JURISPERITUS

THE LAW JOURNAL

Powered by
Legal Education Awareness Foundation

VOLUME VI ISSUE I

JANUARY 2023

ISSN: 2581-6349
PIF – A++
www.jurisperitus.co.in

 ISSN 2581-6349

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We, at Jurisperitus believe in the principles of justice, morality and equity for all. We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

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ELECTRONIC EVIDENCE IN COMPUTER FORENSICS FOR CRIMINAL INVESTIGATION: AN ANALYSIS IN INDIA

- ***Surbhi Dadhich***[1]

Abstract

The law of evidence has changed dramatically in recent years, with different types of evidence now deemed admissible by a court. This change has also come to India with various changes to the existing legislation. Pursuant to India's obligation to the United Nations Commission on International Trade Law (UNCITRAL), the Information Technology Act 2000 (hereinafter the Information Technology Act) entered into force. This act legitimized and encouraged electronic commerce in the global marketplace and amended the Indian Evidence Act of 1872 (referred to here as the Evidence Act) to include provisions on electronic evidence. The Evidence Law requires that primary evidence be proven under section 64, while secondary evidence must be proven under section 65. Primary evidence is the type of evidence that is considered to have the highest factual certainty in question. Any evidence excluded from this category is considered secondary evidence. The burden of proof to demonstrate the admissibility of secondary evidence rests with the party presenting the evidence. Section 65A of the Evidence Act requires that electronic evidence be proven in accordance with the provisions of Section 65B. Section 65B was added to the Evidence Act by virtue of Schedule II of the TI Act. It is a provision regarding the admissibility of electronic evidence. It establishes that any information contained in an electronic document is considered a document admissible as evidence and original, provided that it meets the conditions established in sections 65B (2) to 65B (5). Therefore, each piece of electronic evidence must be accompanied by a certificate issued after the checklist provided for in section 65B has been completed.

Keywords: *IT Act, Electronic Evidence, Admissibility, Evidence Act*

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1. Introduction

Electronic evidence is fundamentally different to hard copy, such that the rules of evidence surrounding documentary evidence need to be re-examined. Indeed, a computer disc is different from a filing cabinet in which hard copy documents are stored because the information is actually embedded in the storage medium. The 21st century has seen an exciting technological revolution not just in India, but all over the world. The use of computers is not restricted for established organizations or institutions, but accessible to all individually with the swipe of a finger. Information technology has relaxed of almost all humanized actions. In the age of a cyber - world like the application of computers became more popular and expansion came in the growth of technology.
The evolution of information technology (IT) gave rise to the cyberspace in which the Internet offers opportunities for all people to access all information, data storage, analyse, etc. using advanced technology. This growing dependence on electronic means of communication, electronic commerce and warehousing Information in digital form has certainly created the need for transform information technology laws and regulations the admissibility of electronic evidence, both in civil and criminal matters business in India. The proliferation of computers and the influence of information technology on society as a whole, linked to the capacity everything was necessary to store and collect information in digital form changes in Indian law to provisions on evaluation of digital evidence. The information technology law, 2000 and its amendment are based on the United Nations Commission on International Trade Law (UNCITRAL). The amendment made in Information Technology (IT) Act 2000 made the admissibility of digital evidence viable in India. A change of the Indian Evidence Act of 1872, the Indian Criminal Act of 1860 and the Banker's Book Evidence Act of 1891 provides the legal framework for transactions in the electronic world. With the change of law, the Indian courts have developed a case Law of Use of Electronic Evidence. The judges too demonstrated knowledge of its intrinsic "electronic" nature evidence, including understanding of admissibility of e-evidence, and the interpretation of the law regarding how electronic evidence can be submitted in the court of law.

2. Electronic Evidence: Meaning

Electronic evidence also referred as "digital evidence" or "computer evidence “. The word digital is often used in computers and electronics, especially where information from the

physical world becomes in binary digital form as in digital audio and digital photography. Definitions of digital evidence include "Evidence information of value stored or sent in binary form, stored information or sent in binary format that can be trusted in the court of law. While the term "digital" is too broad, because we have seen that "binary" is used too restrictive because it only describes one form of data. Electronically test: data (consisting of the output of analog devices or data digital format) that is manipulated stored or communicated by an artificial device, computer or computer system or transmitted a communication system that has the potential to make it feasible account of one of the parties more likely or less likely than it would be no evidence. This definition has three elements. First of all, it is intended to include all forms of evidence created, manipulated or stored in a product that, in the broadest sense, can be considered a computer, excluding the human brain for the moment. Second, Consider the different forms of devices with which data can be recorded, stored or transmitted, including analog devices an exit. Ideally, this definition includes any type of device, if it is a computer, since we currently understand the meaning of a computer; telephone systems, wireless telecommunications systems and networks, such as the Internet; and the computer systems that are integrated into a device, such as mobile phones, smart cards and navigation systems.

The third element limits data to information that is relevant to the process leading to a dispute, regardless of the nature of the disagreement is decided by an arbitrator, regardless of the form and level of the assessment. This part of the definition includes an aspect of receptivity, only relevance, but does not use it, the "admissibility" itself as the determining criterion, because there is evidence will be admissible, but excluded by the mission referee of its authority, or inadmissible for independent reasons with the nature of the evidence, for example, because of the way it is it was collected. Government agencies are open to submit electronically and periodically various administrative policies with the regulation and control of industries are carried out by electronic means. These are different forms of electronic evidence / digital evidence increasingly used in legal proceedings. Judges are often asked to rule on the admissibility of electronic documents as evidence and this significantly affects the outcome of civil proceedings or conviction / acquittal of the accused. The court keeps fighting with this new electronic frontier as the unique nature of evidence, such as well as the ease with which it can be manufactured or counterfeited barrier to admissibility that other evidence does not face. The differences electronic evidence categories such as CD, DVD, hard drive / memory map data, website data, social media communication, email, snapshot chat messages, SMS / MMS

and computer generated document poses Unique issue and challenges for proper theme and authentication to various set of views.

3. Electronic Evidence and the Indian Evidence Act, 1872

The definition of evidence given in the Indian Evidence Act, 1872 includes

a) Testimony, i.e. oral evidence, and

b) Documentary evidence, including electronic records prepared for judicial inspection.

Section 3 of the law has been modified and the phrase "All documents prepared for examination by the Court" was replaced by "All documents, including electronic records produced available for inspection of the Court". As for the documentary evidence, in section 59, of the words "Content of documents" of words "Content of electronic documents or records" superseded and sections 65A and 65B inserted to include admissibility of electronic evidence. Traditionally the basic rule of thumb is that direct oral evidence can be used to prove it all the facts except the documents. The heresay rule suggests that all Evidence that is not direct can only be reliable if it is recorded by one of the exceptions provided for in sections 59 and 60 of the test Act on the heresay rule. However, the rule of heresay is not as restrictive or as simple in the case of documents as it is in the case of the oral test. It is because it is an established right that it is oral evidence cannot prove the content of a document and the document Speak for itself.

Therefore, when a document is missing, the oral test cannot and cannot be given as to the accuracy of the document in relation to the content of the document. It's because i should disturb the rule of heresay (since the document is absent, the truth or the accuracy of the oral test cannot be compared to the document). Within to test the content of a document, primary or secondary Evidence must be provided, although the main evidence of the document is the document itself, the realized that there would be situations where the primary evidence may not be available. So secondary evidence in certificate form copies of the document, copies made by mechanical means and Oral reports from anyone viewing the document were allowed under section 63 of the Evidence Act for the purpose of testing the content of a document. Therefore, the provision is to allow the secondary evidence somewhat undermines the beginnings of the heresay rule and is an attempt to overcome difficulties in obtaining the production of primary documentary evidence where original not available. Section 65 of the Evidence Act describes the situations what main evidence of the document is not necessary to provide Secondary evidence - as set forth in Section 63 of the Evidence Act – may be referred.

4. Admissibility of Electronic Evidence

Section 65A of the Indian Evidence Act is a special provision providing mode of proving and making eevidence admissible in court. It says, “Contents of electronic records may be proved in accordance with the provisions of section 65B.” In general words, electronic record may be proved, if compliance of section 65B is made. In exceptional cases, the content of electronic records can be tested. Section 65B has been complied with this means that the content of that document can be tested on the basis of a simple certificate. Now it's up to the court to see what document can be proved during certification according to section 65B of the Indian Evidence Act. For Example: System log-in data record. It may be proved by certification under section 65B of the IEA. Term may be used, so it is not obligatory. It depends on the circumstances, the court may request for better evidence. Section 65A of the Evidence Act creates Electronic evidence law: the content of electronic documents may be tested in accordance with the provisions of section 65B. The section performs the same function for electronic records as the section 61 done for supporting documents: create a separate procedure, distinguishes itself from the simple oral testimony procedure.

In the landmark case of State vs Mohd Afzal the test for admissibility of e-evidence under section 65B was considered for the first time, wherein the Division Bench of the High court of Delhi was called to determine if the call tapes were included in the evidence in accordance with section 65B. The defendant argued that the CDRs (details of call record) were inadmissible because the certificate for subsection 65B (4) was not submitted by appellant. This allegation was refuted by the party on the grounds that the conditions set forth in subsection 65B (2) had been met by oral testimony. Delhi bench accepted the argument of the prosecution and stated that, "the certificate under subsection 65B (4) it was just another form of proof and compliance with sub-sec (1) and (2) of the section 65B is sufficient for the electronic records to be admissible and to prove it. Comparing computer output under Section 65B to secondary documentary evidence under Section 65 (d), the Court considered that the oral testimony was also sufficient and that the absence of a certificate was not automatic bar for inadmissibility .

Section 65B (1)

The section states that any information in an electronic record produced from a computer (known as computer output) copied onto an optical or magnetic medium, then such electronic recording copied "is also considered a document" subject to the conditions u/s

65B(2) are fulfilled. Both with regard to the information and the computer it contains question such document " is authorized in any procedure when additional proof or production of the original as proof of any content of the original or of any fact expressed in it, whose direct evidence would be allowed.

Section 65B (2)

Section 65B of the Evidence Act elaborates special process to bring forward electronic records as evidence. Sub-section (2) lists the technological aspects and circumstances upon which a duplicate copy (including a print-out) of an original electronic record may be used:

a) The computer output containing the information was produced by the computer during the period in which the computer was regularly used to store or process information for the purpose of activities carried out regularly during that period by the legally controlled person on the use of the computer ; b) During said period, information of the type contained in the electronic record or the type from which it is derived has been regularly entered into the computer in the normal course of said activities; c) Throughout the material/physical part of said period the computer was functioning correctly or, if not, with respect to a period during which it did not function properly or was inoperative during that part of the period, it was not with respect to electronic filing or accuracy of its content; and

d) The information contained in the electronic file is reproduced or derived from said information entered in the computer during the normal performance of said activities.

Section 65B (4)

Regarding the person who can issue the certificate and the content of the certificate, issue the certificate by performing one of the following operations things: identification of the electronic file with the declaration and a description of how it came about; Give details device, addressing one of the problems associated with the mentioned in paragraph (2)are related to and are intended to be signed by a person holding an official position responsible for the operation of the device in question or the management of activities (what is applied is the test of each problem indicated in the certificate and for the application of this subsection enough to explain a question to the best of our knowledge and belief and belief of the person who says it. Regarding the person who can issue the certificate and the content of the certificate, issue the certificate by performing one of the following operations things:

a) Identification of the electronic file that contains the declaration;

b) Describe how the electronic record was made.

c) Provide details of the device involved in the production of this album.

d) Manage the applicable terms and conditions listed in the section 65B (2) of the Evidence Act; and

e) Signed by a person holding an official position related to the operation of the device in question. Referring to the above definitions in light of the provisions of section 65A and 65B of the Evidence Law, Electronic evidence is now another type of documentary evidence, namely If it is duly proven in the manner provided in Sec 65-B, it may take as strong evidence.

5. Judicial Interpretation on Admissibility of E-Evidence

In a reference related to the interpretation of Section 65B of the Electronic Records Admissibility under Evidence Act of 1872, RF Nariman's three-judge court, S. Ravindra Bhat and V. Ramasubramanian, held that the certificate required under section 65B (4) is a prerequisite for the admissibility of evidence by means of an electronic file, as rightly judged by the three-judge tribunal in ***Anvar PV v. PK Basheer***, (2014) 10 SCC 473, and incorrectly `` clarified " by a divisional bench in ***Shafhi Mohammad v. State of Himachal Pradesh***, (2018) 2 SCC 801.

The court further clarified that the certificate required under Section 65B (4) is not necessary if the original document is self-produced or primary in nature qualifying condition mention u/s62. The Court heard the remission of the order of July 26, 2019, in which, after citing ***Anvar PV v PK Basheer***, (2014) 10 SCC 473 (decision of this court with three judges), it was determined that a sentence of the additional bench in ***Shafhi Mohammad v. Himachal Pradesh state***, (2018) 2 SCC 801 may need to be reconsidered by larger bench of judges. The divisional bench had clarified in the Shafhi Mohammad judgment that the requirement of a certificate under Section 64B (4), being procedural, can be relaxed by the Court when the interests of justice justify it, and a circumstance in which the interest of justice would be for the electronic device to be produced by a party that does not own that device, which would prevent that party from obtaining the required certificate.

Anvar P.V. vs. P.K. Basheer & Ors:

Notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act17."

The court also cleared up the confusion surrounding the earlier judgment in the Anvar PV case and ruled that the last sentence in the Anvar PV case that reads: "if an electronic record as such is used as primary evidence u/s 62 of the Law of Evidence ... "must be read without the words" by virtue of section 62 of the Evidence Act18 .” These observations are clearly contrary to the provisions of Section 65B, which does not distinguish between "primary" and "secondary" evidence. In doing so, the Court added virtual words to section 65-B to say that the certificate is necessary for secondary tests and not for primary tests. It was also inappropriate to rely on section 62 to reach this conclusion. Sections 65A and 65B are complete codes, as evidenced by the no-obstruction clause. In addition, Sections 61 to 65 deals with conventional docs i.e. documents that are not generated on an electronic device, while Sections 65-A and B deal with electrical evidence to the repletion of Sections 61 to 65. But the court later said that secondary evidence for the content of the document could also be based on section 65 of the Evidence Act. This statement is manifestly incorrect and contrary to the provisions of section 65B.

NCT of Delhi v. Navjot Sandhu

Subsequently, in Shafhi Mohammad, the Supreme Court ruled that the requirement to present a certificate under section 65B (4) was procedural and not always mandatory. A party not in possession of the device from which the document was produced cannot be required to submit a certificate under section 65B, paragraph 4, which will apply only when a device provides electronic evidence and therefore can provide such a certificate. However, if the person is not in possession of the device, sections 63 and 65 cannot be excluded.

6. Conclusion

Digital evidence or electronic recording is permitted in India, if it meets the conditions provided under Section 65B. Therefore, the law on the admissibility of digital evidence is very well crystallized. However, one of the concerns that still arise is when, if a secondary electronic record is confiscated from the defendant, obviously the certificate cannot be obtained under 65B (4). Furthermore a question arose, when an electronic document used as primary evidence under section 62 of the Evidence Act is admissible as evidence without meeting the conditions of section 65-B of the Evidence Act? After analysing the provisions and judgements held by apex court it can be thus conclude that the admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition

of the law settled in the recent judgment of the Apex Court and various other High Courts as discussed above. The intention is clear and explicit that if the secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the testimony of the witness in the court of law cannot be looked into by the Indian court. However when an electronic document used as primary evidence under section 62 of the Evidence Act is admissible as evidence without meeting the conditions of section 65-B of the Evidence Act held by supreme court in its various judgements.

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CAPITAL PUNISHMENT AND SENTENCING POLICIES

- ***Jatinder Kumar Garg***[2]

INTRODUCTION

"I cannot in all conscience agree to anyone being sent to the gallows. God alone can take life because he alone gives it".

- *Mahatma Gandhi*

All punishments are based on the same proposition i.e. there must be a penalty for wrongdoing. There are two main reasons for inflicting the punishment. One is the belief that it is both right and just that a person who has done wrong should suffer for it; the other is the belief that inflicting punishment on wrongdoers discourages other from doing wrong. The death penalty or capital punishment also rests on the same proposition as other punishments.[3]

Death penalty is an integral part of the Indian criminal justice system. Increasing strength of the human rights movement in India, the existence of Death penalty is questioned as immoral. However this is an odd argument as keeping one person alive at the cost of the lives of numerous members or potential victims in the society is unbelievable and in fact, that is morally wrong.[4]

Death penalty is to be very sparingly applied with special reasons in cases of brutal murder and gravest offences against the state. About retention or abolition of capital punishment, debates are raging the world over amongst social activists, legal reformers, judges, jurists, lawyers and administrators. Criminologists and penologists are engaged in intensive study and research to know the answer to some perennially perplexing questions on Capital Punishment.

- Whether capital punishment serves the objectives of Punishment?
- Whether complete elimination of criminals through capital punishment will eliminate crime from the society?
- Whether complete elimination of crime from society is at all possible or imaginable?

Human beings are neither angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self-destruction. Taking human nature as it is, complete elimination of crime from society is not only impossible but also unimaginable. Criminologists and penologists are concerned about and working on reduction of crime rate in the society..

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[2] Research Scholar, Faculty of Law, Tantia University, Sri Ganganagar, Rajasthan.
[3] http://newindialaw.blogspot.in/2012/11/constitutional-validity-of-capital.html
[4] http://www.allsubjectjournal.com/archives/2015/vol2issue4/PartK/62.pdf

Social attitude also needs to change towards the deviants so that they do enjoy some rights as normal citizens though within certain circumscribed limits or under reasonable restrictions.
But we also have to think from victims' point of view. If victims realize that the state is reluctant to punish the offenders in the name of reform and correction, they may take the Law in their own hands and they themselves may try to punish their offenders and that will lead to anarchy. Therefore, to avoid this situation, there is a great need for prescribed and proportional punishment following Bentham's theory of penal objectives that pain of offender should be higher than pleasure he enjoys by commission of the crime. But this "higher" must have proportionality and uniformity too; for example, for theft, trespass, extortion and so forth, capital punishment is not reasonable and even life imprisonment is disproportionate and unreasonable.

MEANING OF DEATH PENALTY

Death penalty, also called Capital Punishment, execution of an offender sentenced to death after conviction by a court of law for a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law. The term death penalty is sometimes used interchangeably with capital punishment, though imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment[5].
The term "Capital Punishment" stands for most severe form of punishment. It is the punishment which is to be awarded for the most heinous, grievous and detestable crimes against humanity. While the definition and extent of such crimes vary from country to country, state to state, age to age, the implication of capital punishment has always been the death sentence. By common usage in jurisprudence, criminology and penology, Capital sentence means a sentence of death[6].

HISTORICAL BACKGROUND

Capital punishment is an ancient sanction. There is practically no country in the world where the death penalty has never existed. History of human civilization reveals that during no period of time capital punishment has been discarded as a mode of punishment[7]. Capital punishment

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[5] http://www.britannica.com/topic/capital-punishment
[6] Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1
[7] *Op.cit.* Capital Punishment by Dr. Subhash C. Gupta, 2000, p.

for murder, treason, arson, and rape was widely employed in ancient Greece under the laws of Draco (7th century BCE), though Plato argued that it should be used only for the incorrigible. The Romans also used it for a wide range of offenses, though citizens were exempted for a short time during the republic[8].

This finds support in the observation made by Sir Henry Marine who stated that "Roman Republic did not abolish death sentence though its non-use was primarily directed by the practice of punishment or exile and the procedure of questions"[9].

CAPITAL PUNISHMENT IN INDIA

GENERAL

A careful scrutiny of the debates in British India's Legislative Assembly reveals that no issue was raised about capital punishment in the Assembly until 1931, when one of the Members from Bihar, Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for the offences under the Indian Penal Code. However, the motion was negative after the then Home Minister replied to the motion.

The Government's policy on capital punishment in British India prior to Independence was clearly stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debates of the Legislative Assembly. "The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided"[10].

At independence, India retained several laws put in place by the British colonial government, which included the Code of Criminal Procedure, 1898 (‘CrPC. 1898’), and the Indian Penal Code, 1860 (‘IPC’). The IPC prescribed six punishments that could be imposed under the law, including death. For offences where the death penalty was an option, Section 367(5) of the CrPC 1898 required courts to record reasons where the court decided not to impose a sentence of death:

“If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed.”

In 1955, the Parliament repealed Section 367(5), CrPC 1898, significantly altering the position of the death sentence. The death penalty was no longer the norm, and courts did not need special

[8] http://www.britannica.com/topic/capital-punishment
[9] *Op.cit.* Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1
[10] *Ibid.*.

reasons for why they were not imposing the death penalty in cases where it was a prescribed punishment. The Code of Criminal Procedure was re-enacted in 1973 ('CrPC'), and several changes were made, notably to Section 354(3):

"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."

This was a significant modification from the situation following the 1955 amendment (where terms of imprisonment and the death penalty were equal possibilities in a capital case), and a reversal of the position under the 1898 law (where death sentence was the norm and reasons had to be recorded if any other punishment was imposed). Now, judges needed to provide special reasons for why they imposed the death sentence.

These amendments also introduced the possibility of a post-conviction hearing on sentence, including the death sentence, in Section 235(2), which states:

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law[11]."

Various laws under which death penalty can be prescribed as a possible punishment in India are given at *Annexure-I*

The punishment to which offenders are sentenced under the provision of Indian penal Code.[12]

- Capital punishment
- Life Imprisonment
- Imprisonment (rigorous and simple)
- Forfeiture of property
- Fine.

Capital punishment is one of the abrasive punishments which are provided under the IPC which involve taking of life of accused for his wrongful act. The risk of penalty is the cost of crime or wrongful act which the offender has to pay; when this suffering is high as compared to benefit which the crime is expected to yield, it will be useful to deter a considerable number of people. Here the question arises whether a State has right to take a life of a person, however he

[11] India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp. 17-18.

[12] Section 53, Indian Penal code, 1860,Gaur K.D. Text Book Of Indian Penal Code, University Law Publication, 6th edition

cross the any limit of barbarousness. The people distributed in two group about this question First is Moralists who feel that this penalty is necessary to deter the other like-minded person; Second is Progressive, who argue that this is only a judicial taking of life which court mandated.

An analysis of Criminal jurisprudence, would explore that the penalty of Death is given only in extreme or "Rarest of rare cases" in which a high degree of guilt is involved, which threat the society highly. Not only culpability of dangerousness of the act is taken into consideration to decide whether or not he deserve this penalty of death but also his personal attributes and circumstances and gravity of offence has also to be taken into deliberation. So the penalty should depend upon the gravity of offender's act and societal reaction on it.

AIM AND OBJECTIVE OF DEATH PENALTY

The objectives of death penalty are found in making the evil doer an example and deter other likeminded people. Out of the various theory of punishment the two i.e. the retributive and the deterrent[13] provides justification for death penalty. Retributive theory emphasizes retention of death punishment for horrendous crimes. This theory is based on principle "An eye for an eye", ''a tooth for a tooth"". It consists not in simple but in proportionate retaliation, that is in receiving in return for a wrongful act not the same thing but its equivalent. Deterrent theory set an example for the wrong doer. This theory operates on two counts:

i. **Firstly**, when the offender is punished by infliction of death; the society gets rid of him;
ii. **Secondly**, it impresses the consciousness of people at large and thus serves the purpose of preventing others from committing crimes[14].

This is the theory also emphasize the need of death penalty as a token of emphatic disapproval of the society for murderous crime. The aims of punishments are now considered to be retribution, justice, deterrence, information and protection and modem sentencing policy reflects combination of several or all these aims. The retributive element is intended to show public repulsion to the offence and to punish the offender for his wrong conduct. In the concept of justice as an aim of punishment growing emphasis is laid upon it by much modem legislation but judicial opinion towards this particular aim is varied an rehabilitation will not usually be

[13] G.W. Paton, Text book of Jurisprudence, (Oxford University Press, London, 3rd edition, 1969)
[14] Jagmohan Singh v. State of U.P. AIR 1973 SC 947(958)

accorded precedence over deterrence means both the punishment should fit the offence and also that like offences should receive similar punishment.

INTERNATIONAL SCENARIO

The international landscape regarding the death penalty - both in terms of international law and state practice - has evolved in the past decades. Internationally, countries are classified on their death penalty status, based on the following categories:

- Abolitionist for all crimes
- Abolitionist for ordinary crimes
- Abolitionist *de facto*
- Retentionist

At the end of 2014, 98 countries were abolitionist for all crimes, 7 countries were abolitionist for ordinary crimes only, and 35 were abolitionist in practice, making 140 countries in the world abolitionist in law or practice. 58 countries are regarded as retentionist, who still have the death penalty on their statute book, and have used it in the recent past[15]. While only a minority of countries retain and use the death penalty, this list includes some of the most populous nations in the world, including India, China, Indonesia and the United States, making a majority of population in the world potentially subject to this punishment. Country wise list of these four categories is given at *Annexure-II.*

CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS TREATIES

- The International Covenant on Civil and Political Rights ('ICCPR') is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty[16].
- The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death

[15] India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.38-39
[16] *ICCPR, Article 6.*

penalty, which is open to signatures from all countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories[17].

- ❖ Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child ('CRC')explicitly prohibits the use of the death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC[18].
- ❖ The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention') and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty *per se* as a form of torture or cruel, inhuman or degrading treatment or punishment ('CIDT'). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies[19].
- ❖ In the evolution of international criminal law, the death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, international criminal courts exclude the death penalty as a permissible punishment'[20].

Of the treaties mentioned above, India has ratified the ICCPR and the CRC, and is signatory to the Torture Convention but has not ratified it. Under international law, treaty obligations are binding on states once they have ratified the treaty. Even where a treaty has been signed but not ratified, the state is bound to "refrain from acts which would defeat the object and purpose of a treaty"[21].

Mercy petition by the Executive[22]. Supreme Court, last year held that judicial clemency could be granted on the ground of inordinate delay even after a mercy petition is rejected[23].

LAW COMMISSION OF INDIA'S REPORT ON DEATH PENALTY

[17] "UN Treaty Collection: Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty". United Nations.
[18] Article 2 (1), Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.
[19] India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.44-45
[20] *Ibid.* pp.45-46
[21] *Ibid.* p.46
[22] India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.190-191
[23] Indian Express, New Delhi, dated 27.5.2015

The Law Commission of India in its 262nd Report (August 2015) recommended that death penalty be abolished for all crimes other than terrorism related offences and waging war. Complete recommendations of the Report are as follows:[24]

- The Commission recommended that measures suggested that police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.
- The march of our own jurisprudence -- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases - shows the direction in which we have to head.
- Informed also by the expanded and deepened contents and horizons of the Right to life and strengthened due process requirements in the interactions between the State and the individual, prevailing standards of constitutional morality and human dignity, the Commission felt that time has come for India to move towards abolition of the death penalty.
- Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the Commission did not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war. Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible.

INDIAN SCENARIO

LEGISLATION: The Indian Penal Code, 1860 (IPC) is the Public Law and substantive Criminal Law which defines crimes and prescribes punishments. Section 53 of the IPC provides for death sentence and imprisonment for life as alternative punishments.[25]

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[24] Supra note13 at7

[25] These are as follows: (1) death sentence or (2) imprisonment for life, (3) imprisonment with or without hard labour,

In ***Mithu v. State of Panjab***[26] the apex court declared that section 303 is unconstitutional because it is not in tune with articles 14 and 21 of the constitution. In India, non- governmental organizations as well as generalpeople are fighting against inhuman, degrading and cruel punishment and protection of human rights. Nevertheless capital punishment still remains in force. Although judiciary has evolved the principle of "*rarest of rare cases"* and has indicated that it is with special reasons that death penalty must be imposed in cases of exceptional and aggravating circumstances where offences are very grave in nature, the application of the principle itself, as evident from a plethora of cases, is violative of Constitutional provisions.

CONSTITUTIONAL LAW:

Article 21 of the constitution guarantees right to life and personal liberty to all which includes right to live with human dignity. No person shall be deprived of his right except according to the procedure established by law. Therefore, the state may take away or abridge even right to life in the name of Law and public order following the procedure established by Law. But this procedure must be "due process" as held in ***Maneka Gandhi v. Union of India***[27]. The procedure which takes away the sacrosanct life of a human being must be just, fair and reasonable. So, fair trial following principles of natural justice and procedural Laws are of utmost importance when capital punishment is on the statute book. Therefore, our constitutional principle is in tune with procedural requirements of Natural Law which constitute the inner morality of Law which may be stated as follows:

(i) Death sentence is to be used very sparingly only in special cases.

(ii) Death sentence is treated as an exceptional punishment to be imposed with special reasons.

(iii) The accused has a right of hearing.

(iv) There should be individualization of sentence considering individual circumstances.

(4) forfeiture of property and, (5) fine. Under Indian Penal Code, death sentence is alternative punishment for the following several offences such as; waging war against the government of India (sec.121); Abetting mutiny actually committed (sec.132); Giving or fabricating false evidence upon which an innocent person suffers death (sec.184) ; section 302 punishment for murder, abetment of suicide of child or insane person under section 305, section 307 punishment for attempt to murder by life convicts, section 396 dacoity with murder; but nowhere it is mandatory except under section 303 which deals with punishment for murder by a life convict.

[26] (1983)2 SCC 277

[27] 1978 AIR 597, 1978 SCR (2) 621.

(v) Death sentence must be confirmed by the High Court with proper application of mind.

(vi) There is right to appeal to the Supreme Court under article 136 of the Constitution and under section 379 of the CrPC. The Supreme Court should examine the matter to its own satisfaction.

(vii) The accused can pray for pardon, commutation etc. of sentence under sections 433 and 434 of the CrPC. and under articles 72 and 161 to the President or the Governors. Articles 72 and 161 contain discretionary power of the President and the Governor beyond judicial power to interfere on merits of the matter; though judiciary has limited power to review the matter to ensure that all relevant documents and materials are placed before the President or the Governor. However, the essence of the power of the Governor should be based on rule of Law and rational considerations and not on race, religion, caste or political affiliations.

(viii) The accused has a right to speedy and fair trial under articles 21 and 22 of the Constitution.

(ix) The accused under article 21 and 22 has right not to be tortured.

(x) The accused has freedom of speech and expression within jail custody under articles 21 and 19 of the Constitution.

(xi) The accused has right to be represented by duly qualified and appointed legal practitioners.

CONCLUSION

Death as a penalty has plagued human mind perennially. Death sentence must fulfil the conditions for protection of human rights in Criminal Justice Administration in India. In European countries the agitation against capital punishment started with criminologists Jeremy Bentham and J.S. Mill's writings for due punishment; who maintained that punishment must be just, adequate, fair, reasonable and proportionate to the crime to achieve the goal and should never be excessive. This is also a problem in Indian socio-legal system. Delay in execution is not infrequent which is a violation of accused's basic human rights including right to live with dignity which is enshrined under article 21 of the Indian Constitution and the Universal Declaration of Human Rights. The accused in death sentence who is waiting for execution of punishment is living with terror of death every moment he is waiting for. Delay in execution

is another punishment on him which is inhuman, degrading and must not be allowed in any civilised society.

Execution of ***Dhananjay Chatterjee***[28] in 2004, after fourteen years in death cell and thereafter in the year 2006 Md. Afzal's instance of capital punishment again gave new impetus to the debate between abolitionists and Retentionist concerning speedy justice, fair trial, protection of human rights of the persons under death sentence, their human dignity as well as the victimological perspective to maintain law and order in society.

In India the issue of death sentence is hotly debated and has attracted the attention of general public as well as government and non-governmental organisations. Though India is an active member of the United Nations and has signed and ratified most of the International Instruments on human rights, capital punishment still remains in our statute book. According to our judiciary it must be imposed in exceptional cases i.e. in *rarest of rare cases* with special reasons. Article 72 of the Indian constitution confers on the President power to grant pardons etc. and to suspend, remit or commute sentences in certain circumstances.

In the words of P.N. Bhagwati, J. in ***Bachan Singh v. state of Punjab***[29] *"the judges have been awarding death penalty according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions".* Therefore, whether the sentence will be for death or for life imprisonment depends, in a large measure, on the court or composition of bench of the court. We have seen earlier about execution and commutation of death sentences into life imprisonment, there are several judgments which show that there are no fix principles to determine delay and other factors in the similar cases. Even in ***DhananjayChatterjee's case***[30] there was fourteen years' delay in execution of death sentence but it was not commuted to life imprisonment although in some earlier cases two years, two and half years, three years and nine years delay in execution was treated as violation of human rights and fair procedure and their sentences were commuted to life imprisonment. Is this not a violation of articles 14 and 21 of the Constitution which enshrine fundamental and sacrosanct rights of human beings?

Due to arbitrary and discriminatory decisions and unjust procedures, basic rights of accused are violated in inhuman and brutal manner which are not only contrary to the National Human Rights principles envisaged in the Constitution but also contrary to the Universal Human

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[28] Dhananjay Chatterjee v. State of West Bengal and Ors. (2004)9 SCC 751.

[29] See supra note 16.

[30] See supra note 48.

Rights ethos. In order to serve as a just and effective mechanism for administration of justice to all sections of society, law should be nourished by and nurtured in human rights. There is nothing to prove the fact that extreme measure of death sentence reduces crime rates in contemporary society; rather death sentence has failed as a deterrent. Life imprisonment is enough for deterrence as well as for mental and moral metamorphosis of a human being.

AN ANALYSIS OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND FOR DIVORCE

- ***Tarun***[31]

ABSTRACT

Marriage in Hindu Law is seen as a sacrament as opposed to a contract. Before the enactment of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), divorce was not provided for in Hindu law since marriage was seen as a permanent union of two people. The Act for the first time permitted filing a petition for divorce on certain specified grounds. These grounds were based on fault on the part of the respondent. Subsequently, in 1964 grounds partially based on breakdown of marriage were added and in 1976 divorce by mutual consent was introduced. This paper would address a few questions relating to irretrievable breakdown of marriage in particular and the theories of divorce in general. Part I would briefly discuss the theories of divorce: fault theory and no-fault theory. Part II would question whether the distinction between fault theory and no-fault theory is viable and practical and would examine if grounds based on fault creep into no fault grounds also.

Keywords: *Hindu Law, Marriage, Breakdown, Irretrievable, Divorce*

I. INTRODUCTION

"Marriage in Hindu Law is seen as a sacrament as opposed to a contract. Before the enactment of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), divorce was not provided for in Hindu law since marriage was seen as a permanent union of two people. The Act for the first time permitted filing a petition for divorce on certain specified grounds.[32] These grounds were based on fault on the part of the respondent. Subsequently, in 1964 grounds partially based on breakdown of marriage were added[33] and in 1976 divorce by mutual consent was introduced.[34] Thus, over the years, the Indian legislature has been open to the introduction of new grounds on which divorce can be sought according to the changing practices in society. However, discussions for almost half a century have not led to a consensus on whether

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[31] Research Scholar Tantia University Faculty of Law Sri Ganganagar, Rajasthan
[32] See Section 13 of the Act.
[33] See Section 13 (1A) of the Act.
[34] See Section 13B of the Act.

irretrievable breakdown of marriage as a ground for divorce should be introduced or not. The Law Commission of India submitted a report on the issue in 1978 and recommended the introduction of such a ground in the Act[35]. In 2009, the Law Commission once again recommended the inclusion of such a ground[36] and a Bill to that effect was introduced in 2010[37]. The Rajya Sabha passed this Bill with amendments on August 26, 2013.[38] However, the Bill lapsed when the Lok Sabha dissolved in 2014. There are divergent views on whether the ground should be introduced and if yes, then what safeguards should be provided to prevent the provision's misuse.

This paper would address a few questions relating to irretrievable breakdown of marriage in particular and the theories of divorce in general. Part I would briefly discuss the theories of divorce: fault theory and no fault theory. Part II would question whether the distinction between fault theory and no fault theory is viable and practical and would examine if grounds based on fault creep into no fault grounds also. This is important to understand as irretrievable breakdown of marriage is considered to be a no fault ground. Part III would critically analyse the various provisions of the Bill that introduced the new ground of irretrievable breakdown of marriage and lastly Part IV would make suggestions.

I.A. Theories of Divorce"

Divorce has, until recently, been based exclusively on the fault of one party. However with changing societal mores, new theories of divorce have emerged. Marriage is no longer seen as irrevocable and the dominant view is that if spouses do not wish to live with each other and if living with each other becomes torture, they should be legally allowed to part ways.[39] This view has brought in other theories of divorce that do not require the fault of one party in order to obtain divorce. The theories of divorce can broadly be categorised into the fault theory and the no fault theory.

A. Fault Theory

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[35] See Law Commission of India, 71st Report on The Hindu Marriage Act, 1955- Irretrievable Breakdown of Marriage as a Ground for Divorce, April, 1978.

[36] See Law Commission of India, Irretrievable Breakdown of Marriage- Another Ground for Divorce, Report No. 217, March 2009

[37] The Marriage Laws (Amendment) Bill, 2010.

[38] It must be clarified that the scope of the paper is not to analyse the entire Bill that introduces the ground of irretrievable breakdown of marriage for divorce but only to analyse a few aspects of it. Certain provisions like the necessity to ensure adequate provision for the maintenance of children born out of the marriage before granting divorce have not been dealt with at all.

[39] The courts have also subscribed to this view. See generally Dastane v. Dastane 1975 SCR (3) 967, Ashok Hurra v. Rupa Bipin Zaveri 1996 (2) HLR 512 (Guj)., Naveen Kohli v. Neelu Kohli AIR 2006 SC 1675., Krishna v. Somnath (1996) DMC 667 (P&H)., Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511.

