the definition contains the phrase "public order" which is a reasonable restriction to the fundamental right of freedom under Article 19.[1591] Thus, it is clear that it is well within the powers of the police to put restrictions and curtail the citizens' fundamental rights, as long as it done reasonably and non-arbitrarily. However, this is not always the case.

The nature of police atrocities is vast, however the focus of this paper is arbitrary arrests and detention. While on the topic of arrests, it is material to mention that protection against arrest and detention in certain cases is guaranteed as a fundamental right under Article 22.[1592] Yet the police, who have been provided with elephantine powers, get away with arbitrary arrests and detention. It is pertinent to note that "power of arrest is the most important source of corruption and the extortions by the police officers."[1593]

In 2015, the police arrested two women for posting allegedly offensive comments on Facebook about the propriety of shutting down of Mumbai after the death of Bal Thackery, a political leader. The police made the arrests under Section 66A of the Information Technology Act of 2000 (ITA).

[1590] *Arbitrary*, Black's Law Dictionary, (11th ed. 2019).

[1591] INDIA CONST, Art. 19.

[1592] INDIA CONST, Art. 22

[1593] 177 Report, Law Commission of India (2001).

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In this case, it has widely been contended that the police had no grounds for arresting the two girls. The decision of the court seems to be a case in this point, as it struck down Section 66A which provided for arrest for posting offensive content on the internet, on the grounds that it violated Art.19(1)(a).[1594]

Despite the Court's directive to protect citizens 'liberty, there are no safeguards against police infringing citizens' fundamental rights. A recent example is the arrest of Prashant Kanojia on 8 June 2019. He was arrested without an arrest warrant under Sections 500 and 505 of the Indian Penal Code[1595] read with Section 67 of the Information Technology Act[1596] for posting allegedly defamatory content about UP CM Yogi Adityanath. The Supreme Court ordered his release stating that he could not be deprived of his liberty for the impugned action, and emphasized that Art.19 is "non negotiable". Despite the intentions of the court being made clear in 2015,[1597] the police still arrested Kanojia.

It was as early as 1997[1598] when the Supreme Court had laid down certain guidelines that were to be followed during every arrest. It is evident that, despite the court's efforts, the police still make arbitrary arrests, and this is violative of the basic fundamental right of equality.

This violation of basic rights can be curbed by introducing more transparency and accountability into the system. The root of all socio-political problems in the nation springs from two factors- lack of legislation and if legislation exists, lack of implementation. Stringent laws are only effective if they have a deterrent effect. While effective redressal for violation of fundamental

[1594] *Supra* note 30.

[1595] Indian Penal Code, No. 45 of 1860, PEN. CODE § 375 (1860).

[1596] Information Technology Act, No. 21 of 2000, INDIA CODE (1993) § 67 (2000).

[1597] *Supra* note 30.

[1598] DK Basu v. State of West Bengal, (1977) 1 SCC 416.

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rights is provided under Article 32[1599] and 226[1600], the goal is to nip the problem at the bud. For this purpose, a policy of surprise checks can go a long way. This should be done externally- i.e., by a non-police authority. Further, all arrests and detentions can be published on an online platform along with the police officer in charge of the arrest and detention. This will ensure transparency and accountability in the system, the very system that instead of protecting the citizens acts as a threat to their fundamental human rights.

CONCLUSION

This paper has presented research on the doctrine of non arbitrariness under Article 14 of the Constitution of India. The principle of non arbitrariness is on of the basic principles of equality in India. The courts have well established that equality and arbitrariness are so antithetic that they are like sworn enemies. If any state action, legislative or executive, is arbitrary, it shall be violative of Article 14, and will accordingly be struck down.

While this is the new and positivist approach to equality and it transcends the old doctrine of reasonable classification, the old doctrine can not be eliminated completely. Both these doctrines are mutually inclusive.

It is further concluded that despite guidelines issued and judgements adjudged to curb arbitrary state action, the police still misuse their powers arbitrarily. The paper focused on arbitrary arrests, and how they are still prevalent in the society. It is put forth that such arbitrary state action is a direct threat to the non- negotiable rights and duties enshrined in Constitution of India. The courts have, time and again, gives out rulings and judgement to curb this. Unless the system is made more transparent and the police more accountable, arbitrary state action shall continue to exist.

[1599] INDIA CONST, Art. 32.

[1600] INDIA CONST, Art. 226.

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WAYS TO COUNTER-ACT AGAINST AMBUSH MARKETING

- **RANVEER CHAPEKAR**

INTRODUCTION

Ambush marketing is "the term used to describe the piggybacking of a brand on to an event for which they are not official sponsors," and it is banned during particular national and international events[1601]. This means that unless you are an official sponsor or news outlet, you are forbidden from mentioning, tweeting or retweeting about the event. The rule guidelines specifically forbid non-accredited brands from retweeting any official news or topics regarding the event, or even creating a discussion about the events at all.[1602]

IMPACT OF AMBUSH MARKETING

What most of these stunts do is that they advertise for the ambushers. In today's times, it is the rebels who receive a lot of love. In Euro 2012, after scoring a goal, Niklas Bendtner dropped his shorts to reveal his Paddy Power underpants. Paddy Power was not an official sponsor of Euro 2012. The company Paddy Power has announced that it will pay the fine on Niklas Bendtner's behalf, the hefty fee representing good value for the publicity stunt. Paddy Power has announced on its website that Bendtner was wearing "lucky pants."[1603]

The problem with these kinds of tactics is that they get free marketing. Tournaments have certain sponsors, and do not allow the rest, is because they want a greater revenue and exclusivity. Ambush marketers will ambush and get away with a fine. Even if the Anti-trust or the competition laws or Intellectual Property Law come into effect, they will find a loophole there as well.

[1601] Ambush Marketing and What It Means For Iconic Sporting Events • Belle Communication, BELLE COMMUNICATION (2018), https://bellecommunication.com/ambush-marketing-and-what-it-means-for-iconic-sporting-events/ (last visited Jan 30, 2020).
[1602] Ibid
[1603] Ibid

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As of now, certain countries do have specific ambush marketing laws for a specific sporting tournament. Certain countries also make decisions under Intellectual property laws. One of the notable cases is *Arsenal Football Club Plc vs. Matthew Reed*.[1604] In this case, Arsenal Football club was the registered proprietor of trademark for the word ARSENAL and the ARSENAL Cannon Device among other things.[1605] Matthew Reed was selling souvenirs and club merchandise bearing these registered trademarks without a license from the football club.[1606] The Club brought an action against Matthew Reed for trademark infringement and passing off.[1607] Even though the club lost in the European Court of Justice under the argument that the use of the club logo by Reed was not a case of passing-off, the appellate court ruled in favour of Arsenal.

In the case of *ICC Development vs. EGSS*[1608], injunction was granted against the misuse of the ICC logo by the defendants.[1609] However, this is not enough. A more specific law is required, only regarding ambush marketing.

WAYS TO STOP AMBUSH MARKETING

There are various options that the sporting body can do to stop ambush marketing. However, it can never be completely eradicated. Advertisers will always find a way to bypass the said law.

BAN ALL ADVERTISING

[1604] Arsenal Football Club Plc vs. Matthew Reed , Case C-206/01 ECJ 12/11/2002
[1605] Shrabani Rout, HTML.RAW(AMBUSH MARKETING: NEED FOR LEGISLATION IN INDIA - INTELLECTUAL PROPERTY - INDIA) ARTICLES ON ALL REGIONS INCLUDING LAW, ACCOUNTANCY, MANAGEMENT CONSULTANCY ISSUES (2018), https://www.mondaq.com/india/trademark/690204/ambush-marketing-need-for-legislation-in-india (last visited Apr 30, 2020).
[1606] Ibid
[1607] Ibid
[1608] ICC Development vs. EGSS, 2003 (26) PTC 228 Del
[1609] Shrabani Rout, HTML.RAW(AMBUSH MARKETING: NEED FOR LEGISLATION IN INDIA - INTELLECTUAL PROPERTY - INDIA) ARTICLES ON ALL REGIONS INCLUDING LAW, ACCOUNTANCY, MANAGEMENT CONSULTANCY ISSUES (2018), https://www.mondaq.com/india/trademark/690204/ambush-marketing-need-for-legislation-in-india (last visited Apr 30, 2020).

Ambush marketers piggyback their way into the spotlight on the back of official sponsors. If there are no official sponsors, there will not be any piggybacking. The official sporting channels can host the show of the federation during long breaks of a sporting tournament.

The downside is that the tournament will lose a lot of revenue. Organising the tournament involves booking the venue, paying the umpires/referees, maintenance, security, hotels, transport etc. All of this costs a lot of money. This money can be covered by the sponsors. The more sponsors a tournament has, the more money will an organizer earn.

BIDDING FOR EVERY DAY/MATCH

Instead of sponsoring the whole tournament, advertisers can sponsor every day, or one match. The concept is that the advertisers bid for every match. So different matches or days can have different sponsors. The sporting fed can have a single name sponsor and a few other permanent sponsors. The rest can give a go through a bidding system.

The advantage of such a system is that most advertisers can show that they are aligned with the sporting event, legally. Even though it is beneficial to the advertisers to earn publicity without paying for it, in the long run they lose the confidence of the public. During the World Cup match between Netherlands vs. Denmark in the FIFA WC 2010, nearly 40 Dutch women stripped out of the clothes they had worn into the stadium to reveal bright orange mini-dresses. The mini-dresses incorporated the colour of the Dutch national team, but also bore a small logo identifying Bavaria brand beer. The dresses were distributed as part of a giveaway campaign with the purchase of an eight pack of beer. The choreographed striptease would not have posed such a problem were it not for the fact that Budweiser was the official beer of the World Cup.[1610]

[1610] Linda Norcross, BEST DEFENSE AGAINST AMBUSH MARKETING IS A GOOD OFFENSE BUSINESS & CORPORATE LAWYERS | HOWARD & HOWARD (2011), https://howardandhoward.com/user_area/uploads/BestDefense Against AmbushMarketing - Norcross 3-2011.pdf (last visited Apr 30, 2020).

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In the period of 2012-2018, the brand Bavaria only showed a growth of around 50%.[1611] In 2011 itself. Budweiser grew over 27%.[1612] Moreover, Budweiser grew to $26.3bn[1613], while Bavaria grew to only $ 771.72mn[1614]. In 2011 itself, Budweiser was the most valuable beer brand[1615], and in 2019, it is ranked number 24 on the list of the most valuable brand.[1616] This shows that as the official sponsor of the 2010 FIFA football world cup, Budweiser only grew, while Bavaria has still not shown any major spurt of growth due to ambushing Budweiser in the 2010 WC, and in the 2006 FIFA WC as well.

Marketing teams of any sponsor usually depend on bombarding the viewers with their message. This technique involves hammering the point to the viewers. An example of this is when the BJP used the tagline 'janta maaf nahi karegi'. To do that, the sponsors need to be omnipresent tournament. This technique does not allow that.

NEW INTERNATIONAL LAW

Most of the writers on ambush marketing recommend a national law. In 1996, Australia had made a law for this specific problem when they hosted the 2000 Olympic Games in Sydney[1617]. But that law was made only for the Olympics. It expired after the Games were over. A national law will not help either.

Like the UNCITRAL Model Law, the International Olympic Committee should make a model law for ambush marketing. The host countries will have to ratify the model law if it is to host the sporting event. One of the compulsions of hosting a sports event is that the host nation will ratify

[1611] Statista Research Department, NET SALES OF BAVARIA N.V. 2012-2018 STATISTA (2020), https://www.statista.com/statistics/785757/net-sales-of-bavaria-nv/ (last visited Apr 30, 2020).
[1612] Hamish Champ, Budweiser 'the world's most valuable beer brand' morningadvertiser.co.uk (2010), https://www.morningadvertiser.co.uk/Article/2010/02/19/Budweiser-the-world-s-most-valuable-beer-brand (last visited Apr 30, 2020).
[1613] Ibid
[1614] Supra 10
[1615] Supra 11
[1616] Budweiser, FORBES (2019), https://www.forbes.com/companies/budweiser/#3831025d1613 (last visited Apr 30, 2020).
[1617] Hergüner Bilgen Özeke, HTML.RAW("AMBUSH MARKETING": A MARKETING PRACTICE THAT CATCHES LEGISLATORS OFF GUARD - MEDIA, TELECOMS, IT, ENTERTAINMENT - TURKEY) ARTICLES ON ALL REGIONS INCLUDING LAW, ACCOUNTANCY, MANAGEMENT CONSULTANCY ISSUES (2012), https://www.mondaq.com/turkey/advertising-marketing-branding/210908/ambush-marketing-a-marketing-practice-that-catches-legislators-off-guard?login=true (last visited Apr 30, 2020).

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and make a national law on the model law. It can add a few laws of their own as well. It can change a few laws according to the region and the regional issues. The model law also does that.

However, as it ceases to be an international law, and becomes a domestic law, all issues regarding that law will be taken by the domestic courts. This solves the issue of both the tournament specific law and ambush marketing issues. As even FIFA and the ICC and many other sporting federations come under the IOC, this model law is applicable to all major sporting events, like the FIFA WC and the Cricket World Cup.

The IOC has to make ambush marketing a criminal offence, a white-collar offence. This will work better as a roadblock for ambush marketers. Currently, companies which indulge into ambush marketing pay a fine to the organizers. Bavaria did that after their 2006 FIFA WC and 2010 FIFA WC acts. It should be both a civil and criminal offence. Both will work together.

The country of which company indulges into ambush marketing should face some fine as well. The government of that country can take the fine from that company. This is not punishing the company twice for the same offence as the punishment in this case is against the State, not the company itself. That the State can take the fine from the company is their private dispute, nothing to do with the International Sporting Federation.

In the case of *ICC Development International Ltd v Arvee Enterprises and Anr.*,[1618] ICC Development (International) Ltd had filed a suit for injunction pleading that the plaintiff company was formed by the members of International Cricket Council to own and control all its commercial rights including media, sponsorship and other intellectual property rights relating to the ICC events.[1619] The Court rejected the application on the grounds that the logo of ICC had not been misused and hence there was no scope of any assumption amongst the purchasers of the defendants' goods that there was any connection between the defendants and the official sponsors of the events.[1620] The main talking points from this case are that the Delhi High Court concluded that the

[1618] ICC Development International Ltd v Arvee Enterprises and Anr, (2003) 26 PTC 245(DEL)
[1619] Shrabani Rout, HTML.RAW(AMBUSH MARKETING: NEED FOR LEGISLATION IN INDIA - INTELLECTUAL PROPERTY - INDIA) ARTICLES ON ALL REGIONS INCLUDING LAW, ACCOUNTANCY, MANAGEMENT CONSULTANCY ISSUES (2018), https://www.mondaq.com/india/trademark/690204/ambush-marketing-need-for-legislation-in-india (last visited Apr 30, 2020).
[1620] Ibid

term "Cricket World Cup" is quite generic, and Philips did not suggest any connection with the Cricket World Cup being held at that time.

Even though it is a judgment of the Delhi High Court, the arguments used by the judgement can be used by the Model Law to fight against Ambush Marketing. To avoid any confusion at all, at the time of the sporting event, all advertisers must write and say in clear terms whether they are connected with the sporting event or not.

In another case in Canada, *National Hockey League (NHL) et al v. Pepsi-Cola Ltd*[1621], a case was filed against Pepsi. Coco-cola was the official sponsor, but it did not have any right to advertise in Canada. The NHL sols the rights to a company which sold it to Pepsi. Since Coca-Cola did not have any right to advertise, this was not a case of ambush marketing as the organiser did not protect its official sponsor. This was the fault of the organiser.

Another issue which crops up is the player sponsors. Many sporting stars are sponsored by sporting companies, which can be in conflict with the official sponsor of the tournament. Even though the players can sport the logos, they cannot make any other gesture, indication or speak of the same during the course of the tournament.

CONCLUSION

It is very difficult to combat ambush marketing. But we have to try. The current laws across the world are not enough. Stricter punishment is the way to go, with making this offence a criminal offence the first step. Intense pressure from all quarters on the companies indulging in ambush marketing is required, which includes asking the national government of the country in which the ambush marketer is based to punish them, apart from international restrictions.

[1621] National Hockey League (NHL) et al v. Pepsi-Cola Ltd, 92 DLR 4th 349

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ROLE OF ASIAN DEVELOPMENT BANK DURING PANDEMIC

- **PRIYA MONDAL**

ABSTRACT :

Asia is a hot spot for emerging and re-emerging infectious diseases, including those with pandemic potential. At the same time, the region is grappling with growing antimicrobial resistance and the health impacts of climate change and frequent natural disasters, all of which pose a threat to regional health security. The reasons for high health security risk in Asia are complex—rapid economic growth, increased trade, urbanization, mobile populations, and weak health systems all play a role. Health security is a regional public good, and as such regional cooperation is essential to protect it.

Strategically, investments in health systems as well as investments beyond the health sector are needed. The Asian Development Bank (ADB) has a long history of investing in public goods and health security and is in a unique position to support countries in these efforts. ADB has consistently played a vital role to convene stakeholders, build on its existing health sector portfolio, and structure long-term financing for health.

This paper provides an overview of ADB's role in strengthening health sector, addressing the recurring of pandemic and epidemic patterns in the Asian-pacific region and it's constant strategic endeavour to contain it.

KEYWORDS : The Asian Development Bank (ADB) , Health, Pandemic.

INTRODUCTION

The Asian Development Bank (ADB) was established in 1966 in order to provide and facilitate development financing for countries in Asia and the Pacific. Initially the ADB started with 31

members. It has since grown and now has 68 members (as of 23 March 2019): 49 members from the Asian and Pacific Region, 19 members from Other Regions[1622].

Article 1 of the Agreement Establishing the Asian Development Bank states, the purpose of the Bank shall be to foster economic growth and cooperation in the region of Asia and the Far East (hereinafter referred to as the "region") and to contribute to the acceleration of the process of economic development of the developing member countries in the region, collectively and individually[1623].

Article 2 of the Agreement spells out the ADB's functions, which include: to promote private and public investment for developmental purposes, assist ADB member countries to formulate, finance and coordinate development plans, support regional and sub-regional projects and programmes to contribute to a harmonious economic growth of the region and promote intra-regional trade.[1624]

With the growing aspects of ABD's vision in health sector, it launched an operational plan for health in the month of June (2015), whose main objective was to support the developing countries to cover the sphere of health, its main objective was to finance health infrastructure and health governance. The Health sector plan provided a focused approach for addressing the health needs of ADB developing member countries by leveraging loans and grants to achieve Universal Health Coverage through strategic investments in health infrastructure, health sector governance, and health financing. The Operational Plan for Health (OPH), 2015–2020 provides a wide range of integrated strategies and solutions to assist ADB developing member countries in meeting the United Nations post-2015 goal of expanding public and private health services. It includes provisions for increasing ADB health sector investments in the Asia and Pacific region from 1% to 2% (2014) of our total portfolio to 3% to 5% by 2020[1625].

ROLE OF ASIAN DEVELOPMENT BANK IN PANDEMIC AND EPIDEMIC SITUATION – PERSISTENT APPROACH

[1622] https://www.adb.org/about/our-work ,(Apr.12,2020 5:03 p.m.)
[1623] id
[1624] id
[1625] https://extranet.who.int/sph/donor/adb ,(Apr.12,2020 3:03 p.m.)

ADB has a long history of supporting the health sector starting from 1978[1626], with a major health project in a polyclinic in Hong Kong, China. Since then, ADB's investment in health projects has gradually evolved from rural health, communicable diseases in the Asian pacific region to the strengthening of the health systems.

Ensuring optimum health throughout their life course enables citizens to be productive members of society. Therefore, health has emerged as the central to the ADB's priority for human capital development. The strategy 2030 provides a focused approach for addressing the health needs of the developing countries by leveraging financial support to achieve UHC through strategic investments in health infrastructure, health sector governance, and health financing[1627].

The 2003 severe acute respiratory syndrome (SARS) epidemic was the first epidemic of the 21st century to pose a threat to global health and generate considerable panic across the globe. The Asian Development Bank (ADB) approved a program which donated two million US dollars to help combat severe acute respiratory syndrome (SARS) in China's western regions. Under the program, the donated fund was used to give technical support to prevent, monitor, manage and ease SARS in the underdeveloped parts of China's western regions. The fund was also be used to enhance the epidemic monitoring system, invite domestic and foreign experts to offer help in the diagnosis and treatment of SARS, and promote public awareness of preventing the disease. The program was expected to start in late May of 2003 and run through May next year[1628].

The Regional Malaria and Other Communicable Disease Threats Trust Fund was set up in December 2013 with the specific remit to support developing member countries to develop multi-country, cross-border, and multi-sector responses to urgent malaria and other communicable disease issues. The fund is open to all ADB developing member countries with priority given to the Greater Mekong Sub-region (GMS). It's main objective is to improve health outcomes and increase health security by reducing the risk of malaria and other communicable disease threats in Asia and the Pacific[1629].

[1626] ADB. (2015). Operational Plan for Health, 2015–2020. ADB's vision for the health sector. Retrieved from https://www.adb.org/sectors/health/operational-plan-for-health-2015-2020,(Apr.09,2020 3:03 p.m.)

[1627] ADB. (2019b). Pandemics and Emerging Diseases. Retrieved from https://www.adb.org/sectors/health/issues/pandemics-emerging-diseases (Apr 12,2020,5:05p.m.)

[1628] http://en.people.cn/200305/27/eng20030527_117262.shtml (Apr 12,2020,1:05p.m.)

[1629] https://www.adb.org/site/funds/funds/rmtf(Apr 14,2020,3:05p.m.)

The ADB Cooperation Fund for Fighting HIV/AIDS in Asia and the Pacific benefitted from a $19.2 million grant from the Government of Sweden with the goal of assisting ADB's developing member countries meet their commitment to Millennium Development Goal 6, target 6A: to have halted by 2015 and begun to reverse the spread of HIV. The objective of the fund was to support these countries to develop a comprehensive AIDS response; enable them to partner with ADB in areas that play to the bank's strategic value and advantages; and particularly to benefit sub-regions, countries and communities that are most vulnerable to HIV[1630].

ADB Response to COVID-19 Pandemic,2020 The Asian Development Bank (ADB) today announced a $6.5 billion initial package to address the immediate needs of its developing member countries (DMCs) as they respond to the novel coronavirus (COVID-19) pandemic[1631].Mr. Asakawa stressed that "ADB stands ready to provide further financial assistance and policy advice down the road whenever the situation warrants, on top of the $6.5 billion package[1632]."

In East Asia, the ADB has a growing portfolio in addressing the growing burden of Non-Communicable Diseases (NCDs) and long-term care. ADB health sector aims to mitigate the risk of substantial fiscal constraints and negative social consequences of aging by capacity building in developing countries in Elderly Care. This includes developing policies and plan for long-term care services[1633].

CONCLUSION

With growing globalization comes increased exposure to global epidemics. ADB is committed to the expansion of the sector in building responsive, equitable, and quality health systems to achieve universal health coverage. ADB has optimize indirect health benefits by tapping synergies with its portfolio in other core sectors, including transport, urban, water, sanitation, and energy.

[1630] Game Changers, Success Stories, Lessons Learned: The ADB Cooperation Fund for Fighting HIV/AIDS in Asia and the Pacific, ISBN 978-92-9254-889-6(Print) 978-92-9254-890-2 (e-ISBN),2015

[1631] https://www.adb.org/news/adb-announces-6-5-billion-initial-response-covid-19-pandemic(Apr.21,2020,3:03 p.m.)
[1632] ibid
[1633] ADB, ADB BRIEFS, (2014). Social Protection Brief. Strengthening Elderly Care Capacity in Asia and the Pacific.

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Consequently, ADB is also taking an initiative to manage the growing burden of NCD's and elderly care cost-effectively and sustainably. ADB's current lending in the health and population sector has remained stable at 2–3%[1634] of total ADB lending. Though, ADB remains a minor player in this important sector, The health sector continues to be a strategic area of intervention to be supported under the partnership agreements, Close co-operation between the International Organisations and ADB can catalyse greater contributions and engagement towards global health.

SUGGESTIONS

The pandemic demands a coordinated response and strong collaboration among countries and organizations. ADB should strengthen it's collaboration with the International Monetary Fund, the World Bank, regional development banks, the World Health Organization, and as well as the US Centres for Disease Control and private sector organizations, to ensure effective implementation of its response in case of Pandemics and epidemics.

ADB should promote primary health care by emphasizing on structural changes for good governance and incentives to help governments take on the health functions of a modern bureaucracy.

ADB should continue using its strength as a regional organization to address public health infrastructure, particularly on issues of cross-border significance. Communicable disease surveillance should be promoted.

Within the poverty reduction strategy framework and in harmony with development partners, ADB needs to work out its strategic focus in the health sector.

The Strategy to develop the health sector should place more emphasis in developing partnerships with other donors, the private sector, and civil society to become more efficient and effective to strengthen the health sector to mitigate the waves of pandemics or epidemics over time.

[1634] UNESCAP. 2004. Economic and Social Survey of Asia and the Pacific 2004. Available: www.unescap.org/pdd/ publications/survey2004/index.asp (Apr.16,2020,9:09 p.m.)

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THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW

- ANUSREE TELFY. C

"The truth is often a terrible weapon of aggression. It is possible to lie, and even to murder, with the truth" ***- Alfred Adler***

ABSTRACT

According to customary law, the act of aggression by a State formed part of the concept of crime of aggression, and the modifications to the Rome Statute adopted at the 2010 Review Conference in Kampala by the international criminal court. The description specifically involves two distinct misconducts by separate actors. It is not clear how the aggressor state and the individual have an international obligation and why their responsibility for the latter can only rest on the former. The paper looks at the manner in which the aggressor state and the victim have violence, and how the State and the victim are segregated from each other, with a emphasis on the legal interest of the aggressed state. Firstly, the claim explores the manner in which international law prohibits and criminalizes violence by defining mutual obligations in this regard between States and individuals. The study also looks at the relationship between states 'obligations to refrain from violent actions and individuals' commitments to refraining from aggression-related behaviour. Finally, the investigation into the ICC's crime of violence.

INTRODUCTION

Aggression, in essence, was described as "the state action that either initiates war against another State or leads to (or can be) warriors." Up till the early twentieth century international law did not forbid the war and states were able to use war as a political tool in law. The Covenant of the League of Nations of 1919 reflects a change in which Member States are obligated "to uphold the territorial

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integrity and political freedom of all League members against foreign aggression and to maintain it." War as a weapon of national policy was usually discarded in the Kellogg-Briand Treaty of 1928. In Article 2(4) of the Charter of the United Nations (UN) which forbids the potential danger and the use of force against both the territorial sovereignty or national sovereignty of any State, a ban on State use of force was adopted after the Second World War. Nevertheless there have been two exceptions: first, individual or collective self- defense by States which use force is allowed by Article 51 of the Charter and secondly, by the UN Security Council, the use of force as provided for in Article 42 of the Charter may be permitted.The above laws are all concerned with state behaviour. States will then be held liable for a violation. In the first instance of the Constitution of the International Military Tribunal of Nuremberg (IMT), violence was accepted as an international crime leading to individual criminal responsibility under international law. In Article 16(a) of the Tokyo Charter, the IMT has jurisdiction in relation to crimes against peace, 'in other words the planning, prepare, begin or wage war or war in violation of international treaties or agreements or assurances, or prepare a common plan or conspiracy for the accomplishment of any of the foregoing.'[1635]

A Brief History

The crime of aggression is one of the four offences within the jurisdiction of the International Criminal Court pursuant to the Rome Law. A definition of crime was adopted on 11 June 2010. States Parties to the Rome Statute. In esprit, when a leader of a State unlawfully uses force against another State, a crime of aggression is committed, given that the use of force constitutes by its definition, seriousness and the degree to which it manifestly violates the Charter of the United Nations. The ICC can prosecute crimes of aggression in future, though not before 2017, provided a number of jurisdictions are met. When triggered, the jurisdiction of the Court in relation to crime of aggression will provide for the first time since the Nuremberg and Tokyo trials a form of universal criminal responsibility for this "supreme crime." The following are the most significant steps, beginning with the seminal year 1945, leading to this growth, but remember that efforts to prohibit and criminalize illegal warfare were already under way before 1945.[1636]

[1635] Crime of Aggression*, available at:* https://www.asser.nl/nexus/international-criminal-law/international-crimes-introduction/crime-of-aggression/ (last visited on April 9, 2020)
[1636] History, *available at:* https://crimeofaggression.info/history/ (last visited on April 9, 2020)

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The Crime of Aggression

In the Rome Statute of the ICC adopted at the 2010 Review Conference in Kampala, the crime of attacks is defined by Art. 8bis. In essence, there are three elements:

Firstly, a political or military leader must be a perpetrator, that is, a "person who is effectively capable of exercising control over or directing a State's political or military action." Secondly, the Court shall show that an act of aggressiveness of the State was organized, prepared, committed or carried out by the defendant. Third, an act of aggression of that State must be in compliance with the concept found in resolution of the General Assembly. This State act must constitute a clear violation of the Charter of the United Nations by its nature, magnitude, and size. Which means that the jurisdiction of the Court can only be regulated by the most extreme types of unlawful use of force between States. There is also a strong exclusion of cases of lawful self-defence, whether person, group or acts allowed by the Security Council.[1637]

For the purposes of the Statute, "crime of aggression" means to plan, prepare, launch or implement an act of aggression, which constitutes by character, gravity and scale, a manifest infringement of the Charter of the UN, by an individual in a position effectively to exercise control or direct the political or military action of a state. The use by a State of army against the sovereignty, territorial integrity or political independence of another state or in any other way that is incompatible with the United Nations Charter is the so-called "act of aggression" for the purposes of paragraph 1. In accordance with UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, any of the following actions, irrespective of a declaration of war, shall be regarded as an act of aggression:[1638]

a) the invasion or aggression by the military forces of another State's territory or any military invasion, however short term, arising from such an encroachment or attack or any illegal occupation by the use of power of a State's territory or part of that State;

b) Bombardment by the State's army against another State's territory, or the use of arms by a State against another State's territory;

[1637] Definition of the Crime of aggression*, available at:* https://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/ (last visited on April 9, 2020)
[1638] Roman Statute of International Criminal Court, Art. 2bis.

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c) Blockade by armed forces of another State of ports or coasts;

d) An assault on ground, shore, air or naval and air fleets of another State by the armed forces of a State;

e) the use by armed forces of one State, in contravention of the agreement conditions or of the prolongation of their existence in that territory after the termination of an agreement, within the territories of another State, with the consent of the receiving State;

f) the action of a State to allow the other State to use its territory, which it has made available to another State, in order to perpetrate an act of aggression against a third nation;

g) the sending by or on behalf of a State of armed bands, gangs, anomalies or mercenaries conducting armed force actions against a State of such severity that amount to, or are substantially involved in, the above acts.[1639]

Act of Aggression

An act of aggression is the first prerequisite of the concept of aggression. Article 8a(2) describes two sub-parts of an act of violence. The opening sentence of Article 8bis(2) provides the overall meaning ('usage by a State of armed force against any other State's sovereignty, territorial integrity or political freedom or in any manner that is inconsistent with the Charter of the United States'). Article 8(2), second paragraph, offers an exhaustive list of examples of actions which are defined as acts of aggression. In the end, the violent amendments decided that Article 6 (crimes against peace) of the Nuremberg Law would be amalgamated and the concept of attacks included in Resolution 3314 of the United Nations General Assembly. This composite definition incorporates the two benefits of the Nuremberg Definition's historical pedigree, and the broad consensus reached in Resolution 3314. [1640]

Aggression in International law

Aggression, in foreign affairs, by one Country, by means of an unprovoked military assault or act or a strategy of expansion at the expense of another. Aggression was defined by international law

[1639] Id.
[1640] The Anatomy of an International Crime: Aggression at the International Criminal Court*, available at:* http://iccnow.org/documents/SSRN-id2209687.pdf (last visited on April 15, 2020)

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as any use of military force in international relations not justified by defensive necessity, international authority or consent of the State in which force is used for the purposes of reparation or retribution after hostilities. Several treaties and official statements since the First World War have tried to ban violent actions to ensure mutual security among the nations, including the League of Nations Convention (Article 10) and the Charter of the United Nations (Article 39). After the First World War it was also important for the international institutions to take up the issue of violence in the event of war by the majority of states to refrain from the use of force. In these situations, the League of Nations and the UN generally follow the cessation-fire protocol and find a government to be an aggressor only if the order has not been complied with. The cease fire orders marked the end, by 1925, of hostilities between Turkey and Iraq, Greece and Bulgaria in 1925, Peru and Colombia in 1933, Greece in 1947 and neighbours, the Netherlands and Indonesia in 1947, India and Pakistan in 1948, Israel and neighbouring Israel in 1949, Israel, Britain, France and Egypt in 1956, etc. Neither is considered an aggressor at the time. On the other hand, Japans were identified as aggressors in Manchuria in 1933. The aggressors in the Chaco region in Paraguay in 1933. Northern Korea, mainland China in Korea in 1950 and 1951.[1641]

Individual Criminal Responsibility

The expertise of the ICC includes only the assessment of individuals' criminal liability. If these individuals are also authorities or state agents, the duty of the state to which the individual's actions are due may also be questioned. When an international crime is perpetrated by a state or otherwise attributed to the State under the jurisdiction of the ICC, in reality, there would typically be an violation of international law by a State responsible individual. The explanation is that all crimes under the jurisdiction of the ICC represent the principle of "dual obligations," which means that the prohibitions underlying such "core crimes" not only relate to individuals but are also related to the same (or significantly similar) obligations on States. If the finding that an international crime has been committed by a State body for which it has individual criminality typically means that an international wrongful act has been committed by the States to which its actions are due, which induces state liability, it is not generally the task of the ICC for the State to define such a duty. However if the ICC finds that state institutions have a strategy to conduct or establish a program

[1641] Aggression, *available at:* https://www.britannica.com/topic/aggression (last visited on April 10, 2020)

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for these crimes, such findings will not be state responsibility statements or determinations, but rather a declaration of the evidence that indicate state responsibility.[1642]

However, the definition of the crime itself calls upon the ICC to determine the responsibility of the State as a prerequisite for finding out whether it is personally responsible for the crime committed. It means that we are not thinking here about an inference — although a reasonable one — that results from the assumption that a national organ committed a crime against humanity or an act of genocide. In addition, we talk about a strict determination of state liability in compliance with international law as the condition for determining individual criminal responsibility. The required connection between state and individual responsibility for the crime of aggression indicates that the crime of aggression is different from other 'international crimes.' For one thing, the International Criminal Justice initiative aims to ensure that 'crimes under international law are committed by human beings and not by abstract individuals,'. For attacks, however, the state remains based on the fact that the tribunal first determines state guilt and can only assess person culpability or innocence after doing so.[1643]

Moreover, the required connection between the State and individual responsibility leads to a set of practical questions for the ICC, which, in this brief contribution, we are simply emphasizing, along with some tentative answers for the debate. The first problem is whether a State whose officials are being investigated for a crime of aggression will interfere in ICC proceedings to argue that there has been no clear breach of the United Nations Charter in this particular case. The second related issue is whether the ICC is still able to assess the nature of individual criminal liability in compliance with international law by the means of accessory liability. Any court which operates on a limited basis of jurisdiction must decide how far it can render the incidental findings necessary to respond to a major legal issue within its remit. In Lockersbie for instance, the ICJ has faced such questions and it has also taken the matter to the courts and courts, such as those operating under the UN Convention on the Law of the Sea dispute resolution system. However, the question that arises regarding the crime of aggression is if the main issue is a question of curriculum gold—that is, a situation in which we have to deal with the crime of aggression. It would therefore have consequences for how we should comment on the Court's still uncertain authority over crime as it

[1642] The Crime of Aggression in the ICC and State Responsibility, *available at:* https://harvardilj.org/2017/04/the-crime-of-aggression-in-the-icc-and-state-responsibility/ (last visited on April 15,2020)
[1643] *Ibid.*

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is responsible for the question of state liability while making determinations on actual criminal liability for the crime of aggression. It will also impact a variety of the proceedings the Court will pursue if and when the crime of violence is actually involved.[1644]

Jurisdiction of ICC

Unlike the other crimes triable by the ICC, the Court shall exercise jurisdiction over the crime of aggression only with respect to the States Parties who have agreed to a amendment containing a definition of and the conditions required for who crime. The opt-in framework for competence in relation to violence, which was rejected as an overall mechanism by Article 121(5) during the initial negotiations on the formation of the ICC, seems to be effectively provided for in the agreement. Thus, if citizens of one State Party conduct assault on another's territory, they can only be charged if both States have agreed. The language of the law does not appear to require any equal right of states party to the law to challenge a change in assault. There has been a criticism of this disparity in treatment, but the situation of non-party states in general is not different.[1645]

Prosecution of aggression before the ICC

There is much more debate about *ius ad bellum* legal concepts than the *ius in bello*. It is not appropriate to look back in time for examples of circumstances involving challenging determination of the rule of the military intervention than the 2001 war in Afghanistan, the intervention by the United States, the United Kingdom and other parties in Iraq and the 2006 operation by Isreal in Lebanon. Judicial rulings concerning state detention would undoubtedly have implications on international peace and security.There may be problems for the ICC itself, problems of a nature that can often occur in relation to certain crimes beyond the jurisdiction of the Court, but which in terms of violence are especially serious. The ICC is structured to assess responsibility, not Government, according to its constitution and procedures. Crime investigations cover the most sensitive topics for the protection of a State and national security. As in Germany and Japan during World War II – when the courts have a surplus of defeated governments most of the hidden papers – there are considerable difficulties of access to evidence, when data from the defeated State is accessible from the international community. Things like these have evoked a

[1644] *Ibid.*
[1645] Robert Cryer (eds), "An Introduction to International Criminal Law and Procedure"275, (*Cambridge University Press*, New York, 2007)

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cautionary stance on the fact that criminal law is being used to control state use of force. Transforming the ICC into a forum for arbitration between States would jeopardize both the court and international security. There have been questions as to whether or not the use of violence in the ICC Statute is more than mere symbolism. However, some way to put the crime of violence before the court is to be sought. In connection with a plea for self-defence by the defendant, as specified in the Nuremberg IMT, the matter should eventually be investigated and agreed to comply with international law.[1646]

Conclusion

The crime of violence, which had been properly established for the intent of the statute since the implementation of the Rome Statute in 1998, is a major challenge. Given the task of creating workable regulations on procedure and materials, which could probably have a transformative impact on one of contemporary international law's main and most important principles, the authors correctly used existing sources and skilfully helped improve international law progressively. It was crucial that during the drafting process, the drafters were aware of the need to make new criteria consistent in particular with the UN Charter with the rest of the applicable international law. It would also be very good to draft texts reached by 2008 and, if such fine-tuning changes have been made in the final draft by the Special Working Group on Crime of Agreement, it will have the chance in future to obtain sufficient approval by the states parties to the Rome Statute.

There are few but major changes yet to be made. In order to change the respective positions of victims states, the International Court of Justice and the Security Council, draft Article 15 bis defining the procedure for defining jurisdiction of the International Criminal Court in the area of the crime of aggression should be updated. The legal implications of acts of aggressions committed by states parties to the Rome Protocol against non-governing parties are a practical problem which would remain partly resolved even after the amendments to the Statute of Rome were put into force. In such cases, individuals may be charged only when the Security Council decides that this act is in fact an act of aggression or if the affected states accept the jurisdiction of the International Court of Justice either permanently or on that particular particle, despite being not a member of the Roman Statute.

[1646] *Ibid.*

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MATHAI V. GEORGE AND OTHERS

SLP (C) NO. 7105 OF 2018

- **DEEPTAM BHADAURIA**

Mathai v. George decided on 19/03/2010 is the apex court's straight and blatant response to thousands of miscellaneous and frivolous Special leave petitions being filed in the court every year. The case originated when a S.L.P. was filed against the judgment and order dated 09.11.2009 of the High Court of Kerala Ernakulam in W.P.(C) No. 31726/2009.

The petitioner here was a defendant in this case where the genuineness and authenticity of a will dated 13/01/2006 was in contention. The forensic department submitted the will to trial court but the petitioner was not satisfied with the report and wanted a second opinion and requested the trial court for it but the court refused. So, the petitioner moved to the Kerala High Court under writ jurisdiction but it was also rejected and thus the petitioner under article 136 has lodged a S.P.L. in the honorable court.

After hearing petitioner's learned counsel the bench comprising Justice Markandey Katju and Justice R.M. Lodha speaking for the honorable court pronounced the judgment which examined the maintainability of thousands of special leave petition that are being lodged in the apex court on a regular basis.

The court prima facie is of the opinion that these types of S.L.P. should not be entertained because in recent years it has become a trend that these petitions are being filed against every such order in which one party does not agree with the decision of the court. Hence, every small matter that can be resolved at the lower court's level is being dragged up to the apex court increasing the pressure on already overburdened court and thus ultimately violating the root cause due to which article 136 was included in the constitution.

Article 136 says that supreme court in its discretion may interfere in any case of any court or tribunal which lies within territory of India, but it is not explicitly mentioned that in what kind of matters the court should interfere which leads to a lot of confusion and ambiguity regarding the

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usage of this power, which ultimately leads to court receiving tons of insignificant and frivolous petitions. Hence, a broad guideline is needed to be lay down by the constitution bench to stop this barrage of petitions. It was observed in the case of *N. Suriyakala v. A. Mohandoss*[1647] that "Article 136 of the Constitution is not a regular forum of appeal at all. It is a residual provision which enables the Supreme Court to interfere with the judgment or order of any court or tribunal in India in its discretion". The use of word 'discretion' suggests that it does not grant any right of appeal on any party rather it merely vests a discretion in the Supreme Court to interfere in exceptional cases.

The court reiterated that in case *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*[1648] that the power given in article 136 should not be invoked on a daily basis rather it should be used in only exceptional matters and the apex court may or may not choose to entertain an appeal, it only gives a party the right to appeal before the court in matters where there is grave miscarriage of justice or a substantive question of law.

Now-a-days it has become a practice of filing SLPs against all kinds of orders of the High Court or other authorities without realizing the scope of Article 136, hence the court finds it important to remind everyone that it was not meant to be an ordinary forum of appeal and these ordinary cases should be resolved at maximum high court level, Supreme court being the highest court of the country should only focus on really important matters.

The court also relied on a lecture delivered by Mr. K.K. Venugopal, Senior Advocate and a very respected lawyer of this Court where he talked about how the apex court is turning into simply a court of appeal and correcting every error made by the lower judges and how the court is straying from its original objective of being a constitutional court. He also focused upon the conditions and workload of judges in India with comparison to supreme courts around world by giving examples of supreme court of US which only listens to around 120 cases every year and the court of Canada which hears about 60-70 cases in a year against Indian supreme court which has backlog of 55,000 cases in which most of them are appeals filed under 136.

[1647] *N. Suriyakala v. A. Mohandoss* (2007) 9 SCC 19.
[1648] *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* AIR (2004) SC 1815.

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Mr. Venugopal also suggested a broad guideline on what type of cases should be entertained by the SC and it contained matters relating to substantial question of life, public importance, judicial review and disputes between highest court of land and the courts also welcomed it by adding some more categories of their own like grave miscarrige of justice or where the fundamental rights of a person are being violated.

This bench finally believes that it is time for the constitutional bench to decide this matter as it is related to article 136.

In 2016 the 5 judged Constitutional bench heard the transferred matter and quoted excerpts from some old cases like *Pritam Singh v. The State*[1649] where the court observed that "appeal from any judgment, decree, sentence or order" which occur therein and which obviously cover a wide range of matters; secondly, that the words used in this article are "in any cause or matter," The courts observed that after going through all the arguments and obiters given in other cases the one thing that stands out is the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under the this article.

The Court finally decides that this power should only be exercised in the matters where special circumstances are clearly visible and it should be used judiciously but its power should not be restricted on a permanent basis and hence the S.L.P. was dismissed as infructuous.

AUTHOR'S VIEW

The misuse of article 136 is a standard example of how litigants and parties find loopholes in even one of the most detailed and thoroughly written constitution of the world, Although the word 'loophole' may not be the right term to be used here but surely it has been treated as one. It was meant to be a last resort or a life saver provision through which the apex court can serve justice

[1649] *Pritam Singh v. The State* AIR (1950) SC 169.

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being the highest court of the land or to interrupt in some special circumstances to avoid grave injustice to happen or to rectify the lower court's mistake.

It can even be used in situations where a new but substantial question of law arises and requires instant resolution by the court but roughly around one percent of the total S.L.P.s lodged in a year fulfill the criteria of special circumstances and generally court is flooded with miscellaneous petitions where all types of irrelevant matter is being contested unto the highest court. The court's decision of not restricting this power completely is really sensible because it would eclipse the ideology with which it was introduced in the very first place and the matters which are a subsequent question of law can be delayed indefinitely but a checkpoint or a filter mechanism is really the need of the hour to prevent further flooding of already burdened court.

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EUTHANASIA

- ANDUKURI ANOOP

ABSTRACT:

Euthanasia is on of the most debatable issue across the world and many discussions among philosophers, doctors, jurists, and all kind of thinkers took place. Euthanasia means intentionally quitting life to relieve from pain and suffering. The given research paper will discuss euthanasia in various countries and in religious views. This paper will also discuss euthanasia in India with several noteworthy cases which includes Aruna Shanbaug's case.

INTRODUCTION:

The word euthanasia comes from the Greek word "eu" and "thanatos" means "good death."[1650] The word euthanasia was first used in 17th century by Francis Bacon in medical context[1651].

TYPES OF EUTHANASIA: Euthanasia can be classified as

Active Euthanasia: In active euthanasia a person directly and deliberately causes death of person by giving lethal substances.

Passive Euthanasia: Passive euthanasia is withholding or withdrawing treatment to hasten the death of a terminally-ill patient.

Voluntary Euthanasia: Voluntary euthanasia is performed with the consent of the patient.

Non-voluntary Euthanasia: In non-voluntary euthanasia a person is unable to give his consent as he is unconscious.

[1650] https://en.m.wikipedia.org
[1651] https://www.medicalnewstoday.com (17th Dec 2018)

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Involuntary Euthanasia: Involuntary euthanasia is conducted without seeking patient's consent or against will of the patient.

DIFFERENCE BETWEEN ASSISTED SUICIDE AND EUTHANASIA:

Euthanasia is the act of intentionally ending life to relive from pain and suffering. For example taking lethal doses or substances.

Assisted suicide is intentionally helping others to kill themselves. For example providing a prescription to someone with having the knowledge that they intend to use it for suicide.

EUTHANASIA IN VARIOUS COUNTRIES:

Netherlands: In April 2002, Netherlands became the first country to legalise euthanasia and assisted suicide. They also imposed a set of conditions that the patient must be experiencing unbearable suffering and their illness must be incurable. Even children below 16 years can request for assisted dying, but parental consent is mandatory. About 10% to 15% of the people who come to us for seeking for information actually commit suicide, says Ton Vink, head De Einder, a foundation that advises people contemplating suicide.[1652]

Belgium: In 2002, Belgium became the second country to legalise euthanasia.[1653] The law regarding euthanasia states that doctors can help the patients to end their lives if they freely express their wish to die because of unbearable suffering. Belgium legalised euthanasia for children and there is no age limit for them to seek lethal injection. They also need to seek approval of their

[1652] https://www.guardian.com
[1653] https://www.guardian.com

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parents to end their lives. Patients can also undergo euthanasia if they have stated it before entering to vegetative state.

USA: Active Euthanasia is illegal throughout United States. Assisted dying is legal in several states namely Oregon, Washington, Vermont, California, Colorado, Washington DC, Hawaii, New Jersey, Maine and Montana all these states have laws allowing doctor-assisted for terminally ill patients[1654]. Doctors are allowed to prescribe patients for fatal drugs, but a health care professional must be present when they are administered.

Switzerland: Switzerland allows assisted suicide as long as the motives are not selfish. Article 115 of Swiss Federal Criminal Code states that whoever with selfish motives induces another to commit suicide shall be punished even if it is committed or attempted[1655]. About 1.5% of Swiss deaths are of assisted suicide. Euthanasia is illegal across the country.

Australia: In 1995, Australia's Northern Territory introduced voluntary euthanasia law but it was overturned by federal authorities. In Victoria voluntary assisted dying has legalised and patients are required to be eligible, including suffering from terminal illness, person must be aged at least 18 and should have less than six months to live. A Victorian women has become first person to end her life under new voluntary assisted dying laws[1656].

Canada: In Canada both euthanasia and assisted suicide are allowed to adults suffering from grievous conditions.

Luxembourg: Luxembourg legalised euthanasia and assisted suicide for those who are suffering with incurable illness.

[1654] https://www.theweek.co.uk
[1655] https://www.theweek.co.uk (Aug 28 2019)
[1656] https://www.straitstimes.com

Euthanasia in India: The issue of euthanasia has been a much debated subject in India after a several noteworthy cases took place including that of Aruna Ramchandra Shanbaug case. There are various judgments on this issue by different courts.

Maruti Shripati Dubal v. State of Maharashtra[1657] which first time came before the court whether a person has right to die. In this case a police constable, who was mentally ill due to a road accident attempted to commit suicide which is prevented under section 309 of Indian Penal Code. Bombay High Court struck down section 309 as it violates Article 21 of Indian Constitution which guarantees 'right to life'.

Chenna Jagadeeswar v. State of Andhra Pradesh, in this case the High Court held that section 309 of I.P.C doesn't violate Article 21 of Indian Constitution.

Rathinam v. Union of India the court overruled Chenna Jagadeeswar v. State of Andhra Pradesh stated that right to live also includes right not to live and it finally held that section 309 violates Article 21 of the Constitution.

Gian Kaur v. State of Punjab the court overruled Rathinam v. Union of India and held that Article 21 of the Constitution guarantees right to life and does not include right to die. And it further held that right to life is a natural right and suicide is unnatural termination of life.

Aruna Ramchandra Shanbaug v. Union of India[1658]

Aruna Ramchandra Shanbaug was a nurse in King Edward Memorial(KEM) Hospital in Mumbai. On 27th November, 1973 she was sexually assaulted by a sweeper at KEM. He attacked while she was changing cloths in the basement of the hospital. He tied a dog chain around her neck wrenched her back with it. The next day on 28th November, 1973 at 7.45 a.m. she was found by a cleaner in unconscious stage with blood around her. It was also alleged that due to choking by the dog chain the supply of the oxygen to brain stopped and the brain got damaged. A journalist activist Pinki

[1657] www.legalserviceindia.com 1987(1) BomCR499
[1658] https://www.scobserver.in

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Virani had filed plea in 2009 seeking that Aruna Shanbaug, who lived in vegetative state for many years, be allowed to die through passive euthanasia . On January 24th ,2011 , Supreme Court constituted a medical board comprising three eminent doctors, and they reported that she was not brain dead and was responding to some situations. On March 7,2011, court turned down Pinki Virani's plea but allowed passive euthanasia. They further said that passive euthanasia will apply only to patients who are in permanent vegetative state. Active euthanasia is illegal in India.

RELIGIOUS VIEWS ON EUTHANASIA:

Hinduism: Most Hindus are against euthanasia because doctors accepting patient's request for euthanasia will cause the soul and body to be separated at an unilateral time. This results in damage of karma of both patient and doctor. Here karma means the belief in reincarnation of soul through many lives.

Islam: Muslims are against euthanasia. They believe that human life is sacred as it is given by Allah, and that Allah decides how long a person will live. "Do not take, life which Allah made sacred, other than in the course of justice" a line in Qur'an[1659].

Judaism: Jewish tradition regards that human life is sacred and shortening of this scared life goes against their moral values. Further Jewish law says that doctors owe a duty against patients to save their lives and such doctors cannot do anything that hastens death.

Buddhism: Buddhists are not unified in their view of euthanasia, and teachings of Buddha don't specially deal with it. Most Buddhists are against involuntary euthanasia and their opinion on voluntary euthanasia is less clear.

Christian: Christians are mostly against euthanasia. They believe that God is the giver and taker of once life and such a life should be respectful.

[1659] www.bbc.com>ethics>religion

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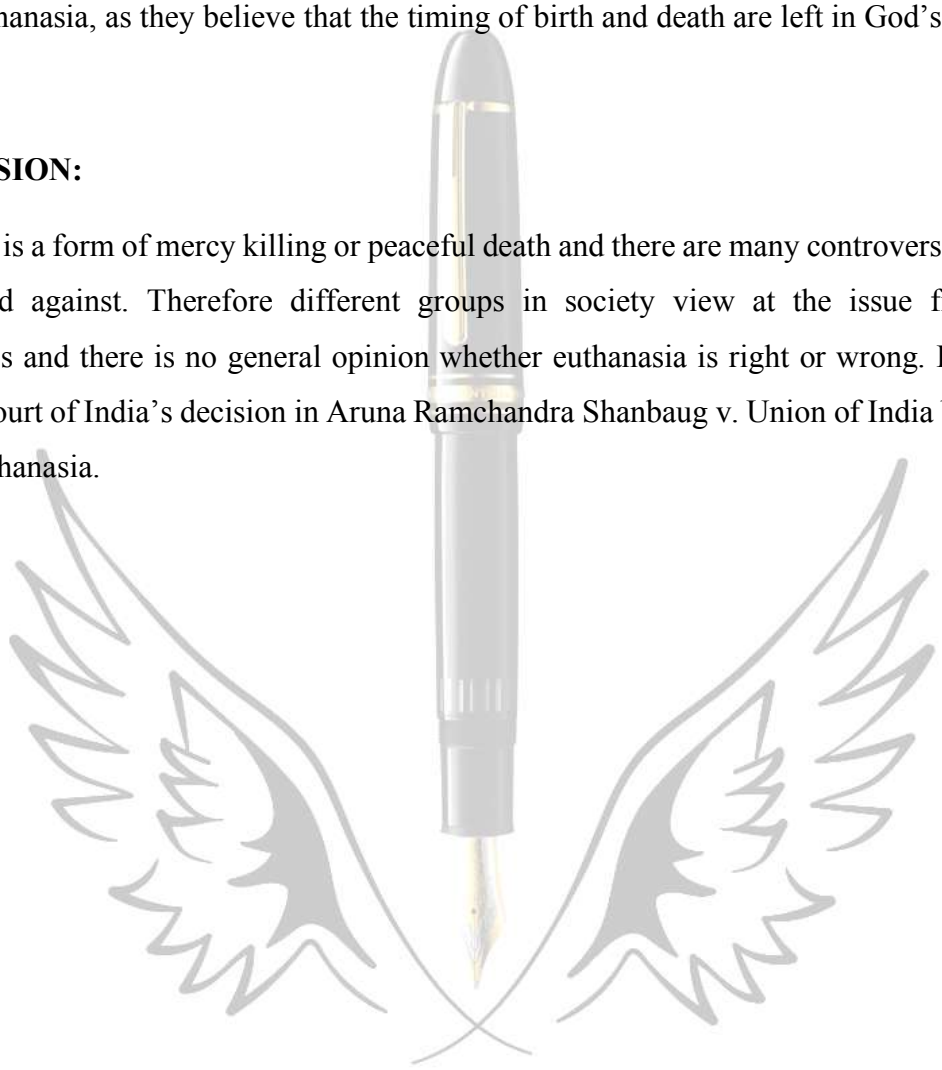
Sikhism: Sikhs are highly respectful to their life which they see as gift of God. Most Sikhs are against euthanasia, as they believe that the timing of birth and death are left in God's hands.

CONCLUSION:

Euthanasia is a form of mercy killing or peaceful death and there are many controversies as people are for and against. Therefore different groups in society view at the issue from various perspectives and there is no general opinion whether euthanasia is right or wrong. I go with the Supreme court of India's decision in Aruna Ramchandra Shanbaug v. Union of India by legalising passive euthanasia.



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JUDICIAL ACTIVISM TOWARDS COMBATING COVID – 19

- RAMALINGAM SEYON

To eradicate any possible recurrence of a new wave, a long term resolve to observe good personal hygiene, reduced gatherings and crowded settings if undertaken would foster confidence in each other and forestall communicative infections. The compulsory use of masks and distancing skills will act like extra brakes to halt the contagious march of Corona Virus. If you really want a thing done, do it yourself, with no vaccine yet discovered, every life saved will be almost a miracle, greater than winning a war that costs life.

Justice A.P. Sahi, Chief Justice, Madras High Court.

"Pandemic has no religion ;
It knows no region;
It won't come on its own;
Unless there is an invitation;
Crowding can lead to its aggravation;
So maintain sanitation and reduce social interaction;
That will alone prevent transmission"

Justice N. Kirubakaran, Judge, Madras High Court

INTRODUCTION

COVID–19 is a disease caused by a new strain of Coronavirus. It is a new virus linked to the same family of viruses as Severe Acute Respiratory Syndrome (SARS) and Common Cold. The symptoms of COVID-19 include fever, cough and shortness of breath. COVID-19 is transmitted through direct contact with respiratory droplets of an infected person which is generated through coughing and sneezing. Human beings can also be infected from and touching surfaces contaminated with the virus and touching their face namely eyes, nose and mouth. No vaccine is

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currently available for COVID-19. It can be prevented through everyday preventive actions which includes staying home, covering mouth and nose with mask, washing hands often with soap and water or sanitizer and cleaning frequently touched surfaces and objects. The outbreak of COVID-19 has been declared a Public Health Emergency of International Concern (PHEIC). The virus now has spread too many Countries and Territories throughout the world leaving no nation affected from it. COVID-19 emerged in early December 2019 in China and has now spread to over 150 Countries and it slowly travelled to India during the first week of March 2020. The Government of India has declared lockdown of the entire Country since March 25, 2020 till April 14, 2020 and was extended to May 3, 2020 and is likely to be extended for at least couple of weeks in May 2020. The Supreme Court of India also by its Circular dated 23.03.2020 has declared the entry of Advocates, Litigants and Public into the Supreme Court as suspended on the ground of five security zone, Advocates are advised against attending Chambers in Supreme Court Campus and Hon'ble Benches were constituted to hear only matters involving extreme urgency and cases to be heard through video conferencing. The Madras High Court by its Circular dated 24.03.2020 has suspended the Court work in the High Court as well as the Subordinate Courts with a direction that entry to High Court shall remain prohibited and entry into all Subordinate Courts shall remain suspended and no matter will be entertained unless it is urgent and imminent emergent and urgent matters will be heard through video conferencing. This paper discusses the facts about COVID-19, the laws dealing with COVID-19 and the Judicial initiative taken by the Indian Judiciary toward combating COVID-19.

FACTS ABOUT COVID-19

COVID-19: CO stands for CORONA, VI stands for Virus, D stands for Disease and 19 stands for year of spreading namely 2019. Earlier this disease was referred to as "2019 novel coronavirus" or "2019-nCoV". COVID-19 affects people every day more particularly older people and people infected with chronic medical conditions namely diabetes and heart disease in India COVID-19 reported cases are from the following: (i) travel related cases and (ii) focal clusters arising from a travel related / unrelated case where cluster containment strategy adopted and (iii) persons coming from COVID-19 affected areas where local and community and transmission is evidence. The spread of COVID-19 can be effectively prevented by using triple layer medical

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mask, washing hands frequently with soap and water for 40 seconds and using sanitizer with 70% alcohol for 20 seconds, while coughing or sneezing cover nose and mouth with hand kerchief or tissue paper, refrain from touching face, mouth, nose and eyes, stay away atleast a metre from those coughing or sneezing and monitoring the body temperature.

LEGISLATIVE FRAME WORK AGAINST COVID-19

The Indian Penal Code deals with offences affecting the public health safety convenience, decency and morals. Sections 188, 269, 270 and 271 of Indian Penal Code are relevant sections for the present scenario of the COVID-19 pandemic and lockdown order. Section 188 of IPC deals about disobedience to order duly promulgated from public servant which prescribes punishment for a period of six months imprisonment or fine of Rs. 1,000/- or both. Section 269 of IPC refers to negligent act likely to spread infection of disease dangerous to life with punishment of six months imprisonment or fine or both. Section 270 of IPC deals with malignant act likely to spread infection of disease dangerous to life which is punishable with two years imprisonment or fine or both and Section 271 of IPC refers to disobedient to quarantine rule which is punishable with six months imprisonment or fine or both. Section 133 of Code of Criminal Procedure deals with conditional order for removal of nuisance. Article 47 of the Constitution of India casts upon a duty to the Government which reads as follows: ***"Duty of the State to raise the level of nutrition and the standard of living and to improve public health;*** 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 and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health." The Union Government enforced the Section 2 of Epidemic Diseases Act, 1897 to all states and Union Territories in India to control COVID-19. The Act provides for the State Government to take special measures and prescribe regulations to dangerous epidemic diseases. The current COVID-19 pandemic had witnessed instances of health care workers attacked and obstructed from doing their duties. The Central Government was compelled to promulgate an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19. The Ordinance aimed to protect healthcare service personnel and property including their living / working premises against violence during epidemics. The amendment makes acts of

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violence cognizable and non-bailable offences. Commission or abetment of such acts of violence shall be punished with imprisonment for a term of three months to five years, and with fine of Rs.50,000/- to Rs.2,00,000/-. In case of causing grievous hurt, imprisonment shall be for a term six months to seven years and with fine of Rs.1,00,000/- to Rs.5,00,000/- In addition, the offender shall also be liable to pay compensation to the victim and twice the fair market value for damage of property. Offences shall be investigated by an officer of the rank of Inspector within a period of 30 days, and trial has to be completed in one year, unless extended by the court for reasons to be recorded in writing. It is hoped that this Ordinance will have the impact of infusing confidence in the minds of healthcare service personnel so that they can work and serve the human mankind without any disturbance.

JUDICIAL INITIATIVES TOWARDS COMBATING COVID-19

The legislative framework in combating COVID – 19 in India is inadequate. It does not cater fully to the needs of the general public at large. Though the Theory of Separation of Powers contemplated by Montesquieu provides for the Legislature to enact laws, Executive to enforce laws and Judiciary to interpret laws, when Legislature is incompetent to enact proper laws, Judiciary through its creeping jurisdiction, extends its helping hands and assumes the role of Legislature and enacts Judge Made Laws through its historical decisions. The supporters of the same call it as Judicial Activism, while the critics call it as Judicial Terrorism. The Indian Judiciary since 1980s embraced Judicial Activism when the Government had failed to protect the people. Historical decisions compelled the Governments to cater the needs of the people. In this pandemic situation of COVID – 19, the Indian Judiciary more particularly the Supreme Court of India and Madras High Court embraced Judicial Activism to protect the public against the COVID – 19. This article analyses a variety of latest judicial decisions which acted as stepping stone to combat COVID – 19.

IN RE : CONTAGION OF COVID 19 VIRUS IN PRISONS (SUO MOTU WRIT PETITION (CIVIL) NO.1/2020) , the Supreme Court of India consisting of Hon'ble The Chief Justice and Hon'ble Mr.JUSTICE L. NAGESWARA RAO in its order dated 16.03.2020

held that**, "**While the Government of India advices that social distancing must be maintained to prevent the spread of COVID-19 virus, the bitter truth is that our prisons are overcrowded, making it difficult for the prisoners to maintain social distancing. There are 1339 prisons in this country, and approximately 4,66,084 inmates inhabit such prisons. According to the National Crime Records Bureau, the occupancy rate of Indian prisons is at 117.6%, and in states such as Uttar Pradesh and Sikkim, the occupancy rate is as high as 176.5% and 157.3% respectively. Like most other viral diseases, the susceptibility of COVID-19 is greater in over-crowded places, mass gatherings, etc. Studies indicate that contagious viruses such as COVID-19 virus proliferate in closed spaces such as prisons. Studies also establish that prison inmates are highly prone to contagious viruses. The rate of ingress and egress in prisons is very high, especially since persons (accused, convicts, detenues etc.) are brought to the prisons on a daily basis. Apart from them, several correctional officers and other prison staff enter the prisons regularly, and so do visitors (kith and kin of prisoners) and lawyers. Therefore, there is a high risk of transmission of COVID-19 virus to the prison inmates. For the reasons mentioned above, our prisons can become fertile breeding grounds for incubation of COVID-19. We are of the opinion that there is an imminent need to take steps on an urgent basis to prevent the contagion of COVID-19 virus in our prisons" and further directed the Governments to suggest immediate measures which should be adopted for the medical assistance to the prisoners in all jails and the juveniles lodged in the Remand Homes and for protection of their health and welfare.

The Supreme Court of India further in the same Suo Motu Writ Petition (C) No. 1/2020 namely **IN RE : CONTAGION OF COVID -19 VIRUS IN PRISONS** in its order dated 23.03.2020 has held that, "the issue of overcrowding of prisons is a matter of serious concern particularly in the present context of the pandemic of Corona Virus (COVID-19). Having regard to the provisions of Article 21 of the Constitution of India, it has become imperative to ensure that the spread of the Corona Virus within the prisons is controlled. We direct that each State / Union Territory shall constitute a High Powered Committee comprising of (i) Chairman of the State Legal Services Committee, (ii) the Principal Secretary (Home/Prison) by whatever designation is known as, (iii) Director General of Prison(s), to determine which class of prisoners can be released on parole or an interim bail for such period as may be thought may be appropriate"

Further the Supreme Court **IN RE: REGARDING CLOSURE OF MID-DAY MEAL SCHEME (Suo Motu Writ Petition (C) No. 2/2020)** in its Order dated 18.03.2020, the Bench consisting of the Hon'ble Chief Justice and Justices B.R. Gavai and Surya Kant held that, "On account of the shutdown of the Schools and the Anganwadis, the children as well as the lactating and nursing mothers would be deprived of the nutritional food. Non- supply of nutritional food to the children as well as lactating and nursing mothers may lead to large – scale malnourishment. Particularly, the children and the lactating and nursing mothers in rural as well as tribal area are prone to such mal-nourishment. Such mal-nutrition may affect their immunity system and as such, such children and lactating and nursing mothers would be more prone to catch the infection. While dealing with one crisis, the situation may not lead to creation of another crisis. In that view of the matter, it is necessary, that all the states should come out with a uniform policy so as to ensure, that while preventing spread of COVID-19, the schemes for providing nutritional food to the children and nursing and lactating mothers are not adversely affected".

IN RE CONTAGION OF COVID 19 VIRUS IN CHILDREN PROTECTION HOMES (SUO MOTO WRIT PETITION (CIVIL) NO. 4 OF 2020),

the Supreme Court in its order dated 03.04.2020 has held that, **"** This petition has been listed suo moto because of the COVID-19 pandemic which is sweeping the country. There are children who need care and attention and are kept in or children to conflict with law who are kept in various types of homes. There are also children who are kept in foster and kinship care. In these circumstances, it was felt that the interest of these children should be looked into. Interest of these children all of whom fall within the ambit of Juvenile Justice (Care and Protection of Children) Act, 2015 should be protected and toprevent the same, the following directions are issu ed". The Supreme Court has framed measures to be taken by Child Welfare Committees, Juvenile Justice Boards and Children Courts, Governments and Child Care Institutions. It also enumerated preventive measures for Child Care Institutions which included spreading of COVID-19, necessary steps to practice, promote and demonstrate positive hygiene behaviours, practice social distancing and cleaning and disinfecting rigorously. The Supreme Court also enumerated responsive measures for Child Care Institutions which included conducting regular screening,

following of health referral system, quarantine, and planning in advance for emergency situation. The Supreme Court further directed the Registry to immediately send a copy to all State Governments and also shall ensure that a copy with translated version is sent to all Child Welfare Committees and Child Care Institutions and further directed the Registrar Generals of all High Courts to send the copy of the same to the Principal Magistrates presiding over the Juvenile Justice Boards and Presiding Officers of the Children Courts. The above direction of the Supreme Court clearly depicts the Apex Court's anxiety in protecting the children from COVID-19.

IN RE: GUIDELINES FOR COURT FUNCTIONING THROUGH VIDEO CONFERENCING DURING COVID-19 PANDEMIC (SUO MOTU WRIT (CIVIL) NO.5/2020), the Supreme Court Bench consisting of Chief Justice S.A.Bobde, Justices D.Y. Chandrachud and L. Nageswara Rao in its order dated 06.04.2020 contemplated guidelines for court functioning through video conferencing during COVID-19 pandemic. The Supreme Court held that, **"**Access to justice is fundamental to preserve the rule of law in the democracy envisaged by the Constitution of India. The challenges occasioned by the outbreak of COVID-19 have to be addressed while preserving the constitutional commitment to ensuring the delivery of and access to justice to those who seek it. It is necessary to ensure compliance with social distancing guidelines issued from time to time by various health authorities, Government of India and States. Court hearings in congregation must necessarily become an exception during this period".

……. "Indian courts have been proactive in embracing advancement in technology in judicial proceedings"…….

"Faced with the unprecedented and extraordinary outbreak of a pandemic, it is necessary that Courts at all levels respond to the call of social distancing and ensure that court premises do not contribute to the spread of virus. This is not a matter of discretion but of duty. Indeed, Courts throughout the country particularly at the level of the Supreme Court and the High Courts have employed video conferencing for dispensation of Justice and as guardians of the Constitution and as protectors of individual liberty governed by the rule of law. Taking cognizance of the measures adopted by this court and by the High Courts and District Courts, it is necessary for this court to issue directions by taking recourse to the jurisdiction conferred by Article 142 of the Constitution".

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The Supreme Court in exercise of the powers conferred under the Article 142 of the Constitution of India directed the following:

i. All measures that have been and shall be taken by this Court and by the High Courts, to reduce the need for the physical presence of all stakeholders within court premises and to secure the functioning of courts in consonance with social distancing guidelines and best public health practices shall be deemed to be lawful;

ii. The Supreme Court of India and all High Courts are authorized to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies; and

iii. Consistent with the peculiarities of the judicial system in every state and the dynamically developing public health situation, every High Court is authorised to determine the modalities which are suitable to the temporary transition to the use of video conferencing technologies;

iv. The concerned courts shall maintain a helpline to ensure that any complaint in regard to the quality or audibility of feed shall be communicated during the proceeding or immediately after its conclusion failing which no grievance in regard to it shall be entertained thereafter.

v. The District Courts in each State shall adopt the mode of Video Conferencing prescribed by the concerned High Court.

vi. The Court shall duly notify and make available the facilities for video conferencing for such litigants who do not have the means or access to video conferencing facilities. If necessary, in appropriate cases courts may appoint an amicus-curiae and make video conferencing facilities available to such an advocate.

vii. Until appropriate rules are framed by the High Courts, video conferencing shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage. In no case shall evidence be recorded without the mutual consent of both the parties by video conferencing. If it is necessary to record evidence in a Court room the presiding officer shall ensure that appropriate distance is maintained between any two individuals in the Court.

viii. The presiding officer shall have the power to restrict entry of persons into the court room or the points from which the arguments are addressed by the advocates. No presiding officer shall prevent the entry of a party to the case unless such party is suffering from any infectious illness. However, where the number of litigants are many the presiding officer shall have the power to restrict the numbers. The presiding officer shall in his discretion adjourn the proceedings where it is not possible to restrict the number".

Further the Supreme Court has held that, " The above directions are issued in furtherance of the commitment to the delivery of justice. The cooperation of all courts, judges, litigants, parties, staff and other stakeholders is indispensable in the successful implementation of the above directions to ensure that the judiciary rises to face the unique challenge presented by the outbreak of COVID-19".

The Supreme Court in **SHASHANK DEO SUDHI Vs. UNION OF INDIA & OTHERS (WRIT PETITION (CIVIL) Diary No(s). 10816/2020)** in its order dated 08.04.2020 has held that, **"**The private Hospitals including Laboratories have an important role to play in containing the scale of pandemic by extending philanthropic services in the hour of national crisis. We thus are satisfied that the petitioner has made out a case for issuing a direction to the respondents to issue necessary direction to accredited private Labs to conduct free of cost COVID-19 test. The question as to whether the private Laboratories carrying free of cost COVID-19 tests are entitled for any reimbursement of expenses incurred shall be considered later on. We further are of the view that tests relating to COVID-19 must be carried out in NABL accredited Labs or any agencies approved by ICMR". Further the following interim directions were issued to the Union of India, (i) The tests relating to COVID-19 whether in approved Government Laboratories or approved private Laboratories shall be free of cost. The respondents shall issue necessary direction in this regard immediately. (ii) Tests relating to COVID-19 must be carried out in NABL accredited Labs or any agencies approved by WHO or ICMR.

The Division Bench of the Madras High Court consisting of **JUSTICE N.KIRUBAKARAN and JUSTICE R.HEMALATHA** in **INDIA AWAKE FOR TRANSPARENCY, REP. BY ITS DIRECTOR, RAJENDER KUMAR VS. THE SECRETARY, DEPARTMENT OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF TAMIL NADU, CHENNAI AND ANOTHER (W.P.No.7443 of 2020)** in its order dated 08.04.2020 as held that**, "** As it is a public interest litigation, this Court would like to deal with issues arising out of COVID virus comprehensively and therefore, this Court suo motu impleads "Union of India represented by the Secretary to Government, Ministry of Home Affairs, New Delhi" as third respondent".

"Since out of 5194 people infected by Corona virus, as on date Tamil Nadu stands second with 690 patients, while Maharashtra stands first with 1018 patients. However with regard to the release of Disaster Risk Management Fund, the Home Ministry has released only 510 crores which in the opinion of this Court is not adequate, whereas, the States which have got lesser number of virus infected patients have been allotted more fund. This Court is not against the allotment of more

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fund to the other States, but concerned about Tamil Nadu getting lesser amount of fund. Therefore, the Central Government may positively consider increasing the amount".

"Even though Tamil Nadu has got 690 COVID positive patients, it is stated that their family members and friends have not come forward to subject themselves for test as well as for quarantining. The pandemic spreads like a wild fire. It would not only affect the individual but also affect their family members, relatives, friends and even the whole of village or town. Further, many persons have come from foreign countries since the end of February and they have not voluntarily subjected themselves for testing and quarantining. Therefore, this Court appeals to the persons who have travelled abroad in the recent times, their family members and friends to subject themselves voluntarily for testing and quarantining, as the same would enable the pandemic to be controlled in the interest of the public".

"Furthermore, lakhs and lakhs of people are affected because of the lock down. The daily wagers, migrant workers and platform dwellers are without food and shelter. Though the Government is taking all efforts to provide food, it 4/7 is reported in the media that in some places like Tirupur and Coimbatore, the migrant workers have staged a protest as they have not been given food and shelter. Therefore, the authorities are directed to verify the persons who are without food and shelter and provide them by having community kitchens".

"Since the pandemic spreads due to physical contact or due to proximity and also by droplets, it must be everyones' endeavor to keep social distancing. Inspite of the appeals made by the authorities, the public is not listening to them and they are living very closely and there is every chance to spread the dangerous pandemic. It is in their own interest, the public are requested to keep social distancing while moving out for purchasing essential commodities or for visiting hospitals etc., If we are not disciplined even at this hour of crisis, no one can could save us. The issue is not concerned with an individual but it is concerned with the entire society. It is stated that the Pandemic is only in second stage and if it reaches to community spreading, there is likelihood of loss of lives in lakhs, as we are 134 crore population country. It is a crucial stage and we should

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be vigilant. Only by staying in our house, we can cooperate with Doctors, Health workers and Policemen who are working round the clock for us. Otherwise, we will be doing injustice Therefore, this Court appeals to the people to avoid going out or congregating and to maintain social distancing".