This is the traditional theory that requires an innocent party to approach the court to file for a divorce due to a fault on the part of the other party. Here, it is possible to distinguish between two kinds of faults: which are directed towards the petitioner and which are not directed towards the petitioner. The latter may be referred to as a separate theory- "theory of frustration of marital relationship".

Both the kinds of faults have been incorporated in the Act as grounds for obtaining divorce. The following are examples of grounds based on fault that is directed against the petitioner under the Act: adultery, cruelty, desertion, bigamy, rape, sodomy or bestiality and failure to pay maintenance.

The grounds for divorce on the basis of fault not directed towards the other party are: conversion to another religion, insanity, virulent or incurable form of leprosy, venereal disease in a communicable form, renunciation of the world and being missing for seven years or more. Thus the fault can either be inherent in the person or be a result of his/her actions; nonetheless there must be a fault in the person.

The Act provides for certain defences to a petition for divorce. No person in order to get relief can take advantage of his own wrong or disability, can connive, condone or collude with the respondent and unnecessarily delay the filing of the petition. Any of these circumstances would result in denial of the grant of divorce even if the fault is proved.

Thus, the theory requires an innocent party in need of relief and a guilty party against whom the relief is granted. If the guilty party is able to show that the party claiming to be innocent is also guilty, no relief would be granted to the petitioner.

B. No Fault Theory

No-fault theory does not require any one of the parties to be guilty; no fault needs be proved. It is also referred to as the "breakdown of marriage". A divorce based on the no fault theory can be through mutual consent or without the consent of the opposite party due to an irretrievable breakdown of marriage. Only the former has been incorporated in the Act by virtue of Section 13 B. The Section allows for divorce to be granted if both parties agree for it provided they have been living separately for one year or more.

Section 13 (1A) which was inserted in 1964 in the Act has been said to be based on the theory of breakdown of marriage. It is actually a hybrid provision- based on a combination of fault theory and no fault theory. It states that divorce can be sought by either of the parties subsequent to the passing of a decree for restitution of conjugal rights or for judicial separation,

provided there has been no cohabitation for one year or more after the decree. This means that even a party at fault can file a petition for divorce. However, the provision isnot based on the no fault theory since it requires that a decree of restitution of conjugal rights or judicial separation must have been passed. These decrees are passed only when the respondent is at fault. Hence to be able to file a petition under this Section, fault is a pre requisite. Also, the legal position is as follows: Section 23 (1) (a) of the Act is applicable to Section 13 (1A) provided the wrong is a fresh wrong and not merely non-compliance of the decree of restitution of conjugal rights or judicial separation.

C. Fault even within no Fault Theory

As seen above, the difference between a ground based on fault and a no fault ground lies in the fact that in a no fault ground even a party at fault would be able to file a petition for divorce and the general defences to divorce would not be applicable.

Under the no fault theory of divorce, fault is not a requirement at all. However, fault in one way or the other does creep into no fault grounds also.[17] Let us consider the proposed provisions for no fault divorce in Section 13 C of the Marriage Laws (Amendment) Bill, 2013 (hereinafter referred to as the 2013 Bill). In order to grant a divorce on the ground of irretrievable breakdown, the court must be satisfied that the marriage has broken irretrievably.

A three year separation is a prerequisite to grant divorce but is not the deciding criterion. The court must consider other facts and circumstances before deciding whether there has been an irretrievable breakdown of the marriage or not. While deciding this issue, it would invariably consider the reasons for irretrievable breakdown which would be generally caused because of the fault of one of the parties.

"II. ANALYSIS OF PROPOSED BILL INTRODUCING IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND FOR DIVORCE"

" The Marriage Laws (Amendment) Bill, 2013 introduced irretrievable breakdown of marriage as a ground for divorce and attempts to provide for safeguards to prevent its misuse. Some of these provisions are discussed below:

A. Discretion given to court to deny divorce if grave financial hardship caused to wife and to order compensation to be paid to the wife

Irretrievable breakdown of marriage as a ground for divorce would allow even a guilty party to obtain divorce. It is imperative to introduce certain safeguards to prevent its misuse and to ensure that it does not result in grave injustice to the opposite party. Consequently, Section 13

D and Section 13 F of The Marriage Laws (Amendment) Bill, 2013 have been added in the 2013 Bill and these sections are gender specific. They deal with discretion given to court to dismiss or stay a proceeding and order payment of compensation respectively. Each of these Sections would be discussed in the subsequent paragraphs.

Section 13 D allows the court the discretion to dismiss the petition or stay the proceedings unless appropriate arrangements are made if the grant of divorce on the ground of irretrievable breakdown of marriage would

(i) cause grave financial hardship to the wife and

(ii) that granting divorce would be wrong to dissolve the marriage in light of all the circumstances. The proposed Section limits the discretion to be exercised only when both the conditions are fulfilled and when the respondent is the wife. The Law Commission of India while recommending this provision conceded that it might not be fair to allow a party to contest the divorce on the ground of hardship caused but stated that theoretically it would not be wrong to allow such discretion. It warned that the provision must be used sparingly only in exceptional circumstances and that its inclusion would promote the '*interests of justice*". In the very next paragraph, the Commission gave its reasons for making the Section gender specific. It reasoned,

"The fact that a woman has commenced proceedings would, in Indian conditions, imply in most cases that she finds conjugal life intolerable. We do not think that in such circumstances it would be just or fair to leave any scope for refusal of relief on the ground of hardship to the respondent husband. Where the wife is the petitioner and the husband is the respondent, there could hardly arise a situation in which the hardship likely to be caused to the husband by the grant of a decree".

It did recognise that the opposite might be true in infrequent cases. However it did not think wise to provide for such "rare" situations. Apart from not providing for the cases which might arise (albeit infrequently), the report reinforced stereotypical versions of Indian women by saying that they would file a case only when they find marital life intolerable. The author fails to understand how making the provision gender neutral would have done any injustice. It is to be used by the courts after analysing the facts and circumstances of the case and it is patently wrong not to allow the courts the discretion to deny the relief when it is causing grave financial hardship to a husband respondent (even if such cases are very rare). Using the language of the Commission itself, it would not be "theoretically wrong" to allow such discretion.

Section 13F of the Bill allows the court to order compensation to the wife (respondent) in form of immovable (not inherited or inheritable property) and movable property to settle any claims of the wife. This Section, once again provides that compensation would be payable only to the wife (respondent) and not to the husband. It might be true that in majority of the cases, the wife would be entitled to property and not the husband but there is a possibility for the opposite kind of cases. Moreover, the Section does not make it obligatory for the court to order compensation but says that the court "may" do so.

While analysing these Sections, it is imperative to bear in mind that these are to be inserted in the Hindu Marriage Act which was enacted in 1955. Even six decades back, the Act included a gender neutral provision for maintenance. The reasonableness of making the maintenance provision gender neutral then might have been debatable but introducing gender specific provisions in 2015 is definitely an issue that needs to be dealt with today.

There is no doubt that the society is still unequal for women and many women are financially dependent in need of assistance. However, is this reason enough to enact a gender specific provision? The history of the application of the Act demonstrates that gender neutral provisions are not always applied equally.

B. Three year separation required to file a petition for divorce on the ground of irretrievable breakdown

The 2013 Bill requires a three year separation before a divorce on the ground of irretrievable breakdown of marriage can be granted. The rationale is to have a minimum standard according to which it could be said that the marriage has irretrievably broken down. The Bill clarifies that separation means that the spouses are not living with each other in the same household[40]. Thus, to obtain a divorce, the petitioner must show that the parties have been living in different households from each other for at least three years. This provision limits the scope of the provision considerably if the phrase "*in the same household*" is interpreted to mean "*under the same roof*". Without a definition of the word "*household*", this question would definitely be raised.

The Family Law Act, 1975 in Australia abolished fault based grounds for divorce and introduced the sole ground of irretrievable breakdown of marriage which could be granted only when the court was satisfied that the parties had been living separately and apart for at least

[40] See Section 13C (5) of the 2013 Bill.

twelve months.[41] It further stated that parties could be living separate and apart despite the fact that they had been living under the same roof. Cases where the parties claimed to be living separately under one roof came before the court in many cases.[31] The court held that they could be granted divorce but that they would have to show why they continued to live under the same roof.

VIII. CONCLUSION

The preceding part of the paper critiqued some of the provisions of the 2013 Bill. This part would suggest some changes that could be made to the Bill to eliminate the loopholes and flaws in it. The suggestions made are independent of each other and it is possible that incorporation of one of the suggestion might render another suggestion redundant.

A. Fault and no fault grounds should be combined.

Presently Sections 13 (1) and 13 (2) deal with grounds based on fault and the 2013 Bill seeks to insert a provision providing for the ground of irretrievable breakdown of marriage. The Sections thus segregate grounds based on fault theory and no fault theory. This scheme is not sound because as discussed in Part II of this paper, fault and no fault theories are not entirely mutually exclusive.

A better way to insert the ground of irretrievable breakdown of marriage would be to allow divorce if the marriage has irretrievably broken down. The provision providing this should enumerate the circumstances which would amount to irretrievable breakdown of marriage. These circumstances would be fault based grounds as well as the no fault ground that requires a minimum separation of three years. For the purpose of giving a solution to problems where both parties are at fault and the marriage has completely broken down but the parties have not been staying separately, two alternatives are possible.

First, a sub-section could be added that empowers the court to grant divorce even if none of the enumerated circumstances are fulfilled but when the facts and circumstances warrant such an action. In such a case, the court should be obligated to provide reasons as to why it thought that the marriage had irrevocably broken down. The second alternative could be to abolish the defences to divorce provided in Section 23 (1). The second alternative is preferred by this author as the first leaves to much discretion in the hands of the courts.

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[41] Family Laws Act, 1975, Part VI, Section 48

England has only one ground for divorce, i.e. irretrievable breakdown of marriage. The court can grant a divorce on the ground only if any of the conditions given in the provision are fulfilled.[34] These facts are based on fault theory as well as no fault theory of divorce. This paper suggests a similar provision but with an addition that would ensure that the court is empowered to grant divorce in appropriate cases even if the case does not fall within any of the facts mentioned in the provision.

B. Irretrievable breakdown should also be a ground for judicial separation

The Bill introduces the ground of irretrievable breakdown of marriage only for divorce and not for judicial separation. This is an anomaly since under the Act judicial separation can be prayed for on any of the grounds enumerated in Sections 13 (1) and 13 (2) of the Act. Ideally, it should also be possible to ask for judicial separation on the ground of irretrievable breakdown of marriage.

This would increase chances for reconciliation as the parties would get the opportunity to suspend their marriage without dissolving it. In case, they are unable to resolve their problems, they would have an option to approach the court under Section 13 (1A) or Section 13 C.

C. No gender specific provision

The Hindu Marriage Act was introduced in 1955. At that time, the number of financially independent women was way lesser than now and yet maintenance was a gender neutral provision. It might not have been fair to make it gender neutral then, however it makes no sense to make provisions relating to distribution of property gender neutral now. As discussed in Part III, making the provisions gender specific entrenches the status of a woman as a victim and does not provide any remedy to the husband in the rare cases where he might suffer grave financial hardship or might deserve property belonging to the woman.

Even if the provisions are made gender neutral, they would be used sparingly against women keeping in mind the Indian situation. A gender specific provision leads to retarding of the process by which women and men are becoming financially equal. Cases where there are house husbands and working women might hardly exist but such a provision prevents such cases to increase in number.

ISSN 2581-6349

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ISSN 2581-6349

JUVENILE JUSTICE ACT, 2015 - A PANACEA TO LEGISLATIVE INEFFICIENCIES IN PRECEDING ACTS

- ***Harbir Singh***[42]

Abstract

Children form the backbone of the society. They deserve all the love and care in the world to become contributing and responsible citizens of the country. Education builds their intellect, and transforms them into assets that become an essential part of the society. However, some children deviate from this golden path and commit gruesome acts, petty offences or engage in unlawful behaviour. They are tried in the court and sentenced for their criminal behaviour. Despite that, in case of heinous crimes, juveniles are let off with less than severe punishment. Nirbhaya case raised this issue and became a turning point with respect to juvenile legislation. This case had sparked public turmoil and nationwide criticism, and prompted the Parliament to replace Juvenile Justice (Care and Protection of Children) Act of 2000 with Juvenile Justice Act, 2015. This Article analyses if the recent Act resolves the legislative efficiencies existing in previous Acts or falls short of country's expectation.

Introduction

Transformation is a natural occurrence that unfolds in all aspects of life; therefore, the law cannot fall outside its ambit. Similarly, the rules relating to children, that had their origins in the implementation of the fundamental right enshrined under Article 15(3) read with Directive Principles of State Policy under Article 39(e) & (f), as well as fundamental duties provided under Article 51A of the Indian Constitution, were a societal necessity.

Juvenile justice is the area of criminal law applicable to persons not old enough to be held responsible for criminal acts. In most states, the age for criminal culpability is set at 18 years. Juvenile law is mainly governed by state law and most states have enacted a juvenile code. The main goal of the juvenile justice system is rehabilitation rather than punishment.[43] In India, Juvenile Justice Act came into existence in 1986. With time, the aforementioned Act evolved

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[43]Dr. B. Ramaswamy, *Handbook on Juvenile Justice, Child Protection, Care and Welfare System in India* 5 (alfa Publications, New Delhi, 2013).

into the Juvenile Justice (Care and Protection) Act, 2000, and the Juvenile Justice Act, 2015 (hereinafter JJ Act).

The existing Act was brought into effect on January 15, 2016, following a country wide uproar and public outcry over the age restriction for children charged with heinous crimes, which was triggered by the Nirbhaya incident and its after-effects.

The JJ Act: A Brief Overview

The JJ Act has taken effect, replacing the Juvenile Justice (Care and Protection of Children) Act of 2000. The primary objective of this statute was a surge in the percentage of gruesome acts (including rapes) committed by juveniles (specifically aged 16 to 18). The new legislation, which was more punitive than reforming, raised many issues. The legislation is viewed as retributive as it stipulates those minors who are guilty of committing dangerous crimes or a vile act (one punishable by seven years or more) must stand trial akin to adults, in juvenile court rather than in adult court. The child who is convicted for the heinous crime is placed in a secure facility until he turns 21 years old, at which point he is shifted to prison. Children's court has the responsibility to oversee this.

Many demonstrators claimed that the new law relating to minors was in contravention of the principles enshrined in the Indian Constitution. In *Pratap Singh's* case[44], the Court held that in accordance with Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, even when a minor is liable for committing a crime, the mental and moral elements must be given top priority.

Numerous protesters have highlighted that the Act is violative of Article 20(1) of the Indian Constitution. Since the provisions of the Act permit the Court to imprison a convict who turns 21 before serving his sentence, it goes against the objective of the above-stated Article and impinges upon the right of the offender.

Principle Features of the JJ Act

Some of the salient features of the Act are discussed as follows:

- The Juvenile Justice Board will decide on the claim of juvenility. The Board must make a decision on the claim of juvenility prior to the judicial proceedings. However, this

[44]*Pratap Singh* v. *State of Jharkhand & Anr*, Appeal (crl.) 210 of 2005.

claim can be brought at any stage of the proceedings. In a case[45], the Apex Court pronounced that as per Section 9 of the JJ Act, defence can bring the question of juvenility during any stage of the trial even despite the disposal of the matter. Moreover, in *Arnit Das* v. *State of Bihar*[46], the Hon'ble Court declared that the date on which the offender is brought before the competent authority will be the date upon which claim of juvenility is decided.[47]

- The Present Act deals with the dual category of children namely, children that are in confrontation with the law; and children that require care and protection.
- To handle the cases of children in conflict with law, Juvenile Justice Board has been declared as the competent authority. It shall consist of three members.
- The Act has emphasized upon the need to set up institutions for the children such as special homes for those children who are in conflict with law, children's homes for receiving children who need care and protection, observation homes as a temporary facility for the ones who are waiting for completion of the inquiry and after-care organizations for the ones who are released from either special or children's home.
- This Act has categorized the offences in three ways. Firstly, the 'heinous offence' that will attract the punishment of seven years minimal or more of imprisonment. Secondly, the 'serious offence' that will attract the punishment of 3-7 years of imprisonment. Lastly, the 'petty offence' for which accused will be sentenced with less than three years of imprisonment.
- The definition of child has been expanded to include a child employed in contravention of labour law; impending probability of getting married before attaining the legal age; residing with an individual who has or had threatened to hurt, exploit, abuse or neglect the child or act in violation of any other prevalent laws, whose parents are not physically, mentally or in any manner whatsoever fit to look after him/her.
- This Act has introduced the concept of Children Court. It means a court established under the Commissions for Protection of Child Right Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012, wherever existing

[45]*Kulai Ibrahim* v. *State of Coimbatore*, Criminal Appeal No. 1308 of 2014.
[46]AIR 2000 SC 748.
[47]Sahil Ahuja, "Salient features of juvenile justice act 2015: Comparative study with UK" 4 *International Journal of Law* 110 (2018).

and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.

- When it comes to matters concerning children in need of care and protection, Child Welfare Committee will not have the final say since it is no longer the ultimate authority on the matter.
- Unlike the previous Acts, this Act has made it mandatory for the Child Protection Committee to investigate any child that comes before it. Receiving production reports must not deter the authority from conducting investigation of any child. Moreover, even the delivered and orphaned children have been included in its ambit.
- All the Child Care Institutions, whether run by State Government, or by self or by non-governmental organizations, have to register themselves mandatorily.

Need for the Enactment of JJ Act

The Juvenile Justice (Care and Protection of Children) Act, 2000 consisted several inconsistencies and did not encompass all types of children within its definition of children. Some of the drawbacks persisting in the aforementioned Act are discussed as follows:

- Since the authorities did not receive adequate financial and other resources, this Act was improperly implemented. The Government failed to provide guidelines or directions to be adhered to pertaining to the allotment and disbursement of funds for the care and well-being of juveniles.
- Under this Act, there was no demarcation between different offences. Hence, a delinquent participating in kidnapping of an individual would be punished with the same maximum sentencing given to a delinquent responsible for rape and murder of a woman. Hence, this prompted the courts to treat both heinous and serious offences on the same level.
- Mental and physical maturity of a juvenile had no relevance or significance under this Act.

Shortcomings in JJ Act

The JJ Act is not devoid of drawbacks. Some of the drawbacks of the Act are discussed herein:

- Child is to be treated as an adult- In the new Act, the children between the age of 16-18 years committing heinous offence, have been categorised as a child in two ways-
  a. Who cannot be treated as an adult and;

b. Who should be treated as an adult.

The criteria while deciding the adulthood of a child is preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he/she allegedly committed the offence. Even after the preliminary assessment and referral order of Board, the Children Court is again bound to determine the adulthood of the referred child. If an order is challenged regarding the preliminary assessment of a child, the appellate body is bound to take assistance of another expert and in this process again the opinion may differ. This yardstick is neither pragmatic nor objective.

- Lack of provision concerning the orders to be passed by Board after enquiry in heinous crimes committed by children falling between 16-18 years- Board has powers to pass any of those orders such as advice, admonition, probation, fine, community service, etc. as prescribed under Section 18, against the child who has committed either a petty offence, or a serious offence, or a heinous offence, being under the age of 16 years. But there is no provision in the Act as to what orders the Board shall pass after enquiry in heinous offence which has been committed by a child aged 16-18 years. In regard to this point, the Act is silent and needs to be clarified. The power has been entrusted with the central government to remove any difficulty.

The JJ Act provides that in cases of children aged 16-18 years, who are guilty of committing heinous crimes, if the Children Court decide that the child should not be tried as an adult, it may pass the orders of advice, admonition, probation, fine, etc. as prescribed under section 18. An inference can be drawn from this sentencing power of Children Court and would be safe to say that Board may also pass the same orders of advice, admonition, etc, in matters of heinous offence committed by children between 16-18 years of age.

- Existing ambiguity concerning Appellate Powers- According to section 101(1), except an order of preliminary assessment under Section 15, all orders passed by Board may be challenged before the Children Court. However, the proviso appended to this subsection says that in case of any delay in filing appeal, delay can be condoned only by a Sessions Court. It is a general principle of criminal law that an Appellate Court is empowered not only to hear the appeal but also empowered to condone the delay. Nevertheless, under the present Act, this power has been divided between the Sessions Court and Children Court. According to this provision, it seems that if there is a delay in filing the appeal, appellant has to approach Sessions Court. If Sessions Court

condones the delay, then again appellant has to approach Children Court for filing the appeal. It would have been better to confer both the powers on Children Court only. The legislative intent behind this provision is ambiguous. Either it is the deliberate intention of legislature or a clerical mistake which resulted in the use of term ‘Court of Session’ in place of ‘Children Court’.

Landmark Judgements on JJ Act

Since the enactment of JJ Act, several cases have been decided by the Apex Court and High Courts. Some of these landmark cases are discussed as follows:

In *Sampurna Behrua* v. *Union of India*,[48] the Supreme Court directed that all Juvenile Justice Boards should ensure that juveniles in conflict with law, who are brought before them, are provided immediate legal aid and if there is any difficulty to direct or instruct, the respective District Legal Services Authority should provide such legal aid.

In *Jitender Singh* v. *State of Uttar Pradesh*,[49] the Hon’ble Court directed that whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form a *prima facie* opinion on the juvenility of the accused and record it.

Jayakumar Nat v. *State of NCT*[50] of Delhi is a shocking revelation of how poor is the functioning of the Child Welfare Committees constituted under Section 29 of the Juvenile Justice (Care and Protection of Children) Act, 2000, the Labour Department and the Delhi Police are.

In *Ranjeet Goswami* v. *State of Jharkhand*,[51] it was held that no cogent reasons have been stated by the High Court to discard the school leaving certificate which was issued on 10-4-2004 by the then Principal of the school. Further, the Apex Court found no reason to reject the school leaving certificate. If that be so, there is no question of subjecting the accused to a medical examination by a medical board. Going by the school leaving certificate since the Appellant was a juvenile on the date of occurrence, he can be tried only by the Juvenile Justice Board.

[48](2011) 12 SCC 232.
[49](2013) 11 SCC 193.
[50]W.P. (CRL) 1548/2015 Judgement delivered on: September 04, 2015.
[51](2014) 1 SCC 588.

In *Rajinder Chandra* v. *State of Chhattisgarh*,[52] it was held that while determining the age of the accused for the purpose of finding whether a child is an accused or not, hyper technical approach should not be adopted.

In *Rahul Sharma* v. *State of Maharashtra*,[53] the Court held that proper care is expected from all the agencies, institutions and the government to ensure that necessary efforts are made to take appropriate and prompt steps to provide necessary infrastructure and opportunity for reformation of juveniles and not to allow them to become hardened criminals.

In *Jyoti Parkash Rai* v. *State of Bihar*,[54] the Supreme Court held that in order to determine the age of offender, the question whether he was juvenile or not on the day of commission of offence, is essentially a question of fact, which is to be determined on the basis of materials brought on records by the parties.

The Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021: An Overview

On July 28, the Rajya Sabha passed the Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021. This Bill seeks to modify the Juvenile Justice Act, 2015.

The reforms ushered forth through this Bill will provide District Magistrates with more powers and duties. Apart from ascertaining that, speedy trials are conducted in the cases falling under JJ Act, this Bill will empower the District Magistrate to take measures that will provide more protection to the children at district level. Moreover, this Bill will be a positive step towards expediting the adoption procedure in India.

District Magistrates, including Additional District Magistrates, can now issue adoption orders under Section 61 of the JJ Act in order to expedite case disposition and improve accountability, as per the amendment. Adoption procedures were previously handled by courts, and due to a massive backlog, each adoption case would take years to complete. This reform will see to it that a large number of orphans in need of caregivers are adopted more swiftly.

The District Magistrates have been entrusted with additional authority under the Act to facilitate the seamless implementation of the Act and to coordinate efforts in favour of children in distress. This means that DMs and ADMs will oversee the operation of numerous agencies established under the JJ Act in each district, such as Child Welfare Committees, Juvenile

[52](2002) 2 SCC 287.
[53]2005 Cr LJ 1973.
[54]AIR 2008 SC 1696.

Justice Boards, District Child Protection Units, and Special Juvenile Protection Units. Furthermore, District Magistrates are accountable for maintaining that all rules and procedures are followed by Child Care Institutions in their jurisdiction.[55]

Conclusion

It is imperative that we implement changes to our juvenile justice system. The JJ Act, on the other hand, is not the panacea to this problem. Allowing children to be tried as adults and sentenced ultimately wrecks their life in such a way that they do not even have a chance to rehabilitate themselves for atrocities they committed as innocent adolescents. Our country's justice system has at all times been reformatory since it attempts to reintegrate convicts into community as good Samaritans rather than deviant members. It is critical to comprehend how the transition of adolescents into criminals can be halted at the grassroots level.

Juvenile homes should be designed in such a way that delinquents have the possibility to integrate into society. They must be given opportunity to rehabilitate and enlighten themselves in order to be prepared to reintegrate into civilized society and lead a dignified life. The rehabilitative process entails a diversified cognitive approach to confidence boosting and employability, with the goal of preparing juveniles to tackle the obstacles of ordinary life.

The modifications in the law pertaining to juveniles' ages were enacted in response to concerns that rising teenage crime rates would stymie society's progress. Because of these unjustified and erroneous beliefs, politicians have taken a strong position on juvenile law. Juveniles account for a minor proportion of total crime in society. Moreover, there has been no significant growth in their numbers in last few years. As a result, the emphasis should be on effective implementation of prevailing rules and legislations rather than on enacting new ones. The present framework is insufficient for effective execution, and that there is a considerable paucity of resources. In lieu of reacting to public outrage, the administration should have accepted responsibility and addressed the eroding juvenile system. Although it is undeniable that horrible crime committed by minors is increasing, the answer does not rest in incarcerating these children, but in training and reforming them.

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[55]Esha Roy, "Explained: What changes in JJ Act for juvenile offenders and District Magistrates?", *The Indian Express,* August 5, 2021, *available at*<https://indianexpress.com/article/explained/juvenile-justice-amendment-bill-2021-explained-7429971/>*(last visited on March 11, 2022).*

COMBAT CYBER CRIMES AND RELATED PROBLEMS

- ***Anuj Raghuvanshi***[56]

Cybercrime is any criminal activity that involves a computer, networked device or a network. While most cybercrimes are carried out in order to generate profit for the cybercriminals, some cybercrimes are carried out against computers or devices directly to damage or disable them, while others use computers or networks to spread malware, illegal information, images or other materials. Some cybercrimes do both -- i.e., target computers to infect them with a computer virus, which is then spread to other machines and, sometimes, entire networks.

A primary effect of cybercrime is financial; cybercrime can include many different types of profit-driven criminal activity, including ransomware attacks, email and internet fraud, and identity fraud, as well as attempts to steal financial account, credit card or other payment card information. Cybercriminals may also target an individual's private information, as well as corporate data for theft and resale. As many workers settle into remote work routines due to the pandemic, cybercrimes are expected to grow in frequency in 2021, making it especially important to protect backup data.

PROBLEM

The convergence of computer network and telecommunications facilitated by the digital technologies has given birth to a common space called 'cyberspace'. This cyberspace has become a platform for a galaxy of human activities which converge on the internet. The cyberspace has, in fact, become the most happening place today. Internet is increasingly being used for communication, commerce, advertising, banking, education, research and entertainment. There is hardly any human activity that is not touched by the internet. The growing importance of Information Technology can be visualized from the fact that in India for the first time a Delhi based businessman has made a digital will of the secret information saved in his e-mail account. Digital will is a foreign concept which is gaining momentum in India also.[57]

Therefore, Internet has something to offer to everybody and in the process it only increases and never diminishes. The 'cyber manthan' has bestowed many gifts to humanity but

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[57] "Ab E-mail Accounts Ki Bhi Hui Wasiyat", Navbharat Times, April 5, 2010, p. 5

they come with unexpected pitfalls. It has become a place to do all sort of activities which are prohibited by law. It is increasingly being used for pornography, gambling, trafficking in human organs and prohibited drugs, hacking, infringing copyright, terrorism, violating individual privacy, money laundering, fraud, software piracy and corporate espionage, to name a few.[58]

Despite such a great influence of computers and internet on day-to-day lives, the fact remains that only a fraction of people know what computer and internet is all about? There is a paucity of systematic study which elaborately discusses the basic concepts of cyber world like meaning, evolution, generations, types, characteristics and major components of computers; forms of networks, history of Internet in India, services and limitations of Internet etc.[59]

Most of the books and thesis directly deals with the concept of cyber-crimes without thinking that to understand computer and internet crimes, one needs to understand first the computers and internet. This study is a sincere effort in this direction. Well, the new medium which has suddenly confronted humanity does not distinguish between good and evil, between national and international, between just and unjust, but it only provides a platform for the activities which take place in human society. Law as the regulator of human behaviour has made an entry into the cyberspace and is trying to cope with its manifold challenges.[60]

Though various countries have their domestic cyber laws, but the problem is that most of the books deal with cyber laws of individual nations. In this research work an attempt has been made to do a comparative study of the cyber laws of different countries. A legal framework for the cyber world was conceived in India in the form of ECommerce Act, 1998. Afterwards, the basic law for the cyberspace transactions in India has emerged in the form of the Information Technology Act, 2000 which was amended in the year 2008. The IT Act amends some of the provisions of our existing laws i.e. the Indian Penal Code, 1860; the Indian Evidence Act, 1872; the Bankers Book Evidence Act, 1891 and the Reserve Bank of India Act, 1934. Though since 2000 the IT Act is in place in India for curbing cyber-crimes, but the problem is that still this statute is more on papers than on execution because lawyers, police

[58] "Byte Replaces Bullets On Cyberspace", Hindustan Times, September 18, 2006, p. 11
[59] Dr. S.C. Sharma, "Study of Techno – Legal Aspects of Cyber Crime and Cyber Law Legislations", Nyaya Deep, 2008, p. 86
[60] Justice T. Ch. Surya Rao, "Cyber Laws – Challenges for the 21st Century", Andhra Law Times, 2004, p. 24

officers, prosecutors and Judges feel handicapped in understanding its highly technical terminology.

Through this thesis the researcher has tried to interpret its technical provisions into simple language which can be understood even by laymen. Since cyber-crime is not a matter of concern for India only but it is a global problem and therefore the world at large has to come forward to curb this menace. As a saying in criminology goes – "a crime will happen where and only when the opportunity avails itself." Until recently, we were aware of only traditional types of crimes like murder, rape, theft, extortion, robbery, dacoity etc. But now with the development and advancement of science and technology there came into existence machines like computers and facilities like internet. The internet has opened up a whole new virtual heaven for the people both good and bad, clever and naive to enter and interact with lot of diverse cultures and sub-cultures, geography and demographics being no bar. The very same virtues of internet when gone in wrong hands or when exploited by people with dirty minds and malicious intentions, make it a virtual hell. Stories of copyright theft, hacking and cracking, virus attacks and plain hoaxes etc. have mounted up in the last few years.[61]

There is no single text available which provides a coherent and consistent exposition on the various categories of cyber-crimes, their nature, scope, features and essential ingredients. It is fascinating to study cyber offences like cyber hacking, cyber fraud, cyber pornography, cyber terrorism, cyber stalking, cyber ragging6 etc. and also the US, UK and Indian approaches towards these offences. As a result of the rapid adoption of the internet globally, computer crimes are multiplying like mushrooms.

The law enforcement officials have been frustrated by the inability of the legislators to keep cyber-crime legislation ahead of the fast moving technological curve. At the same time, the legislators face the need to balance the competing interests between individual rights such as privacy and free speech, and the need to protect the integrity of the world's public and private networks. Moreover while investigating cyber-crimes, the investigating agencies and law enforcement officials follow the same techniques for collecting, examining and evaluating the evidence as they do in cases of traditional crimes.[62]

Most of the books are silent on the issue of electronic evidence. In this study the researcher has critically analysed the admissibility and evidentiary value of electronic evidence in addition to the methods of its procurement and examination. Further complicating cyber-

[61] S.K. Verma, "Controlling the Internet Crimes", CBI Bulletin, August, 2001, p. 17

[62] "Cyber Thieves are Caught, But Conviction is Wobbly", Hindustan Times, August 9, 2006, p. 18

crime enforcement is the area of legal jurisdiction. Like pollution control legislation, one country cannot by itself effectively enact laws that comprehensively address the problem of internet crimes without cooperation from other nations. While the major international organizations, like the OECD and the G-8, are seriously discussing cooperative schemes, but many countries do not share the urgency to combat cyber-crimes for many reasons, including different values concerning piracy or espionage or the need to address more pressing social problems.

These countries, inadvertently or not, present the cyber-criminal with a safe haven to operate. Never before has it been so easy to commit a crime in one jurisdiction while hiding behind the jurisdiction of another. Though the issue of jurisdiction in cyberspace cannot be settled spontaneously, but still a global effort in this direction is the need of hour.8 The present researcher has made an attempt to exhaustively analyse these jurisdictional riddles and has suggested the evolution of a uniform international law applicable to transnational cyber-crimes. Apart from tangible rights, some intangible rights called as 'intellectual property rights' such as trademarks, copyrights and patents etc. are also infringed in the cyberspace.
There is no dearth of specific books on IPRs, but books on IPRs vis-à-vis cyberspace are not much in number.

SOLUTION AND ITS ANALYSIS

This study has tried to undertake a collaborative approach on IPRs and cyber world. The purpose of this study is to cover the complete scenario of internet crimes, their magnitude and nature, and make an insight into the people who are responsible for it. This research work will also take a comprehensive view of the governmental efforts being done in India and abroad to stop such crimes and will look closely on their success and failures. An effort will also be made to vigorously analyse the various perspectives of IT Act, 2000; its ins and outs including its shortcomings and the possible means and ways to overcome them.

It has been generally accepted that procedural aspect of the criminal law is the main hurdle in tackling the problem of cybercrime effectively but at the same time, substantive part of the cybercrime also needs to be redefined to fight against ongoing cyber criminality. Out of a variety of cybercrimes, the European Convention has chosen ten specific cybercrimes and urged the member states to include them in their information technology laws and provide a concrete mechanism to fight against them. But it is rather unfortunate that many cybercrimes of a particular country are not treated as crime under the criminal law of other countries, which

really pose a problem when cross-country cybercrimes are involved. The solution to this problem lies in enacting a global cyber law uniformly applicable to all the countries of the world.

The crux of the matter is that universally accepted standard cybercrime preventive laws should not vary from place to place. A nation wise survey of cyber law indicates that only a few countries have updated their cyber law to counter the cyberspace crime effectively, while many of them have not even initiated steps to frame laws for policing against these crimes. This divergent approach of world nations towards the desirability of cyber law poses a real problem in handling the internet crime and at the same time provides ample scope for the cyber criminals to escape detection and punishment. All the nations should therefore, realize the need and urgency for generating awareness about the dangerous nature of cyber-crimes which are perpetuating illegal online activities in cyber space.

Cyber criminality is perhaps the deadliest epidemic spread over the world in the new millennium which has to be curbed by adopting a global preventive strategy. An overall global view of the cyber law indicates that many countries do have their national legislation for combating cyber criminality, but they radically differ from each other as a result of which, a particular cyberspace activity which is considered as a criminal offence in one country may not be necessarily so in another country. This variation in law provides loopholes for the cyber offenders to escape punishment. Therefore, there is dire need for international cybercrime legislation which could be uniformly acceptable by all the countries to tackle the problem of cybercrime. Not only that, there should also be an international policing agency for countering cyber offences. The solution to the problem therefore, lies in the concerted and united efforts of nations around the world and their mutual cooperation in fighting against cyber criminality.[63] Broadly speaking, the law enforcement agencies all over the world are confronted with four major problems while dealing with cybercrimes in a network environment.

The detection and prosecution of cyber criminals online is hindered by the challenges, which may be technical, legal, operational and jurisdictional. As regards technical challenges, cybercrimes such as hacking of a website, stealing data stored in computers, espionage, exchange of pornographic material, blackmailing etc. involve detection of source of communication which is a complicated task. Therefore, the cyber criminals find it easy to impersonate on the internet and hide their identity. The legal challenge emerges from the fact

[63] "Cooperation and capacity building are vital for Curbing Cyber Crime", The Pioneer, March 18, 2008, p. 7.

that cyber criminality is no longer confined to the developed countries alone but it has assumed global dimensions in recent decades. The conventional legal techniques of investigation of cybercrimes are inadequate particularly, in case of cross-country crimes. The problem becomes more complex because of lack of any universally accepted definition of cybercrime. Therefore, a cybercrime in a country may not necessarily be a crime in another country.

There are hardly 20 countries in the world which have enacted comprehensive cyber laws. In the absence of an adequate cybercrime laws, the cyber criminals carry on their illegal activities undeterred. Therefore, effective handling of cybercrimes requires a legal framework which is equally applicable to all the countries. The cyber laws should also be responsive to the fast developing information technology.

The operational challenges faced by the law enforcement agencies because of lack of adequate cyber forensic technology for dealing with cyber-crimes constitute another in-road which renders it difficult to collect and preserve sufficient evidence against the person accused of cybercrime, thereby resulting in his acquittal by the court. The traditional modes of procuring evidence are unsuited in case of cybercrime investigation because most of the evidence exists in electronic form. Therefore, there is dire need to develop suitable computer forensic mechanism for effective handling of cyber-crime investigation.[64]

In the context of electronic evidence, it is significant to note that despite the fact that digital signatures have facilitated e-commerce by reducing paper-work and ensuring quick transactions, it has not been widely accepted in India because of the technicalities involved in it and therefore, people in general still believe that paper-based documents are more dependable and trustworthy than the paperless electronic records. The reason being that former are tangible and serve as best piece of evidence before a law court. However, with the expansion of e-commerce and legal recognition of e-contracts in business transactions, there is change in the mindset of the people and they are gradually adapting themselves to the new e-environment and finally switching over to paperless electronic transactions.