……." Meanwhile, it is open to the Police Authorities to arrest as well as seize the two wheelers or the four wheelers which are used in violation of Section 144 order, if anybody comes out without reason beyond 1.00 P.M. The Police Authorities are directed to enquire/inform the employers of the violators (Government or Private employee) about the violation made by them".

This judgment of the Madras High Court clearly depicts the pandemic situation of the COVID-19 in Tamil Nadu and also it has given a free hand to the Police Authorities to enforce the laws without any fear or favour.

Further the same Bench in **S.JIMRAJ MILTON VS. UNION OF INDIA (W.P.Nos.7414 and 7456 of 2020)** in its order dated 09.04.2020 has held that, **"…….** This Court is also concerned with the health condition of the Doctors, Health Workers, Sanitary Workers and the Policemen as they are the forefront warriors in the fight against the Corona Virus"…..….. "They should also be safeguarded against the viral attack and therefore, they should be subjected to regular testing by the Authorities. This Court hails and appreciates the round the clock service rendered by Doctors, Health Workers, Sanitary workers and Policemen in the fight against dangerous pandemic which is threatening the entire humanity. This Court hopes and expects that respective Governments would appreciate their services by proper increase in their salaries. This Court is of the firm opinion that Doctors, Health workers and Policemen are doing service day and night throughout the years and their salary is not in commensurate with their work. Their work and services are essential for maintaining good health and law and order in the society"

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The same Bench in **P.ARULARASU VS. CHIEF SECRETARY, GOVERNMENT OF TAMIL NADU AND OTHERS (W.P. No. 7423/2020)** in its order dated 09.04.2020 has suo motu impleaded the Secretary, Labour Department, Government of Tamil Nadu as a necessary party to the proceedings and held that, "The endevour of this Court is to see that nobody suffers from starvation in the State and therefore, effective steps have to be taken by the Government".

The Division Bench of the Madras High Court consisting of **JUSTICES M.SATHYANARAYANAN AND M. NIRMAL KUMAR** in **Suo Motu W.P.No. 7492/2020** in its order dated 20.04.2020 has Suo Motu taken the issue of the burial of the body of the Medical Doctor has held that, "In the considered opinion of the Court the scope and ambit of Article 21 includes, right to have a decent burial, *It prima facie* appears that as a consequence of above said alleged acts, a person who practiced a noble profession as a doctor and breathed his last, has been deprived of his right, to have a burial, in a cemetery earmarked for that purpose and that apart, on account of law and order and public order problem created, the officials who have performed their duties, appeared have sustained grevious injuries" and further held that, "Citizens are not expected to take law and order into their hands and if it is so, would definitely lead to anarchy. There is likelihood of similar kind of incidents to occur in future also". The Court issued notices to the Chief Secretary, the Home Secretary, the Health and Family Welfare Secretary, Government of Tamil Nadu and Chennai Corporation Commissioner and DGP and Chennai Commissioner of Police and directed to list the matter on 28.04.2020 for further hearing.

The Kerala High Court in **SUO MOTU WRIT PETITION – COVID-19 - TAKEN UP BY THE HIGH COURT (W.P. (C) No.9400 OF 2020 (Suo Motu))** in its order dated 25.03.2020 has held that, "….. We are of the firm view that, right of personal liberty guaranteed under Article 21 of the Constitution of India should not, at any rate, be infringed by arresting an accused, except in matters where arrest is inevitable. However, the State is at liberty to take appropriate decision in respect of heinous/serious offences and in rest of the cases, State may act accordingly." "In the event of any arrest, the Constitutional obligation under Article 20(2) shall be followed in letter and spirit. Over-crowding in prisons is one of the issues taken up by the Hon'ble Supreme Court in Suo Motu Writ Petition (C) No.1/2020. Therefore, learned Magistrates/Judges before whom the

accused is produced, depending upon the nature of offence, shall consider as to whether judicial/police custody is required or not. Needless to state that, bail is the rule and jail is an exception. We make it clear that, the above said directions stand excluded to subjects relating public order/law and order and any action taken by the State Government to combat the outbreak of COVID-19 and actions taken thereof". "….It is sincerely expected that, due to the outbreak of COVID-19, State Government, LSG Institutions, Government of India, and Public Sector Undertakings owned and controlled by the State/Central Governments that no coercive action be taken since there is no opportunity to the persons to approach the Courts at present".

A clear analysis of the above judicial pronouncements will clearly depicts that whenever the Government failed to protect the public at large, the Indian Judiciary lend its helping hands through its creping jurisdictions by embracing Judicial Activism by its historical judgments.

CONCLUSIONS AND SUGGESTIONS

COVID-19 is a new disease emerged in early December 2019 in China and has now spread over to more than 150 Countries and is likely to spread to more Countries like forest fire. Combating COVID-19 is the need of the hour not only for the Government but also for the public. Combating COVID-19 involves not only strict implementation of laws, but also extensive co-operation on the part of the public through social distancing. A clear perusal of the judgments rendered by the Superior Courts in the COVID-19 pandemic situation clearly reveals the following:

1. Whenever the Government or its machinery failed to protect the people, Indian Judiciary through its historical decisions embracing Judicial Activism helped the public at large.

2. In complicated situations, when the Government was struggling to tackle the situation, Judiciary through its Suo Motu Proceedings entered into the matter on its own and has

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helped not only the Government but also the public (Suo Motu Proceedings initiated by the Madras High Court in the burial of Christian Medical Doctor).

3. The Suo Motu Proceedings of the Apex Court in the matter of court functioning clearly revealed the anxiety of the Apex Court to protect the legal fraternity from COVID-19.

4. The Suo Motu Proceedings of the Apex Court in the matter of children in conflict with law depicted the involvement of the Supreme Court in protection of children kept in Children Protective Homes.

5. The Suo Motu Proceedings of the Supreme Court regarding the Closure of Mid-Day Meal Scheme depicted the motherly care of the Supreme Court in providing nutritional food to the children.

6. The Suo Motu Proceedings of the Supreme Court in the matter of Contagion of COVID-19 Virus in Prison particularly about the concern of overcrowding of prisons in the present context of the pandemic of COVID-19 and also the direction to State Governments to form a High Power Committee for release of prisoners on Parole or interim bail showed the eagerness of the Apex Court in enforcing Fundamental Rights of the accused.

7. The order of the Supreme Court dated 08.04.2020 in directing the Governments to issue necessary direction to the accredited Private Labs to conduct free of cost of COVID-19 test to the citizens shows the concern of the Supreme Court in the protection of health of poor people.

8. The directions of the Madras High Court with regard to people suffering from starvation and direction to the Government to take effective steps to prevent starvation shows the parental care of the Judiciary in protecting its citizens from starvation.

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9. The direction of the Madras High Court with regard to the health condition of the Doctors, Health Workers, Sanitary Workers and the Policemen and further direction to subject them to regular testing and to safeguard them against the viral attack depicts the encouragement of the courts for the health service providers. The further direction of the Madras High Court to increase their salaries also will give a boost to their round the clock service.

10. The direction of the Madras High Court to the Police Authorities to arrest and seize the vehicles which are used in violation of Section 144 Order will help the law enforcing authorities particularly Police Personnel to act without fear or favour.

Robert Frost, the famous Poet, penned that, the woods are lovely dark and deep, but I have promises to keep and miles to go before I sleep and miles to go before I sleep. We have to go miles to combat COVID-19.

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AN OVERVIEW OF PRISON REFORMS IN INDIA WITH SPECIAL REFERENCE TO HEALTHCARE OF PRISONERS

- ROMIT CHANDRAKAR & AASHNA BANSAL

INTRODUCTION

Justice Mulla penned these verses in the report of All India Committee on Jail Reforms:

"Locked behind high walls and iron bars,
An unfortunate human world slumbers;
Here they have lost even their names,
And now they are just a roll of numbers.
When will their season of sorrow change,
When will the locks be broken;
With every breath each one of them hopes and prays,
All these lost souls in agony unspoken;
Counting each moment of their unending prison days"

-Justice Anand Narain Mulla

Every person is born equal and is endowed by its creator with some basic rights which we term as natural rights. These rights are primarily right to life and liberty. However a person is deprived of these rights when he/she refuse or do not comply with the conduct of the society, with proper punishment.

Prison organisation is, not at all new, it existed during the reign of Emperor Chandragupta Maurya and also in the modern times. Prison is where the society puts its whole expectations towards the criminal equity framework. It is to be understood that the primary objective of prisons is to bring the offenders back to the mainstream of the society and not inflicting pain on them in the name of punishment.

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As a social organization, prisons in India are a part and parcel of the larger criminal justice system which makes invaluable contribution in upholding the rule of law and maintenance of peace and tranquility, law and order in the society. Most of the people, who haven't been to jail rarely knows what happens within the four walls of prisons, which impacts into the low political and budgetary priority prisons receive from the Government. However commissions, prison study groups and committees formed from time to time tendered a yeoman's service in drawing the attention of public and legislature towards the situation, problems and issues, which prisons are facing in the country. These are highlighted by the deliberations of 'All India Committee on Jail Reforms', that administration of prisons and living conditions of prisoners are need to be paid a pointed attention.

The closed nature of penal system makes it easier for any kind of abuse goes unattended and unnoticed. It is therefore important to hold the functionaries of prison accountable for their actions. To this end, multiple oversight mechanisms have been instituted in India either by way of legislations or regulations to monitor the prison conditions regularly and safeguard the rights of prisoners notwithstanding the isolation of the place they are confined in and the nature of their crime.

For many years healthcare in prisons has grabbed little or almost no attention of public health authorities at both national and international levels. World Health Organisation (WHO) in the first four decades of its existence carried out as such no substantive work relating to healthcare services in prisons. Prisoners' healthcare issues were little studied and were rarely the subject of academic programmes and published articles in various medical journals. Prisons were considered to be a 'separate world' and only a few doctors working in prisons were employed and supervised by the prison administration with almost no contact with local or national healthcare bodies, medical schools or other such professional bodies. Therefore the health concerns of prisoners are the health concerns of the general community.

Today, there are many monitoring mechanisms established by government but apparently they have become perfunctory and are not being monitored in accordance with law. This has led to unhygienic conditions, high incidence of abuse, mental health issues and prolonged and unnecessary detention of under-trials. The present paper therefore focuses on prison reforms which have taken place, which are effectively implemented, which are yet to be implemented effectively,

which require more strictness and what else can be added up to these reforms, with special focus on healthcare of prisoners.

HISTORICAL BACKGROUND OF PRISON SYSTEM AND PRISON REFORMS IN INDIA

In Ancient times, the earliest mention of prison system could be found in the Manusmriti, Manu mentioned imprisonment as among the three primary modes of punishment. Manu laid as following, "Let king carefully restrain the wicked or culprit through three methods: (1) by imprisonment, (2) by putting them in behind fetters (prisons) and (3) through various other kinds of corporal punishment.[1660] Prison organisation is, not at all new, it existed even during the reign of Emperor Chandragupta Maurya and also in the modern times. The punishment given during the Mughal period in India was mostly as a deterrence or retribution. During Mughals the principal forms of punishment includes banishment fines, flogging, mutilation, capital punishment and imprisonment.[1661]

Our present prison administration is a legacy of British rule. In modern times, the year of 1835 marks the beginning of reform in prison system of India.

1. Prison Discipline Committee, 1836

When Lord T.B. Macaulay arrived to India as a Member of the Indian Law Commission, thereby a committee was appointed i.e. Prison Discipline Committee, 1836 and the committee submitted its report on 1838. Committee recommended for an increased rigorousness of treatment and it rejected all the reforming influences, be it of education, moral or religious teaching or any other system of regards for good conduct, rejecting all sorts of humanitarian needs and reforms for the prisoners. Central Prisons were constructed from 1846 on the recommendations of Lord Macaulay Committee. In pursuance of committee's recommendations, many central prisons were constructed – at Agra (1846), Bareilly and Allahabad (1848), Lahore (1852), Madras (1857), Bombay (1864), Alipore (1864), Varanasi and Fatehgarh (1864) and Lucknow (1867).

2. Commission of Inquiry into Jail Management and Discipline, 1864

[1660]R.M. Das, Manu, *Crime and punishment*, PATNA: JANAKI PRAKASHAN. 1987 at 42; also see Dr. Birendranath, *Judicial Administration India* PATNA: JANAKI PRAKASHAN, 1979 AT 90.
[1661] Dr. Satya Prakash Sangar, *Administration of Justice in Mughal India*, BHATIA VOL.5.

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The Second Commission of Inquiry into the Jail Management and Discipline was made in 1864, which made similar recommendations as given by the 1836 Committee. In addition to this this Commission made some suggestions regarding the improvement in diet, bedding, clothing, medical care and accommodation of prisoners. To inquire into prison administration, a Conference of Experts met in 1877 and proposed for enacting a prison law and thereby a draft bill was prepared.

3. Conference of experts on Jail Management, 1888

Fourth Jail Commission was appointed in 1888 and on its recommendation; a consolidated prison bill was formulated. A Conference of experts on Jail Management specifically examined the provisions regarding jail offences and punishment. In 1894, with the assent of Governor General of India, the draft bill became law, and named as 'Prisons Act, 1894'.

From time to time, various committees, commissions been setup by the State and Central Government, such as under the Chairmanship of Justice Anand Narain Mulla, All India Prison Reforms Committee was constituted in 1980, a committee under the chairmanship of RK Kapoor in 1986 and in 1987, Justice Krishna Iyer Committee was constituted to make suggestions for improving prison conditions and its administration, and making them more conducive to rehabilitation and reformation of the prisoners.

4. The Model Prison Manual

Model Prison Manual of 1960 is the guiding principle on the lines of which the present Indian Following the Model Prison Manual, the Union Home Ministry, appointed a working group on prisons in 1972, which brought out in its report the need for a national policy on prisons and made some important recommendation with regard to classification and treatment of offenders.

5. The Mulla Committee

A Committee on Jail Reform was setup by Government of India in 1980 under Justice AN Mulla's chairmanship with the objective of reviewing the laws, rules and regulations keeping in mind the overall objective of protecting society and rehabilitating offenders. Committee submitted its report in the year 1983.

6. The Krishna Iyer Committee

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In 1987, Govt. of India appointed a committee under the chairmanship of Justice Krishna Iyer to undertake study on the situation of women prisoners in India. Committee recommended for induction of more women in the police reviewing their special role in tackling women and child offenders.

Based on the recommendations of various commissions, committees, which have been formed from time to time, Central assistance was provided to the State Governments for repairing and renovating the old prisons, improving security of prisons, providing medical and other healthcare facilities, modernization of prison industries, facilities to women offenders, development of borstal schools, vocational training, training to the prison personnel, and for improving high-tech security under the prisons.

LAWS DEALING PRISONS AND PRISONERS IN INDIA

Prison comes within the subject of the States under List-II of the Seventh Schedule of the Constitution of India. The management and administration of prisons falls exclusively in the domain of the State Governments, and is governed by the Prisons Act, 1894 and the Prison Manuals of the respective State Governments. Thus, States have the primary role, responsibility and authority to change the current prison laws, rules and regulations.

Important statutes which have a bearing on the regulation and management of prisons in the country are:

- The Indian Penal Code, 1860.
- The Code of Criminal Procedure, 1973.
- The Constitution of India.
- The Prisons Act, 1894.
- The Prisoners Act, 1900.
- The Identification of Prisoners Act, 1920.
- The Transfer of Prisoners Act, 1950.
- The Representation of People Act, 1951.

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- The Prisoners (Attendance in Courts) Act, 1955.
- The Probation of Offenders Act, 1958.
- The Mental Health Act, 1987.
- Mental Healthcare Act, 2017.
- The Juvenile Justice (Care & Protection) Act, 2000.
- The Repatriation of Prisoners Act, 2003.
- Model Prison Manual (2016).

International Guidelines and Obligations

The Constitution of India, the Universal Declaration of Human Rights (UDHR) and the Standard Minimum Rules for Treatment of Prisoners vividly specify the standards of treatment to be adopted, while handling the prisoners in jails. It is important to keep in mind that the purpose of imprisonment is to confine the offender, dissociate him from others and prevent further crimes and at the same time restrain him from spreading any sort of criminality.

India follows the international obligations and guidelines regarding this with utmost respect and various steps are being taken towards prison reforms from time to time.

In 1955, **The Amnesty International** adopted certain rules for the treatment of prisoners, opposing any kind of prejudice among prisoners on various grounds, along with advocacy for hygienic conditions for living in prisons; the food served must be of nutritional value; services of qualified medical officers, having knowledge of psychiatry, should also be made available; separation of under trials should be made from the convicts.

One of the most important treaties on protection of the rights of the prisoners is the **International Covenant on Civil and Political Rights (ICCPR)**. India ratified this Covenant in 1979 and bounds itself to incorporate its provisions into its domestic laws and state practice. Another important covenant in this regard is the **International Covenant on Economic, Social and Cultural Rights (ICESR)** which states that prisoners hold a right to the highest attainable standard of physical and mental health.

The **UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** prohibit torture and cruel, inhuman, or degrading treatment or punishment, without exception or derogation. India signed the convention in 1997 but has not ratified it so far.

There are several additional international documents that expatiate the human rights of persons deprived of liberty, which provide certain guidelines as to how governments should abide by their international legal obligations. One such important guideline is the **United Nations Standard Minimum Rules for the Treatment of Prisoners** (also known as the Standard Minimum Rules), adopted by the U.N. Economic and Social Council in 1957. They constitute an authoritative guide to the binding standards of the treaty.

These standard rules emphasize on the separation of the different categories of prisoners. They include points such as men and women be detained in separate institutions, the under-trial prisoners are to be kept separate from convicted prisoners, complete separation between the prisoners detained under civil law and criminal offences, etc. They also provide for mandatory separation for young prisoners from the adult prisoners. These rules firmly advocate that incorporating modes of corporal punishment and disciplinary actions in jails should be completely prohibited.

Other relevant documents relating to guidelines to be followed to maintain prison conditions include the **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**, the **Basic Principles for the Treatment of Prisoners**, and the **United Nations Standard Minimum Rules for the Administration of Juvenile Justice.** Like the SMRs, these instruments too bind the governments to the extent that the norms set out in them explicate a broader framework of standards in human rights treaties.

The United Nations Human Rights Committee in 1992 stated that states have "a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty." The Committee has stressed on the point that the obligation to treat persons deprived of their liberty with dignity and humanity is a fundamental and universally applicable rule, and is not dependent on the material resources available to the state party.

WHY THE NEED FOR PRISON REFORMS?

Positioned at a very low pedestal of the criminal justice system, prisons and prisoners get very little attention. Often prisons become places of injustice with little possibility of rehabilitation

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although the objective of the prisons is just to keep the convicted away from society. In many countries, where the judiciary is slow and the bar nonchalant, prisons can be seen overflowing with convicts yet to be proven guilty of a crime. This can be usually seen in countries where a legacy of colonialism has left the police unaccountable.

Many prisoners are juveniles, mentally ill, jailed for petty crimes that don't require detention, under-trial prisoners who have been jailed for longer period than they would have remained there had they been properly tried or just unwanted. Imprisonment affects not only the prisoner but also his family as whole family has to suffer and adjust to the financial imbalance of the house. Not only does the family has to suffer the financial problem to maintain itself but it also has to incur financial loss because now they have to engage an advocate, arrange food for the prisoner, transport to prison to visit the prisoner, etc.

Prisoners' reform is a modern concept. In ancient and middle ages, prisons were considered to be places of torture. The most commonly recognized modes of punishment used to be death penalty, hanging, whipping, flogging, or starving to death. Prisoners were given inhumane and cruel treatment. In India, prison reforms began from the British era. That period witnessed the reformation of prisons and prisoners and introduction of changes in the existing prison system. Subsequently, the Prison Act, 1894 was enacted with its primary attention on safe custody of prisoners and under-trials as well as their reformation and rehabilitation in society. The Model Prison Manual 2016 outlines the roadmap for undertaking reform endeavors and rehabilitation of prisoners.

This is a sacrosanct, oft-repeated and well recognized legal principle that guilty should not be punished twice for the offence committed once. And this principle is a guiding light for prison reforms as well for maintaining safe and healthy prison conditions in a civilized society. If prison conditions are not proper then it is just like that the prisoner is punished twice. Also it cannot be expected that a prisoner shall get enough motivation to reform him/herself. Thus whole purpose of prison shall get defeated if prison conditions are not conducive. The situation is uncalled for legally as well as morally in a civilized world, as neither the legal principle of 'double jeopardy' shall be followed nor will it serve the purpose of reforming the person so that he/she gets rid of the criminal intent. Rather it shall be counterproductive as it shall harden the criminal instincts of the person which shall be harmful to society in future.

The Supreme Court of India in various cases[1662] has taken the view that the provisions of Part III of the Constitution should be given widest possible interpretation. It has been observed in many leading cases that right to legal aid, speedy trail, right to have interview with friend, relative and lawyer, protection to prisoners in jail from degrading, inhuman, and barbarous treatment, right to travel abroad, right to live with human dignity, right to livelihood, etc. though specifically not mentioned but they do come within the ambit of the Fundamental Rights guaranteed under Article 21 of the Constitution. The Supreme Court has considerably widened the scope of Article 21 and has time and again held that its protection shall be available for safeguarding the fundamental rights of the prisoners and for effecting prison reforms.

Mahatma Gandhi once said that crime is an outcome of the diseased minds and jail must have an environment of hospital for treatment and care. There is in no way possible that a society can be free of crimes but, this doesn't imply that the rights of the prisoners be overlooked by giving them such harsh punishments which are absolutely inhuman and degrading to the offender's right to life and dignity. To improve prison conditions does not mean that prison life should be made soft or lenient; rather it should be made human and sensible at least where a prisoner can live with basic human rights. Even crime rates can substantially be reduced if focus is made more on prison reforms or corrective measures.

Among the various problems faced by the prisons and prisoners, some common problems include:

- Over-crowding or congestion in jails,
- Improper separation of prisoners, for example under-trial prisoners from convicts,
- Gender-specific treatment,
- Shortage of staff, their poor training and other administrative inadequacies,
- Corruption, extortion and ill-treatment by prison staff,
- Unsatisfactory living conditions relating to basic amenities such as food, clothing, bedding, cleanliness, sanitation, improper water supply, etc.

[1662] **Maneka Gandhi v. Union of India**, 1978 SCR (2) 621; **Sunil Batra vs. Delhi Administration**, 1980 SCR(2) 557; **Hussainara Khatoon v. State of Bihar** 1979 AIR 1819 1979.

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- inequalities and distinctions, giving special privilege to prisoners from higher class,
- lack of adequate vocation and educational prison programmes,
- poor spending on healthcare and welfare services,
- lack of legal aid and assistance,
- abuse of prisoners, which includes both physical and mental abuse,
- improper monitoring on prison disciplines,
- problem of criminality among prison inmates,
- problem of privacy and communication,
- lack of effective system of jail visitors,
- no proper segregation of sick prisoners.

In the case of **Rama Murthy v. State of Karnataka**[1663], the Supreme Court recognized the lack of proper healthcare as one of the major problems. In **Parmanand Katara v. Union of India and others**[1664], the Court ruled that the state has an obligation to preserve life whether he is an innocent person or a criminal liable to punishment under law.

A person behind bars cannot be denied justice. It is important to cure the malaise the system of prison suffers from and ensure that the legal rights of the persons in prison are safeguarded. It is obvious that no society can be free from crime. However, crime rate can be substantially reduced if more focus is put on prison reforms or corrective measures. Prison reforms is a call of the hour and it requires a more focused stratagem from the jail authorities.

IMPACT ON HEALTH DUE TO OVERCROWDING

Penitentiary overcrowding or overpopulation can have adverse consequences in the physical health of persons. The increase in physical contact, the lack of ventilation and light, as well as a shortage of time spent outdoors favors disease propagation, essentially infectious and parasitic diseases. Owing to various reasons such as increase in crime rates, excessive delays in trials, rise in

[1663] (1997) 2 SCC 642.
[1664] 1989 SCR (3) 997.

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population, and a complex and tedious justice-delivery system, there is severe overcrowding and exhaustion of prison facilities in India (for example, confinement of both under-trails and convicted in the same prison). This has led the prison environment to be rather unhealthy and as a consequence often it serves as a "hot-spot" for infectious disease transmission. It is an obvious cause of and contributing factor in many of the health issues in prisons, most notably infectious diseases and mental health issues.

On a general level, overcrowding can lead to: a) violation of international rules on the separation of inmates (men-women; preventive-sentenced inmates, juveniles, under-trails, etc.); b) risk to the psychological and physical health of inmates; c) risk for the public healthcare; d) minacious environment for inmates and for penitentiary professionals; and e) attack on human rights, as it can lead to a cruel or inhuman treatment.

The Indian Prisons are afflicted with over-crowding. This is due to unequal distribution of population amongst the existing jails. So also the under-trial prisoners are on the remarkable increase. It wouldn't be wrong to say that overcrowding in Indian prisons is not primarily due to the higher rate of imprisonment but because of high number of under-trial prisoners.

Overcrowding even leads to unsatisfactory living conditions. Although several jail reforms outlined earlier have focused on issues like diet, clothing and cleanliness, unsatisfactory living conditions continue in many prisons around the country.

INCARCERATION AND MENTAL HEALTH OF PRISONERS

Among the many issues, recognition and providing for adequate provisions for the deploring mental health of the population is one of the most perturbing concerns that India is currently facing. Prisoners are yet another part of this vulnerable population whose mental health is usually untended. In fact, general research has shown that there is a significantly higher rate of mental health problems with prisoners in India. The prevalence of poor mental health among prisoners is considerably higher than in the community, and studies worldwide have shown that suicide rates in prisons are up to 10 times higher than those in the general population.[1665]

[1665] WHO Office, *Mental Health*, WHO, www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/focus-areas/mental-health.

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Mental Health issues can arise due to various reasons such as deprivation of personal liberty, lack of basic necessities in prisons, etc. The World Health Organization (WHO) has identified overcrowding, various forms of violence inside the prisons, lack of privacy, lack of meaningful activity, enforced solitude, isolation from social networks, insecurities about future prospects, along with the lack of effective mental healthcare in prisons as major reasons for rising mental illness issues in prisons.[1666] A prisoner with mental health problems is vulnerable to other issues like suffering from poor physical health, drug abuse, self-harm, suicide, damage to well-being of other inmates, and inability to maintain relations inside the prison.

In the landmark case of **Sheela Barse**,[1667] the Supreme Court through a commission identified the poor status of mental healthcare facilities in the prisons.

In 2017 an exhaustive piece of legislation, The Mental Healthcare Act, was enacted with the objective to provide mental health care facilities to those who are in need including the prisoners. Under Section 103 of the Act, it mandates each State Governments to setup mental health establishment in the medical wing of at least one prison in each State and Union Territory, and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment. While the Act points out important concerns regarding mental health, however in reality there is a lack of adequate infrastructure and qualified staff in the country.

In 2016, the Ministry of Home Affairs issued the Model Prison Manual which in itself is a chapter towards medical care. It provides suggestive guidelines and such model manuals time to time for states to emulate them and also recommends for a minimum of one psychiatric counsellor in each type of prison.

In the cases of **Jan Adalat v. State of Maharashtra**[1668], **Raju Jagdish Paswan v. State of Maharashtra**[1669] and in few other cases, the court has time and again commented on the inadequacies of different state models, expressing discontent on the poor emulation of reformative measures outlined in Model Prison Rules. The Court in various cases has also observed that most of the states have in fact failed to devise their rules on the basis of the 2016 Model.

[1666] Supra.
[1667] AIR 1983 SC 378
[1668] 2017 SCC (Bom.) 239.
[1669] Criminal Appeal Nos. 88-89 of 2019 arising out of SLP (CRL.) Nos.5422-5423 of 2013.

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In the case of **Accused X v. State of Maharashtra**[1670], the Court acknowledged that prisons could be difficult places to be in. Various aspects of a prisoner's life, like overcrowding, violence, isolation, and absence of familial affection, could have an adverse bearing upon their mental health. The three judge bench held that post conviction; mental illness could be a mitigating factor while deciding the cases of commutation of death sentence.

Present Status, Recent Trends In Prison Reforms

Modern prison system is considered to be in far more better condition than the past but still so much remains to be done in the direction of prison reforms. Prison reforms did not emerge out of social movement but an outcome of the worst conditions of treatment as faced by political sufferers in the prisons during their imprisonment period.

- **Various tools and techniques in the institution of jail of Prison Reforms**

The desired goal of reformation or rehabilitation of criminals is achieved through various tools and techniques in the institution of jail. Some such tools and techniques of prison reforms are as follows:

1. **Probation**

Probation is one of the significant tools of reformative penology; basically it is a period during which the convict ordered to undergo sentence remains, instead of being in prison, under supervision. Releasing a convict on probation serves as a reformative treatment plan as the conviction on probation lives within his community and modulates his life under conditions imposed by court and remains under probation officer's supervision.

2. **Parole**

Parole is the release of a criminal from a penal reformative institution that remains under the control of correctional authorities and thus it is the last stage in the correctional scheme and probation may probably be the first. After careful study, showing the potential for correction he's allowed to join the society conditionally.

3. **Furlough**

[1670] Review Petition (Criminal) No. 301 of 2008 in Criminal Appeal No. 680 OF 2007 decided on 12.04.2019.

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Another reformatory tool, Furlough is sometimes often confused with parole. Irrespective of any particular reason, furlough must be granted to the prisoner periodically. The objective behind furlough is merely to enable him, retain social and family ties and avoid negative effects of a continuous prison life; furlough period is treated as remission of sentence.

4. **Pardon**

Grant of pardon may be absolute or conditional, it is an act of mercy by which prisoner is absolved from penalty, imposed on him. There are certain provisions, contained in Article 72 and 161 of Constitution of India which provides that the President and Governor are empowered to grant pardon, reprieve or commute the sentence of any convict.

5. **Open Prisons**

Open prisons often termed as open jails are another significant tool of criminal reformation; these are essentially a 21st century device for rehabilitating prisoners to normal life in the society. Instead of allowing them to remain idle inside the prison cells, these open prisons provide work in forests, agricultural farms and construction sites to the inmates. The first open prison in India was started in Bombay Presidency in the year of 1905; however in 1910 this open prison was closed. Thereafter Uttar Pradesh established the first open prison in India in the year of 1953.

6. **Self-governance by inmates**

Under this Self-Govt. system, the inmates elect their representatives amongst themselves and that elected body of prisoners runs the entire prison management. They are expected to take care of interests and welfare of their fellow prisoners; primarily they exercise complete or at least partial control over the mess.

7. **Work Release**

In modern criminal justice system, one of the effective reformation tools is ‘work release’ where the prisoner for part time basis is allowed to work for pay in the society, which gives him an opportunity to mingle with the society in a normal manner.

8. **Vipassana**

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The purpose of 'Vipassana' is to deal with the psychological and emotional problems of prison inmates and to achieve peace of mind and live a happy useful life. In 1975, the first Vipassana course in a prison took place in Jaipur; however after almost 20 years it was that Vipassana established itself as a tool for social and prison reform and became an integral part of the prison which helped in building community as and developing their personality in a positive manner.

CONCLUSION

Administrative apathy, procedural complexities and lack of health infrastructure, along with massive overcrowding and alienation, are the major reasons for the rising health related issues among the prisoners. The most disturbing fact is that majority of these prisoners are actually under trial and have not yet been declared guilty or not-guilty, and have been only accused of a crime.

The denial of rights and dignity to the prisoners, especially to those dealing with health issues in prison, is not only a violation of human rights and natural rights, but is also a violation of domestic and international laws.

Some would argue on the point that the very purpose of putting criminals behind bars is to punish them and inflict pain upon them in order to make them repent for their wrongs. But these ideas of retribution do not go well with the ideas of liberty and justice enshrined in our Constitution. It is the legal, moral and constitutional duty of the Indian state to protect the interests of all prisoners, especially those with mental health issues, and ensure to them a life of dignity.

What happens in prisons is intrinsically linked with how the criminal justice system as a whole is managed, and how it deals with the offenders. In assessing the prison system it is important that efficient management and humane prison conditions are not dependent on the prison authorities alone. Thus, attempts to reform the prison system need to be undertaken as part of a comprehensive programme that addresses challenges in the entire criminal justice system.

The need of the hour is to build stronger infrastructures with better prison health facilities and policies especially for issues related with mental health, and adopt a reformative approach, in order to turn criminals into healthy, law-abiding citizens. Allowing an alienating and humiliating prison system, will lead to the violation of the right to life of these prisoners. After all, punishment should not be considered to be a tool to disable criminals.

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It is not just about prison buildings but what goes on inside them that needs to be changed and the focus must be on the human rights of prisoners besides improving their amenities. There are several legislations and judicial pronouncements which seek to protect the rights of prisoners in India, but still a lot more is required to be done in this direction. Implementation of these rights continues to be one of major obstacle in the prison reforms in India.

The courts have in recent years been giving serious thought to the rights of prisoners and have played a vital role for the improvement of the prison system in the past. Hopefully the decisions given by the apex court would further help in reducing some of the existing problems in the current prison system.

Policy makers as well as the general public need to understand that the prison and the community are at continuum. The much needed overhaul of the prison health system by linking it with public health cannot be achieved without a sustained campaign aimed at changing the age old dogmas relating to retributive justice.

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ROLE OF JUDICIARY AS A SOCIAL ENGINEER

- **CHAITANYA JITENDRA ACHARYA**

INTRODUCTION:

Society ought to and has evolved itself over the course of time, in order to liberate itself from the clutches of outdated traditions and drivel stereotypes. It is an uncontested fact that the members of the society themselves are the harbingers of such evolutions, which allow the society to break free from the clutches of the past. There are certain institutions and agents in the society which influence it a great deal, by various mechanisms to carry out and adapt to the necessary amends in the working and thought process, needed to achieve the society's goal of creating a harmonious living order. One such agent is the judiciary, which has often addressed the grievances of aggrieved sections of the society and has created ground breaking and positive impacts by its various judgements and has led the course of society to a more tolerant and accepting environment.

Thus, this could be a reason why Roscoe Pound argued law as being a 'social engineer'. This article seeks to take a short review of various judgements of the Supreme Court in the recent past, can help a long way in upholding the non-discriminatory secular and ethos of our nation, where every citizen enjoys personal liberty and equality before the law.

LAW AS A SOCIAL ENGINEER:

Society has evolved from being governed by customs where social sanction was the only ramification for deviation from the customs of the society to a secular state (at least in India) which controlled all the institutions of a society, where the importance of individual liberty was realised by various philosophers and thinkers. Society is nothing but a congregation of individuals, individuals constitute a unit of the society. Every individual seeks fulfilment of all his desires,

however conflicts are inevitable in a society, thus it is not possible to fulfil every desire of every individual.[1671]

In order to fulfil maximum desires of maximum individuals, the concept of Social Engineering emerged and was coined by Roscoe Pound. The concept of Social Engineering argues that laws are created to shape the society and regulate behaviour of the people.[1672]

In the words of Pound: "*Law is a social engineering which means a balance between the society, in which applied science are used for resolving individual and social problems"*[1673]. Pound argues that similar to an engineer's formulae, laws represent experiences of the past and logical developments arising from such experiences.[1674]

Pound states that like an engineer applies a formula, the lawyer's and the judiciary's formula is the law which they should apply while deliberating issues in the court, and should ensure that desires of maximum people are fulfilled. Thus, society should be viewed as a structure, which should be built by maximum fulfilment of desires and minimum friction and law can be effectively used to achieve that end, by balancing conflicting interests in the society.[1675]

INSTANCES WHERE THE SUPREME COURT ACTED AS A SOCIAL ENGINEER

The Secretary, Ministry of Defence v. Babita Puniya & Ors.

In The Secretary, Ministry of Defence v. Babita Puniya the Supreme Court while upholding a verdict passed by the Delhi High Court, ordered the government to grant permanent commission in the army to women, irrespective of their years in service. A two judge bench comprising D.Y. Chandrachud J. and Ajay Rastogi J. elaborated their views on gender stereotypes in detail, by dedicating a separate part in the judgement titled as **Stereotypes and women in the Armed Forces (Part E)**. The court began by acknowledging that there still exists a pressing need for change in attitudes and mindsets to adhere to the values of the constitution. The Court then proceeded towards refuting the submission made by the Appellant, which in the court's view were

[1671] Shubham Kumar, What is Social Engineering?, I PLEADERS BLOG (Apr. 27, 2020 2:14 P.M.) https://blog.ipleaders.in/all-about-social-engineering/.
[1672] Ibid.
[1673] Sai Abhipsa Gochhayat, Social Engineering by Roscoe Pound; Issues in Legal and Political Philosophy, SSRN (Apr. 27, 2020 2:32 P.M.) https://poseidon01.ssrn.com/. [hereinafter 'SAI']
[1674] S.R MAYNENI, JURISPRUDENCE (LEGAL THEORY) 511 (Asia Law House 2007).
[1675] SAI, supra note 2.

stereotypical and regressive. The court rejected the notions such as: physiological limitations faced by women, confinement of women to managing households and taking care of children, inability of women to face harsh conditions in certain areas etc., by stating them regressive and baseless for denying permanent commission to women in the army.[1676]

Navtej Singh Johar v. Union of India

In Navtej Singh Johar v. Union of India, the Supreme Court declared major parts of Section. 377 of the IPC as unconstitutional. Section. 377 criminalised any sexual intercourse against the order of nature and included consensual sexual activity between people of the same sex within its ambit. Thus, this provision acted as a great encroachment on the personal liberty of the people belonging to the LGTBQ community. The Supreme Court struck declared this provision as unconstitutional on the grounds of being manifestly arbitrary, irrational and indefensible.

An excerpt from Indu Malhotra J. verdict in the case revealed the gravity of injustice faced by the LGBTQ community, due to the draconian nature of the provision. Indu Malhotra J. stated that history owes a long due apology to the members of the LGBTQ community and their family members, due to the delay in redressing this grievance of theirs, which largely occurred due to ignorance of the majority in recognizing homosexuality as a normal condition and a part of human sexuality.[1677]

Joseph Shine v. Union of India

This was another instance where the Supreme Court balanced the interests of the society against irrelevant and outdated laws. The constitutionality of Section. 497 of the IPC and Section. 198 (2) Cr. P.C. was called into question on the grounds that it was violative of Article 14, 15 and 21 constitution of India, as it penalised only the male paramour on account of adultery.

The petitioner argued that the historical background in which this provision was enacted is irrelevant in contemporary society.[1678] It was a pre-constitutional law, enacted in 1860 where

[1676] Secretary, Ministry of Defence v. Babita Puniya, 2020 SCC OnLine SC 200.
[1677] Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.
[1678] Jismin Jose, Joseph Shine v. Union of India, LAW TIMES JOURNAL (Apr. 29 2020, 12:27 A.M.) http://lawtimesjournal.in/joseph-shine-vs-union-of-india/.

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women were considered mere property of their husbands and had no rights of their own, thus the offence of adultery was considered as a theft of the husband's 'property'.[1679]

The court struck down Section. 497 as being unconstitutional on grounds of it being violative of Article 14, 15 and 21 of the Constitution. The Supreme Court dealt the matter with a progressive approach, while balancing the interests of husbands and wives in the realm of marriage against that of the society. It recognised sexual privacy and choice as a natural right, the court also acknowledged that since adultery is associated with the institution of marriage and treating adultery as a crime would result in the state being forced into a private realm. The court further distinguished between common morality and constitutional morality and asserted that the latter is guided by equality before the law, non-discrimination on the grounds of sex and dignity, all of which are hampered by Section 497 of the IPC. The court also ruled that Section. 497 was premised on sexual stereotypes and viewed women as unassertive and non-entitled to sexual choice. Apart from dealing with the interests of husbands and wives vis a vis the society, the society also engineered the interests of husbands and wives by ruling that adultery still constituted a ground for divorce.[1680]

Shayara Bano v. Union of India

In Shayara Bano v. Union of India the doors of the Hon'ble Supreme Court were knocked to decide the constitutionality of *talaq-e-biddat* or the 'triple talaq'. Triple talaq was a form of divorce practiced by the followers of Islam, wherein a Muslim man could legally and unilaterally divorce his wife by uttering or writing talaq three times. The Supreme Court declared the practice as unconstitutional by a 3:2 verdict. Rohinton Fali Nariman J. while declaring the practice to be manifestly arbitrary and violative of Article 14 of the Constitution held that: Triple Talaq is manifestly arbitrary in the sense that marital tie can be broken at the whims and caprices of a the husband, without any attempt to reconcile or save the marriage.[1681]

[1679] Tejaswi Pandit, Adultery [S. 497 IPC and S. 198 (2) Cr PC], THE SCC ONLINE BLOG (Apr. 29 2020, 12:45 A.M.) https://www.scconline.com/blog/post/2019/02/21/adultery-s-497-ipc-and-s-1982-crpc/.
[1680] Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.
[1681] Shayara Bano v. Union of India, (2017) 9 SCC 1.

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CONCLUSION

As argued earlier that evolution is inevitable for a society in order to progress and maintain peace and harmony for its members. Roscoe Pound aimed at using law as the 'substance' which could 'engineer' the society to confront the challenges of time and evolution and ensure maximum fulfilment of desires for all individuals in a society.

However, not undermining the instrumentality of law in influencing the mindset of individuals, certain laws and customs if not amended from time to time, act as an impediment to the much needed changes for the progress of the society.

In The Secretary, Ministry of Defence v. Babita Puniya the Supreme Court acted as a social engineer by eliminating regressive gender stereotypes against women being granted permanent commission in the armed forces. The Supreme Court asserted that it is high time that we overlook the specific gender roles- that men being socially dominant, physically powerful and bread earners of the family are stronger than women- who are primarily caretakers and physically submissive must be confined to domestic environments.

As argued in the earlier part of this section that laws too sometimes, if not dealt with can be regressive. Similar was the case with Section. 377 of the IPC which was modelled on the U.K's Buggery act of 1533. The Supreme Court in this instance acted as a Social Engineer by performing the following functions:

- On one hand it declared major parts of Section. 377 as unconstitutional, which allowed consensual sexual freedom to homosexuals, thus ensuring their right of personal liberty enshrined under Article 21 of the Constitution.

- On the other hand the Supreme Court rendered a part of Section. 377 as operative to punish bestiality and sexual intercourse with minors. (At present one can only conclude that these two offences are against the order of nature.)

In Shayara Bano v. The Union of India, the Supreme Court acted as a social engineer by balancing the fundamental rights and dignity of Muslim women against regressive and irrational religious practices, it stepped into religious domain and ensured that irrational and arbitrary religious practices should not lead to inequality and discrimination on the grounds of sex- which is in clear

contravention to our constitutional ethos. Thus, this is an instance where the Supreme Court made clear that despite various religions in India being subject to their respective religious laws, the provisions of such religious laws will be valid only to the extent that they are not violative of the constitution.

The instrument which has helped the Supreme Court quite often, to act as a social engineer is the fundamental law of the land i.e. The Constitution of India. Our Constitution makers drafted the Constitution very meticulously with great foresight and as a result Indian Constitution is amongst the three constitutions of those countries, which gained independence post World War II and whose constitution has survived till date.[1682]

Our constitution makers drafted our constitution with the intent that it is detailed enough to address all the problems of the future, one can assume that the makers expected the entire constitution in general and part III of the constitution, which contains the fundamental rights in particular to function as a 'social engineer The basic structure of our constitution, which includes individual freedom and dignity-which an individual can claim through fundamental rights, has time and again been used by the Supreme Court in providing justice to aggrieved citizens of our country. It is also pertinent to note that the basic structure of our constitution which included individual freedom and dignity cannot be amended by the parliament.[1683] Thus, the constitution along with the implementation of its provisions by the judiciary, is a classic example of 'law as a social engineer'.

[1682] Vishnu Padmanbhan, Pooja Dantewadia, The Indian Constitution, in numbers, LIVE MINT (Apr. 28 2020, 7:42 P.M.), https://www.livemint.com/news/india/the-indian-constitution-in-numbers-11579444816636.html.
[1683] Keshvananda Bharati v. State of Kerala, (1973) 4 SCC 225.

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DRUGS ACT AND ITS IMPACT ON SOCIETY

- **ARJUN A, KEERRTHIVASAN K.B. & ANULEKHA SRINIVASAN**

ABSTRACT:

In India the numbers of drug addicts are tremendous increasing every day. India also has a high at-risk young crowd with 40% being below the age of 18 years. According to UN Convention Reports on Narcotic Drugs and Psychotropic Substances in 1961, 1971 and 1988, it is approximated that, in India, by the time many boys reach the 9th grade, about 50% of them have tried at least one of the gateway drugs.

To most observers and analyst drug-taking is primarily a psychological act based upon individual motivation and with discrete results and consequences. In particular, drug-taking is accompanied with specific individual health and legal risks etc. However, drug taking is also a public act that is inevitably linked to many social contexts it has shifting patterns across place and time as indeed does the drug policy.

But anciently it has also experienced alternate or different periods that have concentrated on prevention and treatments and varying drugs on the basis of evident harm. Variable and shifting drug policies have helped to shape various and often contrasting patterns of consumption. In the wider international field such variations in social context and policy are even clearly obvious.

This paper is primarily concerned, not only with individual effects but with social consequences and context. It is particularly bothered with community context with exploring both proximal and distal neighbourhood influences and outcomes.

INTRODUCTION:

Depressants are drugs that slow down the central nervous system and the messages that go between the brain and the body. These drugs decrease people's concentration and slow down their ability to respond. The name 'depressant' suggests that these drugs can make a person feel depressed, but this is not always the case. The term depressant purely refers to the effect of slowing

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down the central nervous system. Some examples of depressants include: alcohol, opioids (e.g., **heroin**), barbiturates, **GHB**. It is against the law to possess, use, make, import or sell illegal drugs. Possession of drug-using equipment (e.g. a cannabis bong or pipe) that has been used to consume drugs is also against the law in most states and territories. Likewise, if illegal drugs are found in a person's locker, home, car, etc. they will be charged, unless they can prove the drugs do not belong to them. The penalties for drug offences vary depending on the age of the offender (adult or minor), type of drug, quantities involved, previous offences, and the state or territory in which the offence happened.

‘’The information of drugs is as old as man himself’’. The routine used by a man to find cure against different illness let up to a great extent on Psychical effects and certain simple methods like bloodletting and cupping. However, attempts were also made to obtain efficient heal by drugs mainly by some degree from animal and mineral kingdoms and also vegetables. Thus, on the basis of the historical confirmation it can be said that, the history of drugs is rolled out over a prolonged period.

India is squeezed between the world’s two largest zones of illicit opium production, the Golden triangle and the Golden crescent. This propinquity has traditionally been viewed as a source of vulnerability, since it has made India both a destination and a conveyance route for opiates produced in these regions. This fact continues to be salient in defining drug trafficking fashion in the subcontinent.

June twenty six is celebrated as International Day against Drug Abuse and Illicit Trafficking every single year. It is an effort undertaken by the world community to sensitize the people in general and the youth population in particular, to the hazard of drugs.

“In the last 3 decagons (following the inception of the NDPS), the Ministry of Social Justice and Empowerment has conducted 2 nation-wide drug surveys, published in 2004 and 2019. The outcome of these surveys advice that, drug use in India carry on to grow unabated.’’

India is a party to the 3 United Nations drug conventions – the 1961 Single Convention on Narcotic Drugs (1961 Convention), the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention) and the 1971 Convention on Psychotropic Substances.

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The Parliament of India passed the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) hastily, without much argument and discussions. The Narcotic drugs and psychotropic substances Act came into force on fourteen November 1985, replacing the dangerous drugs act and opium acts. The 1940 Drugs and Cosmetics Act, 1940, nevertheless, pursue to bear on.

The official record states that the Narcotic drugs and psychotropic substances Act was sanctioned in order to lay out adequate penalties for drug trafficking strengthen enforcement powers, implement international conventions to which India was a party, and enforce power over psychotropic substances. The Act was amended in 1989, 2001 and not long ago in 2014.

The NDPS Act prohibits possession, cultivation, possession, purchase, trade, sale, import, export, consumption and use of narcotic drugs and psychotropic substances except for medical and scientific purposes in accordance with the law. Preparation for carrying out certain offences is punishable as is attempt. Accessory crimes of assisting and abetting and criminal conspiracy attract the like punishment as the principal offence.

Drug abuse is a complex phenomenon, which has numerous biological, social, geographical, cultural, economic and historic aspects. The breakdown of the remote joint family arrangements, absence of parental care and love in contemporary families where both parents are working, turn down of aged religious and moral values etc lead to a increase in the number of adolescent drug addicts who take drugs to get away from hard actualities of life. The processes of migration, urbanization and industrialization have led to detachment of the traditional procedures of social control rendering an individual vulnerable to the strains and stresses of contemporary life. The fast-changing social backdrop, among other factors, is mainly contributing to the accrual of drug abuse, both of traditional and of new psychoactive substances.

The repercussion of illicit drug use are widespread, causing everlasting physical and emotional damage to users and unfavourably impacting their co-workers, families, and many others with whom they have touch or proximity.

The social upshot of drugs on society is dreadful. Drug abuse results in injuries, risk taking behaviour, crime, worsened livelihoods, depleted resources, high co-occurrence of mental disorder, the deprivation of childcare etc. The burden in terms of trauma, cost and influence on the nation's youth is considerable.

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Some of the social and cultural factors associated with drug abuse are as follows:

Parental influence:

Parental angle towards alcohol plays a vital role in initiating the adolescent to drink alcohol. oldsters have an out of this world influence of kids and so the kids of drinking oldsters square measure largely seemingly to drink and folk's disapproval to it may be a smaller quantity in such surroundings.

Family structure:

Higher levels of parental education and socioeconomic variables have inverse relationship with drug use and use of other psycho-active substances among people. People using inhalants generally sleet from low socio-economic status, engaged in menial work with wobble family income. Marital conflict, divorce among parents, lone parenting, is associated with drug abuse among people. Parents having poor track on their children are likely to have their children abusing drugs.

Peer influence:

Friends have the greatest ascendancy on the young drunkards. The initiation of drinking habit generally occurs in the company of a bosom friend who is a drunkard.

Role model:

Film and TV stars, pop stars and fashion models make drinking seem attractive and the people imitate them to drink in their manner. They leave enormous impact on people mind.

Socio economic factors:

Higher drug-abuse rates are noticed in lower income class. People who are from low socioeconomic backdrop are more likely to become drunkards than the middle-class counterparts. People from low income families tend to use inexpensive and spurious country-made liquor made ready illegally.

Availability:

Availability and accessibility are dominant factors in commencement and maintenance of drug abuse among people. An adolescent who has an undemanding access to drugs or alcohol because

his parents or elder sibling is using, is more likely to use these drugs than those whose parents or anyone else is not using these in the family or friends. Similarly, squint group members making the product available are likely to call up or enroll new adolescents in the drug use behavior.

Knowledge and attitude beliefs:

Knowledge about the dangerous health results has preventive consequences on drug use. Some believe that moderate alcohol use does not have unfavorable results. These confidences permit the people to use drugs without dithering or guilt. Positive and constructive attitude towards the drugs is likely to initiate drug use among the people.

Street children and drug abuse:

India has the huge number of street children in the universe. Though, India is largely still rural, urbanization is taking place swiftly, leading to rapid development of hovel and shanty towns.

Genetic vulnerability:

There is substantial and real evidence for a genetic proneness to develop addiction. For example, studies of twins and adopted children recommend that about half of a person's vulnerability to alcohol issues is inherited. It is also possible that heavy drinking leads to crucial alteration in the brain.

Self-medication:

Alcohol can make us relax and forget our worries and trouble. Unfortunately, over time, the brain of a heavy drinker adjusts to the regular consumption, resulting in irritability and anxiety. And instead of drinking to feel good, the person ends up drinking to feel normal or to feel like an ordinary person.

''According to world health organization (WHO) estimates, up to 90% of the world's street children abuse some kind of drugs, which has led to the increase of drunkards in the recent days.

Drug Addiction is a persistent disease characterized by drug seeking and uses that is compulsive, or tough to control, despite harmful and dangerous outcomes. The commencing decision to take drugs is discretionary for most people, but frequent drug use can lead to brain changes that challenge an addicted person's self-control and obstruct their ability and capacity to resist intense

urges to take drugs. These brain changes can be persistent, which is why drug addiction is considered a relapsing disease or 'revert' disease.

People take drugs because they want to modify something about their lives, saying to fit in, to get of it or relax, to relive boredom, to seem grown up, to rebel, to experiment or trial. They think drugs are the solution. But eventually, the drugs become the problem or tragedy to their life.

Drugs are indispensable and essential poisons. The amount taken directs the effect. A minimal amount acts as a stimulant (speeds you up). A greater amount acts as a sedative (slows you down). An even larger amount poisons can kill. This is true and verifiable to any drug. Only the amount needed to achieve the result differs. But many drugs have another liability: they directly or straight away affect the mind. They can misshape the user's perception of what is happening around him or her. As an outcome, the person's actions may be irrational, inappropriate, odd and even destructive or calamitous.

LEGAL AND SOCIAL CONSEQUENCES OF DRUG ABUSE:

Drug Related Violence: In 2006-2010, estimates of 34,000 Mexicans have been murdered in drug related cases. In 2004, 17% of state prisoners and 14% of federal inmates confessed that they committed their crimes to obtain money for drugs. An average of 25 per cent of prisoners was arrested for drug related cases. Overall 41% of violent crimes committed by the college students and 38% non-students were committed by an offender perceived to be using drugs. About 2 in 5 of all rape/sexual assault cases against a college student were committed by an offender perceived to be using drugs. About 35% of the victims believe that the offender was in the influence of drugs at the time of the incident.

[1684]**Health Epidemics**: According to the 'The Centre for Disease Control and Prevention', 70,000 people have died due to drug overdoses in 2017. Among the 12 million people who inject drugs globally, 1 in 10 is living with HIV. An estimated 10 million people who consume drugs have chronic Hepatitis C virus infection. From 2000-2015, drug overdose rates went up by more than 10% per year among white men and women and other groups. Drug overdoses increased by 10% per year among the African-Americans aged 50 to 64. Te researchers found that 75% of drug overdose deaths from 2012 to 2015 were found in large metropolitan cities, while the deaths in

[1684] www.ncbi.nlm.nih.gov

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rural areas due to drug overdose was only 1%. Some researchers did not consider which drugs were present inside a person's system when they died. Other research has shown that African-American people who overdosed were often taking more cocaine. Most of the deaths have actually been caused by opioids, since cocaine and opioids are often taken in combination. Drug overdose deaths from 2012-2015 were generally highest in countries with the most unemployment, low levels of education, and a low median income. Drug use can have a wide range of effects like short and long term, direct and indirect, etc. These effects often depend on the specific drug or drugs used, how they are taken, how much is taken, the person's health, and other factors. Short-term effects affect changes in appetite, heart rates, and blood-pressure and may get worse like heart attack, psychosis, and even death. These health effects may occur after one use itself. Longer-term influence may result in heart diseases, lung diseases, cancer, mental illness, HIV/AIDS, and others. Long-term drug use mostly leads to addiction. Drug addiction is a brain disorder. Not everyone who uses drugs will become an addict, but for some people, drug use might change certain brain chemistry. These brain changes intervene with how one might experience normal pleasures in life such as food and sex, ability to control stress level, decision-making, ability to learn and remember, etc. These changes make it more difficult for someone to stop taking or consuming the drug even when it's having negative effects on their life and they feel like quitting. Drug use also has indirect effects on both the people who are taking drugs and on those who are around them. These include affecting a person's nutrition, sleep, decision-making, impulsivity, and risk for trauma, violence, injury, and other communicable diseases. Drug use can also affect the babies born to women who are under the influence of drugs while pregnant. Broader negative outcomes are most likely to be seen in education level, employment, housing, relationships, and criminal justice involvement.

[1685]**Mass incarceration**: The number of Americans incarcerated for drug offences has increased from 40,900 in 1980 to 469,545, in 2015. The state level prisoners have increased by 10% since 1980. Globally, one in five prisoners is imprisoned for drug offenses, mostly for mere personal possession. The Federal Bureau of Prisons (BOP) revealed the number of inmates and the percentage of the inmates according to their crimes. The drug related offenders were 73,476 in number with a percentage of 45.5. The prison terms for federal drug offenders increased to 153% between 1988 and 2012, from about two to five years. The United States has 456,000 prisoners

[1685] www.drugabuse.gov

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that are held for possession, trafficking or other nonviolent drug offenses. Among the convicts under SLL crimes (16,777) lodged in various jails in the country, the highest number of inmates were convicted under Liquor & Narcotics Drugs - Related Acts (54.3%, 9,113 convicts). When it comes to law enforcement, not all drugs are treated equally. Both legal and illicit substances are separated into categories based on their perceived risks and medical benefits (or lack thereof). These categories developed by the Drug Enforcement Administration (DEA)—called schedules—play a significant role in dictating legal penalties on the federal level. Individual states may treat these drugs differently:

Schedule 1: Substances with a high potential for abuse and no medically recognized purpose;

- Heroin.
- LSD.
- Marijuana.
- Peyote.
- MDMA/Ecstasy.

Schedule II: Drugs that have approved medical uses but still pose a high potential for abuse and dependence.

- Cocaine.
- Many opioid pain medications like Vicodin, OxyContin, and methadone.
- Methamphetamine.
- Prescription stimulant medications like Adderall and Ritalin.

Schedule III: Medications and substances with a lower risk of abuse and dependence than drugs in Schedule II;

- Tylenol with codeine.
- Ketamine.
- Steroids.

Schedule IV: Medications with a low risk of abuse and dependence;

- Soma.
- Many benzodiazepines like Xanax and Ativan.
- Tramadol.

Schedule V: Drugs with the lowest risk;

- Lyrica.
- Cough medications containing low codeine levels.

[1686]The 2002 amendment to the Narcotics Drugs and Psychotropic Substances Act (1985) created categories: an accused arrested with a non-commercial or a small quantity can be granted bail. The minimum punishment is six months and can go up to a maximum of, 10 years. In the case of commercial quantity, the minimum sentence for the accused is 10 years and may go to a maximum of 20 years plus a fine.

The 2002 amendment also distinguishes between quantities: small (less than 5 gm), non-commercial (less than 250 gm) and commercial quantity (over 250 gm). Moreover, there was no adequate discrimination between a petty peddler, drug trafficker and an addict. Any illegal activity related to drugs was termed as "trafficking" and the punishment was absolute. Now, first-timers on a rehabilitation programme can enjoy the privilege of a discharge. Further, experts expressed that, the law should show leniency to drug addicts so that, they may cure themselves of the addiction and amalgamate back into the society. That makes judges wary and interpretations vary.

[1687]**Waste**: Estimating global spending on drug law enforcement is difficult, but likely to be in excess of $100 billion annually. The illegal trade is estimated to turn over more than $330 billion annually. Profits from this trade diminish the legitimate economy through money laundering, corruption, and the raging of regional conflicts – problems that are more evident in already endangered regions where the illegal drug activity is concentrated. According to a new RAND

[1686] www.idhdp.com
[1687] www.unodc.org

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report, Americans reached nearly $150 billion in 2016 by spending cannabis, cocaine, heroin and methamphetamine. From 2006 to 2016, the money fluctuated from $120 billion and $145 billion each year on these four drugs. The spending on alcohol was estimated to be $158 billion in 2017. In India, opium and cannabis crops are priced, ranging from Rs. 5000 per kg during the crop season in April, to between Rs. 15,000-20,000 in December/January. Injection drug use in India was initially recognized in the North-eastern (NE) states of Manipur and Nagaland, likely due to their proximity to the 'Golden Triangle' – Burma, Thailand and Cambodia. However, injection drug use has increasingly extended outside the NE regions to southern states of Tamil Nadu and Maharashtra, and recent reports suggest emerging epidemics in Northern states of Punjab and Haryana, which border Pakistan. Estimates of the absolute number of injection drug users (IDUs) in India have been highly variable, ranging from 164,820 to 1,294,000 IDUs with some estimates suggesting that the metropolitan cities of Delhi and Mumbai have among the largest populations of IDUs in the world. The 2008 World Drug Report reported that Afghanistan produced 8,200 metric tons of opium in 2007 – the largest in the world and a large proportion of this trafficked via Pakistan to India. This report also suggested that Asia was the largest market for consumption of heroin, with India being the largest consumer in the region (~3 million opiate users). Another study carried out in the State of California found that alcohol and drug abusers, in the year prior to entering a treatment programme, cost the tax payer $3.1 billion per year, that is, on average, $22,800 per heavy drug abuser in 1991.48 (The figure is slightly lower than the one of $28,100 for heroin and cocaine, cited above because of the lower average per capita costs of alcohol abuse.) The figure of $22,800 can be broken down into the following cost components: 35 per cent for criminal justice system costs; 26 per cent for stolen property losses; 17 per cent for health and losses in productivity of the victims of drug-related crime; 14% for costs of health-care for the drug abuser and 8% for disability and welfare payments. If lost earnings are entailed (drug abusers earned, on average, 60% less than would be expected for their age and gender), the losses to society amount to $4.4 billion, or $32,200 per drug and alcohol abuser.

Prevention and measures:

Drugs have a severe impact on both on the individual and the society. Drug abuse is often linked or leads to criminal activity. We can draw a simple connection where the person in taking drugs would lose interest in their jobs and daily activity. Thus, they are forced to quit the job either by

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their own lack of interest in their field or they are driven out of their for-drug usage. So, the addicted person is forced to commit crime make some money to buy the substance. Often, they are subjected to domestic violence abuse and financial struggles a large amount of crime can be attributed to substance addiction. Narcotic addiction is not only a social problem, but it is also a matter of national concern because in a country like India of huge youth population its impact can be worse depending upon the situation. And especially in a country like India poverty is a major problem and it leads to drug addiction due to mental pressure and to make quick money.

STATUTORY PROVISIONS:

Concerned to the public and moral health, the Indian legislature has enacted Acts and also entered the international treaties to control and eliminate the use of drugs. Some of them are

A) Indian parliament enactment

1. The Narcotic Drug and Psychotropic Substance Act1 1985
2. The prevention of Illicit Traffic in Narcotic Drug and Psychotropic Substance Act

B) International treaties and conventions[1688]

1. Convention on Psychotropic Substance, 1971
2. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.
3. Transnational Crime Convention, 2000.
4. Convention on Narcotic Drugs, 1961

NATIONAL PERSPECTIVE:

Taking consideration of the supreme law of land, the Indian legislature has taken several steps to follow Article 47 of the Indian Constitution although Part IV of the Constitution are non-

[1688] Standing Committee on Social Justice and Empowerment, 25th Report on Persons affected by Alcoholism and Substance (Drug) Abuse, Their Treatment/Rehabilitation and role of Voluntary Organizations (Ministry of Social Justice and Empowerment, 2015).

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enforceable which conveys that the State shall work towards increasing the level of life and nutrition of its people and it is the primary duty of the State to improve public health. Drugs and poisons are subject matters of Concurrent list[1689], which allows both the state and the union to legislate laws on the particular subject matter. Thus, the Parliament enacted the Narcotics Drug and Psychotropic Substance Act, 1985 which was later amended and was called as Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Amendment) Act, which came into force on July 4, 1988. The main focus of the Act is to prevent the evil of the drugs by including several drugs as narcotics severing the supply and distribution of drugs denying to which leads to imprisonment of 10 years and also which may extend up to 20 years and a minimum fine of rupees one lakh. The specialty of the Act falls where the act treats both the drug addict and the trafficker equally with respect to punishment. Section 71 of the Act even provides provision for rehabilitation and reformative for the addicts. The collective effect of both deterrent and reformative nature helped India in tackling drug related crimes in India. But this Act also contains Provision to execute the person who is caught with large amount of drugs.[1690] Interestingly in the case of Harm Reduction Network vs Union of India[1691] the Bombay High Court ruled that death penalty under the Act is Unconstitutional but did not struck down Section 31A of this Act Particularly this Act is designed in such a way that it achieves India's Treaty obligation under Single Convention on Narcotic Drugs, Convention on Psychotropic Substances and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

INTERNATIONAL PERSPECTIVE:

Due to Globalization and rapid market expansions and trade beyond national limits has also helped drugs to spread across the world. The International Opium Convention called the Hague Convention on Narcotics was held in 1912 which is considered to be the first drug traffic control treaty at the international level. The Single Convention on Narcotic Drug, 1961 (SCND) is considered to be of prime importance since it codifies all the existing multi- national treaties and merged the Permanent Central Board and Drug Supervisory Board into a Single International

[1689] Entry 18, List III, Seventh Schedule, The Constitution of India 1949
[1690] Section 31 A of Narcotics Drugs and Psychotropic Act
[1691] 2012 BomCR (Cri) 121

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Narcotic Control Board in 1961. The Protocol of 1972 brought great improvement since it highlighted the idea of treatment and rehabilitation. Another convention was signed in 1971 which stressed for the prevention of abuse treatment, rehabilitation, education etc. United Nations declared a convention for International drug control in International Conference on Drug Abuse and Illicit Trafficking from 17 to 26 June 1987, Vienna. This provided the control over the drug and chemical oat national and international level which is used for illegal purposes. To solve the drug issue, the South Asian Association of Regional Cooperation (SAARC) recognized that a regional step would make an effective step over the drugs. As a result, SAARC convention on Narcotic drugs and Psychotropic Substance was adopted on 23rd Nov 1990, which requires every member nation to establish activities related to certain drugs as criminal offence under its domestic laws.[1692]

CONCLUSION:

The government helps the addicts, prisoners, etc. in overcoming the addiction somehow or the other, provided, the abusers cooperate accordingly. The abusers, who have over a period of time, have succeeded in overcoming the addiction, while some find it difficult. The society has a whole has to help the addicts in their recovery for the betterment of the society. The laws and society come together and function together during these times of crisis. One day, there will be a society that will be free from all this issues.

[1692] Art 2(1) of the SAARC convention, 1990

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PERSONAL DATA PROTECTION BILL 2019: A CRITICAL ANALYSIS

- NITI RICHHARIYA

ABSTRACT-

"Privacy is not about something to hide. Privacy is about something to protect. That's who you are." **-Edward Snowden**

India, as a democratic country, gives constitutional guarantee of freedom of speech and expression to its citizens. This freedom, in the present era of globalization and digitization, is largely being exercised through internet, which has reduced this world into a small connected village. However, the open ended nature of internet raises concerns for "privacy", which is deeply intertwined with freedom of expression. Given the presence of multiple interconnected online platforms and availability of enormous data, it becomes imperative for a State to protect its citizens' online privacy through a comprehensive legislative framework. This feat is being attempted to be achieved in India through its Personal Data Protection Bill, 2019 which, on becoming a law, will provide a firm basis for data collection, its regulation and protection, privacy and national security. This article investigates into various crucial provisions of the Personal Data Protection Bill, 2019 and analyzes those provisions keeping in mind the interests of various stakeholders involved. It begins with discussing the concept of "privacy" and its changing nature in the digital era. The article then establishes relationship of the concept of "privacy" with the Constitution of India and its judicial recognition. Further, it discusses the objectives of the Personal Data Protection Bill, 2019 and critically analyses its various provisions. Finally, by taking Sprinklr Data Exchange Deal as an example, the article proposes certain suggestions in order to balance the objectives of privacy, internet openness, free flow of data and national security.

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INTRODUCTION-

People across nations at present find themselves under the sweep of emerging technological trends which thrive on a single fuel called the 'internet'. It is redefining the way we work, interact, learn, analyze, react; in short the way we exist. While this wave of technological advancements has widely affected various economies and societies, it has also permeated into various core principles, one of them being "privacy". The concept of privacy has, for long, been culture-dependent in nature and has been defined differently across jurisdictions[1693]. However, since the advent of digital age, the social sphere and environment of human interaction and living are undergoing constant changes and so the contours of "privacy" are shifting as well. This change has presented various national governments with the difficult task of balancing the free flow of data and the online privacy[1694] of internet users[1695]. Since "data" is now being defined as the new oil[1696], its voluminous online availability presents everyone with entrepreneurial opportunities and also helps online platforms in achieving efficiency of services by closely studying user behavior, profiling and providing customized services accordingly.

With internet transforming the manner of governance, the current ruling party of India in its election manifesto[1697] of 2019 made several technology centric promises to better serve the country and its people. The Ministry of Electronics and Information Technology (**"MeitY"**) in its annual report of 2018-19[1698] provided an estimate of number of internet users in India rising to 829 million by 2021. Using internet as a bridge between its users and the government, the Government of India launched the ***'Digital India'*** program on 1 July 2015, which aims at transforming the way public services will be provided in future through infusion of benefits of digitization into various facets

[1693]Paul M Schwartz, 'The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures' (2013) 126(7) *Harvard Law Review* 1966-2009.
[1694]Report of the UN Secretary-General's High-level Panel on Digital Cooperation, *The Age of Digital Interdependence* (2019) 18.
[1695]See, eg, *Maximillian Schrems v Data Protection Commissioner*, Case C-362/14, [2015] ECLI:EU:C:2015:650 (European Court of Justice, Grand Chamber, 6 October 2015) (*'Schrems v Data Protection Commissioner'*).
[1696]'The world's most valuable resources is no longer oil, but data', (6 May 2017) https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data (accessed 22 April 2020).
[1697]https://timesofindia.indiatimes.com/realtime/BJP_Election_2019_english.pdf (accessed 30 April 2020).
[1698]MeitY, Annual Report 2018-19, available at https://meity.gov.in/writereaddata/files/MeiTY_AR_2018-19.pdf

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of governance. However, along with exploiting the benefits of internet and online available information, it is obligation of the State to provide legislative landscape for protection of its citizens' privacy from infringement. In this context, the Personal Data Protection Bill, 2019[1699] **("PDP Bill, 2019")** is a legislation seeking to provide a framework for such protections.

BACKGROUND OF THE PDP BILL, 2019-

The narrative for framing a data protection law in India started gaining momentum around the passing of a landmark judgment by the Hon'ble Supreme Court of India in *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*[1700], (the **"Privacy Judgment"**). In the Privacy Judgment, the right to privacy was affirmed as a fundamental right and the following observation was made:

"Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state."[1701]

During the pendency of the hearing in the Privacy Judgment, the Union Government constituted a Committee of Experts (**"Srikrishna Committee"**) under the chairmanship of Justice (retired) B.N. Srikrishna as legislative architecture to prepare a comprehensive draft on data protection law. Accordingly, the Committee floated a white paper for public consultation[1702] and subsequently submitted the first draft of the Personal Data Protection Bill in July 2018 (**"2018 Draft"**) along with an accompanying report titled *"A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians"*[1703] (**"Srikrishna Committee Report"**)

[1699]Draft of the Personal Data Protection Bill, 2019 as introduced in Lok Sabha, Parliament of India by Ministry of Electronics and Information Technology, Bill No. 373 of 2019, available at http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf (accessed 20 April 2020).
[1700](2017) 10 SCC 1
[1701] Ibid.
[1702]MeitY, Feedback on Draft Personal Data Protection Bill, available at https://meity.gov.in/content/feedback-draft-personal-data-protection-bill (accessed 25 April 2020).
[1703]https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf (accessed 26 April 2020).

Thereafter, the government revised the 2018 Bill and presented it in the Indian Parliament on 11 December 2019[1704] as Personal Data Protection Bill, 2019 (**"PDP Bill, 2019"**) which is currently pending for deliberation before the Joint Parliamentary Committee (**"JPC"**).

Important definitions– personal data[1705], data principal[1706], data fiduciary[1707] data processor[1708]

Objectives of the PDP Bill, 2019 -

The preamble of PDP Bill, 2019 aims to protect privacy of individuals relating to their personal data, regulate the flow, usage and processing of such data through creation of relation of trust among various stakeholders involved. The PDP Bill, 2019 also addresses the threat of harmful processing of data and seeks to establish a Data Protection Authority of India to prevent any data misuse and ensure due compliance of the provisions of the PDP Bill, 2019. The PDP Bill, 2019 weaves the principle of prior consent[1709] of the individual in relation to processing of his/her personal data. It provides with various other safeguards such as right of deletion[1710] at the end of processing of the data, which are discussed in detail in the following sections of this article.

Analysis of Critical provisions of PDP Bill, 2019-

Formulating and implementing a data protection law involves both public and private sector players but at the helm of this affair are the citizens. Given the user dependence on various online platforms such as Google, Facebook, Amazon, WhatsApp, etc., the Indian Government has

[1704]Draft of the Personal Data Protection Bill, 2019, as introduced in Lok Sabha, Parliament of India by Ministry of Electronics and Information Technology, Bill No. 373 of 2019, http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf (accessed 24 April 2020).

[1705]Clause 3(28) – "personal data means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling…"

[1706] Clause 3(14) - "data principal means the natural person to whom the personal data relates..."

[1707]Clause 3(13) - "data fiduciary means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data…"

[1708]Clause 3(15) - "data processor means any person, including the State, a company, any juristic entity or any individual, who processes personal data on behalf of a data fiduciary…"

[1709]Clause 11(1).

[1710]Clause 9(1) - The data fiduciary shall not retain any personal data beyond the period necessary to satisfy the purpose for which it is processed and shall delete the personal data at the end of the processing.

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outlined various provisions in the PDP Bill, 2019 addressing their concerns while also balancing the interests of these stakeholders through various checks and balances measures. However, in true nature of the crucial provisions has been analyzed as follows for a better understanding:

1) *Scope of exemptions granted* – Clause 11 of the PDP Bill, 2019 requires prior consent[1711] of the data principal in relation to processing of his/her personal data. However, Clause 12 grants extensive exemptions to Government with regarding to accessing this personal data without consent for security reasons[1712]. These exemptions are wider than those provided under the 2018 Draft. Now, the Government has discretion to exempt any entity or department from any provision. Clause 42(1) of 2018 Draft required government access of personal data to meet the principle of "necessity and proportionality" as enunciated in the Privacy Judgment as well. This requirement has been removed from the PDP Bill, 2019.

Thus, while on one hand the PDP Bill, 2019 may appear to be providing citizens with higher degree of protection of their personal data through consent requirement, it is unfortunately diluted and limited by sweeping exemptions granted to the Central Government which goes against the very object behind the privacy law. National security is a very subjective criterion and is internationally for strict state surveillance. However, keeping in mind that 'trust' of the internet users forms the basis for proper implementation of any privacy law, the exemptions should not be granted for all the provisions of the PDP Bill, 2019 and the Government must attempt to provide further guidance and clarity in this regard.

2) *Social media intermediaries and voluntary user verification* – For regulating the social media organizations, the PDP Bill, 2019 has outlined a new category of significant data fiduciaries to be called social media intermediaries (**"SMIs"**) [1713]. The SMIs are defined in the Bill as an intermediary which primarily provide platform for online user interaction and permits other information related activities such as uploading, sharing etc. but excludes: (i)

[1711]Clause 11(1) - The personal data shall not be processed, except on the consent given by the data principal at the commencement of its processing.
[1712]Clause 42(2).
[1713] Explanation to Clause 26(4).

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e-commerce players; (ii) internet service providers; (iii) search engines and email service providers; and (iv) e-encyclopedia, from SMIs. Further, the SMIs are required to provide their users with voluntary verification mechanism[1714] by which any user can voluntarily verify his/her account. Upon verification, a user account shall be provided with demonstrable and visible mark of verification. Further, the data auditors will evaluate compliance of verification obligation by SMIs[1715].

The verification mechanism, instead of securing the data, will rather expose it to more risks. It is no secret that various online platforms closely monitor online user behavior to provide customized advertisement services and resultantly generate a major component of their revenue. The verification mechanism can be an additional tool in this regard. The SMIs may tie up various benefits with the verified accounts to incentivize its users which defeat the very basis of data protection law i.e., data minimization. The online verification mechanism, typically, requires government generated identity proof(s) and may subject these proofs to cyber-attack. Edward Snowden, an American whistleblower, in his memoir[1716] has highlighted the inter-dependent nature of relation between established online platforms and Government. Often, these online platforms, by adopting Government approved routes, become the repository of personal data which are later accessed by the Government. This observation can be applied to Clause 26(4) which permits the Government to categorize any SMI as a significant data fiduciary if it is likely to have significant impact on electoral democracy, security, sovereignty and integrity of India.

3) *Data Protection Authority of India (**"DPA"**): Its constitution, functions and independence-*
The PDP Bill, 2019 provides for constitution of a DPA which will ensure the overall compliance of the provisions of the PDP Bill, 2019[1717]. It is obligated to protect the interest of data principals, prevent misuse of personal data and perform other ancillary functions as

[1714] Clause 28(3).
[1715] Clause 29(2) (f).
[1716] Edward Snowden, '*Permanent Record'* (2019).
[1717] Clause 49(1) - It shall be the duty of the Authority to protect the interests of data principals, prevent any misuse of personal data, ensure compliance with the provisions of this Act, and promote awareness on data protection.

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well[1718]. Additionally, DPA has the power to categorize any data fiduciary as significant data fiduciary after considering the factors provided under the PDP Bill, 2019[1719].

The DPA was also provided for in 2018 Draft, however, the PDP Bill, 2019 brings about major changes regarding the appointment of its chairperson and members. Under 2018 Draft, the appointments for the DPA were to be made[1720] by the Central Government on the recommendations of a diverse selection committee which comprised of experts from executive, judicial and other external sources. However, the PDP Bill, 2019[1721] only retains executives as members of this selection committee and excludes judicial members. This change in the constitution of selection committee weakens the independence and powers of DPA because, DPA could be seen as the regulatory body for proper enforcement of the data protection law. However, if the foregoing provisions attain the finality as they stand today, the DPA will not be independent of State influence. Lastly, it must be noted that with regard to notifying any social media intermediaries as significant data fiduciary, the DPA will be approached by the Central Government only for the purposes of consultation[1722].

[1718]Clause 49(2).

[1719]Clause 26(1) - The Authority shall, having regard to the following factors, notify any data fiduciary or class of data fiduciary as significant data fiduciary, namely:—
(a) volume of personal data processed;
(b) sensitivity of personal data processed;
(c) turnover of the data fiduciary;
(d) risk of harm by processing by the data fiduciary;
(e) use of new technologies for processing; and
(f) any other factor causing harm from such processing.

[1720]Clause 50(2) - The chairperson and the members of the Authority shall be appointed by the Central Government on the recommendation made by a selection committee consisting of—
(a) the Chief Justice of India or a judge of the Supreme Court of India nominated by the Chief Justice of India, who shall be the chairperson of the selection committee;
(b) the Cabinet Secretary; and
(c) one expert of repute as mentioned in sub-section (6), to be nominated by the Chief Justice of India or a judge of the Supreme Court of India nominated by the Chief Justice of India, in consultation with the Cabinet Secretary.

[1721]Clause 42(2) - The Chairperson and the Members of the Authority shall be appointed by the Central Government on the recommendation made by a selection committee consisting of—
(a) the Cabinet Secretary, who shall be Chairperson of the selection committee;
(b) the Secretary to the Government of India in the Ministry or Department dealing with the Legal Affairs; and
(c) the Secretary to the Government of India in the Ministry or Department dealing with the Electronics and Information Technology.

[1722]Clause 26(4) - Notwithstanding anything contained in this section, any social media intermediary,—
(i) with users above such threshold as may be notified by the Central Government, in consultation with the Authority; and

4) <u>*Government Access to Anonymised and Non-personal Data*</u> - Clause 2(B)[1723] makes Clause 91 the governing provision for processing of anonymised data. Clause 91(2) empowers the Central Government to direct data fiduciaries and data processors to provide any anonymised personal data or non-personal data for the purposes of: **(i)** targeted delivery of government services; and **(ii)** formulating evidence-based policies. The term non-personal data was not defined in 2018 Draft and has been defined under the PDP Bill, 2019 to mean the data that falls outside the purview of personal data[1724]. While the term *"evidence-based policies"* has not been defined under the PDP Bill, 2019, Clause 91(1) mentions "growth, security, integrity and prevention of misuse" as measures for framing of government policy for digital economy[1725]. The manner of sharing of such non-personal data will be notified through rules.

Clause 3(2) defines anonymised data as the one that has undergone an *"irreversible process of transforming or converting personal data to a form in which a data principal cannot be identified"*. However, the Srikrishna Committee Report noted that even from anonymised data, identification is possible[1726]. This observation in the Srikrishna Committee Report finds support

(ii) whose actions have, or are likely to have a significant impact on electoral democracy, security of the State, public order or the sovereignty and integrity of India, shall be notified by the Central Government, in consultation with the Authority, as a significant data fiduciary…"

[1723]Clause 2(B) – The provisions of this Act, shall not apply to the processing of anonymised data, other than the anonymised data referred to in section 91.

[1724]Clause 91(1) Explanation - For the purposes of this sub-section, the expression "non-personal data" means the data other than personal data.

[1725]Clause 91(1) - Nothing in this Act shall prevent the Central Government from framing of any policy for the digital economy, including measures for its growth, security, integrity, prevention of misuse, insofar as such policy do not govern personal data.

[1726]Srikrishna Committee Report, page 28 (referring to Paul Ohm, 'Broken Promises of Privacy: Responding to the surprising failure of Anonymisation', 57 *UCLA Law Review* (2010) at pp. 1717 to 1722.

from other researches[1727] as well[1728]. The Srikrishna Committee Report left it to the DPA to prescribe standards for anonymisation[1729].

The afore mentioned measures of growth, security, etc. are both inclusive and subjective in nature and thus, Central Government may further identify additional measures for framing of policies and can interpret all the identified measures as it may deems fit. Thus, it can be said that Clause 91 has been couched in a manner that it grants unfettered powers to the Central Government to access anonymised and non-personal data. Additionally, since MeitY has already constituted a committee of experts[1730], to deliberate upon issues and their resolution regarding non-personal data, Clause 91 may overlap with the proposals of the said committee. Therefore, in order to avoid any confusion regarding non-personal data, Clause 91 can either be deleted or not given effect to in order to avoid any confusion regarding non-personal data.

Further, the non-personal data may also cover various intellectual property rights of the individuals and of various companies. If the concerns pertaining to such rights are not addressed, it can result in slowing down of innovation and may put the confidential business information at higher risk.

5) *Localization of data* - In sharp contrast with the 2018 Draft, the PDP Bill, 2019 has done away with the mandatory requirement for the data fiduciary of storing at least one serving copy of the personal data[1731]. The PDP Bill, 2019 has also reduced the restriction of data

[1727]See for e.g., Rocher, L., Hendrickx, J.M. & de Montjoye, Y. "Estimating the Success of Re-identifications in Incomplete Datasets using Generative Models." Nat Commun 10, 3069, 23 July, 2019. https://doi.org/10.1038/s41467-019-10933-3, https://www.nature.com/articles/s41467-019-10933-3/ (accessed on 21 April 2020).

[1728]See for instance, "Opinion of Anonymisation Techniques" adopted by Data Protection Working Committee, European Commission,10 April, 2014 https://ec.europa.eu/justice/article-29/documentation/opinionrecommendation/files/2014/wp216_en.pdf (accessed 22 April 2020).

[1729]Srikrishna Committee Report, page 30.

[1730]MeitY, 'Constitution of a Committee of Experts to deliberate on Data Governance Framework, dated 13 September 2019', available at https://meity.gov.in/writereaddata/files/constitution_of_committee_of_experts_to_deliberate_on_data_governance-framework.pdf (accessed 27 April 2020).

[1731]Clause 40(1) - Every data fiduciary shall ensure the storage, on a server or data centre located in India, of at least one serving copy of personal data to which this Act applies.

localization as compared to 2018 Draft and has limited them only to the sensitive and critical personal data[1732]. In case of sensitive data, its processing outside India is permitted and exemptions are provided on the basis of reciprocity[1733]. However, it must be noted that the PDP Bill, 2019 permits storing of the sensitive data only within India[1734]. The cross border transfer of sensitive personal data is permitted only on the basis of explicit consent[1735] of the data principal and it must be done pursuant to a contract or intra-group scheme approved by the DPA.

6) *Right to erasure* – The PDP Bill, 2019 provides for a new provision of right to erasure which was absent in 2018 Draft. The right to erasure[1736] empowers the data principal to get such personal data erased by the data fiduciary which is no longer necessary for the purpose for which it was processed originally. However, this right to erasure is not absolute in nature and the request for erasure can be rejected by the Data Fiduciary provided, adequate justifications have been provided to the data principal for such rejection[1737]. On being dissatisfied with the justification provided by the Data Fiduciary, the Data Principal may require the former to "*take reasonable steps to indicate, alongside, the relevant personal data, that the same is disputed by the data principal*"[1738]. This provision is a positive move in protecting the interest of the Data Principal and the PDP, Bill, 2019 provides for sufficient measure to ensure its implementation.

[1732]Clause 33(2) - The critical personal data shall only be processed in India.
[1733]Clause 33 read with Clause 34.
[1734]Clause 33(1) - Subject to the conditions in sub-section (1) of section 34, the sensitive personal data may be transferred outside India, but such sensitive personal data shall continue to be stored in India.
[1735]Clause 34(1) - The sensitive personal data may only be transferred outside India for the purpose of processing, when explicit consent is given by the data principal for such transfer, and where—
(a) the transfer is made pursuant to a contract or intra-group scheme approved by the Authority:
[1736]Clause 18(1)(d) - The data principal shall where necessary, having regard to the purposes for which personal data is being processed, subject to such conditions and in such manner as may be specified by regulations, have the right to the erasure of personal data which is no longer necessary for the purpose for which it was processed.
[1737]Clause 18(2) - Where the data fiduciary receives a request under sub-section (1), and the data fiduciary does not agree with such correction, completion, updation or erasure having regard to the purposes of processing, such data fiduciary shall provide the data principal with adequate justification in writing for rejecting the application.
[1738]Clause 18(3) - Where the data principal is not satisfied with the justification provided by the data fiduciary under sub-section (2), the data principal may require that the data fiduciary take reasonable steps to indicate, alongside the relevant personal data, that the same is disputed by the data principal.

7) *Exclusion of provisions relating to offences of obtaining, transferring or selling of personal/sensitive personal data* – Clause 90 and 91 of the 2018 Draft recognized obtaining transferring and selling of personal data, for unauthorized purposes as a punishable offence and provided for adequate punishment in this regard. However, the PDP Bill, 2019 has removed this provision.

The removal of these clauses from the PDP Bill, 2019 has resulted in doing away with crucial provisions which could have shielded and safeguarded the personal data of Data Principal against cyber crimes and would have also played a vital role in building and maintain the trust of the Data Principal.

SPRINKLR DATA EXCHANGE DEAL-

Lately, the Kerala Government has attracting negative attention over alleged sharing of health related data of COVID-19 patients with a U.S. based firm named Sprinklr[1739], which calls itself a *"citizen and customer experience management platform"*. The Kerala Government engaged Sprinklr for collating and processing the health related data of its patients in its attempt to fight against the pandemic (**"Deal"**). However, concerns were raised against such data exchange and processing on the ground that[1740]: (i) the contract between Sprinklr and Kerala Government was concluded without following any tendering process; (ii) the health related data of the citizens, which is a personal data was shared without their knowledge or consent; and (iii) the contract was signed without sanction from the Law Department.

After receiving criticism, the Kerala Government, through a press release[1741], attempted to justify the deal on the grounds of: (i) lack of sufficient expertise/infrastructure with the Kerala Government to manage and analyse such voluminous and raw data; (ii) speedy and effective counteraction to contain COVID-19's impact; and (iii) data being stored within Indian servers.

[1739]Sprinklr was officially founded in 2010 by Mr. Ragy Thomas, an Indian origin Malyali.
[1740]Santosh Kumar, 'Kerala govt attached over deal with US firm', (25 April 2020) https://www.sundayguardianlive.com/news/kerala-govt-attacked-deal-us-firm (accessed 27 April 2020).
[1741] https://kerala.gov.in/datatransparency/

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The Kerala Government has also made all the deal documents public on its official web portal[1742]. Currently, a petition challenging the Deal is pending adjudication before the Kerala High Court[1743]. As on date, the Kerala High Court has sought explanation from the Kerala Government on the foreign jurisdiction clause in the contract and finalizing the deal without the sanction of law department[1744]. A two member Expert Committee has also been constituted[1745] by the Kerala Government for examining the veracity of the Deal.

Though conclusive comments cannot be made on the Deal, it reminds us of Edward Snowden's observation in 2019 Web Summit in Lisbon when he said that *"the problem is not data protection; the problem is data collection"*[1746]. The Deal offers an opportunity to further review the PDP Bill, 2019 and suggest ways to strengthen it. The two crucial issues arising from the Deal are: **(i)** what should be the minimum standards to be met in emergency situation demanding speedy processing of voluminous data; and **(ii)** can the personal health data of Data Principal be shared for processing without their consent.

Regarding the first issue, subject to the conditions of Clause 34(1), Clause 33(1) permits transfer of sensitive personal data outside India, subject to the condition that it is stored in India. This does not provide a sufficient safeguard since the manner of processing of such personal data by the foreign entity has not been regulated, nor has any liability been fixed upon such data processor. Further, in contrast to Clause 12, the requirement of "necessity" of processing data is not relevant under Clause 33 while engaging a foreign data processor. Thus, it can be seen that no minimum standards have been defined to be met in emergency situations.

Regarding the second issue, Clause 12(1)(e) of the PDP Bill, 2019 allows processing of personal data by the Government without consent, to undertake measures in case of medical emergency.

[1742] Ibid.

[1743] Arjun Raghunath, 'Kerala HC seeks details of Sprinklr deal; CPM to review later' (21 April 2020), available at https://www.deccanherald.com/national/south/kerala-hc-seeks-details-of-sprinklr-deal-cpm-to-review-later-828134.html (accessed on 23 April 2020).

[1744] 'Sprinklr Deal: Kerala HC Seeks Govt Explanation On Foreign Jurisdiction Clause And Lack of Law Dept Sanction' (21 April 2020), available at https://www.livelaw.in/amp/news-updates/sprinklr-deal-kerala-hc-seeks-govt-explanation-on-foreign-jurisdiction-clause-and-lack-of-law-dept-sanction-155559 (accessed on 22 April 2020).

[1745] Government order dated 20.04.2020 bearing number GO(Ms) No.79/2020/GAD

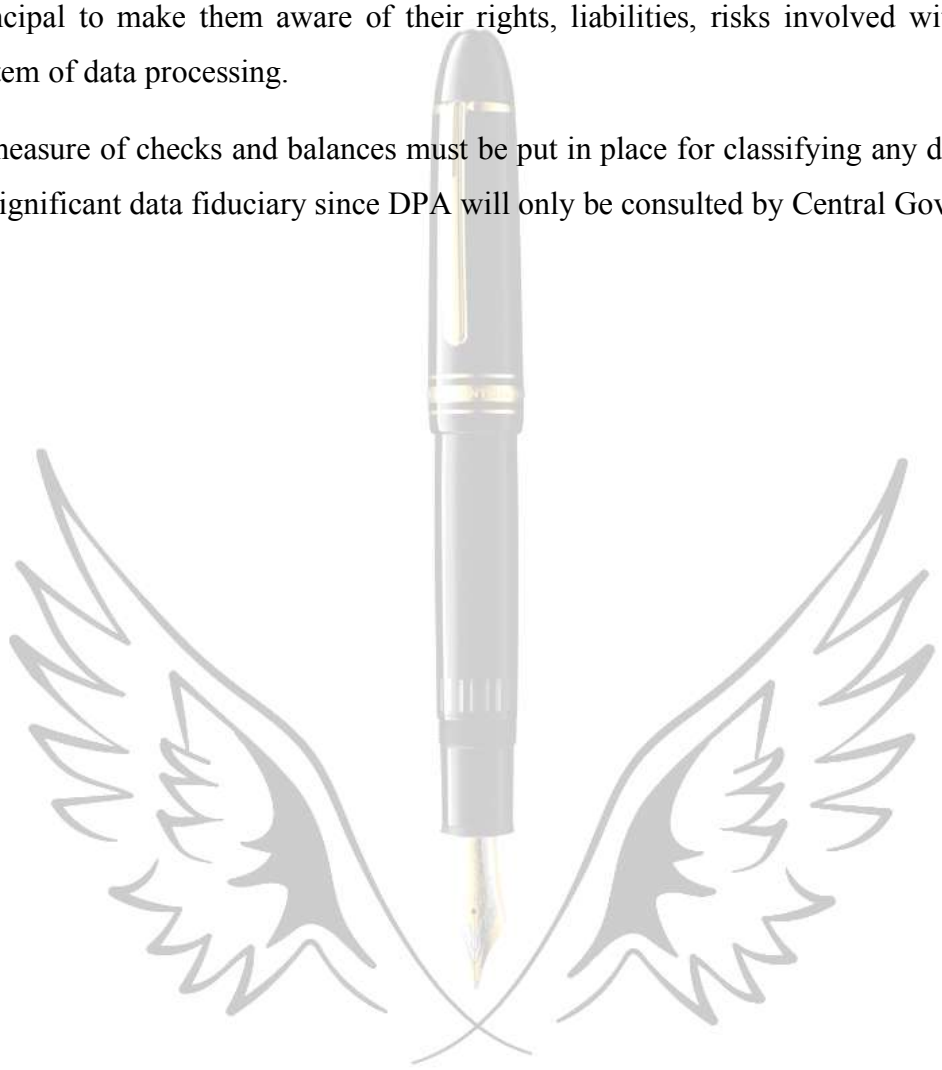
[1746] Mark Paul, 'Big tech business model based on 'abuse', says Edward Snowden', (4 November 2019), available at https://www.irishtimes.com/business/technology/big-tech-business-model-based-on-abuse-says-edward-snowden-1.4072380 (accessed on 28 April 2020).

Thus, though the rider "necessity" is entrenched for sharing personal data for medical purposes, the PDP Bill, 2019 provides no guidance for determining what amounts as 'necessity'.

CONCLUSION AND SUGGESTIONS TO THE PDP BILL, 2019:-

1. The PDP Bill, 2019 is a welcoming step taken by the Government for devising comprehensive legislative framework for data protection law. The Government appears to have taken into account interests of various stakeholders involved. However, it further needs to strengthen the mechanism of checks and balances and provide mandates to avoid conflict of interest. The Central Government's ability to exemptions entities from applicability of any part of the PDP Bill, 2019 must be limited to only those provisions which do not threaten the privacy of the Data Principal.
2. The provision relating to offences of obtaining, transferring or selling of personal/sensitive personal data must be included back from the 2018 Draft.
3. Sufficient standards must be defined to determine the existence of "necessity" under Clause 12 and a mechanism to oversee the compliance of these standards must be put in place.
4. In addition to the requirement of compliance with the directions of the DPA issued under Clause 51, the liability of data processors must be defined elaborately, either within the PDP Bill, 2019 or by prescribing rules.
5. The various measures of "growth, security, integrity and prevention of misuse" mentioned under Clause 91 must be elaborately defined, including the term *"evidence based policies",* through rules in order to provide a deeper insight into the legislative intent behind their contextual usage.
6. Within the distinction of personal and non-personal data, sub categories may be created depending upon the type of data (eg, health data, generic data, family related data, intellectual property rights related data etc.) and separate entities must be engaged for storing and processing these data. Such entities must be engaged only on being objectively satisfied of their expertise.

7. A national awareness program must be run to educate various stakeholders, especially data principal to make them aware of their rights, liabilities, risks involved with the entire system of data processing.
8. A measure of checks and balances must be put in place for classifying any data fiduciary as significant data fiduciary since DPA will only be consulted by Central Government.



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SEXUAL HARASSMENT: MORE VIOLENCE MORE SILENCE

- PIYUSH KUMAR JALAN & SURABHI RATHI

ABSTRACT

Problem regarding Sexual Harassment whether it is at workplace or inside the home is very subjective matter which largely depends upon circumstances. Women sometimes show complacency in fear to loss of their job, same as the spouse who fears the society. Reporting of crimes are less but indeed they are happening. The sexual harassment department in companies don't look unto the issues like this cautiously, for which the reason is the sake of maintaining equilibrium in company. Problem is rampant and is needy. We are living in a society where position of women is not much improved if we talk about smaller towns. They will not come outside their homes, with just a few stands with them who either be NGO'S or pro-bono workers. Society is brittle, it is split. The tendency of inclination depends upon the matter of chance. If we go and analyses the people around us, in each society whether it is metro or is rural, the mentality isn't synchronized with the education or the living standards. Society lacks morality, the curbing of crimes will not depend upon deterrence nor upon the stringent Laws. The women in metro city easily manage to come to police station than the women of villages. Mentality of society is at stake always and ever. It depend upon who takes the chance or who upholds it's moral and ethics. Moreover, it is not only the women who faces this kind of assault but men and children also faces sexual harassment. Each and every person of the country are recognized, where the Constitution of India ensures its people "Social, Economic, Political Justice, Equality of Status, Opportunity and the Dignity of the Individual".

OVERVIEW

In our article we are going to discuss the Sexual Harassment that is taking place in our society, homes, schools, colleges, workplace and etc. Women or girls are not the only victim of sexual harassment but also men or boys face the same. We will be discussing the following aspects:

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- Sexual Harassment in India: A brief Introduction.
- Definition of Sexual Harassment.
- Categories of Sexual Harassment.
- Laws relating to Sexual Harassment and Various Foundations helping the people of India.
- Myths on Sexual Harassment.
- Sexual Harassment at workplace.
- Sexual Harassment at school/ Colleges.
- Sexual Harassment at home.
- Judicial Approach

INTRODUCTION

Majority of the people of India are of the view that this kind of assault happens on a day to day basis. If we talk about recent telecast survey of women working in India who are employed in call centers has confirmed around 46% women faces the assault and harassment from their colleagues or seniors.

It is not necessary that only women faces sexual harassment. School children, college students and even men faces sexual harassment. School kids do not want to complain it to their parents as because they fear that they will be bashed when they go back to school the next day. College students fear about their reputation, other students making fun of them. Whereas, men do not report such cases as because they think, society will not believe them. They think sexual harassment happens only with women which is a common myth on sexual harassment. Sexual harassment can happen at any point of time, it is not necessary that it takes place only at night. It is not mandatory that the accused is always known to a victim, accused can even be a stranger. Sexual harassment can take place if a person teases, stares and makes facial gestures, whistles, pornography and comments which are consensual in nature. If we take this pandemic Co-Vid'19 into consideration, during the lockdowns, the helpline is not ringing. Does this mean that nothing wrong is going on?

Actually No. The reason is just one, the monsters are at homes too. The problem that our country faces is that the Parliament will incorporate laws when the collective conscience of populace speaks. If we consider Nirbhaya gang rape case, Juvenile amendments were brought post to the consequences of the case, until something of grave concern comes up, they are silently watching.

DEFINITION OF SEXUAL HARASSMENT

Sexual Harassment is defined as an unwelcome conduct of a person by another person. Physically touching a person, asking a person for sexual obligationsor commenting such things which are sexually coloured or has shown or induced a person to watch porn or any other kind of verbal or non-verbal abuse.

Prevention of Sexual Harassment at Workplace Act, 2013 lays down that sexual harassment includes anyone or more unwelcome acts or behaviour which can be either directly or by implication namely:-

a) Physical contacts and advances

b) Or a demand or request for sexual favors

c) Or making sexual colored remarks

d) Showing pornography

e) Or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.[1747]

Now explaining Sexual Harassment with some verbal and non-verbal examples.

Verbal Examples

Verbal examples of sexual harassment are as follows:

- Whistling at someone or cat calls
- Passing sexual comments

[1747]Section 2 (n) of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

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- Making sexual jokes or stories
- Trying to discuss sexual fantasies, preferences or history
- Asking personal questions about sexual or social life
- Continuously asking out a person who is not interested
- Passing sexual comments about a person's clothing, anatomy or looks
- Speaking lies or spreading rumours about a person's sex life
- Making kissing sounds, howling and smacking lips.

Non-Verbal Examples

Non-verbal examples are as mentioned below:

- Staring a person up and down
- Blocking a person's way
- Following the person
- Giving personal gifts
- Displaying sexually suggestive visuals
- Making sexual gestures with hands or through body movements
- Making facial expressions such as winking, throwing kisses or licking lip.

Some of the physical examples are as follows:

- Touching the person's clothing, hair or body
- Hugging, kissing, patting or stroking
- Touching or rubbing oneself sexually around another person
- Neck or shoulder massage
- Actual or attempt to rape.

CATEGORIES OF SEXUAL HARASSMENT

If we talk about the categories of sexual harassment most of the cases are not reported in India. So if we go through the statistics in India, according to the reports it is not only the sexual harassment at workplace but also college students and faculty members of the universities faces harassment. The majority of women about, 61.7% reported that they had experienced some form of sexual harassment in or while coming to college. Whereas a minority felt that it was rare. According to men as to whether they had witnessed it, about half of them had witnessed it.

According to the reports of by Complykaro services, Indian companies had reported more cases of sexual harassment in the financial year 2019 compared to earlier years. There were around 14% rise in the cases of sexual harassment. Following through the data published by Ministry of Women and Child Development, there were around 54% increase in the registration of cases of sexual harassment in 2017. Now, if we consider sexual harassment against women, there are many laws protecting them. Whereas, sexual harassment against men cannot be simply ignored. Constitution of India provides its people Right to Equality.[1748] If we simply talk about injustice towards women and do not stress upon men related issues, then the Article 14 of the Indian Constitution is violated as it ensures equality before law and equal treatment, it would be useless to say that we live in a country where people are equal before law. The only act that protects men is 'Sodomy'.[1749] Further, due importance should be given in equal access of justice, in case of all the people of the country regardless of gender, caste, creed, race and etc. Thus, women are not the only ones who face sexual harassment.[1750] The sexual harassment at different places are discussed later in this article.

LAWS RELATING TO HARASSMENT AND DIFFERENT NGO's HELPING THE PEOPLE OF INDIA

[1748]The Constitution of India, Article 14.
[1749] Section 377, Indian Penal Code, 1860.
[1750] Sexual Harassment of Men. Available at: http://www.legalservicesindia.com/article/2039/Sexual-Harassment-of-Men.html [Last accessed on 26th April, 2020].

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There are various laws governing the sexual harassment. There are different NGO's and foundations which are as follows:

- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
- Sodomy, Section 377 of Indian Penal code, 1860.
- Joyful Heart Foundation.
- UNICEF.
- The Lucy Faithful Foundation.
- Children India Foundation.
- World of Children.
- Aarambh India.
- World Childhood Foundation.
- Arpan NGO.

MYTHS AND REALITY OF SEXUAL HARASSMENT

- It has to take place only at workplace.

Reality - No, it can take place anywhere.

- It is done only against an individual.

Reality- No, it can happen with a group of people too.

- It is only induced by men against women.

Reality- No, a man can also be a victim of the harassment.

- It is called harassment if initiated several times.

Reality- No, even a single incident is enough.

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- The victim and the accused has to be of different gender.

Reality- No, even the assault is possible in same gender.

- The victim has to suffer economic loss and physical injury.

Reality- No, it is not necessary.

- It is a common belief that the victim had a past affair with accused.

Reality- No, it can be done even against a sister by a brother at home.

SEXUAL HARASSMENT AT WORKPLACE

Sexual harassment is one of the most serious issues. In India, in the older times the women were not allowed to go out and work. But is has changed with the changing times. Now the women not only work at home but also in offices. Now with change in mindset of people, the women are also getting chances to prove themselves. But if they are not safe in the environment they are working, then it will demotivate them and the women will not be able to stand on their own. Today, across the globe sexual harassment at workplace is increasing and it is understood that it is a violation of women's rights and a form of violence against women. As enshrined in the Preamble to the Constitution of India, "equality of status and opportunity", must be secured for all the citizen of India. Article 14 guarantees, equality of every person. A safe workplace is a legal right of a woman. The Article 14, 15 and 21 of the Constitution of India reserves a person's right to equal protection under the law. It also reserves the right to live a life free from discrimination on any ground and the protection of life and personal liberty.

The roots of sexual harassment are in the patriarchy and in the perception that men are superior to women. This perception encourages and leads to sexual harassment. Sexual harassment constitutes a gross violation of women's right to equality and dignity. Sexual harassment at workplace is a form of violence and which is very harmful for women and even for the society. The sexual Harassment of women at workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted to ensure the safety of women at their working spaces and to build a working environment that respects women's' right and dignity. In today's time, all the workplaces in India are mandated by the laws to provide a safe and secure working environment which is free from sexual harassment for the women. It is well established that if there is a safe environment for

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women there is a positive impact on women which leads to in their participation and increases their productivity which in return benefits the whole nation.

SEXUAL HARASSMENT AT SCHOOL/COLLEGES

School and colleges are educational institutions, an important part of every individual. They shape him for the future and for his career. A school is a place where every parent sends their children with a belief their children are in the safe hands. It is even considered as a second home for every child. It's a place where every individual spends his childhood and most important part of life. Can anyone think that an innocent child or an adolescent can be sexually harassed in the school? The answer is yes, a child or an adolescent can be harassed in the school. Frequently those incidents take place in the schools. Mostly the cases of sexual harassment are of girls. There are several cases but I am referring only some and we will get to know how the child is sexually harassed.

In the year 2015, in Punjab, a 50 year old government school teacher was arrested for allegedly writing obscene remarks in a girl's notebook. This incident took place in Kartarpur in Rupanagar district. It was found that the teacher had earlier written similar remarks in other girls' notebooks as well.

In the same year, the Principal and the Director of the school in Odisha were arrested for allegedly sexually harassing two girl students of class IX. He tried to induce the girls by promising them good marks in exams and in return he wanted physical favour from them.

Not only in schools but in colleges also the incidents of sexual harassment take place. Sexual harassment at college campuses is extremely widespread in India. There is a significant imbalance of powers between the teachers, students and the staffs administrating the college.

Recently, hundred girls of Gargi College, Delhi University came out in protest to demand action against outsiders forcibly entered their campus and alleged groped students during college's festival week.

There are so many incidents that take place every day in India. Some are reported and some are not. The parents does not report because they feel that it will bring shame to the family but they does not understand without complaining those people will not be punished and will continue this obscene behavior. The students who are harassed cannot speak about it because of the fear either

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of their parents or the abuser's. The schools or colleges should be more active regarding these incidents and should have proactive attitude to solve sexual harassment cases.

SEXUAL HARASSMENT AT HOME

Sexual harassment is a serious issue and is widespread in India. One of the reason, why every parent is sacred for the girl child. Though not only girls but boys are also not safe, still somewhat they are. The mental ability of people in this country is questioned because even a child is not safe at her home. Yes, a girl for whom her home is considered the safest place is not safe there as well. The cases of sexual harassment are reported of family members as well. There are several cases of rape, molestation and other forms of sexual harassment of girls by her family members. She is not safe in those hands of people who saw her growing up. We can see in several cases where a girl is raped by her uncle, or by any other male member of her family or any other relatives. But the girl cannot speak about it to anyone, just because it is a family matter. The parents or the guardians ask the victim to keep quiet because they feel that it should not come out in front of anyone so that they can protect the image of family. But why don't they understand, it is a serious matter; if the accused will be let free then he will prey on someone else. This is one of the major reasons why the parents train their daughters to cover herself all the time.

According to the reports of 2014, almost 90% of rapes in India are committed by the people known to the victims such as relatives or neighbors.

In its annual report, the National Crime Records Bureau (NCRB) said there were 337,922 reports of violence against women such as rape, molestation, abduction and cruelty by husbands last year, up 9 percent in 2013. The data showed that 86 percent of rapes had been committed by close family members such as fathers, brothers and uncles, as well as neighbours, employers, co-workers and friends.

The preventive measure that can be taken to stop sexual harassment at home is by punishing the wrong doer. The abuser should be punished according to the law; the families should not hide these matters.

JUDICIAL APPROACH

In the case, the lady in question, Smt. Bhanwari Devi was working with the State Government of Rajasthan on projects to cease "child marriage''. She was a very diligent lady. Now, in one of the case, RamkaranGujjar decided to marry his one year old infant. The social worker tried to stop this but failed. This infuriate the Thakur and they decided to ostracize her. This act failed to lower their anger and they gang raped her.

Further, the trial Court acquitted the accused. Bhanwari Devi decided to have a good fight and she further moved to the High Court who found the accused guilty of gang rape. But the NGO's were not happy and they moved to the Supreme Court of India using the name Vishaka.

Supreme Court framed certain directions for safeguarding the Sexual Harassment of women at workplace. Further with this, as mentioned earlier about the Prevention of Sexual Harassment of Women Act, 2013 came into existence. Whereas, this case was the landmark judgment for the incorporation of the Act.[1751]

But there is no other law regarding sexual harassment of men.

CONCLUSION

To conclude this research paper, it is very clear that not only women faces this kind of assault. Even school kids, men also faces this assault. If we go through the statistics, not only at workplace, but also at homes, this ridiculous act of Sexual harassment is taking place. It is now time for government to incorporate Legislations which will atleast ensure the victims that there are laws to protect them and will also protect the rights of the victim whether it be a women or a child or a men, irrespective of gender and any other kind of discrimination. The legislation should be framed in such a way that the punitive measures will always compel the accused to think and only think before doing a crime. In India this has now become a trend that when there is more violence there is more silence. People don't want to come out and take a stand for themselves. The only reason behind this is that women always fear about her family, girl always worry about the reputation in the outside world whereas men thinks that sexual harassment cannot take place against them.

[1751] *Vishaka&ors. V. State of Rajasthan* AIR 1997 SC 3011.

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To talk about Prohibition of Sexual Harassment of Women at Workplace Act, 2013, this Act is appreciated but at the same time it has loopholes too, which needs to be amended. Article 14 of Indian Constitution talks about 'Equality before Law' for every citizen, but in the said Act, we cannot see any kind of equality towards men and women. This Act is very silent on the part of men and also does not provide any provisions in favour of men. So in our view, this Act is in violation of Article 14 of Indian Constitution. Thus, the government needs to bring into existence laws which are gender equality. Whereas, Ngo's and different foundations need to take care of such crimes in such a way that the case is solved anonymously when victims approaches them.

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SHUTDOWNS OF THE INTERNET IN INDIA: VIOLATION OF FREEDOM OF SPEECH & EXPRESSION?

- **SHUBHAM KUMAR, SAKET VERMA & ABHAY KUMAR**

ABSTRACT:

Internet has become an integral part of our life and our society with the ever-increasing growth of the IT world. It has rapidly grown over the years and has become a necessity for every individual to access social media platforms on which they exercise their right to speech and expression. India having the second largest population in the world bears a huge responsibility of protecting the right of its citizens. Thus, it ensures to its people the Right to free speech and expression through Article 19 of the Indian constitution. However, India has been ranked as one of the top candidates in putting a ban on internet. A total of 385 internet shutdowns have happened in India from 2012 to 2020, restricting the speech and expression of countless people and causing mental and economic harm to the people. This research article is about the effects and legality of internet shutdowns in India. This paper consists of an introduction to the topic and then the history of internet shutdowns in India. After which a brief discussion is done about the current shutdowns in India and their social and economic effect on people. At the end of this paper some suggestions are made and a conclusion is provided. The main focus of this paper is on the question that "Does shutdown of Internet causes violation of Freedom of Speech and Expression?"[1752]

1. INTRODUCTION

A. What is Internet Shutdown?

Internet Shutdown in India always consider it as restriction on people by government. Basically, Internet Shutdowns is a tool used by the government to restrict the flow of false

[1752] Saket Verma Lloyd Law College (2018-22) and Shubham Kumar, Lloyd Law College (2018-22).

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information and put a temporary hold on the speech and expression of the people. This suspension of internet can be done either by the central or the state government, wherein which they send out a directive order to the Internet Service providers to cut off the Internet of particular area, district or entire state. It is not selective ban on any particular website, it imposes on all over internet and social media like WhatsApp, Facebook, etc. There are two types of ban:

Full ban: in this type of ban access to the internet is blocked completely.

Partial ban: in this type of ban the access to the internet is not blocked, but a restriction is put on the access of certain websites and social media platforms.

It may be limited to a specific place, field and to specific period, time or number of days. Sometimes it can even extend indefinitely. An internet shutdown may be limited to mobile internet that you use on smartphones, or the wired broadband that usually connects a desktop or both at the same time.[1753]

B. Why Internet Shutdown?

Internet shutdown is used by the central or the state government to avoid the spread of misguiding messages or hate speech on social media platforms, which may incite the people to gather against the state and disrupt peace and order in the society. Therefore, suspending internet during times like these, to avoid apprehended danger has proven to be quite successful. Social media platforms like WhatsApp, Facebook, Twitter, YouTube etc are used by people to enjoy their right to freedom of speech and expression publicly. These platforms have a big advantage as it can be easily used by an individual to influence a mass amount of people anywhere in the world and can promote them to get involved into violent protests or spread hate against a certain community, religion or the state. People have in the past used these social media platforms available in India, to incite the people to protest against the state using violence. Therefore, to suppress the flow of these hateful ideas and maintain peace and order situation in the society, the government uses this power to shutdown internet.

[1753] *What are Internet Shutdowns,* INTERNET FREEDOM (April 20, 2020, 01:15 PM), https://internetfreedom.in/shutdowns-faq/

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2. HISTORY

India being a democracy grants everyone the right to free speech and expression, but this right is not absolute and certain reasonable restrictions are put on its exercise. In India internet shutdowns have been done more than 385 times to prevent the spread of misleading videos and messages. India was termed as one of the top most ranker in banning internet by the Forbes Statista. The first instance of internet shutdown in India was recorded immediately after the Kargil war in 1999, when the Pakistani daily online newspaper" DAWN" was blocked from access to the people[1754]. After this a series of other shutdowns followed in various states as a preventive measure. The longest span of internet shutdown has been in Kashmir for a total of 213 Days from 4th August 2019 to 4th March 2020, when Article 370 of the Indian Constitution was abrogated by the Parliament of India. A Presidential order was passed on 5th August 2019 which stated the State of Jammu and Kashmir is bifurcated into two Union Territories, which are Jammu & Kashmir and Ladakh. This caused huge uproars amongst the people and they violently protested against the order and caused a great amount of damage to the society. Numerous people started writing hate speeches against the government and false messages went viral on social media platforms, inciting people to participate in violent activities. Thus, to maintain peace and order internet was shut down permanently. On 4th March 2020, a new order was passed by the administration of J&K, by which the white list was removed but internet could only be accessed using 2G on verified SIM's[1755]. Rajasthan has the second most internet ban in India, a total of 68 times. Its first suspension was done on 24th October, 2015, due to communal riots over the alleged killing of a Muslim youth[1756].

In Jaipur, Internet services ranging from 2G to 4G, bulk SMS-MMS, WhatsApp, Facebook, Twitter and other social media were blocked with the help of internet service providers, in

[1754] http://em.m.wikipedia.org/wiki/Internet_in_India
[1755] *Longest Shutdowns*, INTERNET FREEDOM (April 20, 2020, 03:45 PM), https://internetshutdowns.in

[1756] *Communal tension in Rajasthan cities,* THE HINDU (April 20, 2020, 03:55 PM), http://www.thehindu.com/news/national/other-states/communal-tension-in-rajasthan-cities/article7800532.ece

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wake of protest being staged by a community against the Citizenship Amendment Act[1757]. Also because of the Ayodhya Verdict internet was banned in many states simultaneously to avoid any communal fights between the Hindu and Muslim community. Uttar Pradesh is third in position for the most Internet bans in India, a total of 29 bans. Its first internet suspension took place on 16 May, 2016 at Azamgarh when the district magistrate suspended internet to stop riots, spread of misleading information that were creating panic amongst the public[1758]. Therefore, it can be seen that internet shutdowns have been majorly done in instances of communal disparity or protests against the implementation of any law. It has been noticed that internet shutdown is always protested against by the people because of the negative consequences of banning internet. A movement was called upon by a journalist in 2012 called "Save your voice", which was against internet shutdown and supported free speech. It also targeted at the rules framed under the Information technology Act 2000.

3. Impact of the Internet Shutdown

A. Indian Economy

The demand for internet has been increasing day by day, as to so much that it is used everywhere and without it many businesses and people cannot function in their daily lives. It is the lifeblood of all online platforms like Uber, Facebook, Urban clap, YouTube etc., without which they cannot function. In India more than 50% of the national income comes from the IT sector which is dependent on the internet. Therefore, actions like internet shutdowns have a huge impact on the economy. All businesses related to online or any internet and mobile internet is affected by these types of shutdowns. Online selling or purchasing, Cab booking, News and reporting, communication get affected by internet shutdown and incur losses on a daily basis. The shutdown not only affects the monetary part of an organisation but also leads

[1757] *Internet, Metro to Remain Suspended in Jaipur on Sunday,* News18 (April 21, 2020, 02:35 PM), https://www.news18.com/news/india/internet-metro-to-remain-suspended-in-jaipur-on-sunday-2432175.html
[1758] *Internet blocked in riot-hit Azamgarh,* Times of India (April 21, 2020, 07:05 PM), https://timesofindia.indiatimes.com/city/lucknow/Internet-blocked-in-riot-hit-Azamgarh/articleshow/52300964.cms

to unemployment of various people working in those organisations. They are paid less or are not paid at all.

In April 2018, a report of the Indian Council for Research on International Economic Relations (ICRIER) found that the internet shutdowns between 2012 to 2017 in India was total about 16,315 hours of internet shutdown cost the economy approximately $3.04 billion, it is around ₹21,584 crore now. The Kashmir Chamber of Commerce and Industry (KCCI) stated last month that the valley had already suffered a loss of over ₹100 billion since 5 August[1759]. In a news report by the Hindu an interview of Furqan Qureishi was taken in which he stated that how he started a food delivery company called Kart Food in Kashmir. Kart Food in 2017 eventually raised ₹10 lakh and had a turnover of over ₹35 lakh per annum a year, but In August 2019, this food delivery company had to shut shop because internet was suspended and he could not deliver goods to the people[1760].

Tripti Jain, Researcher, Internet Democracy Project says, "The practice of internet shutting down in India has not just disrupted the smooth functioning of the state at large but it is also not in line with the fundamentals of democracy. Internet shutdowns make human rights a hostage to the whims of the executive: the fundamental rights to speech, access healthcare, conduct business, express dissent, and movement of the people in a state, are compromised,"

A research of Top10 VPN found that India was the third worst-hit economy due to shut down. Report says, about 18,225 hours of internet shutdowns around the world in 2019, which carried a total economic cost of $8.05 billion has affected[1761]. According to the Cellular Operators Association of India (COAI), reports say, the loss from internet shutdowns went up in 2019 to ₹24.5 million per hour. Another report by UK-based internet research firm Top 10 VPN showed that shutdowns in India in 2019 are estimated to have led to a loss of over $1.3 billion[1762].

[1759] *India is the internet shutdown capital of the world*, HT MEDIA LIMITED (April 22, 2020, 04:00 PM) https://www.livemint.com/mint-lounge/features/inside-the-internet-shutdown-capital-of-the-world-11575644823381.html

[1760] *The trauma of internet shutdown*, THE HINDU BUSINESS LINE (April 22, 2020, 05:20 PM) https://www.thehindubusinessline.com/specials/india-file/the-trauma-of-internet-shutdown/article30560717.ece

[1761] *Government-led internet shutdowns cost the global economy $8 billion in 2019*, CNBC (April 23, 2020, 02:00 PM), https://www.cnbc.com/2020/01/08/government-led-internet-shutdowns-cost-8-billion-in-2019-study-says.html

[1762] *The trauma of internet shutdown,* THE HINDU BUSINESS LINE (April 22, 2020, 05:20 PM), https://www.thehindubusinessline.com/specials/india-file/the-trauma-of-internet-shutdown/article30560717.ece

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B. Indian Society

Internet shutdown has been time and again used by the government to avoid the spread of misguiding messages on social media and avoid and dangerous outcomes. Suspending internet during times of emergencies to avoid apprehended danger has proven to be quite successful, as social media holds a very strong advantage because it can be easily used to influence people to get involved into certain riots or spread hate. Though it is helpful in avoiding unwanted danger, it also has some disadvantages. In the contemporary times when the IT sector has emerged as one of the leading sources of income for the country then suspending internet services strikes a major blow to the day to day functioning of these industries, which not only affects the company's profits but also the salaries of the working class. Internet shutdown restricts the use of online services like Zomato, Net Meds, UBER, Ola etc, whose sole mode of function is through internet, fails to provide services to its customers. It is through the internet that people can receive these essential goods and medicines which they would not find in the local markets.

Internet shutdown is not only restricted to economic losses but also directly impacts one's human rights. India being a democratic republic gives to its citizens the Right to freedom of speech and expression. This right is not absolute but is subjected to reasonable restriction mention within article 19(2) of the Indian constitution. Social media like Facebook, WhatsApp, YouTube etc act as the platform through which people connect with their friends and family, express their opinions and thoughts, write blogs, and access and share knowledge. These platforms play a major role in their lives and restricting its use is a violation of their human and constitutional rights. India has been listed as one of the top leaders for banning internet services in its states for more than 357 times, which a clear violation of people's rights and against its democratic ideal. In the Forbes Statista report of internet shutdown, it can be seen that countries other than India, which have a restricted type government, have a smaller number of shutdowns than India. This raises a direct question to the democratic idea to the constitution of India. These internet shutdowns make the people feel that their fundamental rights are being violated which may nurture within them a feeling of discontent and insecurity

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that can lead to unpredictable circumstances which would threaten the stability of the country. It has been noticed that many people and journalists protested against the ban of internet in their states and some of them even included violence, thus it can be said that a full internet ban is not the correct initiative to avoid violence but a partial ban is a much effective way. A movement called the #KeepItOn was started in 2019 by an organisation called the Access now in collaboration with STOP project, against the growing damage of the Human Rights due internet shut downs. It raised awareness worldwide and demanded that no nation should curb the right to speech of any individual of their country. Thus, internet shutdowns affect learning process, economic stability, interaction with close ones and other online activities, which is why they should not be used as a tool by the governments and rather as a last resort.

Indiscriminate shutdowns have very high social and economic costs in Indian Society and are often ineffective in nature. A proportionality and necessity test and cost-benefit analysis to determine the right course of action are essential at this juncture. Mainly, Indian society have to push for a transparent and accountable system which ensures the better Internet governance.[1763]

4. Legality of Internet Shutdown

Internet Shutdown in India mostly has been done under Section 144 of the Code of Criminal Procedure (CrPC), which gave the police and district magistrate powers to prevent unlawful gatherings of people and temporary measures to maintain public tranquillity in cases of nuisance or apprehended danger and riot, or an affray. However, in August 2017, the Union government promulgated the Temporary Suspension of Telecom Services under Public Emergency or Public Safety Rules, 2017, under the authority granted to it by the Indian Telegraph Act, 1885.

The main cause of Internet Shutdowns is direct amount of violation of the fundamental right to freedom of speech guaranteed under Article 19(1)(a) and Right to practice any profession or to carry on any occupation, trade or business under Article 19 (1)(g) of the Indian Constitution.[1764]

Internet is very important source of sharing and receiving of information. It is not limited to source of information but also a way to exercise the right to freedom speech and expression. When

[1763] *Are Internet shutdowns healthy for India,* THE HINDU (April 22, 2020, 05:20 PM), https://www.thehindu.com/thread/politics-and-policy/are-internet-shutdowns-healthy-for-india/article30348873.ece

[1764] *Internet shutdown: Validity and legal procedure of such orders*, INDIA LEGALLIVE (April 24, 2020, 02:15 PM), https://sflc.in/legality-internet-shutdowns-under-section-144-crpc

government give instruction to shutdown Internet, large community of people getting affected. It is not only about shutdown of Internet but it violates the freedom of speech and expression, Right to Information and Trade and Business. Right of individual is very important in the of Constitution.

In the case ***Anuradha Bhasin vs. Union of India*** supreme court observed that, the power under Section 144, CrPC, being remedial as well as preventive, is exercisable not only during presence of any danger, or any apprehension of danger.

The freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19 (2) and (6) of the Indian Constitution, inclusive of the test of proportionality in law.

In this case, The Supreme Court noted that section 69A of the Information Technology Act, 2000 (the Act), read with the rules made thereunder (the Suspension Rules), allowed for the blocking of access to information. But the petitioners did not challenge the constitutionality of section 69A of the Act or the Suspension Rules.

Even if Article 19(1) protected Freedom of Speech and Expression, but where Article 19(1)(2) lays down reasonable limitations to the freedom of expression in matters which affecting Sovereignty, Security, Public order, Decency and morality of the State and Friendly relations with foreign countries.

In the case ***Bennett Coleman v. Union of India***[1765]**,** court observed that right of freedom of press is aforesaid rights in modern society. There is no doubt that the freedom of the press is a valuable and sacred right enshrined under Article 19(1)(a) of the Constitution. This right is required in any modern democracy without which there cannot be transfer of information or requisite discussion fora democratic society.

Article 19(1) have broader aspect in Indian Law, both cases clearly mention power of Article 19(1).

[1765] (1972) 2 SCC 788

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5. Current Scenario

The world has been constantly progressing into the technological era where internet has become the lifeblood of many businesses and a crucial need for personal entertainment. Internet has both some pros and cons. It can be used for research and education and it may be used hack into sensitive data or spread false information which may lead to riots and uprisings against the government. Thus, to combat these situations the government uses methods like internet shutdown, website ban and censorship. Internet shutdown is a tool in the hands of central as well as the state government which may use it in the instances of emergencies or to avoid disasters emerging from fake viral text messages. The Indian government has the right to direct telecom companies to shut down internet services or some selected websites in any state for any amount of time. It derives this right through Section 144 of CrPC which gives the executive magistrate the power to issue order in urgent cases of nuisance of apprehended danger and Section 69 of the Information Technology Act which gives the power to issue directions for blocking for public access of any information through any computer resource.

Internet shutdown has been done in almost all the states in India. Some of the instances of internet shutdown in states of India are: -

Kashmir: Kashmir has been the epicentre of the longest internet shutdowns in India; it has experienced a total of 213 days of shutdown in the year 2019-2020[1766]. A ban on internet was put on Kashmir after article 370 was repealed from the constitution of India on 4th August 2019. The ban was lifted on 4th March 2020, while still restricting internet connection to 2g service on verified SIM's, though the justification for such ban was to prevent any violence due to the spread of misguided information, it lead to a great loss in businesses and education which was dependent on internet to function.

Assam: Internet was shutdown in Assam on 12th December 2020, after the implementation of the Citizen Amendment Act (CAA), which led to many uprisings in the state of Assam against the act. The ban was lifted after a week's time after the Gauhati High Court direction to the government.

[1766] *Supra note 3.*

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Delhi: similarly, in Delhi, internet was shut down due the protest against the controversial Citizenship bill. The internet shutdown was a necessary as the protests turned from peaceful to a violent one, which ended up causing loss of human life.

India has reportedly suspended internet to prevent violent protests which arise from rumour-mongering on social media. India has shut down internet 357 times and has been termed as the country with the most internet bans during the year 2016 to 2019 by the Forbes Statista. According to report by the Indian Council for Research on International Economic Relations (ICRIER), 16,315 hours of internet shutdown during 2012 and 2017 cost the India economy $3.04 billion[1767]. Internet shutdown helps the government maintain peace and harmony within the affected area and avoid violence that may harm others.

6. Conclusion & Suggestion

Internet shutdowns have been a topic of debate in all the countries and all have their own different opinions regarding it. But a similar question arises among them all, is shutting down of internet services a violation of freedom of speech and expression of the people? As per the view of the government internet is shut down because they want to obstruct the flow of any misleading information that would lead to violent circumstances. The main motive of the government is to protect its people from any harm and maintain the social structure of the society. They bear the responsibility of protecting the citizens from any type of harm and are accountable to its population if they fail to do so. Internet shut down helps them manage the protests from turning into violent one's and it also breaks the chain of people inciting the general masses against the state. In India the government has used internet shut downs to stop terrorist activities from happening and thus maintaining national security. But these justifications cannot deny the fact that a gross violation of human rights is happening. India being a democratic country is still amongst the top list of banning Internets in its states, which is against the democratic structure of the constitution, which expressly grants to the citizens of India the right to freedom of speech and expression through article 19.

[1767] *The countries shutting down the internet the most infographic*, FORBES (April 25, 2020, 11:45 PM), https://www.forbes.com/sites/niallmccarthy/2018/08/28/the-countries-shutting-down-the-internet-the-most-infographic/#6f1ed7481294

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In an article of Human Rights Watch it was stated that "The Indian government has been promoting the idea of Digital India where people increasingly access goods and services online, but which simply cannot afford blanket restrictions. A modern India that wants technology for development cannot at the same time be haphazardly invoking national security to deny people access to essential information and service". It is the utmost duty of the state to protect this fundamental right and abolish any law made against it, as per article 13 of the Indian constitution which states that *"Laws inconsistent with or in derogation of the fundamental rights shall be void"*. Therefore, no justification can be held valid by the government for the suspension of internet. The human rights watch stated that banning of internet services is violation of human rights of the people. It violates article 19 of the human rights convention and thus it should be stopped and the rights must be protected. It suggested that instead of fully shutting down networks, authorities can use social media to discourage violence and restore public order. The government can use methods like soft ban, social awareness programs, awareness videos; partial internet bans etc to fight against hate speeches and spread of misinformation.

In the recent event when the Indian Citizenship Act was passed there were misconceptions about the act which led to violent protests by the people and internet was shut down in many states, but in certain states the government took the initiative and explained the actual meaning of the act which led to a decrease in the protests. The government recently started an initiative on WhatsApp wherein which it encourages people to report those individuals who are spreading misinformation and they shall be awarded for the reporting them. These acts show that there are other means to maintain peace and order situation without suspending of internet. The government can also use the method of a partial ban wherein which they can ban certain websites which are continuously spreading hate messages or they can employ certain government moderators on social media platforms who would only remove those articles which are actually against the state or are inciting the people to get indulged into violence against the state or an government official. Therefore, the government should not ban internet as it is a clear violation of fundamental right of free speech and expression, so that a feeling of animosity or any discontent does not arise within the people of its nation. It has been rightly said by Martin Luther King Jr." Our lives begin to end the day we become silent about things that matter" therefore the right to speech should always be present.

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NEED TO LEGALIZE COMMERCIAL SURROGACY IN INDIA

- **ANURAG JAIN & SAKSHI DUGGAL**

Family is the fundamental social institution which forms the basis of organised society. From a sociological perspective, children form an integral part of a family since they support their parents in their declining years and carry the family name forward. Additionally, in certain communities, matrimonial alliance is considered complete only on the birth of the couple's own biological child. This view is prevalent in large parts of India. According to anthropologist Robert H. Lowie, "Marriage denotes those unequivocally sanctioned unions which persist beyond sexual satisfaction and come to underline family"[1768].

In today's day and age, having a child through natural methods is becoming increasingly difficult. Keeping up with the global upward trend, infertility rate is on the rise in India as well. It is estimated that infertility affects 10% to 14% of the Indian population with the number being even higher in urban areas where one in every five to six couples is affected by some kind of fertility issue.[1769] Factors like deliberate delay in planning pregnancy to prioritise career, unhealthy life choices and late marriages contribute significantly to the rapidly increasing infertility rate.

Couples with fertility issues can either adopt a child or give birth to a child through assistive reproductive technology. While such techniques are not available to women who have undergone hysterectomy, have suffered multiple miscarriages or are born without a womb, adoption is governed by complex domestic laws and demands years of patient waiting. Given this situation, surrogate motherhood emerges as the only viable ray of hope for infertile couples where the child born is genetically related to at least one of the parents and fulfils the desire of having one's own biological child.[1770]

[1768] Singh, A.K. (2015), *Kinship, Marriage and Family*, Pg 1, Centrum Press, New Delhi.

[1769] Malathy Iyer, Why more and more Indians can't have kids, https://timesofindia.indiatimes.com/city/hyderabad/why-more-and-more-indians-cant-have-kids/articleshow/59587740.cms.

[1770] Irvi H. Thakkar, "Is Surrogate Motherhood Moral?" Cri LJ 88 (2011).

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The word surrogacy has been derived from the Latin word 'surrogatus' the literal meaning of which is 'substitute'. In simplest terms, surrogate motherhood can be described as an arrangement where a woman (surrogate mother) agrees to become pregnant and to bear a child for another person(s) (commissioning parents) to whom the custody of the child will be transferred directly after birth[1771]. On the basis of the gametes used, surrogacy process can be classified into traditional surrogacy and gestational surrogacy. In traditional surrogacy, sperm of the intended father or an anonymous donor is implanted in the surrogate through intrauterine insemination (IUI), IVF or home insemination. The eggs which are used in this process are of the surrogate mother. In gestational surrogacy, the surrogate is implanted with the sperm of the intended father or an anonymous donor and eggs of the intended mother or an anonymous donor. This is done by removing the egg from the intended mother or the anonymous donor and fertilizing it with the sperm of the intended father or the anonymous donor. In this case, the child is not genetically related to the surrogate at all.

Based on who is acting as the surrogate and the extent of financial consideration, surrogacy can be of two types- altruistic and commercial. In altruistic surrogacy, the surrogate is simply reimbursed for the expenses that she bears on her pregnancy. Affection and care act as relevant consideration and there is no money consideration. The surrogate is usually a relative or a close friend of the intended parents. On the other hand, in commercial surrogacy, a surrogate is hired to carry a baby for the intended parents for which she receives a hefty sum in the form of reward in addition to the expenses incurred during pregnancy and delivery. She is compensated fairly for her time and energy, the trouble she goes through and various physical and emotional challenges that she undertakes. The commissioning couple and the birth mother are often strangers. This type of surrogacy is undertaken by the surrogate mother purely for the money consideration involved.

Commercial surrogacy is sometimes referred to by emotionally charged and potentially offensive terms like 'wombs for rent'. It is seen as unethical and exploitative for the surrogate mother as she usually belongs to the economically and socially disadvantaged section of the society. This paper explores the need for legalizing commercial surrogacy in contemporary times. It traces the journey of the legislations on this subject, most recent being the Surrogacy (Regulation) Bill, 2020. To

[1771] *Id.*

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conclude, a number of suggestions have been provided to regulate this industry thereby underlining the need for a comprehensive law on the issue.

Legislative Development in India

The world's second and India's first IVF baby, Kanupriya *alias* Durga was born in Kolkata on October 3, 1978. Since then, the field of ART has developed rapidly in India. ART refers to treatments and procedures that aim to achieve pregnancy. These complex procedures may be an option for those people who have already gone through various infertility treatment options but who still have not achieved pregnancy.[1772] Surrogacy is one of the options under ART in which India is a leading country so much so that it is also called 'the surrogacy capital of the world'.

However, there is no law to regulate the surrogacy industry in India. In 2005, the Indian Council of Medical Research laid down guidelines for surrogacy through which the surrogacy clinics in India were governed and regulated. It made the practice legal, but surrogacy still did not have any legislative backing. This led to the proliferation of surrogacy industry which had negligible regulations and even lesser enforcements. A study conducted in July 2012, backed by the UN, put the surrogacy business at more than $400 million with more than 3000 fertility clinics all over the country.[1773]

Commercial surrogacy is also permitted in India. In the first case of surrogacy in India, *Baby Manji Yamada* v. *Union of India*[1774], the Supreme Court of India affirmed commercial surrogacy as legal which again led to an increase in the instances of surrogacy.

Thereafter, there arose the situation of an Israeli gay couple[1775] having a baby through surrogacy in India. They could not go for surrogacy in Israel therefore, they came to Mumbai to have a baby through surrogacy. They took the baby to Israel but the Israeli government required them to pass

[1772] Assisted Reproductive Technology (ART), https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/treatments/art
[1773] Tarishi Verma, What are the surrogacy laws in India, The Indian Express, March 6, 2017.
[1774] AIR 2009 SC 84.
[1775] Madhavi Rajadhyaksha, Israeli gay couple gets a son in India, The Times of India (Nov 18, 2008, 00:49 am), http://timesofindia.indiatimes.com/india/Israeli-gay-couple-gets-a-son-in India/articleshow/3724754.cms?.

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the DNA test to prove the legality of their parenting before the passport and the other documents of the baby were prepared.[1776]

Another important case is *Jan Balaz* v. *Anand Municipality*[1777] . In this case, a German couple came to India to have baby through surrogacy. The issue here was that Germany did not recognize surrogacy as legal and hence could not give citizenship to the twins. So, the parents made an Indian birth certificate with the name of surrogate mother on it in place of legal mother. The matter came before the Gujarat High Court where the judges, in absence of any law, took the reference of section 3(1)(c)(ii) of Indian Citizenship Act, 1955 and gave the twins, Indian citizenship. In the judgement, the court mentioned the urgent need to enact a comprehensive legislation on surrogacy.

Similar cases came before various high courts which required declaration of the rights and obligations of the surrogate mother and the intended parents, citizenship of the baby born through surrogacy, safety concerns, costs etc. The difference in opinion of various courts and the multiplicity of the issues being raised prompted the government to start paying attention to the need of regulating this industry. This began with the Assisted Reproductive Technologies (Regulation) Bill and Rules, 2008 drafted by the ICMR. This bill considered commercial surrogacy legal and provided that the process should be governed by agreements at every stage of the process which should be regulated by the Indian Contract Act, 1872.

This was followed by the 228th Law Commission Report titled 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy'.[1778] The report raises several moral objections against commercial surrogacy such as commodification of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money.[1779] It provided for active legislative intervention and a pragmatic approach to be followed by legalizing altruistic surrogacy arrangements and prohibiting commercial surrogacy.

[1776] Elly Teman, The Medicalization of "Nature" in the Artificial Body: Surrogate Motherhood in Israel, 17 Medical Anthropology Quarterly 78, 80-82 (2003).
[1777] AIR 2010 Guj 21.
[1778] Report no. 228, Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy, Law Commission of India (August 2009).
[1779] *Id.*

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The Surrogacy (Regulation) Bill, 2014 was introduced by Dr. Kirit Premjibhai Solanki, MP from Gujarat.[1780] This was private member bill and was not sponsored by the government. The Bill allowed commercial surrogacy in the country and also allowed surrogacy for gay couples in India as well as for the couples from abroad.[1781] However, the Bill was not passed. It took two years to draft and introduce a new Bill which was introduced by Ministry of Health and Family welfare in 2016 as the Surrogacy (Regulation) Bill, 2016. The Bill caught immense media and public attention because it sought to ban commercial surrogacy in India. It substantially restricted the applicability of surrogacy arrangement- can be availed by only Indian married couples who have been married for at least five years, of whom at least one of them is infertile. The bill permitted only altruistic surrogacy.

This bill was referred to the Parliamentary Standing Committee on Health and Family Welfare which submitted its report no. 102 on this subject in August, 2017.[1782] The committee observed that permitting only altruistic surrogacy will be an extreme step. It recommended that commercial surrogacy be allowed, but it should be stringently and comprehensively regulated.[1783] The Union Cabinet accepted some of the recommendations made by the committee and introduced the supposedly improved bill in the Lok Sabha as the Surrogacy (Regulation) Bill, 2019. This bill came as a surprise because despite the recommendations made by the committee it allowed for only strictly altruistic model of surrogacy and made practise of commercial surrogacy a penal offence.[1784] The bill has been passed by the Lok Sabha and was referred to the Rajya Sabha Select Committee which presented its report in November, 2019. The Select Committee made 15 major recommendations. All these recommendations have been approved by the Union Cabinet and are incorporated in the Surrogacy (Regulation) Bill, 2020.[1785] This bill was due to be introduced in the

[1780] Grhari, Surrogacy Bill, 2014 Introduced at Indian Parliament, Indian Surrogacy Law Centre (Oct. 21, 2014), http://blog.indiansurrogacylaw.com/surrogacy-Bill-2014-introduced-at-indian-parliament/.
[1781] *Id.*
[1782] One Hundred Second Report, Parliamentary Standing Committee On Health and Family Welfare, Rajya Sabha, Parliament of India (Aug. 2017).
[1783] *Id.*
[1784] Clause 35, Surrogacy (Regulation) Bill, 2020.
[1785] Cabinet nod to surrogacy bill; now widows and divorcee women can benefit as well, Live Mint(26th) Feb. 2020), https://www.livemint.com/politics/policy/cabinet-nod-to-surrogacy-bill-now-widows-and-divorcee-women-can-benefit-as-well-11582720671346.html.

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Parliament in the budget session but that could not happen due to the COVID-19 pandemic. This new bill forms the subject of analysis of this paper. Features of this bill have been discussed below.

1. *Permits only altruistic surrogacy*: The bill only permits altruistic form of surrogacy which has been defined in clause 2(b) as the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.[1786] The words 'and such other prescribed expenses' have been inserted on the recommendation of the Select Committee. Practice of commercial surrogacy has been prohibited under clause 3(ii) and (v) as well as clause 36(1)(a). Contravention of these provisions has been made an offence punishable with imprisonment of up to five years and fine of up to Rs. five lakhs.

2. *Beneficiaries of the process*: A couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy can be 'intending parents'[1787] under the bill provided that they are married and are between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification. Also, a single woman willing to have a child through surrogacy can be 'intending woman'[1788] under the bill provided that she is a widow or divorcee between the age of 35 to 45 years.

3. *Surrogate Mother*: Any woman who agrees to bear a child (whether genetically related to the intending couple or not) through surrogacy from the implantation of embryo can be a surrogate mother.[1789] No woman, other than a married woman between the age of 25 to 35 years on the day of implantation, having a child of her own can be a surrogate.[1790] No woman can act as a surrogate more than once in her life.[1791] Also, the surrogate cannot act as a surrogate mother by providing her own gametes.[1792] This means that traditional

[1786] Clause 2(b), Surrogacy (Regulation) Bill, 2020.
[1787] Clause 2(r), Surrogacy (Regulation) Bill, 2020.
[1788] Clause 2(s), Surrogacy (Regulation) Bill, 2020.
[1789] *Id.*
[1790] Clause 4(iii)(b)(I), Surrogacy (Regulation) Bill, 2020
[1791] Clause 4(iii)(b)(IV), Surrogacy (Regulation) Bill, 2020
[1792] Clause 4(iii)(b)(III), Surrogacy (Regulation) Bill, 2020.

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surrogacy is not permitted. The surrogate is also required to obtain a certificate of medical and physical fitness from a registered medical practitioner.[1793]

4. *Parentage and abortion of the surrogate child*: A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An order concerning the parentage and custody of the child to be born through surrogacy, which shall be the birth affidavit after the surrogate child is born, has been passed by a court of the Magistrate of the first class or above, on an application made by the intending couple or the intending woman and the surrogate mother.[1794] This is a safeguard against possible abandoning of the child by the intending parents.

Abortion of the surrogate child requires the written consent of the surrogate mother and the authorization of the appropriate authority. This authorization must be compliant with the Medical Termination of Pregnancy Act, 1971. Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.

5. *Registration of surrogacy clinics*: The bill prohibits establishment of surrogacy clinics for undertaking surrogacy or to render surrogacy procedures in any form, unless the clinic is registered under this Act.[1795] The clinics which are already in existence at the commencement of this Act are required to apply for registration within 60 days from the appointment of the appropriate authority.[1796] In order to get registered, the appropriate authority must be satisfied that the clinic is in a position to provide such facilities and maintain such equipment and standards including specialised manpower, physical infrastructure and diagnostic facilities as may be prescribed.[1797]

6. *National Surrogacy Boards and State Surrogacy Boards*: These boards are created at the Centre and state level to discharge a host of functions- to advice the government on policy matters relating to surrogacy, to review and monitor the implementation of the Act and rules framed thereunder, to lay down code of conduct to be observed at surrogacy clinics,

[1793] Clause 4(iii)(b)(V), Surrogacy (Regulation) Bill, 2020.
[1794] Clause 4(iii)(a)(II), Surrogacy (Regulation) Bill, 2020.
[1795] Clause 11(1), Surrogacy (Regulation) Bill, 2020.
[1796] Clause 11(3), Surrogacy (Regulation) Bill, 2020.
[1797] Clause 11(4), Surrogacy (Regulation) Bill, 2020.

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and take appropriate steps to ensure their effective performance and such other functions as may be prescribed.

Critical Analysis of Surrogacy (Regulation) Bill, 2020

The Surrogacy (Regulation) Bill, 2020 is comprehensive and provides strict penalties for violation of its provisions. However, the bill suffers from certain flaws. These have been discussed below.

1. *Prohibition of commercial surrogacy*: The bill prescribes a model of surrogacy in which only actual medical expenses are paid to the surrogate mother along with payment of certain other prescribed expenses. These prescribed expenses have been left undefined by the bill. Practice of commercial surrogacy has been made a criminal offence. From the report of the Rajya Sabha Select Committee, it can be clearly inferred that the government is averse to the idea of commercial surrogacy based on the belief that it will lead to commercialisation of reproductive services, commodification of children and exploitation of the surrogate mother.

The arguments of the government opposing commercial surrogacy are based on an incorrect premise that commercial surrogacy is synonymous with purported exploitative practices that take place in this industry. The argument is not supported by any empirical research. The objective of any law should be to strictly regulate those fields which could be potentially abused. A blanket ban on commercial surrogacy cannot be the answer to the problem of exploitation. This ban could potentially drive the whole industry underground thereby creating a black market of surrogate services. This may subject the surrogate mothers to unprecedented sufferings resulting out of meagre payments, lodging in inhospitable conditions, threat to life. Thus, commercial surrogacy should be permitted and should be viewed as a form of labour that requires adequate labour protection by granting minimum conditions of work.

The Surrogacy (Regulation) Bill, 2019 provided that only a 'close relative' of the intending couple can act as a surrogate for them. This provision was relaxed in the Surrogacy (Regulation) Bill, 2020 to allow any intending woman to act as a surrogate. However, it is difficult to think of a situation where any woman who is not related to the intending couple would want to be their surrogate just out of love and affection sans any monetary consideration. Thus, by relaxing the

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requirement of a 'close relative' and that at the same time penalising commercial surrogacy, the legislature has given an illusory choice of making any willing woman a surrogate when in reality such a situation is inconceivable.

Commercial surrogacy can provide women from disadvantaged sections with unique economic opportunities.[1798] The money paid to the surrogate is a mere compensation for the loss of wages over the period of nine months when they cannot engage in strenuous occupation. The surrogates use the money they get from surrogacy for education of their children, construction of their home, treatment of child or spouse, starting a small business or buying an auto rickshaw or farm or small shop which can make them independent and empower her whole family.[1799] By prohibiting commercial surrogacy, the legislature has denied this opportunity to numerous women and has impinged on their right under article 19(1)(g) of the Constitution.

Another aspect of banning commercial surrogacy is that it places undue restrictions on would-be surrogates' bodily autonomy and reproductive rights. The government has offered no logical rationale for why unwed and childless women should not be surrogates. Absent such a justification, the decision of any physically and mentally fit woman to go ahead with a surrogacy arrangement should be her decision alone. The judgement of the Supreme Court in *Justice K S Puttaswamy* v. *Union of India*[1800] specifically recognised the constitutional right of women to make reproductive choices, as a part of personal liberty under Article 21 of the Indian Constitution. In the case of *Suchita Srivastava* v. *Chandigarh Administration*[1801] it was held that reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth, and to subsequently raise children; and that these rights form part of a woman's right to privacy, dignity, and bodily integrity. Thus, it can be concluded that the decision of a woman to carry a child for herself or for someone else, is a personal choice that she can exercise under the right to reproductive autonomy.

2. <u>*No requirement of consent of intending parents in the decision of abortion*</u>: Under the bill, no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist, intending couple or any other person shall conduct or cause abortion during

[1798] Malavika Ravi, A Critical Analysis Of The Surrogacy Regulation Bill 2016, Feminism in India (31st August, 2016), https://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/.
[1799] 102nd Rajya Sabha Report
[1800] Justice K S Puttaswamy v. Union of India, (2017) 10 SCC 1.
[1801] Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

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the period of surrogacy without the written consent of the surrogate mother and on authorisation of the same by the appropriate authority concerned. The appropriate authority shall authorise the abortion only if it is compliance with the provisions of the Medical Termination of Pregnancy Act, 1971.

A major shortcoming of this provision is that no room has been left for obtaining the consent of the intending parents. This is not to undermine the weightage attached to the decision of the surrogate mother who has the right to make the final decision of whether she wants to carry the pregnancy to term or terminate it. However, considering that intending parents are also stakeholders in this process, there should be mechanism in the law to ensure that both the intending parents and the surrogate mother are convinced. The fact that authorisation of the appropriate authority can be obtained only in compliance with the provisions of the Medical Termination of Pregnancy Act, 1971 acts as a safeguard against any potential abuse by the surrogate mother or the commissioning parents.

3. *Allowing only married women having one biological child of their own to be surrogate mothers*: The bill excludes unwed women and married women who do not have a biological child of their own from being surrogate mothers. Only a married woman between the age of 25 to 35 years on the day of implantation, having a child of her own can be a surrogate mother. While the age bracket of 25-35 years is a reasonable restriction considering that this is the most suitable age for reproduction and ensures the health of both the mother and the child but no rationale has been provided for excluding other women. Marriage and already having a child have no bearing on the health of the surrogate mother or the child to be born and thus, do not serve any purpose. It acts as an unreasonable restriction[1802] for unwed women and married women without a child of their own and thus violates the right to be treated equally under article 14 of the Constitution.

4. *No requirement of a contract between parties*: Clause 6 of the bill provides that a woman intending to act as a surrogate must be explained all the known side effects and after effects of procedures entailed in the surrogacy process. After this, the woman is required to give her written consent in the prescribed form and in the language that she understands.

[1802] Chandrika Manjunath, The Surrogacy Bill, 2019 Denies Women Agency Over Their Bodies, Feminism in India (8th August 2019), https://feminisminindia.com/2019/08/08/lok-sabha-passes-surrogacy-regulation-bill-2019/.