The jurisdictional challenge impeding the efficient handling of cybercrime investigation result out of widespread inter-connectivity of the computer networks and the supporting infrastructure such as telecommunication information dissemination on the website etc. In fact, jurisdiction is a broad concept which refers to whether a court has power to adjudicate, i.e., whether it has personal jurisdiction to try the case and territorial jurisdiction

[64] https://shodhganga.inflibnet.ac.in/bitstream/10603/7829/18/18_chapter%209.pdf

over the location or place where the crime is committed or the parties concerned reside. In case of cross-country cyber dispute or crime, the problem often arises as to the law of which country would be applicable to the case in hand.

CONCLUSION

In view of the expanding dimensions of computer-related crimes, there is need for adopting appropriate regulatory legal measures and gearing up the law enforcement mechanism to tackle the problem of cybercrime with stern hands. Even a short delay in investigation may allow cyber criminals enough time to delete or erase the important data to evade detection, which may cause huge loss to the internet user or the victim.

That apart, the peculiar nature of cybercrimes is such that the offender and the victims do not come face to face, which facilitates the criminals to carry on their criminal activities with sufficient sophistication without the fear of being apprehended or prosecuted. It is for this reason that a multi-pronged approach and concerted efforts of all the law enforcement functionaries is much more needed for effective handling of cybercrime cases. A common cybercrime regulatory law universally acceptable to all the countries would perhaps provide a viable solution to prevent and control cyber criminality. The process of crime prevention essentially requires cooperation and active support of citizens, institutions, industries and the government alike. Therefore, a sound strategy for prevention of cybercrimes necessitates mobilization of community participation in combating this menace. This calls for participative role of all those who perceive that the growing incidence of cybercrime is a potential danger to the society as a whole.

The suggestions are:

1. Net Security by Tightened Up
2. Use of encryption technology
3. Intrusion management
4. False E-mail Identity Registration be Treated as an Offence
5. Self-regulation by Computer and Net Users
6. Liberalization of Law Relating to Search and Seizure
7. Use of Voice-recognizer, Filter Software and Caller- ID for Protection against Unauthorized Access
8. Development of Cyber Forensics and Biometric Techniques
9. Need to Establish a Computer Crime Research & Development Centre

10. Need for a Universal Legal Regulatory Mechanism
11. Global Code of Digital Law for Resolving IPR Related Disputes
12. Need for Universalization of Cyber Law
13. Interpol and Emergency Response Computer Security Team
14. Combating the Menace of Cyber Terrorism
15. Special Cyber Crime Investigation Cell for Hi-tech Crimes
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INDIAN CHILDREN: INNOCENT VICTIMS OF DOMESTIC VIOLENCE

- Jatinder Jain[65]

Abstract

When we think of domestic violence, we always think of how much it hurts the adult victim and seldom talk about its impact on innocent children who happen to be an innocent victim of domestic violence by being a witness to the same. It's true that domestic and family violence is most often violent, abusive or intimidating behaviour by a man towards a woman. But what you may not realise is that children also experience domestic violence and this affects their physical and emotional health and wellbeing depending upon the nature of domestic violence and the age of children. This paper aims at exploring the possible impacts of domestic violence on children and suggesting ways to control and remedy the same.

Keywords: *Domestic Violence, Abuse, Child*

1. Introduction

Pursuant to its acknowledgement as a human rights issue by the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995), the United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Woman (CEDAW) in its General Recommendations No XII (1989) recommended that state parties should act to protect women against violence of any kind, specially that occurring within the family and consequently the Indian government came up with the Protection of Women from Domestic Violence Act, 2005, addressing for the first time the widely prevalent phenomenon of domestic violence here in India.

This was not the first time that such a law was made to protect women from such acts of violence occurring within the family. Section 498A was inserted by way of an amendment in the Indian Penal Code which provided that it is an offence if a woman is subjected to cruelty by her husband or his relatives. In addition to the recourse under section 498A of the IPC, this 2005 Act provided a civil remedy for protection of women from being victims of domestic

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violence and to prevent the occurrence of domestic violence in the society. The 2005 Act is a civil law which focuses on the reliefs given to the aggrieved woman such as compensation, protection, right to residence in the "shared household" etc., unlike in the criminal law, where the prime focus is on punishing the accused.

The 2005 Act is worded in a manner so as to provide the widest possible connotations meant to cover all kinds of violence faced by a woman at her "shared household". Section 3 of the 2005 Act defines "Domestic Violence" as any act, omission, or commission or conduct by the respondent, if it causes or even tend to cause any harm or injury to the safety, life, health or well-being of the aggrieved person and it includes within its ambit physical, sexual, verbal, mental or economic abuse as well. Moreover, it also includes any injury or harm done to the aggrieved woman or her relative with a view to coerce her or any person, to meet unlawful dowry demand. Threats to commit violence are also covered under this definition. This definition and its implications in unequivocal terms provides a glimpse of the concept and the wide-ranging nature of 'domestic violence'.

This definition provided for, in the 2005 Act is modelled in accordance with the definition of domestic violence United States Department of Justice Office on Violence Against Women, which defines it as a pattern of abusive behaviour in any relationship that is used by one partner to gain or maintain control over another intimate partner. In addition to the forms of domestic violence enumerated in the preceding paragraph, the definition also includes psychological abuse, threats, stalking and cyber stalking.

Although the Indian response to this evil phenomena of domestic violence is undoubtedly a remarkable feat in so far as its commitment towards the preservation, protection and upliftment of rights and dignity of women is concerned, still it has not yet aptly responded to the plight of another vulnerable section of society i.e, the children, the innocent and voiceless victims of domestic violence are concerned as the laws relating to domestic violence here in India treats only women as a victim and it completely ignores the plight of innocent and immature children who are always a witness and often victim to the acts of domestic violence.

2. Children: Unheard Victims of Domestic Violence

In so far as the impact and effects of domestic violence on women and other adult individuals of the house hold are concerned they are well people of considerable maturity and their plight can be well documented as they are mature enough and are able to express their plight and concern before the concerned authorities. They can even approach the concerned authorities

and ask for available remedies. However, there are other voiceless victims of such abuse who due to sheer lack of considerable maturity fail to raise their voices, these are the innocent children who are often ignored by the concerned authorities including the law makers while formulating and implementing laws relating to domestic violence. Domestic Violence against children often involves physical and psychological abuse and injury, neglect or negligent treatment, exploitation and even sexual abuse. The perpetrators may include parents and other close family members. If reports of UNICEF are to be believed it states, "*Every year, as many as 275 million children worldwide become caught in the crossfire of domestic violence and suffer the full consequences of a turbulent home life*".

In so far as the international arena is concerned, the authorities have time and again highlighted and addressed the issues relating to the rights of child. The Universal Declaration of Human Rights had stipulated under para 2 of Article 25 that childhood is entitled to special care and assistance. This principle and various other principles were incorporated in the Declaration of the Rights of Child adopted by the General Assembly on November 20,1959. Even the International Covenant on Economic, Social and Cultural Rights under Article 10 and the International Covenant on Civil and Political Rights Under Articles 23 and 24 made provisions for the care of the child. The Convention on the Rights of the Child was adopted by the General Assembly on 20 November 1989.[5] This Convention under Article 1 states that a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. The logical reason underlying the definition of children as a human being below the age of eighteen seems to lie in the basic & universal fact that the human beings below the age of eighteen years, due to their economically and socially dependent status in the society are rarely capable of taking their own decisions and are often dependent upon other adults for their needs relating to care, protection, education and overall well-being and thus are not considered adult.

The Indian response in so far as the protection and upliftment of rights and dignity of children is concerned is overwhelming, which is evident from the provisions enshrined in our Indian Constitution and also in other laws such as, the Children (Guardianship and Custody) Act, 1957, the Commissions for Protection of Child Rights (CPCR) Act, 2005, the Protection of Children from Sexual Offences Act (POCSO), 2012, and the Juvenile Justice (Care and Protection of Children) Act, 2015 enacted by the legislators keeping in mind the special need of care & protection to the children. These laws however have failed in yielding any significant outcome in those cases in which children are victims of a violent or abusive household. As per

the directives of United Nations, it is evident that they too, have time and again taken up the cause of child victims and have come out with the following six guiding principles in form of the Report of the Independent Expert for the United Nations Study on Violence against Children, which states. -

1. No violence against children is justifiable.
2. All violence against children is preventable.
3. States have the primary responsibility to uphold children's rights to protection and access to services.
4. States have the obligation to ensure accountability in every case of violence.
5. The vulnerability of children to violence is linked to their age and evolving capacity.
6. Children have the right to express their views, and to have these views taken into account in the implementation of policies and programmes.

The Juvenile Justice (Care and Protection of Children) Act, 2015 provides both the definition and the legal framework to deal with situations where a child is in need of care and protection. Although the Act has tried to provide the broadest possible definition to the phrase "*a child in need of care and protection",* the Act failed to include in clear and unambiguous terms, within its ambit, those children, who are witness of the acts of domestic violence. The impact of domestic violence occurring within the four corners of the house can be devastating depending upon the maturity level of the child.

1. **Early childhood (Birth to eight years),**

Early childhood the most critical time of childhood for it is a time that involves basic and essential learnings such as Emotional regulation and attachment, Language development, Cognitive development and Motor skills. The Indian National Education Policy 2020 too have admitted that over 85% of a child's cumulative brain development occurs prior to the age of 6, which indicates the critical importance of appropriate care and stimulation of the brain in the early years in order to ensure healthy brain development and growth.

2. **Middle childhood (Eight to twelve years),** and

Middle childhood is the time during which the children develop foundational skills for building social relationships and learn roles that will prepare them for adolescence and adulthood, it

involves academic success, self-discipline, situation analysis, decision making, negotiation skills and relationship management with family and friends.

3. Adolescence (Twelve to eighteen years).

The period of adolescence usually starts sometimes in the middle school and ends with attainment of legal majority and sexual maturity. One of the most basic tasks getting accomplished during adolescence is that of identity formation of an individual.

The abovementioned three stages of childhood jointly constitute the formative years of human being as they involve varied stages of learning and of attaining maturity and independence and therefore if the childhood is scarred by exposure to the acts of domestic violence it will either significantly delay the learning process due to lack of care & concern and other environmental stressors & factors, which can affect the brain and may seriously compromise a child's physical, social-emotional, and cognitive growth and development or will destroy the entire process of learning and of attaining maturity which are considered essential for a civilised human being.

The behavioural and psychological consequences of growing up in a violent home can be just as devastating for children who are not directly abused themselves. Based upon its nature and severity, the impact of domestic violence on children can have both short term as well as long term implications. Infants and small children who are exposed to violence in the home experience so much added emotional stress that it can harm the development of their brains and impair cognitive and sensory growth which may result in certain behavioural changes such excessive irritability, sleep problems, emotional distress, fear of being alone, immature behaviour, and problems with toilet training and language development, whereas the adolescents who are exposed to the instances of domestic violence often resort to deviant behaviour such as illegal and criminal activities involving substance abuse and violent crimes. During its formative years, a child's brain is becoming 'hard-wired' for later physical and emotional functioning. Exposure to domestic violence threatens that development and can disrupt the overall development of the child as they are more concerned with the issue of coping up with this trauma rather than focusing on their education or developing a new skill which can improve their chances of becoming a competent professional in their respective field of interest.

Theorists after studying and examining behaviour of children for centuries have propounded numerous theories explaining the impact of domestic violence & abuse on children.

2.1 The Theory of Imitation:

Gabriel Tarde, who was the forerunner of modern learning theorists and believed people learn from one another through imitation.[7] According to this theory individuals in close, proximate and intimate contact often imitate each other's behaviour. This imitation always spreads from the top towards down and as consequence children and youngsters imitate older individuals and weak imitate powerful people.

A boy of tender age often considers his father to be his hero, strongest, super powerful and thus when he witnesses his father indulged in abusive behaviour and specially getting away with it, he subconsciously starts imitating his father's dominating and abusive nature and there is a possibility that, the same child upon attaining adulthood might end up being an abusive partner or parent. At the same time a girl child who witnesses the plight of her mother in an abusive relationship subconsciously imitates her behaviour and upon reaching adulthood she herself could a victim of abusive behaviour at hands of her partner. Quite often the consequences of domestic violence span generations. The effects of violent behaviour tend to stay with children long after they leave the childhood home. Boys who are exposed to their parents' domestic violence are likely to become abusive men as are the sons of non-violent parents. Furthermore, girls who witness their mothers being abused are more likely to accept violence in a marriage than girls who come from non-violent homes.

3. Social Process Theory And Family Relations

Family relationships within a household are considered a major determinant of individual behaviour. Youths who grow up in a household characterised by conflict and tension, or where there is lack of familial love, affection and support are susceptible to crime - promoting forces in the environment. Children raised within a distressed household are at risk for delinquency. Children born and raised in a loving atmosphere, who have affectionate ties to their parents report greater levels of self-esteem, however, when parents exhibit deviant behaviour, their children are likely to follow the same traits. Children raised in violent and abusive household often exhibit personality defects such as excessive anger and negativity.

Children who witness or survive abuse often suffer long-term physical and psychological damage that impairs their ability to learn and socialize, and makes it difficult for them to perform well in school and develop close and positive friendships. Children who are exposed to violence often suffer symptoms of post-traumatic stress disorder, such as bed- wetting or night-mares, and are at greater risk than their peers of suffering from allergies, asthma,

gastrointestinal problems, depression and anxiety. Primary school-age children who are exposed to domestic violence may have more trouble with schoolwork and show poor concentration and focus.

There is a clear and established link between child abuse, neglect and crime. Children who are subjected to physical violence often resort to violent means in personal interactions. It is not disputed that aggressive child often have aggressive parents who use similar tactics when dealing with others. In some extreme cases the child victim, who has been subjected to domestic violence and or have witnessed the same or is raised in a dysfunctional family often displays unique and deviant personality traits. Because of the mental trauma that he experienced at tender age he may react in various unusual ways, such a child might become introvert, aggressive, anti-social. Also, in some of the extreme cases such abuses and violence occurred during the childhood might result into ***patri-cide***, the killing of the father, or ***matri-cide***, the killing of the mother, or ***parri-cide***, the killing of close relative, or even ***suicide***

4. Conclusion

Children have the inalienable right to a home environment that is safe and secure, and free of violence and the state therefore has a corresponding duty to provide them with a home environment that is safe and secure, and free of violence which can only be ensured by an integrated, strengthened and responsive institutional mechanisms. It should be made mandatory that while handling an issue or a call relating to domestic violence the responding officer must ensure that special care and attention is given victim especially to the children residing in that household. By the time our Indian legislators come up with more focussed and stringent laws on this issue, the concerned authorities should ensure that the provisions relating to child care and children welfare should be read along with the provisions relating to domestic violence. The effectiveness of measures and initiatives will depend on coherence and coordination associated with their design and implementation. We must provide for mandatory reporting mechanism thereby compelling schools, day-cares, hospitals to inform law enforcement agencies if they find any symptom associated with domestic violence and abuse. I am sure that with concerted and co-ordinated multisectoral efforts we can make things better.

TRIAL BY MEDIA: A VIOLATION OF THE RIGHT TO FAIR TRIAL?

- ***Kanishk Gupta***[66]

Abstract

Outreach of Indian media has been unparalleled in the last two decades with the emergence of technology. As the information has become easily accessible, reliance of a common man upon media outlets and news channels has grown significantly. However, media is no longer a symbol of truth with its act of distorting the facts and reporting false and malicious pieces of news.

In the last few years, Media has felt empowered to conduct trials and interfere with the right of the accused to be legally represented and receive a fair trial. Owing to this, many suspects have faced backlash, humiliation, loss of reputation even before they were declared as convicts. The past wrongs cannot be undone; however, the rights and privileges granted to the press must not be unconditional or unrestricted. It is high time that Courts regulate the unfettered power enjoyed by the press to the point it does not affect their right to freedom of speech and expression.

Introduction

In the form of legal constraints, India's media is among the most liberated in the world. Freedom of expression, as enshrined in Article 19(1) of the Constitution, continues to be a significant enabler of widespread participation in a democratic setting.

Pandit Jawaharlal Nehru had put it succinctly-

"*I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press.*"

The wonderful leader could not have anticipated the risk associated with the act of administering justice. It is something that is at the heart of natural justice and the rule of law, and he might not have presumed the media to participate in something that is beyond its ethical bounds. To turn his vision into reality, the press has been accorded numerous rights and

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privileges, ensuring that this cornerstone of democracy never loses its footing. It should be noted that freedom of expression is not absolute, unrestricted, or unregulated, and that granting unrestrained freedom of speech and expression would lead to uncontrolled licence under different scenarios.

The media has transformed into 'public court' with the aim to deliver justice without awaiting the court's decision on the matter.[67] Not only that but it has gone to the extent of meddling in the affairs of court by disrupting the proceedings. It has entirely forsaken the existing distinction between a person who has been indicted and a convict. Presently, all that we witness is nothing but ‘media trail’. In this, independent investigation is conducted by the media that allows the common man to form opinion about the person charged with the offences even before the trial commences in the court. This separate trial sways the public opinion and influences the pronouncements of the judges in a negative matter. This hampers the rights and liberties of the accused and weakens his chances of proving himself innocent.

Throwing Spotlight on Media Trial

Abuse of this fundamental freedom granted to the media has been rife, notably in the modern age where technology has taken over essentially every facet of our life. Reporting of news is no longer confined to the conventional methods of print and publication. There are news outlets and media companies that broadcast news 24 hours a day, seven days a week. Diametrically opposed to bygone days when there was a dearth of information and communication channels, today's society suffers from an abundance of and rapid dissemination of information. With boundless information accessible, it can be tough to determine what content to absorb. In a technological and data driven world, it is critical to give the press the flexibility to control their operational bases. However, with power comes accountability. The press should be answerable. Not only that but it should never shy away from accepting responsibility for the actions whether positive or harmful. Regrettably, quite often, absolutism has been practised in the mainstream press. Hence, it intends to seize control and function as per its ideas and impulses. As a result, there is a media trial. The media's desire is no longer simply to disseminate information after ensuring the veracity of the statements or news, but to boost its TRP (Television Rating Point) in order to compete effectively. The expression "media trial" refers to the media's declaration of culpability or innocence of an individual before he or she

[67] S. Devesh Tripathi, *Trial by Media- Prejudicing the Sub-Judice*, *available at* http://www.rmlnlu.ac.in/webj/devesh_article.pdf (last visited on February 6, 2022).

has been heard in any court of law, based on little or no evidence, if any evidence is available whatsoever. Prior to attempting to launch a charade against a specific individual, the mainstream press most presumably doesn't quite consider the consequences of its doings. Aside from affecting the judges and the public, a media trial meddles into the private matter if an individual and, truth be told, has a significant impact on the person's psyche as well as that of his kith and kin. The individual's reputation suffers, quite often even before the court having the competency to decide the case takes cognizance of the matter. It is saddening that the mainstream press, for the sake of its benefit, successfully strangulates individuals, making it difficult for them to integrate into society or start afresh. There have been several instances in which an individual could no longer bear what the media said and committed suicide. Once a person ceases to exist, the prospect of a fair trial is lost, as is the implicit repercussion of the despair and endless torment that follows the death. When it comes to ethics, grave transgressions have occurred, and many wrongs have been ignored and allowed to subsist.

Media Trial: A Gross Violation of Right of the Accused

Litigation is not always a quest for finding out the truth or sifting fact from fiction. Media trials have always been fraught with complications because they involve a pull between two opposing principles: the free trial and the free press, both of which the general populace appears to believe in. Press enjoys the freedom bestowed upon and this freedom is an essential component of democratic governance. This is the kind of explanation that has been provided for investigative reporting.

Simultaneously, the right to a fair trial is a fundamental right guaranteed to all offenders and victims alike, unaffected by any external agency, and is thus acknowledged as a fundamental principle of justice.

It does not take into account the plethora of truths and the complexities of incidents, challenges, or persons. When a trial conducted in a court of law is intrinsically complicated in an adversarial legal system, a trial by media brings about major challenges.

Negative campaigns, unsubstantiated allegations, and the likes have a significant effect on the legal system. They also pollute the country's social and intellectual ecosystem. From their perspective, the media trial may be completely fair and justified since it can do no wrong. Since the public sees the media as a credible news source, the media has the ability to affect the outcome of a trial and the life of the accused. Consequently, the media functions as a public court or a Janta court, determining the culprit prior to the initiation of the court hearings.

By continuously reporting about an individual who is accused in a trial, the press convinces the common man to form an opinion about that individual as a wrongdoer, resulting in the offender's guilt before the proceeding commences. As a result, the media trial is not as objective because they lack the authority to intervene and push the public to form a forced opinion against a person. By conducting the pre-trial, the press interferes with the court's system and mechanism, which is prohibited by any legislation or statute and violates the right of the accused to receive a fair trial.

Discerning the Judicial View towards Trials Conducted by Media

There has never been a legal system in which the press has been given the authority to adjudicate a case. Each coin has two faces, and the same is true for the trial by media; in some cases, journalists depict a predetermined image of an offender, so shredding his/her reputation, which can subsequently impact the trial and the judgement, thereby media trial. In India, such trials have gained ground. Numerous instances have occurred in which the press decided the case on its own accord and announced verdict against an offender in violation of fair trials sanctioned by law. Today, media has the means to influence a common man's thought process. People's perceptions are influenced by media, which can have both favourable and harmful consequences. The press does nothing more than corrupt people's minds. Once an actor died a few years ago, there was a lot of outrage about the inquiry and apparent mishandling of the latter's strange death. The media told the complete narrative of the actor's death in such a fashion that the general public was conditioned to believe in the suspect's culpability. The mainstream press had taken a giant step by publishing and broadcasting information upon mere conjecture regarding the course of the investigation by relevant authorities, in order to strongly comment on the topic on a continuous basis and opine on the findings without confirming the truth.

This form of coverage has placed unnecessary strain on a fair inquiry into the matter and trial of the accused. The press launched a parallel investigation and trial in this form, and prophesied its decision without waiting for the completing of trial and pronouncement of judgement by the Court. In relation to the matter, the court questioned whether the existing framework for its process of regulating itself without interference of external agencies of the digital media was suitable to maintain an equilibrium between right of free speech and expression enshrined in Article 19(1)(a) of the Indian Constitution and an offender's right to receive fair trial.

Challenges of Regulation

Regulation of the media poses a challenge more than ever before. Modern media consists of many diverse means, both traditional and new: newspapers, periodicals, books, TV, films, the Internet, and cell phones. Newspapers are over 200 years old, while the internet is less than three decades old. Each has evolved at a different time; each depends on a different technology and throws up its own peculiar challenges. As a result, there is no single law or coordinated control by a centralized authority but a web of laws and authorities regulate the media. The police have powers to punish for offences relating to obscenity, defamation, disruption of public order or national security under various statutes such as Indian Penal Code and the Information Technology Act, 2000. For TV, the local Magistrate and the Police Commissioner are empowered to take action for contravention of the Cable Television (Networks and Regulation) Act, 1995 in whatever form- the telecast of obscene material, programmes which are likely to incite disorder or violence, defamatory material or material likely to cause class hatred, for piracy, etc. The Press Council, a body under The Press Council Act, 1978 has power to regulate content in newspapers. The courts have the power to punish for contempt of court, as does Parliament, and the State Legislatures the power to punish for contempt of the House or a breach of privilege. The Censor Board, an authority constituted under the Cinematograph Act, 1952 regulates the content of cinematograph films and has powers to censor films on more or less the same grounds found under Article 19(2) of the Constitution. Disputes within the film industry are usually resolved by self-regulatory bodies which are fairly effective. Advertisements are regulated through self-regulation as also under the Cable Television (Networks and Regulation) Act, 1995, the Indian Penal Code and the Consumer Protection Act, 2019. Lately, self-regulatory bodies in the broadcasting industry, such as the Indian Broadcasting Federation (IBF) and the News Broadcasters Association (NBA) have become fairly active. The seamless web of laws and diverse authorities makes media regulation a rather complex and unwieldly task.

In *Destruction of Public and Private Properties* v. *State of A.P.*[68] which arose out of destruction of property during strikes and demonstrations, the Supreme Court accepted the F.S Nariman Committee recommendations on regulation of the media. The gist of these recommendations is mentioned herein:

[68](2009) 5 SCC 212.

So far as the role of media is concerned Mr F.S. Nariman Committee has suggested certain modalities which are essentially as follows:

a) *The Trusteeship Principle-* Professional journalists operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.
b) *The Self-Regulation Principles-* A model of self-regulation should be based upon the principles of impartiality and objectivity in reporting; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security; and respect for privacy.
c) *Content regulation-* In principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statutes. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. But prior content control (while accepting the importance of codes for self-restraint) goes to the root of censorship and is unsuited to the role of media in democracy.
d) *Complaints Principle-* There should be an effective mechanism to address complaints in a fair and just manner.
e) *Balance Principle-* A balance has to be maintained which is censorial on the basis of the principles of proportionality and lease invasiveness, but which effectively ensures democratic governance and self-restraint from news publications that the other point of view is properly accepted and accommodated.

It is felt that the appropriate methods have to be devised for norms of self-regulation rather than external regulation in a respectable and effective way both for the broadcasters as well as the industry. It has been stated that the steps constitute a welcome move and should be explored further.

Regulation has been made more challenging by the globalisation of news and entertainment through satellite television and the Internet. Previously what could be regarded as acceptable in certain societies could be regarded as entirely unacceptable and liable to censure in others. However, with globalisation and exposure to foreign cultures, notions of social mores, of morality and acceptability are becoming increasingly homogenised. Also, paradoxically, the very technology that made this media revolution and globalisation possible also makes it

virtually impossible to control the flow of information. While the advancement of technology has broken down traditional barriers and has made communications instantaneous and globalised, it has also rendered censorship redundant. The availability of information on the Internet is difficult to monitor, and what may be banned in one country is easily available through the Internet and satellite television in another.

In a country with as robust and multifaceted a freedom of expression as India, censorship by the government and moral policing is undesirable. Yet, given the sliding standards in content, some argue that an element of centralized regulation is necessary. Organised self-regulation may provide some solutions but may not be adequately effective given the vested interests within the industry. One solution could be the establishment of an autonomous supervisory regulator, free from governmental control as from private control. Another point of view is that the media should be left as it is; free to follow its own course. Every democracy gets the government it deserves, and every society, its media.

How Media Trial has Overshadowed Fair Trial

Pre-trial publicizing undermines the integrity of a fair trial. The trials by media have indeed placed strain on legal practitioners not to undertake matters where the public perceives certain individuals to be culpable without proof, causing the defendant to waive his right to a representation. However, it also creates a lot of hurdles and challenges for the lawyers who sign up for such cases. The concept of a media trial is not new. The part played by media in impacting the course of a trial and the subsequent judgement was discussed in the matter of Priyadarsini Mattoo[69] and other prominent cases.

The power of the fourth pillar i.e., media, has been immense, however, when this power hampers the administration of justice, intervention by the Court become necessary.[70] There have been countless cases where the press has been condemned of conducting the offender's trial and rendering the judgement before the court delivers its decision. Consider the instance, when Ram Jethmalani represented the suspect Manu Sharma in the matter concerning Jessica Lal's murder[71]. Commenting on senior advocate's move to represent the accused, a senior editor of a News station claimed it to be lost battle stating that Manu Sharma was guilty for the

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[69]*Santosh Kumar Singh* v. *State thr. CBI*, Criminal Appeal No. 87 of 2007.
[70]Vishwajeet Deshmukh, *Media Trials in India: A Judicial View to Administration*, JURIST-Student Commentary, January 20, 2021, *available at* <https://www.jurist.org/commentary/2021/01/vishwajeet-deshmukh-media-trials-india/> (last visited on February 8, 2022).
[71]*Manu Sharma* v. *State (NCT of Delhi)*, Criminal Appeal No. 157 of 2007 and Criminal Appeal No. 224 of 2007.

deceased's murder, even before the trial was concluded. The media's presumption certainly infringes upon the defendant's right to receive a fair trial and his right to choose a legal practitioner to defend his case.

In the aforementioned case, the court stated that, given the importance of electronic and print media in recent times, it is not only preferable but also the minimal to be hoped from those in control of affairs in the system to ascertain that trial conducted by them does not impede the investigation to be done by the relevant authorities and, more pertinently, does not violate the perpetrator's right to defence in any form. If each of these poses barriers to the recognized judicious and fair inquiry and trial, it will be a farce of justice.

What started as a gimmick to gain attention of the public and increase the viewership has lasted too long now and is endangering the very democracy that it gets its power from.[72]

Reporters are permitted to inquire into the facts of a case and comment on the same; however, they cannot convict somebody, make baseless remark on the problem without knowing both sides of a coin, or influence the outcome of the trial. A fair trial seeks to provide the offender with the best possible opportunity to establish his innocence. A fair trial proves advantageous to both the offender and society. However, an unjust trial chips away at the moral fabric of society and fails to preserve the spirit of justice.

Supreme Court's Stance Concerning Media Guidelines

In 2012, the Supreme Court of India constituted a Constitution Bench of five judges to consider whether guidelines ought to be framed by the court in respect of media reporting of ongoing cases. The immediate provocation was the unauthorized leak by a private television channel of a privileged communication in respect of a settlement proposal exchanged between the lawyers on two sides in *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*[73] (hereinafter the "*Sahara*"). On 10 February 2012, the Apex Court passed the following order:

"*We are distressed to note that even 'without prejudice' proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV channels. Such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice. In the above circumstances, we have requested*

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[72]Aditee Dash, *Media Trials: Misuse of Freedom of Speech and Deterrent in the Path of Justice,* Manupatra, July 2, 2021, *available at*https://articles.manupatra.com/article-details/Media-Trials-Misuse-of-Freedom-of-Speech-and-Deterrent-in-the-path-of-Justice (last visited on February 9, 2022).

[73](2012) 10 SCC 603.

learned counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate Orders could be passed by this Court with regards to reporting of matters, which are sub-judice…."

In an application filed by *Sahara*, (IA No. 35-36 of 2012) complaining of the unauthorized broadcast, the Supreme Court opened up the debate on general media reporting of court cases and arguments were addressed before the Constitution Bench on behalf of several parties including media houses and journalists over a hearing which lasted for several weeks from March to May 2012. Most parties argued against the framing of court guidelines, notably the applicant, Sahara itself. A few parties argued in favour of guidelines, particularly to address the difficulties arising from media reporting of criminal cases.

What was sparked off by the mysterious leak to the media of a confidential exchange between lawyers in the case, snowballed into an open-ended debate on media transgressions and the need to rein it in with guidelines. It did not help that in several recent cases the court had expressed its displeasure with media sensationalism. Still fresh in the public memory were the controversies surrounding the live telecast of 26/11 and the involvement of journalists in the Radia conversations. Here was an opportunity, it seemed, for the court to show the media its place once and for all, to craft contours within which it could report the courts. There was reason for concern.

The judgement is probably more significant for what it does not say. The court refrained from carving out any general guidelines, recognising that no one shoe fits all. That itself brought much relief.

It can be gathered that while recognising the presumption of open justice and the media's right to report court proceedings, the Supreme Court held that there may arise exceptional cases where reporting may adversely impact the administration of justice. In such cases, reporting may be deferred for a limited duration by the Supreme Court or the High Courts. An order of postponement must pass the tests of necessity and proportionality and be resorted to only where no alternative measures are available.

The *Sahara* judgement should not be seen as a dilution of the open justice principle. Such an interpretation would have dangerous implications not only for the media but for the larger public interest. The idea was surely not to open the floodgates for the rich and influential to approach the courts to have publicity of their proceedings censored, albeit temporarily. That could be very damaging for the public interest. With the ills that plague the justice system in India, we need more openness, not less. In addition to the high-profile cases that get media

attention, if the media followed up on the fate of ordinary cases involving ordinary people, perhaps the tens of lakhs of cases that languish in courts across the country would get more efficient justice delivery. What is known as the "sunshine effect" of open justice ensures that the State machinery is not misused to unjustly condemn the innocent, that judges and public prosecutors conduct themselves with probity, that proceedings are not needlessly protracted and that justice is delivered fairly and efficiently. The glare of contemporaneous publicity and the fear of public censure keep the entire system on its toes.

The world has never known so much transparency and openness as technology has made possible today. In several jurisdictions, there is live televised reporting of cases. Technology should make the system cleaner and more accountable. The media must report more cases, not less. All jurisdictions recognise exceptions to open justice. But exceptions cannot displace the norm.

Conclusion

The media trials have clearly had a detrimental influence rather than a beneficial one. The courts must effectively supervise the media. While a government-controlled media is not healthy for democracy, the implications and consequences of unchecked published news pieces are much more injurious, not only to the individual's image in a society but also on the judgements pronounced in courtrooms. As a result, these trials have only managed to aid people in a few circumstances, but this is not applicable in all the cases, thus constraints must be placed on them.

Media form one of the cornerstones of our society. Hence, it should acknowledge its responsibility towards disclosing verified information to the viewers and discarding unsubstantiated pieces of information. Since a common man relies on media to learn about the current events, and forms an opinion according to the information published, media should not misuse the faith invested by him and other such individuals and discharge its duty with utmost care.

This, in fact, necessitates the presence of a responsible media. No freedom or privilege, no matter how important, can be granted in an unlimited fashion. Existence of checks and balances is important. This also applies to freedom of press which is bound by the laws of the country. Therefore, while carrying out its functions, press should be mindful of its actions and the consequences that may ensue from them.

The legislative bears a tremendous deal of responsibility when it comes to creating rules governing the media, ensuring that their independence is not restricted. The press has the freedom to debate and opine on case decisions, but they do not have the right to conduct a trial on matters that are under judicial consideration.

The Apex Court of India has authorized the use of contempt powers by judges against publications and media outlets in a handful of cases. The ambit of media's freedom of speech and expression cannot be widened to the point that it hinders the offender’s right to receive a fair trial.

INFLUENCE OF PUBLIC OPINION ON CRIMINAL JUSTICE SYSTEM IN INDIA

- ***Harpreet Singh***[74]

ABSTRACT:

In this article, the meaning and definition of public opinion have been discussed and how this public opinion affects the whole criminal justice system of India. Various causes have been discussed that give an elaborated idea of how public opinion influences police investigation and then the court's decision. The role of media in moulding public opinion has also been discussed in this article. The criminal justice system needs to be reorganized to inspire public confidence by treating everyone fairly and to provide systematically high standards of service for the victims and the witnesses, and to provide more justice through a modern and efficient justice system in compliance with the rule of law. The criminal justice system should focus more on actual evidence and witnesses while delivering justice and less on public opinion. It is by ensuring justice for everyone, we can assure peace for all.

Keywords: criminal justice, opinion, influence

INTRODUCTION

As Aristotle had said, "It is an injustice that ordering of society is centred." The criminal justice system upholds the Rule of Law which is the fundamental principle of our democracy and hence plays an important role in maintaining order in the society. The Indian courts are staggering with a lot of pending cases. It is important to note that, delay in justice is justice denied and denial of justice is justice buried. Even in this digital era, the delays in proceedings of the courts are unpardonable. Effective use of e-governance tools for accelerating the process of solving criminal cases in all regions of India is highly in need. In a court of law, legal technicalities must not prevail over the fundamental requisite of providing justice. Although the conviction rate for the crimes under the Indian Penal Code, has been improved marginally in recent years, still there are many cases where Public Opinion has influenced the police investigation and affected the Criminal justice system of India. A recent case of high court

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where police, on a protest raised by public removed a suspect from the array of accused and ultimately resulted in the acquittal of the accused in the case, is been discussed in this article. Since the media and public are always obsessed with crimes, there is a popular culture of news coverage of criminal issues that happen in the country. Therefore, the media plays a crucial role in shaping up the social perspectives of criminal justice through moulding public opinion. It sometimes pushes people to prejudge the verdict of criminal proceedings. As media affect the public preferences regarding a particular criminal matter, the judges and jurors are also likely to give their judgments in ways that allow them to favour the media. So, how far does this public opinion influence the decisions of the court and end up affecting the criminal justice system of India is discussed in this article?

WHAT IS MEANT BY PUBLIC OPINION?