> Additionally, clause 4(iii)(a)(II) provides that on an application made by the intending parents and the surrogate mother, an order of parentage and custody of the child to be born through surrogacy, which shall also be the birth affidavit of the child, shall be passed by a court of Magistrate of the first class or above.

While these provisions ensure that a woman agrees to be a surrogate with her free consent and that custody of the child is not disputed after his/ her birth, some gaps are still left which can be addressed effectively by a legally binding contract. Thus, the law must provide for the parties to enter into a registered tripartite agreement between the intending parents, the surrogate and the surrogacy clinic involved. This agreement, inter alia, should contain details of the compensation to be paid to the surrogate, order of payment of instalments, details for bank transfer, a nominee who will have the custody of the child in case the parents are involved in any eventuality, custody of the child in case the parents decide to separate during the surrogacy process. The surrogacy agreement should be registered also. The jurisdiction for registration should lie before the Registrar where surrogate mother resides or where the intending parents reside or where the agreement is executed.

Since a surrogacy agreement is a legal document, it will act as bedrock of the surrogacy arrangement and shall have a legal binding on all the parties involved in the surrogacy and help in solidifying the rights and duties of both the participants to the arrangement.

Regulation of Commercial Surrogacy

As discussed earlier, the main object of criminalising commercial surrogacy by the government is to prevent exploitation of women from disadvantaged sections of the society and to avoid commodification and marketization of children. Though the concern of the government is valid, the line of arguments is questionable.

The belief that all commercial surrogacy arrangements are exploitative is based more on moralistic assumptions rather than primary research data. There may be some instances where such arrangements have been exploitative but it cannot be concluded that all commercial surrogacy arrangements are inherently exploitative. For instance, it would be exploitation if a surrogate mother refused to hand over a child while also refusing to return the money she had been paid.

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Similarly, altruistic surrogate motherhood is not inherently exploitative but individual instances can be when, say, relatives or friends unfairly pressurise a woman.[1803]

It must be noted that when money is paid to a surrogate, it is a consideration for the reproductive service provided by her and not for buying the baby.[1804] Similarly, money is paid to the surrogacy clinics for the medical services that they offer.

The legal enforceability of all surrogacy contracts and active regulation of all aspects of the process by the government will help to reduce the risk of any possible exploitation. For this, the first and the most significant step to be taken is the legalising of commercial surrogacy by means of a comprehensive and robust legislation. Such a law should provide for the regulation of all the fathomable aspects of the process. Some of the possible safeguards are discussed below.

1. *Preliminary Screening Test and Mandatory Counselling of Intending Parents*: The law should provide that surrogacy process can be initiated by only those couples which are able to clear a preliminary screening test. This test should, inter alia, assess the basic medical fitness of the intending couple; their socio-economic background, police verification to ensure that there are no criminal antecedents, financial position, etc. This screening could be similar to the one done in case of adoption procedure. There must be a provision of mandatory counselling of intending couple wherein they are made aware of the option of adoption and about how it could be explored.
2. *Empanelment of willing women by the state surrogacy boards*: Instead of private establishments and surrogacy clinics advertising their services to look for potential surrogates, the state surrogacy boards should call upon willing women to enlist themselves with the board. This will eliminate the risk of misleading advertisements by surrogacy clinics. The enlisted women should be made to undergo a medical assessment and counselling sessions to guide them about the process and the possible risks that it entails. On application to the state boards, the surrogacy clinics should be allotted willing women

[1803] https://theconversation.com/commercial-surrogacy-lifting-legal-restrictions-is-the-moral-thing-to-do-to-help-people-trying-to-have-babies-108999.

[1804] Paul R. Brezina & Yulian Zhao, The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies, Obstetrics and Gynecology International (2012).

from only those enlisted with the board after obtaining their written const. The fact that it is on the intending couple or the surrogacy clinics to look for surrogate mothers will drastically reduce the chances of exploitation of poor women.

3. *Fixing of minimum amount that can be paid for the process*: The government should actively intervene to regulate and fix the price that can be paid by intending couples for the services of surrogate mothers. This amount must be paid to the surrogate mother, even if she suffers miscarriage or has to undergo abortion because of any health exigency. This amount can be fixed in consultation with the National Surrogacy Board on the basis of the data collected by the State Surrogacy Boards. It must be revised periodically in order to be at par with the inflation levels in the country. Fixing of minimum price will ensure that the surrogate is not underpaid and is adequately compensated that for the service of a lifetime that she renders.

4. *Establishing Surrogacy Ombudsman*: Since any possible disputes arising between the parties will be, by and large, of a private nature, the government should explore the option of creating surrogacy ombudsman on the lines of banking ombudsman and insurance ombudsman. This will ensure availability of an effective remedy for resolving disputes in a timely manner.

Conclusion

This paper has been an attempt at highlighting the pressing need for regulation in the surrogacy industry. Through this paper, it is argued that this industry needs a comprehensive legal framework that seeks to mitigate the exploitative element that is present in it, as opposed to a blanket ban on commercial surrogacy. The best form of protection for all parties involved is legislation that enables commercial surrogacy to be undertaken openly, by trained, registered health professionals, in licensed and monitored premises. Such legislation would safeguard the health of both the surrogate woman and the child. It would ensure that proper records are kept, which will be important for the child's later welfare.

Thus, it is the need of the hour that the legislature makes an honest effort of understanding the commercial surrogacy industry and regulating it, instead of prohibiting its operation and denying the benefits of scientific advancement to thousands of people.

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CORPORATE SOCIAL RESPONSIBITY – A DETAIL ANALYSIS OF THE POLICY IN CONTEXT OF INDIA

- KRISHNA NIGAM & KRISHNA RASTOGI

ABSTRACT

India being a welfare state where the major focus of the government is to ensure the social justice of the society. The concept of Corporate social responsibility (CSR) plays major role in ensuring this. The concept of Corporate social responsibility (CSR) provides that while using societal resource for production and earning profit, the companies must ensure the benefit of society by distributing certain portion of profits in society by various means like development projects etc which ensures the benefits of people. Under Section 135 of the companies Act 2013, the provision of Corporate social responsibility is given which is regulated by Corporate Social Responsibility Policy Rule,2014 which makes Corporate social responsibility, a mandatory policy in India for the Companies, making India first country to do so.

The paper begins with the introduction of Corporate social responsibility and development concept of CSR from Gandhian phase to 21st Century. The paper also deals with detail analysis of CSR rule and law and its current status in present time and analysis the role of legislature and judiciary in development of CSR. The paper also makes suggestion for the betterment of the CSR Policy.

INTRODUCTION

Earlier business activities were simply confine to buying and selling of products and services but now it is not feasible to do these activities without considering the environment in which they operate. The term “corporate social responsibility” came into use in the late 1960s after many MNC formed the term stakeholders (whom organization activities have an impact). Companies should voluntarily do business in an economically, socially and environmentally responsible manner so that it can sustainable over the long term. Corporate social responsibility (CSR) refers to business practices involving such initiatives which benefits the larger portion of the society. A business's CSR can consist of a wide variety of tactics, from giving away a portion of a company's profits to charity, building educational institution, providing free medical services. The concept of

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CSR based on the ideology of give and take. Companies take resources from the society. By performing the task of CSR activities, the companies are giving something back to the society in form of donation and other activity. CSR policy functions as a built-in, self -regulating mechanism whereby business monitors and ensures that its active should confine within law, have ethical standards, and follows international norms. The goal of CSR is to encourage a positive impact through its activities on the environment, consumers, employees, communities, and all other members of the public. The concept of CSR focus on the human aspect of development in the society. It reminds that human being are first, and therefore, human relationships have to be managed efficiently. Development should be multidimensional, it has to cater to all the players in the economy, polity, and society. A relationship based on trust between the partners of growth needs to be established.

Corporate Social Responsibility (CSR) is an important concept in modern business, management and politics, especially after the launch of the United Nations Global Compact in 2000, which act as an initiative to encourage businesses all around the world to adopt sustainable and socially responsible policies, and to report on them. It is a concept whereby firms integrate social and environmental concerns in their business operations with voluntary and mandatory activities. The nature and scope of corporate social responsibility has been changing over time. CSR has been gained interest worldwide over recent years. The history of CSR is almost as long as that of firms. This CSR concept is not new to India. A number of organisations, particularly family-based firms already have this tradition. Philosopher like Kautilya already promoted ethical principles while doing business. The concept of helping the poor and needy can be seen in ancient literature. The idea was also supported by several religions. Hindus follow the principle of Dhramada (law) or Moksha and forms an integral part of Hindu rituals. Similarly, in Sikhism, there is provision of free Langar food and shelter in the Gurudwaras. Muslims followed the concept of Zakaat, which is donation from one ‘s earnings which is specifically given to the poor and disadvantaged section. In India, in the pre independence era, the businesses which pioneered industrialization along with fighting for independence also followed this idea. They put the idea into action by setting up charitable trust, educational institution and healthcare institutions, and trusts for societal development.

DEVELOPMENT OF CSR IN INDIA

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Though CSR is not a new to India but its development has been categories into four phases:

i. FIRST PHASE: CSR GUIDED BY CHARITY AND PHILANTHROPY

The first phase of CSR is mostly determined by culture, religion, family tradition and industrialization. Charity and philanthropy being the oldest form of CSR, still have their influence in CSR practices today. During the pre-industrial period nearly up to the 1850s, businessmen by themselves they contribute for society development be it for religious reasons or other, they share their wealth, by building temples, Ashram etc. Moreover, these business community provided relief in times of crisis such as famine or epidemics by providing food, shelter and clothes.

During colonial rule, Western types of industries reached India and changed the practices of CSR. The pioneers of industrialization in the 19th century in India were a few families such as the Tata, Birla, Bajaj, Lalbhai, Sarabhai, Godrej, Shriram, Singhania, Modi, Naidu, Mahindra and Annamali, who were strongly devoted to philanthropically motivated CSR. Jamshedji N Tata, who played a pioneering role in the industrialization of India, had put people before profit. Even today Tata group follow this as integral part of their organization culture. Based on the logic that the wealth which comes from people, it must as far as possible, go back to the people in more effective way which lead to their development.

ii. SECOND PHASE: CSR FOR SOCIAL DEVELOPMENT OF INDIA

The Second phase was characterised between (1914-1960), which was dominated by the country ‘s struggle for independence and influenced by Gandhi ‘s theory of trusteeship which aimed at social development. Indian businesses actively engaged in the reform process during the struggle of independence. Gandhiji introduced the idea of trusteeship in order to make firms the temples of modern India businesses to set up trusts for schools and colleges; they also established training and scientific institutes. This period for emphasis to manage that the business entity as a trust, held in the interest of the community and prompted many family run businesses to contribute toward socioeconomic development of the society.

The heads of the firms largely aligned the activities of their trusts with Gandhi’s reform programmes. These programmes included activities that sought in particular the abolition of untouchability, women ‘s empowerment and rural development.

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iii. THIRD PHASE: CSR UNDER THE MODEL OF THE MIXED ECONOMY

The third phase of CSR was between (1960-1980) which was cauterised by the mixed of the mixed economy, with the emergence of Public Sector Undertakings and various legislation on labours, factories and environmental standards. This model came into being in the post-independence era under the aegis Jawahar Lal Nehru which was driven by a mixed and socialist kind of economy. This phase was also characterized by a movement from corporate self-regulation to legal framework for the regulation of business activities. Under the pattern of the mixed economy, the role of the private sector in advancing India increases. During this, the public sector was emerged as prime mover of development. This era described as an era of command and control, because of strict legal regulations which determined the activities of the private sector. The introduction of a high taxes and a quota and license system imposed tight restrictions on the private sector which indirectly triggered corporate malpractices. As a result of which corporate governance, labour and environmental issues rose on the political agenda and became the subject of legislation. Moreover, state authorities established Public sector undertakings with the intention of guaranteeing the proper distribution of wealth to the needy.

iv. FOURTH PHASE: CSR AT THE INTERFACE BETWEEN PHILANTHROPIC PHILOSOPHY AND BUSINESS APPROACHES

The fourth phase (1980 until the present) where Indian firms began avoid traditional philanthropic engagement and integrated CSR into a coherent and sustainable business strategy, partly adopting the multi-stakeholder approach which was given by Milton Friedman. As per this model, corporate responsibility is confined to its economic bottom line which implies that it is sufficient for business to obey the law and generate wealth, which through taxation and private charitable choices can be directed to social ends. In 1991, the Indian government liberalize the Indian economy by tackling the shortcomings of the mixed economy and introduce the concept of privatization and globalisation. The government also liberalise controls and abolished license system from most of the activities, and the Indian economy experienced a pronounced boom. This rapid growth did not lead to a reduction in philanthropic donations, on the contrary, the increased profitability also increased business willingness as well as ability to give, along with a surge in public and government expectations of businesses. India has become an important economic and political actor in the process of globalization. This new situation has also affected the Indian CSR agenda.

With more Transnational National Companies resorting to global sourcing, India has become an attractive and important production and manufacturing site in world. As western consumer markets are becoming more responsive to labour and environmental standards in developing countries, Indian firms producing for the global market need to comply with international standards. The companies Act 2013 makes provision for compulsory CSR activities for certain threshold companies which by CSR rule 2014.

ROLE OF JUDICIARY IN DEVELOPMENT OF CSR

Judiciary played a very vital role I in development of CSR till now through its various judicial pronouncement. It has also expanded the scope of Article 21 (Right to Life and Liberty) by relating it to environment, employment, dignity and also included many provisions of DPSP in the ambit of definition of fundamental rights in various cases which related to overall welfare of society especially of weaker sections. Socialist state, Social justice and Economic justice are the aim provided in preamble and provisions like Article 21, Article 23 & 24 of fundamental rights and provision of DPSP relates to the aspect of corporate social responsibility. Judiciary has played very significant role in establishing this relationship and by ensuring that legislature make suitable law to make Corporates socially responsible. Judiciary has laid down some which important principles related to social welfare/ social responsibility by using jurisprudential postulates while deciding cases related to social responsibility aspect.

In Samatha v. State of A.P. & Ors[1805] , where the court established the *Egalitarian Social Order Principle* and said that "Justice is an attribute of human conduct. Law, as a social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a Socialist Secular Bharat Republic". In T.S.Arumugham v. Lakshmi Vilas Bank Ltd.[1806] The hon'ble Court recognised Company as *Socio- Economic Institution* and observed that the Company is an important part of society.

a. Interpretation of Socialist State & Social Justice by Judiciary

[1805] AIR 1997 SC 3297.
[1806] 1994 80 Comp Cas 814 Madras.

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In DS Nakara v. Union of India[1807] S.C. held that the main aim of a socialist state is to eliminate all kind of inequality in income status and standard of life and to provide security from cradle to grave. In Excel wear v. Union of India[1808], the court held that the addition of word socialist might enable the courts to lean more in favour of nationalisation and state ownership an industry. But private ownership of industries is also recognised and governs large proportion of our economic structure, this principle of socialism and social justice cannot be pushed to such an extent so as to ignore completely the interest of another section of the public namely the private owners of the undertakings must be taken care. In ***Sadhau Ram Vs Pulin Bihari[1809],*** the hon'ble Supreme court held that the concept of social justice means social wellbeing or benefit to community. The social equality and prevalence of justice in social setup should be the aim of the state and other organisations including private enterprises.

b. Judicial pronouncement related to Fundamental Rights supporting CSR

In the case of Reliance Natural Resources Ltd. v. Reliance Industries Ltd.[1810] The court interpreted the provisions of Article 14, 39 (b) and Article 297 in light of the Public Trust Doctrine. The Supreme Court held that Public trust doctrine is part of Indian Law and it is duty of the Government to provide complete protection to the natural resources as a trustee of the people. In MC Mehta v. State of Tamil Nadu[1811], the court held that right to live under article 21 includes the Right to pollution free water and air. If anything endangers or impairs the quality of life in derogation of laws a citizen has a right to access court under article 32. This is one of the most important aspect which relates to the concept of corporate social responsibility because corporates/ industries are the main source of air and water pollution in order to remain in working corporate will have to protect environment and this can only be done by being socially responsible.

c. Judicial pronouncement in relating DPSP supporting CSR

In Tamilnadu v. Abu Kavar Bai[1812], the hon'ble Supreme court held that it is the responsibility of the corporate to have such kind of behaviour so as to fullfill the obligations of article 39 (b) & (c)

[1807] AIR 1983, SC 130.
[1808] AIR 1979, SC 25.
[1809] AIR 1984, SC 1471.
[1810] Civil Appeal no.4274.
[1811] AIR 1991, SC 417.
[1812] AIR 1984 SC 516.

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otherwise state for the purpose of distribution or preventing concentration of wealth can resort to acquisition by way of nationalization. In Randhir Singh v. Union of India[1813], the Supreme court recognise that the principle of equal pay for equal work provided under Article 39 (d) is not a fundamental right but is certainly a constitutional goal and therefore capable of enforcement through constitutional remedies under Article 32.It is also applies to persons employed on daily wage basis. In Air India Statutory Corporation v. United labour Union[1814] **,**the hon'ble Supreme court explained the concept of social justice as provided in Article 38 and provided that social justice a dynamic devise to mitigate the sufferings of poor, weak, Dalits, tribals and deprived sections of the society and to eliminate them all to the level of equality to live a life with dignity of person.

LAW & RULE OF CORPORATE SOCIAL RESPONSIBILITY IN INDIA

The new Companies Act 2013 provide the provide the Corporate Social Responsibility which is made compulsory for the corporate houses to comply with. Section 135 and schedule vii of the companies act as well as (corporate social responsibility policy) rules, 2014 (CSR rules) regulate the activities of CSR.

Section 135 of the Companies Act 2013 provides the certain boundary line limits for applicability of the CSR to a Company:

(a) net worth of the company should be Rs 500 crore or more; or

(b) turnover of the company should be Rs 1000 crore or more; or

(c) net profit of the company should be Rs 5 crore or more.

Further the provisions of CSR are not only applicable to Indian companies, but also applicable to branch and project offices of a foreign company in India.

Companies that qualify any of the criteria must spend at least two percent (2%) of their average net profits made during the previous three financial years on CSR activities.

a. DEFINITION OF THE TERM CSR:

[1813] AIR 1997 SC 449.
[1814] AIR 1997 SC 645.

The term CSR has been defined under the CSR Rules[1815] which provided inclusive definition and it is not limited to:

- Projects or programs relating to activities specified in the Schedule VII to the act; or
- Projects or programs relating to activities undertaken by the Board in pursuance of recommendations of the CSR Committee as per the declared CSR policy subject to the condition that such policy covers subjects enumerated in the Schedule.

b. CSR COMMITTEE AND POLICY

Every company which qualify, will required to constitute a Committee of the Board of directors consisting of 3 or more directors, including at least one independent director.[1816] The CSR rules 2014 also states that an unlisted company and a private company which are not required to appoint an independent director shall constitute a CSR committee without an Independent director.[1817] A private company which have only two directors shall constitute its CSR committee with two of them.[1818] In the case of a foreign company, the CSR Committee shall consist of at least two persons wherein one person must be Indian resident and another person shall be nominated by the foreign company.[1819]

The CSR Committee shall articulate and endorse to the Board, a CSR policy which shall specify the activities that to be undertaken by the company and recommend the amount of expenditure that to be incurred on these activities, and referred and monitor the CSR Policy of the company.[1820] The Board shall take into considerations of the suggestions made by the CSR Committee and approve the CSR Policy of the company.[1821]

c. ACTIVITIES UNDER CSR:

The companies act provides a wide range of activities which may be undertaken by the corporates body in India. Apart from the specified activities, the Government may prescribe the option of any

[1815] RULE 2C OF CSR RULE 2014.
[1816] Section 135(1) of the Companies Act 2013.
[1817] Pursuant to Section 149 of the Companies Act, 2013 and Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 5(1(i)).
[1818] Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 5(1(ii)).
[1819] Companies (Corporate Social Responsibility Policy) Rules, 2014, Rule 5(1(iii)).
[1820] Section 135 (3) of the Companies Act,2013.
[1821] Section 135 (4) of the Companies Act,2013.

other activity which it thinks proper to be included within the ambit of CSR. The activities (in areas or subject, specified in Schedule VII) that can be done by the company to achieve its CSR obligations include[1822]:

(i) eradicating hunger, poverty and malnutrition, promoting health care including preventive health care and sanitation including contribution to the 'Swachh Bharat Kosh' set up by the Central Government for the promotion of sanitation and making available safe drinking water:

(ii) promoting education, including special education and employment enhancing vocation skills specially among children, women, elderly, and the differently abled and livelihood enhancement projects;

(iii) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centers and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;

(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the 'Clean Ganga fund' set up by the Central Government for rejuvenation of river Ganga;

(v) protection of national heritage, alt and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts:

vi) measures for the benefit of armed forces veterans, war widows and their dependents;

(vii) training to promote rural sports, nationally recognized sports, Paralympic sports and Olympic sports;

(viii) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the SC, ST, other backward classes, minorities and women;

[1822] Schedule VII of Companies Act, 2013.

(ix) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;

(x) rural development projects;

(xi) Slum area development.

d. PENALTY FOR CONTRAVENTION OF CSR PROVISIONS

The companies act mandates the board of directors to disclose all the relevant information about its Company's CSR policy and its implementation on an annual basis[1823]. Section 134(8) of the Act provides that if the company fails to comply with the aforementioned provision, it shall be liable to pay a fine which shall not be less than ₹ 50,000 but may extend to ₹ 25,00,000. Moreover, every defaulting officer shall be punishable with an imprisonment for a term, not more than 3 years or with a fine which shall not be less than INR 50,000 but may extend to ₹ 5,00,000 or with both.

OTHER LEGISLATION SUPPORTING CSR POLICY

Besides Companies act,2013 there are various other legislation which directly or indirectly supporting the CSR policy. It also imposes obligation o corporates to be responsible for the welfare of the society. United Nations Industrial Development Organizations explains CSR, a mode through which a company can achieves Triple Bottom Line approach (i) balance of economic, (ii) balance of environmental and (iii) balance of social imperatives, and at the same time also addresses the expectations stakeholders.

SECURITIES EXCHANGE BOARD OF INDIA (SEBI) ACT, 1992

Clause 55 in Securities Exchange Board of India (Sebi) Act, 1992 made mandatory for the top 100 listed companies (on the basis of market capitalization) to report their certain important information as a part of their business responsibility. The Business Responsibility Report (BRR) is mandatory for these companies at Bombay Stock Exchange (BSE) and National Stock Exchange (NSE). This is done so that they are not only accountable to their shareholders from the revenue perspective but also to stakeholder. Further, the adoption of responsible business practices are in the interest of society and environment which is as vital as their financial performance. MCA

[1823] Section 134(3)(O) the companies Act 2013.

(Ministry of Corporative Affairs) on July 2011 came out with the 'National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business'[1824], which provides compulsory inclusion of Business Responsibility Reports (BRR) as a part of Annual Reports of listed companies, which should be abide by the principles and guidelines and consider that public interest at large.

LABOUR LAWS

The growth of Industrial Jurisprudence (a new branch of jurisprudence) can significantly be noticed not only from increase in labour and industrial legislations but also from a judicial decision on industrial matters. Legislation in labour should be based on the principles of social justice, equity, international uniformity and national economy. It implies two things, (i) equitable distribution of profits and benefits between owner and workers. (ii) provide protection to the workers against harmful effects to their health, safety and morality. The principles of Industrial adjudication also aim at promoting social and economic justice which rests on serving the interest of society as a whole, therefore it also sub-serve the public interest. Many laws and legislations have been enacted and passed by the legislature to promote safety and security to the people of society with the objective to make industries concerned for the health of people and to establish a welfare society.

ENVIRONMENTAL LAWS

Since beginning of the industrialisation, the protection of environment has been a measure concern for the world. After the independence of India, various legislations have been framed to protect the environment. Such as Environmental protection Act 1986, Water Act 1974, Air Act 1981 etc. Moreover, it is a fundamental right of an individuals to live in a healthy environment[1825]. The need of the hour is the "Sustainable Development." and to achieve it, the protection of environment constitutes an integral part of developmental process and it cannot be left alone in isolation. Today, we are facing the problem of poverty, hunger, ill health and illiteracy and the deterioration of the ecosystem on which we depend for our well-being.. There exists a close relationship between a healthy environment and economic condition of community at large. Furthermore, the violation of

[1824] circularCIR/CFD/DIL/8/2012, dated August 13, 2012.
[1825] RLEK v. STATE,AIR 1988 SC 2187.

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anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, which has to be borne by the future generation. Therefore, it is necessary for people and industries should be aware of the adverse consequences of environmental pollution and they should protect and improve the environment and also ensure the proper compliance of anti-pollution laws.

THE COMPETITION ACT, 2002

The preamble of this act revels that the law was enacted keeping in view of the economic development that would result in removal of controls and consequent economic liberalization which required the Indian economy to allow competition in the market within the country and outside the market. The objective of the Act is to sustain free competition in the market and to protect the consumers' interest. The objective of such economic policy is to sustain competition for economic efficiency and maximization of public/consumer interest which could be ensured by free and fair competition amongst economic enterprises. The Competition Act, 2002 is a socio-economic legislation based on constitution ideology which should be liberally construed so as to advance the object of the Act and fulfils its aim.

TAXATION LAWS

Section 37 of the Income Tax, 1961, provides that while allowing deduction for business expenditure, the law takes into account the purpose for which the expenses are incurred. The Judiciary is also view that the reasonableness of any expenditure is to be considered from the viewpoint of normal man. Moreover, all the Corporate Social Responsibility expenditures which are incurred by the company during the year ,are subjected to the activities specified in Schedule VII of the Companies Act, 2013 which are required to be disclosed in the Board's Report and once these expenditure are declared as Corporate Social Responsibility expenditure then such expenditure cannot be claimed as expenditure under Section 37 of the Income Tax Act, 1961. Notably, after the proper interpretation of Section 37 of the Act, Corporate Social Responsibility expenditures are even allowed within Sections 30 to 36 of the Act, 1961. These sections provide specific deductions in respect of certain expenditure which are not expenditure in true business sense. Further, the expenditure done in accordance with the provision of Section 135 of the Act, 2013 along with Schedule VII would automatically get a deduction for such expenditure under the provision of the Income Tax Act, 1961.

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RECOMMENDATION/SUGGESTION

i. Public should be made aware about CSR policy so that CSR implementation become more effective.

ii. Appropriate step should be taken to address the issue of building effective bridges among all the stakeholder for the better implementation of the CSR policy for more effective development of society.

iii. Government to take step to cover more companies under CSR policy and should focus on rural area development.

iv. Companies should focus on the development of educational institution, health facilities and other institution for the better development of rural areas.

v. Incentives and reward should offer to private sector who perform their responsibility in a way that it helps the society at large.

CONCLUSION

The Corporate social responsibility policy in India is the mandatory activity which every corporate has to undertake which make the country, first one to have mandatory law for CSR. This policy was made to change the attitude of companies to make them more responsible for the society where they are operating so that they can give back to society what they have earned out of the resources from society. It is not only the duty of government to perform activities for upliftment, but also it also a responsibility of other institution to take such step which help in the development of the society. Many leading corporations of the world realise the importance of being associate with the society which help increasing their goodwill reputation and increasing their competitive worthiness. Some companies adopted CSR strategy for mutual and community development simultaneously. Even corporate sectors are now planning to introduce CSR in the small and medium enterprises sector so that they can increase its reach in remote areas. In India, the number of companies which carry CSR obligation has been increased from 10,418 in the year 2014-15 to 13,182 in the year 2016.The average spend by a government company is somewhere between ₹ 8-10 crore per company between 2014-15 to 2017-18 whereas the average spend by a private

company has been increased from ₹ 72 lakhs per company in 2014-15 to ₹ 95 lakhs per company in the year 2017-18.[1826] Though policy has been success but it failed on the ground that it help the firm to increase their profitability by enhancing their goodwill. It can also be tax albeit spend by the firm instead giving to government and Some of the other reason non-compliance of CSR by companies are (i) problems in identifying a suitable project, (ii) selection of suitable implementing agency, and (iii) Multi-year projects, (iv) Inability of Company to Formulate a well-conceived CSR Policy etc.[1827]At the global level, CSR has been an essential concept but in India, it needs to be taken up on a greater critical notice rather than a trifling tax reaping benefit. The amount that to be spent on CSR activities must be fixed with the help of authorities. Moreover, the activities under CSR must provide the solution for social and economic upliftment of the society.

[1826] Report of High level committee on CSR 2018.
[1827] Ibid.

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FREEDOM OF SPEECH & EXPRESSION IN THE REALM OF DIGITAL MEDIA

- SABREEN HUSSAIN

ABSTRACT

Digital Media has prevailed as the best ever invention in the last two decades and has become an important facet of each individual. Today's world is therefore a virtual world. In light of this development, it is integral to safeguard the interests of the virtual world much like the real world by providing them with all the fundamental rights, the primary one being the right to freedom of speech and expression. Comparing the status of free speech and expression between the real-time and virtual scenario; it is evident that the virtual space also acts as a suitable platform for the user to exercise his rights. Similar to the real-time scenario, the existence of free speech and its restrictions can be reflected virtually through true threats, offensive comments and defamation. But as the time passes, conflict on balancing between the free speech and its regulations is growing gravely as behind a text or sentence of a speech, there can be much more meaning along with the literal meaning of the sentences which frequently amounts to various interpretations and misunderstandings. Due to this, it makes so challenging to identify the limitation of free speech in the realm of digital media. Hence, an attempt has been made in this paper to encounter the pressing issues lying in such borderline disorder in Digital Media followed by the recent reforms in this context and moreover, necessary recommendations have been suggested to balance the equation of digital freedom.

Keywords: Digital Media, Censorship, Democracy, Free Speech, Reforms, Information.

INTRODUCTION

Freedom of speech and expression is largely understood as the idea that every person has the natural right to freely express themselves through any media and frontier without external interference, such as censorship, and without fear of reprisal, such as threats and harassments. Freedom of expression is a complex right as this freedom is not absolute and carries with it special

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duties and responsibilities.[1828] Thus, this right may be subject to certain restrictions provided by law.[1829] The internet and digital media has become a central communications tool through which individuals can exercise their right of free speech and exchange information and ideas. A growing campaign around the world has been witnessed, advocating for change, justice, equality, accountability of the powerful and respect for human rights.[1830] In such movements, the internet and digital media has often played a key role by empowering people to connect and exchange information instantly and by creating a sense of solidarity.

Laws Applicable

In the Indian Constitution, freedom of Speech and Expression include as a fundamental and inherent right of an Indian Citizen under Article 19(1)(a)[1831] though this freedom has not been guaranteed absolutely, but with a cover of reasonable restrictions. Although, along with the safeguard of fundamental rights, in India, the cyber laws like the Information Technology Act, 2000 and its amendments have been attempting to provide more restriction on free speech and expression in the digital world. This is by virtue of Section 66A[1832] of the Information Technology Act where in anyone who posted material that was grossly offensive, inconvenient, injurious, menacing in character or insulting, could be imprisoned for up to three years. This was blanket provision that provided the authorities to act arbitrarily and censor content at their discretion much to the disadvantage of its online users.[1833]

Further, the Indian Government has also asked internet companies like Google, Facebook, Microsoft, etc. to generate a framework to pre-screen the data before it goes up on the website. A huge debate broke out on the matter and it was depicted in a negative light, Kapil Sibal[1834] told

[1828]UNESCO, Freedom of Expression Toolkit: A Guide Students, 2013, 1-86, at 16, available on the Web, URL: http://unesdoc.unesco.org/images/0021/002186/218618e.pdf., accessed on 14/4/13.
[1829]Randal Marlin, Propaganda and the Ethics of Persuasion (Ontario: Broadview Press, 2002), pp. 226-227.
[1830]Justice Rajesh Tandon, "Policing the Web: Free Speech under Attack?", Lawyers Update, August 2011, also available on the Web, URL: http://lawyersupdate.co.in/LU/7/65.asp, accessed on 24/5/13.
[1831]The Constitution of India, 1950, Article 19(1)(a).
[1832]Information Technology Act, 2000, Section 66A.
[1833]Namrata Chakraborty, Human Rights and Digital Media: A Study on the Status of Free Speech in Virtual World with respect to US, UK & Indian Outlook, International Journal of Law and Legal Jurisprudence Studies, Vol. 3 (2016).
[1834]The Hindu, _Sibal warns social websites over objectionable content '(6 December 2011), < http:// www.thehindu. com /news/national/sibalwarnssocialwebsitesoverobjectionablecontent/article2690084.ece accessed on 7 June 2016.

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media that the Government was not trying to censor the freedom of speech and expression online but was merely attempting to stop offensive material from being uploaded online.[1835] The companies also informed the Government that it is would not be possible for them to fulfill these demands due the volume of user-generated content in India and that they cannot be held responsible for determining what is or is not defamatory.

Furthermore, according to the Freedom House's latest report 'Freedom on the Net, 2012', India's overall Internet Freedom Status is "Partly Free". India has secured a score of 39 on a scale from 0 (most free) to 100 (least free), which places India 20 out of the 47 countries worldwide that were included in the report.[1836] On 12 March 2012, Reporters without Borders published a report titled 'Internet Enemies Report, 2012' on the basis of the growing control over the net by Government.[1837] Report contained a list of 'Enemies of the Internet' that restrict online access and harass their netizens; and a second list of 'Countries under Surveillance' for displaying a disturbing attitude towards the Internet. Report put India in the list of 'Countries under Surveillance'. In its seventh transparency report, Internet giant Google noted that the Indian government has nearly doubled its requests to Google for removal of content in the second half of 2012 as compared to the first six months.[1838] The report, further noted that between July and December 2012, Google had received more than 2,285 government requests to delete 24,149 pieces of information. In the first half of 2012, Google received 1,811 requests to remove 18,070 pieces of information. During the same six-month period, the Indian government, both by way of court orders and by way of requests from police, requested Google to disclose user information 2,319 times over 3,467 users/accounts. Thus, the attempts to monitor and control the online content by the Government is clear and these attempts challenge the foundation of a democracy at its very core.

In light of the Indian government's draconian laws and arbitrary actions in the digital realm, a chilling effect was created over the sacred right of freedom of speech and expression. Hence, digital reforms are the need of the hour to march along with the progressive trends in today's

[1835]"Indian Government v. Social Networking Sites", available on the Web, URL: http://barandbench.com/indian_government_v_social_networking_sites.html, accessed on 30/4/12.
[1836]Freedom House, Freedom on the Net, 2012, available on the Web, URL: http://www.freedomhouse.org/sites/default/files/India%202012.pdf, accessed on 24/5/13.
[1837]Reporters without Borders, Internet Enemies Report, 2012, available on the Web, URL: http://march12.rsf.org/i/Report_EnemiesoftheInternet_2012.pdf, accessed on 24/5/13.
[1838]Google Seventh Transparency Report can be accessed online, URL: http://www.google.com/transparencyreport/, accessed on 01/5/13.

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technology savvy world. There can be no democratic participation in decision making without complete transparency and sharing of information. Social media has the potential to reach the masses and distribute information, which in turn has resulted in everyone acting as a watchdog, scrutinizing the powerful and exposing mismanagement and corruption.[1839]

The Supreme Court in what was hailed as a landmark judgement in the protection of freedom and speech and expression struck down the draconian provision of Section 66A for being violative of the constitutionally guaranteed right of free speech and expression, in the case of *Shreya Singhal v. Union of India*[1840]. Besides championing free speech in the digital world, the Supreme Court, in Shreya Singhal, released content hosting platforms like search engines and social media websites from constantly monitoring their platforms for illegal content, enhancing existing safe-harbor protection.[1841] The court made it clear that only authorized government agencies and the judiciary could legitimately request internet platforms to take down content.[1842] As content hosting platforms are the gatekeepers of expression in the virtual world, this was a turning point in India's online free speech regime.

In the *Secretary, Ministry of Information and Broadcasting, Government of India and others v. Cricket Association of Bengal*[1843], the Supreme Court held that for ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an aware citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly- whether the monopoly is of the State or any other individual, group or organization.[1844]

CRITICAL ANALYSIS

[1839]Bal Mukund Vyas (2008), "Sharing of Information with citizens", All India Reporter (Journal Section), 2008, pp. 171-176, at 176.
[1840]Shreya Singhal v. Union of India, AIR 2015 SC 1523.
[1841]*Ibid.*
[1842]*Ibid.*
[1843]Secretary, Ministry of Information and Broadcasting, Government of India and others v. Cricket Association of Bengal, AIR 1995 SC 1236.
[1844]"Censoring the Internet", available on the Web, URL: http://barandbench.com/censoring_the_internet.html, accessed on 30/4/13.

APPLICATION

The digital reforms have surely put India on the map as one of the pioneers of free speech. There have been numerous success stories thereinafter which have only gone to prove that India allows its citizens to dissent using their voices. There are two good examples in furtherance of the same where digital media has been the heart and soul of the movement:

1) #MeToo Movement

Beyond exposing India's sexual harassment problems, the #MeToo campaign highlights the power of social media in mobilizing people and generating social change.[1845] Access to digital technology has given women in India a way to fight gender injustice. This movement forms the best example yet of how social media can turn simple ideas and concepts into infectious ideas that are impossible to get out of your head.[1846] The usage of social media formed a platform to express solidarity with victims of sexual harassment and abuse, as well as an easy way to comment on the remarkable power imbalance that still exists in Indian society between men and women.[1847] The world has changed forever as the result of a single tweet, highlighting the power of social media.

2) Anti-Citizen Amendment Act Movement

Over the course of the movement, the youth has witnessed a solidarity circle to help those in need through digital media. All the brutalities that took place at Jamia, JNU, AMU and all over the country is present on social media. More so, it is now present as evidence of what happened. The younger generations' access to the world in a way that didn't exist prior 2010 has made this possible. Knowledge is thus, now more than ever a power for the people to shape society. What social media has done in the protest against CAA and NRC is to combine the people of India. Various social media handles update daily information about protests of every corner of the country. Poetry, music, songs, videos of protests are viral on Internet. This emergence of a public sphere that reaches to those in times of need, that pass on information to everyone in times of

[1845]Khomami N, #MeToo: how a hashtag became a rallying cry against sexual harassment, The Guardian. October 21 (2017) https://www.theguardian.com/world/2017/oct/20/womenworldwide-use-hashtag-metoo-against-sexual-harassment.

[1846]Wexler, Lesley, Jennifer K. Robbennolt, and Colleen Murphy. "# MeToo, Time's up, and Theories of Justice." *U. Ill. L. Rev.* (2019): 45.

[1847]Lee, Bun-Hee. "# Me Too Movement; It Is Time That We All Act and Participate in Transformation." *Psychiatry investigation* 15, no. 5 (2018): 433-433.

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emergency and that keeps an eye on their mobile phones for every bit of information, that uploads protest videos and images makes this a defining moment.[1848]

With all the strides digital media is making in the application of freedom of speech and expression, the hindrances along the way cannot be ignored as overcoming these is the only means of creating a truly 'Digital Free India'. The biggest hindrance that was witnessed in India and condemned by the population at large was:

1) **Internet Shutdown in Kashmir**

The internet shutdown that began on 5 August, 2019 has been the longest to date in India, and engendered a number of serious violations of the right to freedom of expression.[1849] During the period from 1 January to 4 August 2019, the Indian government blockaded the internet in Jammu & Kashmir 54 times. In addition to the internet being blocked, both landline and mobile phone connections were also disconnected.[1850] The shutdown is the longest ever imposed in a democracy and has seriously curtailed the basic rights of its citizens by blocking them out from the rest of the world and covering up multiple human right violations taking place. However, the remarkable thing to note is that under these circumstances, the rest of the country came together in the digital world to support the rights of their fellow citizens and became the dissenting voice in uncertain times.

However, the Supreme Court once again recognized these violations and ruled that the freedom of speech and expression and the right to carry on any trade or business using the internet, is constitutionally protected in the case of *Anuradha Bhasin v. Union of India*[1851]. The apex court also directed the Jammu & Kashmir authorities to immediately restore internet services in all institutions providing essential services, including hospitals and banks and stated that the power

[1848]Majumdar, Meghna. "How Art on Social Media Became the Face of Anti-CAA Protests." *The Hindu*, December 23, 2019.
[1849]APDP and JKCCS, Annual Review of Human Rights situation in Indian administered Jammu and Kashmir (January to December 2019), p.100. Available at: http://jkccs.net/wp-content/uploads/2019/12/2019-Annual-Human-Rights-Review.pdf.
[1850]FIDH, Update on human rights violations in Indian-administered Jammu & Kashmir since August 2019, 26 September 2019, https://www.fidh.org/IMG/pdf/20190926_india_j_k_bp_en.pdf.
[1851]Anuradha Bhasin v. Union of India, 2019 SCC Online SC 1725.

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under Section 144 of the Criminal Procedure Code cannot be used to suppress legitimate expression of opinion or grievance or exercise of any democratic rights.[1852]

There is constant conflict with respect to application of the right of freedom of speech and expression in the realm of digital media, however, the Judiciary supports free speech and through its numerous interpretations has always a catalyst for the same.

Limitations

It is also vital to look at the other side of the coin. It is true that social media is a platform to voice one's opinions and thoughts on any subject. There have been instances when social media has been lauded for playing a major role in pushing forward multiple movements. However, if the idea or content posted and disseminated is capable of igniting ill-feelings and violence among people, it becomes exploitation of the freedom of expression rather than exercising it. In such cases, social media does not actually play the role of a liberator as it ought to, but instead, causes public menace.[1853]

There have also been instances when the government has had to censor social media content to ensure public harmony. In 2012, Assamese migrants were brutally attacked by Muslim groups during a peaceful protest at Azad Maidan in Mumbai against the then ongoing Assam riots. This was followed by rumors that the entire Muslim population of the country was turning against the Assamese migrants (the Bodo community) and that Muslims in Assam will be evicted out of the state. At that time, social media was vital in acting as a vehicle for instantly disseminating these inflammatory messages/rumors across large distances. What followed were Assamese migrants fleeing to their homeland from Mumbai and a lot of brutal attacks on Muslims in Assam. The more people read such rumors, the more they started believing them to be true. The absence of self-verification of facts before posting content online is a major reason for this. The situation did not take too long to spiral out of control as was obvious from all the attacks and widespread riots that followed.[1854] This incident is a classic example of why censorship sometimes becomes crucial and

[1852] *Ibid.*
[1853] Max Fisher (2012, August 22). When Is Government Web Censorship Justified? An Indian Horror Story. Retrieved from: http://www.theatlantic.com/international/archive/2012/08/when-is-government-webcensorship-justified-an-indian-horror-story/261396/
[1854] Greeshma Govindarajan, & Nanditha Ravindar, Freedom of Expression On Social Media: Myth or Reality, Global Media Journal Vol. 7 (2016).

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almost mandatory. Rumors, hate speeches, anti-national remarks are merely some instances of content that could disrupt the harmony and unity in any country. Taking all of this into account, it is difficult for any government to completely avoid censoring any content online. After all, governments are the public bodies who are responsible for the law and order situation of their countries.

Suggestions and Recommendations

Freedom of Speech and Expression is the heart and soul of our democracy. Without this right the Indian democracy would be at stake. However, some sort of restrictions in terms of such absolute freedom should be existent in order to protect self-personality and creativity from hampering by other individuals. A few recommendations to ensure that such a balance is maintained are as follows:

1. Firstly, a thorough investigation must be conducted as to whether the statements are false and harmful or not, before prosecuting any citizen who has expressed an opinion online. A high threshold must be created before finding the content harmful.
2. Secondly, when a request is made for shutdown or blocking any content or material published on Internet, the entire material should be subjected to revision to ensure that blocking the material would not infringe digital freedom and public interest.
3. Thirdly, there should be no legislations or policies adopted by any Government in any Nation which curbs the area of individual freedom of speech and expression.
4. Fourthly, every citizen must be diligent in checking the terms and conditions of any social media platform before signing up. Further, every citizen must ensure that the content posted by them does not hurt the sentiments of any other community or spread hatred against a particular community.
5. Fifthly, no action must be taken by police officers while receiving complaints regarding blocking contents or taking down any website, unless they get any court order.
6. Lastly, a specific legislation is desirable to regulate digital media which lay down the norms acceptable as opposed to the current Information Technology Act which places immense

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power in the hands of the Government. This must be implemented at the hands of a Special Committee well equipped to do the same.

Conclusion

It is clearly evident that digital media is a very powerful weapon to exercise one's right of freedom of speech and expression. However, it is also been increasingly used for illegal acts which has given force to the Government's attempts at censoring social media. Where on the one hand, the misuse of digital media entails the need for legal censorship, on the other hand, there are legitimate fears of violation of civil rights of people as an inevitable consequence of censorship. Thus, a balance must be maintained of the two sides of the coin to ensure that there is no violation of rights. On an end note, it is imperative to note that ultimately it is the duty of all the users of realm of digital media to ensure that their actions are not affecting the rights of other individuals. Each citizen must act responsibly and sensibly before posting content and be mindful of the consequences their actions have.

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REMOVAL OF STATE GOVERNOR'S CASE

BP SINGHAL V. UNION OF INDIA

- **ABHIJIT BANSAL**

OVERVIEW

B.P. Singhal vs. Union of India[1855] is one of the important case related to the state governor's removal. As per Article 153 of the Indian Constitution, it is stated that there needs to be a governor in the each state which will be representing the state at the central level. This case basically deals with a interpretation of term called "Doctrine of Pleasure". This Case is heard under 5-judge constitution bench which helps to understand what the doctrine of pleasure really means and how it should take into consideration and whether there is limitation on removal of Governor or not, whether the President can act in an arbitrary manner or not and whether there can be a judicial review to it. These are the entire questions which have been answered in this case.

Facts of the case

This case is about the governors of four states of UP, Haryana, Goa and Gujrat who were removed by the newly elected Central Govt. in 2004 July, post 14th Lok Sabha Elections on the instruction given by the council of minister. It has been stated in case that if President appoints the governor and the governor is holding the office during the tenure of President it doesn't make him servant or employee or maybe an angent of such government and his autonomous constitutional 0ffice is n0t submissive to the government, and also hee can't be made accountable to them for the way in which he brings out his duties and function as Governor .It was further thereby argued that a governor must normally be allowed to remain in office for a tenure of five years and even if he embraces the office during the pleasure of the President, he can be eliminated before the end of five years, only in rare and extraordinary situations for valid and compelling reasons and by following certain norms . But this was not done in this case as these Governors were removed without any reasonable grounds, there decision was arbitrary, capricious or unreasonable.

[1855] (2010)6SCC331

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Hence, the petitioner has filed a case against the government in order to ask them that why they have removed them without any reasonable reasons and hence petitioner has pursued-

(a) A path to the Union of India to present the entire files, documents and facts which shaped the foundation of the order dated 2.7.2004 of the President of India;[1856]

(b) A writ of certiorari, quashing the elimination of the four Governors;

(c) A writ of mandamus to respondents to permit the four Governors to finish their pending tenure of five years.

Issues raised in the case

(i) " Maintainability of the petition"

(ii) "What is the extent of "doctrine of pleasure"?"

(iii) "What is the position of a Governor under the Constitution"?

(iv) "Whether there are any express or implied limitations/restrictions upon the power under Article 156(1) of the Constitution of India?"

(v) "Whether the removal of Governors in exercise of the doctrine of pleasure is open to judicial review"?

JUDGEMENT

1.Whether such petition is maintainable?

The Petitioner had no such right to file a petition in respect to prayers demanding release for advantage of seperate Governors but, with respect to general question of public significance as to scope of Article 156 (1) and limitations on doctrine of pleasure, the court said that Petitioner had an eduqate right to file such a petition.

2 Doctrine of Pleasure:–

The doctrine as originally considered in England acted as a prerogative control which was unfettered. Be that as it may, where rule of law lies, there is no unfettered discretion or inexplicable

[1856] www.sci.gov.in/judgement

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action. The intensity of obligation for purpose might change, the level of inspection amidst judicial review might shift yet the obligation for reasons survives. Therefore once the constitution states that certain offices would be held among the pleasure of the President, without any express limitation or confinement, it must however principally be perused as subject of the "fundamentals of constitutionalism". So by this way in a constitutional setup, when an office is held amongst the pleasure of a authority, and also if no detention are set on the "at pleasure doctrine", it infers that the incharge or the holder of the office maybe evacuated by the authority at whose pleasure he holds office, without allocating any reason. However this doctrine isn't a license to perform with unfettered discretion to perform arbitrarily, unconventionally or thoughtlessly.

3. Governor's Position under the Indian Constitution

The court placing its reliance in the cases of state of Rajasthan vs. Union of India[1857], state of Karnataka vs. Union of India[1858] and Rameshwar Prasad(VI) vs. Union of India[1859] held that the governors role in constitution is evidently clear and tolerates very partial political over tones. There has been no question by union government having Governors who are in sync with such kind of order and policies. Governors are not expected or obligatory to apply the policies of general order , because once a Governor is appointed, he owes his commitment and devotion only to constitution and not to political party . Therefore respondent's assertion that a Governor must be in synchronisation to the policies of union government, was rejected. The Hon'ble court quoted the statement of Dr. B. R. Ambedkar "if the constitution remains in principal the same way as we intend that it should be, that the Governor should be purely constitutional Governor, with no power of interference in the administration of the province"[1860].

4. Whether Power under Article 156(1) is in regard to any implied or express restrictions

The court already held that Article 156(3) is not meant to put a restraint on the to remove the Governor at any time under 156(1) That the sanctions made by different commissions, howsoever

[1857] 1977(3) SCC 592
[1858] 1977(4) SCC 608
[1859] 2006(2) SCC 1
[1860] B.P. Singhal v. Union of India AIR 2010 SCC 331

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rational or commendable consideration and acceptance, remain advices. They can not supersede the provisions of the constitution as they stand, nor can help in understanding Article 156. Further , although there is a agreement among the parties to the level that a Governor can be removed only for lawful cause, though, the respondent's contention that Governor should thereby in syncronization to the ideas of the union government was forbidden by the court.

5. **Does The removal of Governors in lieu of the doctrine of pleasure is open to judicial review**

There is a difference in-between the need for a cause for the removal and the need to reveal the reason for removal. While during the removal of the governor president is not required to justify the cause or reason of such removal, it is implied that a reason must be existence and if court doesn't continue on that principle, it would refer that the President on the guidance of the council of ministers, might create any mandate which might be clearly illogical or unsual or malafide. Thus some valid reason must persist for the elimination or commonly known as the removal. Thereby respondent's dispute or the contention that Article 156 is not justiciable in court of law isn't correct. In relation to Article 74(2) reliance was placed in the case of SR Bomai vs. Union of India[1861].Wherein it was stated that Article 74(2) bars any examination on the advice that was given by council of ministers to the President , but doesn't bar the study of material on the base of which the President had made such order and doesn't bar the court from calling on the union of India to reveal to the court the material on which the President has formed the mandatory satisfaction. The power within Article 74(2) will not derive in the manner of the court. Although the adequancy of the material couldn't be asked, the legitimacy and implication drawned from such material is exposed to judicial review. Thus the court held that it had a power over the judicial review however the court acknowledged this argument that no cause need to be given and no reason need to be shown and no notice need to be delivered before removal of the governor.

AUTHORS REMARKS & Case Comments

After viewing the rationale of the court, one may agree with the reasoning that the removal of the Governor should be for compelling causes and there shouldn't be any whimsical or capricious ground , however one may take deviation from the same, where the court stated that opportunity

[1861] 1994(3)SCC1

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of being heard will not be given to Governor while removing him. It is agreed that the doctrine of fair hearing is not itself absolute in nature and subject to some restrictions. However, it is to be noted that these restrictions should be fair, just and reasonable. As it was stated by the court in the present case itself that "it is no doubt true that the Governor is appointed by the President which means in effect and substance the Govt. of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of Govt. of India"[1862]. Thus if the Governor post is so independent, then why the court in the present case, did not go for the purposive construction while interpreting the provisions of the constitution, as it did in the Supreme Court Advocate on record vs. UOI[1863] and third judge case[1864] and include the applicability of the rule of fair hearing for the removal of Governors too. The court should have looked into the practicality of this grievance instead of basing of opinion in distinction between the need for a cause for the removal, and the necessity to reveal the cause for removal because if there is no disclosure of the reason, there is no purpose of the need of the reason, as, justice must not only be done but noticeably and unquestionably be seem to be done. Further the judgement doesn't deliver any anticipatory release but only declares the authority of the court to look in the matter post-facto if aggrieved were to approach the court. Also from the author's point of view in the present case neither the petitioner nor the court took into consideration of the violation of the fundamental rights of the Governors. No contention for the same, as removal being violation of right of right of reputation or right to equality, was raised by any one.

[1862] B.P. Singhal v. Union of India AIR 2010 SCC 331
[1863] (1993)4 SCC441
[1864] In Re Presidential Reference, AIR 1999

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CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS ACT)

- ANNAPOORNA R., APURB VIVEK EKKA, VIVEK VILAS SABLE

ABSTRACT

The intersex community is the most ignored and vulnerable community in India. People belonging in the intersex community are considered as transgender in India. The term transgender is an umbrella term that includes trans-men, trans-women, intersex, and many more. Intersex people have no proper identity in our nation, and they are continually seeking for it. The government has enacted The Transgender Persons (Protection of Rights) Act, 2019, for protecting the fundamental rights of transgender persons. The purpose behind this research is to highlight problems faced by the intersex community in their daily lives and conduct a critical analysis of this act, find out its loopholes and find out various reasons why the intersex community is calling this act as the murderer of the gender justice. This paper is focused on intersex people because they are not getting any major benefits from this act, and research data is collected via various interviews and forums of people belonging to the intersex community.

Keywords: Intersex, Hijra, Transgender, Gender justice, The Transgender Persons (Protection of Rights) Act, reservation for intersex community, population of intersex people

INTRODUCTION

Waking up in the morning, having breakfast and going to college or work seems like a very normal and common routine of any individual, but for some people, it is not even possible to go to schools or colleges, and when it comes to the office they can't even have a dream of going to the office, you as a reader might be thinking that it sounds exaggerated statement right? But it is true, and it is happening in India with millions of intersex people. For many intersex people, it is just a dream to be a part of society, they are not even asking for any other fundamental human rights, they are just asking society to accept them and treat them as a part of society, but this harsh Indian culture

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does not allow it, and that is the reason why many intersex children, teenagers, and adults are forced to move towards begging and prostitution for making their daily earnings.

According to Article 14 and Article 15 of The Indian Constitution prohibits discrimination based on the grounds of religion, race, caste, sex, or place of birth. India has done many great things after getting independence, but it took around 66 years to recognize intersex people as the third gender legally, and they also have the right to get all the rights provided by The Constitution of India. In the case of NALSA V Union of India, 2014, a landmark judgement was given. For the first time in Indian society, various civil and political rights were assured to the transgender community of India[1865]. In this judgment Supreme Court directed the central government of India to treat transgender community as socially and economically backward classes and provide them opportunities to grow with the help of reservation in education, employment, etc., also supreme court directed central and state governments to run awareness programs for tackling the stigma against the transgender community in the Indian society, the supreme court also directed central and state governments for making a legal recognition of "third gender" in all documents and frame schemes for the development of the transgender community. This judgment brought a ray of hope for the development of a transgender community. However, according to many intersex people, everything was not followed, and they are still waiting for the development schemes and other promises made in that judgement.

Analysis of Transgender recognition with the help of AIDS Report of India

The National Aids Control Organization[1866] (NACO) has published several reports over the year; there first report published was Annual Report 2008 - 09[1867]. On 31st March 2009, Various State AIDS control societies and partners targeted about 1,271 Intervention projects and covered 77% are Men who have Sex with Men (MSM) and Transgender population.

Annual Report 2009-10[1868], 1,290 Intervention Project numbered and out of which 78% are Men who have Sex with Men (MSM) and Transgender. In Both Annual Report of 2008 - 09 and 2009

[1865] National Legal Ser.Auth vs Union Of India & Ors on 15 April, 2014
[1866] Naco.gov.in. n.d. Annual Reports | National AIDS Control Organization | Mohfw | Goi. [online] Available at: <http://naco.gov.in/documents/annual-reports>
[1867] Naco.gov.in. 2011. Annual Report 2008-09. [online] Available at: <http://naco.gov.in/sites/default/files/Annual_Report_NACO_2008-09.pdf>.
[1868] Naco.gov.in. 2011. NACO Annual Report 2009-10 English. [online] Available at: <http://naco.gov.in/sites/default/files/NACO_AR_English%202009-10_NEW.pdf>.

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- 10, there was a significant amount of rising, but still, there was no report on any other form of survey (i,e; Sampling Methodology, Aide Memoire, etc.) and free antiretroviral treatment for Transgender.

Annual Report 2010 - 11[1869], National Aids Control Population (NACP - III) intervention shows MSM and Transgender were higher than other groups and the numbers at maximum risk as 3.51 lakh, the estimation in 2009 revised their number to 4.12 lakh. The report said that they had covered 2.85 lakh (69%) MSM and Transgender with the help of 37 such Targeted Intervention Project by Community-Based Organization (CBOs). There was an initiative started by NACO to develop the Operational Guidelines for Transgender Intervention[1870] for CBOs/NGOs and SACS/TSU, which was put forward on 15th September 2014. For Advance HIV Infection ART treatment, the eligible number of Transsexual and Transgender were below 1000, from the report it said for the month of (April - June 2010) numbered 576 (July - September 2010) numbered 605 and (October - December) numbered 668 which was far more less than the target. From this year NACO and Ministry of Health and Family Welfare (MoHFW) started distributing free condoms to State AIDS Control Society (SACS) and NGOs for the Transgender community. The India HIV/AIDS alliance had started supporting the prevention program for MSM and Transgender community under Global Fund for Transgender Intervention.

Annual Report 2011 - 12[1871], Around 4.27 lakh population has been estimated of High risk in (MSM) and Transgender, and with the help of Target Intervention Project, 2.74 lakh (64%) had been recovered from the service. However, still, the Targeted Intervention Project by CBOs sticks with 37 in number even though the High-risk population intact the same as the previous years. But for the prevention programs that have been supported last year, it came out to be promising as they collaborated with Naz Foundation International (NFI). Even this year the eligibility for Advance HIV Treatment for Transgender remains the lowest and to the addition data of (July - September 2011) was missing and only 2 quarters were done from (April - June 2011) numbered 1,204 and

[1869] Naco.gov.in. 2011. NACO Annual Report 2011. [online] Available at: <http://naco.gov.in/sites/default/files/NACO%20Annual%20Report%202010-11.pdf>.
[1870] Naco.gov.in. 2015. Operational Guidelines For Implementing Targeted Interventions Among Hijras And Transgender People In India. [online] Available at: <http://naco.gov.in/sites/default/files/TG-%20OG%20%28new%29.pdf>
[1871] Naco.gov.in. 2012. NACO Annual Report 2011-12 English. [online] Available at: <http://naco.gov.in/sites/default/files/NACO_AR_Eng%202011-12.pdf>.

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(October - December) numbered 829. For the very First time on 5th May 2011, a draft version 1.0 has been made by NACO, NACP IV working group on Transgender/Hijra community[1872], in which the study shows the primary concern and strategies to cure the epidemic situation.

Annual Report 2012 - 13[1873], About 4.12 lakh Country-level estimation of MSM and Transgender population was recorded via Targeted Intervention project where 2.91 lakh (70.6%) were covered with the services through 201 Target Intervention and in which 37 Targeted Intervention which is done by CBOs. In this report the revolutionary change has been happened and it is that the Hijras and Transgender community had been recognised and will be separated from the rubric of 'MSM' group. That time there was no national level survey has been done to estimate the size of population of Transgender community. So, NACO comes up with a solution to map Hijras-Transgenders community with the help of the Department of Aids Control (DAC) and United Nations Development Programme (UNDP) also Information, Education and Communication (IEC) have been build to give to the specific need for this population. As a result, 20 Targeted Intervention assigned to work exclusively with the Transgender/Hijra Population by December 2012.

Annual Report 2013 - 14[1874], the population mapping estimated around 70,000 Transgender/Hijra and 13,200 were identified in seven states (Gujarat, Delhi, Karnataka, Maharashtra, Tamil Nadu, Uttar Pradesh and West Bengal) and covered under the program. In (NACP - IV[1875]), DAC has prioritized working with the Transgender/Hijra community with 22 Targeted Interventions, which can be increased based on the mapping data.

Annual Report 2014 - 15[1876], About 70,000 Transgender estimated out of which 24,000 covered which makes 34.29%. Major things like Clinic visits, HIV test at ICTC's, etc. was concerned seriously.

Importance of the Transgender Persons (Protection of Rights Act), 2019

[1872] Naco.gov.in. 2011. Transgender – Hijra Strategy | Draft Version: 1.0. [online] Available at: <http://naco.gov.in/sites/default/files/4.%20TG_paper_NACO%20shortversion.pdf>.
[1873] Naco.gov.in. 2013. Annual Report 2012-13 English. [online] Available at: <http://naco.gov.in/sites/default/files/Annual%20report%202012-13_English.pdf>.
[1874] Naco.gov.in. 2014. Annual Report 2013-14 English. [online] Available at: <http://naco.gov.in/sites/default/files/NACO_English%202013-14.pdf>.
[1875] Naco.gov.in. 2015. NACP-IV Components | National AIDS Control Organization | Mohfw | Goi. [online] Available at: <http://naco.gov.in/nacp-iv-components>.
[1876] Naco.gov.in. 2020. Annual Report NACO 2015-16 English. [online] Available at: <http://naco.gov.in/sites/default/files/annual_report%20_NACO_2014-15_0.pdf>.

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In the year 2019, a new ray of hope came again, The Transgender Persons (Protection of Rights Act) was passed on 5th December 2019, the heading of this act says that "An Act to provide for the protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto"[1877] it sounds nice, at first, this act seems like a shield against the violence, crimes, discrimination, etc. faced by the transgender community and a boost for the transgender community which will help them to grow economically and socially, a shield which will protect them from all the bad elements of the society. You might be thinking it is a good step for the development of the transgender community, but no one from the transgender community is happy with the new act. It has many flaws, and intersex people are calling this act as an eraser, which is made for erasing their identity.

What is wrong with the Transgender Persons (Protection of Rights Act), 2019?

The term intersex defined and grouped with the term transgender.

According to the Government of India, this bill focuses on many important things related to transgender community reorganization of the identity of transgender persons and to gives them the right to carry self-perceived identity[1878]. Section 2(k) has defined the "transgender person" it says "a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such social-cultural identities as kinner, hijra, aravani and jogta."[1879], the reason for which intersex people are against this act lies in the definition of an intersex person. The definition of an intersex person is "describing or relating to a person or animal that has both male and female sex organs or other sexual characteristics,"[1880] and the definition of a transgender person is "describing or relating to people whose sense of gender identity does not match their biological sex or does not easily fit in with the usual division between male and

[1877] Heading Section of The Transgender Persons (Protection Of Rights) Act, 2019
[1878] Pib.gov.in. 2019. Transgender Persons (Protection Of Rights) Bill 2019 Passed By Parliament. [online] Available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=195089>
[1879] Section 2(k) of The Transgender Persons (Protection Of Rights) Act, 2019
[1880] Oxfordlearnersdictionaries.com. Intersex_1 Adjective - Definition, Pictures, Pronunciation And Usage Notes | Oxford Advanced Learner's Dictionary At Oxfordlearnersdictionaries.Com. [online] Available at: <https://www.oxfordlearnersdictionaries.com/definition/english/intersex_1?q=intersex>.

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female"[1881] if we look at these two definitions we can see that intersex person is totally different from a transgender person, so, on the one hand, this act claims that it is giving identity to the transgender person, but on the other hand it is erasing the identity of intersex people and this is the reason transgender activist Grace Banu has described this act as "murderer of gender justice."[1882]

Right to residence with parents

Many authors have written many books based on the topic "Family." Whenever you get into trouble, you seek help, emotional support from your family, but what will happen if the person who is troubling you is your own family, then where you will go to seek help or seek emotional support? Section 12 of The Transgender Persons (Protection Of Rights) Act, 2019, talks about the residence rights of transgender people. It says that every transgender person will have the right to reside with family members[1883]; also, it is one of the major provisions provided in this act. But in reality, many teenagers, children as well as adults are forced to leave their homes due to disrespect given to them by their family members and society just because they are born intersex, in many cases parents abandons their intersex child or sometimes intersex children are sold to the intersex community for money by their parents.

Sometimes parents force sex correction surgeries on the intersex child. Research suggests that these kinds of surgeries cause long term mental and physical damage. This act gives intersex people the right to live in the residence of their family, but it does not provide any strict punishments for the family members or society for humiliating or discriminating against that intersex person. The State of Tamil Nadu has set a good ray of hope and example, it has banned the forced sex correction surgeries of intersex children in the entire state, and it is the only state which has taken this step towards protecting the identity of an individual intersex child[1884]. Indian Government should promote awareness about the problems faced by the intersex community and must ban these kinds of sex correction surgeries on children in the entire nation. Also, according

[1881] Oxfordlearnersdictionaries.com. 2020. Transgender Adjective - Definition, Pictures, Pronunciation And Usage Notes | Oxford Advanced Learner's Dictionary At Oxfordlearnersdictionaries.Com. [online] Available at: <https://www.oxfordlearnersdictionaries.com/definition/english/transgender>.
[1882] Pathak, S., 2019. India Has Passed a Trans Rights Bill, Why Are Trans Activist Protesting Against It. [online] Npr.org. Available at: <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it>.
[1883] Section 12(2)(a) of The Transgender Persons (Protection Of Rights) Act, 2019
[1884] Bureau, M., 2019. Indian State Bans Unnecessary Surgery On Intersex Babies. [online] Medicaldialogues.in. Available at: <https://medicaldialogues.in/indian-state-bans-unnecessary-surgery-on-intersex-babies>.

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to Dr. Shaibya Saldanha complications of intersex people are more social than medical[1885]. Juvenile Justice (Care and Protection of Children) Act, 2015, also has no provision for the protection of an intersex child. By looking at the current situation of the intersex community, we can say that our Government is not armed with regulations that will help to protect and provide fundamental human rights to the intersex community. The Government of India should establish programs that will help parents to understand and accept their intersex children.

Crime against intersex community

Intersex community is the most vulnerable community when it comes to community-based crimes; according to many intersex people, police also do not take crime against intersex people seriously. Now, this act has arrived to protect the intersex people. Section 18 talks about many promising things to protect the fundamental rights of transgender persons. Punishment for the crime against any transgender person is imprisonment for a minimum of 6 months, which can be extended up to 2 years[1886]. But key thing to notice here is that punishment for all kind of offenses such as sexual abuse, forcing a transgender person to leave the village or house, harming a transgender person, injuring their health or abusing a transgender person physically or mentally is same, which makes this community more and more vulnerable. The punishment for sexually abusing a woman or child can be life imprisonment or, in some cases, death also, but for similar crimes against the transgender people, the punishment is less, so it shows that lives of transgender people are dispensable in the eyes Indian legal system[1887].

Also, in the year 2011, The Karnataka Police Act, 1963, was amended, and a new section 36A was added to the act. Basically section 36A gives Karnataka state's police authority to control all undesirable activities of intersex people in any area of Karnataka State. This section instructs police to prepare and maintain a register for keeping track of all intersex people and their place of residence who are suspects of kidnapping boys and other objectionable activities. This amendment is only promoting stigma and fear against the intersex people, also this amendment makes

[1885] hardships, rights, transgenders, Jogappas, list, mile, Coronavirus live updates: India's tally surges to 31, 5., excellence, 29..., India... and reall, 2019. Male? Female? Neither? Both?. [online] Deccan Herald. Available at: <https://www.deccanherald.com/metrolife/metrolife-your-bond-with-bengaluru/male-female-neither-both-728347.html>.

[1886] Section 18 of The Transgender Persons (Protection Of Rights) Act, 2019

[1887] Pathak, S., 2019. NPR Choice Page. [online] Npr.org. Available at: <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it>.

community of intersex people more vulnerable because it gives power to police to put any intersex person behind the bars on the basis of suspicion[1888]. The government should implement some strict policies for protecting the people belonging to the intersex community as well as people belonging to the transgender community. If we search for the crimes done by intersex people, we can find many crimes, but there is no record of crimes that were done against the people belonging to the intersex community as well as people belonging to the transgender community. The government should also keep track of crime against the people belonging to the intersex community.

Reservation for Intersex Community

According to census 2011, India has 4,87,803 transgender (intersex) people, and literacy rate is around 56%, which is very low if we look at the number of people in the community[1889]. In the year 2014 Supreme Court has already given people belonging to the intersex community all the rights which a human being has; also Supreme Court has directed the central as well as state government to make reservations for the people belonging in the intersex community in education as well as employment. In the year 2018, a very amusing incident happened where the Kerala State Government hired more than 20 intersex people in the Kochi Metro project, the intersex people were hired according to their qualification for suitable jobs[1890]. Kerala Government has welcomed intersex people in government jobs, which proves that there is equal opportunity for each and every gender, but the sad thing is not many states are things for helping intersex people to get jobs or education. The Transgender Persons (Protection Of Rights) Act, 2019 does not have any strict provision where it makes central and state governments to provide reservation for intersex people. It is an unfortunate thing that this is the bill that does not have any provisions; even after Supreme Court has instructed to provide reservations for them, no clause of reservation has been added to this act.

Welfare Board

[1888] Narrain, S., 2013. Policing Hijras. [online] Infochangeindia.org. Available at: <http://www.infochangeindia.org/agenda-issues/access-to-justice/9363-policing-hijras.html>.
[1889] Census2011.co.in. 2011. Transgender/Others - Census 2011 India. [online] Available at: <https://www.census2011.co.in/transgender.php>.
[1890] CK, V., 2018. Nine Months Later, Transgenders Employed At Kochi Metro Say Things Are Moving On The Right Track. [online] YourStory.com. Available at: <https://yourstory.com/2018/01/nine-months-later-transgenders-employed-at-kochi-metro-say-things-are-moving-on-the-right-track>.

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Section 8 of The Transgender Persons (Protection Of Rights) Act, 2019 says that "The appropriate Government shall formulate welfare schemes and programs which are transgender sensitive, non-stigmatizing and non-discriminator,"[1891] till now very state governments have taken steps towards achieving this goal, the leader in making policies dedicated towards the growth and development and full participation of people from the intersex community in the society is Kerala Government. Kerala Government has created its STATE POLICY FOR TRANSGENDERS IN KERALA, 2015[1892]. In February 2019, Gujarat State also formed its own Transgender Welfare Board, and the purpose of establishment is to provide intersex people access to housing, medical care, education, and employment[1893]. Also since the year, 2014 intersex community was asking for the establishment of a welfare board for transgender in Maharashtra, in the year 2018 Maharashtra state finally create a board but did not appoint any members to it, but after many delays now in the month of march 2020 Maharashtra state has assigned Rs.5 crore for the board[1894].

A key thing to notice here is that very few states are taking an interest in the development of people belonging to the intersex community. Even after Supreme Court's instructions, not many states have established welfare boards for the intersex people; also, another important thing to notice is that no state has published the output of their welfare policies, which are created for the development of the intersex community is. Indian government must need to establish a strict system of checks and balances for the development of the intersex community. On paper, it looks intersex community is in an excellent state, but in the actual situation, it is opposite, the intersex community has become more and more vulnerable in recent years.

Certificate of Identity

According to section 5 of The Transgender Persons (Protection Of Rights) Act, 2019 an intersex/transgender person can make an application for the certificate of their gender identity to

[1891] Section 8(3) of The Transgender Persons (Protection Of Rights) Act, 2019
[1892] Kerala.gov.in. 2015. [online] Available at: <https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015>.
[1893] Unaids.org. 2019. State Of Gujarat Establishes Transgender Welfare Board. [online] Available at: <https://www.unaids.org/en/resources/presscentre/featurestories/2019/february/20190226_gujarat>.
[1894] News, C. and News, M., 2020. Maharashtra: In A First, Rs 5 Crore For Transgender Welfare Board | Mumbai News - Times Of India. [online] The Times of India. Available at: <https://timesofindia.indiatimes.com/city/mumbai/maharashtra-in-a-first-rs-5-crore-for-transgender-welfare-board/articleshow/74524608.cms>.

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the district magistrate, and then according to section 6(1) of the Transgender Persons (Protection of Rights) Act, 2019 that district magistrate will issue a certificate stating the identity of the applicant as transgender. After this, the act says in section 6(2) that the gender of the person shall be recorded in all official documents. A key thing to notice here is that you can identify yourself as transgender/ intersex person but to make it official you will have to apply for the certificate, and then district magistrate will issue your certificate, and then your documents will be updated in short if you don't have a certificate then you will not be allowed to use the gender as transgender/intersex person on any document. So for proving your identity, you will have to carry a certificate sounds easy but imagine you are a male or female, and you will have to carry a certificate all the time for verification of your gender, how it will feel? It is the reason many transgender people (intersex people) are opposing this act and asking for amendments to it.

No discrimination against Intersex People

Section 9 of The Transgender Persons (Protection of Rights) Act, 2019 says that no establishment shall discriminate against any transgender person relating to employment but not limited to, recruitment, promotion, and other related issues and after this section 10 talks about Every establishment shall ensure compliance with the provisions of this Act and provide such facilities to transgender persons as may be prescribed and stupidity does not end here after this section 11 says Every establishment shall designate a person to be a complaint officer to deal with the complaints relating to the violation of the provisions of this Act[1895]. Now let's be practical according to our harsh stigmas against intersex people there is a very less chance that a private firm will hire an intersex person for any job, let's consider someone does it and then our government wants that person to assign an officer to handle the complaints of that intersex person don't you think it is too much? Who will do it? And irony to the situation is there is no compulsion to follow this Act because there are no punishments or remedies given to the intersex people, so the government is just telling every establishment to comply with this Act, but the government is not making it mandatory for them to hire intersex people as employees.

Important Provisions are missing in the The Transgender Persons (Protection Of Rights) Act, 2019

[1895] Section 9, 10, 11 of The The Transgender Persons (Protection Of Rights) Act, 2019

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Many important and necessary provisions are missing, and this act does not have any provision for the right to property, right to marry, right to adoption, right to social security, right to a pension, and many other provisions are missing in this act. The government should take a survey of all intersex persons in the county, and it is an easy thing because the population of intersex people is below 5 lac so the central government can instruct state government to take a survey about what is the current situation of the intersex people and what they want to amend, what they think is correct in a relation of this act.

CONCLUSION AND SUGGESTIONS

If we look at the analysis above, we can clearly see that the government is also just pretending to care about the rights of intersex people. Also, we can see that the government has not defined the concepts clearly; by putting intersex people under the umbrella and by not doing any gender justice. Also, the act has so many loopholes with the help of them any government as well as the private organization can refuse to hire intersex people as employees, because the whole act is just like a guideline template which is not mandatory to follow because it does not have any provisions for compulsory reservation for intersex people or any kind of punishments for not following the act. Also, if you read this act carefully, you can see that this act is totally based on the stigma we have for intersex people instead of based on actual surveys and studies of the intersex community, it does not provide any importance to the intersex people. The government needs to amend this act and include a reservation, right to property, right to marry, right to education, etc. for people belonging in the intersex community. Also, this act lacks strict penalties; the government should add strict punishments and exemplary penalties for the crime against the people belonging to the intersex community. Also, it is a need of time that we as ourselves need to change our point of view towards intersex people. The government should spread awareness about intersex people because being intersex is not easy because intersex people are always discriminated, abused emotionally, physically, sexually, and also economically, we need to change our old harsh stigma against the intersex people. In the end, we would like to say that “we are humans and intersex people are also humans, so be kind towards everyone.”

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JUDICIAL RESPONSE TO THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE: A JOURNEY

- RICHA VISHWAKARMA

ABSTRACT

Women have had gender equality since ancient times, but it was only due to moral and social bounding, at that time gender equality was not legally recognized. The status of women started suffering setbacks from the post -Vedic period due to the introduction of patriarchal society. Gender equality has been given legal recognition by the Constitution of India under certain articles such as Article 14,15,16, 21,19(1)(g) of the Indian constitution as fundamental rights of women, these articles guarantees right to equality, prohibits sex discrimination, equal opportunity of employment, right to life, right to equality in trade, occupation, and business respectively. Article 21 of the constitution also includes right to live with dignity so, workplace sexual harassment is highly incompatible with the dignity and modesty of a woman. This offense was recognized for the first time in the case of Vishaka Vs. state of Rajasthan[1896], in this case Supreme Court in its landmark judgment, issued certain guidelines. Later on, to curb this evil, and for the strict implementation of the guidelines, Government of India passed a new legislation i.e. Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act,2013, this Act particularly dealt with the issues of workplace sexual harassment.

(Keyword: gender equality, workplace sexual harassment, Vishaka case)

INTRODUCTION

Women have a unique position in our society. Women participation in all spheres plays a very important role in the development of a nation. They have enjoyed equality with men since ancient time like in the 18th century, also known as the "Enlightenment period of Western Europe", it was said that 'women are human being not a sexual being,' therefore, there should not be any unreasonable discrimination between men and women, but the status of women have started

[1896] (1997) 6 SCC 241: 1997 SCC (Cri)932

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changing from post –Vedic period due to patriotism, and they started suffering Gender- Based discrimination.

Gender Equality which is the basis of all human rights without which there will be social, economic, and political injustice. Gender Equality has been given legal recognition under various articles of the constitution of India. It became necessary to give equal opportunity to women in all spheres for the exercise of all human rights guaranteed under the constitution as fundamental rights, and promote economic interest in women.

Workplace sexual harassment is an offense against women which violates their right guaranteed under constitution of India. Workplace sexual harassment is highly incompatible and inharmonious to the dignity and modesty of a woman guaranteed under article 21 of the constitution of India. Safe working environment is also a legal right of women. Workplace sexual harassment creates a feeling of insecurity and hostile environment, this will prohibit women employment. Prohibition of women employment affects social and economic growth of a nation. It is duty of state to make such law and policies to eliminate sex differences and state should focus on providing safe workings environment, which encourages the women to participate in economic sphere in accordance with their professional requirements. There was no legislation which particularly dealt with the issues of workplace sexual harassment, workplace sexual harassment is an offense against the dignity and modesty of a woman, workplace sexual harassment was recognized as an offense for the first time in the year 1997 in Vishaka case. In this case, Supreme Court issued certain guidelines in its landmark judgment for the protection of women against workplace sexual harassment and provide remedy for the same, and held that these guidelines should be strictly observed in all workplace until a new legislation enacted in this regard, but in the post-Vishaka scenario it was observed that these guidelines were not effectively implemented. So, on the request of government of India, to protect women against workplace sexual harassment, Workplace Sexual Harassment (Prevention, Prohibition, and Redressal) Act, 2013 enacted which was based on guideline issued by the Supreme Court in its landmark judgment in Vishaka case. Its objective was to protect the rights of women guaranteed under article 14, article15, article16 and article 21 of the constitution of India, article 21 also includes the right to live with dignity. Sexual harassment outrages the modesty of a woman. Article 19(1) (g) of the constitution provides for the right to equality in trade, occupation, and business, also includes a safe working environment, free

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from any harassment. Before the enactment of 2013 Act, complaints of workplace sexual harassment were lodged under sections 354 and 509 of IPC.

INTERNATIONAL SCENARIO

International provisions for gender equality and protection of women against workplace sexual harassment:

1. **Universal Declaration of Human Rights, 1948:** The preamble of declaration shows the importance and necessity of having faith in the fundamental human rights and dignity of individuals including both men and women. The declaration expresses the basic principles of human rights in a most comprehensive manner and it deals with civil and political rights of men and women in terms of equality along with social and economic rights.

   a. **Article 1 of UDHR**, states that all human beings are born free and equal in dignity and rights .They should act with understanding and spirit of brotherhood.

   b. **Article 2 of UDHR**, speak about the declaration without discrimination of any type such as, race, caste, gender, language, religion, political opinion, social, or national origin, property etc.

   c. **Article 3 of UDHR**, speaks about right to life, liberty, security

Expressing his view Kelson said that , it is intended to be a common standard of achievements for all people and all nations and that the declaration is made with the end that every individual and every organ of the society shall strive to do something with respect to the rights laid down in the declaration.

   d. **Article 3 to 21 of UDHR**, deal with civil and political rights.

   e. **Article 22 to 28 of UDHR** deals with social and economic rights.

f. **Article 29 of UDHR,** speaks about the limitations i.e. above rights are not absolute, they are subject to morality, public order, general welfare etc. and it also contemplates that everyone owes duty towards the community and other individuals.

2. **The International Covenant on Economic Social and Cultural Rights, 1966:** declares under article 3, the state parties to the present covenant undertake to ensure the equal rights of men and women to the enjoyment of all economic, social, cultural rights forth in the present covenant.

3. **The International Covenant on Civil and Political Rights, 1966:** declares under article 3, the state parties to the present covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present covenant.

4. **The Convention on the Political Rights of Women, 1953:** It intends to implement the principle of equality of life for men and women in equal terms. It further states and emphasizes regarding the recognition of the principle of equality in the public employment, equal representation of government of his/her country directly or indirectly by means of voting system[1897].

5. **Declaration on Elimination of Discrimination Against Women, 1967:** The preamble of the declaration states that despite the existence of various certain particular rights of women, discrimination continued, therefore, this declaration pledged to reduce discrimination against women in any form and it reaffirm the principle of equality of rights of women in the world wide scenario.

6. **Convention on the Elimination of all forms of Discrimination Against Women(CEDAW), 1979:** By this convention it was observed and reiterated that the state party to the international covenant of human rights are under obligation and are duty bound to provide equal right to both men and women civil, political, economic rights and specialized agencies have to be established in order to achieve the basic fundamental objectives of the

[1897] Article1.

convention and they should strive to endeavor to eliminate all forms of discrimination against women. The state parties to the convention were fully convinced that existing discrimination is an important factor causing obstruction in the development, betterment, and advancement of women with men at national and international level.

CEDAW defines sexual harassment, the evil consist of unwelcome sexual advance, request for sexual favors and other verbal or physical conduct of the sexual nature in three situation:1)where submission to such conduct is expressly or impliedly made a term or condition of employment; 2) when submission and rejection to such conduct is used as basis for employment decisions affecting an individual(for example, promotion); and 3) where such conduct has the effect or purpose of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment[1898].(US EEO Commission, November 1980)

CEDAW focuses on the protection of women at the workplace. Some of the relevant provisions in this regard are:

Article 11, state party shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same right, in particular:

(a)The right to work as an inalienable right of all human beings;

(f) Protection of health and to safety in working conditions, including safeguarding the function of reproduction.

7. **Declaration on the Elimination of Violence against Women, 1993:** The General Assembly by UN adopted in 19913 and it is first of its kind which exclusively dealt with elimination violence against women and intends to protect the fundamental rights of women.

Declaration on the elimination of women, 1993, states that, "any act of gender -based violence that results in or, is likely to result in physical, sexual, or psychological harm or suffering to women

[1898] US EEO Commission, November, 1980

including threat of such acts coercion or arbitrary deprivation to liberty whether occurring in public or private life."[1899]

Therefore, in view of the above it is clear that violence is not limited only to physical or social harm, but also extends to psychological harm.

8. **Optional Protocol to the Convention on the Elimination of Discrimination against Women, 1999:** By the means of this protocol it was realized by the state party to the convention, there is an urgent and immediate need to group by all the adequate means to ensure full and equal enjoyment of freedom by the women of all human rights.

India was signatory to above protocol has shown the parliamentary endeavor which resulted in year 2005 passing of enactment of Domestic Violence Act.

9. **Commission on the status of women:** In 1946, the economic and social council established a commission, known as commission on the status of women, having following functions mentioned below:

   a) To prepare a report and its recommendation relating to measures that are to be taken in prevention of the rights of women in the field of women rights.

   b) To recommend the matter this is of urgent nature in the field of women rights.

The following are the conferences in this regard:

Vienna Conference: It was held in 1989, emphasized that serious and immediate endeavor must be made to give memorandum to the campaign for the advancement of women and they have adopted 23 variety of subject such as AIDS, ageing, refugee, displaced women, poverty, apartheid, and submitted the draft for approval to the economic and social council of UN and during Vienna conference and the commission on the status of women pledge unanimously on the elimination of

[1899] Article 1of the Declaration on the Elimination of Violence against Women, 1993

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violence against women and also realized that it is a major hurdle to the achievement of equality, development, and peace.

Beijing Declaration, 1995: In respect of human rights of women and draft of document was approved on the status of women which was presented in conference with respect and appraisal of the progress made by women. In this platform for action recommend in 12 areas of which were considered as hurdle to the women advancement for e.g. poverty, education, health, violence, armed and other conflicts, economic participation, power-sharing, decision-making, national and international machinery, mass media, environment, development, and girl child

NATIONAL SCENARIO

It was observed in Kesavananda Bharati's case[1900] that UDHR may not be a legally binding instrument but it shows how India understood the nature of human rights. Moreover, on various occasions Apex Court classified that no. of provisions of Indian constitution are similar to the provision of UDHR and, therefore, the UDHR provisions can be referred while constructing judicial pronouncement and interpreting the Indian constitution provisions.

One of the important reasons for workplace sexual harassment against women are economic independence, women are also enjoying economic equality with men. Workplace sexual harassment of women is violation of gender equality, safe working environment is also a legal right of a woman. Gender inequality will lead to social and economic injustice. Women cannot exercise human rights without gender equality which is the basis of all human rights guaranteed under the constitution as the fundamental rights.

Article 14 of the constitution provides right to equality and article 15 of the constitution prohibits gender discrimination. Some special privileges are provided under article 15(3) of the constitution that permits state to positively discriminate in the favor of women and state can make special provision to ameliorate the condition of women socially, economically, and politically. Article 16 of the constitution guarantees equality of opportunity for all citizens in matters relating to public

[1900] AIR, 1973 SC 1461.

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employment. Article 21 provides for the right to life and liberty which also includes the right to live with dignity. Gender equality would be meaningless in the absence of the right to live with dignity. Workplace sexual harassment is highly incompatible with the dignity and modesty of a woman, it will outrage the modesty of a woman, outraging the modesty of a woman is a crime under section 354 of IPC and punishable under section 509 of IPC. It is the duty of the state to create a safe working environment as women also have equal opportunity of trade, occupation, and business, as guaranteed under article 19(1)(g) of the Indian constitution, they should be freed from any harassment.

Before 1997, there was no legislation which particularly dealt with the issues of workplace sexual harassment, the complaints of workplace sexual harassment were lodges under section 354 of IPC which provides for criminal assault of outraging the modesty of a woman and under section 509 of IPC which provides for any act, gesture, word extend to insult the modesty of a woman, but what word, act, and gesture amount to insult the modesty of a woman is a controversial issue, it will depend on the facts, and circumstances of a case, and it is left to the discretion of police.

Scenario has totally changed after landmark judgment of Supreme Court in the case of Vishaka v. state of Rajasthan[1901], it was for first workplace sexual harassment was recognized as a particular offense against women, and also defined workplace sexual harassment.

In Vishaka case, Vishaka was social activist working with an NGO with an aim to eliminate sexual aberration and to curb the evil of child marriage, but patriarchs to teach her a lesson, five men engaged her, and she was being brutally gang raped by them. She fought her legal battle in High Court of Rajasthan, but there she did not get justice, but she did not lose faith in our judicial system, and she filed Public Interest Litigation in Supreme Court, and gave a landmark judgment and issued certain guidelines and held that these guidelines should be strictly observed in all workplace for the protection of women against workplace sexual harassment and provide remedy to the survivor until a new legislation is enacted in this regard. Following guidelines were issued by the SC:

1. **Duty of the employer and other responsible person at workplace and other institution**: It is their duty to prevent or deter the commission of the act of sexual harassment and to

[1901] (1997) 6 SCC 241: 1997 SCC 832

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provide procedure for settlement, legislation for the protection of women against workplace sexual harassment by taking all steps require.

2. **Definition**-Sexual harassment include such unwelcome or unwanted behavior whether directly or by implication-

a) Physical contact and advances,

b) Demand and request for sexual favors,

c) Making sexual colored remark,

d) Showing pornography,

e) Any other unwelcome behavior including, physical, verbal, and non-verbal conduct of sexual nature.

When any of these acts committed in any circumstances, the victim of such conduct has reasonable apprehension of being suffering any disadvantage in relation to her employment, and promotion, etc. creates a hostile environment that would be treated in the above mentioned category. Moreover, any of the above mentioned acts is a humiliating threat to the physical and mental health.

3. **Preventive steps:** All employers of a person having authority of the workplace whether public or private sector should take appropriate step to prevent workplace sexual harassment, following steps should be taken:

a) Express provisions of sexual harassment as defined, at every workplace should be notified, published, and circulated in appropriate ways.

b) Rules and regulation of government and public sector relating to conduct and discipline should include rules and regulation prohibiting sexual harassment and providing penalties in such rules against the offender.

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c) As regard to public employment steps should be taken to include above said prohibition under standing order under the Industrial Employment (Standing order) Act, 1946.

d) Suitable condition should be provided in respect of work, leisure, health, hygiene, so, there is no hostile working environment towards women at workplace and no employee women should have reasonable ground that she is being disadvantaged in connection with employment, their conduct amount to specific offense under IPC or any other law, the employer shall take appropriate action by making complain to authority.

Moreover, victim of sexual harassment have option to seek transfer of perpetrator and their own transfer.

4. **Disciplinary action:** Such conduct amounts to specific offense under IPC or any other law as per service of such employment, the appropriate disciplinary action should be taken.

5. **Complaint mechanism:** Whether such conduct is an offense under law or breach of service law, appropriate complaint mechanism should be created to address the complaints of the victim and time bound action should be taken.

6. **Complaint committee:** The complaint mechanism as discussed should be adequate to provide a necessary complaint committee, counselor support system including adequate confidentiality, committee should be headed by a woman, and half of the members should be women. Moreover, to prevent the possibility of undue influence for senior member, complaint committee should involve third body such as NGO or other body who should familiar with sexual harassment. Complaint committee should make an annual report of the government department of complaints made and action taken. Moreover, the employer/person in charge, also repairs with complaint with respect to guidance etc.

7. **Workers initiative:** Employees should be allowed to raise issues of sexual harassment at a worker meeting and matter should be affirmatively discussed in employer-employees meeting.

8. **Awareness:** Awareness of the right of female employees should be cleared in particular by prominently notifying the guidance (and when appropriate legislation enacted on subject) in appropriate manner.

The central and state government is required to consider adopting suitable measures including legislation to ensure that guidelines laid down by this order are also observed by the employees in the private sector.

These guidelines will not prejudice any of the rights available under protection of human rights 1993.

POST- VISHAKA SCENARIO

Even after Vishaka case in which supreme court issued certain guidelines and asked for strict implementation of these guidelines despite this landmark judgment these guidelines were not strictly implemented and women continue to be the victim of workplace sexual harassment. In Medha Kotwal Lele v. Union of India[1902], it was highlighted that Vishaka guidelines are observed in breach and women are still subjected to sexual harassment through some legal and extralegal methods and hurting their dignity and modesty. It was realized that existing laws must be revised and new legislation should be enacted by Parliament for the protection and prevention of women from workplace sexual harassment, and also protect them from any form of indecency, indignity and disrespect at all places.

In the year 2005, a Bill was presented before the Parliament for the protection of women from workplace sexual harassment, till then there was no legislation for their protection and their safety. After 10 years of wait bill was moved in the Lok Sabha with slight changes including redress mechanism such as internal complaint committee at workplace and local complaint committee at a district level, and this new bill also defined the "sexual harassment at workplace." Women who

[1902] (2013) 1 SCC 297: 2013 1 SCC (Cri) 459

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are working as client, customers, and apprentices besides students and research scholars in colleges and universities, and patients in hospital are also covered under this new bill, but there was a very high chance of false and malicious complaint, to remove false and malicious charges, this new bill provide the action against false and malicious complaint by ICC or LCC against complaint under Section 14 of Act. After filling all the lacuna in the bill, finally the bill was passed in the year 2013, and legislation was enacted foe the protection women against sexual harassment at workplace.

FEATURES OF THE ACT

1. This Act provides that it is duty of every employer to prevent women from workplace sexual harassment in his organization, provide preferential treatment, and safe working environment irrespective of her age, employment status or threat related to employment will also be treated as sexual harassment of women.

2. It also requires all the organizations to have an internal complaint committee at each office and branch to hear and redress the victim of such offense. Committee shall submit an annual report to the employer and district officer and if the employer fails to constitute a committee, he will be imposed with a fine of Rs.50, 000 and on repetition of offense punishment will be doubled.

3. It also provides there should be a local complaint committee in the concerned district for dealing with the cases of sexual harassment of women of those establishments where internal complaint committee has not been constituted for reason being had less than 10 employees. A woman aggrieved of sexual harassment can make complaint to the internal complaint committee or to local complaint committee with a supporting name and addresses.

4. This Act empowers the internal complaint committee or local complaint committee during the pendency of inquiry into the complaint ask the employer for interim

measure for the prevention of any further sexual harassment of a woman and provide compensation to the aggrieved woman.

5. This Act includes both the private and public sector. The statute applied to all governmental offices, non -governmental organizations, hospitals, entertainment activities, etc.

CONCLUSION

Sexual harassment of women at workplace is the serious problem, and it has negative impact on women and lead to gender inequality which the fundamental right of women. Enactment of this act is the significant step in safeguarding and providing protection to all working women. Safe working environment is the legal right of all, which is denied by hurting the dignity of and modesty of women. By this legislation the government has taken a major step to ensure a safe and working environment. However, this Act still has some lacuna, firstly, it does not include those women's doing agriculture work and armed forces, which is a highly male- dominated sector. Secondly, it is biased as it only protects women from any harassment. Thirdly, there is high chances of law being misused by the women, and making false and malicious complaint against employer, it is to worry about there is less under-reporting cases than malicious complaint against the employer for their benefit, there was also vicarious liability, employers have to suffer unnecessarily because of breach of law done by their employees. Fourthly, victims of the offense are being compensated monetarily, accused made to pay based on economic and professional status, so in this case the person with high rank and status made to pay more than the person with low status; it serves nothing, and discriminatory in nature.

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DOWRY – A CURSE TO THE SOCIETY

- **RIYA SRIVASTAVA**

ABSTRACT

India is a country where women are worshipped as goddesses, it is one where brave, independent and furious women have made their way up to create history. But today the same nation has been ranked the topmost in the "Most Dangerous Countries for women in the world".

This is an example of hypocrisy at its best. Our country is filled with people of orthodox mindset who still believe that women are just a piece of property and they should work according to the men of the society.

Among all the crimes that exists 'dowry death' is one which has ruined the lives of many women.

Dowry is basically a parental gift given by the bride's parents to the groom's. It is a custom which has been around since ancient times, but was purely voluntary in those days. But today the greediness of people has made it a bane for society. Marriages are being arranged merely on how much dowry is the girl's family giving, girls are being seen as objects and measured with money. The system of forceful dowry does not only exist in the people of lower strata who are socially unaware but is also found commonly in the educated and well off people of the society.

Failure of bride's parents to pay sufficient dowry leads to torture and violent behavior of the in-laws towards the girl after marriage. There have been cases of violence to such a degree leading to the death of the girl with such brutality which is beyond one's imagination.

Even after coming of the new provisions to stop the crime, there has been no difference. The Indian judiciary might have made laws but has failed in the implementation. Society will only change when people change their mindset and think rationally. Dowry deaths are rapidly increasing and there ought to be some way to stop that.

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INTRODUCTION

India is a land with great history and uncountable customs, one of which still exists is the practice of taking dowry. Dowry is what the bride's parents give to the groom's parents at the time of marriage it can be in the form of cash or kind like expensive cars, electronic items, property papers. It is a curse that the practice is still going on in the country and the worst part is that it is commonly being found in the educated and well off section of the society. Dowry reduces the value of the girl to mere commodity; she is measured by wealth and not by her qualifications and qualities. Both the families negotiate the amount which is to be paid in the dowry, more the educated groom more is the demand for dowry.

HISTORY

The history of dowry has been quite vague. Even though dowry is known to be a custom but its presence is not found in the form it is practice today. Some eyewitnesses like Arrian who wrote his first book at the time of Alexander the great's conquest mentions that Indian care about nothing whether the girl has dowry or a good fortune they just see her beauty and other advantages as a person. approximately 1200 years after Arrian's visit Al-Biruni a Persian scholar who spent 16 years of his lifetime in India, he stated,

"The implements of the wedding rejoicings are brought forward. No gift (dower or dowry) is settled between them. The man gives only a present to the wife, as he thinks fit, and a marriage gift in advance, which he has no right to claim back, but the (proposed) wife may give it back to him of her own will (if she does not want to marry).[1903]*-Al-Biruni*

These two sources from the history claim that there was no exchanging of gifts between the families of bride and the groom.

[1903] Chapter on Matrimony in India, about 1035 AD

But there are also sources that show that dowry was present even in the ancient times but it was not voluntary for the groom's family to give it. The girl had the right to inheritance which was given her at the time of marriage. It was seen as a security for the girl for any future contingencies.

DOWRY PRACTICES IN 21ST CENTURY

Even after the steps taken by the government to eradicate this evil practices from society, it is saddening that people still indulge in giving and taking dowry without any fear of the law. The greediness of people has led to continuation of this practice which was, even though voluntary in the past but has now become a forceful one. Bride's parents are forced to give a certain amount of dowry and if they fail at it the marriage gets canceled. The common notion which people have is, such crimes would be committed by the ones who are not educated or aware about the impact it has on the society but it is shocking to discover that the percentage of the literate class practicing dowry is considerably increasing in urban areas. An article from National Daily in the 2012 stated that 12 women are either forced to die out of torture or killed for dowry each month in the national capital. This news dated back eight years ago and since then we can only see dowry death and torture cases increasing.

Dowry practice is one of the major reasons why people do not prefer a girl child. There are still parts of our country where the birth of girl child is seen as a curse to the family. Girls are considered "*Paraya Dhan"* which means someone else's property. The dowry practice is so common in such areas that the fear of giving dowry and spending money on the girl child who has to be given away one day make people reluctant to have baby girls thus which leads to female feticide. Illegal child sex determination tests are conducted to enquire about the sex of the child being born, if it is a girl the mother is forced to have abortion because in Indian society a boy is seen as the one who brings prosperity to the family whereas a girl is considered property of another family and the one who can never bring wealth and prosperity.

DOWRY PRACTICE AROUND THE COUNTRY

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The custom of dowry is followed in all parts of the country. The greediness of human makes them commit this crime. Talking about the northern part of India, one of the biggest state in the region which is Uttar Pradesh with a population of 20.42 crores ranked highest in the survey done by the Lok Sabha on the number of Dowry deaths between the years 2005 to 2010, Bihar being on the second position followed by Madhya Pradesh in central India. The cases of dowry deaths in these states have been increasing continuously. According to the 2010 survey Uttar Pradesh had 12,254 deaths, followed by Bihar with 7,136 and Madhya Pradesh with 4,800.But there are some states like Uttrakhand and Jammu Kashmir in the northern India which reported zero cases between 2001-2011.The practise of taking dowry is also very prominent in the South India.

According to 2017 report of National Crime Record Bureau a metropolitan city like Bengaluru which is also referred as the Silicon Valley of India because of all the multinational Companies working there had the highest number of dowry cases registered. Out of 951 cases that were registered that year across the country, 77% were from Bengaluru.

Nothing changed in 2018 and the city as the previous year had the highest number of cases registered among all the other southern metropolitan cities of the country and 53 of them became victims of dowry death. Delhi registered 137 victims of dowry torture.

It is surprising that the developed cities with majority of educated and aware citizens even have a high crime rate. This can also be seen as in a positive way that, in cities like Bengluru women are aware enough to come out and speak for their rights and against the wrong they are suffering. All the government reports are based only on the number of cases that are being reported but there are still a lot of women who are caged in their respective houses and are unable to report against what they are going through either from the fear of their husband and in –laws or due to lack of education and awareness about their rights or both.

HARDSHIPS FACED BY WOMEN

According to the recent reports of the polls by global experts India was ranked the topmost country for the most dangerous country for women to live. The crimes against women in the nation are

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continuously increasing and have no end. Dowry related harassment being the one. If a bride does not bring sufficient dowry with her she is humiliated and tortured by her husband and in-laws .Dowry can be in any form it can be expensive gifts like real estate, automobiles, jewellery or even cash. There are cases where a groom's qualifications decide how much dowry is to be demanded from the other side.

A wedding of a girl is one of the biggest occasion a her life, it is the time when she leaves her family and goes to another family with dreams and hopes of a new start, it is a life changing step for her which she dreams to be filled with happiness and love but the question that arises is, whether the bride's family is wealthy enough to afford the demands of the groom's parents, if yes then there is happily ever after but when the demands are not fulfilled and the girl has to face humiliation and torture from husband and in-laws all her dreams get shattered.

The Hon'ble Supreme Court in **Kamlesh Pinjiyar v State of Bihar**[1904] has given an emotional view in context of dowry cases, it has said "*Marriages are made in heaven, is an adage. A bride leaves the parental home for the matrimonial home, leaving behind sweet memories there with a hope that she will see a new world full of love in her groom's house. She leaves behind not only her memories, but also her surname, gotra and maidenhood. She expects not only to be a daughter-in-law, but a daughter in fact. Alas! the alarming rise in the number of cases involving harassment to the newly wed girls for dowry shatters the dreams. In-laws are characterized to be outlaws for perpetrating terrorism which destroys the matrimonial home. The terrorist is dowry, and it is spreading tentacles in every possible direction*."

Pressure is created on her to bring more dowry, many girls are sent back to their homes and asked only to return if they could bring more dowry.. There are many others who in the fear of the society and reputation of their parents refuse to go back and accept to go through all the violence they are being subjected to, most of such cases result in the death of the girl by committing suicide. In the above mentioned case of **Kamlesh Pinjiyar v State of Bihar** the apex court also noted that in most of the suicidal cases the offender makes it look like the death has occurred due to natural

[1904] (2005) 2 SCC 388

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cause to cover the crime committed, but in reality suicide is the result of all the harassment and torture the women would have been facing as a consequence of not brining sufficient dowry.

The mindsets of women play a very important role in such crime. The situation will be dealt in a different way by a women who is aware of her rights and the torture she is going through than a women who is neither educated nor aware and has orthodox mindset. Education plays a very important role in anyone's life be it a boy or a girl, it helps them to identify the difference between good or bad, it makes them aware about their rights and responsibilities and how they should speak against any wrong in the society.

India has always been a patriarchal society where the man takes all the major decisions and the women is the one who manages home and children, a women according to orthodox mindset has to obey and respect her husband. **In V.N.Pawar v State of Maharashtra**[1905], husband was convicted for burning his wife alive in the demand of dowry. The wife in her dying declaration told that she didn't wanted her husband to be beaten up after she dies, the Hon'ble Supreme Court stated *"The statement by the dying tragic woman that her husband should not beaten, even though she was dying having been burnt, cannot be converted into one exculpative of the accused. This is a sentiment too touching for tears and stems from the values of the culture of the Indian womanhood."* The court also stated that wife burning incidents are frequently increasing in the country, it advised that law must be more advance and firm to help the helpless women who are being victimised in this grievous crime secretly committed inside their homes. Thus this is the situation of women in India, their lives are of no value and are being brutally burnt alive.

DOWRY HAS NO RELIGION

Dowry has no religion. It does not differentiate between Hindus, Muslims, Parsis, Christians etc. The custom of dowry is followed in every religion and the women irrespective of whatever religion they belong to are the one who suffer.

[1905] 1980 AIR 1270

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According to the manuscripts there was nothing as the dowry custom in the vedic period, the girl was voluntarily given Stridhan by her father which only belonged to the girl, we can also find traces of tradition where the father gives a part of his property to the girl for future contingencies. But eventually due to wrongful motives of the in-laws to takeover the property of the girl, giving non-movable property was stopped and only movable property like ornaments, cash etc were given which eventually took the shape of dowry. The tradition of dowry was evolved out of greediness of people in the passage of time which has now become an important part of the marriage in Hindus. The oldest example of dowry comes from the Ramayan where Tulsi das states the huge amount of gold, jewels, animals etc king Janaka gave in the wedding of lord Rama and goddess Sita.

In Muslims dowry is addressed by the Arabic word Jahez and the practice of dowry is called Jahez-e-fatimi. It comprises of two categories, the first contains all the essential things which the girl would require for her upcoming new life, the second one comprises of expensive gifts, clothes, ornaments, money etc. All these might be sent in the name of the bride but the main owner of the things become the in-laws .But the practice of Jahez is not a part of Islam it is inspired by the ancient Hindu practice of dowry. The bride's parents give dowry to find a good groom for their daughter and thus after marriage the girl becomes mere property of her husband and the in-laws.

Thus, dowry prevails everywhere, it has nothing to do with religion till the greediness of people prevail. No matter if it is a Hindu family or Muslim family at the end it is the girl which has to suffer all the harassment and torture.

EVOLUTION OF ANTI-DOWRY LAWS

Dowry is a fatal practice which has been existing in our society for several years, it is the origin of many other heinous crimes like female feticide, domestic violence and has lead to cases like even burning alive of the women by her husband and in-laws. In the late 1900s dowry cases kept on coming up where women were being tortured and subjected to harsh cruelty, thus the

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government decided to form the Dowry Prohibition Act in 1961.But even after the act was enacted and the practice of dowry was made illegal such practices kept continuing , there was no implementation of the act .

This is when the women themselves came out on the road to fight against the wrong. Progressive Organization of Women in Hyderabad in 1975 protested against the evil practice of dowry where almost 2000 people came on the streets to protest[1906]. Protests began in various parts of the country like Punjab, Maharashtra, Karnataka and even in the National Capital. The victims of dowry were maximum in Delhi and thus the protest was most prominent their, they not only demanded end of dowry but also to end the crimes which are committed in the name of dowry.[1907] One of the biggest protest was in Delhi against the case of Tarvinder Kaur, whose brother had reported about the sufferings of dowry harassment but police refused to register saying that it was a family matter, Tarvinder was found dead the very next day.[1908]

Till now there was a Dowry Prohibition Act which had made

- the custom of taking dowry void, it was cognizable offence
- It had assigned penalties for giving and taking dowry and also demanding dowry.
- The act had also banned the telecasting of advertisements promoting the practice of dowry.
- It also had ordered the state to appoint dowry officers if necessary who would perform all the work in dowry related cases, it also had to ensure that the practice is not being followed in his region and had to take strict actions against the same.

There are also various sections of the Indian Penal Code for dowry related cases:

[1906] Concept and Evolution of Dowry, by Soumi Chatterji
[1907] ibid
[1908] https://feminisminindia.com/2017/06/21/historical-journey-anti-dowry-laws/, assessed on-5:44pm,19.04.2020

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DOWRY DEATH (Section 304B) - which deals with the cruelty and Harassment by husband or relatives in demand of dowry leading to death of the women by burning or by bodily injury.

INTENTIONAL DEATH OF WOMEN (Section 302) - If the person intentionally causes women's death that would be murder punishable under this section.

ABETMENT OF SUICIDE OF WOMEN (Section 306) – If the husband or the in-laws create a situation which he knows will drive the woman to commit suicide and she actually does so within periods of seven years of marriage, this section will be applied.

According to the Hon'ble Supreme Court in **State of Punjab v Iqbal Singh**[1909] the period of seven years is considered turbulent one after which the legislature assumes that the couple would have settled down in life.

But still despite all these laws there was no decrease in dowry related cases, the state and the central government had failed in implementation of the laws enacted.

In 1983 amendments were made by bringing in THE CRIMINAL LAW(SECOND AMENDMENT ACT),1983 in which some provisions were added that would help in stopping the dowry custom in the country.

Chapter XX-A of this act dealt with 'Cruelty by Husband or relatives of husband' which inserted

Section 498A - In the Indian Penal code. This section was brought to stop the harassment and torture women face in the name of dowry, there were frequent cases where the girl was being ill treated to bring lesser dowry as the in-laws were demanding more. This section made such cruelty punishable.

Section 174 sub-section 3 was amended in the Code of Criminal Procedure, the new section stated that if a women commits suicide or dies within seven years of her marriage and creating suspicion as to some other person was responsible for the death then the police takes reasonable suspicion that the death has been caused by the husband or the family members.

[1909] AIR 1991 SC 1535

Several steps have been taken from time to time to eradicate this dowry named curse from the society, our law makers have tried to modify the law to make it competent enough in the recent times because it is always the women who suffer most in the society, most of the crimes are committed against them. But we can say that times are changing unlike earlier, women of 21st century do not believe that being abused in their houses is their fate, they know how to fight back and stand for themselves.

There also has been a drawback here, there have been cases where women have lodged false complain under the acts mentioned above with an evil intention to create problems for her in-laws. The Ho'ble Supreme court in **Preeti Gupta v State of Jharkhand** the court said "It is a matter of common knowledge that exaggerated versions of the incidents are reflected in a large number of complaints".[1910] In these kind of cases mostly the woman falsely accuse the family for ransom, she tries to extort money by putting false legislations.

CONCLUSION

Therefore as there are two sides of each coin similarly there are two phases of the society, but the majority one is where innocent women in reality deal with the problems of dowry torture and harassment. The government has been trying to make positive changes in these situations. but it is also our responsibility as a society to ensure that such incidents do not take place. I think it would make a change if each one of us makes effort to ensure that such incidents don not take place in our family or neighborhood, just small efforts like, making people aware of what a boom dowry is to our society will also be helpful. Thus we all gave to come together as a society irrespective of religion or status and do our bit stop this evil practice in our society.

[1910] AIR 2010 SC 3363

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PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA: ANALYSING THE EXISTING INTELLECTUAL PROPERTY REGIME

- **V.VIDHULA, P.VISHNU MANOHARAN & K.VIKRAM**

INTRODUCTION:

The international debate on the protection of traditional knowledge mainly revolves on whether adequate and appropriate protection is provided through Intellectual property right's Convention before the collaboration of WIPO and UNESCO in the year 1978[1911]. Traditional Knowledge is diverse in its nature which is developed and maintained by a wide range of communities, people and individuals in varied culture in many different countries. Ideas, experiences, practices and information developed by indigenous communities and at times acquired by means of inquiry peculiar to that culture and concerning the culture itself or the local environment in which it exists.[1912] The indigenous people of the world possess an immense knowledge of their environments, based on centuries of living close to nature. Living in and from the richness and variety of complex ecosystems, they have an understanding of the properties of plants and animals, the functioning of ecosystems and the techniques for using and managing them that is particular and often detailed.[1913] In contrast to CONVENTION ON BIO DIVERSITY, the TRIPS agreement contains no provisions regarding, Traditional Knowledge and Benefit Sharing. However, the compulsion to safeguard the Geographical Indications can be used as armour to shield the traditional knowledge and genetic resources.[1914] With the implementation of Traditional Knowledge Digital Library, a joint effort of CSIR Department and AYUSH has resulted as a

[1911] *Intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore*, WORLD INTELLECTUAL PROPERTY ORGANISATION, (Apr.19, 2020) WIPO/GRTKF/IC/7/6
[1912] Anonymous, *Traditional Knowledge*, WORLD INTELLECTUAL PROPERTY ORGANISATION, (Apr. 15, 2020, http://www.wipo.int/tk/en/tk/
[1913] Anonymous, *Definitions of Traditional Knowledge*, NATIONAL ABORIGINAL FORESTRY ASSOCIATION, (Apr.19, 2020) http://nafaforestry.org/forest_home/documents/TKdefs-FH-19dec06.pdf
[1914] Varkey Elizabeth, *Traditional Knowledge - The changing scenario in India,* (Apr,20, 2020) www.law.edu.ac.uk.ahrb/publication/varkey.htm.

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contrivance to undertake bio piracy. Many countries across the world do not have Sui Generis System as an alternative for the protection of traditional knowledge, resulting the natives to work on the existing IPR laws. As of India is concerned Handicrafts and other few traditional knowledge works are protected under the copyright, trademark and Geographical Indications. The Nagoya Protocol is an ancillary accord to the Convention on Biological Diversity seeking to establish a transparent legal framework that achieves the objectives mentioned in CBD in protection of bio-piracy (traditional knowledge) .[1915] Some of the indigenous and local communities depend on traditional knowledge and cultured practices for their livelihoods as well as to sustainability to manage and exploit their ecosystem. The best example that can be citied is Agricultural practices followed across India is considered to be Indigenous Knowledge and products that were produced through Turmeric, Neem and other medicinal herbs are the resources exclusively available in India.

This paper focus on how India and other countries are trying to protect "Traditional Knowledge" along with few suggestions for protection as it is concerning the culture and traditions that is prevailing in the local environment.

PROTECTION OF TRADITIONAL KNOWLEDGE UNDER THE PRESENT REGIME IN FOREIGN NATIONS:

The advent of intellectual property began in the West with the passage of the statute of monopolies in Britain in 1600s. There was no going back after it and as technology, inventions and art grew so did the need for protecting them in the sense that the owner was secured some benefit. Their laws intended to protect the technological advancements and new forms of art made by individuals and corporations alike. The first effort to protect Traditional Knowledge (TK) under the IP regime was a joint initiative taken by WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1978 which led to the Protection of Expressions of Folklore against Illicit exploitation and other prejudicial Actions in 1982 and Since then, the protection of

[1915] Convention on Biological Diversity, *About the Nagoya Protocol*, (Apr.21,2020) https://www.cbd.int/abs/about/

Traditional Knowledge has gained increasing attention with the adoption of the Convention on Biological Diversity (CBD) in 1992[1916]. 8 years later, in 2000 the World intellectual Property Organization (WIPO) introduced and then later in 2009 the members agreed to formulate one or more legal instruments that would be binding that gave protection to traditional knowledge, genetic resources and traditional cultural expressions (folklore). It was also not until the 2000s that individual countries large realised the necessity and the need to protect the traditional knowledge of their local and respective indigenous communities. This would not only secure their economic development but also ensure the sociological and cultural development of the region in various aspects.protecting traditional knowledge also preserves the identity of the community and the people of the community. Implementing an effective international protection regime remains arduous challenge as traditional knowledge can take many shapes and forms unlike the other kinds of intellectual property. It may change from nation to nation and to tailor a blanket regime that suits all is strenuous task. The nature of Traditional knowledge is such that it might not necessarily fit into the sphere of intellectual property but might be guided by existing intellectual property laws[1917].

In the US the State department is the authority that deals with this. Legislations such as the Archaeological Resources Protection Act of 1979 and the Native American Graves Protection and Repatriation Act of 1990 were passed to ensure protection of cultural property. The Department of State is also charged with implementing the enabling legislation for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; this legislation is called the Convention on Cultural Property Implementation Act, and was ratified in 1982. There is a Cultural Property Advisory Committee in place to review requests from countries regarding import restrictions on artefacts

[1916] Farooq, Saeema & Majeed, Asmat & Khan, Nisar & Bhat, Zulfiqar & Mohi-ud-din, Roohi. (2019). L*egal framework on protection of traditional knowledge: a review.* (Apr.21,2020)

[1917] Marisella Ouma Ph.D, *Why And How To Protect Traditional Knowledge At The International Level,* wipo.in, (Mar.27,2020), https://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_ge_2_16/wipo_iptk_ge_2_16_presentation_11ouma.pdf

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which, if pillaged, would endanger that country's cultural heritage[1918]. The USPTO created a database for the voluntary registration of Indigenous insignia and symbols of state and federally recognised tribes, However, although there are guidelines for entering insignia, there is no investigation as to whether this is the official insignia of the registering tribe and hence, as the database is voluntary and is merely a collection of insignia, no intellectual property protections are gained through the database, like trademark rights[1919]. The US does not have a comprehensive system for protection of traditional knowledge on all fronts.

Australia does not have a Sui Generis system for Indigenous Knowledge protection so Indigenous people work within the framework of existing intellectual property, biodiversity and cultural heritage laws, However Indigenous people have also been able to assert their rights in Indigenous Knowledge, to varying degrees, under a number of other laws, including laws related to native title, trade practices, customs, resale royalty, geographic names and succession[1920]. Indigenous clan designs, stories and rock art that first existed in material form thousands of years ago and remain part of the particular Indigenous culture in perpetuity are not protected by copyright as there is usually no one identifiable author that can be associated with it. In patents even though there are individual cases where people of the indigenous community have registered patents for objects of traditional knowledge, in most cases the applications are rejected as they do not meet the legislative criteria. Australia however does permit registration of patents to protect indigenous knowledge of plants. Trademark law can be applied to register traditional names and symbols of an Indigenous community. Hence, one can say that though Australia has taken certain steps these aren't enough to ensure an effective mechanism to bring about a well rounded protection regime for traditional knowledge.

[1918] Molly Torsen, *Cultural Property Protection: International and U.S. Current Affairs*, HARVARD- CYBER, (Apr.20,2020). https://cyber.harvard.edu/bold/devel03/torsentk.html

[1919] Lindsey Schuler, *Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law* (Apr.18,2020) MICHIGAN STATE INTERNATIONAL LAW REVIEW, 752-800.

[1920] Maiko Sentina, Elizabeth Mason and Terri Janke, Terri Janke and Company, *Legal protection of indigenous knowledge in australia*, IP AUSTRALIA, https://www.ipaustralia.gov.au/sites/default/files/supp_paper_1_legal_protection_in_australia_28mar2018.pdf

The latin American countries as a whole have a humongous amount of wealth in terms of the traditional knowledge that they possessed in intellectual property. Since the 1960s, Latin American bilateral treaties and conventions involved Intellectual Property protection, but these have been mostly minor mentions. The World Intellectual Property Organization (WIPO) has highlighted problems relating to the protection of traditional knowledge and its misappropriation by commercial organisations and other countries not belonging to the region. There does exist however harmonious law through the whole region though individual nations have their own laws on traditional knowledge. While Panamanian law on the protection of the collective intellectual property rights of indigenous peoples is particularly far-reaching, and the national laws on intellectual property are not harmonised across Latin American countries, it is not the only one to grant special protection to the cultural heritage of the indigenous people of the continent, countries such as Peru, Costa Rica, Brazil and Venezuela all have enacted specific laws which recognise the indigenous communities' rights over their traditional knowledge which can therefore not be appropriated and used commercially by third parties without their consent[1921]. Latin America is home to over 800 tribes containing more than 45 million people, having an efficient system for protecting traditional knowledge is thus all the more important especially since the region is often prone to illegal theft of resources. Another interesting aspect of protection of traditional knowledge in the region is the Andean community. It is a A regional economic, social and political integration treaty signed in 1969. Its members are Bolivia, Colombia, Ecuador, Peru, Venezuela and Panama associated with Chile. The treaty contains certain restrictions on IP, that protect copyrighted material, brands, innovations and industrial property patents such as genetic materials and plant varieties from agricultural developments. These laws are common to all Andean community member countries and recognise the traditional knowledge of indigenous and Afro-descendent communities as their intellectual property and require authorisation from those communities for use or research. Food and cosmetics companies from developed countries have a lot of interest in

[1921] Nicolás Gutiérrez, *How Latin America countries protect their Traditional Knowledge through IP*; INTELLECTUAL PROPERTY FOR EU SMES IN LATIN AMERICA, (Apr.19,2020), https://yourlatamflagship.com/2020/01/16/how-latin-america-countries-protect-their-traditional-knowledge-through-ip/

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traditional communities' biological resources and deep knowledge, which we protect with the international system of IP[1922].

Though there have several deliberations and meetings by WIPO and its members around the world, however it hasn't come to fruition yet and there is no uniform international mechanism that pans across continents to protect traditional knowledge in its various forms.

PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA: THE NEED OF THE HOUR:

Traditional knowledge refers to the knowledge, innovations, customs and practices of local and indigenous communities around the world. Developed from experience gained over centuries, adapted and ingrained to the local culture and environment, traditional knowledge is passed down orally through generations, It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in fields such as agriculture, fisheries, health, horticulture, forestry and environmental management. Thus, Traditional knowledge is type of a living body of knowledge that is developed, sustained and passed from generation to generation within a community, often forming part of its cultural, social, economic or spiritual identity. So it is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Its living nature makes "traditional" knowledge difficult to define.[1923]

India is a mega diverse country with only 2.4% of the world's land area; it harbors 7-8% of all recorded species, including over 45,000 species of plants and 91,000 species of animals. Of the 34

[1922] Raquel Ceballos Molano, *How Colombia Is Protecting Indigenous and Afro-Descendant Knowledge,* AMERICAS QUARTERLY, (JAN.21,2019), https://www.americasquarterly.org/content/protecting-intellectual-property (DATE OF ACCESS: APR.2.2020.

[1923] SABA, *Protecting Traditional Knowledge – the India story till date,* THE SCC ONLINE BLOG (APR 23, 2020), https://www.scconline.com/blog/post/2018/04/23/protecting-traditional-knowledge-the-india-story-till-date/#_ftn6

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global biodiversity hotspots, four are present in India. Further, India is the largest producer of medicinal plants developed under traditional medicinal systems of Ayurveda, Siddha and Unani. Given the immense knowledge possessed by the indigenous communities coupled with the vast resources, the local groups have become dependent on these traditional practices for their livelihood and existence. [1924]

The development of new technology and the new use of traditional knowledge based products today is the major threat to the survival of many of these communities. The modern cultural industries as well as the manufacturing industries now commercially exploit the traditional knowledge based products using new technology without the permission and sharing of profits with the communities. It is possible today to bring out new products or find out new use of existing products based on traditional knowledge utilizing the technological developments in the field of biotechnology. This is proved beyond doubt particularly in the field of medicines, agriculture etc. The development of new products or new use of existing products enables the industries to get protection for these products through the formal intellectual property laws.[1925]

We find the need and importance of protecting the knowledge, innovation and practices of the indigenous and local communities as there is a growing commercial use of these resources beyond the traditional context which increasingly makes the traditional knowledge vulnerable to misappropriation and misuse by third parties. Adding on in the recent years, there have been several cases of bio- piracy of traditional knowledge in India The immediate need is to ensure that the benefits of cumulative innovations with traditional knowledge go to their holders while enhancing their socio-economic development. [1926]

Traditional knowledge should be especially protected in developing countries like India where such protection should primarily be with regards to, firstly, the recognition of the rights of the original traditional knowledge holders and secondly, the unauthorized acquisition of rights by third

[1924] Srividhya Ragavan*, Protection of Traditional Knowledge,* vol.2 issue 2 MINNESOTA INTELLECTUAL PROPERTY REVIEW pp. 1-15 (2001).
[1925] Raju Narayana Swamy, *Protection of traditional knowledge in the present IPR regime: a mirage or a reality* (Apr.21,2020) http://www.iipa.org.in/New%20Folder/Dr.%20Raju%20Narayana%20Swamy.pdf
[1926] Roohi Mohi-ud-din,,& Saeema Farooq,,& Asmat Majeed, *Legal framework on protection of traditional knowledge: a review.* Vol no.8, issue 1 INTERNATIONAL JOURNAL OF ADVANCED RESEARCH IN SCIENCE AND ENGINEERING,(jan 2019)

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parties over traditional knowledge. Now let us have an idea on the existing legal regimes in India for the protection of traditional knowledge.

CRITICAL ANALYSIS EXISTING LEGAL REGIME FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA

Legal protection of traditional knowledge has never been on the agenda of Indian law-makers, irrespective of the fact that India is one of the richest in this knowledge base and many communities and industries have been surviving on this. It is the TRIPS Agreement and the CBD that made the policy-makers look at the problems of protection of traditional knowledge in India. Subsequently, measures have been adopted by India such as Biodiversity Act, 2002 and Protection of Plant variety and Farmers Right Act, 2001 and the Patent (Amendment) Act, 2005 to give effect to its obligations under the TRIPS agreement, CBD and International Treaty on Plant Genetic Resources for Food and Agriculture 2004. From the perspective of potential impact on traditional knowledge protection, the forms of IP that are important are patents, copyrights, trademarks, plant variety protection and Geographical Indications (GIs).

With the adoption of TRIPS Agreement in 1995, India has to amend its patent laws to fulfill its obligations under TRIPS Agreement. Accordingly, in 2005 India has enacted the Patents (Amendment) Act and introduced product patents along with some provisions relating to Traditional knowledge. The Patents Act has a provision wherein "an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components" is not an invention and, hence, not patentable. The Act defines an invention as a new product or process involving an inventive step and capable of industrial application, Moreover the Patent Act specifies that:

(i) The applicant must disclose the source of geographical origin of any biological material developed (Section 10(d))

(ii) If the applicant does not disclose or wrongly mentions the source of geographical origin of biological material used for invention, then it becomes the ground for refusal of the patent application (Section 25).

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Thus the Patents Act makes provision for opposing the patent application before grant of a patent and opposing the grant of a patent within a year from the grant on grounds of non-disclosure of geographical origin of the biological material or if the complete specification of claims in the application is anticipated from the knowledge held by indigenous community. For better understanding of the patent protection to traditional knowledge we have 2 case laws,

The Neem case:

A controversy that can be tagged the "first" for India, and which rose doubts about a supposedly "strict" patent system, was the granting of patent to a company W.R. Grace. The company was granted a patent in the United States and the European Union, for a formulation that held in the stable storage of azadirachtin, the active ingredient in the neem plant; it planned to use azadirachtin for its pesticidal properties. Traditional systems of medicine like Ayurveda and Unani, identify antiviral and antibacterial properties of the neem tree also known as the "curer of all ailments" in Sanskrit, and prescribe the same for treating skin diseases and as a natural pesticide. The applicant admitted in the patent application of how the pesticidal uses of neem were known and pointed out to the fact that storing azadirachtin for a longer duration is difficult. The US patent granted, covered a limited invention whereby the applicant was only given the exclusive right to use azadirachtin in the particular storage solution described in the patent.

According to India's claim, it was stated that Neem is an indigenous product and it is still in practice as a form of traditional knowledge in India. It was also said that Neem if granted patent it would affect the poor farmers and by this the Indian economy will also be harmed. A group of individuals and several NGO‟s initiated their Neem campaign and this was done to mobilise the people for support and to protect the traditional knowledge systems and also protect Indian traditional products from bio-piracy. The Neem Case was the first initiative to challenge US and European patents with regard to bio-piracy. Thus, On July 30,1997 the European Patent Office (EPO) accepted the arguments of Indian scientists thus this resulted in rejection of patent granted by the iUS patent office to W R Grace and co. The argument which was accepted on whole was the use of Neem and its products in India for a period of more than 4000 years.

The grant of the patent was followed by an uproar and it was challenged through re-examination and post-grant opposition proceedings before the United States Patent and Trade Mark Office (USPTO) and the European Patent Office (EPO), respectively. Though there was no success at the

Uspto, the European Patent Office ruled in favour of the opposition stating the patent granted, lacked in novelty and inventive step.

Turmeric case:

The crux of the issue in this case was the patent issued by USPTO to the University of Mississippi Medical Centre in 1995 for its use in wound healing. In fact, the patent holders were two non-resident Indians –Suman Das and Harihar Cohli. The CSIR raised objections and submitted 32 references from ancient Indian scriptures. The issue herein was twofold: (i) Whether the claimed invention fits into the patent criteria and (ii) The violation of IPRs and bio-piracy under CBD. This was a landmark case which India won, but the issues remained – lack of proper documentation of bio-resources, the virtual absence of information to USPTO regarding TK and the ground reality that we cannot

The Indian Copyright Law though protects the unpublished Indian works under Section 31A(2) of Indian Copyright Act, does not extend its branches to protect directly the traditional knowledge of indigenous people or the expression of the folklore. There are 3 drawbacks namely in considering copyright as a mechanism for protection they are as follows, The Indian Copyright Act protects the author of the work but in protection of traditional knowledge there is no single author for granting protection to the author. In the case of traditional knowledge, the work is an accumulation of knowledge from generation to generation and by this tracing the authorship is difficult and also impossible, The Indian Copyright law protects the work registered under this for a fixed period of time which is only for a period of 60 years. But in case of traditional knowledge, it should have a perpetual protection and not a limited period of time protection. And protecting the copyright under the Indian Copyright Law only a tangible form of work can be registered. But in case of traditional knowledge, it is never a fixed form of work but it is only a verbal form of knowledge that passed on from generation to generation. Whereas in some of the cases the stories can be found in written form. Thus the traditional knowledge can not be registered under Indian Copyright law and can be easily denied for being registered because the traditional knowledge fails to satisfy the basic requirements of Indian Copyright Act

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Trademarks are indications of distinctiveness that a trade mark holder may affix on a product for which that mark is registered. Like other trademark legislations, the Indian Act does not protect the knowledge or technology incorporated in a trademarked product and, hence, does not impede the commercialisation by a third party of an imitative product, if not protected under the Patents Act, under a different trade mark, or without a trade mark. Two particular categories of trademarks are, however, employed to identify the goods 'geographic origin and assist in the protection of Traditional Knowledge associated. This includes Certification and Collective marks. Certification marks indicate that the product meets pre-established standards, which can be linked to its place of origin. Collective marks distinguish the goods or services as having a connection with a specific group and can also imply a geographic origin. Trademarks can be used to secure protection for the ISM practices since GI Act does not cover services whereas Trade Marks Act does.[1927]

The Geographical Indications of Goods (Registration and Protection) Act, 1999, passed by Parliament is primarily intended to protect the valuable geographical indications of the country. Protection under the Act is available only to the geographical indications registered under the Act and to the authorised users. The Act permits any association of persons or producers or any organisation or authority established by law representing the interests of the producers of goods to register a geographical indication. It may be possible to argue that the holders of the traditional knowledge in goods produced and sold using geographical indications can register and protect their traditional knowledge under this law, but it is also a fact that many communities producing goods based on geographical indications have not formed associations to claim protection under the Act. In many cases, it is the distributors of these goods who have associations, and they may be in a position to obtain registration. It appears that there is no effective provision in the Act or its associated Rules to find out whether the associations applying for registration really represent the producers, i.e. traditional communities, of goods that contain traditional knowledge.[1928]

It is the first piece of legislation in the world which recognises the contribution of the farming and tribal communities in conserving biodiversity and developing new plant varieties. The Act is a sui generis system to protect traditional rights and enshrines the rights of farmers as breeders,

[1927] N. S. Gopalakrishnan, *Protection of Traditional Knowledge: The Need for a Sui Generis Law in India,* 5 J. World Intell. Prop. 725 (2002).
[1928] K Venkataraman, *Intellectual Property Rights, Traditional Knowledge and Biodiversity of India, Vol. 13* JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, pp 326-335, July 2008

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conservators and cultivators. It stipulates that a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled for recognition and reward from the Government Gene Fund. It confers on the farmer the entitlement to save, use, sow, re-sow, exchange, share or sell his farm produce. Any person, group of persons or NGO, on behalf of any village or local community may with the previous approval of the Central Government, file a claim attributable to the contribution of the people of that village or local community in the evolution of any plant variety for the purpose of staking claim on behalf of such village or community. Enactment of this legislation has been hailed as a milestone in the history of conservation of Traditional knowledge.

Whatever said and done, the current IPR system cannot protect traditional knowledge in a comprehensive manner for three reasons. First, the current system seeks to privatize ownership and is designed to be held by individuals or corporations, whereas traditional knowledge has collective ownership. Second, this protection is time-bound, whereas traditional knowledge is held in perpetuity from generation to generation. Third, it adopts a restricted interpretation of invention which should satisfy the criteria of novelty and be capable of industrial application, whereas traditional innovation is incremental, informal and occurs over time.

THE WAY FORWARD:

The protection of Traditional knowledge raises several policy issues, prominently the objectives and methods of such protection, and its impact and ramifications for intended beneficiaries. Such issues are extremely complex, since there are broad differences about the definition of the subject matter, the justification for protection, and the means for achieving its purposes. Traditional knowledge should be protected on both human rights and utilitarian grounds, but the political strategy adopted by India for the past two decades needs to be seriously reconsidered. In terms of legal benchmark, this strategy has been dichotomous. The issues pertinent to Traditional Knowledge should be addressed in a comprehensive manner, including ethical, environmental and socio-economic concerns. Moreover, there are still several unresolved technical issues such as the problem of collective ownership and the modes of enforcement of rights. There is a risk of transferring concepts and models unsuited to their realities to such communities, or which may prove ineffective in solving the issues they are supposed to address. The protection of Traditional

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Knowledge should not outweigh the fact that its preservation and use requires ensuring the survival and improvement of living conditions of such Local and Indigenous Communities

The development of any system of law for the protection of Traditional knowledge should be established on a logical definition of the objectives sought, and on the propriety of the mechanism opted to accomplish them. IPRs may be one of the devices to be used, but their limits and ramifications should be clearly gauged. A balance should be struck between the protection and promotion of the use of such knowledge.

A sui generis system of protection, based on IP principles if adopted, would make it possible to accommodate the peculiarities of traditional knowledge systems and ensure that the custodians of such knowledge are able to manage and exploit it in line with customary practice. It would also provide a means of defensive protection to stop third parties from acquiring IP rights over traditional knowledge. A relevant and effective framework will also take into account the trans-boundary nature of traditional knowledge, which is often widely shared by communities across national boundaries India, for example, has established a traditional knowledge database (TKDL) which has significantly reduced the number of erroneous patents derived from traditional knowledge.

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UNIFORM CIVIL CODE: REMOVING DEMENTIA OF THE SYSTEM

- **HARSHIT SANKHLA**

ABSTRACT

Standing in the 70th year of Independent India, and claiming it to be a secular nation, but are we secular? There are still personal laws that are time and again being used to fulfil the selfish motives. In such a state of peril a uniform structure of laws is a need. Uniform civil code has been called as an important necessity for the nation by courts and many politicians but still the law makers or the legislative assembly that holds the power to make such law has paid no heed to the subject.

The constitution of India quantifies some Directive Principles of State Policy with an object to apply rights irrespective of race, place of birth, religion, caste, creed, or gender. One of these directive principles is the constitutionally enshrined Uniform Civil Code. Uniform civil code (UCC), a common code that indicates the idea of similar set of rules regardless of their religion, caste, sex etc. is an ongoing controversial topic in the nation. Article 44 requires the state to endeavour the citizens of India a Uniform Civil Code throughout the nation.

The founding fathers of the constitution of India while drafting the constitution felt the need to lay down the groundwork for a uniform set of guidelines for future application. Thus, they avoided the use of word "enact" and alternatively, used words like "endeavour" and "strive" in the provision. It was quite clear that to unite India further, there will be a need for Uniform Civil Code, however after so many years of Independence the goal still seems like a far cry.

INTRODUCTION

India is popularly quoted as the society rich in its cultural diversities, where numerous languages are spoken, cultures being followed and religions being preached. This diverse nature is appreciated and looked up to but many times it leads to the problem of integration and governance

over the citizens. There are various personal laws acting as the custodian by governing these different communities and religions, distinguished by the customs and traditions, their applications and usages.

The Constitution of India envisaged a Uniform Civil Code under Article 44, which includes a large ambit of personal laws. A Uniform Civil Code lays down a similar set of civil laws to govern everyone, even to those people who belong to different religions and regions. It does not play biased on the bases of race, cast, sex, place of birth etc. It covers the entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance.[1929]

Article 44 of the Constitution of India quantifies the concept of a Uniform Civil Code, laying down that:

"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."[1930]

Uniform Civil Code implores the personal laws framed on the customs and traditions of each community. Such laws talk about four major areas: Marriage, Divorce, maintenance and succession. After such a long era of independence people are still being dominated and pondered upon by the personal laws of their respective community. Article 44 was incorporated in the constitution with a view to achieve uniformity.

The purpose contained in the uniform civil code is to eradicate the contradictions based on different religious ideologies and promote the concept of national unity. All communities in the country would then be kept on the same platform and judged, as sharing a same periphery would mean that no community would be governed by diverse personal laws.

Right after the country got independent it was not feasible to impose a Uniform Civil Code on the circumstances as it would have led to the disintegration of the nation and would have caused chaos in the nation, as people from different communities would have raised their voices for their

[1929] Amit Kumar Kashyap & Renu Sharma, Decoding Uniform Civil Code: Scope and Practicability, Aligarh Muslim University, Aligarh (Apr. 21, 2020, 11:30 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520935.
[1930] Ind. Const. art. 44.

personal laws, so this was the reason that the code was covered under the Directive Principle of State Policy.

But, even after seventy years after independence, the uniform civil code enshrined in Article 44 of the Constitution, is still under Directive Principles.[1931] Law is supreme and the most fundamental of the rights conferred is 'equality before law' and 'equal protection of law'. The demand for a Uniform Civil Code has attained communal overtones which have overshadowed the merits of the proposal. However, Article 44 of the constitution is by no means the only Directive Principle to have not been implemented even after half a century of its formation. **Most directive principles continue to remain pious doctrines rather than the law of the land.**[1932] We are governed by the rule of law but still but still there are many lacunas that need to be filled.

Also, the Preamble of Indian constitution is enshrined with the constitutional spirit. Its main focus is to constitute India as Sovereign, Secular and Democratic Republic nation. It contains those entities which are the soul of the constitution. It also ensures Justice, Equality and Liberty to each and every citizen while assuring their faith in the integrity of the nation. But divided by the gulf of personal laws are we really integrated? So, in this context the importance of Uniform Civil Code can be visualised, but it has to understood by the bureaucrats and the law makers of the country.

Then only we can truly say that we are governed by LAW!

PROPOUND CONSTITUENTS OF UNIFORM CIVIL CODE

The constituents that are proposed for Uniform Civil Code requires to be of unbiased nature. The framework of Uniform Civil Code requires to be done in such a way that the best elements of every religion should be taken and clubbed together, and further it should have a reformative impact on the laws mentioned below: -

[1931] Vasundhara Sanger, A pious doctrine, but untouchable, The Times of India (Apr. 27, 2020, 2:32 PM), https://timesofindia.indiatimes.com/india/A-pious-doctrine-but-untouchable/articleshow/1733642.cms.
[1932] What's a Uniform Civil Code, Hindu Vivek Kendra (Apr. 19, 2020, 2:30 PM), http://www.hvk.org/2003/0703/227.html.

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MARRIAGE AND DIVORCE

Marriage is the establishment of any society. Time has showed its impact on marriage and has converted it from a "Sacrament Union" to a "Civil Contract". It would not be unwise to call marriage as an institution. Marriage has become a global phenomenon which attracts the interest of masses.

The personal laws of each religion contain different essentials of a valid marriage. The time has come for codifying the laws relating to marriage and divorce.[1933]

SUCCESSION AND INHERITANCE

This sector possesses many intractable problems. The Hindu Law and Muslim Law offers different laws in this as in Hindu law, there is a distinction between a joint family property and self-acquired property which is not so under the Muslim law. With regards to the institution of family, Hindu law creates a distinction between a joint family property and self-acquired property. On the other hand, this distinction is non-existent in Muslim law, where limitations are imposed on the extent of property that can be bequeathed by will. The essentials of valid will, the procedure for registration and execution of the will should be provided for.[1934]

MAINTAINENCE

The maintenance law regarding Hindu and Muslim laws are very different from each other. Apart from personal laws, a non-Muslim woman can claim maintenance under Section 125 of Code of Criminal Procedure.[1935] A Muslim woman can claim maintenance under the Muslim Women (Right to Protection on Divorce) Act, 1986. Apart from the above there are also provisions relating to the maintenance of the children, parents and other close dependent relatives.

[1933] Ms Jorden Diengedh v S.S. Chopra, A.I.R. 1985 S.C. 934, 940.
[1934] Gauri Kulkarni, Uniform Civil Code, Legal Services India (Apr. 24, 2020, 12:35 PM) http://www.legalserviceindia.com/articles/ucc.htm.
[1935] Sarla Mudgal & ors. V. UOI, A.I.R. 1995 S.C. 1531.

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NEXUS BETWEEN SECULARISM, CONSTITUTION AND UNIFORM CIVIL CODE

Uniform Civil Code has been a highly inflammable topic since the inception. After India got independent Uniform Civil Code was a highly debatable topic in the parliament. On one end of the discussion many eminent personalities like, Dr. B.R. Ambedkar who was supported by nationalists like Gopal Swamy Iyenger, Ananta sayam Iyengar, KM Munshi ji were supporting the idea of Uniform Civil Code whereas on the other side it was strongly the idea was strongly opposed by the Muslim fundamentalists like Poker Sahib and people from other religions.

The idea of Uniform Civil Code got heated when the issue was raised in the constituent assembly in 1947 and was enumerated as the Directive Principle of State Policy. The typical feud between the personal law and a uniform law hampered the nation to achieve the goal of an integrated legal system throughout the nation. The conflicting views raised by the religious communities based on the personal law acted as a road block from advancing the nationhood and achieving the Uniform Civil Code.

The Chairman of the drafting committee of the Constitution, Dr. B.R. Ambedkar, said that, "We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able to invade so far as the marriage and succession ... and it is the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change."[1936]

Every ounce of controversy circling around the Uniform Civil Code has been about Secularism and the freedom of religion enshrined in the constitution of India under Article 25[1937] and 26[1938].

[1936] Lok Sabha Secretariat, Constituent Assembly Debates Vol. III, 551, Nov. 23, 1948.

[1937] (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law- a) regulating or restricting any economic, financial, political or other secular activities which may be associated with religious practice; b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

[1938] "Subject to public order, morality and health, every religious denomination or any section thereof shall have a right-a) to establish and maintain institutions for religious and charitable purposes; b) to manage its own affairs in

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The Preamble of The Constitution of India states India as a Secular, Sovereign, Socialist, Democratic Republic, which implies that a state does not have a religion of its own.

The process of Secularisation has a direct link with the Uniform Civil Code as they both share a cause and effect relationship. J. Reddy stated that the religion is the matter of individual faith and cannot be mixed with secular activities as secular activities can be regulated by the State.[1939] Uniform Civil Code does not oppose Secularism or Article 25 and Article 26. Article 44 is raised on the theory that in a civilised society there is no necessary relationship between religion and personal law.

The preamble of the Constitution states that India is a "secular democratic republic". A secular state does not distinguish people on the basis of religion they follow, the only thing that they take into consideration is the relation of man with another man, and the relation of man with God is not what they are concerned about.

In India, "Positive Secularism" distinguishes secularism with individual faith. Positive Secularism is a common doctrine of secularism that says, there is a boundary between religion and state. This doctrine of secularism as taken into effect in other countries like United States of America and Europe is of totally different nature as comparison to that of India, as these countries do not intervene into the religious matters of the people. It had to be understood that the evolutionary process that these countries went through consists of reformation, enlighten and renaissance. On the other hand, India has never passed through these stages and thus the state has a responsibility to intervene in the matters of religion so as to remove the restrictions in the governance of the state. It is the duty of the state to see to it that religion is not causing any hindrance to the overall growth and development of the nation.

The constitution of India guarantees us Article 25 and Article 26, under these articles the right to freedom is enshrined. Article 25 provides the freedom of conscience and the right to profess, practise and propagate religion. Article 25 and 26 purview extends to the activities done by an individual or group of individuals in the pursuance of their religion and therefore, contains

matters of religion; c) to own and acquire movable and immovable property; and d) to administer such property in accordance with law".

[1939] S.R. Bommai v. Union of India, 3 S.C.C. 1 (1994).

guarantee for rituals and observations, ceremonies and means of worships, which constitutes the integral part of any religion.

Uniform Civil Code neither is opposing the view of secularism nor is violating Article 25 and Article 26 of the Constitution. Its essence is often misunderstood, but Article 44 is based on the concept that there is no obvious link between religion and personal law in a civilized society.

Every person standing under the big umbrella of Secularism has its own rights guaranteed to him by the constitution of India as these rights combines to form the basic structure of the Constitution of India. Marriage, Divorce and maintenance are issues which are of secular nature and thus they cannot be caged by any law. Thus, Implementation of Uniform Civil Code will not lead to interference of one's religious beliefs.

Justice for Gender

Women, whose whole life is devoted to play different roles in the society selflessly, are being discriminated in all personal laws. Despite of being the backbone of the family women have always been under the scrutiny of various laws but none of them does the job of giving them a fair chance. Women are always discriminated is all sectors be it Divorce, Inheritance, Maintenance, Adoption, Marriage etc., there rights are always being suppressed under the cape of the customs and traditional practices being followed from primitive era. Women have been considered as an inferior side in all of the personal laws as compared to men. Following instances justifies it:

HINDU LAW

Looking at the picture from the starting, in Hindu Religion in old era women were treated as goddesses. Even in today's world female deities are worshiped all over the India but still, time and again their rights are hampered.

Before the codification of Hindu Law in 1955 and 1956 the women in Hindu religion did not enjoy the equality among rights with the Hindu men. Before the codification of Hindu law Polygamy

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was prevalent in Hindu religion which deprived women of the love and affection they deserved from men. Not only this, woman was considered as a weaker section of the society and were not allowed to keep any property under their possession except the "Stridhan". She had no or very minimal piece of estate. In the matters regarding adoption again the rights of women were hampered as a Hindu Woman could not adopt a child on her own. She could not become the guardian of her children as long as her husband is alive. These examples are only illustrative in nature and not exhaustive.

Even after the codification of Hindu Law the problem of discrimination has not solved thoroughly. In most of the states women are not allowed to become the coparcener except in few states like Andhra Pradesh, Maharashtra, Karnataka and Tamil Nadu. Discriminatory sections of Hindu Succession Act, 1956 are repealed.[1940] Property of a female Hindu is her absolute property, whether acquired before or after the commencement of Hindu Succession Act.[1941] Hindu female has now not only equal rights of Divorce but also, they have extra grounds of Divorce too.[1942] The task of law makers was not faced by much agitation or protest as The Hindu Community was ready to adapt to the reforms. But Hindu Customs, hampered the growth of Hindu Law and thus, the codification of personal law of Hindus has not succeeded completely in eradicating the gender inequality, till date.

MUSLIM LAW

The Muslim personal law has adopted the more unfair and rigid practices like Polygamy, Unilateral Divorce, Non-Maintenance of divorced wife and discrimination in matters of succession. Halala[1943] process in itself is very inhumane and discriminatory provision for a woman to remarry.

[1940]Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India), §23 & §24, repealed by the Act No.39, 2005.
[1941]Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India), §14.
[1942]Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India), §13(1) & §13(2).
[1943]The divorced Muslim wife has to marry another person and get the marriage consummated. Thereafter, the wife will take divorce from second husband and then she can be able to marry the first divorced husband.

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In Muslim Law a man is allowed to marry four wives at a time but the wife has not been given the same option. In Shia law here is no limit regarding number of marriages.

There are certain aspects in Islam that puts the women on a lower platform as compared to men especially the wives. A Muslim male can consummate as many as four marriages, however polygamy in Muslim law is not a compulsion but mere permission. Muta'h marriage also known as "Nikah al-Muta'h" is a marriage for a temporary but fixed period with a Muslim female by a male Muslim, after specifying dower.[1944] There is no ceiling on the number of Muta'h marriages that may be contracted by a Muslim male. In the matter of divorce, the position of the Muslim women is the most inferior and insecure as compared to others. Particularly the method of divorcing the wife by the husband by pronouncing triple 'Tilak' is highly discriminatory.

With respect to Maintenance as per Muslim law a Muslim wife is not required to be paid alimony after the period of "Iddah".

The Criminal Procedure Code has certain provisions which creates an obligation on the husband to maintain his wife including divorced wife until and unless she is able to maintain herself. This led to the spark of the controversy that whether the Muslim men should pay maintenance to his divorced wife even after the ending of the period of Iddah as per the provisions of Section 125 of Cr. P.C.

In the case of Mohd. Ahmed Khan Vs. Shah Bano Begum[1945] the Supreme Court speaking through Y. V. Chandrachud, the then Chief Justice held that Section 125 Cr.PC. is applicable also to the Muslims, and that even a Muslim husband also is liable to maintain his divorced wife beyond the Iddah period. Because of the controversy and buzz created by the judgment and also because of the politics played by the Government to increase their vote bank, the parliament has passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 to overrule the judgement in Shah Bano case. The effect of this Act is that a Muslim husband is not liable to maintain his divorced wife beyond the Iddah period, unless both the spouses submit to the court at the appropriate time that they would like to be governed by Cr. P.C.

[1944]Manzar Saeed, Muslim Law in India 125 (Orient Publishing Company, 2008)
[1945]Mohd. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945.

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The whole incident shows that the temporary will of the parliamentary majority is sometimes able to subvert the secular and egalitarian values. Therefore, said Act can be held unconstitutional on following grounds:[1946]

• It discriminates divorced women on the ground of their religion.

• Art.15(3) enjoys that the special law made for women must be beneficial to them but at the same time does not permit same law to be framed for the women of a particular religion.

• Dignity of women and equality of status and equal opportunity for all and fraternity of the preamble of the Constitution are not saved.

• It is violative of Art.14 of the Constitution as the classification is arbitrary, irrational and unreasonable.

• It is also inconsistent with the provisions of Art. 39-A of the Constitution.

According to Nehru, the extreme religious reverence which some people gave to their personal laws was completely misplaced.[1947]

OTHER LAWS

In other religions the women have to go through the same agony of discrimination. As in,

- In Christian Religion, a Christian Husband can get the divorce on the ground of Adultery on the part of his wife, but if the wife seeks the remedy of divorce on the same ground of Adultery committed by husband she had to prove one more another ground such as Mental Sickness, Leprosy, Cruelty, Desertion in addition to adultery committed by the husband to get divorce.

It is crystal clear that in Christian Law thinks of wife inferior on the ground of Divorce.

- In case of Jews they still lack a codified matrimonial law in India.

[1946]Bhagwati Prasad Singhal, Uniform Civil Code- Framing is Imperative 167 (A.I.R. 1998 Journal).
[1947]Jawahar Lal Nehru, Glimpses of World History 736

- Parsi woman who marries non-parsi man lose their share in the property while if a non-parsi woman marries a parsi man then she will be entitled to only half of the husband's property as per the parsi law.

The Illustrations of Diversities in the religious practices of various religions says that none of them is prone to mistakes as in some way or other women are being treated as a submissive character in the society. Thus, all of them could use some upgradation and pruning.