As said by Anderson and Parker, "A public is that form of collectivity which includes a number of dispersed and non-organized individuals who are faced with an issue about which there may be differences of opinion." Kimball young defined opinion as, "A belief somewhat stronger or more intense than a mere notion or impression but less strong than positive knowledge based on complete or adequate proof. Actually, opinions are beliefs about a controversial topic." After defining these two terms 'Public' and 'Opinion', let's move towards the definition and meaning of Public Opinion.[75]

According to Morris Ginsberg, *"By public opinion is meant the mass of ideas and judgments operative in a community which is more or less definitely formulated and have a certain stability and are felt by people, who entertain or hold them to be social in the sense that they are a result of many minds acting in common."* Hence, we can say that *"public opinion is said to be the opinion of the people held by them on any issue which is for the welfare of the whole community and it is a collective product. Public Opinion is an opinion in which the public finds itself for any reason constrained to accede. It is a kind of synthetic average formed out of all the different opinions, which are held by the public."*

INFLUENCE OF THE PUBLIC OPINION ON POLICE INVESTIGATION

[75] Negi Mohita, 'Public Opinion: it's meaning and characteristics' (*Your Article Library*) <https://www.yourarticlelibrary.com/essay/public-opinion-its-meaning-and-characteristics-of-public-opinion/24307> accessed 23 July 2021

In the case of ***Mani & Anr vs State of Kerala,***[76] the High court of Kerala delivered the judgment on 19th, July 2021. "The Division Bench comprising of Justice K Vinod Chandran and Justice Ziyad Rahman AA has acquitted two non-tribal persons who were accused in the case relating to the rape and murder of a Tribal woman that occurred on 30th May 2005.[77] The accused were Mani and Rajan from Agali in Palakkad." The Bench observed that *"When public opinion influences an investigation, its very course gets diverted with exasperating results".*

The suspect of this rape and murder case was the confidant of the tribal woman from the same community. He was suspected by the immediate family member of the deceased at the stage of the investigation; conducted himself in a very suspicious manner after the death. He deposed that he had slept the entire night in the forest, leaving the corpse as such and informing his brother only on the next day morning. He also went into hiding when the police came to the scene. However, the court noted that the community reacted angrily to the implication of one of their own, prompting the police to remove him from the list of suspects. The inquiry was also carried out against the other two suspects, who were from a separate upper caste group. As a result, the complaint was filed under the Indian Penal Code of 1860 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

The case was allegedly constructed on the evidence of Jungan (suspect), who had apparently surrendered himself to the police and stated that he had killed her, according to the Public Prosecutor. The court, on the other hand, considered his account of the event to be extremely weak and full of contradictions. The High Court while acquitting the accused of this case made the following observation:

"We find nothing to connect the accused to the crime other than the testimony of Jungian, whom we suspect, as being interested in either saving himself or covering up the facts. The incident happened more than a decade and a half back and that alone inhibits us from ordering a further investigation, which would be futile especially in the absence of any scientific evidence. Again, a woman is molested and murdered and the perpetrators are roaming free; the poor soul is not avenged. We see absolutely no other way other than to acquit the accused."

Thus, from this case, it is seen that how public opinion influences the investigation of the Police and consequently led to the acquittal of the accused by our criminal justice system.

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[76] Crim App No 1237 of 2016

[77] Hannah M Varghese, 'When Public Opinion Influences Investigation Its Very Course Gets Diverted With Exasperating Results": Kerala HC Acquits Accused In Rape And Murder Of Tribal woman' (*Live Law*, 23 July 2021) <https://www.livelaw.in/news-updates/kerala-high-court-acquits-accused-in-rape-and-murder-case-of-tribal-woman-178034> accessed 24 July 2021

ROLE OF MEDIA IN MOLDING PUBLIC OPINION

Since the 1950s, television has been the primary tool for shaping public opinion. The media use a variety of advertising methods to disseminate information and alter people's perceptions. The notion that the messages conveyed by the media have a significant effect on specific populations, such as changes in reinforcing or weakening of beliefs held by those particular groups, is a general definition of media influence on human behaviour, thoughts, and attitudes. Various research on the impact of media on the public has been conducted throughout the years. It is determined by a number of variables, including the demography of populations and the psychological moods of those people. Media effects may be good or negative, gradual or immediate, long-term or transient. Some of them confirm pre-existing beliefs, while others challenge them.[78]

THE MEDIA AFFECTS THE PUBLIC IN THE FOLLOWING WAYS:

"They use it to make out patterns, infer information into novel behaviors, and compound various sources of information, first cognitively by conveying new information or messages through news coverage, and then behaviorally by using it to make out patterns, infer information into novel behaviors, and compounding various sources of information."Second, through influencing people's beliefs. People may choose to trust certain sets of information, even knowledge about occurrences they have yet to see. Third, through influencing people's attitudes by sending signals that cause them to form particular conclusions about connected subjects. Fourth, the media is successful in terms of persons because media material affects people emotionally when they are exposed to it. Fifth, through influencing the public physiologically, that is, by displaying information that causes people to respond physically and instinctively. Finally, at the micro-level, through influencing individual behaviours.

In India, the media is considered the fourth pillar of democracy. Its function in a democratic democracy is to promote transparency, accountability, and public knowledge, as well as to provide a forum for public debate. However, as the media becomes more corporatized, it is overstepping its bounds by announcing its judgement before the court trial starts, thus

[78] VVLN Sastry, *Influence by Trial Media on Criminal Justice System of India* (Walden University 2019) <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=8084&context=dissertations > accessed 25 July 2021

breaching the norms of a fair trial. The media has an impact on public opinion by pronouncing an accused person guilty in the eyes of the public before the court renders a decision.[79]

INFLUENCE OF PUBLIC OPINION ON THE DECISION OF COURTS

The media create a public opinion and judges of the courts are affected by them. A victory of public opinion can shake a fast-track court into action, in a country where justice is delayed or sometimes even denied. A public opinion many times dominates over the rule of law. Astonishingly, the courts are also getting influenced by public opinion. "The Nirbhaya case shocked the conscience of the nation and many amendments were introduced in criminal law to redefine the ambit of offences, providing for effective and speedy investigation and trial. The delay in such matters has, in recent times, create agitation, anxiety, and unrest in the minds of the public. It is one of the cases where agencies have swiftly considering the public outrage, which ensured that the court has to award the death sentence."[80]

In the judgment of Nirbhaya case, Justice Dipak Mishra has said: *"It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome bestiality of passion ruled the mindset of the appellants to commit a crime which can summon with a tsunami of shock in the mind of the collective and destroy the civilized marrows of the milieu in entirely."*

In the case of *Gurvail Singh v. the State of Punjab*[81], the apex court took a view that public opinion is a relevant factor that influences the decisions of courts. Though the court in Ayodhya has cleared the path for a straightforward land purchase process in the public domain, the case is much more than a property dispute. The governing Bhartiya Janta Party couldn't help but use it as a political rallying cry. It was also sensationalised under the moniker of 'Ram' by the media.

As a result, under such situations, public opinion and the resulting pressure on the case are unavoidable.[82]

[79] Arifa Khan, 'Judiciary, Media and Public Opinion : An overview' (*Lexquest*, 4 October 2017) <https://www.lexquest.in/judiciary-media-public-opinion-overview/ > accessed 26 July 2021

[80] *In Re: Assessment of The Criminal Justice system In Response To Sexual Offences* 2019 SCC OnLine SC 1654

[81] (2013) 2 SCC 713

[82] Pranab Tanwar & Saurabh Pandey, 'Public Opinion and the Ayodhya Case: Breaking the myth of infallibility' (*The Leaflet*, 29 Oct, 2018) <https://www.theleaflet.in/public-opinion-and-the-ayodhya-case-breaking-the-myth-of-infallibility/> accessed 27 July 2021

In the Navtej Sandhu case,[83] the apex court stressed the point that the "conscience of the society" will only be satisfied when the convict is sentenced to death. "In the National anthem case of 2016 also, after many public debates, the judgment was diluted to non-mandatory direction from mandatory direction of playing the national anthem before movies at cinema halls. The Kashinath Mahajan judgment[84] (SC/ST Atrocities Act[85]) was overturned by the Parliament because of massive agitation and strikes by the community."

Therefore, from the aforesaid cases, we can see that influence of public opinion on the decision of courts or on the judiciary is not a novel thing. The public's attention is drawn to terrible crimes and even religious conflicts, and the courts have started on a road that goes beyond the rule of law.

CONCLUSION

Judiciary cannot exist independent of society and public opinion and hence, their interaction is inevitable. But the rule of law is unsurmountable. Throughout the article, we have seen how public opinion influences police investigation, the judiciary, and ultimately the whole criminal justice system. There is no doubt that media publicity and public opinion play a great role in preventing the miscarriage of justice and help in the fast proceeding of the cases of the criminal justice system of India. Jessica Lal, Priyadarshini Mattu, Ruchika Girhotra, and many more like them would never be got justice without public opinion. But the judgments and sentencing should not follow the public opinion always but it should be only based on evidence and the witnesses, otherwise, innocents may be the victims of public outrage or public opinion. Therefore, while dealing with criminal matters, it is necessary to call for the information regarding the status of criminal cases at the ground level from various duty holders like investigating agencies, prosecution, medico-forensic agencies, legal-aid agencies, etc. and then implementation of various provisions of criminal law as well as respective amendments related to those crimes. In sum, an educated, engaged, and cultivated civil society can be the best watchdog and public order and the rule of law should be embedded in the public from childhood itself

[83] *State (NCT of Delhi) v Navjot Sandhu* (2005) 11 SCC 600
[84] *Dr Subhash Kashinath Mahajan v The State Of Maharashtra* Criminal Appeal No 416 of 2018
[85] Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

A CRITICAL ANALYSIS OF JUDICIAL VERDICTS RELATING TO CORPORATE CRIME IN INDIA

- ***Gajender Singh Nanda***[86]

Abstract

Initially it was argued that corporation being legal person cannot form the mens rea, unlike natural person and cannot be held responsible for criminal offences. Moreover, company does not have body or soul. Hence it cannot be punished like natural persons. Therefore the company ought to be kept outside the jurisdiction of the criminal jurisprudence. However, the doctrine of identification theory was adopted in broader sense. Further, the Courts in India started to attribute company for criminal acts of its directors, or agents or servants, whether they involve mens rea or not, provided they have acted or have purported to act under authority of the company or in pursuance of the aims or objects of the company. However jurisprudence of juristic personality suggests that corporate personality cannot be equated with personality of natural person in respect of all offences mentioned in the law of crimes, which could be committed only by natural persons, e.g. murder, treason, bigamy, rape, perjury etc.

Keywords: *Person, Crime, Punishment, Company*

Introduction

Industrial revolution took place in UK and gradually spread across European Countries and North America. Industrial growth in India was at snail pace up to 1980s. India liberalized its industrial policy during 1990 decade. In the contemporary world, India is forced to reckon in industrial growth. More number of National and International Companies invested huge amounts in India and started more number of businesses which has changed the outlook of India. The volume of company's transaction multiplied by number of times.

Indian companies are not lagging behind in adopting new technology in the business in order to compete with foreign companies and to enhance their reputation as global company in the world. Equally the companies started to show the other face of company that it could employ unfair means to achieve their desired results. Further some persons started to make use of artificial creation of company's personality to commit crime because they took the advantage

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of loophole in the law that corporate body could not be prosecuted for criminal offence because company cannot be punished effectively.

Criminal Liability of Corporation and the provisions of Indian Penal Code.

Section 2 of the *Indian Penal Code* refers to offences committed within the territory of India and declares that a person shall be liable to be punished for all acts or omissions which contrary to the provisions of the IPC which he shall be guilty within the territory of India[87]. The section asserts the principle of criminal liability on the basis of the locality and places of the offence committed. According to this section "every person" irrespective of his caste, color, creed, sex or place of birth or his rank, status, will be held liable for punishment for an offence committed within India.[88] The word "every person" includes citizens, as well as non-citizens. Further, Section 11 of IPC defines the word 'person' which includes any company or Association or body of persons, whether incorporated or not. Obviously the literal interpretation of Section 2 read with Section 11 of IPC makes it explicitly clear that juristic person like company or association of persons like partnership firm could be prosecuted or indicted for every offence proscribed in the IPC. However jurisprudence of juristic personality suggests that corporate personality cannot be equated with personality of natural person in respect of all offences mentioned in the law of crimes. This view is endorsed by even eminent authors of criminal law text like K.D.Gaur and Ratanlal and Dhirajlal.[89] Even there is no unanimity among the judiciary in respect of corporate criminal liability on the ground that unlike natural person, legal person is incapable of forming the *mens rea* and it is impossible to punish legal person.

Presumption of innocence of accused

Court will decide a question of fact which is in issue, either by obtaining actual evidence or by prior presumptions. There is a doctrine *praesumptiones juris sed non de jure* which means, inferences of facts hold good until evidence has been given which contradicts them.[90] It is

[87]Indian Penal Code,1860 (Act 45 of 1860).

[88]Gaur.K.D, *The Indian Penal Code* 35 (Universal Law Publishing Co. Pvt .Ltd, New Delhi, 4th edn., 2008).

[89] Gaur K.D. in his book writes that person under IPC does not a non-judicial person such as a corporation or a company, because a company cannot be indicted and charged for offences such as murder, dacoity, robbery adultery bigamy and rape etc., as these can only be committed by a human being. See, Gaur, K.D., *The Indian Penal Code* 35 (Universal Law Publishing Co. Pvt .Ltd, New Delhi, 4th edn., 2008). Further, Ratanlal and Dhirajlal also says that a company cannot be indictable for offences which can be committed by a human individual alone, like treason, murder, perjury etc., or for offences which are compulsory punishable with imprisonment or corporeal punishment. See, Ratanlal and Dhirajlal, *The Indian Penal Code* 3(LexisNexis Butterworths Wadhwa , Nagpur, 33rd edn., 2010).

[90] J. W. C. Turner (ed.), *Kenny's Outlines of Criminal Law* 455 (Cambridge University Press, 19th edn., 1966).

settled principle that an accused is always presumed to be innocent until his guilt is proved. According to this presumption the prosecution must prove the guilty of accused beyond reasonable doubt and the graver the crime the greater will be the degree of doubt that is reasonable.[91] The golden rule of evidence has emerged from the historical case of *Woolmington* v. *DPP*[92] in which the House of Lords verdict that an accused presumed to be innocent is fundamental doctrine of criminal law. Lord Chancellor Viscount Sankey said, "If the jury is left in reasonable doubt whether act was unintentional or provoked, the prisoner is entitled to be acquitted."[93]

Further, the following general statement of Viscount Sankey has affected the entire criminal jurisprudence.

"Throughout the web of English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to the defense of insanity and any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, as to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out a case and the defendant is entitled to acquittal."[94]

The burden of proof so placed upon the prosecution remains throughout the trial. Obviously, it does not shift to the accused merely because the prosecution makes out a *prima facie* case.[95] The burden of proof in criminal cases is heavier than civil cases because in civil cases there is a balance of probabilities.

Judicial Response in India

Initially it was argued that company being artificial person, unlike natural person cannot be held liable for criminal offences. Moreover, company does not have body or soul. Hence it cannot be punished like natural persons. Therefore the company ought to be kept outside the jurisdiction of the criminal jurisprudence. These are the issues raised in the *Ananth Bandu* v. *Corporation of Calcutta.*[96] The Hon'ble High Court has laid down the following important ratio of corporate criminal liability.

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[91]*Id. at* 456.
[92] (1935) AC 462 (HL).
[93] *Id.*
[94] *Woolmington v DPP* (1935) AC 462 (HL).
[95] Glanville Williams, *Criminal Law* 43 (Stevenson & Sons, London, 2nd edn., 1983).
[96] AIR 1952 Cal 759.

i. If there is anything in the definition of a particular section in the Statute, which prevent the application of the section to a limited company, definitely a limited company cannot be proceeded against. There are heaps of sections in which it will be physically impossible by limited company to commit the offence.
ii. Then again a limited company cannot be generally tried when mens rea is an essential ingredient.
iii. Company cannot be tried for the offences, where the punishment for the offence is only imprisonment. Because it is not possible to send a limited company to prison.
iv. Where other sentences than imprisonment or death is provided, that does not prevent the Court from inflicting a suitable fine. And a sentence of fine need not carry with it any direction of imprisonment in default.

State government based its argument on the common law theory that "committed for trial means committed to prison with a view to being tried before the judge."[97] Therefore, company cannot be committed to prison for trial, hence it cannot be prosecuted under Criminal law. However, the Court rejected the argument and held that, except above stated class of cases there is nothing to prevent Indian criminal law to apply to the limited company.

In *State of Maharashtra* v. *Messrs Syndicate Transport Co. (P) Ltd and others*,[98] Hon'ble High Court held that "it is not disputed that there are several offences which could be committed only by individual human being, for instances, murder, treason, bigamy, rape, perjury etc."[99] Further court held that where the offence imposes only corporeal punishment, then company cannot be held guilty because, prosecuting a company for such offence would only result in the Court "stultifying itself by embarking on a trial in which a verdict of guilty is returned, no effective order by way of sentence can be made"[100]

Therefore, Court observed in a broad sense that, 'a person which included a corporation will be read as being subject to some kind of limitation'. Court said that person under Section 11 of IPC is subjected to "unless there is anything repugnant in the subject or context."[101] Section 420 of IPC imposes mandatory punishment of imprisonment hence, company cannot be held liable for criminal offences.

[97] *King* v. *Daily Mirror News Paper Ltd* (1922) 2 K.B. 530:(91 L.J.K.B.712)
[98] AIR 1964 Bom 195.
[99] *Id.* at 196.
[100] *Id.*
[101] *State of Maharashtra* v. *Messrs Syndicate Transport Co. (P) Ltd and others, AIR 1964 Bom at 197.*

Though Section 403 and 406 of IPC require the element of mens rea, they do not impose the mandatory punishment of imprisonment. Therefore, corporation being juristic person incapable of forming the mens rea and cannot be held liable for criminal offences.

Conclusion

Initially the judiciary in India was reluctant to impose criminal liability on the company on the ground that it was juristic person, therefore it was incapable of forming the mens rea. Gradually it changed the attitude and tried to hold the company liable for those criminal offences which do not require the *mens rea* ingredients.

However, it made clear that company could not be indicted for those offences which can be committed by only natural persons. Indian judiciary is akin to common law legal system therefore it adopted the common law theory of “alter ago” or “identification theory.”On the other hand whether company could still be indicted for criminal offence even when the officer intended to benefit him rather than benefit company. The theory of alter ago creates more problems when think tank of the company is consisting of multi member body. If there is unanimity among the board of directors, then it would not be problem to make company criminally liable. But, where the board of directors was divided over the decision, the problem is which directors brain would represent the company is difficult to determine it.

Another gray area about corporate criminal liability is about which Offence Company could be indicted. The judiciary is very firm that certain offence could be committed by only natural person not company like murder, rape, bigamy, adultery, theft and dacoity etc. It is very difficult to illustrate exhaustively for which offence company could be made liable.

So far Indian judiciary has exercised the option of imposing fine on company as punishment but never thought about the other option of punishments like winding up of the company, cancellation of license of company for particular business, disqualification of company for certain benefits, forfeiture of illegally earned profit by the company, probation of company, and the publication of company name in the newspaper or Tele Vision.

Another area in which judiciary is not made much inroad is whether the company is being accused person, can it claim the right of accused from the perspective of fair trial under the Article 14, 20, and 21 of the Indian Constitution. The question is about whether company could raise issue that its trial procedure is discriminatory because it is not allowed to take defense provided in the IPC which are available to natural persons. All these questions look very philosophical but sooner it would become reality.

CAPITAL PUNISHMENT: A COMPARATIVE STUDY

- *Shri Krishan Lila*[102]

INTRODUCTION

Punishment' is the coercion used to enforce the 'law of land' which acts as one of the pillars of modern civilization. It is the duty of the State to punish the criminals in order to maintain law and order in the society. In the past, there wasn't any specific law or order for such crimes and the quantum and extent of punishment was largely dependent on the King. With time modern theories of punishment were developed and voluntary submission of our rights and power to maintain law and order was given to state. The most brutal or we can say the highest punishment awarded in present time is 'Capital Punishment'.

Capital punishment is the punishment which involves legal killing of a person who has committed a certain crime prohibited by the law[103]. Capital punishment is also known as 'Death Penalty' which is sanctioned by the government in which a person is put to death by the state as a punishment for the crime he committed.

The sentence condemning a convicted defendant to death is known as 'Death Sentence' and the act of carrying out the death sentence is known as 'Execution'.

Whenever, the court awards a punishment there is a theory or proposition on the basis of which it passes its Judgment. These theories are known as 'Theories of Punishment' and are generally of five types:

1. Deterrent Theory
2. Reformative Theory
3. Preventive Theory
4. Retributive Theory
5. Expiation Theory

The word 'Abolition of Death Penalty' is one of the most discussed topics in United Nation (UN) where Death Penalty is considered as a violation of Human Rights. UN laid more emphasis on Reformative Theory of Punishment rather than the Deterrent Theory of Punishment.

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[103] Roger Hood, Capital Punishment, Encyclopaedia Britannica, https://www.britannica.com/topic/capitalpunishment

Justice V.R. Krishna Iyer in the case of Rajendra Prasad V. State of Uttar Pradesh commented that-

"The special reason must relate, not to the crime but to the criminal. The crime may be shocking and yet the criminal may not deserve the Death Penalty[104]". If we take a look at the Theories of Punishment we can say that the Reformative Theory has its fair share of advantage over Deterrent Theory. Because, in Reformative Theory there is a 'Scope of Improvement' present whereas in Deterrent Theory this scope is completely absent.

In India, the prisoners of Tihar Jail make 'Essence Sticks' and 'Dhoop Batti' which is a good way to make them adjust or flexible with the society. Whereas, on the other hand in Deterrent Theory there is no essence of humanity neither it provides the scope for improvement.

Death Penalty is a very serious topic as it means taking away the life of a person which is a very sensitive issue. This is the reason why questions are raised against countries like China, India, USA, Arab countries for awarding Death Penalty.

Among these countries China alone carries out maximum number of executions with over 60% in number. Whereas in India Capital Punishment is given in rarest of rare cases. The punishment of death is extreme and severe; therefore it should only be used as a last resort.

If we discuss Capital Punishment with the members of our society then we will be getting two views from it-

There will be a section of people who believes that, the person who has committed the crime deserves to die. Whereas, on the other hand there will be people with the view that,the person who committed the crime should be given a second chance, it is not our place to decide who gets to live and who gets to die. Further, taking away a life of an individual in the name of law is not justice.[105]

CAPITAL PUNISHMENT IN INDIA

"We are all the creation of god. I am not sure a human system created by a human being is competent to take away a life based on artificial and created evidence".

- A.P.J. Abdul Kalam[106]

Whenever a Punishment is awarded for the wrong doing there are two main reasons for inflicting such punishment;

[104] Rajendra Prasad vs State of UP, 1978 AIR 916.

[106] 11th President of India from 2002 to 2007

1.) One is that the person who committed the wrong must suffer for it.

2.) And, the other one is that inflicting punishment on wrongdoer acts as an example for others.

In India deciding the case for death penalty is based on doctrine of "rarest of the rare test" which was stated in the case of Bachan Singh V. State of Punjab. Which means that death penalty will only be awarded in rarest of rare cases only[107].

Further, in the case of Macchi Singh & Others V. State of Punjab[108]- the Three Judge Bench followed the decision of Bachan Singh and stated that only in rarest of rare cases when collective conscience of community is in such a way that it will expect the holders of the judicial powers to inflict death penalty then it can be awarded if-

1.) When the murder is committed in an extremely brutal, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

2.) When a murder of a member of a Scheduled caste is committed which arouse social wrath.

3.) In case of "Bride Burning" or "Dowry Death".

4.) When the crime is enormous in proportion. 5.) When the victim of murder is-

- An Innocent child
- A vulnerable Women or a Person rendered unaided by mature epoch or illness

THE DOCTRINE OF "RAREST OF RARE"

In the case of Bachan Singh V. State of Punjab[109], the Supreme Court pointed out its view regarding death penalty that death penalty should be awarded only in rarest of rare cases. This view of Supreme Court was highly supported as it aimed to reduce the use of Capital Punishment.

The Ratio Decidenti or the Rule of Law applied by the Supreme Court in the case of Bachan Singh is that- the death penalty is constitutional only if it acts as an alternative to life imprisonment. And same shall be applied in rarest of rare case when the alternative option is unquestionably foreclosed.

Further, in the case of Santosh Kumar Bariyar V. State of Maharashtra the Supreme Court further explained that "The rarest of rare dictum only serves as a guideline in enforcing the

[107] Bachan Singh vs State Of Punjab, AIR 1980 SC 898 (Y Chandrachud, A Gupta, N Untwalia, P Bhagwati, R Sarkaria

[108] Machhi Singh And Others vs State Of Punjab, 1983 AIR 957 (Thakkar, M.P. (J)).

[109] Id

provisions mentioned in Section 354(3) of CrPC and entrenches the policy that life imprisonment is the rule and death punishment is an exception[110].

The Constitution of India under Article 21 states that no person shall be deprived of his 'Right to Life' unless done with due process of law[111]. In the case of death penalty when the punishment of death is awarded then it also limits the scope of introduction of new facts or law in the case. If the punishment has been executed it is irrevocable. **Law Commission Report of 2015** India's Law Commission in its 262nd Report (August 2015) recommended that the concept of death penalty should be abolished for all crimes other than terrorism related offences to safeguard national security[112].

The Law Commission in its previous review in the year 1967, the commission concluded that India couldn't risk the "experiment of abolition of capital punishment". But in 2015 the Commission stated that "the commission feels that the time has come for India to move towards abolition of the death penalty"[113].

Despite the fact that death sentences are rarely executed in India, still the commission suggested that the penalty should be abolished. The commission gave following reasons:-

1.) Times have changed. 2.) It's not a Deterrent.

3.) India's justice system is flawed.

Rate of Execution and Commutation of Capital Punishment in India

In India, the concept of death penalty is present but there were only 7 executions done from year 1998-2018. Between 2004 and 2013 there were a total 1303 capital punishment verdicts but still only 3 convicts were executed between this period. From 2004 to 2012 not even a single execution was done.

In the last 20 years a total of 3751 death sentences were commuted to life imprisonment. In July, 2007 Yakub and 11 others were convicted with sentence to death. By special court for planning or carrying out the 1993 bombing in Mumbai which killed nearly 260 people and injured several others[114].

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[110] Santosh Kumar SatishbhushanBariyarvs State Of Maharashtra, 2009 (6 SCC 498) (S.B. Sinha, Cyriac Joseph

[111] . Indian Constitution, Art. 21.

[112] Report No. 262, The Death Penalty, Law Commission of India, 2015.

[113] Id.

In March, 2013 the SC upheld Memon's Death sentence, while commuting the death sentence of 10 others to life imprisonment while one died later.

In the past 14 years only 4 have been hung till death:

1.) DhananjoyChatterjee (August 14, 2004). 2.) Mohammad Ajmal Amir Kasab (November 21, 2012).

3.) Afzal Guru (February 9, 2013).

4.) YakubMemon (July 30, 2015)

COMMUTATION OF CAPITAL PUNISHMENT

The Constitution of India u/A 161 & 72 empower the Governor of any State and President of India to award pardons, reprieves, respites or remissions of penalty or to suspend, remit or commute the sentence of any person convicted of any offence[115].

(a) in all cases where the punishment or sentence is by a Court Martial;
(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union/State extends;
(c) in all cases where the decree is a verdict of fatality.

LEGAL PROCEDURE

just the once the death verdict is awarded by a sessions (trial) court, the ruling must be established by a High Court to make it finishing. Once confirmed by the High Court, the condemned convict has the option of appealing to the Supreme Court. If this is not possible, or if the Supreme Court turns down the appeal or refuses to hear the petition, the condemned person can submit a 'mercy petition' to the President of India and the Governor of the State. The present day constitutional clemency powers of the President and Governors originate from the Government of India Act 1935 but, unlike the Governor-General, the President and Governors in independent India do not have any prerogative clemency powers.

EXECUTION PROCEDURE

- **HANGING**

Hanging is the method of execution in the civilian court system, according to the Indian Criminal Procedure Code.

[115] Indian Constitution, Art 161 & Art 72

- **SHOOTING**

Under the 1950 Army Act, hanging as well as shooting are both listed as official methods of execution in the military court- martial system.

CONCLUSION

"Life is precious and death is irrevocable"

When a death penalty is awarded to the accused it is more than mere a punishment, we are ending or killing a person in name of justice and law. Killing a person is immoral and it demonstrates the lack of respect towards human life. And opposing death penalty doesn't mean that someone is supporting the criminal. When a death penalty is awarded it eliminates the scope of improvement which could have changed the life of an individual, this is the reason why democracies around the world are supporting reformative theory of punishment and abolishing deterrent theory of punishment.

"Even the vilest criminal remains a human being possessed of common human dignity" as a result one be supposed to esteem each one and all individual . We are no one to decide who gets to live and who gets to die on the basis of rules and regulations which we made ourselves. It is true that a criminal needs to be punished for the crimes he committed but we as a civilization need in the direction of eliminate the offense not the illegal. This is the main difference between human being and animals. We are given a precious gift – 'we are a human' and killing another human being falsify the mere purpose of being a human being.

We call ourselves a 'civilized society' but we kill another human being in the name of justice. The principle of death penalty is based on deterrent theory which in generic terms set an example by inflicting fear on the mind of others but there are certain other ways by which a leading example can be set such as in reformative theory.

The concept of capital punishment is ancient and barbaric and should be abolished as it involves killing of a human being which is immoral as life is precious and death is irrevocable. Democracies should thrive more on reformative theory rather than deterrent theory as it provide a chance of improvement which can change the life of an individual and can offer him a chance to get back in the society and hence reformative theory has its advantage over deterrent theory. After looking at all the statistics and report we can conclude that China still has a long way to cover in order to abolish the concept of death penalty.

THE ROLE OF MEDIA IN PROTECTING HUMAN RIGHTS

- ***Rupinder Walia***[116]

Abstract

Free speech is the cornerstone of a free society as it is an inherent, inalienable right of the citizens of a democratic country. It is a basic human right enjoyed by all such citizens, regardless of cultural, religious, ethnic, political formation or other backgrounds and is the foundation over which other basic human rights are built. Often regarded as an integral concept in a democratic set up, without free speech no justice is possible and no resistance to injustice and oppression is possible. Thus, freedom of speech is significant at all levels in society. It is also equally important to governments because when criticisms of a government are freely voiced, the government has an opportunity to respond to the grievances of the citizens. On the other hand, when freedom of speech is restricted, rumours, unfair criticisms, comments and downright falsehoods are circulated through private conversations and surreptitiously circulated writings. In that context, the government is in no position to counter such views, because they are not publicly stated. It is in the government's interest to allow criticisms in the public arena where it can answer its critics and correct its mistakes if any. Now, due to the surge of Information Technology, the governments have wider and faster access to electronic media far in excess of past communication channels.

Keywords: *Media, Human Rights, Law, Protection*

1. Introduction

"Justice is conscience, not a personal conscience but the conscience of the whole of the Humanity."

- Alexander Solzhenitsyn

Media has played and continues to play a crucial role in promotions of human rights. Why is it so? It's because the common man is not aware of human rights. The significance of human rights is known only to a few. People are aware of everything that happens around because, in recent years, mass media users have started consuming a wide variety of information via different platforms. But not keeping abreast of the developments and the crucial role played by

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human rights defeats the purpose of staying informed. When it comes to factors that affect one's life significantly, it is imperative to know about these rights through any medium deemed fit and who can disseminate this information better than media!

The UN defined human rights as those rights which are inherent in our state of nature and without which we cannot live as human beings.[117] Human rights belong to every person and do not depend on the specifics of the individual or the relationship between the right-holder and the right guarantor.[118] The term 'human rights' was used post World War II specifically after the establishment of the United Nations. It replaced the phrase natural rights because it became a matter of great controversy and the later phrase the rights of man was not understood universally to include the rights of women. [119]

With the establishment of the United Nations and successive adoption of The Universal Declaration of Human Rights (UDHR), human rights issue turned out to be the most significantly discussed issues across the globe. United Nations Charter became the foremost international document. United Nations adopted this document in the year 1945. This document imposed an obligation on all human beings and states to acknowledge the promotion of human rights and to work for the preservation of human rights. The purpose of adopting the charter was to prevent the states and individuals from engaging in another war that would inflict atrocities on the human beings akin to the ones caused by the First and Second World Wars. Both the world wars caused gross violations of human rights and stripped people off of their basic rights.

2. Human Rights, Freedom of Press & The Constitution

Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feeling to others. Freedom of speech and expression is thus a natural right, which a human being acquires on birth. It is, therefore, a basic right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration of Human Rights (1948). The people of India declared in the Preamble of the Constitution, which they gave unto themselves

[117] Mishra, Pramod (2000) *Human Rights Global Issues.* Delhi: Kalpaz Publications, p. 4.
[118] Coicaud, Jean Marc, Doyle, Micheal, W. and Marie, Anne (eds.) (2003) *The Globalization of Human Rights.* New York: United Nations University Press, p. 25.
[119] Weston, Bums, H. (1984) 'Human Rights', Human Rights Quarterly, n. 1. p. 257-58.

their resolve to secure to all the citizens liberty of thought and expression. This resolve is reflected in Article 19(1) (a) which is one of the Articles found in Part III of the Constitution, which enumerates the Fundamental Rights.

In India, freedom of speech and expression is guaranteed under Article 19(1) (a) of the Constitution of India. Article 19(1) (a) says that all citizens shall have the right to freedom of speech and expression. But this right is subject to reasonable restrictions imposed on the expression of this right for certain purposes under Article 19(2). The First Amendment of the Constitution of the United States, guaranteeing freedom of speech, is regarded as the root for the development of this concept in western countries. It can be observed that Article 19(1) (a) of the Constitution of India corresponds to the First Amendment of the United States Constitution, which says, "congress shall make no law… abridging the freedom of speech or of the press".

In ***Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India*** this court after pointing out that communication needs in a democratic society should be met by the extension as specific right to inform, the right e.g., the right to be informed, the right to inform, the right to privacy, the right to participate in public communication, the right to communicate, etc. proceeded to observe as follows:-

"In today's fine world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and nonformal education possible in large scale particularly in the developing world where television and other kind of modern communication are not still available for all sections of society. The purpose of the press is to advance the pubic interest by publishing facts and opinions without which democratic electorate cannot make responsible judgments. Newspaper being purveyors of news and views have a bearing on public administration, very often carry material which would not be palatable to Governments and other authorities. The authors of the articles, which are published in the newspapers, have to be critical of the auction of the government in order to expose its weaknesses. Such articles tend to become on irritant or even a threat to power."

3. Trial By Media: The Real Scenario

One of the fundamental rights that are guaranteed to every citizen of India (and most democratic countries, for that matter) is the right to a free and fair trial. It is considered to not merely be a modern legal right, but also an essential principle of natural justice and, thus, has certain connotations and implications that extend beyond its strict legal character. In short, the

right to a free and fair trial is considered sacrosanct and inviolable in most modern democracies, and is an essential part of modern democratic justice systems. If this fundamental right is not ensured to all individuals and entities that are indicted in a court of law, then the integrity of the court and the legal system itself will have been effectively compromised.

Right to a fair trial is an absolute right of every individual within the territorial limits of India vide Articles 14 and 20, 21 and 22 of the Constitution. The right to a fair trial effectively flows from Article 21 of the constitution to be read with Article 14. It must be noted here that the legal concept of fair trial is not purely for the private benefit for an accused – the publics' confidence in the integrity of the justice system is crucial, as stated in Gisborne Herald Co. Ltd. V. Solicitor General. The right to a fair trial is at the heart of the Indian criminal justice system. It encompasses several other rights including the right to be presumed innocent until proven guilty, the right not to be compelled to be a witness against oneself, the right to a public trial, the right to legal representation, the right to speedy trial, the right to be present during trial and examine witnesses, etc. In the case of Zahira Habibullah Sheikh v. State of Gujarat the Supreme Court explained that a "fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."

Nowadays, what we observe is media trial where the media itself effectively does a separate 'investigation' of its own, thus constructing public opinion against the accused even before the court takes cognizance of the case. By this way, it prejudices the public and sometimes even judges and as a result the accused person, who should be assumed innocent until proven guilty under the aegis of the principle of Free Trial, is presumed as a convicted criminal, endangering his rights and personal liberty. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime and thus has a significant chance of colouring the proceedings of the case, it amounts to undue interference with the "administration of justice", calling for proceedings for contempt of court against the media. Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent the encroachment of civil rights.

An example of trial by media was the murder case of Aarushi Talwar, in which extensive media reports laid the blame for the murder first on her father, Dr. Rajesh Talwar, and then on her mother, Nupur Talwar, despite the fact that there was no substantial forensic evidence to suggest that either had been involved in the crime. In fact, these reports were made even before a thorough police investigation into the crime had commenced. These reckless media reports

painted the formerly respectable Dr. Talwar as a public hate figure, and incited public opinion against him. Later on, an official CBI forensic report confirmed neither Dr. Talwar nor his wife had anything to do with the crime, but the damage to their reputation had already been done. This was highly reminiscent of the murder case of Jon Benet Ramsey, in which the media strongly suggested that her parents had been responsible for the young girl's killing, despite the lack of compelling forensic evidence to support this claim. Years later, a thorough DNA test vindicated the couple from all blame and dismissed them as viable suspects, but not before they had been subjected to a keen and humiliating trial by media.

Herein lays the crux of the issue, and the fundamental problem that legislators face in their attempts to pose reasonable restrictions on the freedom of the press to protect the interests of the parties involved in a case and prevent the infringement of their fundamental rights. The measures proposed by the Law Commission would essentially impose certain terms of pre-censorship on the media of the country, as it would prevent them from broadcasting and propagating coverage of certain sub judice matters that the Court considers to be sensitive in nature. Pre-censoring of media (especially newspapers) is considered to be expressly illegal in India, with several significant legal precedents like the case of Reliance Petrochemicals Ltd. v. Indian Express40. Thus, it would be exceptionally difficult to introduce such measures and restrictions on the sphere of activity of the Indian press, even though such restrictions would, in this particular case, be necessary to protect the basic human rights of the parties involved in any number of cases that can be sensationalized by the present-day media. Thus, there is a lengthy and difficult road that must be tread before the blatant and flagrant infringement of human rights to free and fair trials by the media can be remedied and prevented.

4. Challenges in Reporting Human rights Issues

How effectively do news channel report cases of human rights violation? On what basis do the reporters assess the quality of their research material? Are they subjected to constraints while shedding light on such cases of atrocities? How can they improve the quality of their work? How do they deal with the pressure when digging up a story? How do they ascertain the truthfulness of the stories and cases? These questions sum up the points put up by the International Council on Human Rights Policy in a report. These points mention the difficulties that are faced by journalists in reporting cases of human rights violation. The report analyses the changes noticed in the reporting system after the advent of technology. This report throws

the spotlight on the standpoints of the editors, reporters, journalists and how they influence or control how news dissemination takes place.