WHY INDIA NEEDS UNIFORM CIVIL CODE?

Dr. Ambedkar, speaking about Article 44 and its calls for a uniform code, observed "It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary."[1948]

Dr. B.R. Ambedkar while framing the constitution of India was pretty clear about the need of a Uniform code in India but due to the stiff beliefs of different communities in their personal laws no action was taken at that point of time, because that would have caused rise in the rebellions.

It has been decades and we can still feel the need of Uniform Civil Code in our country. India as a country has suffered for quite a long period of time in the absence of a Uniform structure of laws for all religions. The society in India is already distributed into pieces on the name of religions, caste, race, sex and every religion have their own set of rules, regarding Marriage, Adoption, Divorce, Maintenance and in many cases the traditions come in the way of the execution of law, as they are violative of the Constitution of India.

The Hindus, Sikhs, Buddhists, Jains come under the purview of Hindu Law while Muslim and Christians have their own set of laws as Muslim people are governed under Shariat Law.

[1948] Jayan, U.C.C based Indian civil code for spreading secular throughout India irrespective of personal laws for authentic India, Legal Services India (Apr. 21, 2020, 6:05 PM), http://www.legalservicesindia.com/article/1461/u.c.c-based-Indian-civil-code.html.

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The Uniform Civil Code is a component of Rule of Law and for these arguments presents the need of it in our country:

- The code creates equality: - After the independence of the nation every religion went through the process of upgrading their personal laws, as many changes could be seen in various personal laws as many practices were abolished, but same has not been the case in Muslim Law. How can equality be achieved as long as every religion will do as they please.
- Gender equality: - Gender has always been able to draw a line in the world as one gender is considered as superior over another. In our nation women have always been looked down upon in all personal laws. In Hindu law women's rights are hampered be it in the case of Succession, from married daughter's place of residence to the possession of the property Hindu women have always been given less preference as compared to Hindu men.

In case of Muslim Law, the Gender problem is even a bigger crisis, as most of the customs practiced by the religion are in violation of the basic rights granted to women by the constitution. Numerous traditions in Muslim law like Nikah Halala, Mahr, Triple Talaq, leads to the discrimination of women.

Goa being an exception

The state of Goa is the first state in India to practice Article 44 which is called as Goa Civil Code. There is a common civil code in Goa for people of all communities and religions. The Portuguese colonists framed this code[1949] way back in 19th and 20th century through various legislations. After the liberalisation all colonial laws were removed and scrapped over but however this law was allowed to continue.

The main emphasis has been laid on the issue of divorce in this law and the most significant provision in this law is the prenuptial Public Deed regarding the disposal of immovable and movable property in the event of divorce or death, because after the death or divorce the distribution of the property was a point where discrimination could be done.

In case of dissolution of marriage, the property is to be divided equally between the sons and daughters. In order to prove the above, it necessitated the compulsory registration of marriages.

[1949]The Goa Civil Code, collectively called 'Family Laws'

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This action has many good effects, as it will lead to registration of the marriage which will be helpful in Family Courts and the registration process also lead to the decrease in the Polygamy and Bigamy.

The idea behind the application of a set of Uniform laws for everyone in the territory was to inculcate the feeling of togetherness between Husband and Wife as they are considered as the backbone of the family. The whole society is based on the harmonious relationship between the family. It was understood that with removal of the discrimination of one gender over other a stable society could be created.

Commenting that the dream of a UCC in the country finds its realisation in Goa, former Chief Justice of India, Y.V. Chandrachud had once expressed hope that it would one day "awaken the rest of bigoted India."[1950]

Still there are numerous doubts regarding the application of Uniform Civil Code. It has to be said that no law is bad in itself. Our legal system constitutes of many laws that promote equality and reduces discrimination. Our judiciary is always at work to remove the gap between the genders. In the same way a Uniform Civil Code needs to be implemented efficiently, because it is the need of the era. Its benefits are something that cannot be ignored.

CONCLUSION

A Uniform Civil Code (UCC) sets the precedent for achieving true equality and an homogenize society. The implementation of UCC in India will unite and integrate the country more then it has ever been. UCC acts as a custodian to minority as they are the one's who get supressed by the dominating majorities. UCC not only promotes national integration, but also prohibits the evils of discrimination against the minorities. A uniform law to all its citizens is a dream cherished by reputed legal scholars, members of the Constituent Assembly who drafted out constitution and judges alike.

Its been so long since our constitution was drafted and after that we have only delayed in building a common structure of laws, but we can't procrastinate any longer. By not implementing UCC the

[1950] Mohammad Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945.

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government is only promoting untold human rights violation and discriminating on the basis of gender.

It is not up to the courts to implement UCC as the segregation of powers is enshrined in the constitution. Separation of powers is one of the many features that are part of the basic structure doctrine formulated in 1973 through the Kesavananda Bharti[1951] case. Even in the matter of UCC the court has reiterated that the onus in on the Parliament to bring the Uniform Civil Code into force.[1952]

The concept of one nation and one framework guiding its mechanism is the golden goal and it goes back to the time of drafting of the constitution. Every modern nation is moving towards achieving it, and its time that we truly implement it and become the democratic nation that we claim to be.

[1951] His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 S.C.C. 225.
[1952] In Maharshi v. Union of India 1994 Supp (1) SCC 713, "it dismissed a petition seeking a writ of mandamus against the Government of India to introduce a common civil code. The court took the view that it was a matter for the legislature. 'The courts cannot legislate in these matters".

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INDIAN YOUNG LAWYERS ASSOCIATION V. STATE OF KERALA

WRIT PETITION (CIVIL) NO. 373 OF 2006

- PRIYA SHARMA & SANSKRITI KUKRETI

ABSTRACT

Like many temples in Kerala, Sabarimala has its unique mythology, tradition and rituals. One among them is that it is open only for five days in the month – starting with the first day of every Malayalam month. The second is that while men from all ages can worship, the temples traditions place a restriction on women below 50. So, to most people sitting at a distance from Ayyappa and Sabarimala, its traditions are being viewed through the narrow prism of women's discrimination. And debates on faith vs Constitution are inevitable. The natural question is why not here? The answer is simple – this is not about discrimination at all. This is about faith of both women and men who worship Lord Ayyappa. The fundamental question on the Sabarimala issue is "should the judiciary or the government be indulging in a matter that is predominantly a matter of faith and tradition?" The Supreme Court should not interfere with the religious sentiments of people. These all are customs and religious faith and much more than the need for gender equality. Gender equality can be attain at so many in life, rather than bringing the religious angle to it.

Key words:- Discrimination, Fundamental Right, Gender Equality, Faith, Women

INTRODUCTION:

Sabarimala Temple issue is all about the conflict between tradition and women rights. Sabarimala Dharma Shasthra Temple is one of the most famous Hindu temples in India, located in the Pathanamthitta district of Kerala. The temple is managed by the Travancore Devaswom Board. Sabarimala is an ancient temple of Ayyappan who is worshipped as a 'Naishtika Bramhachari' or

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a celibate for life. Therefore, as per notification by the Devaswom Board that manages the temple, women belonging to the menstruating age are not permitted to enter the temple. The custom of not allowing women in the Sabarimala Temple is protected by Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 "Public Worship Rules". This rule allows the exclusion of women from any place of worship, if the exclusion is based on 'custom'.

FACTS OF THE CASE:

- This ban to temple entry for women was challenged before the Kerala high court in **1991** in S. Mahendran vs. The Secretary, Travancore. The Kerala high court ruled in favour of the prohibition of women entry in the temple, ruled and stated that these restrictions have existed since time immemorial and not discriminatory to the Constitution. This order of the High Court was followed for the next 15 years.
- In **2006**, a petition was filed in the Supreme Court by Indian Young Lawyers Association on the grounds that the rule violates the fundamental right of the women to follow and propagate religion, which is in Article 25 of the Indian Constitution.
- In **2007** LDF government of Kerala files affidavit supporting PIL questioning ban on women's entry.
- In **2016** two judge bench of Supreme Court question practice banning entry of female devotees at Sabarimala temple as it is a violation of right to equality and plea filed in Supreme Court to transfer this case to the gender-equal bench.
- The five-judge constitution bench headed by Chief Justice Dipak Misra, in its 4:1 verdict ,ruled that restricting entry of women between 10 and 50 years old was unconstitutional and allows women of the all ages enter in to the temple.

ISSUES RAISED IN SABARIMALA CASE:

The issues raised by the Supreme Court in the given case are as follows:-

1. Whether the exclusionary practice based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by "morality" as used in Articles 25 and 26 of the Constitution?

2. Whether the practice constitutes an "essential religious practice" under Article 25 and whether a religious institution can assert a claim to do so under right to manage its own affairs in the matters of religion?
3. Whether Ayyappa Temple has a denominational character?
4. Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the ages of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women to the temple on the ground of sex?
5. Whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965?

ARGUMENT ADVANCED:

The argument given by the petitioner in the given case are:

The Ayyappa Temple in Sabarimala prohibited menstruating women between the ages of 10-50 years from entering as the deity Lord Ayyappa was considered to be 'celibate'. It is evident from the last many judgements that Lord Ayyappa too has character of a justice person under the Hindu Law, as recognised by this Hon'ble Court consequently the deity enjoys right as a person under article 21, 25 (1) and26 of Indian Constitution. So being a person deity also enjoys the right to privacy under article 21 and right to remain 'Naishtika Bramhachari'. According to Hindu Law, **a Naishtika Brahmachari is one who undertakes a vow to remain a celibate till his death**. He also has to undertake to live forever with his guru and stays away from women till his death due to their religious belief and faith. It is clearly mention in the commentaries that the male naishtika bhramachari stays away from the female naishtika bhramachari and the female naishtika bhramachari stays away from the male naishtika bhramachari. This right to privacy falls under article 21 of the Indian Constitution. Hence, the entry of women inside the temple should continue to be restricted.

The Ayyappa in Sabarimala is a celibate body and his individual rights should be protected by the Indian Constitution. He also argued that the rule is not discriminatory and it is neither based on misogyny nor menstrual impurity, rather Ayyappa's celibacy here is a fundamental character of the temple.

The Travancore Devaswon Board said that "Prohibition is not because of male chauvinism. It is linked to the penance and character of the deity. Women accept the prohibition. It is not imposed on them."[1953]

The **Defendant argued** that the bar on entry of women in Sabarimala temple is not the essence of their religious affairs, observing that it is "neither a ritual nor a ceremony associated with Hindu religion". It is also argued that the Sabarimala temple cannot claim a character of an independent religious denomination, pointing to the fact that it is managed by the Travancore Devawson Board, which receives public funds. As a result, the temple cannot practice gender based discrimination as it violates article 14 and 15.

In Shiroor Muttto Case, it is pointed out that attribute of a "religious denomination" has five folds- 1. Having its own property, 2. District Identity, 3. Having its own set of followers, 4. Distinct set of practices and beliefs, 5. Its own hierarchy of administration without external control and interference. It was also argued that the ban on entry was based on practical consideration rather than on traditions.

Senior Advocate Indra Jaisingh equated the ban on entry of women to the temple with the practice of 'untouchability'. "Prohibition of women entry is a form of untouchability. The sole basis of restriction is menstruation of women. To keep away menstruating women is a form of untouchability. Menstruating women are seen as polluted" and Indian Constitution guaranteed freedom to practice religion (Article 25), noting, "There is nothing in health, morality or public order to prevent a woman from offering worship in a public temple". She also argued that deity as

[1953] https://www.thehindu.com/news/national/sabarimala-entry-ban-on-women-mired-in-patriarchy-sc/article24504357.ece.

a deity as a legal person has limited rights, and could claim protection of life and liberty U/A 21 and freedom of conscience U/A 25[1954].

JUDGEMENT-

On 28th September 2018, the Court delivered its verdict in Sabarimala Temple Entry. A 4:1 majority held that the temple's practice of excluding women is unconstitutional. It held that the practice violated the fundamental rights to equality, liberty and freedom of religion, Articles 14, 15, 19(1), 21 and 25(1). It struck down Rule 3(b) of the Kerala Hindu Places of Public Worship Act as unconstitutional. Rule 3(b) allowed for Hindu denominations to exclude women from public places of worship, if the exclusion was based on 'custom'.

The Court delivered four separate opinions: Chief Justice Misra, Justice Nariman, Justice Chandrachud, and Justice Malhotra. Justice Nariman & Justice Chandrachud concurred with the opinion of Chief Justice Misra. The dissenting opinion in the case was delivered by Justice Indu Malhotra.

Chief Justice Deepak Misra's opinion-

According to justice Misra way of life intrinsically linked to the dignity of an individual. He stated that the exclusion of women between the ages of 10-50 years practiced by the Sabarimala Temple denuded women of their freedom of worship, guaranteed under Article 25(1). He observed rule 3(b) of Kerala as violation of the constitution and ultra vires to Sections 3 and 4 of its parent Act. Sections 3 and 4 of the Act were written with the specific aim of reforming public Hindu places so that they become open to all sections of Hindus. Rule 3(b) achieves the opposite -- it allows public Hindu places of worship to exclude women on the basis of custom. Hence, CJI Misra concluded that the rule not only violates the Constitution, but also stands in conflict with the intention of the parent Act.[1955] Further, he held that the devotees of Ayyappa did not pass the constitutional test to be declared a separate religious identity. He said that they are Hindus. Thus

[1954] https://www.thenewsminute.com/article/should-sabarimala-temple-open-its-doors-women-here-are-arguments-heard-court-89070.
[1955] https://scobserver.clpr.org.in/court-case/sabrimala-temple-entry-case/plain-english-summary-of-judgment-ee5ae148-9597-479f-84d7-35d398ed5e68.

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he held that the temple's denominational right to manage its own internal affairs, under Article 26(b), was subject to the State's social reform mandate under Article 25(2) (b). Article 25(2)(b) provides that the State can make laws to reform Hindu denominations. Specifically, Article 25(2)(b) allows the State to make any law that opens a public Hindu institution to all 'classes and sections' of Hindus. Justice Misra interpreted 'classes and sections' to include the gendered category of women. He concluded that the Sabarimala custom of excluding women is subject to State mandated reform. He also held that the exclusion of women between ages 10-50 by the Sabarimala Temple cannot be an essential religious practice. He held that if the Ayyappana are Hindus, the practice of excluding women cannot be held to be an essential religious practice and everyone has fundamental freedom to practice and profess religion.

Justice Indu Malhotra-

Justice Indu Malhotra delivered a dissenting opinion. She argued that constitutional morality in a secular polity, such as India, requires a 'harmonisation' of various competing claims to fundamental rights. She said that the Court must respect a religious denomination's right to manage their internal affairs, regardless of whether their practices are rational or logical. The article 14, right to equality, justice Malhotra said that it cannot be the only touchstone to test religious customs and practices. According to Justice Indu Malhotra article 25, which is freedom of religion specifically provides the equal entitlement of every individual to freely practice their religion equal treatment under article 25 of the Indian constitution is consider by the essential beliefs and practices of any religion. She added that the issue in this case not limited to Sabarimala only. It will have far reaching implications for other places of worships, she said-Reacting to the dissenting view, senior lawyer Indira Jaising said, "While I disagree with Justice Indu Malhotra, she has an opinion which must be read, I am sad though that a dissent in Sabarimala came from a woman judge."

Four judge bench rule in favour for lifting the ban on women entering in the Sabarimala Temple. CJI Deepak Misra and Justices Khanwilkar, Nariman and Chandrachud found the practice discriminatory in nature and it violates Hindu women's right to pray.

CJI Deepak Misra said that devotion cannot be subjected to discrimination. "Patriarchal rules have to change. Patriarchy in religion cannot be allowed to trump right to pray and practise religion", he said. Justice Khanwilkar concurred with the CJI's verdict."

Justice Nariman said "To exclude women of the age group 10-50 from the temple is to deny dignity to women. To treat women as children of lesser god is to blink at the Constitution."

Justice Chandrachud: "Religion cannot be used as cover to deny rights of worship to women and it is also against human dignity." "Prohibition on women is due to non-religious reasons and it is a grim shadow of discrimination going on for centuries."

All judges ruled that devotees of Lord Ayyappa do not constitute a separate religious denomination.

CONCLUSION

Sabarimala is built on a story. A story that has linkages with faith that said that the main deity of the temple, Lord Ayyappa, is a brahmachari (a celibate god) and the presence of women of the menstruating age group from 10-50 years is a hindrance to his meditation. Women outside this age group can enter the temple and that has been always so. There is no end to the debate whether law of land should dictate religious institutions. The Supreme Court can pass an order on the recommendation of state government and let the doors of Sabarimala temple be open for all the women but it would ridicule the faith of the people for whom worship matters. It is fact that Sabarimala temple is the most liberal religious institute for worship. It does not differentiate on the basis of religion, anyone can enter the temple. There is no differentiation on the basis of caste. A person from upper caste to lower caste can enter the temple. Even the restriction on women has not been necessarily seen as an act of oppression but the willingness of female devotees to respect a faith.

The fundamental question on the Sabarimala issue is "should the judiciary or the government be indulging in a matter that is predominantly a matter of faith and tradition?" The Supreme Court should not interfere with the religious sentiments of people. These all are customs and religious faith and much more than the need for gender equality. Gender equality can be attain at so many

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in life, rather than bringing the religious angle to it. And if talking about gender equality than Sabarimala temple is not the only temple where women are not allowed even Sikharji a temple situated in Jharkhand is also a religious place for worship where women are not allowed. There are many temples like the Bhagwati temple situated in Kanya kumari where the entry of men are prohibited and only entry of women are allowed. So, there is no link between gender equality and religious faith.

Even Justice Malhotra observed that there are 1000 temples of Lord Ayyappa where women are not denied entry. She said," Article 25 (freedom of religion) specifically provides the equal entitlement of every individual to freely practise their religion. Equal treatment u/a 25 is conditioned by the essentials beliefs and practise of any religion. Equality in matters of religion must be viewed in the context of the worshipper of the same faith." [1956]

The question simply is this- Should such a situation be outlawed? Is it necessary to force women into a men's temple and vice versa to uphold equality?

[1956]http://timesofindia.indiatimes.com/articleshow/65997997.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

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TRADITIONAL KNOWLEDGE IN IPR

- K. BHANU SIREESHA, V. MOHAN VINAY & G. JAYA RAM

INTRODUCTION:

Traditional knowledge is created, preserved and circularised in the civilized traditions of indigenous people. It is considered as an identity of indigenous people. Traditional knowledge in short known as TK. The concept of TK is an old concept, which is developed with the development of man when the science was not developed. TK helps to render solutions to the difficulties which was faced by the human race. Traditional Knowledge is a living body of knowledge which is developed, continued& passed from one generation to other generation within a community.[1957]

Definition of TK:

There is no hard and fast rule that TK should only be like ancient and static, It's nature is to extent of creation and use are part of the cultural traditions of a community.

However TK is a known from ancient to present people, there is no universally accepted explanation as to meaning of TK, however different people defined its meaning depending upon their intellectual basis and as per their professional interest. However it can be said as Traditional Knowledge is a living body of knowledge which is developed, prolonged and passed through one generation to other generations within a community. It is a kind of knowledge, wherein certain members of distinct cultured holds.

While a number of definitions for TK have been put forward, there is no widely accepted definition for it. In its report on a series of fact-finding missions, The World Intellectual Property Organization summarized the concerns of TK-Holders in the following ways-

- The youngest next generation of community is not ready and willing to loose their TK
- To respect the Traditional Knowledge

[1957]. Saipriya & Balasubramania, *Traditional knowledge and patent issues: An overview of Turmeric, Basmati, Neem cases,* Singh& Associates, http://www.mondaq.com, last seen 24/04/20.

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- TK cannot be misappropriate particularly without benefit.
- TK need to preserve and promote.[1958]

ARTICLE 8(J) OF Convention on Bio Diversity,1992:

Traditional knowledge can be called as the knowledge, innovations and practices of indigenous people and local communities around the globe. Which is developed from experience gained over the centuries and adopted by the culture and environment. TK is transmitted orally from one generation to other generation.*1959*

Preservation, Protection and Promotion of Traditional knowledge:

TK can be found inter alia in medicinal, agriculture, bio-diversity, scientific, technical and ecological knowledge. The protection, promotion and preservation of the traditional knowledge, its innovations and practices of indigenous communities is of cardinal importance for developing countries for trade and gain. Their rich natural endowment of TK and Bio-Diversity play a crucial role in their health care, food security, culture, religion, identity, environment, sustainable improvement and trade.

Why need of protecting traditional knowledge-

The ravin of traditional knowledge without sharing the benefits of it with the TK-Holders and without their prior informed and permission for its use is a matter of serious concern. It is therefore important for the international community to take effective steps to ensure that the TK in all countries must be preserved, protected and promoted. And for such every state must adopt strict laws.

- By way of Documentation of traditional knowledge.
- Registration and innovation patent system
- Development of a sui generis system.

The traditional knowledge may be preserved by recording, documentation, digitization, registries or database. Through preservation of such knowledge by above means not only the knowledge

[1958]. G.B.Reddy, *Protection of Traditional knowledge-An Indian perspective.* 3. Law digest with statutory diary 16,17, (2008).
[1959]. Saba, *Protecting Traditional Knowledge-the India story till date,* https://www.scconline.com, last seen 24/04/20.

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remains alive in the communities but also the possibilities of it being lost in future comes to an end. By adopting above practices the access to TK by persons for commercial gain may be regulated and it help the communities to get benefits for providing access of such knowledge.

Protection of TK by preventing the un-authorization use or misappropriation of TK for commercial use. There have been instances where pharmaceuticals companies without prior consent to produce drugs and pharmaceuticals and in some cases to get patents without sharing any benefits to TK-Holders.

Significance of traditional knowledge:

TK is essential to identify the local groups. It is a key constituent of a communities social and physical environment and as such its preservation is of paramount importance. Due to misappropriation of TK for commercial benefits and industrial use it prejudices the interest of its rightful custodians.

Protection of traditional knowledge in India:

There is no specific enactment made by parliament with respect to protection of traditional knowledge but indirectly there are some provisions in which traditional knowledge is protected.

There are two types of protections under intellectual property I.e.,Positive and defensive protections. Former protection establishes the TK-Holders to file IPR applications. Positive protection means an active exploitation of traditional knowledge by the indigenous groups themselves. They can also allow others to file application with their anterior informed acceptance with benefit sharing clause

The latter one prevents others from filing IPR applications. Defensive protection ensures that third parties should not gain benefits out of TK.[1960]

How other IP laws protects traditional knowledge:

Under Trademarks Act, 1999- TM Act, 1999 is helpful for the indigenous people as per the provision of chapter-viii&xi. Chapter-8 is related to Collective Trade Marks and Chapter-9 of the Act deals with Certification Trade Mark. In simpler terms, Collective mark is a kind of trade mark which differentiates the goods and services of members of an association of persons. Where as certification mark is a mark which is capable of differentiating the goods in connection with which

[1960]. Graham dutfield, Protecting Traditional Knowledge, https://ictsd.org last seen 24/04/20.

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it is used in the course of trade which are certified by the proprietor of the mark in respect of its source, material, Manner of manufacturing goods, quality, accuracy, or other characteristics from goods not so certified. [1961]

Indian Patents Act, 1970- Patents Act of1970 furnishes defensive protection for TK. The whole objective behind this Act is that the person who is making application should reveal the root and geographical origin of any biologic material evolved in place of a description.

Section- 3(p) of the said Act says that if an invention is the outcome of TK or based on TK or which is duplication of traditionally known properties is not an invention under this Act.

To be granted a patent under this Act, the applicant must satisfy certain criteria as defined under Sec-3 It provides that if any patent to be granted it must by novel and not previously known.

Apart from these provisions their are certain provision U/s- 25(1)(k) It states that after publication of a patent application but prior to its grant any person can oppose the application on the basis of that the claimed invention claimed of the complete specification is traditionally known knowledge which is available within the indigenous community in India or elsewhere. The post-grant opposition

U/s-25(2)(k) can be filed under this section by any person who is interested after the grant of patent before one year of publication of grant of a patent.

Designs Act, 2000- Section-4 of the said Act prohibits registration of certain designs if such designs are not new or original or which have been revealed anywhere in India or else in any other country through publication in tangible form prior to the filing date.

Biological Diversity Act, 2002- The *Biological Diversity Act, 2002* was enacted to give effect to the provisions of the *UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY, 1992* to which India is a signatory. This Act is very precious for India as India was rich in biological diversity and associated traditional knowledge relating thereto.

India being a signatory to the CBD the parliament has passed BDA, 2002 which is enacted for Conservation of Biological Diversity and sustainable use of its elements and to provide a maximum fair and equitable sharing of benefits arising out of the use of biological resources and its knowledge. Without acquiring anterior approval of the *National Biodiversity Authorities*

[1961]. V.K.Ahuja, Law relating to Intellectual Property Rights, 671, (3rd ed.,2017)

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approval no person can apply for any IP right in or outside the India for any invention based on biological resource obtained from India.

The CBD is the first international agreement which acknowledges the function and contribution of indigenous groups in the conservation and sustainable utilization of bio-diversity. The convention inflicts responsibility for conservation, sustainable use, sharing of information on, and equitable sharing of benefits derived from bio-diversity. Each party to this convention has a responsibility to develop national legislation in their respective countries. But the method for achieving is left with individual nations.

Geographical Indications Act, 1999- This Act, was enacted to furnish for the registration and better protection of GI goods. Goods here includes *any natural, agricultural manufactured goods or any goods of handicraft or of industry and includes food stuff.*

The holders of TK who are producing goods in a traditional manner and selling them using GI can form into association and apply for the registration of their GI.

Instances of Bio-Piracy and establishment of TKDL

Instance of Bio-piracy in India- Bio-piracy means *The appropriation of the knowledge and genetic resources of farmers and indigenous groups, by any institutions or individuals which seeks sole monopoly rights over those resources and knowledge.*[1962]

The term Bio-piracy means theft of several genetic resources and materials mainly the plant varieties in the form of obtaining patent. By patenting the TK of indigenous groups the patent-holders will limit the people from use of their own traditional knowledge and thus it affects the bread and butter of native people.

When bio-piracy happens- By providing wrong patents such as for mere discoveries of a known substance cannot be granted.

Traditional Knowledge Digital Library: *The Ministry of AYUSH had established TKDL in collaboration with COUNCIL FOR SCIENTIFIC & INDUSTRIAL RESEARCH.* TKDL is a pioneer initiative of India to forbid defalcation of countries traditional medical knowledge at International Patents Offices. TKDL is an Indian Digital Knowledge Repository of the traditional

[1962]. J. Tarunika & J. Tamilselvi, Traditional knowledge and patent issues in India, https://www.acadpubl.eu/hub last seen: 25/04/20

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knowledge which is used for medical purpose in Indian system of medicines. Which was set up in the year 2001.[1963]

Contents of TKDL: The TKDL contains documentation as to the TK as follows-

- Relates to Unani, Siddha, Yoga and Ayurveda
- In a digitization format.
- The above referred mentioned subjects are available in 5 different languages I.e., German, English, French, Spanish and Japanese

Purpose of TKDL:

- It ensures to forbid the grant of patents, if the products are developed by means of utilizing TK.
- It acts as a bridge between information recorded in TKDL and patent examiners and provides database containing information in different languages.
- language for granting of patent.

In just two years India had succeeded against Europe in strike downing or withdrawal of 36 applications for grant of traditionally known medical formulations related patent. The key for achieving this is because of implementation of Traditional Knowledge Digital Library. TKDL is a database which consists of 34 million pages of formatted information on 2,260,000 medical formulations in multiple languages. It is configured as an instrument to aid patent scrutinizers of major intellectual property offices in carrying out prior art searches. It bridges the linguistic gap between the expressed local language of TK and patent examiners.

How it all began?

India's TKDL is established with collaboration project between the *COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH AND DEPARTMENT OF AYUSH*

Objective: The objective for setting up of TKDL is to secure the traditional knowledge of the country from being exploiting by means of biopiracy and prevent it by filing unethical patents, through preserving of such documents electronically and also to ensure patent offices around the world to not grant patents for applications based on India's wealthiness of age-old TK.[1964]

[1963]. Yashaswi Singh & Vinod mathur, *Traditional Knowledge systems in India for bio-diversity conservation,* https://researchgate.net, last seen 25/04/20.
[1964]. Dr. V.k.Gupta, Protecting India's Traditional Knowledge, Wipomagazine, https://www.wipo.int, Last seen 28/04/20.

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The thought for formation of TKDL in India is of paramount importance and it became a steadfast in opposing for grant of patents which is the outcome from use of TK. This concept was came into force when there is an ample number of patent applications filed and granted for such applications has been raised in *UNITED STATES PATENT AND TRADEMARK OFFICE* on the *WOUND HEALING PROPERTIES OF TURMERIC* and the patent granted on the *ANTIFUNGAL PROPERTIES OF NEEM by the EUROPEAN PATENT OFFICE.*

***Turmeric controversy*: Thiis a watershed judgement as it was the primary case where a patent has been granted based on TK of a developing country had been successfully challenged and won the suit.**

Turmeric is a tropical herb which is grown in east India. Turmeric powder is extensively used by Indian's as a medicine, as a food component and also for cosmetic purposes. *United states awarded patent on turmeric to University of mississippi medical centre in 1995 because it is a wound curative property in nature. A monopoly* right had been granted for its sale and distribution.

In 1995, Two Indian people at the university of Mississippi Medical Center got the patent for use of turmeric in wound healing procedure. Two years later, *India's Council of Scientific and Industrial Research challenged the university in respect of THE NOVELTY OF THE DISCOVERY on the ground that it has been in public dominie and used from very long time. In support of CSIR'S contention they produced documentary evidence which is published in the JOURNAL OF INDIAN MEDICAL ASSOCIATION in1953 and also A SANSKRIT TEXT. At last the contentions of CSIR was upheld by USPTO and revoked the patent.1965*

***Neem TK* Controversy: It** is a tree which is generally grown in India and other parts of south and Southeast Asia. Neem serves for medicinal purpose, fertilizers and pesticides. Neem extracts is very helpful and used to kill hundreds of pests and fungal diseases that attack food crops, and also the neem oil which is extracted from the neem is used in soaps. It is used for medicinal purpose for malaria and skin diseases.

W.R.GRACE along with THE DEPARTMENT OF AGRICULTURE, USA had filed a patent applicant in EUROPE PATENT OFFICE. In the year 1994, the EPO granted patent to the US

[1965]. G. Krishna tulasi & B. Subba Rao, *A detailed study of patent system for protection of inventions,* Indian journal of pharmaceutical sciences, https://www.ncbi.nlm.nih.gov last seen 28/04/20`.

corporation for their patent application. W. R. GRACE discovered a method for controlling fungi on plants by the aid of a hydrophobic which is extracted the from neem oil.[1966]

In 1995 a legal opposition has been filed by India against such grant of patent on the ground granted patent is very well known and used by Indian's from time immemorial by Indian farmers in their agriculture process to protect the crops, and thus there is no novelty.

In 1999, the EPO after reviewing the India's contentions and evidences came to know that all the features of disclosed patent in the present claim is priorly known and it was held that there is no inventive process. Hence the patent granted was revoked.

Report: As per the estimated report by TKDL, annually, 2000 patents connected to Indian medicinal systems were being mistakenly granted by patents offices around the globe.

Why so many patents had been granted for the foreign applications relating to known Indian traditional knowledge is a question?

When patent scrutinizers evaluated the applications of patentability, the inventions did not found in the prior art searches carried out so far. Therefore those patent application of the inventions deemed to be not known substance and hence such inventions got patentable and also the biggest drawback is at that time the India's traditional knowledge mostly existed in certain languages like Urdu, Sanskrit, Arabic, Tamil and Hindi. These languages are not much reachable and cannot be understand by all patent scrutinizers who is working in the major patent offices world wide.

The known fact was that there is so many patents which had been granted falsely by U.S. and Europe caused a great deal of suffering. knowledge possessed by distinct cultured people is wrongfully detained from them.

The TKDL had defeat the trouble of language barriers and bridge the gaps in TK information in leading patents office, by way of using INFORMATION TECHNOLOGY TOOLS AND A NOVEL TRADITIONAL KNOWLEDGE RESOURCE CLASSIFICATION SYSTEM, the Traditional Knowledge Digital Library had change over and organised ancient textual matter into 34million A4-sized papers and they have been translated and interpreted into Five languages. The TKDL is a unique database that incorporates divers knowledge systems and languages relating to Indian medicinal knowledge and it is made accessible to all patent offices for scrutinizing the applications. Now India is able to protect nearly 0.226 million medical formulations. Access to

[1966]. *Traditional Knowledge Digital Library* http://tkdl.res.in last seen 29/04/20

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database helps patents officers to examine at the initial stage itself whether the requirement of novelty is satisfied or not.

Controversies with regard to TK in India:

Protection of TK and its holders appear to be the most controversial and perplex issue. There are number of cases were filed with respect to exploitation of TK. Apart from turmeric and neem cases, there are certain other instances where the patent grant has been given to TK.

Basmati case: Basmati rice is a variety form of rice from Punjab provinces of India and Pakistan. *It is unique in its way as it is svelte, redolent and long.*

FACTS- In 1997, American company known as RiceTec Inc had filed for registration of a mark TEXMATI before UK Trade Mark Registry. Seeking a monopoly over various rice lines. After knowing this, it was opposed by Agricultural and Processed Food Exports Development Authority. India made a request for re-examination of this grant of patent in 2000. Now the dispute rotates around the use of name Basmati and similar names used like Texmati, Kasmati and Jasmati in USA. Basmati is a generic term and the name cannot be a similar as it resembles alike in the minds of unknown persons.

The documents shown as the evidence by the Rice Tec is that the registration of the mark granted by US patent office to Rice Tec. This US utility patent was unique in a way to claim a rice plant having characteristics similar to the traditional Indian Basmati Rice.[1967]

The case of Hoodia Cactus:

The San, is a tribe who is living close to Kalahari Desert which was located in South Africa. For satisfying his hungriness and thirst because of long hunting tips, he had eaten HOODIA CACTUS which was traditionally known eatable substance. The same was documented by Dutch anthropologist in year 1937. Recently, Scientists of South Africa Council and Industrial Research found this report and after a thoroughgoing study patented Hoodia's appetite- suppressing element in the year, 1995. Thereafter they licensed the same to UK BIO-TECH COMPANY IN THE YEAR 1997. In the year 1998, the company of PFIZER pharmaceutical got the rights for developing and marketing P57 as a slimming drug and to cure the problem of obesity from the UK BIO-TECH COMPANY for $32 billions in royalty along with other payments. Some how the original TK

[1967]. Surabhi dhole & Suvigya vidyarthi, *Basmati pride of India,* https://lawctopus.com last seen 2904/20

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holders got to know the exploiting of their traditional knowledge by the pharmaceutical companies. The TK holders menaced the CSIR to brought a legal action on the ground of Bio-piracy that their TK had been stolen. In relation to this in March 2002, a negotiation of understanding was reached between CSIR and the pharmaceutical companies. They negotiated to pay the future royalties for San.*1968*

Findings: India is rising as a pioneer in this field. As far as till date, only the TKDL acted as effective machinery in preventing bio piracy. Documentation and digitising of the TK information must be in secret and only the authorities should have the access.

Recommendations:

➢ Legislations pertaining to protection of TK should be made and those laws must address the rights of TK holders along with benefit sharing clause.

➢ Database of all sorts of TK in India must be made available to the patent officer before any grant of such Traditional knowledge based IP.

➢ The digital libraries of traditional knowledge must be integrated in and shall be linked to every patent office for search of processing of patent application because of recent increase in exploitation.

CONCLUSION:

TK is thing wherein every Government had a sine-quo-non obligation to give protection against exploitation and to secure the TK holders. It should be secured as a precious asset as it is the primary form of indigenous people livelihood and also TK raises the economy of the countries because the traditional knowledge is used for production of certain products which have the eminent commercial value. TK also benefits the agriculturalists by conserving and maintains the bio-diversity and make sustainable agriculture practices. Through the process of documentating the TK, prevents against the chances of bio-piracy and it automagically prevents misuse and misappropriation of knowledge by the third parties.

[1968]. Dr. G. B. Reddy, *Intellectual Property Rights and the law, 404,(9th ed., 2012)*

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COPYRIGHT IN THE INDIAN MUSIC INDUSTRY

- **SRIDATTHA CHARAN**

ABSTRACT

The pursuit of originality and not of simulation or imitation inevitably is the most important characteristic in musical works. In a legal sense, "**originality**" has become a significant doctrine where the creativity of the author and the innovation of the work have been protected by Copyright. Certain Countries allow protection under copyright on the basis of how much diligence, capital and labour it took to compose a piece work, regardless of how original the work is. This is referred to as the "**sweat of the brow' doctrine**". Countries such as USA, Canada, UK and even Australia have recognized this doctrine. In the Indian context, the copyright legislation has been in force since long. Moreover, India is a member of various international treaties and conventions, but in-spite of that there is a continuous floating of Copyright Laws. The author shall examine the position of the Indian Law on the concept of "originality" in the law of copyright, analyse whether this law is sufficient

Keywords: copyright law; copyright protection; copyright infringement; intellectual property laws; fair use; derivative works; music plagiarism

INTRODUCTION

Plagiarism and imitation of music is now no more an immorality in the contemporary times. Artists like Handel, Bach and even Brahms have all been accused for such plagiarism allegations.[1969] Cole Porter,[1970] the Bee Gees,[1971] and Michael Jackson[1972] have also been accused of plagiarizing their musical work from other artists. The Music Industry in India is mainly a sub-part of the Indian Film Industry which is a conglomerate various regional language industries across India and the most prominent one being Bollywood. Songs have always been part of the Indian Film Industry since its inception and with globalization; the foreign influence in the Indian Music Industry has

[1969] M. P. Seifried (2002), *Music and copyright: Substantially "out of tune"?* (Dissertation), Adelaide University, p. 1.
[1970] Arnstein v. Porter, 154 F.2d 464 (2d Cir., 1946).
[1971] Smith v. Michael Jackson, 84 F3d 1213 (9th Cir, 1996).
[1972] Selle v. Gibb, 567 F Supp 1173 (ND III, 1983).

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become apparent. The film producer of Bollywood have relied the concept that there is no Copyright in new ideas which motivated them to compose various derivatives of copyrighted musical works.[1973] The mot established artists in the Industry continue to come under scrutiny for plagiarizing protected musical work despite the opposition of the various Industry players.[1974]

A striking example is the Singer and Producer named Himesh Reshammiya who has been accused multiple times for copying his work from other original work.[1975] Further, a renowned and famous music director from the South Indian Industry, Ilaiyaraja, who has composed numerous hit songs for the industry during 1980s, has communicated his fear and warned other composers in the industry to stop copying his songs without the prior permission and expressed the need and his desire for more stringent copyright laws in the India.

Meaning of 'Musical Works'

Copyright law in the Indian Jurisprudence protects the musical work which is created in India. The 1957 Copyright Act has been adopted from the Copyright Law of Great Britain.[1976] The Copyright Act protects a wide spectrum of work including but not extending to original dramatic, literary, musical and artistic works including combination of them from Copyright violation. The Act further grants rights which are exclusive to the copyright holder which authorizes him distribute, perform and translate his work among the other specific rights prescribed.[1977] However, the Act extends no protection to ideas or concepts. It only protects those ideas and concepts once they are expressed and brought further in a tangible medium.

Section 2(p) of the Copyright Act, 1957 defines musical work as;

"Musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music".[1978]

[1973] A. Marcom (2001), *An understanding between Bollywood and Hollywood? The meaning of Hollywood-style music in Hindi films*. British Journal of Ethnomusicology, 10, 63.
[1974] A. Arnold (1988), *Popular film song in India: A case of mass-market eclecticism.* Popular Music, 7, 177
[1975] *Ibid.*
[1976] Thomas, P. N. (2001*, June). Copyright and emerging knowledge economy in India*. Economic and Political Weekly, 36, 2147, 2152.
[1977] The Copyright Act, 1957, § 14.
[1978] The Copyright Act, 1957, § 2 cl p.

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INTERNATIONAL APPRAISAL OF MUSICAL WORK

The *Berne Convention for the Protection of Literary and Artistic Works* identifies the concept of 'musical work' as a theme for protection from copyright violation under Article 2(1).[1979] Further, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) extends protection and ensures that the authors have some rights under the Copyright jurisprudence. Article 9 of the TRIPS agreement ensures that the members of the agreement should comply with the Berne Convention.[1980]

The UK Copyright, Designs and Patents Act, 1988 under section 3(1) defines Musical Work as "*a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music*". Further, the US Copyright Act, 1976 has defined musical works under section 102(a) (2) as "*including any accompanying words' as among the words of authorship protected under the Act"*.

In ***Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Assn.***,[1981] Krishna Iyer, J. has held as under:

A somewhat un-Indian feature we noticed in the Copyright Act falls to be mentioned. Of course, when our law is intellectual borrowing from British reports as, admittedly it is, such exoticism is possible. 'Musical work', as defined in Section 2(p), reads: '2. (p) musical work means any combination of melody and harmony or either of them printed, reduced to writing or otherwise graphically produced or reproduced.'

Music by itself is a unique and different genre in the area of copyright protection. However, music can be considered to be a special category which deserves an independent copyright law or legislation. Unfortunately, the inherent form and nature of music creates a difficulty to identify copyright violations.[1982] Each song or an original music composition contains multiple elements and moving parts working together. With the advent of the digital age and innovation in technology, it's become easier to manipulate and plagiarize original musical world. The traditional

[1979] Paris Act of July 24, 1971, as amended on 28 September 1979.
[1980] Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994
[1981] Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Assn., AIR 1977 SC 1443.
[1982] Christian, J. K. (2004). *Too much of a good thing? Deciphering copyright infringement for the musician*. Vanderbilt Journal of Entertainment Law & Practice, 7, 132, 133.

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view for examining copyright violation of music is out-dated because it fails to consider and take into account the complexity and intricacy of a contemporary work of music.[1983]

INGREDIENTS OF COPYRIGHTABLE WORK

Protection under Copyright requires two essential pre-conditions to be satisfied. The first one is "O*riginality*" which essentially means that the work should have been originated from the author himself and not have been borrowed from someone else. The second ingredient is "Creativity", which signifies that the work is of a character that goes beyond the usual or trivial. These two ingredients apply to the domain of musical work no less than to any other subject-matter of copyright protection.[1984]

ORIGINALITY

The common conception of the meaning of "original" is something that is new, not done before. In fact, "original" is defined as "*existing from the first; primitive; earliest; not imitative or derived; creative*". [1985]

The Indian Copyright Act, 1957 hasn't defined the term "original"; however, it recognizes "originality" to be the prime criteria for copyright protection. According to Section13 of the said Act,

"*Copyright subsists in the following works:*

(i) original literary, dramatic, musical, and artistic works;

(ii) cinematograph films; and

(iii) sound recordings."

In ***Rupendra Kashyap v. Jiwan Publishing House***,[1986] the court held that

[1983] Korn, A. (2007*). Issues facing legal practitioners in measuring substantiality of contemporary musical expression.* The John Marshall Review of Intellectual Property Law, 6, 489-491.
[1984] Nimmer, M. B., & Nimmer, D. (Ed.). (1990). *Nimmer on copyright*. Vol. 2.01A. Newark, NJ: Matthew Bender & Company, Inc.
[1985] Swannell, J. (Ed.). (1986). *The little Oxford dictionary* (6th ed.). New York: Clarendon Press.
[1986] Rupendra Kashyap v. Jiwan Publishing House, (1996) PTC 439 (Del).

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"The word 'original' in Section 13 of the Copyright Act, 1957 did not imply any originality of ideas, but merely meant that the work in question should not be copied from some other work and should originate from the author being the product of his labour and skill. Thus, the term 'original' in reference to a work simply means that the particular work 'owes its origin' to the author. Original simply means that the work has independently been created by the author, and has not been copied from someone else's work."

Further, in ***Errabhdrarao v. B.N Sarma***,[1987] the court observed:

"By an original composition we do not convey that it is confined to a field which had never been traversed hitherto by any other person or persons, either in respect of ideas or material comprised therein. Indeed such contributions are few, as most works depend upon the contribution of others, using them as steps in aid of reaching a particular object which may be original in its design and conception."

Creativity

The Indian Supreme Court, in its judgement of ***Eastern Book Company v. D.B. Modak***,[1988] laid down a standard of originality that might fall midway between "*sweat of the brow*" and "*minimum modicum of creativity*". Certain Countries allow protection under copyright on the basis of how much diligence, capital and labour it took to compose a piece work, regardless of how original the work is. This is referred to as the "*sweat of the brow' doctrine*". In doing so, the Indian Supreme Court was simply following the reasoning given by the Canadian Supreme Court in ***CCH Canadian Ltd. v. Law Society of Upper Canada***.[1989] The Court essentially held that the it was of the view that to claim protection of copyright in a music compilation, the author or singer must produce a material or a piece of work with use of his skill and exercise of judgement which may or may not be "creativity" in the sense that it isn't novel, however, with respect to the same, it isn't just the result of capital and labour. Therefore, this ingredient of copyright protection favours the author so far as the work is original. Therefore, the only required condition to be satisfied is of that of originality of the said work.

[1987] Errabhdrarao v. B.N Sarma, AIR 1960 AP 415.
[1988] Eastern Book Company v. D.B. Modak, AIR 2008 SC 809.
[1989] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 (1) SCR 339 (Canada).

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TEST LAID DOWN BY THE INDIAN COURTS

In Ram Sampath v. Rajesh Roshan & Ors.,[1990] D. G. Kartik, J. observed that

"In my view for considering whether a copy of a part of the former musical work into the latter musical work amounts to an actionable infringement, the following factors would be required to be taken into consideration. First is to identify the similarities and the differences between the two works. Second is to find out whether the latter would meaningfully exist without the copied part. It may be necessary to find the soul of a musical work. The soul cannot be determined merely by comparing the length of the part copied but whether the part copied is an essential part of a musical work. Though a musical work may have a length of several minutes, the listener often remembers a 'catch part' to which he is immediately hooked on. It is necessary to look for such 'catch par' or the 'hook part'. If the 'catch part' or the 'hook par', however small, is copied the whole of the latter work would amount to actionable infringement ... These factors are only illustrative and there would be many other factors which may be required to be looked into depending upon the facts and circumstances of each case."[1991]

In the case of ***Super Cassettes Industries Limited v. Chintamani Rao and Ors.***,[1992] the Delhi High Court held that small amounts of usage of songs in a programme by India TV does not amount to infringement of the copyright.

A few words from the song *"Kajrare, kajrare*" from a Yash Raj Film *"Bunty aur Babli"* were used in an advertisement for a consumer affairs programme telecast on India TV, and a portion of the song *"Salaam Namaste"*" was sung by Vasundhara Das in a programme *"India Beats"* on India TV. Yash Raj Films had claimed infringement of its copyright. The court was of the opinion that "*creativity would shrink if usage of minute bits of songs/lyrics is termed infringement"*.

[1990] Ram Sampath v. Rajesh Roshan & Ors., 2009 (40) PTC 78 (Bom.).
[1991] *Ibid.*
[1992] Super Cassettes Industries Limited. v. Chintamani Rao and Ors., 2012 (49) PTC 1 (Del).

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RECOMMENDATIONS AND SUGGESTIONS

India has taken adequate precautionary and development measures by amending the Act in 2010. This amendment ensured that lyricist and composers were provided with more protection and royalties and both were in consonance with the international standards.[1993]

However, the Copyright Law in India suffers from an inherent inability to enforce the laws effectively and efficiently. Due to this lack in enforcement, violation of copyright protected works is rampant and widespread in the forms of pirated copies and unauthorized or plagiarized derivative of protected musical works.[1994] The author makes certain suggestions to improve the current scenario of the music Industry in India.

One way to help reduce the frequent cases of plagiarism by Bollywood and other regional or local music directors would be to amend the existing legislation imposing stringent and harsher penalties to those violate the protected work.

Further, the Copyright Enforcement Advisory Council [CEAC], the body established by the Government of India to monitor the progress of the Act and enforce it, should utilise the public information domain to ensure that all the players of the Industry are aware of the laws.

Just as the Governments of Taiwan and Malaysia took up the initiative to target the copyright infringers the Government of India should also commit to the action and reduce copyright infringement by penalizing the high-profile violators instead of siding with them.

In the present scenario of copyright regime for music, there is no specific definition of "*originality*". The legislature should provide an exhaustive definition in order to reduce the scope for varied judicial interpretation and avoid confusion

CONCLUSION

The Indian jurisprudence for Copyright still has to leaps and bounds to go before it becomes effective to prevent unauthorized derivatives and plagiarized from entering the market. However, with 2010 Amendment some headway has been made. With respect to the international

[1993] Anuradha Salhotra & Rahul Chaudhry, *Decoding The Good From the Bad in the Copyright Amendment Bill, 2009*, Legally India (Feb. 9, 2011),
[1994] 2010 SPECIAL 301 REPORT, supra note 21, at 26

perspective, the law regarding 'originality' in copyright is as diverse as the countries themselves.[1995]

Protection through copyright is allowed for the purpose of protecting an author's creative and original expression and to further encourage and support his creative expression. Creative works are afforded copyright protection only if they are "*original."* The only part of a musical work which has copyright protection is that which is originates from the author. Thus, *"the sine qua non of copyright is originality"*[1996]

Lastly, it is an obvious and inevitable that in the music industry in any country, the inspiration and the motivation of the artists stems from other accomplished musicians. This essentially means that the present infringers will be fighting the same battle for protection of their work. Therefore, in the words of Castanaro, "*To continue balancing the competing interests of protecting the work of a copyright holder and not stifling the creative process."* [1997]

[1995] Raghavan, N. (2010, January 9). *Let the music play on*. Hindu, p. 9
[1996] Supra note 10.
[1997] Castanaro, V. M. (2008*). 'It's the same old song': The failure of the originality requirement in musical copyright*. Fordham Intellectual Property, Media & Entertainment Law Journal, 18(5), 1271.

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CHECKMATE TO DISCRIMINATION

- **MINDALA NAGASAI**

INTRODUCTION:

The word reservation makes us to recollect Dr. B. R Ambedkar who is the first law minister and the chairman of the drafting committee. He has rightly stated that "Birth never decides the worth". People may born either in poor or rich families but this does not mean poor will be poor and rich will remain as rich unlike the statement All the glitters are not gold all those who born in the lower caste are not poor.

Intelligence does not come by birth and religion does not decide the worth. The only thing that need is an opportunity. The same was proved by Dr. B. R Ambedkar being born in the excluded class suffered with this religion evil so he being the member of the drafting committee had introduced many provisions in the Indian constitution in order to checkmate the discrimination and gave the protection by providing the equal opportunities to all for this he is often called as the architect of the present reservation policy.

He could be considered as a pioneer who has introduced the concept of a reservation policy in India in early 1930's and he is responsible for the commencement of the reservation era in the country. The systematic framing of various types of remedies against the discrimination including the reservation has emerged only during the 1950s and 1960s.

Dalits are considered to be one of the most vulnerable groups in the society. They are considered to be the uncivilised people living away from the society especially in the forests. In order to change the situation many people tried in many ways. The following is the article which deals with safeguards and protections given to these scheduled castes and scheduled tribes.

PRE – CONSTITUTION EFFORTS OF AMBEDKAR:

The idea for the promotion of planned efforts for the development of backward communities particularly for the tribal groups has its foundations in the pre independence period itself. There were many movements, revolts, rebellions which led to the destruction of both property and life.

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So this led to the British to formulate special administrative arrangements for the tribal people and for the development of the tribal dominated areas.

The scheduled district act of 1847 has given a special status for the tribal dominated areas of madras presidency. Indian education commission of 1882 also made some suggestions for the preferential treatment of the tribal's children through non-payment of school fees and some other provisions[1998]

Dr. B. R Ambedkar is considered as the pioneer of the inclusive policies in the world as he was the one who has developed the legal framework for such type of policies and got implemented as early as in 1930s.

The following are some of such policies:

- In 1919 for the first time Dr. B.R. Ambedkar has submitted a statement regarding the reservation to the South Borough Committee on the demands of the untouchables in the political sphere in the legislative council.
- In 1928 he submitted a memorandum to the Simon Commission for safeguarding the interests of the depressed classes and later in 1930-32 he once again demanded for the social and political safeguards to protect the interests of the excluded groups. In 1930 he again asked for reservation in the form of Poona pact.
- On the eve of formation of the constituent assembly (1946) he presented a plan on the multi dimensional aspects of the position of the SC's (scheduled castes) in the free India
- Latter, he was appointed as the chairman of the drafting committee of the constituent assembly and there he drafted and debated the provisions regarding the concept of safeguarding the interests of the SCs in particular[1999]

POST INDEPENDENCE PERIOD:

[1998] N.K. BEHURA & NILAKANTHA PANIGRAHI, TRIBALS AND THE INDIAN CONSTITUTION, 54-55 (2020).
[1999] DR. B.R. AMBEDKAR, DR. B.R. AMBEDKAR 32- 33 (Sukhadeo Thorat & Narender Kumar 2020).

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The framers of the Indian constitution have adopted a two way strategy of tribal development. They are:

1. Providing protection against exploitation
2. Assisting them through economic activities, to rise above the level of poverty.

In this regard the two Indian proponents of the tribal interests namely *Thakkar Bapaand Jaipal Singh* has contributed enormously to the shape of the Indian constitution.

FIRST STEP TOWARDS RESERVATION POLICY:

The first intervention by Ambedkar in the post constitution period was the intercession on the judicial interpretation of Article 16(4) of the constitution. It was in the light of the supreme court judgement regarding this Article that the constitution bill was introduced which was the first amendment bill which was introduced by the first law minister Dr. B.R. Ambedkar involving the reservation for the backward classes in the educational institutions.

This amendment apart from other Articles has introduced Article 15(4) providing that nothing in this Article or in clause (2) of the Article 29 shall prevent the state from maintaining any special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes. This was the *first step towards the reservation policy.*

It was in the year 1951, where he took *second step* that he suggested the measures through the election manifesto of the scheduled castes federation[2000]

AMBEDKAR WORDS ON ARTICLE 16(4):

I have carefully studied both the judgements of *Madras v. Shrimati Champakam Dorairajan*[2001] which deals with the Article 29 (2) and *Venkatraman v. the State of Madras*[2002] which deals with the clause (4) of Article 16 i.e. reservations in the educational institutions. Where the Supreme Court came to the conclusion that as it involved the 16 (4) ground of discrimination so it is invalid.

[2000] AMBEDKAR, *supra note* 38.
[2001] Madras v. Shrimati Champakam Dorairajan 1951 AIR 226
[2002] Venkatraman v. the State of Madras 1951 RAJLW 331

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So he stated that with the respect to the judges of the Supreme Court I cannot help saying that I find this judgement to be utterly unsatisfactory.

.....My view is that in Article 29 (2) the most important word is "only" no distinction shall be made on the ground only of race, religion, or sex. The word only is very important. It does not exclude any distinction being made on the grounds other than those mentioned in this Article and I respectfully submit that the word only not receive the same consideration which ought to have received. .....[2003]

These are the words of our Dr. B. R. Ambedkar in respect of two judgments with special reference to article 16 and article 29.

CITIZENSHIP RIGHTS:

Ambedkar had been concerned with the problem of the lower castes from 1919 and argued that their problem had been deeply entrenched in the institution of the caste system and untouchability. So the remedies against discrimination were placed within the framework of the citizenship rights. He called the *equal rights for the untouchables as the citizenship rights.*

CLAIM FOR EQUAL RIGHTS:

In his first memorandum Ambedkar has demanded for the political representation. And he started with a claim of equal rights for the untouchables. As he felt that in the absence of these rights they were not treated as equals and so as a consequence of this they will suffer discrimination, exploitation, seclusion and exclusion in multiple ways in the society.

And he further stated that without having claim on such rights their position would lack the primary conditions of participating in the socio-political developments. So he claimed for the equal rights.[2004]

RESERVATION IN EDUCATIONAL INSTITUTIONS:

[2003] AMBEDKAR, *supra note* 352.
[2004] AMBEDKAR, *supra note* 41.

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From the first amendment the era of reservation has commenced. With this first amendment to the constitution the state has reserved seats for the SCs and STs in the educational institutions including the technical, engineering and medical colleges and in scientific and specialised courses and all the educational institutions under the direct control of or receiving the grant in aid follow the reservation policy of the *15% for STs and SCs in the matters of admissions*[2005]

In the case of *Shalini* the Supreme Court held that for the benefit of the scheduled tribes in the educational institutions some seats can be reserved for them under the Articles 15(4), 15(5), 16(4), 41, 46, 335[2006]

In a case S. Nagarajan case which was an appeal from the Madras high court to the Supreme Court. Where the bench was consisting of *Justice Ramaswamy* and *Justice Nanavati* has held that Articles 14, 15, 16 of the constitution confer several benefits of social and economic advancement, empowerment, and social equality of status and dignity of person by *providing reservation in government services and in educational institutions for the scheduled castes and scheduled tribes*[2007]

RESERVATIONS IN LEGISLATURE:

Articles 3330, 332, 334 and 335 *ensure the reservations of the seats for the scheduled castes and scheduled tribes*. For reservation of seats in the Lok Sabha the provision for this was mentioned in article: 330 and in the state legislative assemblies it was mentioned in 332 and for municipalities it was mentioned in Article 243-T.

In the Article 334 it was stated that such reservations were to be ceased on the expiry of 40 years period from the commencement of the constitution[2008]

CONSTITUTIONAL PROVISIONS

There are almost *22 Articles* and *2 schedules* in the Indian constitution which explains the privileges given to the tribal people. From the draft constitution to the present constitution the

[2005] BEHURA & PANIGRAHI, *supra note* 64-66.
[2006] Shalini v New English High School Association AIR 2013 16 SCC 526 (India).
[2007] S Nagarajan v District collector, Salem, AIR 1997 SC 935 (India).

[2008] INDIA CONSTI. Art. 334

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following are the provisions related to the safeguards and privileges given to the scheduled castes and scheduled tribes.

- We can see the provisions related to the protection of scheduled castes and scheduled tribes in the part 3 of the constitution i.e. fundamental rights in the following articles 14, 15, 16, 17, 19, 23, 24, 29.
- In the Part 4 (DPSP) *Article 46* of the Indian constitution speaks about the special care in promoting the educational and economical interests of the weaker sections of the society especially the ST's (scheduled tribes) and SC's (scheduled caste) and to protect them from all forms of exploitation[2009]

The entire *welfare programme* for the scheduled tribes is based on *Article 46* whereas the required *funds* are provided under the *Article 275 (1).*

The following Articles: 38, 39, 41, 43, 46, 47, 48 deals with the *privileges for the scheduled tribes and scheduled castes.*

The Articles related to the *protective provisions* in a whole for the scheduled tribes and scheduled castes are: 14, 15, 16, 17, 19, 23, 24, 29, 46, 164, 244, 275, 330, 332, 334, 335, 338, 339, 340, 341, 342, 366 and 371.

AMBEDKAR WORDS

.....for the STs I am prepared to give far longer time. But all those who have been spoken about the reservation to the STs or to the SCs have been so meticulous that the things should end by 10 yrs. All I want to say them in the words of Edmund burke, is "large empires and small minds go ill together[2010]

Article 330 states "seats are to be reserved for the ST's, SC's in Lok Sabha". Originally this reservation was to operate for ten years from the commencement of the constitution. But this has been extended by 10 yrs each time. With the 109th amendment the reservation will last until 25 Jan 2010 which was mentioned under Article 334(a)[2011]

[2009] JAIN, supra note 1492 - 1493.
[2010] AMBEDKAR, *supra note* 340.
[2011] JAIN, *supra note* 1512.

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PARLIAMENT POWER:

In Pankaj Kumar Saha case the Supreme Court has observed that the court is devoid of power to include or exclude from or to substitute or to declare synonyms to be SC's or ST's.

It is for parliament to amend the list and include or exclude any caste or tribe. Once the lists are issued by the president any later addition or subtraction can be made only by parliament and not by a presidential notification which was already stated in Article 342(2)[2012]

The court has upheld the impermissibility of addition or deletion to the list of castes specified under a presidential order except by parliament made law. Neither government nor courts can alter the presidential order[2013]

WHO ARE SC'S & ST'S:

In the constitution it is no where mentioned who are the SC's and ST's. The power to list them is vested with the president i.e. central executive. SC's are those whom the president may notify according to Article 366(24) read with Article 341.

Article 341(1) states 'the president may by public notification specify who should be regarded as the SC's ST's in relation to state or union. The list varies from state to state and union territory.[2014]

In Maharashtra v. Milind the Supreme Court expressed that the words caste or tribes should be used in the sense of the definitions contained in the Articles 366(24), (25)[2015]

TRIBAL WELFARE MINISTERS:

Article 164 provides for the provision of a minister of tribal welfare in Orissa, undivided Madhya Pradesh, and in the undivided Bihar to look after the tribal welfare which points the concern of the constitution for safeguarding the interests of the scheduled tribes.[2016]

GRANTS FROM THE UNION: [ARTICLE 275 (1)]

[2012] Pankaj Kumar saha v the sub-divisional officer, Islampur, (1996) AIR SCW 1943 (India).
[2013] R.Unnikrishnan v VK Mahanudevan, AIR 2014 SC 1201(India).
[2014] JAIN, *supra note* 1507.
[2015] Maharashtra v. Milind, AIR 2001 SC 393(India).
[2016] JAIN, *supra note* 1514.

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Article 275 (1) provides *the grants from the union* to certain states for the *tribal development.* The creation of the sixth schedule for the formation of the autonomous regions and regional councils as regards to the management of resources according to the customs also receives directions under this Article.

Provisions of the *special central assistance (SCA)* have been made to the states having the scheduled tribe's population against the specific schemes for their welfare. During the 8th five year plan some amount was released to the state governments under this provision

SCHEDULED AREAS UNDER 5TH SCHEDULE AND ARTICLE 244(1):

Article 244(1) and 5th schedule states "provisions for administration of ST's and scheduled areas in any state other than the states of Assam, Meghalaya, Tripura, Mizoram." The president may by order be able to declare an area to be a scheduled area which was mentioned in the clause 6 of the 5th schedule and such areas lies in Bihar, Gujarat, Madhya Pradesh and Tamil Nadu[2017]

UNTOUCHABLES:

The *scheduled castes* are known as the *untouchables or harijans*. And the scheduled tribes are known as aborigines. The scheduled castes are not any linguistic or religious minority but they are part and parcel of the Hindu society. To eradicate this evil of untouchability the constitution has provided for the opening of the Hindu temples for the harijans.

Parliament has passed an important act in 1989 for taking the measures to prevent the atrocities. This act is known as the scheduled castes and scheduled tribes (*prevention of atrocities)* act 1989, which became effective from the year 1990. It was amended in 2015 and again in 2017. Section 3 of this act describes the punishment to be given for the offences of atrocities.[2018]

Presently, only those offences listed in IPC as attracting punishment of 10 years or more and committed on members of Scheduled Caste/Scheduled

[2017] JAIN, *supra note* 519.
[2018] The scheduled castes and the scheduled tribes (prevention of atrocities) Act, No. 33 of 1989.

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Tribe are accepted as offences falling under the PoA Act," said a statement issued by the Ministry of Social Justice and Empowerment[2019]

ABOLOTION OF UNTOUCHABILIY:

Article 17 of the fundamental rights of the Indian constitution provides for abolition of untouchability and its practice in any form. The main *object* was to *ban its practice*. For this parliament has enacted the untouchability (offences) act, 1955 which prescribes punishment for the practicing untouchability which was renamed as the protection of civil rights act, 1955 in the year 1976[2020]. Practice of untouchability in any form is considered to be an offence and is also punishable with imprisonment or fine.

ANTI-DISCRIMINATION BILL

Discrimination can be either direct or indirect. Dr Tharoor an MP has pointed out that the existing provisions for the protection of the lower castes meant to protect citizens against discrimination had failed.

"Existing constitutional protections against discrimination under articles 14, 15, 16 and 17 are not sufficient and need to be strengthened with additional statutory protections in order to realise their intended purpose. The constitutional directives under articles 38, 39 and 46, as well as the Fundamental Duty of all citizens under clauses (c) and (e) of article 51A are also intended towards ensuring equality among all," reads part of the objective laid down in the draft Bill.

A comprehensive anti-discrimination Bill was introduced in the Lok Sabha by Congress MP Shashi Tharoor. The law is meant to cover both the public as well as the private sectors and seeks to make public servants like the police accountable for their failure to prevent discrimination.....Dr Tharoor pointed out while introducing the Bill that "Cases of discrimination continue to be witnessed…[2021]

[2019] Stringent punishment for atrocities on Sc, st under new act, (Apr. 22, 2020, 12:10 PM) https://economictimes.indiatimes.com/news/politics-and-nation/stringent-punishment-for-atrocities-on-sc-st-under-new-act/articleshow/50717243.cms?from=mdr
[2020] JAIN, *supra note* 1048.
[2021] *15 examples of discrimination in India* (Apr., 20, 2020, 11: 45AM), https://www.nationalheraldindia.com/news/a-new bill-against-discrimination-lists-common-forms-check-out-if-you-know-of-citizens-subjected-to-discrimination.

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A STUDY ON DISCRIMINATION:

The study published in the latest edition of the Economic and Political Weekly it was reported that in Delhi, more than one-fifth and in Mumbai 25% of Dalits are facing caste discrimination. This study also shows that the most common location for the discrimination is schools.[2022]

Caste continues to be one of the biggest factors that determine a person's occupation according to the census data conducted on the nonfarm workers. It is observed that the low works are continued to be dominated by the scheduled castes in general and the high occupations are associated with by the persons other than the scheduled castes and tribes.[2023]

Despite the fact that untouchability was officially banned when India adopted its constitution in 1950, discrimination against Dalits remained so pervasive. They are considered impure even from their birth. Untouchables perform jobs that are traditionally considered "unclean" and that too for very little pay.

India's National Crime Records Bureau indicate that in the year 2000, the last year for which figures are available, 25,455 crimes were committed against Dalits.[2024]

CONCLUSION:

Untouchability and discrimination has once ruled the Indian society and discrimination had been a barrier in the development for the dalits and other lower castes. Their birth itself used to decide their status and fate in the society. They were humiliated and were discriminated in schools, in villages, in play grounds, in employment opportunities and so on.

[2022] Vishnu Padmanabhan, *The discrimination Dalits and Muslims face in India*, (Apr., 22, 2020, 4:00PM), https://www.livemint.com/Politics/69Nrdm8oMIvspVNHgdBPsK/The-discrimination-Dalits-and-Muslims-face-in-India.html.

[2023]Rema Nagarajan*, In 21st century India, caste still decides what you do,* (Apr., 19, 2020, :11:00AM), https://timesofindia.indiatimes.com/india/in-21st-century-india-caste-still-decides-what-you-do/articleshow/67201813.cms.

[2024] Hillary Mayell, *India's "Untouchables" Face Violence, Discrimination (*Apr., 20, 2020, 3:30PM), https://www.nationalgeographic.com/news/2003/6/indias-untouchables-face-violence-discrimination.

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Several provisions in the form of articles in the constitution, and in the form of acts by the legislatures had helped them to get rid of this social evil. The position has changed gradually compared from the independence to the present. Earlier no punishment is prescribed for those who are responsible for the discrimination but after commencement of the constitution the stand has changed with the introduction of acts prescribing the punishment.

Though the position has not changed completely as still there exist some cases of this discrimination in the villages but with these acts, rules the situation is under control. If these enacted laws are followed in a stringent manner we can checkmate this evil of discrimination.

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ANTI-DEFECTION LAW: DISMANTLING DELIBERATIVE DEMOCRACY IN INDIA

- **NIMISHA PRIYADARSHI**

INTRODUCTION

India has an indelible imprint on the world map for being the largest democracy wherein it has established, and reconfigured the modern political theories of democracy.[2025] Here, the citizens exercise their right to vote to choose their leaders at different levels of the government, while elections are actively contested and hotly debated, creating an inclusive public sphere for effective discussions. However, the democratic structure is not devoid of any challenges that questions not the legitimacy of democracy but the legitimacy of law on which it stands. One such challenge is casted on the anti-defection law under X Schedule of the Indian Constitution.

Anti-defection laws are enacted to curb defections that arise when a member changes his political party after being elected to office due to reward of office or other similar considerations. Before 1967, there were instance of only 500 defections which were not due to the lure of office but for ideological reasons. Hence, disallowing such defection would have eroded the democratic participation in parliamentary set-up.[2026] However, between 1967 and 1972 more than 50 percent of the legislators switched their parties after being elected to office.[2027] This foreshadowed an alarming situation that would have eroded the democratic fabric of the country. So, the process to frame anti-defection law started with the recommendations of a high-level committee under the chairmanship of Shri Y.B. Chavan in 1969. However, the recommendations were not acted upon. Thereafter, two modest attempts were made to introduce such a law in 1973 and in 1978 but in both the situations, the bills were met with strong opposition and they could not be culminated into

[2025] Christine Keating, *Decolonizing Democracy: Transforming the Social Contract in India*, Penn State University Press, Pennsylvania, 2011.
[2026] K.N. Singh, "Anti-Defection Law and Judicial Review", *JPI,* Vol. 38, No. 31, 1992.

[2027] J,K, Mittal, "Anti-Defection Act: A Comment on its Constitutionality", (1987) 3 SCC(J) 25 at 26.

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law. Finally, in 1985, the 52nd Constitution Amendment Act[2028] was passed to introduce anti-defection law in X Schedule of the Indian Constitution to cure the malaise of floor-crossing and corrupt mal-practice of the parliamentarians.[2029]

The main import of this constitutional scheme is that once a member is elected under the symbol of a political party, he would not be allowed to leave or switch from his party thereafter. This paper concerns itself to one of the provisions which is:

"2. ***Disqualification on ground of defection.-*** *(1) Subject to the provisions of Paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—*

[…]

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention […]"

Thus, under the present constitutional scheme, a party assigns a whip[2030] and it casts an obligation upon other members to mandatorily follow the directions of whips while voting on a motion. Anything inconsistent to it would be treated as a defection, hence, a ground for disqualification.

In this paper, it is argued that this provision has undemocratic ramifications to the Indian democracy. This provision stifles debate and dissent and takes away the very soul of a deliberative democracy that India has strived to achieve. This paper calls for watering down the provision so that the discussions in the Parliament are stimulated by exchange of ideas and are not stifled by concomitant threat of disqualification. Thus, the focus should be on conscientious-decision making

[2028]The Constitution (Fifty Second-Amendment) Act, 1985, at http://india.gov.in/govt/documents/amendment/amend52.htm (Last visited on April 17, 2020).
[2029] Kartik Khanna, Dhvani Shah, "Anti-Defection Law: A Death Knell for Parliamentary Dissent?", *NUJS Law Review,* Vol. 5, 2012, pp. 104-127.
[2030] Subash C. Kashyap, *Parliamentary Procedure: The Law, Privileges, Practice and Precedents*, Vol. II, Universal Law Publishing, Gurgaon, 2000.

and not mechanical decision making process on the tune of a procedural law. In a nutshell, this paper analyses the anti-defection law through the prism of deliberative democracy.

Anti-Defection Law: Costing a White Elephant to Deliberative Democracy

The Parliament is the enlightened symbol of democracy in India within whose walls, laws are enacted and issues of national importance are discussed and deliberated upon by the rule of majority. However, the anti-defection law, which establishes democratic behaviour by preventing 'horse-trading', ironically casts a shadow on the blooming concept of deliberative democracy through Paragraph 2(1)(b) of X Schedule of the Indian Constitution.

[2.1] Stifling Discussion through Rubber Stamping

The scope of deliberative democracy has an essential facet credited to its fold – that is the idea that decisions are to be made through *active discussion by* the participants where all are treated equally[2031] and where it is ensured *"that no individual or group can dictate the outcome of others' actions."*[2032] The refined model on deliberative democracy by Habermas mandates a similar supposition that augments the need for an open, coercion-free discussion where participants are guided by rational arguments *"to realize the conditions of ideal discourse"*.[2033]

Contrarily, the anti-defection law through Paragraph 2(1)(b) of Schedule X, poses serious ramifications to the democratic thread of the country and curbs discussions and dissents in multiple ways. One would argue that while members are free to openly discuss against the issues within the party meetings, deliberative democracy is preserved, he leaves out the fact that a law proscribing the members from voting against the party whip or an abstinence from voting on it, would make such a discussion an empty formality, since those members would ultimately vote for the motion despite expressing contrary opinions. This issue was widely publicised when Women's Reservation Bill, 2010 was tabled before the Rajya Sabha with reports that several members who opposed the Bill, had in fact voted in favour because of being bound by the party's whip.[2034]

[2031] Shirin Rai, "Deliberative Democracy and Politics of Redistribution: The case of Indian Panchyats", *Democratic Theory,* Vol. 22, No. 4, pp. 64-80, 2007.
[2032] Stokes, Susan, *Pathologies of deliberation n Deliberative democracy*, Cambridge University Press, Cambridge, 1998.
[2033] Chantal Mouffe, "Deliberative Democracy or Agnostic Pluralism?", *Social Research,* Vol. 66, No. 3, pp.745-748, 1999.
[2034] The Telegraph, *Agree to Disagree*, April 21, 2010 at http://www.telegraphindia.com/1100421/jsp/opinion/story_12362774.jsp (Last visited on April 29, 220).

Essentially, such a practice amounts to rubber stamping the party's agenda which is nothing but a "*mere agreement*" rather than a "*rational consensus*".[2035]

Seyla Benhabib demarcates the features of Habermasian model of deliberative democracy in following three-fold points[2036]:

1. Equal participation of all participants in a deliberation;
2. Having the right to question the topic assigned; and
3. Right to initiate reflexive arguments.

These threefold points emphasize Russel Hardin's conception of representative democracy where he says *"that an assembly legislates better than the prince (i.e. a monarchical head of state) because it allows interests in contest to decide policy."*[2037] Further, as Jeremy Waldron's concept of *legitimate* political authority proceeds on the supposition that respect for the judgement of the citizens and pervasive disagreement in politics occupy same pedestal,[2038] the conflictual arguments in a decision-making process has to be preserved for an effective deliberation.

A deliberative democracy, thus, initiates pooling of innovative ideas, counter-arguments to separate the shaft from wheat in a motion. However, a system where a legislative member has to show allegiance to his political party by voting in consistence with the party's whip, it takes away any incentive of the member to resist the motion through his *reflexive arguments* because ultimately, he will have to bow down to the diktats of his party.[2039] The anti-defection law, therefore, stifles forming an opinion and expression of the same, hence, is rooting out any legitimate *dissent*. Infact, the performance of the legislature in past few years show that only few hours are devoted to discussions and debates before passing a bill. For instance, for the entire parliamentary session of 2009, approximately 27 percent of the bills that were passed were debated

[2035] *Supra* note 9.
[2036] *Ibid.*
[2037] R. Hardin, "Democratic Epistemology and Accountability", *Social Philosophy and Policy,* Vol. 17, p. 110, 120, 2000.
[2038] Thomas Christiano, "Waldron on Law and Disagreement", *Law and Philosophy,* Vol. 19, No. 4, pp. 513-543, 2000.
[2039] Indian Express, House for this Debate?, January 3, 2007, at http://www.indianexpress.com/news/house-this-for-debate/19938/0 (Last visited on April 29, 2020).

over for less than 5 minutes in Lok Sabha.[2040] In 2007, the Lok Sabha spent a mere 9 percent and the Rajya Sabha, a mere 12 percent on discussions related to bills.[2041] These statistics pose a worrying figure, though the situation in 2019 Lok Sabha session improved considerably wherein on an average a bill was discussed for 3.6 hours in Lok Sabha and 3.3 hours in Rajya Sabha.[2042]

Further, attention is drawn to a peculiar yet common situation where the party's agenda conflicts with the interest of a *dissenting* member's constituency wherein a conundrum of party-obligation versus constituency-obligation is created. It would be blasphemous to even think that once a member is elected, his obligation is merged with the larger interest of the nation as represented by a political party because such a presumption negate the very roots of a representative democracy. The elected members are obliged to ensure the protection and advancement of its constituency's interests and to represent them not just within the party forum but also on a larger platform as that of an Assembly; needless, to say, the credibility of discussion within the party forum is seriously doubted owing to the majority of them having dictatorial structure. Thus, the only platform that is available for recourse is the assembly where the members can actually contribute to the needs of their respective constituencies rather than merely acting as numerical figures to pass the agenda. Paragraph 2(1)(b) of X Schedule incidentally takes it away, leaving the interest of the constituency at the altar of party's agenda. Profoundly, the fate of constituencies finds echo in Cavell's cry, *"What if there is a cry for justice that expresses a sense not of having lost out in an unequal yet fair struggle, but of having from the start being left out."*[2043]

[2.2] Reducing Voting to an Empty Formality

According to David Peritz, a deliberative process involves a two-fold process – *"participants aim to secure each other's agreement by publicly deliberating before a vote is taken"* and *"that their votes must be informed by what they learned though deliberation."*[2044] Therefore, on his account,

[2040] PRS Legislative Research, *Vital Stats: Parliament in 2009*, at http://www.prsindia.org/administrator/uploads/general/1262663823~~parliament%20in%202009.pdf (Last visited on April 29, 2020).
[2041] PRS Legislative Research, *Vital Stats: Legislation in Parliament*, at http://www.prsindia.org/administrator/uploads/general/1241757092~~Legislation%20in%20Parliament. pdf (Last visited on April 29, 2020).
[2042] PRS Legislative Research, *Parliament Functioning in First Session of 17th Session,* at https://www.prsindia.org/parliamenttrack/vital-stats/parliament-functioning-first-session-17th-lok-sabha (last visited on April 29, 2020).
[2043] Stanley Cavell, *Conditions Handsome and Unhandsome,* Chicago University Press, Chicago, 1990.
[2044] David Pertiz, "Social Space for Deliberative Democracy", *The Good Society,* Vol. 10, No. 2, pp. 21-26, 2001.

expression through arguments and informed voting remain central to his concept of deliberative democracy.

The procedure of passing a bill also justifies the significance of discussion by mandating a bill to go through three readings before a vote is taken. A nuanced discussion of the provisions is done during the second reading. While in the third reading, instead of going through the detailed analysis like that in the second reading, the procedure concerns to the reasons why the bill should be passed or rejected.[2045] Such a practice facilitates an intrinsic democratic procedure. However, the issuance of whip and the threat of anti-defection law always hang like a Damocles' sword since how the voting has to be done is already dictated by the party's whip.[2046] Reliance on Dominique Leydet's observation can be placed to bolster this claim, as according to him, members do not have to generally rely upon the opposition for passing a bill, since its own members generally form a majority.[2047] While ethics demand that the government consider the opposition's concerns and the opinions of its own members, this may not be followed every time, especially, where a party holds a sweeping majority in the House. In such a situation, the entire process of discussions and consequent voting remain an empty formality as the concomitant threat of disqualification refrain a member from voting against the party whip, hence, refraining him from expressing his legitimate concerns.

Secondly, on issue of encumbered votes that subjugates the rights of the members of free speech and expression, attention maybe drawn to Article 105(2) of the Indian Constitution that states:

"[…] (2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof […]"

Further, voting in a democracy is an ultimate expression of one's opinion.[2048] While right to vote is a statutory right, the freedom to vote, once that is vested, is a Fundamental Right under Article 19(1)(a) of the Indian Constitution.[2049] Thus, even a cursory reading of Article 105(2) and the

[2045] *Supra,* note 5.
[2046] National Social Watch, *Citizen's Report on Governance and Development 2010*, at http://socialwatchindia.net/publications/citizens-report/citizens-report-on-governance-and-development-2010-executive-summary (Last visited on April 29, 2020).
[2047] D. Leydet, "Partisan Legislatures and Democratic Deliberation", *Journal of Political Philosophy.* Vol. 23, No. 3, p. 16, 2015.
[2048] K.N. Subbareddy, Advocate v. Advocates Association, ILR 2009 KAR 1697.
[2049] Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 69.

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judgements of Supreme Court on right to speech and expression reveals that voting is an exercise of one's speech and an expression of dissent in a deliberative democracy. Paragraph 2(1)(b) of X Schedule, by attaching encumbrances to the votes, stifles not only effective voting but *informed* voting also. An informed voting mandates the participants to vote according to their opinions which are formed after the deliberation is over. By restricting the members to vote on lines of party's whip, it forces them to vote in favour of it despite expressing contrary opinions. Hence, only a façade of one's own opinion is created, leaving the votes to be uninformed, and consequently, undermining the importance of *deliberation* in a democracy.

SOLUTIONS AND CONCLUSION

In *Kihoto Hollohon v. Zachillhu and Others,* [2050] the Supreme Court attempted to make a harmonious construction of the provisions of anti-defection law by limiting the cases in which members can be disqualified by voting in contrary to the whip. It demarcated the cases to be the ones involving vote of no-confidence/confidence, and matters concerning policies of the parties. While the first case justified disqualification, the second case poses an ambiguous situation, particularly, when whips are issued for trivial matters. This was evidently the case when Ms. Mamata Banerjee issued an informal whip, directing her MLAs to vote in favour of Mr. Trivedi in Rajya Sabha.[2051] While disregard to this whip would not be a ground for disqualification, seldom would members dare to disregard it since the sole discretion to invoke paragraph 2(1)(b) rests with the party leaders.[2052]

The anti-defection law, through Paragraph 2(1)(b) confuses dissent with defection and costs a hefty white elephant to the structure of deliberative democracy in India. To rectify this, Manish Tiwari, a Member of Parliament, proposed limiting disqualification under paragraph 2(1)(b) to following instances:

"(i) motion expressing confidence or want of confidence in the Council of Ministers,

(ii) motion for an adjournment of the business of the House,

[2050] Kihoto Hollohon v. Zachillhu and Others,1992 SCR (1) 686.
[2051] The Statesman (India), *Congress rests Rajya Sabha case on cross-vot*e, March 17, 2002.
[2052] *Supra* note 5.

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(iii) motion in respect of financial matters as enumerated in articles 113 to 116 (both inclusive) and articles 203 to 206 (both inclusive),

(iv) Money Bill"[2053]

On similar lines, Dinesh Goswami Committee on Electoral Reform[2054] suggested restricting the use of paragraph 2(1)(b) to cases involving confidence or no-confidence motion. Alternative proposal was also made by 107th Report of Law Commission recommending issuance of whip only in cases where the existence of government is at threat.[2055] The proposal by Goswami committee or by Mr. Tiwari seems to be more plausible since they demarcate the limited grounds in contrast to limited circumstances as proposed by the Law Commission.[2056]

Further, following the American jurisprudence that political parties have a vested right to manage its internal affairs and prescribe its own rules and procedures,[2057] there should not be any bar to initiate internal actions against the dissenting members. However, allowing disqualification from the House would stifle freedom of speech and would affect the larger interests of the society.

Following the assertion that "*diversity trumps ability theorem*"[2058] made in Helene Landemore's book, *Democratic Reasons,* it is argued that the Indian Parliament with a boisterous strength of 545 and 250 members, embodies the spirit of pooling in of expertise in a representative form, rather than restricting it to a homogenous group.[2059] Ironically, the anti-defection law puts brakes to discussions and dissents in this temple of democracy. In a nutshell, addressing the elephant in the room; it is proposed to differentiate between defection and dissent and thereby, to water down the provisions of anti-defection law to bring it in sync

[2053] Anita Joshua, *Congress MP moves Bill to amend Anti-Defection Law*, at http://www.thehindu.com/news/states/article103984.ece (Last visited on April 29, 2020).
[2054] Dinesh Goswami Committee on Electoral Reforms (as referred to in PRS Legislative Research), The Anti-Defection Law-Intent and Impact, November 23, 2011, at http://www.prsindia.org/uploads/media/Note%20on%20Anti-Defection.pdf (Last visited on April 29, 2020).
[2055] Law Commission of India, 170th Report on Reform of the Electoral Laws.
[2056] *Supra* note 5.
[2057] Michael Stokes, "When freedoms conflict: Party discipline and the First Amendment", *Journal of Law & Politics*, Vol. 11, pp. 751, 753, 1995.
[2058] Gautam Bhatia, 'The Absence of Deliberative Democracy: The Fetters of the Anti-Defection Law' (2018)WordPress at https://indconlawphil.wordpress.com/category/anti-defection/ (last visited on April 29, 2020).
[2059] *Ibid.*

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RIGHT TO INFORMATION ACT 2005 AND ITS POSITIVE SOCIOLOGIAL IMPACTS

- **AYUSHMAN DAS**

INTRODUCTION

The Right to information bill was a law enacted by the parliament of the country in the year 2005. It has a deep historical connection as to how it should be placed. Article19(1) places the importance of the right to free speech and expression. Everyone started realizing the importance of getting information in the democracy they are living and paying taxes. People started understanding the importance of knowing what is happening in the bureaucratic system of India . India a country that was considerably a new country started learning from countries like Sweden that started putting in transparency laws since 1775. Even long before the country enacted the law , the state of Tamil Nadu made freedom of information a law .The real struggle for information actually started in the era of emergency when everyone was fighting to bring democracy in our country efficiently. Morarji Desai was one of the foremost people that started the struggle. He talked of an open economy in his election manifesto, he asked whether the Official Secrets Act could be modified for the benefit of the people . In the 1977 elections these are the ideals by which they fought the tyrannical Indira Gandhi . A famous case that can be talked about while discussing the pre enactment of the ACT is the LK Koolwal v State of Rajasthan and others 1986 which talked about how the people should be given information and only then they could be given the right to speech and expression. The case law also emphasises on how under Article 51(a) the State has obligations to perform their duties . What actually happened was that the lanes of various localities was not clean therefore mr koonwal filled a writ petition under Article 21 and gradually under the Rajasthan Municipal Act 1959 the municipal board was asked to fulfill its duties .But the act also has some limitations like for example when there are things related to national security and that needs security at utmost levels for example disclosing of the infamous Rafael aircraft deal that was a matter of national importance , but also in such cases the state must explain to its citizens why and what are the reasons for non disclosure . The right to information should be known as not an

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absolute right that can be exercised for any rhymo reason for example a citizen cannot ask transactions related to public security.

The real struggle for RTI was started by the Mazdor kisan shakti sanghattan MKSS asking for right to information in the rural development of the state of Punjab in the 90s . The 2000s saw the formation of the freedom of information bill and the finally after the presidents assent , the bill became an ACT under the official Gazette of India . Every other country before India has somehow adopted it in their democratic system but with Indias subsequent failures the country slowly started feeling the importance of the right to know what is going about in the various structures of the economy , the system and its workers. A major reason for a strive for such a bill is the subsequent failure of a number of majority parties that were part of the system also but could not actually point out the faults and weaknesses . A major party like the congress had a leader who had held people against the fundamental rights and infrindged the right of freedom of press but proper questioning was not done. If we look at it closely its not only about the government ie the party which is held liable under the act all the various organs are for example the judiciary , which has a whopping million cases pending which may never end and this talks about the inefficiency of the judiciary . Even the very institutionalization of the RTI ACT took almost 20 years to get it on its feet .

Some important cases which have rightfully showed why RTI is very effective:

A RAJA 2G TELECOM SCAM:

In this case the former telecom minister and a couple of other ministers,the government was accused of under changing mobile telephone companies for a frequency allocation license when they generate a 2g spectrum which gave a loss of about 1. 76 lakh crores , shubhash Chandra Agarwal an RTI activist brought out an information after which a 15 minute long meeting was recorded between A RAJA and the solicitor general of India . Even though the people that were the 21 accused were acquitted, the information was vital in discovering what is right and what is wrong.

ADARSH SOCIETY SCAM:

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In this scam a high rise building was constructed in the collaba area of Bombay , this place was constructed for the widows of the Kargil war but consequently that building suddenly started to be used as a housing society . Some RTI activists started to plot out this nexus between the bourgeoise and exposed the state for illegally using a military land .Further explaining the right to information is a right which can be used intelligently to get answers which a democracy must definitely see.

VEDANTA CONTROVERSY:

The Vedanta group has been accused of various things ,being the capitalists they are , they have invested a lot for industrialization , but they have also been criticized for numerous number of reasons . for environmental problems , for socialistic problems. Heres one issue that the RTI had exposed exceptionally . Balco a BHARTIA ALLUMINIUM COMPANY Ltd under the vedant group started violating rules under the KMC (korba municipal corporation)several notice were given but the people still went on working. Balco also had completed constructions of a number of power plants including 540MW and 1200MW. It means projects that got no permission started working without it . Even though the RTI has exposed the Balco company ,the judicial proceedings are still going on . Government has about 49% shares in the company . When the people of the company were asked about it , they completely refuted the charges that have been placed against them . The ACT again showing how it can be so instrumental to expose people, organization and even the state at times.

THE 2010 COMMONWEALTH SCAM:

A non profit organization filed an RTI , against the government that time, for diverting large sums of money to the commonwealth games of 2010, which was almost an amount of 700 crore. This money should have been used for the development of the dalit community which was the money that had to be use for the welfare of the community. The worst part of this was that even the cash that was diverted for the games wasn't used properly . All the accused were charged for corruption charges including the chairman Suresh Kalmadi , were charged for corruption, cheating, forgery , criminal conspiracy under the Prevention of Corruption Act 1930. It was a black day for India in the world of sports and the country still remembers the humiliation they received .

RIGHT TO INFORMATION (AMMENDMENT BILL) 2019:

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The right to information amendment bill proposes, that the central government will propose the tenure of the Chief Information commissioner and Information commissioner , The bill also proposes that the central government will be allotting salaries to the CIC and IC and also remove equal salaries equivalent to the Chief election commissioner lastly the bill states that if the person had any other position then his salary would be cut accordingly to the amount of the pension.

The amendments put forward are been criticized across the country by undermining the statutory body, and thus weakening India's very strong transparency laws. Many other problems such as fake degrees etc were bottling up , the government has defended this by saying according to a report by India Today "Probably, the then government of the day, in a hurry to pass the RTI Act, 2005, overlooked a lot of things. The Central Information Commissioner has been given the status of a Supreme Court judge but his judgments can be challenged in the high courts. How can that exist? "These are some of the small problems that are there with the act .

CONCLUSION:

In the end, the concept of having the right to produce information in front of the people so that the transparency and knowledge of the people living in the democracy keeps them updated about every type of information . At the end it is the people who pay the money, it's they who run the country so therefore they have full right to know actually what is happening. Therefore holding the RTI in high regard is not only important for the people of the country but also for the state at large.

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THE ROAD SAFETY PARADIGM: A CASE AGAINST HIGH BEAM LIGHTS

- RITIK KANOUJIA, PRATEEK SINGH, UDAYAN DWIVEDI

INTRODUCTION

Road safety in India is a very complex issue and requires to be dealt with care and caution. The usage of unnecessary use of the high beam should be prevented. The paper portrays the concept of contributory negligence resulting from the use of high beam lights. The headlights provided in most vehicles are meant for safety, but often, they result in a menace, particularly when a high intensity beam blazes into eyes of an approaching driver. It is contended that it is the driver's responsibility to abide by the rules of the Motor Vehicle Act to prevent the accidents caused due to the usage of the high beam lights. Through, this paper, an analysis of the repercussions of using high beam lights has been presented. It is a common scenario - the negligence of one driver causes injuries to the another, and results in contributory negligence, as the drivers are unable to identify the road ahead of them, due to the sharp glare of light that partially blinds their eyes, often resulting in heavy bodily injuries with grave consequences. Due to the increasing amount of accidents on highways, there is a growing threat to right to life which shows the deleterious effect of mismanagements of roads by the administrative and governing authorities.

WHETHER THE USE OF HIGH BEAM LAMPS IN MODERN VEHICLES IS APPROPRIATE?

The usage of high-beam lights is quite common on Indian roads. High beam lights produce a glare so strong, that it dazzles the oncoming driver's eyes and often results unpleasing mishaps. Glare is defined as a "harsh uncomfortably bright light". Glare Recovery Time ["GRT"] is a measure of the speed with which the human visual system regains its functioning, following exposure to bright

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light.[2060] Now, whenever a driver is partially blinded with glare, his responses are slowed down by a significant time, owing to the added GRT. According to Central Motor Vehicles Act, the construction of headlights has to be such that they are permanently deflected downwards, to such an extent that they are incapable of blinding a driver.[2061] For road safety purposes, an individual can be booked for a sum of upto INR 100 for the unnecessary usage of high beam.[2062] However, such a mere penalty does not prevent drivers from misusing their lights.

High beam lights provided in most vehicles are meant to increase safety, but they often result in a menace, particularly when the same blazes directly into the eye of the approaching driver.[2063] Not only are the pupils of the eyes contracted, but the sensitive retinas are paralyzed for a few seconds, such that the victim is absolutely blinded.[2064] In cases of accidents on highways, every driver has to adapt to the behavior of the other drivers on the road.[2065] Night time driving is identified as one of the six areas for substantially reducing fatalities in India. According to a recent report submitted to Government of India, the risk of accidents at night is 40% higher than during the day.[2066]

In *Archit Saini* v. *The Oriental Insurance Company*, an accident took place as the driver of car could not identify the parked tanker due to flash-lights of the oncoming traffic from front side. Due to the accident the car was damaged extensively, causing the driver of the car and the co-passenger sitting by his side to die instantaneously. Two children, who were on the rear seat of car were also injured.[2067] This case signifies how a high beam can have serious repercussions for other vehicles on the road. Increased number of road accidents are being reported under night time throughout the world.[2068] The number of people driving at night time has increased tremendously in the last 5 years due to increased competition, to meet work deadlines etc.[2069] Thus it proves that

[2060] Gupta, Nishit et al. "Effect of glare on night time driving in alcoholic versus non-alcoholic professional drivers." *International journal of applied & basic medical research* vol. 2,2 (2012): 128-31.
[2061] § 106, Central Motor Vehicles Act 1988.
[2062] § 112 and 177 of Motor Vehicles Act 1988.
[2063] "A New Dirigible Driving Light." *Scientific American*, vol. 117, no. 7, 1917, pp. 119–119. *JSTOR*, www.jstor.org/stable/26021747.
[2064] Ibid
[2065] Kalavati T. Sanghvi v. Habib Khan Yusuf Khan 78 BomLR 528 (1976).
[2066] Meese, George P. E., and Robert D. Knoll. "The Sealed Beam Case: Engineering in the Public and Private Interest [with Commentary]." *Business & Professional Ethics Journal*, vol. 1, no. 3, 1982, pp. 1–23. *JSTOR*, www.jstor.org/stable/27799748.
[2067] Archit Saini v. The Oriental Insurance Company Ltd & Ors. AIR (2018) SC 1143.
[2068] Gupta, Nishit et al. "Effect of glare on night time driving in alcoholic versus non-alcoholic professional drivers." *International journal of applied & basic medical research* vol. 2,2 (2012): 128-31.
[2069] Ibid.

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high beam is a matter of great concern to the nation. Section 495 stipulates that the 'lights are not to be used or manipulated in a manner that causes danger or undue inconvenience to a person by dazzle'. It also mandates the blackening of the Centre portion of the light so that oncoming drivers aren't inconvenienced, thus rapidly flashing is illegal too.[2070]

The use of high beam headlights has been a subject of great criticism

The dazzling head-lights of the vehicles by which the drivers are not able to see very clearly is also a great contention for the judiciary. Though, there is a provision in the relevant Act and Rules that the head-light of the vehicles should be blackened up to the extent of l/3rd but that is not being observed, either by the plying vehicles or by the traffic authorities. This rule should be strictly observed. Another method of over-coming this difficulty is that the manufacturers of head-lights should be instructed/directed to manufacture the head-lights for motor vehicles only after complying with the provisions of the Rules.[2071]

In a research experiment conducted by *Insurance Institute for Highway Safety*, video cameras were placed on the roadside and aimed at a measurement post, to classify vehicles as users of high beam or low beam headlights. As a vehicle passed through an observation site, its headlight pattern illuminated the post, and the video camera recorded the illumination pattern on the post. Additionally, the camera kept a time signature of passing vehicles, and this was used to determine whether a vehicle was isolated from opposing or leading.[2072] Such technology once implemented in India can certainly help identifying vehicles with high beam lights turned on. Thus, helping reducing the total number of accidents taking place.

It is stated that vehicles which are driven on the public roads should be lit with two or four head lamps after half an hour of the sunset or in case of insufficient lights to make it discernibly visible to others on road (both persons and vehicles) who are at a distance of one hundred and fifty five meters (155 m) ahead.[2073] The lights should be in accordance with the surrounding.

[2070] §495, Tamil Nadu Motor Vehicle Act 1989.
[2071] Nasru v. State of Rajasthan CriLJ 326 (1989).
[2072] Raegan, I. and Brumbelow, M. (2016). *The Effects of Rurality, Proximity of Other Traffic, and Roadway Curvature on High Beam Headlamp Use Rates*. Vienna: Insurance Institute for Highway Safety.
[2073] § 105 of the Central Motor Vehicles Rules, 1988.

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In *MC Mehta v. Union of India,*[2074] the Hon'ble Supreme Court has clearly stated the principle that in exercise of its constitutional powers and within the limitations of judicial activism, the court, if necessary, should interpret and evolve new laws so as to protect the basic rule of law[2075] and truly apply the spirit of the Constitution of India[2076]. Vehicle which is to be used on the road has to be in conformity with the requirements of the Motor Vehicles Act. Motor vehicle or vehicle both have been defined under Section 2(28) of the Act[2077]. Under the provisions of Section 110 of the Act, the Government has the power to make rules regulating the construction, equipment and maintenance of motor vehicles.[2078]

More than half of all the highways in India inclusive of both national and state highways do not have adequate lighting conditions in order to drive safely which is why drivers are compelled to use high beam headlamps while driving on such highways. Had there already been sufficient lighting on the highway, drivers would not be force to use high beam lamps since they would already have a good view of the road ahead them.[2079] This goes on to prove the responsibility of the government to install enough street lamps in national highways as an alternative to high beam headlamps. Thus, the courts have to strike a proper harmony between the public interest relating to any laws including environment protection on the one hand and the other public interest which may be relatable to industrial and commercial development.[2080]

WHETHER IT IS THE RESPONSIBILITY OF GOVERNMENT TO MAINTAIN THE HIGHWAYS AND TO ENFORCE THE FUNDAMENTAL RIGHTS ARISING OUT OF THIS RESPONSIBILITY?

Road safety in India is a very sensitive issue, and needs to be dealt with care and caution. For the purpose of establishment of a relationship of this relevant topic with the control of the government, it has to be established that 1. There is a duty incumbent upon the government; and that 2. Accidents are a grave threat to right to life of an individual.

[2074] M.C. Mehta & Anr. v. Union of India & Ors (2006)7SCC456.
[2075] INDIA CONST. Art. 21.
[2076] INDIA CONST. Art 12.
[2077] § 2(28), Motor Vehicle Act 1988.
[2078] § 110, Motor Vehicle Act 1988.
[2079] Steinbach R, Perkins C, Tompson L, et al 'The effect of reduced street lighting on road casualties and crime in England and Wales: controlled interrupted time series analysis' J Epidemiol Community Health 2015;69:1118-1124.
[2080]Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group and Ors. (2006)3 SCC 434.

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GOVERNMENT'S DUTY

Highways are public assets and are therefore ought to be treated with utmost importance by the Government.[2081] The main functions of the National Highways Authority of India are to develop and maintain national highways whose management and operation is vested in the Central Government.[2082]

According to the recently passed Motor Vehicles (Amendment) Bill, "Notwithstanding anything contained in this Act and subject to such conditions as may be prescribed by the Central Government, in order to promote innovation, research and development in the fields of vehicular engineering, mechanically propelled vehicles and transportation in general".[2083]

In the case *Nasru v. State of Rajasthan*, Rajasthan High Court laid down stipulations for the placement of road signs, markings and warnings; Reflective articles should also be used to improve the visibility of road signs and markings.[2084] Even though National Highways and State Highways account for only 5% of India's total road length, they are prone to 52% of all the accidents that occur throughout India.[2085] Since the Central Government have no direct administrative control over the executing agency, there have been instances when the Central Government had to remain helpless in case a State Government overlooked the acts of omission or commission on the part of its staff engaged in the construction and maintenance of national highways.[2086]

The right to travel safely and freely are encompassed in the Indian Constitution under articles 19 and 21 respectively.[2087] Due to the lack of proper enforcement mechanism by the state and central government, there has been an abject effect on the human lives, which can be seen in the rising number of deaths per year due to car and motor accidents.[2088] According to the Motor Vehicles

[2081] Ram Singh A High-handed Approach to National Highways 19 Economic and Political Weekly (3)February 20-26, 2010.
[2082] § 16(1) National Highways Authority of India Act, 1988.
[2083] § 2(b) Motor Vehicles (Amendment) Bill, 2019.
[2084] Nasru v. State of Rajasthan (2006) CriLJ 954.
[2085] PRS Legislative Research Overview of Road Accidents in India Ministry of Road Transport and Highways; Ministry of Statistics and Programme Implementation; Insurance Regulatory and Development Authority of India (1), March 28, 2017.
[2086] North Karnataka Expressway Ltd. v. The Commissioner of Income Tax (2014) 272 CTR (Bom) 225.
[2087] Maneka Gandhi v. Union of India (1978) 1 SCC 248.
[2088] S.Rajaseekaran vs Union Of India (2014) 6 SCC 36.

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Act, it is the power of the central government to make regulation for the driving of motor vehicles.[2089] In consideration of the grave threat posed by car accidents on state and national highways and the responsibility of the government thereof, it is incumbent upon the government to make rules for the prevention of this threat to life and travel of the citizens of India.

CAR ACCIDENTS ENDANGER THE RIGHT TO LIFE

A motor car accident may result in bodily injuries, consequence of which may be death or disability.[2090] In a case law the victim was undergoing great and unbearable pain and suffering in consequence of the injuries sustained by him since the date of the accident. He was unable to perform the natural and routine functions of life independently since the date of the accident. His expectation of life was shortened. His earning capacity is likely to be substantially and adversely affected.[2091]

There are specific laws in terms of Motor Vehicles Act, 1988, Environment Protection Act, 1986 and constitutional protection available to the citizens of India under Article 21 of the Constitution of India having a claim to public interest and in any case, better environment.[2092] The rampant news of deaths due to accidents on national highways like viz. Yamuna Expressway[2093], Mumbai-Pune Expressway[2094] and several State Highways[2095] further the contention that road accidents are a threat to an individuals' right to life.

Conclusion

Safety is the cornerstone of driving vehicles. The research paper emphasizes on the responsibilities of the various sects to prevent the accidents caused due to the high beam lights which produces a glare which is very much capable of blinding the approaching driver from the oncoming traffic.

[2089] § 118 of Motor Vehicles Act, 1988.
[2090]The Branch Manager, National Insurance Co. Ltd. v. Mousumi Bhattacharjee and Ors. (2019) 5 SCC 391.
[2091]Marine and General Insurance Co. Ltd. and Ors. v. Balkrishna Ramchandra Nayan 1976 (78) Bom LR 262.
[2092]Dr Anahita Pandole vs State of Maharashtra 2008 (110) Bom L R 1555.
[2093]India Today. (2019). Two of family killed, three hurt in car crash on Mumbai-Pune Expressway. [online] Available at: https://www.indiatoday.in/india/story/two-of-family-killed-three-hurt-in-car-crash-on-mumbai-pune-expressway-1632540-2019-12-30 [Accessed 30 Dec. 2019].
[2094]Ibid.
[2095]PRS Legislative Research (2017). Vital Stats Overview of Road Accidents in India. [online] pp.1-2. Available at: http://prsindia.org/policy/vital-stats/overview-road-accidents-india [Accessed 9 Jan. 2020].

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The prima facie responsibility is of the driver to get abide by the rules and the regulations provided by the Central Motor Vehicle Act and other eminent authorities. The second responsibility is of the manufacturers of the motor vehicle, who should provide the light in the vehicle in accordance to the rules laid down by the eminent authority. The last but the foremost responsibility lay down to the State to install proper lighting conditions on the highways so that drivers should not compel to use the high beam lights. The issue of contributory negligence leads to injury of the driver and many a times death of both the driver. The accident may result in a great threat to the nation and the right to life also.

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JURISPRUDENCE OF POPULATION CONTROL IN INDIA

- AMARPAL SINGH & MALINI RAJ

ABSTRACT

"Reproductive rights are inalienable human rights to be respected by all, including the Government"

Right to decide freely the number of children and spacing between them is a form is a right to freedom and should be free of coercion. As stated in the guidelines by the International Federation of Gynecology and Obstetrics that it is unethical to perform sterilization on women without her free consent within a government scheme or programme. **The Constitution Amendment Bill, 2020** introduced in Council of States in parliament of India to encourage two-child policy and **Population Control Bill 2020 in** India by withdrawing concessions and offering incentives such as employment, tax and education restricts the freedom of people and further, violates the principle of equality as it distinguishes between families on the basis of the number of children for the offering of concessions

Two-child policy based on one- child model which was implemented in China may lead to cases of forced abortions, sterilization ad arbitrary detention and the incentive offered will be nothing but disregard of the reproductive freedom of the citizens and implementation will do nothing but skew the sex ratio in the country as shown by one-child policy in China during the last 30 years.

It is very well argued that the policy is adopted on the grounds Bentham's **utilitarianism** which suggests *that people can be deprived of their individual rights for the greater interest of the society*. This paper tries to analyze Population Control Bill (2020) and Constitution Amendment Bill (2020) with respect to Bentham's theory of utilitarianism. The doctrinal methodology will be deployed wherein articles, books, internet and the international convention will be referred.

Keywords - Two-Child Policy, utilitarianism, right to freedom, coercion, greater interest.

I. INTRODUCTION

The land is shrinking and the population is rising. There is no such place to build homes. This is a universal truth that one must has to consider. There are roads, water, health, sanitation: how will one give all facilities if population keeps on increasing. For curbing this major issue, a private member bill introduced in the Rajya Sabha, proposing an amendment in the Constitution for the government to offer incentives in taxation, employment and education for controlling the population. The Constitution (Amendment) bill, 2020 as introduced on February 7, 2020 to further amend the Constitution of India by inserting article 47A.

According to the bill, **Article 47A** would be read as: *"The State shall promote small family norms by offering incentives in taxes, employment, education etc. to its people who keep their family limited to two children and shall withdraw every concession from and deprive such incentives to those not adhering to small family norm, to keep the growing population under control."*[2096]

It highlights the need to encourage people to have small families, by allowing tax concessions, priority in social benefit schemes and school admissions, etc. It also tells about penalties like the imposition of heavy taxes and withdrawal of tax concessions, to discourage people who don't follow the measures for population control. This is not the first time that a population control action is being demanded through a legislative change. In 2016, BJP MP Prahlad Singh Patel had also introduced a private member bill on population control. But, it did not reach the stage of voting. Later in July 2019, another BJP MP Rakesh Sinha introduced the Population Regulation Bill in the Rajya Sabha which proposed to penalize the people who are having more than two children. The bill offered various incentives for families to stick to two-child norm, including income tax discounts, free health care services for parents, subsidies and loans for plots and houses. The bill is currently pending in the house.

The fact is that the population of India has crossed over 125 crores is really frightening. India's current yearly growth rate is 1.02%. The nation has a population density of 416 people per square kilometer.[2097]Even after the fact that we have framed a National Population Control Policy, we are the second country in the world with highest population.

[2096]Tax sops, incentives in jobs & education: The print.in .
[2097]The Constitution (Amendment) bill, 2020.

Many criticisms have been made against the two-child norm. Some say the law violates the rights of women. Human rights activists argue that discriminate the women right from birth by encouraging abortion or infanticide of females. It also creates incentives for men to divorce their wives and renounce their families if they want to opt for political office. Human Rights Commission has also declared the two-child policy as regressive and violating the rights of human and child and the principle of voluntary informed choice. It is also argued that if the policy gets implemented then it prohibits people from contesting election of Panchayats. Among these, Dalits, Adivasis and OBCs formed an overwhelming 80%. Implementation of such measures will contravene the 73rd amendment, which intends to give political representation to people from marginalized societies in democratic processes. The difficulties like gender disproportion, undocumented children, etc. faced by China (due to one-child policy) might be experienced by India

II . HISTORY OF POPULATION CONTROL POLICY IN INDIA

The story of population control through family planning is an interesting case in India, which holds the prominence of being the first among the developing countries to officially launch a family planning programme as early as 1951. Even the first Lok Sabha had not yet been constituted. For achieving this population control idea, first Family Planning Association was set up in 1949. The policy to control the expansion of the population in 1951 was revolutionary in view, particularly when it was seen Mahatma Gandhi's disapproval of such a government-backed campaign. Gandhi opposed the purpose of contraception to control family size. He supported the idea of austerity to control population growth. The main focus, however, was on convincing the people to limit the size of their family.

The emergency imposed by Indira Gandhi government in 1970s, which got an aggressive push to the two-child policy. Due to which, the ruling Congress party came under massive criticism for its high-handed and often coercive practices of family planning and birth control measures that were forcefully enforced. The people reacted by voting the opposite party in 1977. This was the decade when China introduced its one-child policy and removed the two-child policy.

In the 1980s, *"Hum Do Hamare Do"* (We Two Ours Two) got popularised through a mass campaign. The National Health Policy was adopted. The National Population Policy came in 2000 with a long-term objective of preserving the population by 2045.However, there is a variation in

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the government's overall approach towards population control through family planning. The emphasis has been on limiting the size of family which resulted in success as total fertility rate coming down from over 3 births per woman in 2000 to around 2 births per woman now. Then India made a commitment to international community that it will honor the individual right of the couples to decide freely the number of children they want to have and also decide the gap between the births of their kids.

If one has to compare the growth rate between 1991-2001 and 2001-2011, the rate of population growth has declined in actual terms from 21.5% (seen during the 90s) to 17.7% (seen during 2001-2011).

III. POPULATION CONTROL IN DIFFERENT STATES IN INDIA

The population of India is projected to overtake China's in less than a decade.[2098] Around 24 states in India and Union Territories have already adopted the small family norm without taking any method methods.

In Andhra Pradesh and Telangana, at the time of 1994 Panchayati Raj election a person with more than two children was disqualified from contesting the election. Those who already had more than three however, can contest these polls. In Maharashtra, people having more than two children are barred from contesting the Gram Panchayat and Municipal election. The Maharashtra Civil Services (Declaration of small family) Rules, 2005 disqualifies a person for holding a state government office whose is having more than two children. Even the women are not allowed PDS (Public Distribution System) benefits if she is having more than two children. Rajasthan and Assam have also declared that persons with more than two children are not eligible for government jobs. In Gujarat, the Local Authorities Act was amended in 2005 to disqualify anyone with more than two children from contesting elections of Panchayats, Municipalities and Municipal corporations.

Madhya Pradesh and Chhattisgarh implemented the two-child policy in 2001 for both local body election and government jobs. But in 2005, both the governments had to discontinue as so many

[2098] World Population Prospects 2019.

complaints they got as this rule doesn't applicable in assembly and Parliamentary elections. But MP government continues this two-child policy for government jobs and judicial services.

Recently the Assam government announced two-child policy. Accordingly to this policy, people with more than two children will not be eligible for government jobs from January 2021. The incentives and disincentives under the policy shall be applicable only prospectively. The idea will directly impact the weaker section of the society including women, whose reproductive choices are often subject to a variety of constraints. Assam will become the fourth state after Maharashtra, Madhya Pradesh and Rajasthan to adopt this two-child norm for government jobs. In certain states like, Rajasthan and Maharashtra, a person only contest for a panchayat election after producing an affidavit to show that he/she do not have more than two children.[2099] Some government schemes related to reproductive and child health have been brought under the purview of two-child norm. There are total five states in northern India: Bihar, Jharkhand, Madhya Pradesh, Rajasthan and Uttar Pradesh that contribute about 40% of the total population.

IV. IMPACT OF CURRENT POPULATION CONTROL POLICY IN INDIA

As per the survey of United Nations, India, with around 1.3 billion people, is the second largest populous country in the world, behind China, with about 1.4 billion population. It is expected that India will overtake this number within a decade. In the previous times, the growing number of people was considered as the driving force for the economies. This is known as 'demographic dividend'. But as information technology and artificial intelligence transform industry and likely reduce the demand for labour, the concern is that ever more young people will be left jobless.

Numerous petitions have been filed in the Supreme Court of India, to compel the government to formulate and enforce strict measures to control population. In which one petition pointed on that India is having the maximum youngest workforce all over the world with around 65% of population are less than 35 years of age. The petition says that "population explosion is driving the youth towards ubiquitous unemployment," and warned that if this persists "it could lead to a civil war." On this the court refused to intervene as it is a problem of policy matter and not a legal one.

[2099] Newsletter of theNational Coalition against Two-child norm & Coercive Population Policies (November, 2012)http://www.chsj.org/uploads/1/0/2/1/10215849/newsletter_05-11-12-for_web.pdf.

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Sajjan Jindal, chairman and managing director of JSW Group, tweeted on Twitter that "Population can have both positive and negative impact on economic development of any nation. If enough in strength, it is an asset; if excess in strength, it's a liability. Today the population in India is clearly a liability."[2100] It is a well- known fact that overpopulation is a big factor in resource shortage, environmental degradation, unemployment, poverty and disease. One of the major reasons behind the rising population is that families living in poverty produce more children because for them more children mean more working hands. They want income. There is a huge number that falls below poverty line such as labourers, farmers and contract workers, etc. The victory of family planning depends broadly on people realizing the vanity of having more children rather than the government telling them what is right for them. The right to reproduce is and must remain an individual choice but the right and responsibility to educate and create awareness of birth control and family planning must continue to be with the government and related stakeholders such as NGOs etc.

"Family planning is considered universally as the smartest development investment. For India to realize its sustainable development goals and economic aspirations, it is important to ensure that people have informed access to contraception and quality family planning services," NITI Analog said. Birth rates are falling but the population continues to grow as more than 30% people are young and in their reproductive stage. The government has started the discussion process with different stakeholders. An NGO has been appointed to carry out preliminary surveys on the reproductive rights of women. The NGO named Taxab is already on the job. "We aim to survey 1 lakh women, covering each district of the country, who have three or more children. Preliminary findings imply that most of the women are against the third child"[2101]as said by Manu Gaur, President of Taxab. Besides studying the issue of reproductive rights of women, the government is also looking at the matter from the perspective of child human rights. If a parent is unable to take care of the family properly, then the child has been brought to this earth because of wrong planning, also suffers, which is against his right to life. In this way, it is a violation of his human rights.

[2100]India's 'two-child policy' debate underscores deep social divisions, Nikkei Asian Reviews (Dec 25, 2018) https://asia.nikkei.com/Spotlight/Asia-Insight/India-s-two-child-policy-debate-underscores-deep-social-divisions.
[2101]Centre gets moving on population control law, Sunday Guardian live (Jan 25, 2020, 6:31 pm) https://www.sundayguardianlive.com/news/centre-gets-moving-population-control-law.

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In 1978, China began to recognize the large outbreak in the population and immediately introduced the one-child policy. China's one child policy got eliminated in 2015, and allowed the couples to have two children. When the policy was imposed on the public, it had worrying consequences for the gender imbalance as their desire for a male child led to various abortions and female infanticide. In 2016, a report was published stating 1.15 males for every female in China, which was the most skewed gender ratio in the world. For the long term effect, China has the largest aging population in the world and that resulted in a huge demographic imbalance. Although the policy was really successful as they are able to reduce the population. Taking into the consideration of long term impact in India, the growth rate is slowing down and to day India is having the largest young population across the globe, which will be able to accelerate the development of the nation in a fast pace.

A legal restriction to two children will force the couples for sex- selective abortions as they have only two attempts. A notable proportion of such women, especially those from lower socio-economic beds, would be forced to go for insecure abortions because of issues of access and affordability.A study, conducted between 2001 and 2004 to examine the outgrowths of two-child norms in five states (Andhra Pradesh, Haryana, MP, Odisha, and Rajasthan) and it was found that there is an increase in cases of bigamy and desertion, neglect and death of female infants, cases of pre-natal sex determination and induced abortion of a female foetus, a child given away for adoption etc.[2102]

Even after knowing the situation, if a couple goes for a third child, one of the petitions has proposed to stop all the government aid and subsidies to the family. This will include free and compulsory education to the third child and also his/her coverage in the public- funded health insurance scheme. It also said that the parents who opted for the third child shall be punished by disqualifying them from contesting election and government jobs. The measures proposed in the petition are contrary to the provisions of Constitution of India as it violates the right to education (Article 21 A, 45 and 51) and right to life (Article 21) and also the United Nations Convention on Child Rights. The petition also created the two sets of citizen in which one set will not able to enjoy his/her constitutional and basic fundamental rights.

[2102]A two-child policy won't take India to 'Vikas', The wire (Mar 20, 2018) https://thewire.in/health/a-two-child-policy-wont-take-india-closer-to-vikas.

India was a member of the International Conference on Population and Development (1994) and a signatory to its programme of action. Later, India withdrew its target-based family planning strategy in 1996. India's own National Population Policy (2000) reemphasizes the government's resolve for deliberate and informed choice in subjects of family planning.The report of the National Colloquium on Population Policies (2003) organised by the National Human Rights Commission (NHRC) also declares the two-child policy as regressive and violating the principle of individual choice, human rights, and rights of the child. The Economic Survey (2016) claims with a higher working-age population as an economic advantage over countries such as China, where the strict population control measure has led to an ageing population. All these commitments and statements cannot be ignored.

V. UTILITARIANISM : ROOT OF POPULATION CONTROL BILL 2020 & CONSTITUTION AMENDMENT BILL 2020

The Constitution Amendment Bill introduced in the Council of States and Population Control Bill 2020, which aims to implement two-child policy in India. The Statement of Objects and Reasons states that Popula

tion explosion can cause harm to the future generation. Further, it also leads to overexploitation of Natural Resource, which is very limited[2103] it can be established the bill promotes greater good and happiness the society thus it has been derived from Bentham's theory of utility which states that "*Action of government and are approved when they promote happiness and disapproved when they cause pain*[2104]". As described by him, the consequences of every action are pleasure and pain. Around 1830 theory of utility became very famous for English legislative reforms[2105].

John Stuart Miller concurred with Bentham's idea of utilitarianism. He expressed his views on utility how the theory is altruistic in nature. Thus, for Bentham, the legislation is to be judged on

[2103]Constitution Amendment Bill, 2020.

[2104] The History of Utilitarianism, Stanford Encyclopedia of philosophy, Mon, Sept 22 2014.

[2105]Dr V.N Paranjape , Studies in Jurisprudence and legal Theory.(7th ed. 2015).

the basis of pain and pleasure[2106]. The idea behind the theory of utility is also that if we apply it in our life it may reduce problems in society and provide for sustained living. Miller went to considerable lengths to show how the principle of justice can be familiar to utilitarianism. Regardless of Bentham who said justice is nothing but an illusion. He concluded justice is a quality of social order which regulates mutual relations among men[2107].

The theory of utility undermines individual discretion and flexibility. Further, he has failed to balance individual right with the interests of the community. As some rights granted to an individual are fundamental which can't be denied to an individual as per rule of law? However, the theory of utility suggests that an individual can be denied these rights for the greater happiness of society. And according to him the adequacy of law should only be judged through the consequences of pain and pleasure which is arbitrary.

VI. CONSTITUTION AMENDMENT BILL AND, POPULATION CONTROL BILL VIOLATES FUNDAMENTAL RIGHTS

India's two child policy is nothing but a replica of China's two child policy. As stated in the Constitution Amendment Bill ,that seeks to amend Article 47 A states that the two- child policy should be promoted by offering tax concession , employment etc. Further the Population Control Bill by Senior Advocate Abhishek Manu Singhvi[2108] which states that benefits will be provided to couples who have only one child[2109]. Further payment of sixty thousand rupees to couple below poverty line who voluntarily sterilization[2110] .

Both the Constitution Amendment Bill, 2020 and Population Control Bill 2020 differentiate for offering of Benefits to families on the sole criteria of number of children which is arbitrary and

[2106]Ibid as 3.

[2107] Micheal.W. Austin , What's wrong with Utilitarianism.

[2108]RashmiNikam, Population Control Bill is going to be introduced in Rajya Sabha (Mar 16, 2020).

[2109]SEC 6 Population Control Bill , 2020.

[2110]SEC 7 Population Control Bill 2020.

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violates Article 14 of the Indian Constitution '*Right to Equality and Equal protection of laws*' which is a fundamental right . If the policy is implemented it will create two sets of citizens The Supreme Court of India in the case of ***E.P. ROYAPPA .v. STATE TAMIL NADU***[2111] stated

''Article 14 of the Indian Constitution strikes arbitrariness in action of the State and ensures fairness and equality of treatment".

VII. Violation of Article 21-A as a consequence of Population Control Bill (2020) and Constitution Amendment (2020)

If the couple has a second child in case of Population control Bill and third child as per constitution amendment bill all the the subsidies may be withdrawn this may include education and thus violate Article 21 A of the Constitution of India which states that - *The state shall provide free and compulsory education to the age groups of sixteen to fourteen years of age* .

This may also lead to forced sterilizations in India almost 4 million sterilization have been performed during the year 2013 - 2014. And more than 700 deaths were reported during the year 2009 and 2012 due to botched surgeries[2112].

VIII. Various International Conventions Against forced Population Control.

Reproductive rights are recognized as basic human right which is restricted by implementation of population control policy by offering incentives. At International Conference on Population and development it was resolved that a couple is *free to choose whether to have children or not and when to have children also they have right to choose number of childre*n[2113]. Further it was also reaffirmed in Convention on Elimination of all forms of discrimination agains*t women that the couples have right to decide numbers of children and spacing between them*[2114].

[2111]AIR 1974 SC 555.

[2112]SoutikBiswas, India's Dark history of sterilization, 14 Nov, 2014.

[2113]Para 7.4, International conference of population and development at Cairo 1994.

[2114]Art 16 (e) Convention on elimination of all forms of discrimination against women 1979.

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International Convention on Economic, Social and cultural rights states that everyone has a right of enjoyment of the highest attainable mental and physical health. The word 'health' also includes reproductive health and also the right to control one's body[2115]

IX. APPLICATION OF UTILITARIANISM BY INDIAN COURTS FOR POPULATION CONTROL

In India it has been held that there is no right to have as many children one chooses to have in the case of ***Javed .v.State of Harayana***[2116]. Further the court upheld the Constitutional validity of HarayanaPanchayat Raj Act 1994 which provides that to contest the election for the post of sarpanch the contestant should not have more than two children. It was observed that how the problem of population is a global issue and provides justification for legislation for population control wherever needed.

The menace of population was also recognized in the case ***AIR INDIA .v. Nergesh Meerza& Ors***[2117] has the court upheld the constitutional validity of the rule that third pregnancy would lead to termination of job of Air hostess as it was in the larger interest of the AIR hostess for upbringing of their children and keep the population under control.

The courts applied the Bentham's theory of utilitarianism keeping in view the larger interest of the society. The Courts have judged the adequacy of law on the basis of the consequence of the legislation. Further, the Constitution of India provides fundamental rights but they are not absolute and always have to be read with restriction provided on these fundamental rights keeping in view the larger interest of the society. In the case of K**.S Puttuswamy .v. Union of India**[2118] apex court of India laid its emphasis on the text written by John Stuart Miller that each *person becomes more valuable to himself and there is development of self by loss of others it dulls and blunts the nature. Our rights and liberties are only available as long as we do not deprive others*[2119] .

[2115] Art. 12 , International Convenant on economic , social and cultural rights

[2116]AIR 2005 SC 3057.

[2117]AIR 1981 SC1829.

[2118]AIR 2017 SC 4161.

[2119] John Stuart , on liberty.

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Thus a right to have a family can be categorized as a Right to life under Article 21 of the Constitution of India but the state can always adopt the theory of Utilitarianism which suggest that though interest of an individual should be placed at a high pedestal, laws legislated in light of public importance thus the constitution amendment bill 2020 and Population control bill (2020).

X. CONCLUSION

The success of family planning totally depends on people realizing the futility of having more than two children rather than the government's action plan to tell them about what is right for them. The right to reproduce always remains a personal choice but the prerogative and the responsibility to spread awareness and to educate on birth control and family planning must be continued by the government. The Population Control bill, 2020 and Constitution amendment Bill that was introduced in the Rajya Sabhawas on the basis of the greater good and happiness of the society. This phrase was given by the Bentham's theory of utilitarianism which says that the legislation is to be judge on the basis of pleasure and pain. The theory suggests that *maximum benefit to the maximum number of people.* The bill that was introduced in the council of states are for the benefit of the country as if the population continues to grow at an alarming rate then there would be scarcity of resources and we cannot fulfill the basic needs of the people, that might result into death due to starvation, proper hygiene, seasonal changes and so on.

The cases cited above help us to understand the true intention behind this policy. Even the fundamental rights are not absolute, they come with some restrictions. So as the two-child policy that may violate some individual rights but the end or consequence will be betterment of the society.

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MISCONDUCT BY PROSECUTORS & INVESTIGATORS: JUSTICE DELIVERED?

- GAURI SWARUP BANSAL & GADHVI PRITHVIRAJ

ABSTRACT

The arbitrariness of the Prosecutors and the Investigating Agencies is in disregard with the Indian criminal jurisprudence. In India, the accused is granted with the right to seek discharge nevertheless the documents produced before the court are those which the Prosecution seeks to rely on. So, it is the Prosecution and the Police officers who are required to be even-handed. Often exculpatory material for the defence is not consciously submitted by the Prosecution and due to such suppression, an innocent suffers. The provisions of the procedural code are ambiguous and are uncertain as to fair disclosure of the material favouring the accused. But, there exists constitutional safeguards which are the pillars of ensuring justice which lay down the rules of fair and free trial. The procedural and the constitutional law has to be harmonised as constitutional safeguards will always override except when the law says otherwise. The most significant is the power of the court in such utter heedlessness of the functionaries. The court must order the production of all documents inculpatory and exculpatory without any prejudice to either party. The Prosecutors and the Investigators must be punished or barred from office for deteriorating the benchmark of justice and the fidelity of trials by their impartiality and pre-determined approaches.

INTRODUCTION

A criminal trial consists of many stages, however a preliminary hearing is the most important part of a criminal trial. A preliminary hearing is one, where the judge decides that whether there is enough evidence against the defence in order to take the matter to trial, basically it is the time of framing of charges. If success is achieved at this stage then it becomes really easy for the prosecution to prove their case against the accused and if at this stage the defence success then it can result in dropping of charges. The right to seek discharge is of great worth which is guaranteed

to the accused. When the court gets the chance to decide whether to discharge the accused or let the case go to trial, it helps the court to throw out meritless cases.

Nowadays, the Investigating Agencies and the Prosecutors are willing to prove the accused liable simply because an offence has been committed thereby deceiving the Indian criminal justice system. The Onus Probandi i.e. Burden of Proof is generally on the prosecution in a criminal trial as according to Section 101 of the Indian Evidence Act, whoever asserts some facts as to the violation of any legal right or liability, he must prove that those facts exist and therefore the burden of proof lies on him. Due this the Prosecutors get an upper hand in producing the evidence which is only self-serving. An innocent is thus framed and held liable in order to deliver justice to the victim, leading to miscarriage of justice. Shouldn't the investigating agencies and the prosecutors abide by the principle of criminal jurisprudence i.e. Presumption of Innocence? They totally forget that they are not the ones to decide the guilt of an accused rather they are the ones who must provide the court with any kind of evidence available with them instead of thriving to prove the guilt of the accused by suppressing the evidence in the favour of accused. In Indian democracy, an accused is not considered to be an offender till he is proved guilty. Here in India, the principle that is followed is totally opposite and that is what the investigating agencies and the Government fail to bear in their minds. The prosecutor conceals the exculpatory evidence in the guise of delivering justice to the victim.

Apparently, Blackstone's ratio[2120]- *"It is better that ten guilty persons escape than that one innocent suffers"* is being destroyed with such practice. Similarly, John Adams argued that "*it's of more importance to community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security*".[2121]

[2120] Sir William Blackstone, *Roof Garden Wall- Right Panel* (Mar. 29, 2020, 3:35 PM), http://library.law.harvard.edu/justicequotes/explore-the-room/south-4/.
[2121] *Adams' Argument for the Defence: 3–4 December 1770*, FOUNDERS ONLINE, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016#LJA03d031n1 (last visited Mar. 21, 2020).

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The innocent accused are treated like they are guilty just because they are accused of an offence. The prosecutorial misconduct is at its peak and the system is turning a blind eye towards it. The civil and fundamental rights of the accused are infringed by such misconduct. Also, the clause-*beyond reasonable doubt* for the conviction of the offender is violated thereby curtailing the fairness of a trial.

ASSOCIATION OF PROSECUTORS AND INVESTIGATING AGENCIES

The basic notion of the functionaries in the Indian Criminal System while collecting and producing the evidence is to get justice delivered to the victim. But, in such race nobody cares about the innocence of the accused.

In the United States, in ***Brady v. State of Maryland***[2122], prosecutorial misconduct became a reason for the Court to declare a mistrial as it was held that concealment of exculpatory evidence by the prosecution violates the due process clause under the fourteenth amendment to the United States Constitution irrespective of the fact that whether such concealment was in good or bad faith, thereby extending a right in favour of an accused.

The question that arises here is that what is the impact of such misconduct in India? In India, the power to investigate lies with the Police Officer as envisaged in Chapter XII of the CrPC. And, only after the charge-sheet has been filed in the Court, i.e. at the stage of trial the Prosecution is involved. Whom to charge and for what offence is not what the Prosecutors in India are to decide unlike the United States. Basically, the Prosecutors are not involved at the stage of investigation. But, the Prosecutors do decide what evidence is to be produced along with the Police report. So, in India the concealment of evidence in favour of the accused is in the hands of both the Prosecutors and the Investigating Agencies.

[2122] 373 U.S. 83, 86-88 (1963).

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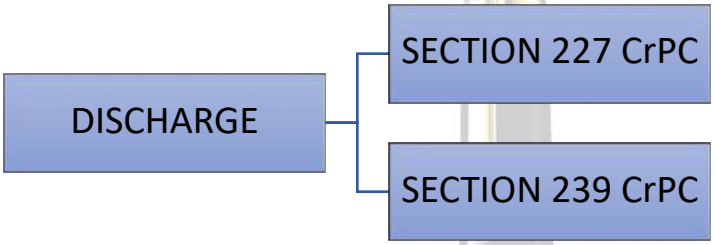
Stratagem Of Discharge



The foundation of a criminal trial is the framing of charges against the accused. The CrPC envisages mainly two Sections related to the framing of charges. One is Section 227 and another is Section 239.

- Section 227, comes into picture when the trial is by the Sessions Court and reads as follows:

"227 – **Discharge**

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."[2123]

The above provision basically defines discharge which can be made by the Court of Sessions.

- However, Section 239 seeks to portray the same meaning but, it is used in the Trial by Magistrate and not Sessions. It reads as follows:

"239. **When accused shall be discharged.**

If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing"[2124]

[2123] CODE CRIM. PROC. § 227 (1973).
[2124] CODE CRIM. PROC. § 239 (1973).

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Both the Sections make it clear that only on the basis of the police report and documents submitted, the court can decide whether the charges are being framed against the accused or not.

Now here the question emerges that what all does the Police Report consist of?

The Police Report along with the documents is submitted before the court under Section 173 of CrPC. Clause 5 of Section 173 which reads as follows:

*"*173. **Report of police officer on completion of investigation.**

(...)

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses..."[2125]

On the reading of the above Provisions, it is clear that the court can make decision regarding framing of charge or discharge of the accused with the aid of the Police Report submitted to it under Section 173. In accordance with law, no other evidence other than the material submitted by the Police can be relied on by the Court in order to frame the charge. The material submitted in the court consists of Police Report, Documents and Witness Statements and the biggest loop hole in this particular provision is that the material is the one which the prosecution seeks to rely on. Now, this can definitely amount to a misconduct by the Prosecution and the Investigating Agency as the material to be produced must not mandatorily include exculpatory material that can make the defence case strong. It is basically a crack in the Section provided in the CrPC which can and often leads to failure of justice. Does the Prosecution just has the right to decide what documents and witness statements to be relied on or does it also has a duty towards the accused and in public interest to provide for any material in favour of accused in case available? Another Question is that whether there lies any duty on the part of the Investigating Officer?

[2125] CODE CRIM. PROC. § 173 (1973).

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DUTY OF THE PROSECUTOR AND INVESTIGATING AGENCY

- law in England

The position in the common law is very clear wherein a duty is imposed on the Prosecutor to disclose any material which is exculpatory to the defence subject to public interest immunity and sensitive information.

In ***R. v. Ward (Judith)***[2126], it was held by the Court of Appeal that it is the *duty of the Prosecutor* to disclose all the relevant tests and experiments along with the copies of witness statements to the defence. This duty is to be followed by the prosecution for a fair trial for both the prosecution as well as the defence. It was also held that the common law duty must cover anything that would assist the defence and if not followed, it would be considered to be an irregularity in the course of the trial.

So, even in the common law of England, the Investigating Authority and the Prosecutors are required to disclose any material exculpatory in nature to the Defence.

- duty of the prosecutor

According to the Bar Council of India Rules, under the Advocates Act 1961, as per the Duty of an Advocate towards the client, "*an advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishment of the innocence of the accused shall be scrupulously avoided".*[2127] Hence, in relation to Professional ethics it is a disgrace for an Advocate to supress any material or evidence which is in favour of the accused and can prove the innocence of the accused.

[2126] (1993) 2 AII ER 577 (CA).
[2127] The Bar Council of India Rules under the Advocates Act, 1961, 1991, pt. VI ch. II rule 16, INDIA CODE 2.

An ideal Prosecutor is expected to act as an agent of justice. He has to bear in mind that his ultimate objective is not to prove the guilt of the accused and seek conviction at any cost but to bring justice as the profession of law demands fairness, truthfulness and impartiality.

- duty of the investigating officer

An Investigating Officer is the one who prima facie investigates the case and it is his responsibility to find all the material related to the accusation. It is the duty of the Investigating Agency to bear in mind to not be biased and not hide anything which can help the defence. They must act in an impartial manner without adopting any pre-determined approach in the process of its investigation. It shall be borne in mind that the number of cases in trial are already so high that meritless cases would burden the courts and may also cause injustice to the accused.

In addition to this, the Investigating Officer has a significant power under Section 169 which reads as follows:

*"*169. **Release of accused when evidence deficient.**

If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial."[2128]

Therefore, there exists a procedural safeguard envisaged by the Legislatures under Section 169 CrPC wherein the Police can file closure reports on being satisfied that there is no sufficient evidence or a reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate.

In fact, an Investigating Officer is required to maintain a diary for each case that may be called upon by the criminal court to aid in the trial. The ultimate object of maintaining such general diary of investigation is that there should be fair investigation and transparency.

[2128] CODE CRIM. PROC. § 169 (1973).

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High responsibility lies upon the Investigating Agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors the position and influence in the society[2129], yet the investigation must not be done with a pre-set mind of getting the accused convicted.

DUTY OF FAIR DISCLOSURE

The duty of fair disclosure is cast upon the functionaries as a procedural safeguard for the accused.

From the scheme of the Code of Criminal Procedure, the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but also to the accused. If, an accused is entitled to any legitimate benefit during trial the Public Prosecutor must not scuttle it. It is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused and bring it to the notice of the court. In such cases when a privately engaged counsel is permitted to act on behalf of the Public Prosecutor, It is not merely an overall supervision which the Public Prosecutor is expected to perform. The role which a Private Counsel plays in such a situation is that of a junior advocate. He is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party.[2130]

A Private Counsel would only try to win the case by getting the accused convicted even if the accused was innocent and such a conviction would not amount to a fair trial. That is the reason why the legislatures restrained the powers of a Private Counsel. He is expected to strictly follow the instructions of the Public Prosecutor.

[2129] Siddhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1, 80 (India).
[2130] Shiv Kumar v. Hukam Chand & Anr., (1999) 7 SCC 467, 472 (India).

In the case of **Hitendra Vishnu Thakur**[2131], the Supreme Court of India held that "*A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Criminal Procedure Code. He is not part of the investigating agency. He is an independent statutory authority"*. The duty of the Public Prosecutor is to ensure that justice is delivered. Fair disclosure shall be made by him. In case, there is something which is in favour of the defence and the defence lacked in presenting it to the court, it is the duty of the Public Prosecutor to bring such material to the notice of the court, if known. He must act as the officer of the court and not as a Counsel of the State.

Therefore, a Public Prosecutor has a wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused.[2132] He must thrive for justice instead of conviction.

- constitutional mandate

There are certain Constitutional mandates which are to be kept in mind while investigating and prosecuting a criminal case. Article 21 is the most significant, when it comes to fair disclosure. Article 21 reads as follows:

*"*21. **Protection of life and personal liberty.**

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

In Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness, true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent

[2131] Hitendra Thakur v. Maharashtra, (1994) 4 SCC 602, 630-31 (India).
[2132] Siddhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1, 74 (India).

and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and are quite in conformity with the constitutional mandate.[2133]

In the pioneering judgement of **Maneka Gandhi v. Union of India[2134],** it was made very clear that the procedure in criminal trials must be right, just and fair and not arbitrary, fanciful or oppressive.

It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. This is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India which cannot be doubted. It is the hovering omnipresence of Article 21 over the CrPC that requires the interpretation of all the provisions of CrPC, so as to ensure that Article 21 is followed both in letter and spirit.[2135]

RIGHT OF THE ACCUSED

An accused has the right to claim copies of the documents or request the court for production of a document which is part of the general diary. A document which has been obtained in good faith and has bearing on the case of the Prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused so that the non-production or disclosure does not affect the defence of the accused prejudicially.[2136]

There must be an obligation to make disclosure of such documents. On a bare reading of Section 207 of the code it is mandated that the accused shall be furnished with the police report, first information report, statements, confessional statements and all other relevant extracts.

Section 207 reads as follows:

[2133] Siddhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1, 79-80 (India).
[2134] (1978) 1 SCC 248, 283-284 (India).
[2135] R.F. Nariman J., *Vinubhai Malaviya & Ors. v. Gujarat & Anr.* (Mar. 26, 2020, 10:44 PM), https://main.sci.gov.in/supremecourt/2013/35581/35581_2013_5_1501_17480_Judgement_16-Oct-2019.pdf.
[2136] Siddhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1, 86 (India).

"207. **Supply to the accused of copy of police report and other documents.**

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."[2137]

In this provision, it is not mentioned that only the documents which the prosecution seeks to rely on are to be furnished to the accused. And therefore, it is in ambiguity when read with Section 173 of CrPc where the expression "documents on which the prosecution relies" is used. Be that as it may, Section 207 heads towards furnishing of the documents and that object should not be hampered in any way as the accused must be able to seek access to such documents and extracts which can aid him in proving his innocence. The codified law must be in consonance with the constitutional mandate of fair trial.

[2137] CODE CRIM. PROC. § 207 (1973).

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The Supreme Court very convincingly held in **Siddhartha Vashisht v. State (NCT of Delhi)**[2138] that *"the liberty of an accused cannot be interfered with except under 'due process of law' shall deem to include fairness in trial. The court gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused".*

It must be ensured that even at the stage of discharge, all evidence even exculpatory is submitted in the court and at the time of discovery provided to the accused keeping in mind Section 207 of CrPC and the constitutional provisions of fair trial.

RESPONSIBILITY OF THE COURT TOWARDS THE ACCUSED

It is not only the responsibility of the prosecution and the investigation agency but also the courts to ensure that the investigation and the trial, both are fair. The court must make sure that the investigation is judicious and expeditious and does not curtail the freedom of any person. There shall be no biasedness in any way.

In addition, Section 91 of the code is significant for the circumstances being dealt with in this piece. Section 91 reads as follows:

*"*91. **Summons to produce document or other thing-**

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power

[2138] Siddhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1, 85 (India).

such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order..."

There is nothing in this section which prohibits its exercise at the stage of discharge. So, whether the accused can invoke Section 91 or can the court proceed with its power under Section 91?

This was meticulously answered by the Supreme Court quite recently- *"It is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the charge-sheet, has crucial bearing on the issue of framing of charge.*

(...) Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 CrPC dehors the satisfaction of the court, at the stage of charge."[2139]

Therefore, a pragmatic approach must be taken by the court as it has the responsibility of acting in a fair and transparent manner with any individual which is the epitome of justice.

SUBMISSION

The Constitutional concept of free, fair and transparent trial, if adopted and followed can provide the shield of justice to everyone. No innocent should be deemed to be a criminal. The fairness and impartiality of a Prosecutor and the Investigating Agency is of paramount importance as the idea of justice relies on them. Blaming only the Prosecutors would not be the correct outlook and therefore, it must be noted that even the Police Officers have to act in an unbiased manner without any pre-determined goal of getting the accused convicted or otherwise it would be a charade of

[2139] Nitya Dharmananda v. Gopal Reddy, (2018) 2 SCC 93, 95-96 (India).

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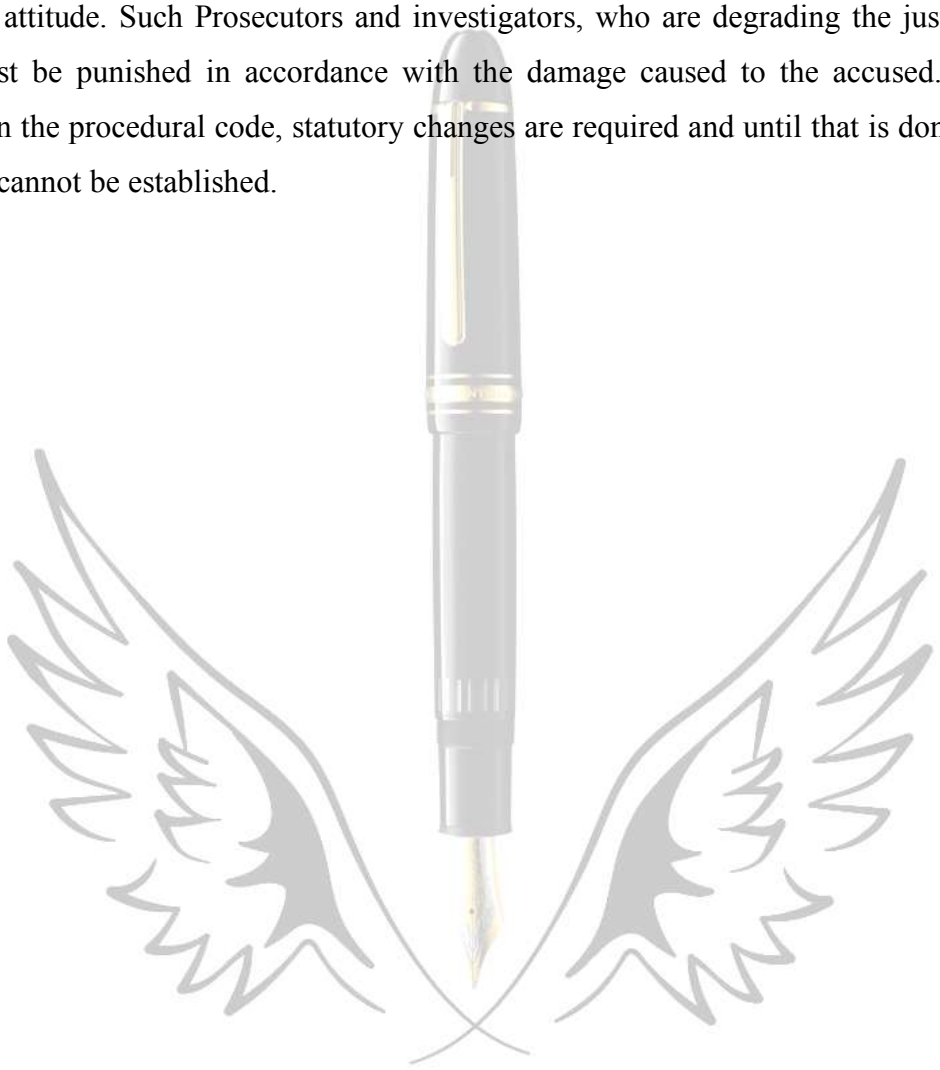
justice. They are the workers of the State, it is the duty of the State to treat every individual equally with a fair attitude. Such Prosecutors and investigators, who are degrading the justice delivery system must be punished in accordance with the damage caused to the accused. Due to the loopholes in the procedural code, statutory changes are required and until that is done, the canon of fairness cannot be established.



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MC MEHTA V. UNION OF INDIA: ABSOLUTE LIABILITY: A SOCIOLOGICAL APPROACH IN INDIAN JUSTICE SYSTEM

- DIGSHIKHA PRIYADARSHANI

A limited Constitution…one which contains specified exceptions to the legislative authority... can be preserved in no other way but through the medium of the courts of justice, whose duty, it must be declare all acts contrary to the manifest tenor of the Constitution, void.

INTRODUCTION

After the end of British Empire in India, India became sovereign state with its laws. An independent judiciary established by the Constitution of India, which is the final interpreter of the Constitution. With the development and change in society role of the Hon'ble Supreme Court has also evolve as guardian of the rights of citizens. To protect the right of citizens and person in India hon'ble Supreme Court has delivered judgment which has given new dimension to the fundamental rights enumerated in Part III of Constitution of India. Doctrine of intelligible differentia, doctrine of rational nexus, concept of basic structure, right to health, protection of rights of prisoner, right for protection of women from sexual harassment, right to privacy, right to education, right to die, right to life, right to environment etc. All these development in justice delivery system is because, courts has adopted liberal, and social approach. The change in society and need of society is observed by the courts and accordingly decision has delivered. Principle of absolute liability is one of those requirements of the society of India to fix the liability of the industrialists and money holder of the country. The principle of absolute liability is evolved version of the principle of strict liability. Absolute liability propounded in case of M.C. Mehta v. Union of India[2140] without any

[2140] (1987) SCC 395: AIR 1987 SC 1086

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exception to the wrong doer whereas strict liability propounded in case of Ryland v. Fletcher[2141] which applies with some exceptions.

KEY WORDS: Absolute liability, strict liability, justice, PIL

JUSTICE:

Justice is genus of which social, economic and political justice is species. Justice means just i.e. which is reasonable, which have some rational behind it. Justice led to the equality and liberty. The essence of justice is to attain the common good and equality. According to Professor John Rawls society is association of persons and for their relation some principles are required. This principle of social justice is essential for the social solidarity. John Rawl has give idea of original position and veil of ignorance. These principles of justice can be understand as individual person has interest but as an association of person some interest are to be avoid for the want of interest of society. Society and individual can protect and promote their interest according to the law of state. Justice is essential feature of the Constitution of India mentioned in Preamble of Constitution. Since the preamble is part of Constitution held in Berubari Union and Exchange of Enclaves, Re[2142] therefore justice is also essential for constitution. Three kinds of justice are provided in Preamble, social, economic and political justice. Social justice implies to the elimination of discrimination based on religion, cast, sex, place of birth etc. Social justice is dynamic concept which keeps alive justice delivery system of country. Social justice is recognition of greater good to a large number without deprivation or accrual of the legal rights of the body[2143]. Article 39 A of the Constitution of India provides that "*The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities"*. It is given under Directive Principles of State Policy which imposes some duty over the state to provide and promote justice based on equality and promote elimination of all kinds of disabilities which are barrier in the path

[2141] (1868) LR 3 HL 330
[2142] AIR 1960 SC 845: (1960) SCR 250
[2143] Rao Mamta, Constitutional Law, 1st Ed. ,2013, Eastern Book Company, p.51

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of justice. In other words the aim of social justice is to attain substantial degree of social, economic and political equality which is a legitimate exception[2144]

Establishment of the principle of absolute liability in Indian judicial system is example of reinforcement of concept of social justice. In the expensive interpretation of Article 21 of the Constitution by the hon'ble Supreme Court right to clean environment declared to be a part of right to life of person. It is because of the social justice Court ignored the technicalities and clerical mistake in the petition and sends it before the Constitutional Bench under Article 145 of Constitution of India. Absolute liability principle imposes liability of the industries which are involved in the hazardous activity and they are liable for any kind of injury caused by them without any exception. The application of polluter pays principle means the person who caused pollution to the environment shall be liable to pay penalty. Therefore of establishment of an industrial plant prior permission and environment clearance certificate issued by the authorities are required. This is because the social justice which imparting clean environment as part of right to life.

Strict Liability:

The House of Lord in Ryland v. Fletcher[2145] laid down the rule of strict liability. Because this principle has various exceptions therefore it is called strict liability rather than absolute liability. It is recognized as no fault liability by the House of Lords. According to this even if the defendant was not negligent nor he having any intention cause harm or loss to other he will be held liable for the wrong. According to this principle if a person keeps any hazardous or dangerous substance or article within its premises and which escape from its premises and caused loss or damage to other person he shall be strictly liable for the loss. Loss is caused by the non natural use of land strict liability against the person is arises. In T. C. Bala Krishna Menon v. T.R. Subramanian[2146] the use of explosive in open ground on day of festival is non natural use of land, and therefore liability under the Indian Explosive Act.

The principle of strict liability having following exceptions:

1) Plaintiff's own default

[2144] Consumer Education & Research Center v. Union of India, (1995) 3 SCC 42: AIR 1995 SC 922
[2145] (1868) LR 3 HL 330

[2146] AIR 1968 Kerala, 151

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2) Act of god

3) Consent of the plaintiff

4) Statuary authority

5) Act of third party.

Absolute liability:

Absolute liability is liability of the person or the industries towards society and its member. Because in a society one cannot live in isolation therefore interdependence is essential. Absolute liability is an absolute principle which does not have any exception like strict liability. It is an Indian Principle propounded according to the structure of the society of India. If any person keep of store any hazardous or dangerous substance which cause loss or harm to the any person, property or environment he shall be absolutely liable for that without any excuse.