Human rights have gained massive momentum in the last two decades. Human rights have become a potent tool in the hands of the government and politicians. They use it to their advantage by appealing to the emotions of the masses. Not only have that but human rights played a critical role in both national and international forums. Policies are formulated with human rights as a central or core theme. Be it the news stories of wars or trade, human rights have played a central role in the last few years. Many learned scholars, organizations, etc engage in debates over human rights issues. This wide coverage of human rights issues has sown the seeds of human activism in the hearts of the viewers and people have become much more conscious. Because of the recent developments in the reporting domain, it can be presumed that journalists and editors will not do away with the accuracy of the stories. They will report the fact as they are instead of bending it to their convenience.

In the last few years, it has been noted that media has travelled to the remotest corners and connected them with the outside world. Media has played a pivotal role in sharing information with people living in the farthest corners. Media has made it a two-way street. They not only communicated the information from outside to the remotest corners, they also shed light on the struggles and challenges faced by these people. This helped the viewers and government understand the adversities of people living in remote corners. In such cases, media becomes the guardian angel that helps the government in providing better facilities to such people and helps them in leading a simpler and quality life.

The aforementioned report does not state that human rights should trump any other new items or that it is most important of all. It does not emphasize that journalists should focus all their attention on covering human rights relates news only. But it is cannot be ignored that the news that travels from the interior to the length and breadth of the nation does have some impact on the government's decisions. It becomes necessary for the policymakers to consider the woes of such people and amend or make laws and policies in a manner that will not deprive these people of their basic human rights. The report seeks to convey that journalists and editors both on the national and international domains should seek to report the facts as they are. The facts should be bereft of bias and provided in a simplified manner. If it's provided without any context, viewers will get lost in the facts and won't arrive at any conclusions. They will misinterpret the case. When reporters fail to present the facts effectively, their ineffectiveness renders the users

incapable of developing an understanding of such issues. In turn, they become incapable of analyzing the policies and laws implemented by the government.

5. Unprecedented Act of Indian Media

"Political leaders and government officials have hardly ever perceived reporters and editors as their allies. Reporters have always struggled to sit at the same tables as the leaders and authorities. Why is it so? It is because of both hail from different factions of the democratic society. On one hand, political leaders are viewed as representatives of the government and on the other hand, journalists are viewed as the representatives of the media, the fourth pillar of democracy. Reporters have suffered curtailment of their rights and imposition of censorship on their right to freedom of speech and expression. But not all journalists have played fairly. The playing field is not the same for all the reporters and editors in India. Several media units joined hands with the government in the course of emergency and bargained with their right to freedom of speech and expression. Whereas few reporters and editors refused to bow down to the pressures of the government during the emergency and protested against the suspension of their freedom of expression. Censorship is not the only element that endangers the freedom of the press. Some other elements play a decisive role in restricting the powers of the press.

It has been noticed in several instances that government authorities and influential leaders feel unsettled at the thought of being exposed by the reporters for their unfair practices. Time and again, officials and leaders find it necessary to clip the freedom of the press for their selfish interests. By imposing arbitrary restrictions on the freedom of expression of the press, the government starts exercising control over the information that gets disseminated in the public domain. Whenever new policies are formulated and laws are implemented by the government, reporters prepare questions on different aspects of these policies and laws to develop a better understanding of the intentions behind the actions of the government. But such initiatives on the part of the journalists often go unrewarded because these questions are scratched from the existence to eliminate any chances of conflicting views concerning the proposed policies and laws. At times, overall control or ownership of the media units is directly or indirectly retained by the government. This enables the government to get access to all the content that flows out from that particular unit. In certain cases, the head of the government controls the press entirely. They appoint the top-level employees constituting reporters and editors and treat them as the spokesperson for the government. They do not allow media units to publish any stories that speak ill about the government in the public domain. They want to create a positive image in

the minds of the citizens. This aforementioned situation does not hold any resemblance to the situation existing in India. In India, government officials cannot misuse its power to restrict or curtail the freedom of the press. Censorship of media is allowed only when fundamental rights such as Article 19 are suspended and not otherwise.

The path of media has always been dotted with thorns and spikes. Reporters and editors have always tackled several challenges to fulfil their roles and responsibilities with precision. Functions of media are different in developed, developing and underdeveloped countries. The situation in developed countries has already been discussed initially. The freedom of the press in developing countries is not unrestricted. Corporate powers and government exert an extent of influence on the information relayed by the media. In developing countries, media do not have the economic freedom to discharge its duties unencumbered. They need advertisers for the generation of funds. Most of the times, these advertisers end up dictating the terms of the content to build a positive image in the minds of the viewers. Secondly, there is a fear of government in the minds of the media units. They do not want to step on the wrong foot of the government. It is so because the government burdens them with legal implications in lieu of unfavourable reporting or conflicting opinions. If the content does not bode well with the government, reporters and editors are at the risk of facing legal consequences. This fear restrains them from exercising their right to freedom of expression freely. Many of the unscrupulous acts and malicious intentions of the authorities go unreported. Independent journalism rarely manages to stay afloat amidst these challenges. Nevertheless, the media should strive to provide accurate information to the public for the development of the nation as a whole.

One cannot define the contours of public interest within set parameters. It is a subjective issue. Everyone holds a different opinion as to what the public interest means and how can it be defined. Fear of legal implications deters them from reporting cases of human rights violations. Whenever any case of human rights violation goes unreported, it becomes the breeding ground for injustice to the present and future victims. One cannot prevent something from happening if one isn't aware that something is happening. It applies in the cases of human rights violation. When people are unaware of such cases, they cannot defend human rights or raise voice against such abhorrent practices. When censorship is imposed on the freedom of the press, journalists do not go report cases of human rights violations and focus on other issues. This restriction on the freedom of speech and expression of the reporters extends to restriction on the reporting of cases concerning human rights violation. If constraints on freedom of the press are to prevent

the human rights violation, such nature of constrain is justified. As long as reporters work towards protecting the interest of the public, there should be no curtailment of freedom of expression for the press.

6. Conclusion

The approval of Universal Declaration of Human Rights by the United Nations on 10th November 2008 marked the culmination of Human struggle for freedom and liberty. It can be accomplished that Human Rights are claim, made by virtue of the fact that we are Human beings with an inalienable Right to Human dignity. The term "Human Rights" are very significant for every democratic society. Economic, social and cultural Rights are indispensable components of sustainable expansion and therefore not possible without respect for Human Rights. No matter what country or continent we come from we are all basically the same human beings. We have the common human needs and concerns. We all seek happiness and try to avoid suffering regardless of our race, religion, sex or political status. Human beings, indeed all-sentient beings, have the right to pursue happiness and live in peace and in freedom. As free human beings we can use our unique intelligence to try to understand our world and ourselves. But if we are prevented from using our creative potential, we are deprived of one of the basic characteristics of a human being. It is very often the most gifted, dedicated and creative members of our society who become victims of human rights abuses. Thus the political, social, cultural and economic developments of a society are obstructed by the violations of human rights. Therefore, the protection of these rights and freedoms are of immense importance both for the individuals affected and for the development of the society as a whole. United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled licence. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be mis-understood as to be a press free to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organised society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom

must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of Law. The Editor of a Newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact then the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself.

It is the task of the media to ensure objectivity of commercial decision making by fearless and honest reporting so that the averment that such decisions are in the greater good of the consumer or the public is indeed followed in principle and spirit.

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DOMESTIC VIOLENCE AND INDIAN CONSTITUTION

- *Gawaraja Suthar*[120]

Abstract

A woman is still neglected lot and subject to discrimination and victimization at home as well as outside home. This grim picture is both at national and international. Women, irrespective, of their caste, colour and creed have been discriminated and were given subhuman status. The dominance of the then male centred ideas adversely affects the status of women. The prevalence of domestic violence reveals that, contrary to popularly held belief that home is the safest place to live in often turns out to be the dangerous. Indian women have been victimized, humiliated, tortured and exploited through the ages. Female-foeticide, *Satipratha,* child marriage, dowry, social boycott of the widows, etc., are just a few examples of the atrocities suffered by women.

Key words: *Woman, Domestic violence, Female Infanticide, Dowry*

I. Introduction

Domestic violence is essentially violence perpetrated by persons in intimate family relationships. Family violence includes hitting, slapping, choking, kicking, biting, pushing, using weapons, entering a residence without permission, destroying personal property, forced sexual acts, and direct threats of violence against another family member. Domestic violence is not limited to physical and sexual abuse, but also includes emotional abuse such as threats of violence and stalking.

Family being considered as a private domain, even, abuse, exploitation, injustice, discrimination and violence are allowed in our patriarchal structure. To this day the majority of Indian women do not have any independent or self-dependent status. It seems to be most disillusioning that, within the family itself some of the things which have so far developed which are not healthy and conductive for the other subordinate or dependent member of the family. Domestic violence often remains a hidden problem which has long lasting effects on its victims.

Women who challenge their husband's right to control their behaviour or who ask for household money or step out of the house without permission may face violence. This process leads men to believe their notion of masculinity and manhood, which is reflected to the degree by which

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they control their wives. The judiciary and police are supposed to be the protectors of the victims of violence as and when such incidences knock their doors.

Domestic violence is a pervasive serious social malady. It has been in existence for a very long time. It bluntly, trips women of their most basic human rights, the right to safety in their homes and community, and carried to the extreme, it may kill, despite its cost in lives, health, economically well being and work productivity and its impact on other social-economic variables, domestic violence tended and still tends to be a 'Crime of Silence'. This ensures that information about domestic violence is sketchy and as a consequence, the perpetrators often escape accountability and continue to commit violent acts.

Steps have been taken at the national and international fronts to protect women from Domestic Violence. The United Nations, from the very beginning is concerned with the plight of women. Efforts rendered by the United Nations from 1975 to 1995, through conventions and conferences, addressing violence against women, brought to light the specific issue of domestic violence against women as a topic for consideration in the international field. The World Conferences held in Mexico, Copenhagen, Nairobi and Beijing have taken up the issues of women seriously with a view to finding productive solutions.

In India, the Indian Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women. The Constitution of India guarantees to all Indian women equality, no discrimination by the State, equality of opportunity, equal pay for equal work. In addition, it allows special provisions to be made by the State in favour of women and children, renounces practices derogatory to the dignity of women, and also allows for provisions to be made by the State for securing just and humane conditions of work and for maternity relief. Indian criminal law also protects women from violence in matters of death, dowry, divorce, indecent representation etc.

Before passing of the Protection of Women from Domestic Violence Act, 2005, there was no independent and comprehensive complaint mechanism to deal with the problem of domestic violence. The problem of domestic violence was seen as any other violent crime defined in the Indian Penal Code. The mechanism which was applicable to the crimes against women identified under the IPC was applicable to the cases of domestic violence substantially. Protection officers are appointed to deal with the cases of domestic violence specifically. NGOs are also involved with an intention to enforce the law more effectively. It is also observed that no proper action is taken to bring awareness among women about their rights

and protection. Particularly in the rural areas due to lack of education and other problems most women are unaware of any law for their protection.

II. Impact of Domestic Violence on Women

Violence does not occur as an isolated incident in the lives of abused married women and young girls. The physical and mental violence occurs on a regular basis causing incalculable suffering and inflicting deep scars on the victims. Women's health is often permanently damaged or it can have fatal consequence. Pregnant women are particularly at risk.

III. Protection of women from Domestic Violence under International Treaties

The phenomenon of domestic violence against women was identified primarily as a private concern. From this perspective, violence was seen to be a matter of individual responsibility, and the woman was perceived to be the one responsible for either adjusting more adequately to the situation as dictated by cultural norms or developing an acceptable method of suffering silently. This basic understanding of domestic violence as a personal issue has limited the extent to which legal resolution to the problem has been actively pursued.

(A) The United Nations and the protection of Women's rights

The United Nations, from the very beginning is concerned with the plight of women. Apart from the charter provisions, more than fifty instruments on human rights have been formed by the United Nations since its inception, many of them recognize the sex or gender as important premises of analysis when it comes to examine the enjoyment of human rights.

(B) International Covenant on Civil and Political Rights (ICCPR): This Covenant was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976. By the end of 2001, the Covenant had been ratified by 147 states including India. In light of this legally binding international obligation, the failure of a government to prohibit acts of violence against women constitutes a failure of state protection. The main provisions of the ICCPR that can be applied to cases of domestic violence are as follows: Articles 1, 2, 3, 6, 7, 16, 23 and 26. Women have used the communication procedure under the first Optional Protocol to the ICCPR to complain to the Human Rights Committee of the UN about sex discrimination which breaches the ICCPR.

(C) Commission on the Status of Women: The Commission on the Status of Women (CSW) is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women. It was established on 21 June 1946 as a part

of the Economic and Social Council which falls under the purview of ICESCR (International Covenant on economic, Social and Cultural Rights), the object being 'to promote implementation of the principle that men and women shall have equal rights'. The ICESCR was considered as the weakest Covenant due to a fear of judicial intervention in the policies of the executive branch of government and the fact that it requires state resources and governments to fulfil their socio economic obligations and that too it provided only for progressive realization depending on the resources of the concerned governments.

(D) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): The most extensive instrument dealing exclusively with the rights of women is the Convention on Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly in 1979. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

(E) UN Resolutions on Prevention of Domestic Violence

In 1985 the UN General Assembly passed Resolution 40/36 on domestic violence, inviting states to 'take specific action urgently in order to prevent domestic violence and to render the appropriate assistance to the victims thereof'. The resolution was the first of its kind to refer to the public effects of domestic violence. It focuses on the negative impacts of domestic violence on children, the family and the victim and invites governments to make broad changes to their justice systems to deal with the punishment of abusers and the protection of victims. The member states were held responsible for preventing domestic violence and assisting victims.

(F) Reports of the Special Rapporteur on Violence against Women, Its Causes and Consequences

Thematic Rapporteurs are held as one of the most effective tools within the United Nations to monitor human rights violations. In 1994, Radhika Coomaraswamy was appointed by the U.N. Commission on Human Rights as the first Special Rapporteur on Violence against Women, its causes and consequences.

IV. Protection of Violence under constitutional provisions

Women are one of the identified sections that are vulnerable to discrimination and hence protected from any form of discrimination. Women are also entitled to special protection or special rights through legislations, if needed, towards making up for the historical and social disadvantage suffered by them on the ground of sex alone.

V. Rights Protected under the Constitution of India

- Equality before law for women (Article 14).
- The State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (Article 15 (1))
- The State to make any special provision in favour of women and children (Article 15 (3))
- Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State (Article 16)
- The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (Article 39-(a)); and equal pay for equal work for both men and women (Article 39(d))
- To promote justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme 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 (Article 39 A)
- The State to make provision for securing just and humane conditions of work and for maternity relief (Article 42)
- The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation (Article 46)
- The State to raise the level of nutrition and the standard of living of its people (Article 47)
- To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (Article 51(A) (e))
- Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243 D(3))
- Not less than one- third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243 D (4))

- Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243 T (3))
- Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (Article 243 T (4))
- To uphold the Constitutional mandate, the State has enacted various legislative measures intended to ensure equal rights, to counter social discrimination and various forms of violence and atrocities and to provide support services especially to working women. Although women may be victims of any of the crimes such as 'Murder', 'Robbery', 'Cheating' etc., the crimes, which are directed specifically against women, are characterized as 'Crime against Women'. These are broadly classified under two categories.

A. Fundamental Rights

Despite the fact that, all fundamental rights contained in Part-III, Articles 12-35 are material to all the residents regardless of sex, certain fundamental rights with certain particular and positive arrangements secure the rights of women. Article 14, gives fairness under the steady gaze of law that is no individual in the state will be denied balance under the watchful eye of law and equivalent assurance of the law. Hence, women in Indian culture appreciate similar assurance and treatment as men which are ensured by the Constitution.

Article-15, forbids such a victimization women when it announces in proviso-1 that 'the state will not oppress any resident on grounds just of religion, position, race, sex, spot of birth or any of them'. Article-15 (3) gives that, 'nothing in this Article will keep the state from making an exceptional arrangement for women and youngsters'. This clearly alludes that at whatever point any need emerges because of curious characteristics the women appreciate; the state won't spare a moment to meet their exceptional necessities by ordering laws for them. This was the aim of the composers of the Constitution and to improve the state of women by giving unique security, this specific provision has been embedded. Legitimizing it Honourable Justice S. Manohar noticed: 'The inclusion of provision (3) of the Article-15 according to women is acknowledgment of the way that for quite a long time, women of this nation have been socially and monetarily impeded. Therefore, they can't partake in the financial exercises of the country

on a balance of equity. It is to wipe out the financial backwardness of women and to engage them in a way that would achieve viable balance among people that Article-15 (3) is set in Article-15. Its item is to reinforce and improve the status of women[121]. Here it is likewise presented that when uncommon treatment for women emerges; they ought to be treated as socially and instructively in reverse as examined in the Article-15 (4) of the Constitution.

In this association, it is imperative to cite Justice Deshpande when he says: "women fulfil the instructive, social and monetary standards of backwardness when contrasted with men. This reality is blurred and has not been brought to the bleeding edge on the grounds that the quest for the rules of backwardness has been limited to correlations being made, between various stations, networks or social classes, every one of them including men just as women. Yet, when the state of women is to be thought of, one can approach by regarding women as a class and think about the state of women as against the state of men.[122]

Article-16 ensures equivalent chance in issues of public work as Article-16(1) announces that "there will be uniformity of chance for all residents in issues identifying with business or arrangement to any office under the state". For this situation a reference might be put forth to the defence of[123], where the standards requiring female workers to get consent before marriage and disavowal of right to work to wedded women were held biased and violative of Article-16 of the Constitution. Equity V. R. Krishna Iyer proclaiming this standard to be in disobedience of Article-16 proceeded to notice: "if a wedded man has right to a wedded woman other thing being equivalent, remains on no more regrettable balance. This second-rate act is aftereffect by the manly culture of undermining the more vulnerable sex failing to remember how our battle for public opportunity a fight against women’s bondage was additionally. Opportunity is resolute, so is Justice that our establishing confidence cherished in Article-14 and 16 ought to have been heartbreakingly overlooked opposite portion of India's mankind, to be specific our woman is a dismal reflection on the distance between Constitution in the book and law in real life. He proceeded to notice further that "we don't intend to universalise or dogmatise that people are equivalent in all occupations and all circumstances and don't reject the require to pragmatism where the prerequisites of specific work, the sensitivities of sex or the eccentricities of cultural areas or the impediment of either sex may urge selectivity. In any case, save where the separation is self-evident, the standard of value should administer."

[121] Government of Andhra Pradesh v P. B. Vijay Kumar , AIR1995 SC 1648 at P. 1651
[122] Charan Singh v. Union of India, (1979) S. L. J. 26 at p. 32.
[123] C.B. Muthamma v Union of India, AIR 1979 SC 1868

Article 16 (4) of the Constitution accommodates the booking of arrangements or posts for any regressive class of residents and its item has been flawlessly expressed by Justice Jeevan Reddy when he stated: so, the article behind 16(4) is strengthening of the denied in reverse networks to give them an offer in the managerial contraption and in the administration of the local area. Presently an inquiry emerges whether women can be viewed as remembered for the 'denied in reverse local area'. Mulling over the reality of their status and position they appreciate and the manner in which they are overlooked, they satisfy practically all the attributes of a denied in reverse local area. As a class unmistakable from men, they are viewed as in reverse in all the circles, social, monetary and instructive. That is the reason, it was felt that the women ought not to be dealt with negatively and each conceivable advance ought to be taken in accomplishing this Constitutional objective of putting women at standard with men.

Article-19 assurances to all the residents the two people "the privilege to the right to speak freely of discourse and articulation". Accordingly, everybody has a fundamental option to shape his own assessment on any issue of general concern. Life and individual freedom of everybody (might be a male or a female) is ensured by the Article-21 of the Constitution which gives that "No individual will be denied of his life or individual freedom besides as indicated by strategy set up by law". Right to life is viewed as the most valuable fundamental rights among all the common freedoms. The articulation 'Life' guaranteed under this Article doesn't imply simple creature presence or proceeded with drudgery through life. It has a lot more extensive importance. So likewise, the Supreme Court has given the most extensive conceivable translation to the articulation 'individual freedom' which shows up in a similar Article in *Maneka Gandhi's case*[124]. The effect of the case is critical as an assortment of rights were brought into the forms of Article-21 by joining the idea of sensibility into the methodology set up by law.

Article-23 of the Constitution explicitly forbids traffic in people. In this setting traffic in people incorporates 'Devadasi System'.[125] Dealing with people has been pervasive in India for quite a while as prostitution and selling and buying individuals at a cost much the same as vegetables. On the strength of Article-23(1) of the Constitution, the governing body has passed the Suppression of Immoral Traffic Act, 1956 (presently renamed as The Immoral Traffic (Prevention) Act, 1956) which targets abrogating the act of prostitution and different types of dealing. This is an Act made in compatibility of the International Convention endorsed at New

[124]1978 AIR 597
[125] Vishal Jeet v Union of India, AIR 1990 SC 1412

York on the ninth day May, 1950 for the avoidance of shameless traffic. As of late the Andhra Pradesh governing body has sanctioned the Devadasis (Prohibition of Dedication) Act, 1988 to forbid the act of devoting women as Devadasis to Hindu Deities, symbols, sanctuaries and so forth, which perpetually brings about shades of malice like prostitution.

In "*People groups Union for Democratic Rights vs. Union of India*"[126], the exaction of work and administrations against instalment of not exactly the base wages was held as constrained work and violative of Article-23. Under Article-25 of the Constitution of India, all people either man or lady of any position or statement of faith are similarly qualified for opportunity of heart and the option to openly affirm, rehearse and engender any religion - subject to public request, ethical quality and soundness of the local area.

The above listed fundamental rights in regard of women as revered in Part-III of our Constitution positively focus on women government assistance and to advance interests of women. The uniformity condition which augments the extent of fundamental rights of women delightfully discovered spot in the expressions of Justice Krishna Iyer when he says: "The battle isn't for women status however for human worth. The case isn't to end disparity of women however to re-establish all-inclusive equity. The offer isn't for portions and fishes for the neglected sexual orientation yet for infinite concordance which never comes till women comes. The spirit of man is lady and when she goes there isn't decency of solidarity left" (V.R. Krishna Iyer "Of Law and Life", 31 (1979)).

B. Directive Principles of State Policy

Other than the Fundamental Rights, the Constitution in Part-IV under Directive standards of state strategy additionally guides the state to take certain medicinal measures for the government assistance of the women. Article-37 says that it is the obligation of the state to apply these mandate standards in making laws. In this way, while uncommon laws are should have been authorized these standards will be followed. Article-39 which guides the state to make sure about a social request and advancement of government assistance of the individuals has explicit arrangements for women too. Article-39 (a) says "that the residents, people similarly, reserve the privilege to sufficient methods for occupation."

Article-39 (d) gives that "there is equivalent compensation for equivalent work for the two people". In *Uttarakhand Mahila Kalyan Parishad vs. State of UP*[127], it was held that female educators are qualified for similar compensation as is paid to the male instructors of a similar

[126] AIR 1982 SC 1473
[127] AIR 1992 SC 1695

establishment. Again, the state has sanctioned the Equal Remuneration Act, 1976 to offer impact to these Directive principles[128].

Article-39 (e) explicitly coordinates the state not to manhandle the wellbeing and strength of the labourers, people. That is the reason the Constitution forces upon the express a commitment to guarantee that the wellbeing and strength of labourers, people and the underage of kids are not manhandled and that residents are not constrained by financial need to enter a job inadmissible to their age or strength. On account of the works dealing with Solar Hydro Project versus State of Jammu and Kashmir, the Supreme Court held that development work is risky business and youngsters under long term can't be utilized in such sort of work.

Article-42 of the Constitution fuses a significant arrangement to help women. It guides the state to make arrangements for making sure about and accommodating states of work and for maternity alleviation. The state has attempted to execute this order by establishing the Maternity Benefit Act, 1961.

A coordinated and systematic response needed for the domestic violence in India. U/s. 498A of the Indian Penal Code is the most significant reforms for protecting women's rights. It is also important that civil law remedies to provide protection to women victims of domestic violence and the Domestic Violence Bill, 2005 is one of the most significant. The Indian Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women.[129] In the sphere of right to equality no uniform judicial approach has been followed by the Indian judiciary in analyzing the legal position of women. In the early cases, the courts have employed a differential analysis in classifying between men and women as a group and in upholding legislations that conferred advantageous position to women. Gradually in cases relating to public employment, discriminatory provisions favourable to men etc., the differential approach was disregarded and assured a welcoming step in ensuring gender justice.[130]

VI. Conclusion

On the analysis of prevalent laws relating to domestic violence we may say that they are not complete in the sense that they provide for criminal trial of violence and is silent on

[128] Uttarakhand Mahila Kalyan Parishad vs. State Of UP, AIR 1992 SC 1695

[129] Anjani Kant, (1997), Women and the Law, A.P.H. Publishing Corporation, New Delhi,p.130

[130] **AIR v** *Nergesh Mirza* **1987 SC 1829;** *C.B. Muthamma* **v.** *Union of India* **A.I.R. 1979 S.C. 1868;** *Ammini EJv. Union of India* **A.I.R. 1995 Ker 252,268.**

means for immediately stopping the violence occurring in the family. Secondly it covers only married woman, other intimate relationships are outside the gambit of this law, this law also does not protect the right to reside in shared household which is very important aspect of law. Statistics indicate that woman in the country do not own property or the matrimonial home which belongs either to the husband or to his family members. The man therefore is literally lord and master of the home. This analysis would not be complete without mentioning that the matrimonial laws of this country do not contain any significant rights to matrimonial property for women, therefore on the breakdown of a marriage, the woman has to literally leave with empty hands.

Domestic violence is a widespread problem throughout the developed and developing world and makes serious impact on quality of human life and broader development. Violence against women is the manifestation of a historically unequal power relationship between men and women. It is a conditioned response and it is not natural or born of biological determinism. In the olden days violence against women was a result of the prevalent atmosphere of ignorance and feudalism. Today violence against women is an uncontrollable phenomenon, which is a direct result of the rapid urbanization, industrialization and structural adjustment programmes which are changing the socio-economic scenario of our country.

Domestic violence affects the lives of many women both in the urban and rural areas in India. It has been found to recur throughout the life cycle of women and has extensive repercussions. Violence against women takes many forms-physical, sexual, psychological and economic. These forms of violence are interrelated and affect women even from before birth till old age. Women who experience violence suffer a range of health problems and their ability to participate in public life is diminished. Violence against women harms families and communities across generations and reinforces other violence prevalent in society. Violence against women also impoverishes women, their families, communities and nations.

Experience shows that woman generally do not want to break the marriage immediately nor they want to send their husbands behind the bars but they want that violence against them must be immediately stopped. Therefore, the purpose of domestic law is to prevent such a situation and to restore a woman to a position of equality within the marriage so as to give her the equality within the marriage so as to give her the time and the space to decide what she wants to do with her rest of life therefore this is the main function of domestic violence law.

Keeping in view all these facts and experiences woman in our country initiated campaign for a new civil law on domestic violence in 2005, this proposed law wants protection for victim of

domestic violence, monetary relief and most importantly the right to live in share household from where victim cannot be sacked out by the aggressor.

Within the last few decades, gradual improvement in women's status due to women's activism in various parts of the world has helped slowly to increase the visibility of domestic violence as a social problem. Despite this, violence against women within the family home, until very recently, has received little attention as either a social or a public health issue.

There are number of preventive laws but still the Government has not been able to control the growing incidents of violence against women. Even the provisions of protective laws for women are sometimes discriminative. The Preamble of the Constitution contains various goals including 'the equality of status and opportunity to all the citizens'. Article 15 (1) prohibits gender discrimination, but in some of the Indian laws the status of woman is considered to be lower than that of man.

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WOMEN WITH DISABILITIES IN INDIA

-Kanchan Bala[131]

ABSTRACT

According to census report of 2011, women constitute around 48% of India's total population. India's emergence as a leading player in international business and politics is increasingly drawing global attention to the nation's approach toward redressing and preventing violations of fundamental human rights, most importantly the rights of Indian women. However, the success of this endeavour in India is rapidly evolving; yet, still deep patriarchy will depend upon strategic mobilization by women's rights advocates and committed efforts by the Court to enforce the rights of women, independent of mainstream opinion and within the boundaries of the separation of power doctrine. This work makes an effort to realize that if India can assume a leading role in advancing gender justice through its judiciary, by using various mechanisms and could serve as an inspiring model for other countries and international human rights bodies.

Key Words: *Constitutional Protection, Gender Justice, PIL, Statutory Protection, Supreme Court, Women Rights.*

1. INTRODUCTION:

"A woman feels keenly, thinks as clearly as man. She 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 marriage, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above or under the other. They are equals."

-Lord Denning[132]

The right to equality and all other human rights are all applicable to man and woman equally but in practice the world is far away. At present when we boast of modern civilization and scientific advancement, the denial of right to equality to woman is sadly a reality. India has a long and a continuing tradition extending over centuries of oppression of women. Women

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[132] The Due Process of Law, pp 194-195 (Butterworths, London) 1981.

enjoyed an honorable position in the distant past. Subsequently patriarchy deprived women of their rightful status in India. During the Vedic period woman was given an honored position. She was entitled to *Stridhana* that is property gifted to her by her parents, presents received etc. over which she had an absolute right. On her death this would devolve on her female heirs. However, there were some in-human practices prevailed during that period like *Sati* in certain parts of India. In medieval period, When the *British* invaded India on the utmost initiation by persons like Raja Ram Mohan Roy they tried to develop the legal status of Indian women through passing of some legislation.[133] The Hindu Widows Remarriage Act 1856, The Child Marriage Restraint Act 1929, The Hindu Women's Right to Property Act 1937 and the Hindu Women's Right to Separate Residence and Maintenance Act 1946 were some of the measures taken by then British Government in India that sought to improve legal, social and economic status of women to a very limited extent.

After independence, the framers of the Constitution of India rightly felt that it is not sufficient to confer some minor benefits on women, but it is necessary to declare in unequivocal terms, their right to equality with men and various other rights which would help them in attaining an equal status or an equal footing with men. Hence, the Constitution provides equality to men and women and also gave special protection to women to realize their interests effectively along with other supporting rights and enactments. Various Articles of the Constitution reveals this noble idea of our Constituent Assembly.[134] However, the holistic principle of giving the *second sex* an equal status per with men remained only on paper.

India received much international attention for its dynamism and innovation on various fronts, yet the country also remains steeped in centuries old norms and conventions. This tension was reflected in the decisions of the Supreme Court also which has assumed an active role in enforcing Human Rights through its decisions in the beginning. It is sometimes limited in this regard by the complex adversarial system in which it operates. But, after the development of Public Interest Litigation (hereinafter PIL) in the late 1970s and 1980s through a series of decisions issued by Indian Supreme Court the whole scenario changed. Through PIL, the Supreme Court has addressed a very wide range of human rights issues, including rights abuses suffered by women. The Supreme Court observed "PIL is really a response to the needs of

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[133] B. Sivaramayya, Gender Justice, Fifty Years of Supreme Courts of India, p 291 ILI Jrnl. (Oxford University Press).

[134] Article 14, 15, 16, 21 etc.

society, particularly the society of women who . . . have been badly treated for centuries”.[135] The Supreme Court in a plethora of judgments extends its humanitarian approach to give equal status to women as desired by our Constitution.

GENDER JUSTICE:

Gender justice is an undefined terminology. Sometimes it refers to equal treatment of both men and women and sometimes ‘justice to the fairer sex’. However, for the purpose of this work gender justice will be treated as the ‘justice to the fairer sex’. It is an important essence of a civilised society. No society can progress denying gender justice. Our father of nation Mahatma Gandhi so once said, “Women are the companion of men, gifted with equal mental capacity. Ignoring them will be a big mess for the civilization.”

In most ancient societies women have been considered men’s inferiors physically and intellectually. Throughout most of ancient Greece and Rome, women enjoyed very few rights. Marriages were arranged; women had no property rights and were not entitled to education. In ancient China, the *yin* and *yang* philosophy reinforced the notion of women’s inferiority[136]. China also devised one of the most repressive customs of foot binding for women, rendering the woman uncomfortable and dependent on family and servants. According to Hindu laws of Manu, as put forth in the *Manusmriti*, women were subservient to male relatives. Widow-remarriage was not allowed and the law sanctioned the practice of Sati, a truly atrocious practice. Wearing bangles is also understood to be a form of fetters/shackles. Under common law of England, a married woman hardly had any rights; she had no rights to her property after marriage[137]. In the early history of the United States, women and children were considered as a man’s possession. Over the centuries, as traditional patriarchal customs and laws became more deeply entrenched, women’s lives became more restricted and oppressed.

Gender justice, particularly concerning matters to do with the workplace and the family should surely top the list of “unfinished business”. It is, along with gender liberation, is among the highest aspirations on the continuum of addressing gender inequalities that profoundly affect the lives of men, women, boys, girls and people of all gender expressions and identities. It is a

[135] Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

[136] David Kirp and Marlene Franks Strong, ‘Gender Justice’, University of Chicago Press, (1986), Chicago, p. 23
6 Ibid, p. 24.

[137] Maitrayee Mukhopadhyay, ‘Gender Justice, Citizenship and Development: An Introduction’, ‘Gender Justice, Citizenship and Development’, Edited by Maitrayee Mukhopadhyay and Navsharan Singh, (2007), published by Zubaan, New Delhi, p. 11.

framework that allows us; as human rights makers, to build on the stepping stones of gender equity, equality and empowerment and to go further to seek societal transformation. Celestine Nyamu Musembi, a fellow at the Institute of Development Studies at the University of Sussex, sums up this concept of gender justice as under:

"Gender justice is about more than simply questioning the relationship between men and women. It involves crafting strategies for corrective action toward transforming society as a whole to make it more just and equal; and it means a place in which women and men can be treated as fully human. Moreover, it implies moving away from arbitrary to well-reasoned, justifiable and balanced that is, 'fair social relations'."[138] There are some key elements of gender justice that are similar in all around the globe and need to be rectified.[139]

1. Fair treatment of women and men, where fairness is evaluated on the basis of substantive outcomes and not on the basis of a notion of formal equality that use an implied 'sameness' standard. This means that in some cases, different treatment may be what is needed for a just outcome.
2. Fairness should be at the level of interpersonal relations and at the level of institutions that mediate these relations and offer redress for wrongs.
3. Acknowledgement that given a long history of gender hierarchy that has disadvantaged women, gender justice inevitably implies realigning the scales in women's favour.
4. Questioning the arbitrariness that characterizes the social construction of gender.

2. THE THIRD GENDER:

The word 'Gender' in archaic use includes men and women only. But in recent times, society has come to acknowledge one more gender namely the transgender people. This is also better known as the third gender. The term 'gender justice' denotes that all people having same or different gender will be treated with equality, justice and fairness and shall not be discriminated against on the basis of their gender.

3. GLOBAL VIEW OF GENDER JUSTICE:

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[138] Celestine Nyamu Musembi, 'Gender Justice A Concepttual Analysis', 2004. Linguith, Suxess.
[139] Challenging the Liberal Subject: Law and Gender Justice around the Globe', Ratna Kapur, 'Gender Justice, Citizenship and Development', Edited by Maitrayee Mukhopadhyay and Navsharan Singh, (2007), published by Zubaan, New Delhi, p. 11.

Equal participation by women and men in both economic and social development, and women and men benefiting equally from societies' resources is crucial for achieving gender justice. The United Nations Development Fund for Women (UNIFEM) was created in 1976 to provide technical and financial assistance for women empowerment. The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) was adopted in 1979 by the UNGA. It is sometimes described as an international bill of rights for women. The Decade for Women (1976-1985) and four world conferences on women (between 1975 and 1995) contributed significantly to raising awareness and commitment to gender equality and gender justice. In July 2010, the United Nations General Assembly created UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women.

In doing so, UN Member States took a historic step in accelerating the Organization's goals on gender equality and the empowerment of women. Apart from that the Commission on the Status of Women, a global policy making body the United Nations Economic and Social Council (ECOSOC) is dedicated exclusively to gender equality and advancement of women. The United Nations Development Programme (UNDP) has developed the two most well known gender justice indexes – Gender Related Development Index and the Gender Empowerment Measure to compare and rank member states with regard to gender justice performance. India is ranked 113 in the Gender Related Development Index, while USA is 16th and UK is 10th.

The European Union is also empowered by treaty to promote equality between men and women and to combat other forms of discrimination. Article 21 of the Charter of Fundamental Rights of the European Union prohibits discrimination on grounds of sex and other constants. The treaty of Amsterdam, 1999 reinforced existing provisions in the EC treaty on preventing pay related discrimination between men and women[140]. It has gone a step ahead by promoting equality and to eliminate inequality between men and women in general[141].

Gender justice in United Kingdom:

The parliament of UK granted voting rights in the year 1918 to women over the age of 30. It was in 1928 that suffrage was extended to all women over 21, giving them complete political equality with men.[142] Margaret Thatcher went on to become the UK's first woman Prime

[140] (Article 141).

[141] (Articles 2 and 3 of the EUROPEAN COMMUNITY TREATY, 1957).

[142] Mary Wollstonecraft ,'A vindication of the Rights of woman' , 'Civil Society and Gender Justice: Historical and Comparative Perspectives', Edited by Karen Hagemann, Sonya Michel and Gunilla Budde, (2000), Oxford University Press, London, p. 19.

Minister and second among the world in 1979. To address the issue of discrimination at the work place The Equal Pay Act, 1970 was enacted and allowed workers to claim equal pay for equal work or for work of equal value. Abortion has been legal in Great Britain since 1967. All working women are entitled to 14 week maternity leave, mandated by the Employment Protection Act, 1975. The Domestic Violence, Crimes and Victims Act, 2004 deals with domestic violence. Efforts have been made to make the judicial system and the police force more sensitive to the needs of victims in cases of domestic violence to counter act the problem. Rape is a statutory offence under The Sexual Offences Act, 2003. The UK is one of the few countries to offer sexual assault victims financial compensation and also to make marital rape a criminal offence. The Sexual Offences Act, 2003 has made the word 'prostitute' gender neutral including in its purview now not only women but other genders too. This has been a tremendous step towards achieving gender justice. And lastly, but not the least, the Female Genital Mutilation Act 2003 makes the perverse traditional ritual of female genital mutilation (mainly of immigrants from Africa and Asia) illegal. With regard to the third gender, Parliament passed the Gender Recognition Act 2004, which effectively granted full legal recognition for transgender people.

Gender Justice in the United States:

The Women's Rights Convention, New York in 1848 specifically marked the beginning of the American movement towards achieving gender justice. It asserted that all men and women were equal and most importantly demanded the right to vote, formally launching the American campaign for women's suffrage. In 1920 this demand was met by the Congress. The Civil Rights Act, 1964 and Equal Pay Act, 1963 guarantee equal employment opportunities and renders it unlawful to discriminate on the basis of sex. The Supreme Court has ruled sexual harassment as a form of sex discrimination.[143] The Family and Medical Leave Act, 1993 permits any employee, male or female, to take up to 12 weeks of unpaid leave per year for maternity leave or child care. The ruling in *Roe v. Wade*[144] given by the Supreme Court put to rest the controversial issue of Abortion and it is now legal in every state. It determined that every woman has a right to self determination and abortion falls under right to privacy. In 1994, the Violence against Women Act declared domestic violence a federal crime, recognizing

[143] Challenging the Liberal Subject: Law and Gender Justice around the Globe', Ratna Kapur, 'Gender Justice, Citizenship and Development', Edited by Maitrayee Mukhopadhyay and Navsharan Singh, (2007), published by Zubaan, New Delhi, p. 15
[144] 410 U.S. 113 (1973).

violent crimes against women as violations of their civil rights and entitling them to sue for damages. On November 8, 2014, the U.S. Senate passed the Employment Non-Discrimination Act (ENDA). At the Federal level, ENDA would bar employers from discriminating based on sexuality and gender identity. The draft legislation is now with the U.S. House of Representatives, where it has not yet been taken up for a vote. Currently, there is no federal law designating transgender as a protected class, or specifically demanding equal treatment for transgender individuals.

Indian Scenario:

Women's groups started emerging in India in the early 1900s and at first focused on social reform and freedom struggle. They have also campaigned vigorously and successfully for social and political equality with men. In 1950 women and men over the age of 21 were granted voting rights. Indian patriarchal society not only harbors a culture of violence against women in the form of dowry, domestic violence and female infanticide, it also manifests in government policies towards women. Despite the deeply ingrained patriarchal attitude prevalent in India, it is one of the few countries ever to have elected a woman prime minister.

The Preamble to our Constitution is "a key to open the mind of the makers of the Constitution which may show the general purpose for which they make the Constitution"[145]. It declares the rights and freedoms which the people of India intended to secure to all citizens. The Preamble begins with the words "WE, THE PEOPLE OF INDIA " which includes men and

women of all castes, religions, etc. It wishes to render "EQUALITY of status and or opportunity" to every man and woman. The Preamble again assures "dignity of individuals" which includes the dignity of women. On the basis of the Preamble, several important enactments have been brought into operation, pertaining to every walk of life – family, succession, guardianship and employment that aims at protecting the status, rights and dignity of women. We must say that our compassionate Constitution, the Fountain Head of all laws, is gender sensitive. The Constitution of India has various provisions to ensure equality of the sexes and also to dismantle the prevalent imbalances in gender hierarchy.

Article 14 of the Constitution provides for equality before the law and equal protection of the law. Article 15 safeguards the right against discrimination. The Constitution also provides for positive discrimination and affirmative action on some counts. Article 15(3) permits special provisions for women. Article 16 provides equal opportunity with respect to public

[145] Kesavananda Bharti v. State of Kerala AIR 1973 SC 1406.

employment and they shall not be discriminated on the basis of sex of the person. Article 21 guarantees the right to life, the interpretation which has been broadened to include the right to live with dignity. Article 23 guarantees the right against exploitation and also prohibits traffic in human beings.

4. A CONSTITUTIONAL INSIGHT

Women as a vulnerable group of the society have been deprived, ill-treated, discriminated, exploited for a long time, and the Indian society is not an exception to this universal problem. It has been rightly observed that, throughout the history, racial, ethnic, and religious discrimination has produced numerous victims, but women, members of a majority group, have suffered even more than members of these minority groups.[146] Discrimination against women by men has been a problem throughout the human history and not vice-versa. According to Justice M.N. Venkatachaliah, in India women have suffered doubly- first, generally as members of castes and classes traditionally looked down upon; and second, particularly as those with lesser status even amongst those castes and classes.[147] It is an irony of fate that women in our country are relegated to a secondary position in comparison to their male counterparts in all walks of life, lag far behind males in terms of economic, social and political attainments.[148] Women represent 70 per cent of the poor according to a 2008 UN Report. Women are the majority of the worlds illiterate. Worldwide, women earn less than men for doing equal work; the average gap in 2008 was 17 per cent.[149] The glaring fact that emerges from the study of social evolution of human society is that in the old feudal society, woman was always given an inferior status. Paradoxically, she was also considered as the symbol of the sanctity and purity of the family. But this very aspect of her personality made women the target and the victim in a conflict-torn society.[150]

The social status of women in India is a typical example of this gap between the position and roles accorded to them by the Constitution and the laws, and those imposed on them by social

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[146] Eschel M. Rhoodie, Discrimination Against Women: Article Global Survey ix (McFarland & Company, Inc., Publishers, North Carolina, 1989).

[147] Justice M.N. Venkatachaliah, —Gender Justice – Achievements of the 20th Century and Challenges of the 21st Century‖ in Muralidhar C. Bhandare (ed.), Struggle for Gender Justice – Justice Sunanda Bhandare Memorial Lectures 109 (Penguin Enterprise, New Delhi, 2010).

[148] Manju Saxena and Harish Chandra (eds.), Law and Changing Society 220 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2007).

[149] Leila Seth, Talking of Justice: People's Rights in Modern India 59 (ALEPH, New Delhi, 2014).

[150] Prof. Madhu Dandavate, —Social Roots of Gender Injustice‖ in Muralidhar C. Bhandare (ed.), Struggle for Gender Justice – Justice Sunanda Bhandare Memorial Lectures 20 (Penguin Enterprise, New Delhi, 2010).

traditions. What is possible for women in theory is seldom within their reach in fact.[151] Supreme Court of India in Madhu Krihnan v. State of Bihar8 observed that women have always been discriminated against men and have suffered denial and are suffering discrimination in silence. Self sacrifice and self denied are their nobility and fortitude and yet they have been subjected to all kinds of inequities, indignities, incongruities and discrimination.

The predominant position given to men in the family structure leads to discrimination against women members of the family in almost all matters that regulate their existence. The structure of the family and the social norms and values that are built around thus are completely against the principle of equality guaranteed by our constitution. The system of gender based inequality, often referred to as patriarchy, does retard the growth of women‘s personality and affects them mentally, socially and psychologically. The inequality of women within the family extends to and is related with their socio-economic and legal position. The laws that affect women most closely are those relating to the family, that is, marriage, divorce, maintenance, custody of children, inheritance and women‘s right to property, etc and known in common parlance, as family or personal laws.[152] Such laws, ever since their codification, are based on the religious practices of different communities.

5. CONCLUSION:

The Indian judiciary develops its own theory of gender justice, informed by local realities and universally accepted norms. Women's rights advocates and the Supreme Court plays a critical role in shaping the discourse. Through various mechanisms, the Court has broadly addressed human rights abuses and spurred the other branches of government into action. However, judicial directives that trespass too deeply into the realms of the legislature and the executive can ultimately undermine the Court's powers, especially when its orders cannot be effectively implemented. The Court could avoid these problematic tendencies by maintaining a focused loyalty to the Constitution.

Having generously empowered the judiciary to develop the procedurally flexible PIL mechanism, the Indian Constitution provides a strong legal basis to enforce gender justice through this process, and permits guidance from international law to that end. Moreover, the

[151] Rajkumar Purthi, Rameshwari Devi, et.al. (eds.), Indian Women: Present Staus & Future Prospects 1-2 (Mangal Deep Publications, Jaipur, 2003).

[152] For Example, the Muslim Personal Law (Shariat) Application Act, 1937; the Dissolution of Muslim Marriage Act, 1937; the Hindu Marriage Act, 1955; the Hindu Minority and Guardianship Act, 1956; the Hindu Succession Act, 1956n etc.

Constitution has clearly delineated the roles of each branch of government, and the judiciary must respect these boundaries in order to maintain its own legitimacy and credibility. The successful promotion of gender justice through court driven mechanisms will also depend on greater coordination and mobilization of women's rights advocates. As seen in the Vishaka case, strengthening collaborations between ground-level activists and lawyers, building public support, working with the media and national statutory bodies, and maintaining advocacy efforts with the other branches of government are all critical to the success of this endeavor.

Mahatma Gandhi said; ―Men and women are equal but not identical. Women are equivalent to the male intellectually, mentally and spiritually and they can participate in every activity.‖203 In spite of this statement by Gandhiji during the freedom movement, even today among all deprived groups; women seem to have suffered and neglected the most. Looking across cultures, we do see women abused, exploited, and violated in a range of practices that have included rape, domestic violence, prostitution and sexual harassment in their culturally specific forms, with equality law standing there on the sidelines. Most cultures see these practices as inevitable (if regrettable) or criminal (if spottily enforced) but not as unequal in the legal sense. Practices seen to attach to differences do not give rise to claims for unequal treatment because the sexes are seen as different rather than unequally treated in those respects. In political sphere women, are dramatically under-represented , in spite of legislative and constitutional provisions granting them the right to participate in politics. Women‗s health is, worse than men‗s, and women are more subject to physical abuse and other forms of degradation. The elimination of discrimination against women still has a long way to go. Marriage, divorce, and family planning remain special issues for women. Education, employment, property rights and more importantly personal autonomy are more general concerns with special salience for women.

From the above it is evident that we have constitutional mandate to ensure equality and justice for women. Indeed, it is expected from the legislature that it will make appropriate laws to realize the constitutional goals and the judiciary to enforce the constitutional mandates. In addition to the basic constitutional mandate, we have also signed the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW), with reservations, which came into force on 3 September 1981.

Article 2 of the Convention provides: All appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women and to establish adequate legal protection for equal rights of men and women, in particular, (a) the

principle of equality of rights shall be embodied in the Constitution or otherwise guaranteed by law……..'Similarly, Article 5 of CEDAW commits signatories to take all appropriate measures ―to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

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CORPORATE ENVIRONMENTAL CRIMES AND REGULATION IN INDIA

- ***Dr. Sandeep Kaur***[153]

Abstract

The Corporate Environmental Crime, a subset of White Collar Crimes, is a recently developed concept. It involves holding corporations liable for violation of environmental obligations, however, as a company being an artificial person several issued have been raised with regard to punishing it with criminal liability. Hence with time many strategies have been evolved to deal with the issue and explore both the punitive, preventive and reformative measures to ensure that the environmental obligations are duly complied with. This Article aims to understand the meaning and nature of the Corporate Environmental Crime and the Corporate Criminal Liability and the various laws and regulations that enumerates the environmental crimes. Part I is Introduction followed by Part II that discusses the Criminal Liability of Corporations. Part III discusses the various strategies that are adopted by regulators to ensure compliance of the environmental standards and regulations. Part IV discusses the various enactments and rules that sets out the legal standards and provides for the criminal offences and liabilities whereas Part V provides for the evolving trend towards inclusion of such compliance in Corporate Governance followed by Part VI that is Conclusion. This Article aims to equip the reader with the basic idea of the corporate environmental crimes and its governance in India.

Keywords: "Corporate Environmental Crimes", "Corporate Governance", "Criminal Liability", "Control Strategies", "Environment".

I. INTRODUCTION

With increasingly globalizing world, it is becoming difficult to lock the natural resources within the bounds of national boundaries and reserving their exploitation exclusively by the natives. Corporations are competing with Governments, often influencing them to capture the natural resources. With an all time high level of consumerism, we have wide range of products

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to choose from. With continuously innovating world, we are creating systems to make our life easier day by day. But all that economics involves a price that is too big for money to pay and numbers to account for. A few decades ago, Bhopal, India witnessed, what was termed as the world's biggest industrial disaster, leaving thousands of people dead and a polluted environment that will continue to haunt thousands of more in the years to follow. Though the contemporary laws couldn't do much justice to the victims, but that incident changed the way India think about environment and its protection.

The Environmental Crimes are the matter of serious concern as they not only victimize the current populace but have inter-generational effects. Furthermore they are not limited to a country alone but rather they have global ramifications and thus the global community has come together to address the issue at a larger level. The term Environmental Crime has a wide connotation and doesn't have any universally accepted definition. However it can be understood to mean the actions/violations committed to ecology or environment to secure personal or business advantage. It is needless to say that in all environmental crimes the Environment or the Ecology is the main target and hence the environmental crimes are more or less classified basing upon the perpetrators and victims of the crime. Broadly they are classified into four categories i.e. organized environmental crimes, corporate environmental crimes, state related environmental crimes and personal environmental crimes. 'Corporate Environmental Crime' is a recently developed concept and is considered as a part and parcel of White Collar Crimes.

The Water Act, 1974 followed by the Air Act, 1981 is few of the first legislations that were enacted in India in the aftermath of the Stockholm Conference, 1972. Since then many industrial disasters have taken place however the legal response has been much lighter in this regard. These types of instances throughout the globe has prompted scholars to come up with various concepts such as 'green criminology', 'environmental justice', inter-generational equity', intra-generational equity' and many more, *'corporate environmental crimes'* is one among them. Thus it becomes desirable to understand how effective this new concept is and what are the measure taken on the governmental level to curb these crimes. In this article we will understand the nature of criminal liability that is imposed on a corporations, what are the control strategies to curb these crime and the existing legal framework along with other tools such as corporate governance.

II. CRIMINAL LIABILITY OF CORPORATIONS

Mens rea is one of the essential elements of crime. It is needless to say that a physical wrong without a guilty mind is merely a tort. Hence many of the earlier environmental crimes were dealt with concepts like negligence, vicarious liability and strict and absolute liability. But the position has considerably changed now. In the famous case of *New York Central & Hudson River Railroad Co.,* v. *United States*[154] it was categorically held that *". . . a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation*." Since then a trend has emerged to hold the occupier of the establishment or the director of the companies liable for the wrong actions of the corporation.

The Indian position, however, has remained complicated for a long period. In fact the Indian Courts were found reluctant to sentence the artificial person and have strongly advocated for putting fines alone on the corporations and hold the directors liable, for instance in the matter of the *Assistant Commissioner, Bangalore & Ors. v. M/s Velliappa Textiles Ltd.,*[155] the Hon'ble Apex Court held that where a statue provides for fines then the court should limit themselves to impose fine alone. This position was however overruled in the matter of *Standard Chartered Bank v. Directorate of Enforcement*[156] where the Supreme Court held that the imprisonment can be given but as the company being an artificial person cannot be locked up in jail, the same can be substituted by fines.

However there has been very strict view towards the people who are responsible for the affairs of the corporations for instance in the matter of the *Uttar Pradesh Pollution Control Board vs. Modi Distillery and ors.*,[157] where the single judge bench of the Allahabad High Court refused to hold the Chairman and Directors vicariously liable the Hon'ble Supreme Court categorically held that in terms of Section 47 of the Water Act, 1974 they were liable. Similar observations were also taken in the matter of *Haryana State Board vs Jay Bharat Woollen Finishing Works.*[158]

Hence as far as the traditional principles of the criminal justice system go, it is impractical to hold a corporation criminally liable and hence the term 'Corporate Environmental Crime'

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[154] 212 US 481 (1909)
[155] AIR 2004 SC 86
[156] AIR 2005 SC 2622
[157] AIR 1988 SC 1128
[158] 1993 CrLJ 384 (Punjab-Haryana High Court)

remains a very grey area are till date in a sense that ultimately the corporations despite it being a separate legal entity.

Though there are many provisions in the Indian environmental statues to lift the corporate veil and hold the officer in charge liable but that doesn't deter a corporation from committing environmental crimes and it can go on continuing to commit such crimes as its shareholders or the stakeholders can always replace the officer in charge. Thus in order to control the corporate environmental crimes, much emphasis must be placed in avoiding commission of such crimes rather than seeking to punish them later on. With passage of time many strategies have been evolved to keep a proper check on the corporate environmental crimes which are discussed in the following section.

III. CONTROL STRATEGIES

As discussed above that merely providing for heavy penalties is not the only solution to control the corporate environmental crime as it is practically impossible to make a corporation criminally liable. Thus it becomes desirable to develop strategies that help us address the problems specifically and also deter such crimes properly. Scholars have identified these strategies and evaluated their workings and effectiveness.[159] These strategies are discussed herein below.

a) Command and Control Strategy

This is the most obvious and common strategy employed by the governments. In command and control strategy the government enacts rules and regulations and requires the companies to comply with them. This strategy involves setting standards for everything, imposing severe punishments and high monitoring and review. This strategy involves punitive sanctions and is less preventive in nature. But the situation is quiet complicated than it appears to be. As already discussed above that companies are immune to imprisonment and they are usually penalized by fines, they do a cost-benefit analysis. If the cost of crime such as legal costs, fine imposed, cost of projects etc is less than the advantage sought to be achieved by committing crime, they are motivated to do it. There are two factors for this; firstly that they are getting benefited in real terms by committing such crime and secondly the penalties are subject to detection of crime. Hence in countries with high levels of corruption such strategies are less likely to deter the offenders.

[159] See, Sally S. Simpson, *An Empirical Assessment of Corporate Environmental Crime-Control Strategies*, Journal of Criminal Law and Criminology, Volume 103, Issue 1, Article 5.

b) Self-Regulation Strategy

One of the major issues with the *command and control strategy* is that the punishment of the crime is subject to its detection. Unless the crime is detected the legal machinery will not be set in motion. Hence another strategy could be that of self-regulation. In this strategy companies are asked to self regulate and comply with the standards. This is also supported by the disclosure based regime where companies are supposed to disclose compliance. Thus adding the environmental compliance with the corporate governance helps to certain extent. However the limitation is that the success of this strategy depends on the ethical and moral behavior of the organization. In India the mixed example of the *command-control strategy* and *self-regulation strategy* is that of Environmental Impact Assessment where both tools are used to secure compliance with the standards.

c) Informal Sanction Strategy

The Informal sanction strategy is different from the above discussed strategies in a way that where both of them require active regulation or legislation by the government, it requires informal action to impose extralegal costs on the corporations. In this strategy efforts are made to highlight the environmental violations of the corporations and thereby negatively publicizing it so as to impose reputational costs on the corporations. This strategy has two major benefits. Firstly with negative reputation the corporations can experience monetary loss in two ways directly and indirectly. In terms of direct monetary loss the corporation may witness a fall in its stocks or experience less trading and in terms of indirect loss it may lose significantly on various aspects such as brand-value and goodwill and it can further lead to small boycotts and non-cooperation by public halting the projects. Secondly, bad reputation also puts a check on managers who take the decision as internally they will be held responsible in the organization which may affect their profile and create hurdles in promotions, increments etc.

These are few of the strategies that are commonly adopted by the regulators to ensure compliance with the environmental standards both are preventive and punitive measures. While the third strategy is informal it is however important to understand the existing legal framework in India with respect to the first of the two strategies. The following two sections i.e. the Legislative Framework and the Impact on Corporate Governance will highlight the various regulatory measures that are taken as a part of the control strategies for corporate environmental crimes.

IV. THE LEGISLATIVE FRAMEWORK

Though there is no specific law that defines or specifies Corporate Environmental Crimes, but there are special provisions with respect to companies in most of the environmental legislations. Hence from an Indian perspective the ‘Corporate Environmental Crimes’ are no different than ‘Environmental Crimes’, the only difference is that punishment is made under a different provision after determining the person in charge of the company at the time of the commission of offence. For example section 16 of the Environmental Protection Act, 1986, Section 40 of the Air Act, 1981 and Section 47 of the Water Act, 1974 titled *Offences by Companies* provides for criminal liability of the officer in charge of the company or occupier of the facility for the commission of environmental crimes. In addition to these laws a separate enactment is also passed to establish a National Green Tribunal to adjudicate upon the environmental crimes; however it has limited jurisdiction over a few enactments only. The following is the list of all major enactments, rules and guidelines that touches upon the aspect of the Corporate Environmental Crimes in India:

a) Environmental Protection Act, 1986

This is the main legislation that deals with the Environmental Crimes in India and it is wide enough to include all harms to environment within its ambit. It was enacted in response to the Bhopal Gas Tragedy and UN Conference on Human and Environment, 1972. The Act read with rules made there under provides for various environmental standards. Furthermore it also provide for co-ordination of the various State and Central authorities. The State and Central Pollution Control Boards are made responsible to enforce these standards and proceed against the violators.

b) The Wild Life (Protection) Act, 1972

This act provides for protection of the wildlife including birds, animals and plants especially the endangered species. It was enacted to ratify the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). It prohibits hunting or trading or possessing endangered species and license such activities. It established various authorities i.e. Central Zoo Authority, National Wildlife Board and National Tiger Conservation Authority.

c) The Biological Diversity Act, 2002

This is one of the major enactments for environmental crimes especially from commercial perspective. It makes provision in relation to the use and access of the biological resources which includes plants, animals, micro-organisms and even their genetic material. It has set up a National Biodiversity Authority which grants various approvals and licenses required under the act. It prohibits access to bio-resources, bio research, bio- utilization or commercial

utilization of any bio-resource or its traditional knowledge. It provides for punishments up to 5 years of imprisonment and fine up to ten lacks on contravening companies.

d) The Water (Prevention and Control of Pollution) Act, 1974

This enactment was one among the firsts of legislative efforts taken for the conservation of environment at that time. This Act was followed by the Stockholm Conference, 1972. This Act, for the first time, established the Pollution Control Boards for the first time and made it as a nodal authority for other environmental legislations. This Act primarily criminalized pollution of water by industries and made provision for proper discharge of trade and sewage effluents. It also made it compulsory to obtain approval before discharging of trade effluents in water bodies and also to establish a water treatment facility at industries. This Act has also provided for stringent punishment for the contraventions. However with the passage of time it is advisable that the penalties be revised and enhanced.

e) The Air (Prevention and Control of Pollution) Act, 1981

This act designed on similar lines of the Water Act, 1974. The Act provides key definitions such as air pollutants and air pollution and provides for stringent punishments for industries that release toxic pollutants in air. It also provides for rules prescribing the heights of chimneys, treatment of air, and other air related standards. The imprisonment under this act can range from a minimum of three months to a maximum of seven years. It is noteworthy to mention here that despite existence of this act the Bhopal Gas Tragedy couldn't meet much justice.

f) **Public Liability Insurance Act, 1991**

This Act was also passed in the aftermath of the Bhopal Gas Tragedy. It also played important role in the LG Polymers gas leak in Vishakhapatnam Gas. This act makes it mandatory for all the corporations that are dealing with hazardous chemicals to have a insurance cover for the public liability that may arise out of unfortunate incidents such as gas leaks etc. This act provides for mandatory compensation for all the victims and provides for penalties for the companies which do not comply with the act. This is also a major act touching upon the corporate environmental crimes in India.

Apart from the above listed enactments there are many rules that are prescribed under those acts to provide for standards and measures to be taken by corporations to safeguard the environment. The violation of these rules also attracts punishment under their respective enactments. It thus becomes necessary to list out the few main Rules that play important role in protection and conservation of environment.

a) Batteries (Management and Handling) Rules, 2001

b) Hazardous Wastes (Management, Handling and Trans-Boundary Movement) Rules, 2008
c) Rules for the Manufacture, Use, Import, Export, and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells, 1989
d) Manufacture, Storage, and Import of Hazardous Chemical Rules, 1989
e) Chemical Accidents (Emergency Planning, Preparedness, and Response) Rules,1996
f) Bio-Medical Waste (Management and Handling) Rules, 1998
g) Environment (Siting for Industrial Projects) Rules, 1999

Hence there is a wide range of laws and regulations that deals with the corporate environmental liability and responsibility, apart from these laws other enactment also contains various provisions to deal with the corporate environmental crimes such as Indian Penal Code, 1860, the Forest (Conservation) Act, 1980 etc. However despite existence of so many checks and balances the environmental obligations are continued to be ignored by the corporations and there is a huge pile stock of cases that is pending before the judicial organizations. According to a report titled ***Down To Earth's State of India's Environment 2020: In Figures,*** released in June 2020 as many as 35000 environmental cases are still pending and at the current rate of disposal it might take us another 33 years to dispose all those cases. Therefore it is a high time that we develop sufficient infrastructure, check and balances and systems that help us eliminate environmental crimes to nil.

V. IMPACT ON CORPORATE GOVERNANCE

As already discussed that in order to conserve and protect environment merely regulations are not enough but efforts are required to be taken to induce corporations to self regulate. This can be done by developing a system where corporations are required to conduct feasibility studies of the new projects, take initiatives for the conservation of the environment and disclose the compliance of the environmental legislations. Through these methods a corporation can be made conscious of its actions effecting environment and be made responsible for them. Many of the rules listed in the preceding section requires the companies to make disclosure, hence for the sake of brevity they are not discussed here. There are many such systems both regulatory and voluntary which help corporations and regulators to cooperate. These systems in a way affect the corporate governance and make the corporations more accountable and responsible.

a) Environmental Impact Assessment

Environmental Impact Assessment is an important tool to control the environmental degradation and act as a preventive measure. It is a mandatory step that every corporation has to complete before venturing into a new project. It requires corporations to do detailed study of their projects and assess the impact of their activities on environment and what are the precautions and solutions they may take to compensate the environment. An EIA report is prepared and submitted to the government. Once it is approved, only then can a project can be started. This mechanism of EIA acts as a preventive measure to control environmental degradation and provide enough understanding to both the Government and the Corporation to avoid commission of environmental crimes. The reason it is discussed as a self-regulation strategy is because it shifts the onus of conducting feasibility study from the regulator to the corporations thus reducing the cost and easing the process.

b) Environmental Management System (EMS)

Environmental Management System is a mechanism through which a company can regularly review and evaluate its own environmental performance. It is not a legal requirement but merely a business practice adopted by many organizations to ensure that they comply with all the environment related regulations. An organization can design its own EMS and set its own targets. The most commonly used EMS is developed by the International Organization of Standardization for ISO 14001 standards. The ISO 14001 is being continuously developed since its inception and the ISO14001:2015 is considered to be of the highest levels. The ISO 14001:2015 covers various topics i.e. Context, Leadership, Planning, Support, Operations, Performance evaluation and Improvement.

c) National Voluntary Guidelines on Social, Environmental and Economical Responsibilities of Business, 2011

These guidelines were issued as early as in 2009 in form of CSR Guidelines by the Ministry of Corporate Affairs. Later it found baking by SEBI in 2012 which mandated for the top 100 listed companies to disclose business responsibility and sustainability indicators by submitting a 'Business Responsibility Report' which was expanded to 500 companies in year 2015-16 by amending Listing regulations. In March 2019, the NVGs were updated to include the Sustainable Development Goals (SDGs), and the United Nations Guiding Principles on Business & Human Rights (UNGPs). There are a total of nine (9) principles that are part and parcel of the 'corporate governance' and also that these guideline salong with the National Guidelines on Responsible Business Conduct (NGRBC) provides for fundamentals in this

regard. The Ministry has also formed a **Committee on Business Responsibility Reporting** which will develop formats for various reporting requirements such as Global Reporting Initiative (GRI), Integrated Reporting (IR) etc. Apart from these the Companies are also required to fulfill their CSR obligations and disclose them. A lot of corporations have taken initiative for conservation and protection of environments as a part of their CSR obligations. Hence through the various systems discussed above the government has sought to address the issue of the corporate environmental crimes. These systems in way support the idea of self regulation as far as the corporate environmental crimes are concerned. The certifications such as ISO can also be developed at domestic levels to extend benefits that can encourage more and more corporations to comply with the environmental regulations.

VI. CONCLUSION

Indeed there is a multiplicity of laws that criminalize the environmental degradation in many forms and also provides for imprisonment as punishment. However despite these laws in place the corporate environmental governance has been very poor in India. Despite existence of stringent laws we have witnessed many industrial disasters. Moreover most of the legislations were passed in response to the various international conferences and hence it shows a lack of concern on the part of domestic policy makers towards the environment. Hence it is suggested that umbrella legislation should be brought in place that deal with the environment in its wholesomeness and also pave way to punish corporations curtaining their liberty in way disadvantageous to them. Efforts are required to further strengthen the systems by incorporating environmental aspect more fully in the corporate governance. The BIS should also come up with certifications and hallmarks that encourage more and more corporations to achieve the compliance and sustainable development goals. Conclusively, India has a long way to go in securing environmental justice to its citizens and promoting a culture conducive and compliant to environmental obligations

BUSINESS AND HUMAN RIGHTS

- **Dr. Saurabh Garg**[160]

ABSTRACT

Businesses have an end motive of earning profits which can indirectly harm the various stakeholders. Stakeholders in terms of business could be defined as consumers, environment, people at large, shareholders, competitors, etc. The businesses owe responsibility towards the various stakeholders. Businesses are supposed to be very careful of the impact it has on its surrounding because public spirited person all across the world could be seen filing cases against the business harming the environment or basic human of individual.

The author intends to highlight few negative effects of business on the environment and the other stakeholders of a business. How litigation has brought the same before the eyes of the system. The courts have remedied the victims and trying to balance out development along with human rights protection. A clean environment is the basic human right of every citizen and the same has been bestowed in the international laws. When the international laws are ratified by State, it has to incorporate the same in its national legislation for it to be effective in the State. The State can regulate the businesses via the national laws. The businesses can be held accountable for their actions and impact on environment.

The author also provides for steps for the businesses to look into the impact it has against the human rights. The international law has played a vital role in spreading awareness among nations about the impact businesses have. Now we see how businesses while growing resort to unfair trade practices resulting in infringing the right of livelihood of individuals. Hence, the focus of today's generation has shifted to sustainable development and organic growth of companies. Striking a balance between the rights of a business and the people, environment and communities.

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THE BEGINNING

In the modern era, capitalism is the survival instincts of every human. They look for corporate jobs. Laws are found to be pro-capitalist and hence when the entire world is tilted towards money and favour the companies, there calls laws to protect the interest of citizens or people against the misuse of their rights in the hands of top companies. Businesses have played an important key-role in development of society, they provide jobs, services, provide means of acquired standard of loving. Nevertheless it is important that the same power should be kept in check, because they tend to harm the environment, communities and people at different level.

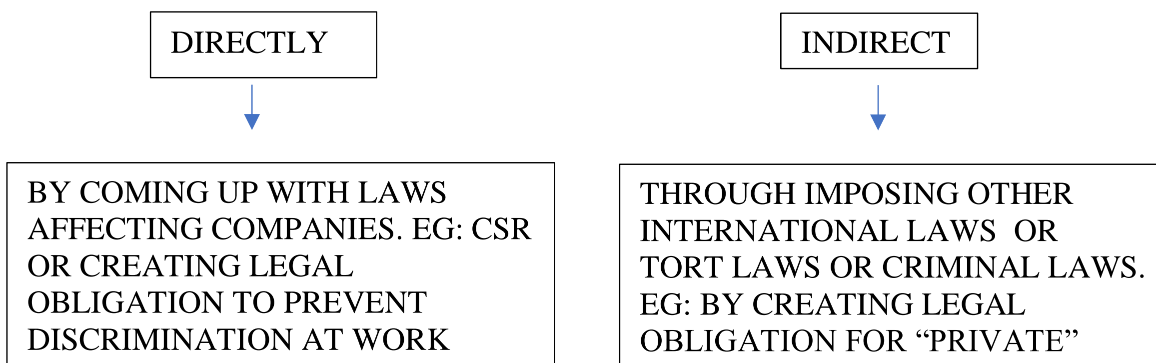
There are human rights which are protected under various international laws which creates a legal obligation on States to take measures to make sure that human rights are not violated. Human rights treaties, such as:

- International Covenant on Civil and Political Rights(ICCPR)
- International Covenant on Economic Social and Cultural Rights(ICESCR)

The treaties are enforceable only when a country ratifies them. It shall have a binding effect when a State signs and ratifies the treaty. This is how an obligation on State is created to follow the international laws. To make it enforceable in their State respectively, they incorporate the international laws in the municipal laws by way of amendments. When it comes to businesses in their State, the Government imposes some duties on the companies to make sure that they abide by it, as even corporates are entitled to artificial personality.

Generally, businesses do not have a legal obligation to care for the interest of citizens, or environment, or people under international law. Hence to create the obligation, it is important that the same is incorporated in their municipal laws, thereby creating legal obligation and holding them accountable for same.

Since States have the primary obligation to protect human rights, they need to make sure that businesses or other people do not hamper the environment, communities, or people. They either protect the right directly or indirectly.



When we look at businesses, their common motive is profit. They fail to acknowledge the negative impacts of their money minting business. The first aspect is climate change.

CLIMATE CHANGE – INTRODUCTION

Climate is an important aspect of environment that is constantly changing due to the invent of the various activities that harm the environment. Ensuring sustainable development for all requires effectively addressing climate change through an internationally coordinated response based on common human rights. The responsibility for climate change is bestowed upon all organs of society, including businesses. With the introduction of the polluter pay principle the polluters can be now held accountable for the harm caused to the environment. Various environmental activists have used law as a way to make the polluters pay for their contribution to climate change and its devastating impacts.

This article aims to highlight the very aspect of emerging climate change litigation by looking into the international framework. It aims to highlight the aspect of climate due diligence, how business entities shall include this into their policy framework and obligation towards the society.

IMPACT OF BUSINESS ON ENVIRONMENT TILL DATE

Business entities have a history of exploiting the environment. From the Bhopal Gas Tragedy[161] to the Vizag Gas leak[162], all have contributed to the climate change. The implementation of the Paris Agreement and the 2030 Agenda for Sustainable Development, combined with the increasing engagement of the Human Rights Council, its special procedures mechanisms and the treaty-bodies dealing with environmental issues present a unique opportunity for developing and implementing ambitious public policies and business practices that integrate both human rights and environmental considerations at the national and international level.

All business enterprises have a responsibility to prevent and address negative impacts of their actions on the environment. It is widely accepted that the business responsibility to respect human rights and environmental rights includes the responsibility to identify, prevent, mitigate, and account for impacts related to climate change, in line with the UN Guiding Principles on

[161] *Union Carbide Co. v. Union of India*, 1990 AIR 273. Also see *M.C. Mehta v. Union of India*, 1987 AIR 1086; *M.C. Mehta v. Union of India*, AIR 1997 SC 734.

[162] 2020 SCC OnLine NGT 129.

Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Similarly, States should ensure that their own business activities, including activities conducted in partnership with the private sector, contribute to mitigating climate change while respecting human rights, and ensuring effective remedies for climate and human rights harms.

The last decade has witnessed a consolidating consensus in the international community about the need to treat climate change and its consequences as a human rights issue.[163] Preventing and redressing the human rights harm deriving from manmade climate change arguably also falls under both the ‘state duty to protect’ (Pillar I) and the ‘business responsibility to respect’ (Pillar II) articulated by the United Nations Guiding Principles on Business and Human Rights (UNGPs). Current policy and judicial developments show that a ‘climate due diligence’ is increasingly taking shape as a dimension of the human rights due diligence (HRDD) obligations of both states and corporations. The number of climate change-related lawsuits, while still relatively low and uncertain as to the outcomes, is growing, and is taking new and creative legal avenues. At the same time, in addition to HRDD legislation already adopted by some countries, the European Union (EU) is considering the adoption of legislation establishing human rights and environmental due diligence obligations for corporations. These developments provide unprecedented opportunities to clarify the specific obligations of public and private actors in relation to anthropogenic climate change and its human rights impacts.

THE NEW ERA OF LITIGATION: CLIMATE CHANGE LITIGATION

At present only a limited number of lawsuits directly targeting the climate change impacts of corporations, and an even narrower sample with an explicit human rights dimension, exist. In April 2019, Milieudefensie and other NGOs submitted a court summons against Royal Dutch Shell alleging the corporation’s violation of its duty of care anchored in Dutch law, human rights law and the Paris Agreement.[164] This approach proposes an integrated interpretation of corporate HRDD based on both human rights law and climate law standards. The plaintiffs clearly aim at riding the long wave of the *Urgenda* judgment and extending its conclusions, *mutatis mutandis*, to private actors.[165] The allegations against Shell include its

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[163] Burger, Michael and Wentz, Jessica, *Climate Change and Human Rights* (Nairobi: UNEP, 2015) 11 Google Scholar; ‘Paris Agreement: Preamble’, online available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 14 May 2021).

[164] *Milieudefensie et al v. Royal Dutch Shell plc*, File no. 90046903, Summons (5 April 2019), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_8918_summons.pdf (Accessed on 14 May 2021).

[165] Supra Note 4.

insufficient action to reduce GHG emissions and the active attempt to mislead the public about the sustainability of its operations.