M.C. Mehta v. Union of India

Facts of the Case: in the present case industry was established in the Delhi, which was close to the residence of local people. The Sreeram Food and Fertilizer, a subsidiary of the Delhi Cloth Mill. There was leak of oleum Gas form the industry which caused inverse effect on the health of the people. There was no initiative by the owner of the industry nor by the government. Therefore M.C. Mehta filled writ petition before the Hon'ble Supreme Court.

Observations of hon'ble Supreme Court

Petition was filed in the form of PIL therefore the first issue before the court was that whether the petition is maintainable before court or not? Therefore the Court defined the scope and ambit of the Article 32 of the Constitution of India. In this particular issue the Hon'ble Supreme Court referred the case of Bandhua Mukti Morcha v. Union of India[2147] and allows the petition. The Court has all the incidental and ancillary power to including power to new remedies and new strategies designed to explore fundamental rights.

[2147](1984) 3 SCC 161: AIR 1984 SC 802

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It the current case court also defined the scope of PIL (Public Interest Litigation) and referred the case of SP Gupta V. Union of India[2148] and Peoples' Union for Democratic Right v. Union of India[2149]. According to the Supreme Court when socially or economically disadvantages people and groups are unable to approach the Court for relief then any member or group can maintain an application for appropriate direction.

According to the Court, court will not follow strict approach in dealing with the PIL. The concept of PIL is similar to the concept of Social Action Litigation which is a concept of The USA. The facts and opinion of the Civil Rights Cases[2150] contain, directly or indirectly, the main conceptual issues of the state action doctrine.

In the present case Bhagvati CJ denied the principle of strict liability as a foreign doctrine in application in India and held that

"This, rule (Ryland v. Fletcher) evolved in the 19th century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norm and the needs of the present day economy and social structure. We do not feel inhibited by this rule which was evolved in the context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments, taking place in this country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot allow our judicial thinking to be constrained by reference of the law as it prevails in England or for the matter of that in other foreign legal order. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done."

The Court further held that power of the court is not only injunctive but also remedial. Court can grant compensation if there is gross and patent loss of fundamental rights.

The following statement made by Bhagvati, CJ, in laid down new principle of absolute liability.

"We are of the view that an enterprise, which is engaged in hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an Absolute and non-delegatable duty to the community

[2148] AIR 1982 SC 149
[2149] AIR 1982 SC 1473
[2150] 109 US 3 (1883)

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to ensure that no harm results to anyone on account of hazardous or inherently dangerous activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm and it should be no answer to enterprise to say that it has taken all reasonable care and that the harm occurred without any negligence on its part."

CONCLUSION

Absolute liability principle has given a new dimension to the right of the people. It is a very important and crucial decision for the better enforcement of the right to life. It provide healthier environment to the people as well as it imposes some duty on the state to protect the rights of citizens and justice delivery system.

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COMPARATIVE ANALYSIS OF ACID ATTACK OFFENDERS PUNISHMENT IN THE UNITED KINGDOM AND INDIA

- **VASUDHA WADEKAR & VIJAY CHAUHAN**

"Half of the Indian population too are 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."

—Justice K. Rama Swamy[2151]

INTRODUCTION

Women are always considered as inferior in the society without any justifiable reason. There are many instances when either woman are not given liberty even for their consent, let alone how they want to live, what lifestyle they want to adopt and what they want to do with their lives or be in their lives. In India, we live in a male dominant society or what is commonly known as 'patriarchal society', where the wish of the males are the commands for the females. This mentality has resulted in many offences against the women because of non-compliance. The National Commission for Women publishes each year the complaints received by it and these relate to: Acid Attacks, Bigamy, Complaint Against NRIs/NRI Marriages, Cyber Crime, Deprivation of Property Rights, Divorce/ Maintenance, Dowry Death, Gender Discrimination, Harassment for Dowry/Cruelty, Harassment of Widows, Kidnapping/ Abduction, Miscellaneous, Murder, Outraging Modesty of Women, Police Harassment, Rape/ Attempt to Rape, Sex Selection/ Female foeticide/ Infanticide in India, Sexual Harassment at Work Place. From April to November 2009, a total of 11004 complaints were received by the Commission in India[2152]. However this research will be solely focusing on one of the most vicious, cruel and heinous crime- acid attacks. Throwing of acid, also

[2151] *Madhu Kishwar* v. *State of Bihar*, (1996) 5 SCC 125.
[2152] Evaw global database, *Statistics of the National Commission for women on violence against women*, http://evaw-global-database.unwomen.org/en/countries/asia/india/2009/statistics-of-the-national-commission-for-women-on-violence-against-women, as on October 11, 2019.

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called as 'Vitriolage' is a form of violent assault[2153]. As understood by the term, it is an act of maliciously throwing or slashing of acid on another's body to disfigure the body purposefully. It may be out of different reasons like jealousy or revenge and further resulting in burning and dissolution of the victim's skin, tissue and even bones[2154]. The crime in itself is referred to as a crime fuelled by jealousy and revenge[2155]. The long-term consequences of the attacks may include blindness, as well as permanent scarring of the face and body along with far-reaching social, psychological and economic difficulties[2156]. But with the changing scenario, these attacks doesn't remain confined to being just 'an offence related to women', it is now evident that the males are being the victims of acid attacks too.

RECURRING INSTANCES OF ACID ATTACKS

Compared to women throughout the world, women in India are at higher risk of being victims of acid attacks, 72% of reported acid attacks in India have involved women[2157]. In India, about 350 cases are legally reported per year, while separate research conducted by an organization Acid Survivors Foundation India, estimated approximately 500–1000 cases per year in India, excluding unreported incidents[2158]. According to the National Crime Records Bureau, Ministry of Home Affairs, there has been a total number 1,24,599 cases that came to the Police and are in the process of being investigated[2159]. A total of 7,25,027 cases are pending in the trial and is being dealt by the courts[2160]. The highest number of cases being registered is in its Capital Delhi followed by Ahmedabad and Kolkata[2161]. But the shocking of all is till now, only 13,804 offenders has been convicted[2162] under the relevant sections of Indian Penal Code[2163].

[2153] Mittal P., Dhattarwal S.K., Vitriolage: The curse of human origin, Medical Science 6(21): 61-64 (2014)
[2154] VIJ K; CORROSIVE POISONS. IN TEXT BOOK OF FORENSIC MEDICINE AND TOXICOLOGY PRINCIPLES AND PRACTISE, 462 (5th ed, 2003).
[2155] *Naeem Khan v. Guddu* v. *State*, Oct. 07, 2013 (High Court of Delhi, India).
[2156] DS Bhullar, *Acid Throwing: A Cause of Concern in India* 10 Indian Journal of Clinical Practice 989, 989-990 (2014).
[2157] National Crime Records Bureau. Ministry of Home Affairs. Crime in India 2015 Statistics. Chapter (1):(22).
[2158] *Ibid.*
[2159] National Crime Records Bureau, Ministry of Home Affairs, Crime in India 2016 Statistics.
[2160] *Ibid.*
[2161] *Ibid.*
[2162] *Ibid.*
[2163] Section 326A and Section 326B.

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The most famous case of the girl Laxmi[2164] is a valid proof in which the girl was summoned from back and when she turned, a person riding on bike whose marriage proposal she had rejected threw acid on her. She laid there withering and was taken to hospital to know that here upper body was heavily damaged and even after numerous surgeries, she hasn't still got her face back even remotely close. The accused person was convicted by the district court but was acquitted by the High Court. This was a huge shock for the victim and she filed a PIL in the Supreme Court for free treatment and that the victims and their family should be compensated due to the trauma both the victims and their family suffers, be it in psychological or financial.

Another landmark case is of a girl named Chanchal[2165] who belonged to a small Dalit family. While going to work as a daily wage work to support her family financially, she used to get harassed both verbally and sexually by four accused. Even though she used to ignore them or sometimes strongly opposed them, their teasing never stopped. Things got worse and one night when Chanchal and her sister were sleeping, one of the accused climbed the roof and spilled acid on Chanchal's face, which also affected her sister's body part as well and ran away. On hearing the cries of both the daughters, their father rushed them to the hospital, where they faced humiliation on being Dalit, got delay in the treatment by the doctors which in turn only worsened the conditions of both the girls. The expenditure of primary medication was too much for the father to bear and hence he came in a lot of debt. The police on the other hand didn't take any action against the accused until the news was all-over the televisions and the media created pressure. The accused was arrested a month later from the date of incident without the statements from both the girls. Their father had to go through a lot of struggle to get the compensation which was very inadequate. Hence, he approached the Parivartan Kendra who after a very detailed analysis filed the case in the Supreme Court and invoked its jurisdiction under Article 32[2166] demanding proper medical care, raise in the compensation and rehabilitation for the victims.

Another similar landmark case was of Preeti[2167] who aspired to become to a nurse. Her neighbour was an unemployed graduate of hotel management who proposed her which she declined and expressed her intention to first prioritise her career. Preeti got a job opportunity in a Hospital which

[2164] Laxmi v. Union of India, 2014 4 SCC 427.
[2165] Parivartan Kendra Vs. Union of India, 2015 (13) SCALE 325.
[2166] Constitution of India, 1950.
[2167] State of Maharashtra v. Ankur Panwar.

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she took. She boarded the train and after reaching the destination, she was called by her neighbour, who splashed acid on her face in the middle of the railway station thereby affecting the fellow passengers as well. The victim suffered fatal and brutal internal injuries as she inadvertently swallowed some amount of acid. She died after a month of continuous struggle.

In United Kingdom the use of toxic substances like drain cleaners are being utilised as the agent for crime whereas in India acids that are available in the market at local stores are put to use for the same. According to London Times, the attacks using corrosive fluids have jumped from 261 in 2015 to 454 in 2016- a huge spike from 166 in 2014[2168].

The United Kingdom has probably the most elevated pace of corrosive assaults per capita on the planet, as indicated by Acid Survivors Trust International (ASTI). ASTI's figures, citing the police, uncover the quantity of recorded assaults has expanded about three-crease from 228 recorded crimes in 2012 to 601 assaults in 2016. With excess of 400 occurrences detailed in a half year, 2017 was broadly viewed as the most exceedingly awful ever year for Vitriolage attacks. Dissimilar to in different nations, where 80 percent of corrosive assaults are against women, in the UK most exploited people are men, as ASTI has reported.

There are many incidents where the most prominent assault incidents of the hundreds have occurred this every year. Starting with the latest incidents of all, On 12th January, 2019, two men were raced to emergency clinic in the wake of being splashed with acid during a horrendous assault outside King's Cross station which brought about their close to death. On 27th December, 2018, a 21-year-elderly person was assaulted in Stoke Newington, north-east London with a destructive substances and furthermore had slices on his hands expected to be caused by a blade. On the date of 4th September, 2018, while going to office, three men were attacked with a poisonous substance in Westbourne Grove, West London. While on 21st July, 2018, a three-year-old child was truly harmed when he was intentionally focused in a corrosive assault in the West Midlands, police said. Cops have captured four men after the little child was injured at Home Bargains in Worcester.

Similar incident occurred in Newham, East London, on 1st June, 2018 when two teenage students were rushed to medical clinic after a presumed assault in were discovered shouting in desolation. On 1st June, 2018, Two high school exploited people, raced to clinic after a speculated assault in

[2168] Jane Onyanga- Omara, *Why acid attacks are on the rise in Britain, Economic Times*, April 27, 2017 https://www.usatoday.com/story/news/world/2017/04/27/acid-attacks-rise-united-kingdom/100739780/.

Newham, East London, were discovered shouting in distress. On 6th May, 2018**,** Two men attacked patrons in Dalston, East London where three men aged 17, 22, 27 received non-life-threatening injuries. On 1st April, 2017, Arthur Collins hurled corrosive in Mangle E8 club in Hackney, East London, harming 20 individuals and leaving a large number of them with perpetual scars. The ex of Towie star Ferne McCann has been condemned to 20 years in jail. On 27th July, 2017 Daniel Rotariu, 31, was left blinded and scarred for life after corrosive was poured over his eyes as he dozed at Katie Leong's home in Leicester. She had co-ordinated the twisted assault after her tenant beau of the time dismissed her advances. Leong was indicted for endeavoured murder and condemned to 17 years for the assault. In September 2015, Engineer Mark van Dongen, 29, ended his very own life after he was blinded and incapacitated when his ex-darling Berlinah Wallace flung packed sulphuric corrosive in his face as he rested in Bristol. In August 2014, Beautician Adele Bellis was soaked with corrosive in Lowestoft, Suffolk. Her harsh ex engineered the assault, which has left her with lasting scarring and the loss of her ear and half of her hair.

In Manchester, cops dealt with a "violent offence" where a six-year-old boy had bleach used against him, while two teens aged 14 and 15 were attacked on the train network[2169]'. In response to a freedom of information request by CNN, data from the London Metropolitan Police showed a sharp rise in attacks, with 465 recorded in 2017, up from 395 the previous year and 255 in 2015. The attacks increased six-fold over six years[2170]. Acid attacks in the UK are frequently linked to honour crimes by the media- and occasionally politicians[2171].

LEGISLATIVE RECOGNITION OF ACID ATTACKS

[2169] Richard Wheatstone and Jay Akbar, *Scarred for life: Acid attacks in UK where they have been carried out and is London the worst city affected*, THE SUN, February 13th, 2019 https://www.thesun.co.uk/news/7002106/uk-acid-attacks-15-every-week/.

[2170] Angela Dewan, *2017 was the worst year for acid attacks in London,* CNN EDITION, January 26th, 2018 https://edition.cnn.com/2018/01/26/europe/london-acid-attacks-2017-intl/index.html.

[2171] *Everything you know about acid attacks is wrong*, BBC UK, November 17th 2017 https://www.bbc.co.uk/bbcthree/article/5d38c003-c54a-4513-a369-f9eae0d52f91.

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India

Preceding the new inserted laws on vitriolage, the cases were decided under the existing sections 320[2172], 322,[2173] 325[2174] and 326[2175] of the Indian Penal Code, 1860[2176]. The Law Commission of India observed that these provisions were highly insufficient to curb the peril of acid attacks[2177]. In consonance with the recommendations made by the Justice Verma Committee, in order to prevent violence against women comprehensive amendments were introduced in the Indian Penal Code, 1860, Code of Criminal Procedure,1973 and the Indian Evidence Act,1872 through the Criminal Law (Amendment) Act, 2013[2178] after the Nirbhaya[2179] case[2180]. The amendments sought to make provisions relating to violence against women more stringent. New offences like acid attack, sexual harassment, voyeurism, disrobing a woman, stalking have now been incorporated into the Indian Penal Code[2181].

In case of acid attacks, these amendments sought to make specific provisions for punishment for the offences including attempt of causing grievous hurt by acid attack and compensation payable to the victim by the State in addition to the fine along with immediate first aid and medical treatment[2182] and section 326A and 326B was inserted in the Indian Penal Code and Section 357A was inserted in Criminal Procedure Code, 1973.

Section 326A[2183], Section 326B[2184], Section 357A[2185] (as has been inserted by Act 5, Code of Criminal Procedure Amendment Act, 2008) of the Indian Penal Code, 1860 has been in use for the curbing of the Vitriolage attacks since the existing laws at that point of time were not sufficient

[2172] Grievous hurt.
[2173] Voluntarily causing grievous hurt.
[2174] Punishment for voluntarily causing grievous hurt.
[2175] Voluntarily causing grievous hurt by dangerous weapons or means.
[2176] *Rajaram* v. *State of M.P.*, 1994 Supp (2) SCC 153 (India).
[2177] 226th Report of the Law Commission of India, *The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime*, 42 (2009).
[2178] Evaw Global Databse, Criminal law Amendment Act, 2013, (October 11, 2019, 19:26 p.m.) http://evaw-global-database.unwomen.org/en/countries/asia/india/2013/criminal-law-amendment-act-2013
[2179] On 16th December 2012, a 23 years old student was brutally gang raped in Delhi, eventually resulting in her death.
[2180] Mukesh v. State (NCT of Delhi) 2017 6 SCC 1.
[2181] *Ibid.*
[2182] Statement of Objects and Reasons, *The Criminal Law (Amendment) Bill* (introduced in Lok Sabha on December 4, 2012).
[2183] Voluntary causing grievous hurt by use of acid.
[2184] Voluntarily throwing or attempt to throw acid.
[2185] Victim compensation scheme.

and had to be more specific regarding the punishment and the compensation of these cruel forms of attacks.

The significant explanation behind corrosive assault occurrences is the simple accessibility of corrosive in retail markets in India. Neither the Central Government nor the State governments of the country could address the issue and these same issues had been pending under the steady scrutiny of the Supreme Court for a long time. In the instant case[2186], in the light of the Model Rules along with affidavits filed by Union of India, State governments and Union Territories, the Supreme Court gave directions that –

1. There should be prohibition of sale of acids and, if a person wants to buy then, the seller must keep a record of its sale and the quantity. The sellers must sell the acid only after verifying the government approved ID or photo ID and the reason for the purchase, and has to be an adult, i.e., above 18 years of age. Fines upto Rs. 50,000 can be imposed by the Sub-Divisional Magistrate, if violations are done. The acid attack victims will be paid at least Rs. 3 Lakhs for their treatments, out of which Rs. 1 Lakh to be paid within 15 days from the incident and the payment of remaining two-third amount within two months thereafter[2187].

United Kingdom:-

"The sale of certain types of acid (and other dangerous chemicals) is governed by the *Poisons Act 1972,* as amended by *the Deregulation Act 2015*. The 1972 Act draws a distinction between 'regulated' substances and 'reportable substances':

• *Regulated substances* – which contain high concentrations of certain chemicals – are now restricted from sale to the general public. If a member of the general public wants to buy any of the regulated substances, they need to apply to the Home Office for a licence to acquire and, from 3 March 2016, to possess and use.

• *Reportable substances* can be bought without a licence, but retailers are required to report suspicious transactions and significant losses and thefts.

[2186] *Laxmi* v. *Union of India*, Apr. 16, 2013 (Supreme Court, India).
[2187] Roopali Mohan, *Hidden Face Does Not Imply Silence - Acid Attacks as Infraction of Human Rights,* 67 NULJ 75-76, 68-84 (2017).

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The aim of the 1972 Act is to strengthen the control of chemicals that can be used to cause harm while still allowing those with a legitimate need for the chemicals to continue their activities. There is no one specific offence of carrying out an acid attack. People who commit such acts would instead be liable for a more general criminal offence. The Offences against the Person Act 1861 sets out the most relevant offences:

• *Section 18 - Wounding/causing grievous bodily harm with intent (maximum sentence: life imprisonment)*

• *Section 20 – Unlawful wounding/inflicting grievous bodily harm (maximum sentence: five years)*

• *Section 29 - Sending, throwing or using explosive or corrosive substance or noxious thing with intent to do grievous bodily harm (maximum sentence: life imprisonment)*

Possession of acid in a public place with intent to use it to cause harm could also be prosecuted as possession of an offensive weapon under section 1 of the Prevention of Crime Act 1953"[2188].

TREATMENT OF SUCH OR SIMILAR INSTANCES IN INDIA AND UNITED KINGDOM

India

While talking about the first instance of Laxmi, the accused was first convicted by the District Court then Acquitted by High Court and then again convicted by the Apex Court of India. He was found guilty, and was sentenced to 10 years of imprisonment. The compensation was fixed to Rs. 3,00,000 lakh and the Apex Court compelled the Central and the State Legislatures to make laws for the regulation of sale of acid immediately.

In the case of Chanchal, the Apex Court decided that the compensation of Rs. 3,00,000 was to be made minimum for the treatment of the victims and the states should provide more of it when there is a need. Also, to check the distribution of acid according to the regulations already laid down in the case of Laxmi. It was also observed that the states have not complied Apex Court's direction

[2188] Sally Lipscombe & Georgina Hutton, *Acid Attacks*, in the BRIEFING PAPER OF HOUSE OF COMMONS, 8041 (2017).

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and haven't enacted any Victim Compensation Scheme in accordance with Section 357A[2189]. It was deemed necessary to be the duty of state to help in victim rehabilitate and while deciding compensation keep in mind the trauma that the victim has suffered. Hence, Chanchal was allowed Rs. 10 Lakh compensation and her sister Rs. 3,00,000.

In the case of Preeti, a judgement of 150 pages was written and within it death penalty was given to the attacker as the Supreme Court considered it as one of rarest of rare case, due to the death of victim. It was for the first time death penalty was sentenced along with the recognition of the brevity of the crime such as Acid attack.

United Kingdom

Amongst the above mentioned cases, it was found that the attacks were not restricted to women and children but included men as well. Also, it was seen that 60% of the attacks were on men unlike from India where the maximum acid is inflicted on the women. Maximum Punishment that has been provided till now in the above circumstances is of 20 years as the offender injured 20 people in a single go. Another offender was imprisoned with 17 years of imprisonment as the victim was blinded when acid was poured on his eyes. 12 years imprisonment was given to the attacker who disfigured the victim's face when she was returning home from her job at Victoria's Secret Store. Another case was when victim's ex-boyfriend ordered another person to attack her, the victim's ex is now in prison for lifetime and the attacker who performed such a heinous offence is serving a sentence from past 6 years.

REFORMS NEEDED IN THE CURRENT LEGISLATION AND PUNISHMENT:-

When talking about both the countries, it can be noticed that the existing rules, laws and regulations are not enough to either curb the attacks or to even minimize the attacks. There is severe need for making separate laws for the most heinous offences just like Vitriolage. It not only destroys the body, but scars the confidence of the victim and thereby causing them to take time to get into daily routine which becomes totally different from them. They suffer both emotionally and physically. The problem with the existing rules and regulations is that they are gender specific. In India, while

[2189] Criminal Procedure Code,1973

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the acid attacks are majorly done on the women, it is contrary in United Kingdom as mentioned in the cases.

Another point to be focused upon is the lack of strict implementation of the existing rules and regulations. Even though both the countries have made laws regarding the same issue, then also it is somehow lacking in the application by the competent authorities. Be it the sale of Acid or any other corrosive substance as used in United Kingdom, is not under proper control and hence the substances are easily available thereby only causing increase in the attacks like these.

Third point is to make separate centres for the support or treatment facilities that specialises in the treating the burn victims and that should be funded by the government so that the victims did not get burdened by it. There is also a need to spread awareness starting from incorporating it under the elementary education as to make the youth realise that they should abstain from such kind of monstrous acts that ruin the life of not only the victims but their family as well. Hence, it is need of the hour 'to change the mind set of society and to achieve equality, stages of change do not have to be, in the Darwinian sense, but trivial steps in evolution can be fast forwarded by fundamental changes of attitude. The most important step that needs to be taken in order to curb these types of ghastly and horrendous crimes is to spread awareness among peoples.'[2190]

NECESSITY FOR REHABILITATION OF VICTIMS:-

There are a multitude of factors that often lead to people to acts which can be concluded of being in the nature of a crime or an offence. There can be any societal, cultural, emotional, personal issue within the offender who was incapable of thinking any other recourse to convey his message other than throwing acid on the victim. The male dominance, class inequalities and the idea of taking revenge against the person by punishing them in some way or the other comes under both societal and cultural factors whereas emotional and personal issue can be any family rivalry, broken heart, short-temperedness and anti-social behaviour. Therefore, such acts are demonstration of a person's intention to deprive the women of any other relationships and may even be attempted on account of various other factors. One study showed that refusal of marriage proposals accounted for 55%

[2190] Ankita Yadav, *Understanding Effect of Globalisation and Gender Based Aspect of Acid Violence in India* 7 RMLNLUJ 186, 170-186 (2015).

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of acid assaults, with abuse from husband/ family member (18%), property disputes (11%) and refusal of sexual or romantic advances (2%) as other leading causes[2191].

While there are many repercussions of being attacked by acid, the physical and the mental pain are the most vicious of them. The victims have to suffer a lot be it due to their damaged body parts or the ways people treat or look at them or the way their self-confidence take a deep dive due to the same. These forms of attacks are often pursued with the intention of stigmatising the victims in the society. Even with the progress of modern medicine and technologies in surgery the treated victims are not able to regain their original features. Due to this the people in general make them uncomfortable by staring or giving inappropriate expressions. The costing of the surgeries goes more than the spending capacity of the families and that creates a huge impact on the overall livelihood of it. The disfiguration of the skin and muscles beneath it causes trauma, in physical form as it causes of pain and surgeries often are painful and in financial form, such surgeries are costly and have seldom borne by the victim, so the family has to budge in for supporting and compensating the victim on account of both these traumas .

The status quo of the laws regarding the implementation of the existing laws which are in themselves very inadequate and rarely enable the part for the justice of the victim and punishment of the offenders. There is a need to shift the focus from providing the money as compensation to the victims, but to rehabilitate them as well. Further, it is critical to spread awareness regarding the first aid of the victims if any such incident ever occurs and to change the mentality of the people to employee the victims so that they can support their family which just went great bounds for their treatments.

CONCLUSION:-

India is the fourth most dangerous place in the world for women to live in as women belonging to any class, caste or creed and religion can be victims of this cruel form of violence and disfigurement, a premeditated crime intended to kill or maim her permanently and act as a lesson to "put her in her place"[2192]. And United States is the first in the same list. The only difference

[2191] DS Bhullar, *Acid Throwing: A Cause of Concern in India* 10 Indian Journal of Clinical Practice 989, 989-990 (2014).
[2192] DS Bhullar, *Acid Throwing: A Cause of Concern in India* 10 Indian Journal of Clinical Practice 989, 989-990 (2014).

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between the two countries is that the former country has more of the female victims while the latter has a 60:40 ratio of women and men. It can be concluded that this is the need of the era that the time is changing and which it the crimes are also evolving. First only the women were victimised and now men are too being the prey of the same viciousness. There is a very recent case that occurred in Aligarh, Uttar Pradesh, a 20 year old girl threw acid on her boyfriend after he refused to get married and declined her marriage proposal. This is a very clear example of how the laws in both countries need to be modified and stop being gender biased. As both the countries are now facing the problem with men as well, so the protection, compensation and the rehabilitation should be extended to men too.

Regarding the existing Indian laws, there is a need to not only increase the compensation but also a need to amend the laws in such a way that they are positively implemented. It was seen in one of the recent cases that as the law provided every state to form a victim compensation scheme whereas it was seen that most of the states had not formed any scheme and hence could not provide the compensation as directed and mentioned by the law. This created not only delay in justice but also showed the ineffective implementation of laws concerned in the matter. The punishments are also not that strict to anyhow

In United Kingdom as well, there are laws and the condition for implementation are much better than that of India, but the existing ones are also insufficient to curb the incidents as offenders are getting their way around using different substances which can be as effective as the acid itself. Hence, as per the conditions, the law needs to stricter, definitions should be in such a way as to include more and more substances so that no one can get around them.

Thus, when there the two countries are compared on the basis of its incidences, laws and the punishments, it is evident that both the countries are similar in the way that even after all the precautionary measures taken by the government, there is a very little improvement in the conditions when the vitrolage attacks are taken into consideration. In either of the countries the supply of corrosive substances needs to highly regularised and just as the United Kingdom is working upon a new legislature for these kind of attacks, India needs to do the same and concentrate on issues that, no such substances should be easily accessible for the public in general, its sale should be regularised and monitored by the government itself. Next, there is a need for proper education about everything related to the attacks and if any such incident happens, measures

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should be provided for speedy justice so that, unlike some cases, the offenders get punished. Although the most crucial of all of them is what about those who have suffered from it. These victims, without being gender specific, should be provided aid and assistance in all spheres of life as merely providing compensation is not the solution. The victims need to be able to kick start their lives again and it takes a lot to do the same. There can be a facilities such as for treatment, aids and many more so that the people affected by the attacks doesn't feel that their life has come to an end and can freely with the assistance of the government do something on their own. All these is not possible in a day but there can has to be a beginning point somewhere. But these things can change lives of many people and maybe on one day in a few years eliminate this evil entirely.

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A SOCIAL AND LEGAL PERSPECTIVE ON WHITE-COLLAR CRIMES

- **ANILA R.**

There has been a large increase in the number of corporations in the last four decades. Apart from maximizing shareholder's wealth, corporations offer enormous economic benefits to society.

However, in the modern world of globalized economy, one wrong decision made within a corporation would travel far and beyond, affecting people by taking away their livelihood and lives. These rash and unwise decisions, taken on unethical and immoral grounds without being accountable to the society they live in, have the potential to cause grave illness on society thereby threatening the very foundation of the social and the economic system that we all live in.

The Global Exchange, an NGO promoting human, social, economic and environmental rights, releases a list every year featuring top corporate criminals[2193] who had committed gross violations of law. Of all the human rights violations and environmental destruction committed by these giant corporations, white-collar crimes pose a more serious threat due to their greater social impact. It is one of the fastest-growing types of crime in the world, where buffered individual greed lies behind the positive perception of corporations. The majority of white-collar crimes constitute cases relating to a) business fraud b) fraud against government c) fraud in government and d) harm to public health and environment.[2194] In the United States alone, white-collar crimes resulted in $250 to $ 1 trillion[2195] of damage to the economy. Experts suggest that the cost of damages and the ripple effect caused by white-collar crimes far outweigh street and occupational crimes but the

[2193] "Top Ten Corporate Criminals Alumni," Global Exchange, https://globalexchange.org/corporate-criminals-alumni/

[2194] Buell Samuel, *White Collar Crimes*, Chapter 37, ((2006) 81 New York University LR 1971) p. 846.

[2195] Friedrichs, D. 0., *Trusted Criminals: White Collar Crime In Contemporary Society* ((2009) Belmont: Wadsworth Cengage Learning).

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latter receive harsher punishments than the white-collar criminals.[2196] White-collar crimes are especially insidious as they do not share the social stigma attached to street crimes, which hinders efforts towards curtailment.

THE WHITE-COLLAR CRIMINAL

The criminologist and sociologist Edwin H. Sutherland coined the term "white-collar crime" in the year 1939 and defined it as a "*crime committed by a person of respectability and high social status in the course of his occupation*".[2197] But scholars observed that his definition lacked clarity. They noted that upper-class people commit other crimes such as murder and rape which are not financial in nature and financial or commercial crimes need not be committed by people belonging solely to the upper-class.

This article focuses on "white-collar criminals" in the context of financial or commercial crimes. For that reason, it would be more pertinent to refer to the Black's law dictionary's definition than Sutherland's definition. The Black's law dictionary defines white-collar crimes as *"a non-violent crime involving cheating or dishonesty in commercial matters*". The oxford dictionary also defines it in similar terms by stating that these crimes are non-violent and mostly financial in nature, committed by a person taking advantage of the knowledge or responsibility of his/her position. Unlike Sutherland's definition, these definitions are broad enough to cover crimes committed (criminal misappropriation of property, breach of trust, cybercrime, fraud/ forgery/ product piracy, insider trading, securities fraud, money laundering, kickbacks, corruption and bribery, tax evasion[2198]) in the economic or the corporate realm by various professionals.

Although these crimes are non-violent in nature, it can affect people around the globe in other harmful ways.

[2196] Bureau of National Affairs, "White Collar Justice, A BNA special report on White-collar Crime" United States Law Week 44 (1976), (;) Seymour, Whitney North, *Why Justice Fails,* (1973) New York: Morrow.

[2197] Payne, B. K., *Section II: Understanding White Collar Crime: Definitions, Extent, and Consequences in White-collar crime*, ((2012) Los Angeles: SAGE.) p.35.

[2198] "Types and schemes of white collar crimes ", National Check Fraud Center, (2011), http://www.ckfraud.org/whitecollar.html

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THE LEHMAN BROTHERS AND THE 2008 FINANCIAL CRISIS

One such insidious white-collar crime was the Lehman Brothers case. The firm carried out a complex global investment business with headquarters in New York and regional headquarters in London and Tokyo. Beginning in 2006, the 164-year-old firm invested in real estate-related assets, mostly housing and subprime mortgages. Despite employing accountants and risk professionals to monitor the risks and financial stability, Lehman failed because of its inability to finance itself. It manipulated its balance sheet by using "Repo 105" ("Repurchase of shares" in India) to make the net leverage ratio appear better than they should be, thereby circumventing the risk limits.

Like most investment banks, Lehman relied on wholesale funding of commercial paper loans and repos by the "shadow banking system". These investment banks, including hedge funds investors, transacted on unregulated short-term loans and repos. By this system, the borrower delivers the collateral to the lender and secures a sale and repurchase agreement. The borrower can repurchase the collateral when the loan is repaid. Repo 105 is a type of short-term loan, in which the loan amount exceeded 105% of the collateral. Unlike other "repo" which are accounted for as "financings", "repo 105" are treated as "sales" so the borrower, in this case, Lehman, who can then can remove the collaterals delivered from the books of accounts.[2199] Lehman escalated "Repo 105" use and removed almost $50 billion of its assets during the quarter-end, to publicly report its positive leverage ratio. Despite its effort to raise more credit to operate, the company failed because other institutions failed to accept Lehman's securities as collaterals, lenders withdrew their credit and others demanded discounts. Their plan of selling toxic real-estate assets into a separate public corporation also failed.[2200]

In the year 2011, the Lehman Brothers' creditors voted for the company's liquidation plan. The **executives' willful ignorance of its risk thresholds, breach of accounting and banking**

[2199] Wiggins, Rosalind Z, and Andrew Metrick, "The Lehman Brothers Bankruptcy G: The Special Case of Derivatives", Yale Program on Financial Stability Case Study (2014-3G-V1, October).

[2200] Rosalind Z. Wiggins, Thomas Piontek and Andrew Metrick, "The Lehman Brothers Bankruptcy A: Overview", Yale school of Management, (October 1, 2014), p.9.

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standards[2201], and the SEC's acquiescence of the company's liquidity status[2202] were the factors for the company's bankruptcy.[2203] During the same period, there were similar instances where the US Congress chartered corporations like Fannie Mae and Freddie Mae which had failed because of the 'US housing bubble burst' (riskier subprime mortgages).

The credit froze and the modern economy, which is incapable of operating without credit in its system for more than a couple of minutes, froze. As this was the biggest crash since the great depression, it triggered the North Atlantic Financial Crisis, also popularly or wrongly termed as the global crisis. However, the NAFC had far-reaching effects affecting people of all classes including the stakeholders, farmers, construction workers, garment producers, etc.

The acts of the Lehman Brothers are very pertinent for this article not only as an academic example but also because of their effects on the Indian economy.

Indian firms relied mainly on global money markets and as the crisis resulted in poor dollar liquidity, these firms were forced to borrow in the rupee money market to convert it to USD to meet its obligations abroad. International evidence suggests that even though there are local rules in place to balance the economy or a crisis, the Corporates or the MNC'S have their own way to operate in the global financial system. This resulted in rupee depreciation.[2204] While India and other emerging countries managed to tackle the crisis, in sub-Saharan Africa the growth of incomes per head fell nearly to Zero and the real per capita GDP decreased for the first time in 10 years.[2205] 450 investment projects related to African infrastructure were canceled in 2008.[2206] Food shortages

[2201] Valukas, Anton R., Report of Examiner, United States Bankruptcy Court, Sydney, *In re* Lehman Brothers Holdings, Inc., et al., (Chapter 11 case no. 08-13555, Vol. 1), p.2-27.

[2202] Debtors' Motion for an Order pursuant to Sections 105 and 365 of the Bankruptcy Code to Establish Procedures for the Settlement or Assumption and Assignment of Prepetition Derivatives Contracts, *In re* Lehman Brothers Holdings Inc., No. 08-13555 (Bankr. S.D.N.Y. Nov. 13, 2008).

[2203] Kimberly Summe, "Misconceptions about Lehman Brothers' Bankruptcy and the role derivatives played", Stanford Law Review (Vol. 64, Nov 2011).

[2204] Ila Patnaik and Ajay Shah, "Why India choked when Lehman broke", National institute of Public Finance and Policy, New Delhi, (January 11, 2010).

[2205] International Monetary Fund, *Regional Economic Outlook: Sub-Saharan Africa: Weathering the Storm*, Washington, DC: IMF (2009).

[2206] Public-Private Advisory Facility, International Finance Corporation (IFC) (2008) https://ppiaf.org/.

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in the least developed countries pushed around 130 to 155 million people into poverty.[2207] The financial crisis thus dominoed into a social crisis.

It's poignant that the top executives of these banks who took unwise risks, meddled with the accounts and pushed the global economy off a cliff, spreading human misery in the process, did not face any prosecutions and these banks were saved by government bail-out schemes because these institutions were "too big to fail".

Unlike passion crimes, white-collar crimes are done with a motive to gain occupational success or economic advantage. However, the justice system shows greater leniency to all types of organizational crimes than occupational or street crimes. This mirrors our social set of priorities attached to violent crimes and privileges easily available to upper-class people in our society. These are no longer "soft social issues" because the prevailing unequal fundamental and human rights curtailment makes the majority of people feel "socially excluded". A society can function only when its subjects trust the system. When the majority of the global citizens lose trust in the prevailing system, the global system will collapse under its own weight.

But to understand this phenomenon holistically, we ought to begin with an analysis of the behaviour of the offender, as individual behaviours constitute the reality of any social structure.[2208]

SOCIOLOGICAL ANALYSIS[2209]

Researchers use various methodologies to analyse the development of white-collar crimes. These studies are classified into research on the individual offender's motivation based on the "interactionist paradigm" and other research focusing on higher-level variables like theoretical orientations and different sets of assumptions. The understanding is that any criminal behaviour, including the white-collar crimes, results from a coincidence of appropriate motivation and

[2207] World Bank, *Global Economic Prospects: Commodities at the Crossroads*, Washington, DC: World Bank, (2008).

[2208] Collins, Randall, "On the Microfoundations of Macrosociology", American Journal of Sociology, (1981) p. 984-1014

[2209] James William Coleman, "Toward an integrated theory of white-collar crime", American Journal of Sociology Vol. 93, No. 2 (Sep. 1987), p. 406

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opportunity. [2210] An opportunity would mean to define a particular set of actions, made possible by a set of social conditions, which symbolically incorporates into a repertoire of behavioural possibilities. Unlike in the popular sense, opportunity here would also mean the things that we do not want to. For eg, an opportunity to commit suicide shall be read on par with an opportunity to double the investment.

The motivation to pursue any opportunity has its formative roots in values that the individual considers desirable. Hence, to understand why one decides to commit such callous acts, the relevant values or ideals and the various ways they find expression in societal life must be analysed.

MOTIVATIONAL BEHAVIOUR OF WHITE-COLLAR CRIMINALS

(i) The Interactionist Theory of Motivation

Society often sees criminals as abnormal people with significant biological and psychological differences. However, there have been no research or scientific attempts to uncover the heredity component or biological condition of criminality with respect to white-collar criminals. Although researchers like Sutherland, Blum and Brumberg investigated the "psychological makeup" of these offenders, their researches were too inconsistent to prove such personality theories as they failed to identify any unusual psychological behaviour or lack of socialization with respect to these white-collar criminals.

Because of this, researchers rely on socio-psychological approaches, specifically "the interactionist paradigm" to analyse the behaviour of white-collar criminals.

Socially created constructs do more than just define reality as they allow individuals to anticipate different kinds of responses from their surroundings to alter and adjust their behaviour accordingly. Thus, the behaviour of an individual is evoked as a result of personal motivations and the motivation to pursue or to abstain from any opportunity stems from factors like (i) general idea of

[2210] Cantor, David, and Kenneth C. Land, "Unemployment and Crime Rates in the post - World War II United States: A theoretical and Empirical Analysis" American sociological review (1985)(;) Vaughan, Diane., *Controlling unlawful organizational behaviour: Social structure and corporate misconduct,* University of Chicago Press (1983).

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reality, ie. the responses of others, social sanctions and societal tolerance associated with any behaviour, (ii) definitions of various individual situations, the social labeling of certain behavioural characteristics as valuable and others as undesirable.[2211]

As this is the generalized idea of motivation within which a social person behaves, most criminals are likely to deviate or violate the above factors by failing to satisfy the general social expectations. Cressey's (1953 - 1971)[2212] work shows that these white-collar criminals/embezzlers (her subjects) usually maintain a non-deviant self-image while still engaging in criminal activities. They used numerous techniques to rationalise their criminal behaviour and stated that their behaviour was only to survive or was for vital economic reasons or did not harm anyone. The offenders strongly believed they did not commit any crime but did what anyone in their position, at a given point in time or situation, would have done. There is ample data from both sociological research and public statements of these offenders to show that these rationalisations are common in white-collar criminals to justify their behaviour and to have an unadulterated social image.

(ii) The Competitive Culture

The culture of competition has become the driving force of the modern world which is why analysing the very structure of the phenomenon of competition within industrial capitalism is the first step in understanding the behaviour of white-collar criminals.

The foundation of the idea that *wealth and success* are the central goals of human endeavour dates back to the 17th century. With a single medium of exchange for measuring profits and losses, money reinforces the culture of competition among people.[2213] Becoming successful by means of accumulation of wealth has become the threshold of success. Contrary to ideals espoused by the major religions and traditional cultures, the competitive struggle to be better than one's peers is reflected as a positive rather than harmful or selfish attitude. Society sanctions such competitive behaviour by defining it as "a builder of character", "a test of personal worth" and "a powerful

[2211] James William Coleman, "Toward an integrated theory of white-collar crime", American Journal of Sociology Vol. 93, No. 2 (Sep., 1987), p. 406

[2212] Ibid. p.409-415

[2213] Amsel, Hans Georg. "Money and Criminality: A Reorientation of Criminological Research", International Journal of Criminology and Penology (1973), p.87

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stimulus" and "one who is competitive will be considered as the key contributor in providing maximum economic value to the society". It is no coincidence that the phrase "possessive individualism"[2214] was coined in the 17th century- the century when modern capitalism and industrial societies were evolving from less materialistic hunting and gathering societies. It is evident from the work of Hobbes, Locke and other social thinkers that each individual, an autonomous person with reasoning power and freewill, will largely be responsible for his/her own condition.

Studies[2215] reveal that growing economic surplus is created because of egoistic motivation (to earn surplus profits and accumulate wealth) rather than altruistic motivation (to serve the society). The Economy is tied to the concept of profits and losses and that is why competition and the quest for personal gain displace the traditional reciprocal exchanges making white-collar criminals act immorally and unethically to accumulate more wealth to climb up the ladder of success.

(iii) Normative Restraints

The ethical standards like fair play, honesty and other legal standards are to be followed by business and people doing business. Despite laws promoting competitive individualism, there are also boundaries within which the business should operate to avoid economic chaos or collapse. The rationality behind the industrial economy demands that exchanges have to be based on "mutually accepted standards" to enable all parties involved to participate in economic activity. But survey research[2216] shows contradictions between the ethical standards and the actual reality because people who are willing to violate ethical standards enjoy a competitive edge over others who are not. The survey research and other artistry and literary works reflect that this contradiction of social sanction and legal sanction creates an oscillatory tension among people, making it difficult for them to comply with ethical standards in the face of extreme pressure of competitive individualism.

To understand this better, we need to understand what "work-related subcultures" are. These subcultures can be classified into three a) subculture contained within the individual

[2214] MacPherson, C. B. *The Political Theory of Possessive Individualism:* Oxford Clarendon (1962)

[2215] Bonger, Willem, *Criminality and Economic Conditions,* Bloomington: Indiana University Press (1969, p 37)

[2216] Baumhart, Raymond C., "How ethical are businessmen?" Harvard Business Review, p.39.

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organisation[2217] b) industry-related subculture that binds similar organizations together[2218] and c) occupational subcultures among those who work in the same profession. In the words of Peter Drucker[2219], "*Contacts outside of business tend to be limited to people of the same set, if not to people working for the same organisation. The demand that there be no competing outside interests and loyalty… not only breeds a parochialism of the imagination comparable to the 'military mind,' but places a considerable premium on it.*" Members of the same profession as lawyers or doctors face similar pressure to support their colleagues and to work to the advancements of common interests.

These subcultures tend to define certain socially criminal behaviour as acceptable or required behaviour for the betterment of the organization or people falling within the ambit of these subcultures. The formulation of criminal behaviour depends on other factors than merely on these occupational subcultures. However, it is important to note that white-collar criminals without early socialization and less sense of global or social reality, experience no difficulty in following one set of ethics on the job and a completely contradictory set of standards in social relationships. Thus, this increased segmentation of personal reality and multidimensional view of self is a noted characteristic of industrial society which paves the way for social deviants to transform or grow into a white-collar criminal.[2220]

OPPORTUNITIES

The analysis of motivation will only take us so far with the matter at hand because no matter how strong the motivation if there is no opportunity, there will be no crime. The wide variations at which society offers opportunities to people belonging to different social status plays a major role in the etiology of white-collar crimes. The appeal of an opportunity for white-collar crime is not

[2217] Clinard, Marshall B., Peter C. Yeager, *Illegal Corporate Behaviour* (1979) p60

[2218] Barnett, Harold, C., "Branch Culture and Economic Structure:Correlates of tax non-compliance in Sweden", American Society of Criminology, (1984)

[2219] Drucker, Peter F. *Concept of Corporation,* New York, John Ed. (1972), p88

[2220] Holzner, Bukart, *Reality Construction in Society,* Cambridge, Mass: Schenkman (1972)

an absolute characteristic of the opportunity structure, the opportunity itself, or of the motivation of the individual person but rather one that arises due to the interaction between them.

The attractiveness or unattractiveness of an opportunity can be determined by the following factors a) perceptions of how much of a gain the person is likely to reap out of an opportunity b) perceptions of potential risks, such as the severity of punishment or likelihood of detection c) compatibility of the opportunities with the ideologies or rationalizations which the person already has and d) comparing the illicit opportunities with all the opportunities, ie. the entire opportunity structures.

LEGAL ANALYSIS

As with criminal law, lack of precise language and foresight in statutes results in generalised criminal prohibitions of a very broad scope. It describes concepts rather than behaviours which leave us with open-textured crimes.

Thus, the instability of the criminal law to specifically define these offences paves way for constant contestations over white-collar crimes and the process involved in its adjudication.

(i) Who deserves to be punished?

The problem of determining who deserves to be punished in white-collar crime is much trickier and more difficult than occupational or street crimes. The potential targets for the punishment of individuals involved in the offense would range from persons doing it, ordering it, approving it,[2221] knowing or negligently failing to know,[2222] the directors, the CEO,[2223] and the organization itself.[2224] Even if all the parties involved are punished, it again becomes difficult to decide how much punishment is deserved by senior executives who claim that they were unaware, yet

[2221] "Developments in the law - Corporate crime: Regulating Corporate Behaviour Through Criminal Sanctions", 92 Harv. L. Rev. 1227, 1266 (1979)

[2222] Wilson, *The Doctrine of Wilful Blindness*, 28 U.N.B.L. J. 175 (1979)

[2223] United States v. Park, 421 U.S. 658, 673-74 (1975)

[2224] The Social Policy of Corporate Criminal Liability, 6 Adel. L Rev. 361 (1978)

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nominated to be accountable for the sole reason of ensuring law observance.[2225] Or instead of individuals, should the Corporation be punished for its culpability or sloppy sets of operating standards or procedures?

The Indian legal system has evolved to prosecute the "alter-ego" (individuals who act on behalf of the company) of the companies when crimes involve imprisonment of the offenders.[2226] Such executives will be liable: -

- When questions of criminal intent or mens rea arise in connection with a crime committed by corporations (crimes committed by executives under the cloak of corporations) and
- When a statute provides for "vicarious liability".

However, in the year 2015, the Supreme Court of India quashed the criminal charge filed under POCA against Sunil Mittal[2227], since (i) there were no "provisions" relating to vicarious liability in the Prevention of Corruption Act, 1988 (before the amendment) and (ii) it relied on the "*attribution principle*" and held that the question of criminal intent or mens rea cannot be applied on a reverse basis to make the individuals liable for the crimes committed by the company.

It is evident from the above two scenarios that the principle of " just deserts" as a standard for punishing criminals[2228] has become a neglected perspective and holds less or no value when it comes to white-collar criminals.

(ii) Law vs Practice

As per the Criminal Procedure Code, 1973, the trial courts will have to determine the culpability of individuals after applying its mind and record sufficient grounds before initiating criminal proceedings. The legal position is unambiguous but is not observed when the issue pertains to

[2225] United States v. Park, 421 U.S. 658 (1975)

[2226] Iridium India Telecom v. Motorola Incorporated and Others (2011) 1 SCC 74. Also see, Standard Chartered Bank v. Directorate of Enforcement (2005) 4 SCC 530, Lee Kun Hee, President. Samsung Corpn., South Korea vs. State of U.P. (2012) 2 SCC 132 and Aneeta Hada vs. Godfather Travels and Tours (P) Ltd. (2012) 5 SCC 661

[2227] Sunil Bharti Mittal vs CBI (2015) 4 SCC 609

[2228] R. Singer, "Just Deserts: Sentence based on Equality and Desert" (1979)

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white-collar crimes. When the trial court summons the accused whose name is not mentioned in the charge sheet or the FIR[2229] or when the investigating agency records that there is no enough evidence or material to implicate the individual[2230], it becomes easy for these white-collar criminals to get away without any punishment.

(iii) Limitations of the Statutes

Generally, the legal systems of the world arrange the list of prohibited activities on a spectrum based on its association with socially acceptable conducts - murder, the easy case unless it involves the question of doctor discontinuing life-saving measures, rape can be punished if can prove the involvement of a forceful penetration, assault and theft might involve certain difficulties but is not as complicated as white-collar offenses. White-collar crimes tend to fall toward the end of the spectrum and require the legal system to make difficult determinations when criminal behaviours associated with commercial transactions, especially when political activity is involved. Questions like 'when does a payment to a politician constitute criminally corrupt influence in a system in which monetary contributions to campaigns are not only welcome but enjoy constitutional protection?', 'when does an attorney's joint representation of and coaching of multiple witnesses constitute obstruction of justice in an adversarial legal system that mandates zealous lawyering?', 'when do a corporation's payments in a foreign country to facilitate the construction of a power plant constitute violations of the anti-bribery laws in the midst of rapid and complex processes of globalization?' and 'when does a threat to bring legal action constitute extortion in a society that welcomes and even lauds the sharp negotiator?'[2231]

These questions are closely associated with routine activities conducted by businesses on legitimate grounds - commerce in corporations, politics in government, dispute resolution in courts and agencies and it generates difficulty in the process of the legal specification. Even assuming that these normative questions are settled, with the rapid growth of technology and sectors of social

[2229] Mr. Ravi Ruia, Director in Sterling Cellular Limited, 2G scam case

[2230] Mr. Sunil Mittal, CMD, Bharti Cellular Limited, 2G scam case

[2231] Samuel W. Buell, "White Collar" Crimes", Chapter 37, Oxfordhb, (2014), p. 837-870

activity that these white-collar prohibitions deal with, it leaves each new move of legal regulation two steps further behind.[2232]

(iv) Victimization

Unlike other criminal offenses, the victims of white-collar crimes rarely suffer from direct physical harm or the apprehension of such injury. In many cases, the victims are diffused and spread far and wide and it becomes difficult to prove the chain of causation from the acts of the principal offender. As complexities and subtleties with respect to victimization feature in the majority of white-collar crimes, they fail to fit the substantial criminal law and its enforcement.

CONCLUSION

While the social expectations propel us towards amassing greater economic wealth, the legal ambiguity has allowed many to think that said goal can be achieved by any means necessary. In a utopian world, one would suggest an alternative standard to measure a man's success in life instead of the number of zeros in his bank account. A more pragmatic approach, however, would be to acquire a clearer understanding of the powers a corporate executive can possibly abuse and to limit his scope so as to remove such opportunities from even being considered as remotely viable.

There must be stricter regulatory measures and frameworks like the appointment of the Serious Fraud Investigation Office (SFIO) under the Companies Act, 2013 to combat the malpractices and fraud committed by these white-collar criminals. Corporations should conduct mandatory training sessions at regular intervals, should have an internalized code of conduct in place and adequate committees to oversee its effectiveness.

Stringent laws and policies alone will not solve the problem. The problem of "white-collar crimes" is a subset of the bigger problem of "inequality". If the privileged and educated elites in the limelight do not act morally and ethically, the labour force is going to keep grinding itself in a vicious cycle. Above all, the fundamentals have to be revisited and our definitions of 'success', 'wealth' and 'growth' revised. The problem of white-collar crimes is a legal knot of intricacies but

[2232] Samuel W. Buell, "Novel Criminal Fraud," (2006) 81 New York University LR 1971 ff.

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it is also a subtle manifestation of the larger problems that an average man faces in his day-to-day life while in their striving for their own personal definition of ‘happiness’.

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SOCIAL LEGAL AND RELEGIOUS PERSPECTIVE RELATING TO ABORTION

- **ADITYA SHARMA**

ABSTRACT

This paper concern the religious,legalisation and historical discourse around abortion. The primarily goals of these paper is to be better understand that how the religions[Islamic,Buddhist,Hindu,Christian,Judaism] address abortion. We considerd the intersection onotology and morality the construction of women selfhood. That hpow the abortion get legalise how much efforts it takes, afterbeing legalise that how the law which made regarding abortion protecting it .we suggest that for many women ,religious doctrine may be balance with mental logic which lead to determination of secision making about the termination of pregnancy.In the paper we talked about that what are the perspective of bible regarding the abortion.later we talked about religious perspective regarding the legalisation of abortion Introduction Abortion literally means the deliberate termination of human pregnancy, the natural expulsion of a foetus from the womb before birth. An abortion may occur spontaneously, in which case it is also called a miscarriage, or it may be brought on purposefully, in which case it is often called an induced abortion. Some religions argue against the state with the point that a fetus is not a living person. The arguments on the morality of abortion are often based on the religious beliefs.

Keyword- Abortion, legalisation, religious perspective, pregnant women, problem phased by women and family,decision making.

INTRODUCTION

Introduction Abortion literally means the deliberate termination of human pregnancy, the natural expulsion of a foetus from the womb before birth. An abortion may occur

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spontaneously, in which case it is also called a miscarriage, or it may be brought on purposefully, in which case it is often called an induced abortion. A 2007 study published in The Lancet, one of the world's bestknown and most respected general medical journals, found that the global rate of abortion was 45.6 million in 1995 and 41.6 million in 2003.1. The World Health Organization (WHO) estimates that 19 million unsafe abortions occur around the world annually and that 68,000 of these result in the woman's death. This shows how abortion is a serious challenge to all human communities. Different nations interact differently with problems based on their different traditional backgrounds, interests, as well as their different approaches

The law needs to be revised to allow abortion not only if the life of the mother is in danger but also when the health of the women is in danger. By doing so, the door will be opened to take into consideration the WHO definition of health, which states that health comprises mental, social, and physical wellbeing (WHO, 2003). This will authorize doctors to provide abortion in the conditions that MFPA advocate for – abortion in the case of rape, incest and psychiatric diseases Some religions argue against the state with the point that a fetus is not a living person. The arguments on the morality of abortion are often based on the religious beliefs.

RELIGIOUS PERSPECTIVES ON ABORTION

Christianity

Christians have always taken a strong view against abortion, based on their belief that all Christianity used to be more accepting of abortion, this view is mistaken. Early Christian texts and scholars condemn direct abortion Nowadays abortion is opposed entirely by the Catholic Church and the Orthodox Church, and most Evangelical groups. Some Anglicans make exceptions in “hard cases”, while small groups within Anglicanism are entirely pro-abortion. There are pro-abortion minorities within most Christian groups, though their theological arguments are in contradiction with the Christian teaching that each child in the womb is known and loved by God.

The Bible

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The following three passages and others are sometimes cited as evidence that a fetus is truly a living human being and deserves the same protection. However, when read in context, it seems clear that was not the intended message. Luke Chapter 1 tells about God's intervention in the miraculous births of Jesus and John the Baptist. Jeremiah Chapter 1 is about Jeremiah's call as a prophet. Job Chapter 10 is Job's plea to God to relieve his unfair suffering.

Public opinion

Polls typically show that about 28% of people in the U.S. say abortion should be legal in all circumstances. Another 17% say abortion should be illegal in all circumstances. A majority, 54%, favor legal abortion in some circumstances. The Roman Catholic Church is strongly associated with the movement to outlaw abortion,

Morality. Many people have deep and serious doubts about the morality of abortion. At the same time, they believe abortion may be the lesser of evils in some cases. Situations thought to justify abortion include, with varying degrees of acceptance, danger to the mother's life, defective fetus, rape, incest, teen pregnancy, risk to the mother's physical or emotional health, unstable family situations, mental retardation of the mother, etc.

Dangers of illegal abortions. Before the 1973 *Roe v. Wade* decision legalized abortion throughout the U.S., abortions were allowed in some of the states. In 1972, 586,800 legal abortions were performed in those states.[8] It is estimated that between 200,000 and 1,200,000 illegal abortions were also performed each year in the U.S.. Those who could not afford that option often sought out someone to perform the procedure illegally. Some sympathetic doctors were willing to help. But many illegal abortions were performed by unqualified practitioners, and many women suffered exploitation, sexual abuse, injury

On the grounds of religion, each religious belief has its views on the concept of abortion, In Christianity abortion is considered a bad omen, an evil practice and non-acceptable by God, the Roman Catholic Church teaches that abortion is wrong and any member of the church found involved in the practice can be excommunicated from the church.

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Judaism

In Judaism, views on abortion draw primarily upon the legal and ethical teachings of the Hebrew Bible, the Talmud, the case-by-case decisions of response, and other rabbinic literature. In the modern period, moreover, Jewish thinking on abortion has responded both to liberal understandings of personal autonomy as well as Christian opposition to abortion. Generally speaking, orthodox Jews oppose abortion, with few health-related exceptions, and reform and conservative Jews tend to allow greater latitude. does not forbid abortion, but it does not permit abortion on demand. Abortion is only permitted for serious reasons. Judaism expects every case [related to abortion] to be considered on its own merits and the decision to be taken after consultation with a rabbi competent to give advice on such matters." Ancient Judaism was naturally pro-natalist, but without a central authority dictating orthodox beliefs there has been vigorous debate on abortion. The only scriptural mention of anything like an abortion does not treat it as murder. Jewish tradition allows for abortion for the sake of the mother because there is no soul in the first 40 days, and even in the latter stages of pregnancy the fetus has a lower moral status than the mother. In some cases, it may even be a *mitzvah* or sacred duty, to prioritize the mother before the fetus.

Buddhism

"There is no single Buddhist view concerning abortion. Traditional sources, such as the Buddhist monastic code, hold that life begins at conception and that abortion, which would then involve the deliberate destruction of life, should be rejected. Many Buddhists also subscribe to this view. Complicating the issue is the Buddhist belief that "life is a continuum with no discernible starting point". The Dalai Lama has said that abortion is "negative," but there are exceptions. He said, "I think abortion should be approved or disapproved according to each circumstance." Buddhist belief in reincarnation leads to the belief that life begins at the moment of conception. This naturally inclines Buddhism against legalized abortion. Taking the life of any living thing is generally condemned in Buddhism, so of course killing a fetus would not meet with easy approval. There are, however, This is evident in the Buddha's way of life, as it tries to get away from

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making finalization and judgment on mattersHis emphasis was to investigate the teaching on how abortion is viewed from the people themselves and the society of the Buddhist. If an individual within oneself finds a teaching to be true, then he should practice the teaching, but not trust any teaching by simply trusting them. Buddha first percepts state" I will not harm any living creature" this does not only apply to the human being community but to all animals, once a fetus is alive the Buddhism faith protest not to harm the fetus and protect the fetus.

The Buddhist approach to ethical and social issues relating to abortion is based on the concept on compassion. The concept of compassion is important to the Buddhist than any other doctrines laws set by the land. It is therefore important on any judgment as to whether abortion is good or evil in the land of the Buddhist one should bring in light the concept of compassion to the fetus before any argument is made. Most Buddhist feel that in relation to the concept of compassion abortion is wrong, and regrettable, it is viewed as the act of depriving the unborn the compassionate right to live, however the compassion should be both to the fetus and the mother,

Hinduism

Classical Hindu texts strongly condemn abortion. As a helpful item on the BBC website states, "When considering abortion, the Hindu way is to choose the action that will do least harm to all involved: the mother and father, the fetus and society." The BBC goes on to state, "In practice, however, abortion is practised in Hindu culture in India, because the religious ban on abortion is sometimes overruled by the cultural preference for sons. This can lead to abortion to prevent the birth of girl babies, which is called 'female feticide'." Hindu scholars and women's rights advocates have supported bans on sex-selective abortions. Some Hindus support abortion in cases where the mother's life is at imminent risk or when the fetus has a life threatening developmental anomaly. in Buddhism, so of course killing a fetus would not meet with easy approval. There are, however, exceptions—in Buddhism, there are different levels of life and not all life is equal. Abortion to save the life of the mother or if not done for In the Hinduism faith, abortion is considered evil; however some of the Hindus texts prove abortion to be a

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'necessary evil', since it save lives. , the abortionist is referenced as the greatest sinner in the society as described by Atharva Veda. It is therefore clear that in the Hindus faith abortion is an abormination. The Vedas does not show when life begins or whether a fetus is a living being but it is clear that abortion is a sinful activity.This is as outlined in the part of the Aryan scriptures is in the Vedas which states;

"Another compelling evidence that abortion is unacceptable in the Hindu religion is contained in the books of Chandrasekhar (1974) in which he pointed out that induced abortion, which he referred to as bhrunahatya (foetus murder) is a sin. He pointed out that according to Vishnu Smriti,the act of abortion which is the destruction an embryo can be considered as the killing of a holy person It is however not easy to simplify what the Bible state concerning abortion, several scholars has indicated that it is not easy to determine the real knowledge on the matters relating to abortion. Most of the Christians however, are just told that abortion is prohibited and not allowed in the society.

Abortion incidence in India

It is estimated that 15.6 million[10] abortions take place in India every year. A significant proportion of these are expected to be unsafe. Unsafe abortion is the third largest cause of maternal mortality leading to death of 10 women each day and thousands more facing morbidities. There is a need to strengthen women's access to CAC services and preventing deaths and disabilities faced by them.

Islam

Although there are different opinions among Islamic scholars about when life begins and when abortion is permissible, most agree that the termination of a pregnancy after 120 days – the point at which, in Islam, a fetus is thought to become a living soul –, abortion should be permissible only in instances in which the mother's life is in danger or in cases of rape. Views of the Four Schools of Islamic Thought on Abortion According to the Hanafi rite: The woman can abort during the first 120 days of pregnancy, the soul is not yet breathed into the body and the future child is still in its

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infancy. It states an abortion conditionality: it is allowed in cases of great need (real and recognized) and for a good reason. There are mainly three opinions that are referred to by the Shafii school concerning the interruption of pregnancy before insufflation of the soul: t One opinion is quite similar to that of Hanafites. Another opinion: abortion is permitted before 40 days of pregnancy, but discouraged If this were to happen, the agreement of both spouses is required. Abortion after 40 days is strictly prohibited.25 A third opinion: Abortion is prohibited from when fertilization occurs, based on the view of Imam Abu Hamid Al Ghazali

The diversity in Islamic thought and abortion law throughout Muslim-majority countries is evident. 'there are as many Islams as there are situations that sustain Investigating Islam's position on abortion reveals that though Islamic jurisprudence does not encourage abortion, there is no direct prohibition on abortion from the Quran and Sunnah, the two most authoritative biblical sources. Further, positions on abortion are notably variable, and many scholars permit abortion in particular circumstances and stages of gestational development. Evidently, Islam has also been interpreted to be compatible with abortion rights in prescribed situation.

An analysis of abortion laws in Muslim-majority countries exemplified a generally conservative approach where 18 of 47 countries only legally permit abortions in cases where the life of the pregnant women is threatened (i.e. not in cases to preserve a woman's physical or mental health, rape, foetal impairment, or for social or economic reasons). Nevertheless, the substantial diversity among the world's 47 Muslim-majority countries is often under-appreciated. Indeed, 10 Muslim-majority countries allow abortion 'on request', which, e.g., is more lenient than Japan, Iceland, Ireland, New Zealand, or the United Kingdom. The diversity found in Muslim-majority countries is likely in part due to the variability of the Islamic position as well as many other factors including whether the legal system is based on Sharia law exclusively This article makes policy recommendations for Muslim-majority countries that currently only allow abortion to save the life of the woman (e.g. Afghanistan, Bangladesh, Yemen and 15 other countries

Sikhism

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Although the Sikh code of conduct does not deal directly with abortion or indeed many other bioethical issues, it is generally forbidden in Sikhism because it is said to interfere with the creative work of God. Despite this theoretical viewpoint, abortion is not uncommon among the Si Sikhs believe that life begins at conception and that life is the creative work of God. Therefore, in principle at least, the Sikh religion takes a very strong position against abortion and treats it as a sin. Despite this, abortion is common in the Sikh community in India; in fact, there are concerns about too many female fetuses being aborted leading to too many male Sikhs. Clearly, the theoretical anti-abortion stance of Sikhism is balanced by more practicality in real life.

CASE OF CALIFORNIA

The Supreme Court struck down a California law regulating antiabortion crisis pregnancy centers, which are Christian counseling centers that try to persuade women to continue their pregnancies. California had required pregnancy centers with a medical license to tell women that the state provided free or low-cost services, including abortion, to low-income women. If a center wasn't licensed, the facility had to post a sign saying so. For all the justices, the case boiled down to a question of fairness. Writing for the majority, Justice Clarence Thomas accused California of discriminating against Christians.

Later in the 1980s, as crisis pregnancy centers rapidly spread, abortion rights supporters launched a similar campaign. Sending undercover activists to the centers, supporters of legal abortion insisted that some facilities advertised themselves as medical facilities without providing any such services. Worse, they argued, staff did not disclose their religious beliefs or opposition to abortion. By the late 1980s, then, the legal battle over abortion was less about the lawfulness of the procedure than the regulation of each side's facilities.**Religious Views on the Legalization of Abortion**

"Abortion. The Assemblies of God views the practice of abortion as an evil that has been inflicted upon millions of innocent babies and that will threaten millions more in the years to come. Abortion is a morally unacceptable alternative for birth control, population control, sex selection, and elimination of the physically and mentally handicapped. Certain parts of the world are already experiencing serious population imbalances as a result of the systematic abortion of female babies."

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"Buddhism does consider abortion to be the taking of a human life. At the same time, Buddhists generally are reluctant to intervene in a woman's personal decision to terminate a pregnancy. Buddhism may discourage abortion, but it also discourages imposing rigid moral absolutes.

This may seem contradictory. In our culture, many think that if something is morally wrong it ought to be banned. However, the Buddhist view is that the rigid following of rules is not what makes us moral. Further, imposing authoritative rules often creates a new set of moral wrongs…

"Hindus consider children a gift from God. Conception, development and birth of a child are sacred events, honored by a ceremony, or samskara, marking these rites of passage. Today's medical technology has developed many means for conceiving children. Hindus have a general unwillingness to interfere with nature and a special aversion to abortion, based on the belief in reincarnation and the sanctity of marriage.Hindu scripture and tradition clearly prohibit abortion, except to save the life of the mother. Multiple births are rare, except when a couple is undergoing fertility treatments, which may result in multiple fetuses, creating a potentially dangerous condition for the mother. Under the principle that abortion is allowed to save the mother's life."

"Rule 1: In Islam, it is (haram) to abort the foetus.

Rule 2: If the child was to die while in the womb of the mother, then it is obligatory to remove it from the womb.

Rule 3: If the pregnancy is a danger to the life of the mother or would result in her become handicapped, then it is permissible for her to abort the child before the time when the soul has been infused into the body.

"While Judaism takes a far less stringent approach to abortion than do many pro-life denominations of Christianity, providing explicit exceptions for threats to a mother's life and rabbinic support for terminating a pregnancy in a host of other situations, there is nonetheless broad objection to abortion in cases without serious cause. In addition,

despite the consensus that abortion is permitted in cases where continuing the pregnancy poses a threat to the life of the mother.

Jewish law does not share the belief common among abortion opponents that life begins at conception, nor does it legally consider the fetus to be a full person deserving of protections equal those accorded to human beings. In Jewish law, a fetus attains the status of a full person only at birth…

LAW RELATED WITH ABORTION

T HE Indian Penal Code 1862 and the Code of Criminal Procedure 1898, with their origins in the British Offences against the Person Act 1861, made abortion a crime punishable for both the woman and the abortionist except to save the life of the woman. the Shah Committee specifically denied that this was its purpose. The term ‘‘Medical Termination of Pregnancy’’ (MTP) was used to reduce opposition from socio-religious groups averse to liberalisation of abortion law. The MTP Act, passed by Parliament in 1971, legalised abortion in all of India except the states of Jammu and Kashmir. Despite more than 30 years of liberal legislation, however, the majority of women in India still lack access to safe abortion care. This paper critically reviews the history of abortion law and policy reform in India , The Medical Termination of Pregnancy Act 1971 and Regulations 1975 The MTP Act . The grounds include grave risk to the physical or mental health of the woman in her actual or foreseeable environment, as when pregnancy results from contraceptive failure, or on humanitarian grounds. The Medical Termination of Pregnancy Rules and Regulations 1957 define the criteria and procedures for approval of an abortion facility, procedures for consent, keeping records and reports, and ensuring confidentiality.

What are the conditions which are required to be fulfilled in order to obtain an abortion?

Under the law (section 3 of The medical termination of pregnancy Act 1971), the doctor can perform an abortion in the following situations:

- if the pregnancy would be harmful to your life or physical or mental health. The doctor will need to consider your circumstances to figure out if the pregnancy will harm your mental health. They also need to look at your future (as a reasonable person would) to figure out the effects of the pregnancy.

Who needs to be satisfied that the conditions have been fulfilled to get an abortion?

- If the pregnancy has not exceeded 12 weeks (first trimester), only **one doctor** needs to be satisfied that the conditions have been fulfilled.
- If the pregnancy has exceeded 12 weeks and is below 20 weeks (first trimester), **two doctors** need to be satisfied that the conditions have been fulfilled.

Who can be punished for committing an illegal abortion?

You should know that an abortion which does not fulfil the conditions is considered a crime under the general law on crimes in India.

- Abortion of under 4 to 5-month pregnancy - The punishment for getting an illegal abortion is jail time of up to 3 years and/or fine. Both you and your doctor are considered to have committed a crime unless it was done in good faith to save your life.
- Abortion of over 5-month pregnancy - If abortion takes place when you can sense the movement of the foetus, the punishment is higher. This is generally known as quickening and usually takes place between 17 and 20 weeks. Both you and your doctor can be punished with jail time of up to seven years and fine unless it was done in good faith to save your life.
- Abortion resulting in death
- Intentionally causing the death of a foetus can also be prosecuted under other provisions of the Indian Penal Code, 1860 under which the punishment can extend up to 10 years.

Do the doctors need my permission to carry out an abortion?

The doctors have a duty to get your consent in order to perform the abortion. If you are below 18 (a minor) or a person with mental illnesses, the doctors have a duty to get

your guardian's permission as well. If a doctor performs an abortion without your consent, he or she can be punished with a jail term extending up to 10 years and fine.inspection.

Before 1971, abortion was criminalized under Section 312 of the Indian Penal Code, 1860 describing it as intentionally "causing miscarriage[7]". Except in cases where abortion was carried out to save the life of the woman, it was a punishable offense and criminalized women/providers, with whoever voluntarily caused a woman with child to miscarry[8] facing three years in prison and/or a fine, and the woman availing of the service facing seven years in prison and/or a fine.

The Medical Termination of Pregnancy Act, 1971

The Medical Termination of Pregnancy (MTP) Act, 1971 provides the legal framework for making CAC services available in India. Termination of pregnancy is permitted for a broad range of conditions up to 20 weeks of gestation as detailed below:

- When continuation of pregnancy is a risk to the life of a pregnant woman or could cause grave injury to her physical or mental health;
- When there is substantial risk that the child, if born, would be seriously handicapped due to physical or mental abnormalities;

The MTP Act specifies – (i) who can terminate a pregnancy; (ii) till when a pregnancy can be terminated; and (iii) where can a pregnancy be terminated. The MTP Rules and Regulations, 2003 detail training and certification requirements for a provider and facility; and provide reporting and documentation requirements for safe and legal termination of pregnancy.

Who can terminate a pregnancy?

As per the MTP Act, pregnancy can be terminated only by a registered medical practitioner (RMP) who meets the following requirements:

(i) has a recognized medical qualification under the Indian Medical Council Act

(ii) who has such experience or training in gynaecology and obstetrics as per the MTP Rules Mtp bill 2014

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HISTORICAL CASES IN RESPECTIVE OF ABORTION IN THE WORLD

Roe v. Wade (1973)

In considering a challenge to a Texas abortion ban, the Supreme Court decided in *Roe v. Wade* to strike down the laws against abortion in every state. The Court claimed that the "right of privacy" previously discovered in the Due Process Clause of the 14th Amendment is "broad enough to encompass" a right to abortion. The Court reached this conclusion even though abortion is never mentioned in the Constitution—and even though, during the very same period in which states ratified the 14th Amendment (1868), states also enacted a wave of laws to protect unborn children from abortion.

The *Roe* Court ruled that abortion must be permitted without limits in the first trimester of pregnancy, that only regulations related to maternal health are permitted during the second trimester, and that, after the point of fetal viability, states may (if they choose) limit or even prohibit abortion.

Doe v. Bolton (1973)

A companion decision to *Roe v. Wade* handed down on the same day, *Doe v. Bolton* struck down a Georgia abortion law and is remembered mainly because it defined the extent of the "health" exception used in *Roe*. The *Doe* decision defined "health" to include even emotional and psychological considerations—so that virtually any reason would justify an abortion on "health" grounds. The result was that, because *Roe* required a "health" exception for any limits on post-viability abortions, even these third-trimester abortions could not be effectively prohibited.

Planned Parenthood v. Casey (1992)

The landmark *Planned Parenthood v. Casey* decision, which upheld several of Pennsylvania's abortion limits, reaffirmed the "central holding" of *Roe v. Wade* while

making certain modifications. Discarding *Roe*'s trimester framework, *Casey* ruled that pre-viability regulations are permissible as long as they don't impose an "undue burden" on the woman's right to an abortion.

THE NIKETA MEHTA CASE: DOES THE RIGHT TO ABORTION THREATEN DISABILITY RIGHTS?

THE CONCLUSION

After researching this topic, I found that religion has no effect on abortion, it just relies on the ideas of the people around us, the ones who complicate it by connecting it with religion. . In my opinion, the idea of compassion brought about by Buddhist beliefs is even more appealing, however, abortion should be practiced with the help of a health professional and when it comes to the mother and child. Yes, you can get abortions under the abortion law of 1971 If your pregnancy is less than 20 weeks, the Hindu article strongly condemns abortion. Right. As a useful piece on the BBC's website, "When considering abortion, the Hindu approach is to choose activities that will affect all people involved. Countries only have legal permission for abortion in the event that the life of a pregnant woman is threatened, Sikhism stands firm against abortion and considers it a sin. Despite this, abortion is common in the Sikh community in India. In fact, there are concerns about too many abandoned baby girls, leading to overcrowding of Sikhs.different religons have there different perspective regardin abortion as the research paper all about but all the struggle and from all the tough situation that a women go through are missed by people.

THANK YOU

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