The summons reference the main business and human rights instruments, including the UNGPs (publicly endorsed by Shell), to argue that climate change impacts must be accounted for in the HRDD processes of corporations, which also have a responsibility not 'to undermine the ability of States to fulfil their own human rights obligations'. The summons refer to the Dutch law social standard of care successfully invoked in *Urgenda* to argue that 'Articles 2 and 8 of the ECHR also colour the duty of care we should be able to expect from Shell', given 'the extent of the control Shell – like the State – has over [the fate of] individuals on account of its substantial share in global emissions and the solutions to climate change.' The plaintiffs maintain that Shell has a duty to adjust its policies and practices to the Paris Agreement targets with due regard to the precautionary principle.

The climate change responsibilities of 47 'Carbon Majors' – including some European corporations such as BP, Shell, Total, RWE, Repsol, LaFarge, Heidelberg Cement and Eni – were notoriously raised in a petition filed with the Philippines Commission on Human Rights by Greenpeace Southeast Asia[166] and a number of organizations and individuals. The petitioners asked the Commission to investigate the human rights impacts of climate change in the Philippines and the responsibility of 'investor-owned Carbon Majors for human rights threats and/or violations in the Philippines, resulting from climate change and ocean acidification'. The petition builds on studies that trace anthropogenic GHG emissions to specific corporations, and largely relies on the UNGPs. Referring to HRDD, it argues that, by taking investment decisions incompatible with the 2°C goal, the corporations are 'failing to prevent human rights impacts that are directly linked to their operations, products, or services' by their business relationships.

A joint summary of *amicus curiae* briefs also stresses that corporations, under the UNGPs, are responsible for assessing and addressing the climate change impacts of their operations, which translates into a responsibility to reduce their GHG emissions, at a minimum, in line with the temperature goals of the Paris Agreement. It also stresses how the carbon producers have long

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[166] Greenpeace Southeast Asia et al, 'Petition – Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change', Annex C (2015), Online available at: https://storage.googleapis.com/planet4-philippines-stateless/2019/05/4879ea58-4879ea58-annex_c_list_of_respondents_with_addresses.pdf (Accessed on 14 May 2021).

known of the adverse impacts of their operations but failed to act upon such knowledge, and even actively misrepresented the connection between fossil fuels and climate change.

In December 2019, at COP 25, the Commission on Human Rights announced its findings, stating that the carbon majors can be held liable for their contribution to climate change and that access to justice must be ensured for victims of the related human rights impacts.[167] The statement also specified that criminal liability might arise 'where they have been clearly proved to have engaged in acts of obstruction and wilful obfuscation'.[34] Although the Commission does not have strong coercive and enforcement powers, its final findings might shed a light on the link between climate due diligence and HRDD, and could be taken into account in the elaboration of new regulatory instruments, as well as in future litigation.[168]

None of the cases noted above has reached its final stage yet. However, the legal reasoning adopted by their proponents highlight some possible features of an emerging concept of 'climate due diligence'. These tend to revolve around two main themes, namely, 'risk mitigation' on the one hand, and 'integration' on the other. While the former is concerned with the reduction of GHG emissions in corporations' activities and projects, the latter requires corporations to integrate climate-related objectives in their policies and processes.

Big emitters are also the target of a lawsuit filed in San Francisco by a large US-based fishing association against oil and gas producers, including Europe-domiciled Shell, Eni, Total and BP. [169]The activities of these corporations are put in a causal relationship with the global warming-induced algae blooms that are forcing the closure of crab-fishing waters in the Pacific, damaging the industry. The defendants are not only accused of negligence and nuisance, but also of having concealed the dangers for decades, working 'to undermine public support for greenhouse gas regulation'.[170] Once again, albeit not framed in human rights terms, the lawsuit insists on the nexus between the contribution of big emitters to global warming and the resulting adverse impacts, as well as on their failure to honestly communicate to the public the climate-related risks of their activities.

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[167] Greenpeace Philippines, 'The Climate Change and Human Rights Petition' (9 December 2019), https://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/ (Accessed on 14 May 2021).

[168] Annalisa Savaresi and Jacques Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' (2 November 2018) 16, https://ssrn.com/abstract=3277568 (Accessed on 14 May 2021).

[169] *Pacific Coast Federation of Fishermen's Associations, Inc v. Chevron Corp* (ND Cal) 3:18-cv-07477, Complaint (2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181114_docket-CGC-18-571285_complaint.pdf (Accessed on 14 May 2021).

[170] Supra Note 9.

Although existing case law on the climate-related responsibilities of public authorities is at a relatively early stage and still underdeveloped, it allows us to draw some initial conclusions regarding the emerging concept of climate due diligence. The transition towards a more sustainable society could then imply stricter regulation of corporate emissions and of projects that would raise their level. Some of the cases referenced also insist on adequate impact assessments taking climate into account.

Thus, existing examples of litigation, both against corporations and public authorities, confirm the importance for corporations to integrate the climate change dimension into their processes and policies, as well as to work towards a mitigation of their climate impacts. While it is not possible to predict how the case law will evolve, with many relevant cases still pending and new ones being filed, it is becoming clear how corporations failing to take action in the two key areas of integration and risk mitigation are increasingly at risk of incurring complex litigation and reputational loss. In addition, given the changing regulatory and financial landscape, further pressure is likely to come from a corporation's own shareholders.

BUSINESS RESPONBILITIES TOWARDS THE PEOPLE

Coming to the second aspect, the UNGPs have outlines main business responsibilities which every businesses should have which have been enlisted below:

1. Corporate responsibility to Respect human rights (Principle 11)

Even though businesses do not have legal obligation to follow these but they are supposed to respect it. They should avoid causing or contributing to negative human rights impacts through the business' own activities and address such impacts when they occur. They can prevent human rights impacts that are directly linked to the businesses' operations, products or services by its business relationships, even if the business has not directly contributed to those impacts. Example : a mining company that doesn't conduct an environmental impact assessment and its operations later pollute the rivers of a local community or when PepsiCo was charged for using the most amount of water, it respected it and decided to give back more water than it consumes.

2. Human Rights Due Diligence (Principle 17)

The businesses should develop a corporate human rights policy to carry out "due diligence" assessment, to make sure it has a policy in place to make sure that in the method of printing of money, they are not sacrificing humanity. Human rights due diligence assessments are monitoring processes undertaken by a company to identify risks to and address negative impacts on human rights that are linked to the company's operations and supply chains.

This means businesses have to think how their activities will impact human rights before they act. After which they create a plan to mitigate these risks to ensure that it doesn't lead to human rights abuses.

How can businesses mitigate these risks, The International Finance Corporation's Guide to HRs Impact Assessment and Management stipulates the steps any business should take to assess the human rights impact due to its projects. They are as follows[171]:

1. Businesses must engage with people that could be affected by their activities.
2. The assessment must identify key human rights risks to people in the country of operation.
3. The assessment must identify human rights risks of key business relationships, including companies they work with and those in the value chain.
4. The assessment must identify human rights risks and impacts relating to the business activity itself. This must include cumulative, long-term and unintended consequences of the activity.
5. The assessment must identify the people that could be affected by the business activity.
6. The assessment must identify the nature and level of the risks and impacts, at different key stages of the project's life cycle (e.g. design, construction, operation, decommissioning and closure etc).
7. The assessment must identify the root causes/perpetrators of the risks and impacts (e.g. the business activity itself, a possible contractor, supplier and/or government involvement etc).
8. The assessment must involve all human rights.

These are proved to be very helpful in assessing the impact of business on the human rights.

3. Access to remedy (Principle 22)

If a business negatively impacts or infringes the human rights of a community or person then it should remedy out. In economics term, bring them to a position where they were before the infringement took place, which could be via monetary compensation or other means.

Example : If an industry pollutes the river, it should clean the river or if their pollution is ruining a cloth store nearby, they should install filter chimney and monetarily compensate the store person for the loss.

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[171] The business impact on human rights, https://action4justice.org/legal_areas/business-and-human-rights/do-businesses-have-human-rights-responsibilities/(Accessed on 15 May 2021)

4. The size of business and Human rights obligation (Principle 14)

Businesses are supposed to respect human rights irrespective of the size or location of the business. But few businesses depending on their turnover would make commitments to develop the rural part of the nation.

The human rights are basic rights which are to be enjoyed by each individual and yet there has to be strict implication to make sure that businesses do not infringe the rights. Not only that, the businesses should pay at least minimum wages or give their employees paid leaves when necessary, basic facilities at work place. Businesses have a responsibility not only to their stakeholders but also their competitors. We find Big companies infringing the right to privacy of individual and right to fair trade practices to their competitors. Now we would study as to how monopoly by few companies infringes the rights of the consumers and the competitors.

BUSINESS IMPACT ON ITS COMPETITORS

With the coming years, innovation is the key to acquiring market share and now entities come up with products of the year, start acquiring market share and eventually, it diversifies with all the money, or buys all the small firms in the same product line and starts abusing its dominant position. That has become the story of present MNC's in India or worldwide. Hence, we need to ensure fair competition for the existing players and optimum choices for the consumers. The question of fair trade practice needs to be ensured by the players.

The big four US tech giants, namely Amazon, Apple, Facebook and Google have been viewed as scrappy startups. Consumers loved their products, regulators largely looked away, and competitors either got acquired or fell by the wayside. That run of good fortune has been under threat for a while, but now they are under the surveillance of various antitrust authorities in various countries.

The internet, once the promised land of free and open interactions for all, is now controlled by a few gigantic technology companies - often referred to as Big Tech. These companies include Facebook, Apple, Amazon, Netflix, Google, Microsoft, Paypal, and some others. Recent events in the United States (US), when these same companies shut down a sitting US president, without due process, have alerted us to their unchecked power. They have indirect control and they can dictate the terms, while the Parliament would be helpless in that regard. Law is the supreme and not a company. Law makes it clear that there shouldn't be abuse of dominant

position by any party. We are going to focus on the well know four horsemen - Google, Facebook, Apple and Amazon.

Each of today's "digital monopolies" operates in a slightly different market.

- Amazon is dominant in e-commerce,
- Google in search and advertising,
- Facebook in social networking, and
- Apple in both mobile content and apps.

Nevertheless, they all had engaged in very similar anti-competitive practices, which included buying up potential competitors:

- Facebook's acquisitions of WhatsApp and Instagram,
- Google's acquisition of Android.

I. Or using their platform to limit competition, control access, and favour their own products

- Apple's control of the App Store,
- Amazon's ability to undercut third-party retailers using its platform.

The other problem is Big Tech firms have acquired extraordinary amounts of data on individuals. How we browse, what goods we covet, where we shop, what shows we watch, what music we listen to, where we travel, who our friends are, who we follow — all this information is now sitting in vast server farms around the world. At a click, Big Tech barons can summon up this information and sell it to whoever they want. Moreover, this transaction happens outside the country beyond the reach of our tax authorities. So Big Tech takes full advantage of a country's prosperity yet makes limited tax contributions. As Big Tech has become pervasive, its conduct has to be evaluated across multiple dimensions. Now countries are coming up with laws to make them accountable and liable to pay higher tax.

Now, the governments are looking at different possible solution to stop the company from getting a life of its own, which means the businesses shouldn't get so big that they start controlling and dictating terms to the government. Also, businesses should not get so big that they start buying all their competitors and kill the competition. This affects the rights of consumers to have a choice and the competitors to a fair trade practice. These companies need

to stay within their limit and should be well regulated by the laws to make sure that the laws are governed by them and not where the laws are made to the convenience of the businesses.

THE BEGINNING OF THE END

It has become paramount that the rights of people, communities and environment is protected to keep the world going. Sustainable development has to be the essence of today's world where we are utilizing more of our natural resources than giving back to nature. It is in the hands of humans to create a balance between environment, people and companies. The same can be executed by way of laws and effective implementation of laws. It is a mandate that we care more about the living and less of monetary. Because a company committed to protect its people, environment goes long way than a selfish business who destroys the environment and people around it. Hence, to survive this world with limited resources, it has become vital that the resources are valued and used efficiently. We spread more awareness and take steps to prevent further harm not only against the environment but also towards other stakeholders. It is time that businesses shouldn't be accorded with all right and liberties and are well-regulated to prevent it from having a life of its own.

ABORTION LAWS IN INDIA: A CRITICAL STUDY WITH SPECIAL REFERENCE TO WOMEN'S CHOICE OF SEXUAL FREEDOM

- ***Dr. Medha Vaid***[172]

Abstract

Becoming pregnant is a wonderful experience, but there are occasions when it is necessary to end the pregnancy. In these situations, abortion is performed using a variety of techniques, including surgery and pill-taking. The vast majority of women in India still do not have access to safe abortion treatment after 30 years of liberal legislation. Ineffective spousal permission rules, contraceptive aims linked to abortion, informal and excessive fees, and low legal literacy all obstruct the appropriate and efficient use of existing laws. To increase women's access to safe abortion care, it is urgently necessary to train more providers, streamline registration processes, disentangle clinic approval from provider approval, delink clinic approval from provider approval, and align policy with modern technology, research, and best clinical practices. India modified the Medical Termination of Pregnancy (MTP) Act 1971 in a historic move to give all people with access to reproductive health services, further empowering women by offering all people complete abortion care. In order to ensure that everyone has access to complete care, the new Medical Termination of Pregnancy (Amendment) Act 2021 broadens access to safe and legal abortion services on therapeutic, eugenic, humanitarian, and social grounds. However, it still has several gaps. Therefore, this article is an attempt at understanding this sensitive issue of abortion, laws related to it in India, various issues in such laws with the help of relevant case laws.

Keywords: *Abortion, Pregnancy, Laws, Consent, Issues.*

Introduction

The term "abortion" is derived from the Latin word "aboriri" this means 'to get detached from the proper site'[173]. Abortion is said to occur when the life of the foetus or embryo is destroyed in the woman's womb or the pregnant uterus empties prematurely.[174] In other words, Abortion

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173 Webster's New Dictionary and Thes Qurus, 1995 DS-MAX Inc., USA, 1-2
174 Ratanlal & Dheerajlal's. The Indian Penal Code, 1860, 448 (Wadhwa and Co., New Delhi, 28th Edn.)

is the termination of a pregnancy by the removal or expulsion from the uterus of a foetus or embryo resulting in or causing its death.[175]

Abortion laws originated in the United Kingdom as early as 1803. but the credit for revolutionizing abortion laws and recognizing the inherent, perhaps inextricable right and liberty of women over their bodies can only be given to the United States - more specifically to the American judiciary. From as early as ***Roc v. Wade***[176] the American judiciary has been reiterating the inherent right of a woman as a constitutional person, to terminate her pregnancy in the earlier stages and thereafter giving the State a role to play, hence making abortion legal for the first time in the United States in 1073.

Legal Framework for Abortions in India

Owing to its colonial legacy and Great Britain's act of outlawing abortions between 1869 to 1967, Section 312 of the Indian Penal Code (IPC) disallowed as an induced act of miscarriage. However, post-independence things changed significantly. In 1952, India introduced family planning programme to check its expanding population. In 1964, the Central Planning Commission formed a committee- under the leadership of the Health Minister of the state of Maharashtra, Shri Shantilal Shah, to look into the need to bring in changes to the IPC and introduce other needed legislation to deal with termination of pregnancies purposefully. The committee submitted its report in 1966, which called for deletion of Section 312 of IPC and the need to bring in a special law to deal with termination of pregnancies. They cited the changes in Great Britain's abortion laws to support the need for India's abortion laws to be changed. As a result, an exclusive abortion-related legislation- the Medical Termination of Pregnancy (MTP) Act, 1971, came into being.

MTP Act follows stringent regulations to allow abortions. For example, only registered medical practitioners, approved under section 2 (h) of Indian Medical Council Act, 1956, can carry out the termination of pregnancies via induced miscarriage. It only allows gynaecologists or obstetric specialists to carry out acts of termination of pregnancies.

MTP Act has been complemented with several rules and regulations over the years. For instance, the Union government in 2003 came up with the "MTP Regulations", which is to be followed in all centrally administered territories or Union Territories (UTs). According to the

[175] J.V.N Jaiswal, Legal Aspects of Pregnancy, delivery and abortion. 165 (Eastern Book Co. 2009).
176 Roc v. Wade, 410 US 113.

aforementioned regulations, all the Registered Medical Practitioner (RMP), must maintain abortion records and submit them to the Chief Medical Officer (CMO). The union government asked states to follow suit and come up with similar laws to regulate abortion procedures. The union government also came up with the Comprehensive Abortion Care (CAC) Training and Service Delivery Guidelines, 2010, which has been amended in 2014. It aims to train medical practitioners and staff to clamp down upon the deaths of mothers from unprescribed induced miscarriage practices. The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) (PCPNDT)Act, 1994, has also been used to supplement abortion laws and regulations to ensure that girl child deaths through illegal induced miscarriages are looked into and avoided in the future.

Women's right to Abortion in india

As per sections 3 and 5 of The Medical Termination of Pregnancy Act, 1971, a woman has a right to abortion if:

1. The continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated.
2. The termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman.
3. The continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman.
4. The continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, or injury to the physical or mental health of any existing child of the family of the pregnant woman.
5. There is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.
6. In emergency, certified by the operating practitioner as immediately necessary: to save the life of the pregnant woman or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

A critical analysis of the Abortion Laws in India in light of sexual freedom of the pregnant women

- The MTP (Amendment) Act, 2021 seeks to establish state-level Medical Boards to decide the termination of pregnancy after 24 weeks on the ground of substantial foetal

abnormalities. Additionally, it is prescribed that professionals like gynecologists, pediatricians, radiologists and sinologist will be the members of the medical board. In spite of removing the barriers for pregnant women and providing them with more facilities, the amendment has only added further layers of bureaucracy which will be responsible for deciding the fate of pregnant women.

- As per the recent Amendment Act (2021), there is no prescribed time limit for the medical board to give its decision. Needless to emphasize, abortion is a time-sensitive matter and delay on the part of the medical board will create further complications for the pregnant woman.
- Also, there is no clarity related to the accessibility of the board, the financial support that might be needed to approach it and how can the presence of so many medical specialists be assured in areas where access to even basic healthcare facilities continues to be an issue.
- It is true that after 20 weeks of pregnancy, it is not medically wise to terminate pregnancy but the earlier period should belong to the women concerned where it is medically feasible to terminate pregnancy, to give content to the right to life and liberty of the women. It is submitted that the liberty of the born i.e. of the female concerned should be given its due instead of taking the right of life to absurd limits to protect liberty of the unborn which has still to see the face of light.[177]
- Section 3 of the MTP Act does not provide for termination of pregnancy caused as a result of sexual offences relating to marriage in the I.P.C., such as bigamy, adultery and the offences of fraudulent conduct in marriage. A woman finds herself in a difficult situation in cases of pregnancies resulting from the above offences. Thus, Section 3 of MTP Act should be according amended to include the above noted circumstances.
- Provisions of MTPA and Hindu Marriage Act in conflict : In Sushil Kumar v Usha,[178] the wife got the foetus aborted in accordance with the provisions of MTP Act without her husband's consent. A petition for divorce was filed by the husband's consent. A petition for divorce was filed by the husband's on the ground of cruelty and the Delhi High Court passed the decree of divorce. The married woman who had done a legal thing under the MTP Act became victimized. It clearly reveals that the provisions of

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[177] Sunita Bandewar, "Abortion services and providers perceptions : gender dimensions", 38(21) Economic and Political Weekly (2003).

[178] AIR 1987 Del 86.

MTP Act and Hindu Marriage Act are in conflict. Thus, to get the pregnancy terminated under the MTP Act husband's consent is not mandatory.[179]

- A major critique of the MTP Act is its apparent over-medicalisation and physician's only policy that reflect a strong medical bias and ignore the socio-political aspects of abortion. The need for two doctors to certify opinion for a second trimester MTP is an unnecessary restriction imposed by law. Though abortion law allows for termination of pregnancy for a wide range of reasons construed to affect the mental and physical health of the woman, it remains with the doctor (and not the woman) to opine in good faith, the need for such a termination. Such a provider- dependent policy might result in denial of abortion care to women in need, especially the more vulnerable amongst them, for various reasons, including conscientious objection.[180]

Some relevant case laws

In the case of ***Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others***,[181] the issue before the court was whether a husband has to provide consent for abortion? The court ruled that Section 3(4)(b) of the MTP Act requires consent from just one person: the woman undergoing a medical termination of pregnancy. A husband cannot force his wife to continue a pregnancy.

In the landmark case of ***Samar Ghosh v. Jaya Ghosh***,[182] the apex court observed that "if the wife undergoes vasectomy (sic) or abortion without medical reason or without the consent or knowledge of her husband, such an act may lead to mental cruelty."

In ***Suchita Srivastava***[183] and ***V. Krishnanan***,[184] 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 Suchita Srivastava, the Supreme Court clearly held that the state has an obligation to ensure a woman's reproductive rights as a component of her Article 21 rights to personal liberty, dignity, and privacy.

In ***Laxmi Mandal v. Deen Dayal Hari Nagar Hospital***,[185] the Delhi High Court ruled that preventable maternal death represents a violation of Article 21 of the Constitution. The High

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[179] Poonam Pradhan Saxena, "Abortion as a ground for divorce under Hindu Law", 29 JILI 423 (1988).
[180] Joseph Minattur, "Medical Termination of Pregnancy and Conscientious Objection" 16(4) JILI (1974).
[181] Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others, 29 November 2011 (CR No. 6337/2011)
[182] Samar Ghosh v. Jaya Ghosh, 26 March 2011 (Appeal (C) 151/2004).
[183] Suchita Srivastava & Anr v. Chandigarh Administration, (2009) 9 SCC 1.
[184] V. Krishnan v. G. Rajan Alias Madipu Rajan, H.C.P.No. 1450 of 1993.
[185] Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors, W.P. (C) Nos. 8853 of 2008.

Court required the NCT of Delhi to implement the service guarantees in the National Rural Health Mission, including safe abortion services, to prevent maternal deaths. This landmark judgment created a state obligation to take steps to end preventable maternal death, including deaths caused as a result of inadequate access to safe abortion.

Conclusion

India should make the abortion laws liberal and any law relating to abolition of abortion is nothing but a clear violation of a woman's right. It violates women's rights to health, right to dignity, right to liberty, and right to privacy. Abortion must be legally permitted in order to protect the most basic rights of women. The legal regulations have abrogated the women's right to liberty to a great extent particularly with respect to right to self-determination, right to have control over her body and right to abortion. These regulations have created serious inroads into a women's right to life and liberty and it has become nothing more than an illusion.

Suggestions

- It is important to recognise that patriarchy has attempted to control women's sexuality for centuries. Although abortion has been legal in India since 1971, there is very little public information, little social conversation (around it) because most women believe that it is either a sin or that they are doing something illegal or criminal. As one can imagine, this lack of information and conversation leads to women seeking out abortions from places or persons that are not qualified resulting in a large number of unsafe abortions. Therefore, there exists a necessary to create awareness on the same.
- The discussed loopholes must also be endeavored by the legislation to be corrected.
- The existing legislations must be implemented in a way that they must be facilitative for women instead of being restrictive.

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DYING DECLARATION AND DOWRY DEATH

- *Dr. Surender Kumar*[186]

ABSTRACT

The task of the judge to scrutinize a matter and find the truth into it. Finding out the truth is a part and parcel of ever justice delivery mechanism. Every fact needs to be analyzed, scrutinized and evidence have to be presented in order to corroborate a narrated story. In a country like India where marriage is considered to be solemn and a wellspring of fresh starts. However, it has the longest shades of malice, one of them being the framework of dowry. Such instance of customs which show male-predominance by socially outraging a woman is still pervasive in the 21st century. For such a custom, women are regularly in the four walls of house are being harassed and tortured for the procurement of dowry. Instead of strict penal provisions being provided, it has been difficult to contain such a heinous crime. Dowry death is tricky one for judiciary as well, as it takes many evidences to prove the guilt of the accused. Dying declaration is one such evidence. This paper seeks to understand the relevancy, credibility, reliability, admissibly and evidentiary value of dying declaration in cases of dowry death.

KEYWORDS: Dowry Death, Dying Declaration, Indian Penal Code, The Indian Evidence Act.

INTRODUCTION

"The law of evidence in India mandates says that the evidence may be given of relevant facts only and of no others"[187] The basic provisions which regulate around the evidentiary process are; firstly, evidence must be given for relevant facts. Secondly, evidence should be given in every case and lastly, hearsay evidence should be excluded. Amongst all the different kinds of evidences provided by The Indian Evidence Act, 1872[188], the statement made by a person under the section 32 (1)[189] is a matter of scrutiny in this paper.

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[186] Assistant Professor Shaheed Bhagat Singh Law College, Hanumangarh, Rajasthan.
[187] Indian Evidence Act, 1872 (Act 1 of 1872), s. 5 (hereinafter the Act)
[188] Ibid.
[189] Section, 32 cl (1), Indian Evidence Act, 1872 (Act 1 of 1872), s. 5 (hereinafter the Act)

Section 32(1) summarizes the whole ideology behind the importance of the last words of a person who is on the death bed. It is presumed that the person dying will be free from any falsehood and will say nothing but the truth about the cause of his death. It is also presumed by many jurists that a person with the imminent form of danger causing his death will silence every motive to lie and concoct a story. Thus a declaration as this, made by a person about his cause of death while in a state of imminent death is called a dying declaration. It is embedded under section 32 (1) of The Indian Evidence Act, 1872[190]. This is also based on a maxim named " "***nemo moriturus praesumitur mentiri*** *" which based on the principle- that a dying man will not meet his maker with a lie in his mouth.*" It said to be a admissible and relevant piece of evidence in Indian law as it is a fact that a dying man can never lie. This research paper attempts to delve more into the topic of "***Leterm Mortem*"** which means "*words said before death*".

PROBLEM STATEMENT

Dying declaration is considered to be a credible as well as relevant evidence and has been considered by many courts while dealing with criminal matters. This evidence is not given under oath and cannot be cross-examined and still comes under the ambit of valid evidence. Therefore, section 32(1) of The Indian Evidence Act, 1872 are one of those sections which are provided as an exception to the rule of hearsay evidence. The reason for such exception is because law wants the

best evidence in each case. Though the discretion of the judges plays a very crucial role in deciding the relevance and admissibility of the same based on the story narrated. There have been many cases of dowry death which have seen changing and different stances of judges in regard to "dying declaration" and guilt of the accused. The major problem lies in determining the danger of imminent death as well as corroboration of the said statements in cases of dowry death.

RESEARCH OBJECTIVES

This research answers the following:

A. To analyze the section 32(1)[191] of The Indian Evidence, Act, 1872 in depth.
B. To analyze the evidentiary value of dying declaration

[190] Ibid.
[191] Supra 1.

C. To analyze the relation between dying declaration and dowry death
D. To analyze the competency of taking the dying declaration
E. To analyze the evidentiary value of dying declaration in cases of dowry death.

DYING DECLARATION

I. SECTION 32 (1) OF THE INDIAN EVIDENCE ACT

The concept of dying declaration was first invented in the English law. It is first very important to note the relevant principles of English now in order to understand the concept of dying declaration in Indian scenario. A dying declaration according to English law is a statement which is only relevant when there is a charge of murder or manslaughter[192] whereas in Indian law it is applicable to all civil as well as criminal proceedings.

The case of R .v Woodcock[193] was the first case to come up with such a concept where it was held that, "***the general principle on which this specie of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to false old is silence, and the mind is induced by the most powerful considerations to speak the truth***.". The courts have time and again taken the consideration of presumption of truth. This is the only place where Indian law and English law differs from each other, where Indian law takes a departure from the rule of "Imminent death"[194]

Dying declaration has been defined under section 32(1) of The Indian Evidence Act, 1872 as reiterated many times. By the basic and simple reading of the section is it understood that statement of a person who come under the said 4 groups[195] are relevant form of evidence. Clause 1 form which concentrates on dying declaration can be divided into 2 half one which talks about the cause of the death and the other which speaks about the circumstances which caused the death, The researcher is of the opinion that second one is of a wider amplitude. As words like "circumstances" includes every such "transaction which resulted in his death" which has a wider dimension. This means that anything which had direct or indirect, proximate or distant relation to the death will come under this ambit. This is also mentioned in a case named

[192] R. V. Mead. (1824) 2 B & C 605.
[193] R .v Woodcock (1789) 1 leach 500.
[194] P.V. Radha Krishna v State of Karnataka, AIR 2003 SC 2859.
[195] Who is dead, cannot be found, become incapable of giving evidence and cannot be procured within reasonable time

Rattan Singh v. State of H. P[196], where the court opined that "'circumstances of the transaction which resulted in his death' is apparently of wider amplitude than saying circumstances which caused his death."

The below table shows a basic difference between English law and Indian law with regards to dying declaration:

English law: Dying Declaration	***Indian Law: Dying Declaration***
Person making statement must be under the anticipation of death or impending death.	***It is not necessary for the admissibility of dying declaration that the deceased at the time of making the statement should have been under expectation of death.***[197]
Admissible only in a criminal charge of homicide or manslaughter.	***It is admissible in civil or criminal proceedings both where ever the question of death comes into question.***
It is admissible only when death has ensued.	***Such statement may be used even if the declarant survives.***
Not admissible	***statements are admissible in cases of suicide***[198]

The procedure to be followed by the magistrate while considering dying declarations have been laid down in Rule 33 of the Criminal Rules of Practice[199]. Similarly, presiding officers are to consider Part-2 in Criminal Rules of Practice and Circular Orders 1990[200] while recording

[196] Rattan Singh v. State of H.P (1997) 4 SCC 161 at 166-167.

197 Inayat Khan v. Emperor 158 IC 336; B. Sharda v. State of Maharashtra, AIR 1984 SC 1622; Tahal Singh v. State of Punjab, AIR 1979 SC 1347.

198 Distinction between Indian and English Law may be seen in Kishan Lal v. State of Rajasthan, AIR 1999 SC 3062; See, Syed Amir Ali and John Woodroffe, Law of Evidence 1760 (Butterworth, Delhi, 17th edn.).

[199] Rule 33 of the Criminal Rules of Practice

[200] Part-2 in Criminal Rules of Practice and Circular Orders 1990

dying declarations. Section 32 starts with a word "Statement", this word has been used in the Act many times but has not been clearly defined. There can two meaning to the word; first being the conceptualization and the second being implication. The Oxford English Dictionary defines "statement" as something which is clearly stated or expressed. Therefore, it is very important to understand what are its forms. In the case of Queen Empress v. Abdullah[201], signs, gestures and nods were considered to be verbal statements. Therefore, it can be said that, dying declarations can be given in many forms such as oral, written, gestures, thumb impression etc. As it was seen in the Nirbhaya rape case, dying declaration was made in the form of gestures, signs and nods which were accepted by the court and were termed to be admissible. There have been many cases where the dying declaration recorded is incomplete in nature, such declarations are non-admissible in the court, as they are not absolute for conviction. And all the forms need to be taken into consideration by the judges in order to prosecute the accused as a declaration once found to be in doubt cannot be used to convict a person prima facie. Dying declaration, once found to be true and voluntary, can be made basis of conviction without further corroboration.

I. DYING DECLARATION AND HEARSAY PRINCIPLE

Evidence law time and again mentions that the fact needs to be proven by direct evidence one which is under other and applicable for cross examination. In simpler words, such evidences are admissible in nature. In the case of dying declaration the direct oral evidence given by the person is not available for cross examination because the make of it is dead or has become incapable of giving the said statement. Such a statement maybe be made long before the enquiry but it consists of the highest degree of truth. That is why such statement have been declared to be relevant and admissible in nature and an exception to the rule of hearsay. This is an exception due to the necessity of the evidence needs for the court to determine as well as probability of the truth said in the said statement. The general rule of hearsay if seen individually is not admissible in the court of law and if taken into consideration there should be other evidences to justify the same.

Moreover, the witness here is considered to be the sole eyewitness and there dying declaration is considered as an exception as courts don't want to take a chance with the only witness.

[201] Queen Empress v. Abdullah, (1885) 7 All. 600; See also Man Chand v. R, 5 L324; R. v. Motiram 1937 Bom. 68; Somatigir v. State of M.P, 1989 Cr. L.J. NOC 9.

DYING DECLARATION AS EVIDENCE

As reiterated before as well dying declaration is very important piece of evidence and the conviction is solely based on the statement of a dead man. It is said that "*The truth sits on the lips of a dying man*" The principles of dying declaration have been very articulately laid down in a Supreme Court case named, Kundanbala Subrahmanyam v. State of A.P.[202] which was further supported by the case named Laxmi v. Omprakash[203] it was held in this judgement that a last words of a person is very emotional and sacred, it is very unlikely for a person to lie in such a state. The danger of death acts as a guarantee that the statements made by the deceased about the causes of death or the circumstances of the same are true in nature and leading toward his death. Once the said declaration and the witness testifying to the same corroborates after the careful analysation of court, then that piece is the most reliable piece of evidence. A dying declaration needs to be free from any doubt, it should be free in nature. Such a pure declaration can be used to convict an accused even without corroboration. As a conviction is based on such a declaration, the same should be of full confidence and correctness. The court sees the following main points :

1. That the deceased was in a fit state of mind before making the said statement.

That the deceased would've have been a competent witness if alive.

In the case of Ram Nath Mahadeo Prasad v. State of M.P[204] it was said that a dying declaration is a weak form of evidence as it is not given under oath and is also not available for cross examination and the same needs corroboration. But this was overruled.[205] The rules of corroboration is only a rule of prudence. "*Thus, there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.*"[206]

I. ADMISSIBILITY

Dying declaration is an admissible form of evidence. The court relies on the following point to address its admissibility:

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[202] (1993) 2 SCC 684
[203] (2001) 6 SCC 118
[204] Ram Nath Mahadeo Prasad v. State of M.P, AIR 1953 SC 420. (Conviction is valid solely on the basis of DyingDeclaration even without corroboration)
205 Kusa v. State of Orrisa, AIR 1980 SC 559; State of Orissa v. Bansidhar Singh (1996) 2 SCC 194.
206 Munnu Raja v. State of M.P, AIR 1976 SC 2194.

1. The court must be satisfied that the deceased was in the fit state of mind.
2. The court should be satisfied that the declaration is true and undoubtedly voluntary in nature.
3. If the court believes in the above said point, a conviction can be levied without the necessity to corroborate.
4. It should be free form prompting, tutoring and/or any imagination.[207]
5. If the court feels that there is any doubt, the same should be immediately corroborated without guaranteeing conviction.
6. Even if a statement is incomplete, It should not be discarded completely.
7. The statement should be recorded in the exact words (**ipsissima verba**) and by a competent magistrate.
8. There must not be any ambiguity while describing the offender.
9. There should be no scope of influence form the 3rd party.

After examining the above said pointer and the carefully analyzed scrutiny of the courts a proper judicial pronouncement can take place establishing and proving that a dying declaration is an admissible form of evidence. Then the dying declaration has the same footing as the other admissible evidences. There should always be a rule for caution which should be taken into consideration.

II. RELEVENCY

As it is said that all admissible facts are relevant, but all relevant facts are not admissible in nature, only the ones which are legally relevant are admissible in nature. Both have different meanings and implications. Dying declaration if made are relevant in nature as mentioned in section 32(1) itself.

The said declaration will only be relevant if its records diligently by a magistrate or in absences of a magistrate a police office or medical officer working there. While recording and for its relevance the person record should check the state of mind of the declarant, if not a proper state of mind, the process should not be taken further as it will be termed as irrelevant. The people who record the statement can then be called as witnesses to corroborate.

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[207] K.R. Reddy v. Public Prosecutor, AIR 1976 SC 1994.

It is also said that the relevancy of a declaration cannot be question merely on the basis of difference in language, serious precautions should be taken to explain each and every aspect and phrase.[208] The courts had also observed that the statement cannot be declared as irrelevant only because the declarant died long after making the statement.

One of the major points which judges focus upon is the state of mind of the deceased at the time of recording the said statement. There is no provision which lays down rules in regards to a “Fit state of mind”, but there have been many judgements which has ruled in this subjective term. The statement made should be made voluntarily, consciously and with full understating. These conditions should satisfy the doctor in order to for it to be considered as valid evidence. This is done as it’s the only piece of evidence to identify the accused.

III. RELIABILITY

Once the dying declaration is submitted to the court, and the court has willfully accepted the same and admitted the same, they look into its reliability. For a dying declaration to be a reliable piece of evidence the court needs to look into the consciousness, state of mind, the capability, physical and mental condition of the declarant. The court needs to assure that there no implication, falsehood, concoction, 3rd party involvement, mala fide intention involved while recording the statement which will nil its reliability. After a strict scrutiny if, it observed by the court that the

declaration is free from any doubts or involvement it will be reliable in nature, though it is very important to scrutinize the same before any action is taken upon the same.

The above three words needs to be look in consonance with each other, All the three are interconnected in order to prove the credibility of a dying declaration. The person recording should be in a strong footing regarding the state of mind of the declarant. A dying declaration is said to be the most credible when recorded by the magistrate directly as it is an independent and neutral capacitated person who delivers justice.

DOWRY DEATH

Relational unions are made in paradise, it’s a saying. A woman leaves her maternal house leaving all sweet memories and recollections behind looking forward to receive the same kind

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[208] Amar Singh Munna Singh Suryavanshi v. State of Maharashtra.

of love and affection in her in law's house "*Sasural*" as called in customary language. But the mere settlement because of dowry smashes the dream of recently married young girl. Customs and rituals are a part and parcel of an Indian cultured wedding but it should not cause ill effects to society. Bride burning is considered as a shame in our society. One of the main reasons for bride burning is dowry. Such victimization of women in the society is done to fulfil the greed of acquiring money from the bride and/or bride family in different kinds of ways such as cash, gold, other kinds of jewelry, electronics, furniture etc.

If such wants are not fulfilled over time a women's dignity is oppressed and questioned by the husband or his family. It results into harassment and torturing of a woman. Women are treated as slaves in this patriarchal society with no equality in a marital relationship. This inhuman treatment forces the women to taken her own life or many times the husband or the relatives of the husband find it necessary and essential to end her life. Even though there is a well settled law, there is no end to such illegal activities being performed in the four walls of the house. It is just a custom in relation to India's Male dominated society. In simple words dowry means brutal violence on the women for non-fulfilment of dowry. It is a social evil and a social menace but such atrocities are still prevalent even in the 21st century. Dowry death, murder suicide, and bride burning or becoming symptoms of peculiar social malady and are an unfortunate development of a social setup. Respective of religion, caste or creed to which they belong almost every day not only a married woman or harassed humiliated beaten and forced to commit suicide believe husband et cetera torture and ill-treatment but thousands or even burnt to death because parents are unable to meet the dowry demands of in-laws or their husbands.

I. PROVISION FOR DOWRY DEATH

In Brief there are three situations where a married woman is subjected to cruelty and harassment leading to the commission of an offence as mentioned below:

A. Cruelty on women by husband or relatives which is covered under section 498-A[209] of The Indian Penal Code,1860. This is attracted when the husband or his family members subject the woman to cruelty or harassment.
B. Secondly, dowry death which is covered under section 304-B[210] of The Indian Penal Code,1860. Which is attracted when there is cruelty or harassment inflicted by the husband or his relatives in regards to demand for dowry. If after the marriage

[209] Section 498-A, The Indian Penal Code,1860.
[210] Section 304-B, The Indian Penal Code,1860.

the woman succumbs to death or burns or any kind of body injury within seven years of the marriage the husband or the relative is deemed to have caused her death and is liable to be punished under the above said section for dowry death.

C. Thirdly, there are certain presumptions as to dowry death which is covered under section 113-B[211] of The Indian Evidence Act, 1872. In this section there is a presumption that the dowry death has arisen from the fact of cruelty and harassment soon before death within seven years of marriage due to non-fulfilment of dowry. In this case it is the duty of the prosecution to a stab list of ingredients of dowry death and later the onus of proof is shifted to the accused. In such cases the court resumes that the death has been a dowry death.

If Section 304-B[212] of The Indian Penal Code,1860 is read plainly shows that the essentials to prove dowry death is death of the woman should be caused by burns or bodily injury, the date should have been occurred within the seven years of marriage, the woman should have been subjected to cruelty or harassment, this can be done by either the husband or the relatives of the husband and such harassment should be done for the non-fulfilment of dowry. This section should be read in consonance with section 113-B[213] of The Indian Evidence Act, 1872. Section 113-B relies on the words "Soon before her death" which is very essential to prove the case under section 304-B. The prosecution needs to show that the death was due to cruelty and harassment. There needs to be direct and proximate nexus between cruelty and death. Many courts have failed to give a time limit to the phrase soon before. Supreme Court observed that there cannot be a limited time limit fixed to the above said phrase. The expression should normally imply that the interval between cruelty, harassment and death should not be disrupted. There is no straight jacket formula that can be laid down as to the length of the time.

The onus of proof lies within the prosecution to prove the unnatural death to come under the ambit of dowry death. Section 113-B stresses more onus towards the accused to prove his innocence. There have been many cases where the case of prosecution was becoming weak in nature due to insufficient evidence to prove the death caused due to non-fulfillment of dowry. This can be fatal to the prosecution's case. Dying declaration is one such evidence which is presented before the court to prove dowry death.

[211] Section 113-B, The Indian Evidence Act, 1872
[212] Supra 24.
[213] Section 113-B, The Indian Evidence Act, 1872

II. RELATION OF DYING DECLARATION AND DOWRY DEATH

Dying declaration is one of the main forms of evidence in cases of dowry death. Last words of a women indicating towards her cause of death in a matrimonial house is used as dying declaration in cases of dowry death.

In a case where two days prior to the occurrence, the deceased wife told to her mother about the harassment that she was facing due to demand of dowry. The letters which she had written to her mother before her death also spoke of the harassment in relation to the dowry. Let us would prove to be in her handwriting in the court of law. This was considered to be a dying declaration because of its proximity of time between the statement and the death. The Supreme Court had upheld his conviction and allowed the dying declaration to prove the accused guilt in the case of dowry death.[214]It is held by the SC in many judgements that statements made by the women expressing danger to her life has been held indicating towards her cause of death.

Recording the dying declaration; Recording of dying declaration is done by the magistrates and it generally has the highest amount of weightage in regards to relevancy, admissibility and reliability. But there can be emergent times where magistrate might not be able to record the statement. For instance, Bride was taken to the hospital where the doctor recorded her burn to be of 80% degree still her statement was recorded and she was deemed to be in a fit condition.

Declaration was held to be reliable even if it was taken by the medical doctor or the officer. The court have had been of the view that there can be a particular bias and danger when a statement is recorded by a family member or a private person. But still in cases of dowry death, a statement made to relative or parents have been considered to be admissible and reliable as they are the first ones in between the 4 walls of the houses to witness such an incident. Once recorded and scrutinized they are considered to be admissible in nature is the points for admissibility as above mentioned are boxed out.

In the case of State of M.P. V Dal Singh[215] it was explained that, "one should not look for loopholes in a dying declaration", "*The trial court or the High Court may not look for corroboration of a dying declaration, particularly in dowry cases, to prove the guilt of an accused unless this statement suffers from any infirmity, the Supreme Court has held.*"[216]

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[214] Nandyala Venkataramana v. State of A.P., AIR 2011 SC 567.
[215] State of M.P. V Dal Singh, AIR 2013 SC 2059
[216] https://www.thehindu.com/news/national/in-dowry-cases-dont-look-for-loopholes-in-dying-declaration-supreme-court/article4740437.ece

It was said Bench of Justices B.S. Chauhan and Dipak Misra that:

1. Indication must be definite: It means that a dying declaration might be made in any form but must be positive and definite.
2. Exaggeration needn't discredit the evidence: No exaggeration can belittle the evidence gathered. The court had observed that a witness might subconsciously be in trauma or shock at the time of the occurrence which can cause one to be emotional with some exaggeration. The court should focus on the credibility of the witness.

The above explanation is given particularly keeping in mind the case of dowry death. In the case of Pradeep Kumar versus state of Haryana[217] there were two dying declarations which were recorded by the deceased who is the wife. First statement was that she caught fire while pumping the stove. Whereas the second statement was that she set herself ablaze being angry with the husband. The two statements would read it to be very contradictory nature but both had to be considered independently on its own merits as with evidentiary value. The second part, the court said, which inculpated her husband inspired confidence. This part had to be treated as a dying declaration.

CASE STUDY: LAL MUNI DEVI VS THE STATE OF JHARKHAND, 2019

This case is a fairly recent case which incorporates the concept of dowry death as well as dying declaration. This case was judged in the court of Jharkhand on the 22nd of February in the year 2019. This was criminal appeal which was filed against the order dated 2002.

I. FACTS OF THE CASE

In this case the victim named Sheela Devi wife of Harish Kumar had a quarrel with her mother-in-law, where her mother-in-law threatened her to be beaten by her husband after he returns from his office and she would be burnt. Later when the husband i.e Harish Kumar returned home, his mother complained to him about the quarrel that took place. Being angry about the same tortured and harassed his wife and dragged her to the kitchen, he poured kerosene on her and set her ablaze. It was also found out that. Her husband, mother-in-law Lalmuni Devi and his brother -in-law Satish Kumar always subjected her to cruelty for demand of dowry. Therefore, this occurrence took place. Due to the noise and "*Hulla*" the neighbors approached and brought her in serious condition in Telco Hospital on tempo and considering her serious condition she was referred to Tata Main Hospital burn ward in 2B where she was getting treatment.

[217] Pradeep Kumar versus state of Haryana, AIR 2014 SC 2694

II. CHARGES INVOLVED

The deceased "*fardbeyan*" was recorded in presence of Dr. R. Bharat, Sr. Specialist, Burning and Plastic Surgery, Tata Main Hospital. On the basis of the same the charges were registered under section 498A/341/323/307/34 of IPC and 3 /4 of Dowry Prohibition Act against the accused Harish Kumar, Lalmuni Devi and Satish Kumar. After the death of the wife hereinafter the deceased the section of 304-B of The Indian Penal, 1860. During trial the accused Harish Kumar died and the proceeding against him was dropped. Hence the trial of the sole accused Lalmuni Devi proceeded.

III. ARGUMENTS FROM THE STATE

1. The states contended that the "*fardbeyan*" should not be considered as an ordinary one but should be considered as a dying declaration under section 32(1)[218] of The Indian Evidence, Act, 1872.
2. The statement was made by Sheela Devi, the deceased when she was in the hospital in an injured and burnt condition prior to her death. In her statement she vividly pointed out her relationship between her husband, her mother-in-law, and her brother-in-law.
3. The statement also referred to the dowry demand at least thrice in the dying declaration. It is therefore to be treated as a deposition made in the court during the course of the trial.
4. The medical practitioner also said that the said deceased was in a conscious state of mind when her statement was recorded, the same was even attested by her via a thumb impression. The doctor also deposed that the statement was signed and stamped by him as well. The medical practitioner also mentioned that even if a person has hundred percent burn degrees he can be in full senses and in a position to speak at least for some hours before their death.
5. The counsel also said that it was an abnormal or unnatural death which had taken place in the matrimonial home within seven years of her marriage pertaining to dowry. In paragraph 20 thecounsel also linked section 113B of the Indian evidence act and its phrase "soon before". Therefore, it is said that the interval between cruelty harassment death in relation to

[218] Section 32(1), The Indian Evidence, Act, 1872.

dowry as a proxy mate live link.

IV. JUDGEMENT

The learned judge first ruled out all the possibilities to make the statement recorded by the deceased in the purview of a dying declaration. Judge agreed with the fact that it was a dying declaration given by the deceased in the presence of a medical practitioner where it was asserted that the deceased was in a conscious state of mind while giving her statement additionally, she also gave her thumb impression. For the offences of section 304B of the IPC the ingredients of unnatural death and that that that had taken place within seven years of marriage for the demand of dowry has also been fulfilled as the dying declaration referred to the said matter at least 3 times. With this reasoning the court held the accused guilty of the above-mentioned crimes and were sentenced to 7 years of jail.

The arrest was made on the basis of the dying declaration, as the statement was clear, complete, made in a conscious state of mind and with no ambiguity making the said piece of evidence admissible, credible, relevant and reliable.

CONCLUSION

Dying declaration is no doubt an important piece of evidence which guides and assists the courts in funding the truth, identifying the accused and delivering justice. It also acts as a very important piece of evidence in the cases of dowry death. Though it is covered with a lot of blemishes it still carries enough amount of weightage. Evidence law only gives weightage to direct evidence and dying declaration constitutes a radical departure from the evidence law principles. That is why this provision gives special sanctity to the last word of a person presuming him/her to be saying the absolute truth. But still court do take caution before admitting the statement blindly. They apply their own expertise and sense of mind to come to a best possible solution while delivering justice and also while determining the relevancy, admissibility and credibility of the same. In the due course of time, the court have applied the concept of rational and caution. If the statement is direct, complete, consciously given, without any ambiguity, with clear understanding courts will heavily rely on the dying declaration. Therefore, it is considered to be an important piece of evidence in regards to truthfulness and its contents. Section 32(1) of the act is having been tactfully designed in respect to the last

words of a person. In the boom of informational technology, dying declaration are also recording in the electronic format apart from the oral or written form.

Dowry today is demanded and paid without any relational connection to the bride's parents' income and wealth. This is leads to brides committing suicide if not fulfilled. This social evil has led to a lot of deaths, though the false defense of accidental death is taken. A woman is subjected utmost amount cruelty, is time and again harassed, illegally detained in the name of dowry. Dying declaration acts as once such evidence, which can lead to justice to the deceased as well as the deceased family.

LAWS AND REGULATION ON PREVENTION OF MONEY LAUNDERING IN INDIA

- ***Dr. Binish Bansal***[219]

INTRODUCTION

Money laundering as an offense is of ongoing starting point and has now risen as a genuine danger to society all in all in view of its effect and connection with different genuine offenses. Before taking upon conversation on money laundering and related offenses, it would not be strange to comprehend wrongdoing when all is said in done. All social orders have certain standards, convictions, customs and conventions which are verifiably acknowledged by its individuals as helpful for their prosperity and sound advancement. Encroachment of these esteemed standards and customs is censured as hostile to social conduct lawfully, „crime" is any type of lead which is proclaimed to be socially unsafe in a State and all things considered prohibited by law under agony of some discipline. Consequently, Tappan has characterized wrongdoing as, " an intentional act omission in violation of criminal law committed without any defence or justification and penalized by the law as felony or misdemeanor".[220]

The term "money laundering" has undertones of washing something which is grimy. The term was first utilized with regards to Mafia packs working in the USA during the 1930s. These posses, which made enormous benefits through the unlawful production and offer of alcohol during Prohibition during the 1930s, needed to represent this riches. In this manner, the mafia posses opened launderettes or dry-cleaning shops which were helpful in clarifying the proceeds of wrongdoing regarding their retail business, even idea there was almost no laundry occurring. Criminals need to launder their money or cause it to seem authentic for a few reasons. As a matter of first importance, authenticity empowers the criminals to appreciate the products of wrongdoing in an unrestricted manner. These illicit proceeds can likewise be used by criminals to make really genuine endeavors. Based on these authentic endeavors, the criminal families can turn out to be profoundly decent inside two or three ages, in light of the fact that their criminal past for the most part gets obscured. Hence, the relatives of these criminal can proceed to lead ordinary and good lives as citizenry.[221]

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[220] Tappan Paul, Crime, Justice and Correction, McGraw Hill Book Company, New York Toronto, London (1960), at p. 80.

[221] Jyoti Trehan, Crime and Money Laundering; The Indian Perspective (2004) at p. 17

Money laundering as a wrongdoing just stood out during the 1980s, basically inside a medication dealing setting. It was from an expanding consciousness of the tremendous benefits produced from this crime and a worry at the huge medication misuse issue in western culture which made the driving force for governments to act against the street pharmacists by making enactment that would deny them of their illegal increases. Governments additionally perceived that criminal associations, through the tremendous benefits they earned from drugs, could sully and degenerate the structures of the state at all levels.

Money laundering is the procedure by which huge measure of wrongfully got money (from tranquilize dealing, fear based oppressor action or different genuine crimes) is given the presence of having begun from the Legitimate source. Money laundering assumes a principal job in encouraging the aspirations of the medication dealer, the psychological oppressor, the sorted out lawbreaker, the insider seller, the expense dodger just as the numerous other people who need to maintain a strategic distance from the sort of consideration from the specialists that abrupt riches brings from criminal operations. At times people additionally allude to it as a harmless wrongdoing however actually it's anything but a wrongdoing against a specific individual, yet it is a wrongdoing against countries, economies, government, rule of law and world at large[222].Some of the crimes like-illicit arms deals, pirating, debasement, medicate dealing and the exercises of sorted out wrongdoing including tax avoidance create enormous entireties. Insider exchanging, renumeration and PC misrepresentation plots additionally produce enormous benefits and make the motivation to legitimize the badly gotten increases through money laundering. At the point when a crime produces significant benefits, the individual or gathering included must figure out how to control the assets without standing out to the fundamental action or the people in question. Criminals do this by masking the sources, changing the structure, or moving the assets to a spot where they are less inclined to stand out. Else, they can't utilize the money since it would associate them to the crime, and law authorization authorities would hold onto it. Whenever done effectively it permits the criminals to keep up command over their proceeds and at last to give real cover to their wellspring of income. Where criminals are permitted to utilize the proceeds of wrongdoing, the capacity to wash such proceeds makes wrongdoing increasingly alluring.

PREVENTION OF MONEY LAUNDERING ACT, 2000:

[222] Aldridge Peter: Money Laundering Law: Forfeiture Codification & Civil Recovery (2003)

The PMLA 2002 was enacted in 2003 and brought into force on 1stJuly 2005 to forestall money laundering and to accommodate connection, seizure and appropriation of property got or inferred, legitimately or in a roundabout way, from or associated with money laundering and for issues associated therewith or coincidental there. The issue of money-laundering is never again limited to the geo-political limits of any nation. It is a worldwide hazard that can't be contained by any country alone. Taking into account this, India has become an individual from the Financial Action Task Force (FATF) and Asia Pacific Group on money-laundering, which are focused on the viable execution and enforcement of globally acknowledged gauges against money-laundering and the financing of psychological warfare.

The counter money laundering administrative structure of the nation has been assessed by the Financial Action Task Force (FATF), a between Governmental body, for improvement and advancement of arrangements to battle money laundering and fear monger financing. A far reaching assessment of the country's authoritative and regulatory structure for anticipation of money laundering and countering financing of dread was made by the FATF in November/December, 2009. The common assessment report arranged after the extensive assessment distinguished a few inadequacies in the current regulatory and authoritative structure to deal with exercises identified with anticipation of money laundering. An action plan was set up by the Government of India, which was submitted to FATF. This action plan records different present moment and medium-term estimates which are required to be taken. This action plan likewise imagines a few revisions in the Prevention of Money Laundering Act so the authoritative and managerial structure of the nation to forestall money laundering and countering financing of dread turns out to be progressively powerful and fit for taking care of the new advancing dangers. The changes proposed are stated to be put together not just with respect to the shared assessment report of the FATF yet additionally the Governments claim encounters in the execution of the Prevention of Money Laundering Act.

Section 3 of PMLA, defines Money Laundering as an offence. It states that any party who has been indirectly or directly involved in any process connected with concealment, possession , acquisition or use of proceeds of crime (any property derived out of criminal activity) shall be guilty of money laundering. This offence is punishable as under Section 4 of PMLA, 2000. The punishment stated is rigorous imprisonment for a term not less than 3 years but may extend up-to 7 years and a fine.

There have been debates on the constitutional validity of Section 2(1)(4) of the PMLA, 2000, which defines proceeds of the crime. In the case of **B. Rama Raju v Union of India and**

Ors[223], the constitutional validity of the section was challeneged in the Andhra Pradesh High Court. The Andhra Pradesh High Court saw that object of PMLA is to forestall money laundering and associated exercises and appropriation of 'proceeds of wrongdoing' and forestalling legitimization of the money earned through illicit and crimes by interest in moveable and immoveable properties. Along these lines, to accomplish this goal the articulation 'proceeds of wrongdoing' has been characterized expansively and accordingly Section 2 (1) (4) of the PMLA, 2002 is constitutionally valid.

MONEY LAUNDERING AND OTHER OFFENECES:

The offense of money laundering is straightforwardly connected with different offenses which we call predicate offenses. A predicate offense is a wrongdoing that is a segment of an increasingly genuine criminal offense. For instance, delivering unlawful assets is the principle offense and money laundering is the predicate offense. For the most part, the expression "predicate offense" is utilized in reference to fundamental money laundering and additionally psychological oppressor account activity. The meaning of money laundering in Section 3 of the PMLA 2002 and meaning of 'Proceeds of Crime' in Section 2 (1) (u) allude to Scheduled Offenses. The scheduled offense is characterized in Section 2 (y). The schedule all things considered has under gone revisions in 2009, 2012 and 2015 a clarified in the first section. At present there are 157 scheduled offenses under Penal Statutes.

The PMLA Schedule is isolated into three parts. According to definition in Section 2 (1) (y) (I) there is no edge limit for offenses under Part An of the Schedule. Section 2 (1) (y) (ii) endorses edge breaking point of Rs. One crore or more for offenses indicated in Part B of the Schedule. The Section 2 (1) (y) (iii) alludes to Part C of the Schedule, which thus alludes to offenses of Cross Border suggestions. The Statutes and offenses in the schedule are talked about as under:

PMLA : SCHEDULE PART A:

In Part An of the Schedule to PMLA there are reformatory Statutes given in isolated sections, with indicated offenses there under. A short review of these are given as under:

(1)The Indian Penal Code, 1860: In passage one of Part An, under Indian Penal Code, the offenses identifying with criminal intrigue; the offenses against the State under Section 121 A;

[223] B. Rama Raju v Union of India and Ors. ,MANU/AP/0125/2011

predetermined offenses identifying with coin and Government Stamps; indicated offenses influencing Human Body; determined offenses against property; cheating; offenses of deceitful mien of property; imitation; indicated offenses identifying with reports and property imprints; and offenses of cash notes and monetary certificates have been incorporated. These offenses are treated as scheduled offenses with no limit esteem. Right now offenses of Theft, Dishonest, Misappropriation of Property, Criminal Breach of Trust, Mischief and Criminal Trespass are excluded however these are additionally part of the Chapter XVII of offenses against property. Anyway all offenses under XVII of the Indian Penal Code are remembered for Part 'C' of the schedule, which alludes to offenses of Cross Border Implications. In implies if any offense against property under Chapter XVII of Indian Penal Code is of Cross Border suggestion then it will be treated as predicate offense.

(2) The Narcotic Drugs and Psychotropic Act, 1985: Offenses under the Narcotic Drugs and Psychotropic Substances Act, 1985, identify with Contravention corresponding to poppy straw; negation according to coca plant; Contravention comparable to arranged opium; Contravention corresponding to opium poppy and opium; Embezzlement of opium by development; Contravention comparable to cannabis plant and cannabis; Contravention according to made medications and arrangements; Contraventions comparable to psychotropic substances; Illegal import into India, Export from India or transshipment of opiate drugs and psychotropic substances; External managing in opiate drugs and psychotropic substances disregarding limitations; Allowing premises and so on to be utilized for commission of an offence; Contravention of requests of the Central Government; Financing Illicit Traffic and harbouring guilty parties; and abetment and intrigue are included. The NDPS Act contains stringent arrangements for control and guideline of tasks identifying with drugs and psychotropic substances. It likewise has arrangements for relinquishment of property got from or utilized in unlawful, traffic in opiate drugs and psychotropic substances to execute the arrangements of the worldwide show on Narcotic Drugs and Psychotropic Substances.

(3) Explosive Substances Act, 1908: The offenses under this Act which manage causing blast liable to imperil life or property; Attempt to cause blast or for making or keeping explosives with aim to jeopardize life or property; and Making or having explosives under suspicious conditions. Every one of these offenses are of genuine nature and could likewise be part of fear monger exercises and other sorted out crimes.

(4) The Unlawful, Activities (Prevention) Act, 1967: The section Four of the schedule incorporate - Penalty for being individual from an unlawful affiliation, and so forth.; Penalty

for managing assets of an unlawful affiliation; Punishment for unlawful exercises; Punishment for fear monger, and so on.; Punishment for setting expectations of radioactive substances, atomic gadgets, and so forth.; Punishment for raising asset for psychological militant act; Punishment for scheme, and so on.; Punishment for sorting out of psychological oppressor camps; Punishment for selecting of any individual or people for psychological militant act; Punishment for harboring, and so on.; Punishment for being individual from fear monger posse or association; Punishment for holding proceeds of fear mongering; Offense identifying with participation of a psychological oppressor association; Offense identifying with help given to a fear based oppressor association; and offense of raising asset for a psychological militant association. The UAPA Act, 1967 have arrangements to adequately forestall unlawful exercises of people and affiliations and furthermore stretched out to manage fear monger exercises in 2004. Altered in 2012 it has likewise worries with monetary security including financial monitory and financial steadiness and relinquishment of proceeds of wrongdoing rebuffing for raising and gathering assets for psychological warfare.

(5)The Arms Act, 1959: Paragraph Five has offenses with deference - fabricate, selling, move, convert, fix or test or demonstrate or uncover or offer available to be purchased or move or currently possess available to be purchased, move, transformation, fix, test or confirmation, any arms or ammo in negation of section 5 of the Arms Act, 1959; to get, have under lock and key or convey any precluded arms or disallowed ammo in contradiction of section 7 of the Arms Act, 1959; Contravention of section 24A of the Arms Act, 1959 identifying with restriction as to ownership of advised arms in upset regions, and so forth.; Contravention of section 24B of the Arms Act, 1959 identifying with preclusion as to bringing of told arms in or through open places in upset territories; Other offenses indicated in section 25; to do any demonstration in repudiation of any arrangements of section 3, 4, 10 or section 12 of the Arms Act, 1959 in such way as determined in sub-section (1) of section 26 of the said Act; to do any demonstration in negation of any arrangements of section 5, 6, 7 or section 11 of the Arms Act, 1959 in such way as indicated in subsection (2) of section 26 of the said Act; Other offenses determined in section 26; Use of arms or ammo in negation of section 5 or utilization of any arms or ammo in repudiation of section 7 of the Arms Act, 1959; Use and ownership of guns or impersonation guns in specific cases; Knowingly buying arms from unlicensed individual or for conveying arms, and so forth., to individual not qualified for have the equivalent; Contravention of any state of a permit or any arrangements of the Arms Act, 1959 or any standard made thereunder.

(6) The Wild Life (Protection) Act, 1972: The offenses identify with Hunting of wild creatures; Contravention of arrangements of section 17A identifying with forbiddance of picking, evacuating, and so forth., of determined plants; Contravention of arrangements of section 39 identifying with wild creatures, and so on., to be Government property; Contravention of arrangements of section 44 identifying with dealings in trophy and creature articles without permit denied; Contravention of arrangements of section 48 identifying with acquisition of creature, and so forth., by licensee; Contravention of arrangements of section 49B identifying with restriction of dealings in trophies, creatures articles, and so forth., got from scheduled creatures. These offenses are part of passage six of the Schedule.

(7) The Immoral Traffic (Prevention) Act 1956: The offenses under this demonstration remembered for passage Seven are - Procuring, instigating or taking individual for prostitution; Detaining an individual in premises where prostitution is continued; Seducing or requesting for reason for prostitution; Seduction of an individual in care.

(8) The Prevention of Corruption Act, 1988: In passage Eight the offenses are - Public hireling taking satisfaction other than lawful compensation in regard of an official demonstration; Taking delight all together, by degenerate or illicit methods, to impact local official; Taking satisfaction for exercise of individual impact with local official; Abetment by local official of offenses characterized in section 8 or section 9 of the Prevention of Corruption Act, 1988; Criminal unfortunate behavior by a local official. These offenses are extremely critical unlawful increase in laundered through money laundering process.

(9) The Explosives Act, 1884: Punishment for specific offenses; Offenses by organizations; culpable under Section 9 B and 9 C are remembered for passage Nine of the Schedule. This Act controls the production, import and fare of explosives. These offenses identify with contradiction of rules as for production, imports or fares, ownership use deal or transport of any blast.

(10) The Antiquities and Arts Treasures Act, 1972: Contravention of fare exchange ancient pieces and expressions fortunes; and offenses by organizations under this Act are remembered for passage 10 of the Schedule. The Act focuses on avoidance of carrying of and managing in artifacts and workmanship treasures. It likewise accommodates mandatory securing open spots.

(11) The Customs Act, 1962: Evasion of obligation or forbiddances under the Customs Act, 1962 culpable under Section 132 thereof is schedule offense under part A.

(12) The Bonded Labor System (Abolition) Act, 1976: Punishment for enforcement of reinforced work; discipline for removing fortified work under the reinforced work framework; and abetment are scheduled offenses in paragraph 13.

(13) The Child Labor (Prohibition and Regulation) Act, 1986: Punishment for work of any kid to work in repudiation of the arrangements of section 3 of the Child Labor Act is scheduled offense under passage 14.

(14) The Transplantation of Human Organs Act, 1994: The offenses of expulsion of human organ without power; discipline for business managing in human organs; and of contradiction of some other arrangement of this Act are incorporated as scheduled offenses under section 15.

(15) The Juvenile Justice (Care and Protection of Children) Act, 2000: Offense under Punishable for pitilessness to adolescent or kid; Employment of adolescent or youngster for asking; Penalty for giving inebriating alcohol or opiate sedate or psychotropic substance to adolescent or kid; and Exploitation of adolescent or kid worker are in section 16.

(16) The Emigration Act, 1983: Offenses and punishments under Section 24 of the Emigration Act, 1983 is in paragraph 17.

(17) The Passport Act, 1967: Offenses and punishments under Section 12 of the Passport Act are remembered for passage 18.

(18) The Foreigners Act, 1946: Penalty for negation of arrangements of the Act, and so forth.; Penalty for utilizing fashioned visa; and Penalty for abetment are scheduled offenses under the Foreigners Act.

(19) The Copyrights Act, 1957: Scheduled offenses under this Act are Offenses of encroachment of copyright or different rights presented by this Act; Enhanced punishment on second and consequent feelings; Knowing utilization of encroaching duplicate of PC program; and Penalty for contradiction of section 52A.

(20) The Trademarks Act, 1999: Penalty for applying bogus trademarks, exchange depictions, and so on.; Penalty for selling products or offering types of assistance to which bogus exchange check or bogus exchange portrayal is applied; Enhanced punishment on second or resulting conviction; Penalty for erroneously speaking to an exchange mark as enrolled; Punishment of abetment in India of acts done out of India are in passage 21 of the Schedule.

(21) The Information Technology Act, 2000: Penalty for break of secrecy and protection; Act to apply for offense or repudiation submitted outside India are in section 22.

(22) The Biological Diversity Act, 2002: Penalties for repudiation of section 6, and so on culpable under Section 5 read with Section 6 is a scheduled offence under passage 23.

(23) The Protection of Plant Varieties and Farmers Act, 2001: The Penalty for applying bogus group, and so on.; Penalty for offering assortments to which bogus division is applied; Penalty for erroneously speaking to an assortment as enrolled; Penalty for resulting offense are scheduled offenses under section 24.

(24) The Environment Protection Act, 1986: Penalty for releasing natural contaminations, and so on., in abundance of recommended norms; and Penalty for taking care of perilous substances without consenting to procedural shields are in passage 25 of the schedule.

(25) The Water (Prevention and Control of Pollution) Act, 1974: Penalty for contamination of stream or well; and Penalty for repudiation of arrangements of section 24 is in passage 26 of the schedule.

(26) The (Air Prevention and Control of Pollution) Act, 1981: The offense identifying with Failure to conform to the arrangements for working modern plant is remembered for section 27 of the schedule.

(28) The Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms On Continental Shelf Act, 2002: The offenses regarding Offenses against transport, fixed stage, payload of a boat, oceanic navigational offices, and so on are remembered for section 28 of the schedule.

PMLA SCHEDULE PART B:

Part B of the PMLA schedule is intended for offenses which are scheduled offenses with a limit sum as endorsed in Section 2 (1) (y) (ii). In the first Act the edge sum was Rs. 30 lac or more. Be that as it may, through 2002 corrections of PMLA, all offenses in Part B of the schedule were converged with Part B for example with no edge limit against through Finance Act, 2015 revision an offense under Section 132 of the Customs Act, 1962 has been remembered for Part B with a recommended edge breaking point of Rs. One crore or increasingly under Section 2 (1) (y) (ii) as changed in 2015. The offense identifies with bogus affirmation and bogus reports and so on.

PMLA SCHEDULE PART C:

The section C was embedded through 2009 alteration of PMLA to manage offenses of cross fringe suggestions. Whereby all offenses in Part A just as Part B of cross fringe suggestion are

to be treated as scheduled offenses, inspite of edge limit as recommended around then (Rs. Thirty lac) for Part B offenses. Since the 2012 change blended the Part B offenses with Part A the necessity of Rs. 30 lac edge stopped to apply, and waiver of limit proviso (2) was overlooked from Part C of the Schedule.

Offenses Against Property under Chapter XVII of IPC: The 2012 Amendment of PMLA presented a statement (3) in part C of the Schedule giving that all offenses against property under Chapter XVII of the Indian Penal Code, 1860, if have trans-fringe suggestion will be scheduled offenses. All offenses under Chapter VII of the Indian Penal Code, with the exception of offenses relating to robbery of property; Dis-legitimate Misappropriation of property; criminal break of trust; evil; and criminal trespass are there in part An of the Schedule. In this manner offenses of robbery of property; Dishonest misappropriation of property; Criminal rupture of trust; Mischief and criminal trespass will likewise be scheduled offenses of these are of cross fringe suggestion.

Offenses u/s 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015: Further the Finance Act, 2015 incorporated the offense of persistent endeavor to dodge any assessment, punishment or premium alluded in Section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. Therefore this offense will likewise be a scheduled offense when it has the cross the fringe suggestion.

From the previously mentioned conversation plainly scope of offenses under various statutes have been incorporated as scheduled offenses under three parts of the schedule to PMLA. Laundering of proceeds of these offenses is culpable as an offense of money laundering under PMLA. The PMLA schedule is unmistakable when it alludes to scheduled offenses. Still there are other act and exercises by which illegal money is produced by abusing other administrative and administrative structure. In the second spot there is a need to go to the underlying drivers of different predicate offenses which should be annihilated to check the age of proceeds of wrongdoing. A portion of these issues like defilement in open life, tax avoidance, dark money, underestimate of land transactions, benami transactions, consumption on races, pirating, illegal progression of assets over the outskirt have been independently talked about in Chapter V.

CONCLUSION:

The money laundering is anything but another wonder however it has drawn more consideration of the administrators and the law enforcement offices in view of its developing linkage with genuine crimes. These days such crimes are not kept to national fringes yet have

universal reunification. Also, the criminals engaged with such exercises are progressively sorted out and work at an enormous scope. Further improvement is the contribution of psychological militant and fear based oppressor associations in money and security transactions.

Taking into account the need to control money laundering unique exertion has been made to perceive money laundering as a particular offense. The individual nations have been encouraged to institute law to manage this wrongdoing. Since the offense of money laundering must be connected to the source of proceeds of wrongdoing, subsequently explicit wrongdoing which are alluded as predicate offenses have been distinguished. The Prevention of Money Laundering Act, 2002 remembers for its Schedule 29 Statutes and 157 Offenses as Scheduled Offenses. There are a lot more acts and exercises which are connected with money laundering. The schedule to PMLA has been changed and re-composed through revisions in 2009, 2013 and 2015 so as to adjust to global enemy of money laundering parameters and to grow the ambit of money laundering offense. Still there can be further extent of consideration of more acts and exercises inside the domain of the PMLA as the rundown of scheduled offenses isn't comprehensive.

Along these lines, to battle money laundering a complete methodology is required to comprehend the wrongdoing and guiltiness in the offense of money laundering as well as those related crimes, the proceeds of which are engaged with money laundering.

CORPORATE GOVERNANCE

- ***Dr. Suman Mawar***[224]

ABSTRACT

This paper aims at identifying the true meaning of Corporate Governance in legal sense. An attempt has been made to look into some of the various issues circling around corporate governance within the countries. In furtherance of the same, the paper will delve into related party transaction which would further substantiate how companies actually work as opposed to how the law intended them to work and thus, formulating the pattern of abuse of related party transactions. Furthermore, the convergence of corporate governance in India is looked into whereby some of the various issues with the model is discussed briefly and an attempt to find a plausible conclusion is made.

INTRODUCTION

The meaning of the term "Corporate Governance" refers to the capability of the company to deal with the business, the assurance that the company will adhere to morals and provide sufficient involvement on all the material issues. This will enable the company to maintain a general partner certainty and therefore, will give into effect, effective allocation of capital and other monetary and economic development.[225] The modus operandi of a company is interlinked with governance. At the same time, governance is also attached to provision of guarantee that the functions will be reasonable and straightforward in nature.[226] In 2013, Rajya Sabha had passed the Companies Act (hereinafter referred to as "The Act").[227] The Act paved way for novel straightforwardness and governance in a corporate environment. This was in addition to making corporate governance a paramount condition in the present body of corporate structure. It has the potential to be a noticeable a fact, as it aims to strengthen corporate governance, simplify processes, raise the monetary advances of shareholders concerned, and articulate the position of whistle blowers out of the blue. The Act encourages good governance practises by placing the onus on free executives to oversee the Board's operations and ensure minority

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[225] F. Mayer (1997), 'Corporate governance, competition, and performance', In Enterprise and Community: New Directions in Corporate Governance, S. Deakin and A. Hughes (Eds), Blackwell Publishers: Oxford.
[226] National Foundation for Corporate Governance , Discussion Paper : Corporate Governance in India : Theory and Practice
[227] The Companies Act 2013.

investors' support.[228] The Act is a significant point of reference in India's corporate governance circles, and it is likely to have a significant impact on the country's organisational governance.[229] “Corporate governance is a mechanism for coordinating and controlling businesses. The executive sheets are in charge of their corporations' administration. The role of the investor in governance is to delegate the executives and reviewers to ensure that a proper governance system is in place. The board's responsibilities include establishing the organization's focal points, granting authority to put them into action, guiding the business's administration, and reporting to investors on their stewardship. The board's actions are subject to rules, directives, and the owners as a whole."[230]

The recognition by management of the perks enjoyed by the shareholders, – which cannot be overlooked – true owners of the partnership and of their own part as stewards for the good of the investors is known as corporate governance. It's about committing to principles, taking a moral business stance, and establishing a distinction between employee and corporate funds in an organization's administration.[231] Financial experts from first world countries are urging Indian corporates to follow international fair practises, with a focus on corporate governance. According to a McKinsey report published in the International Journal of Pure and Applied Mathematics Special Issue 958 in 2002, people who took part were willing to pay a premium of up to 25% for a highly represented business.[232] The hit-backs associated with the market in

[228] . Cadbury Committee Report : A report by the committee on the financial aspects of corporate governance. The committee was chaired by Sir Adrian Cadbury and issued for comment on (27 may 1992)
[229] A.C.Fernando (2006), Corporate Governance, Principles, Policies and Practices. pp 76, Pearson
[230] *Ibid.*
[231] Aggarwal, Reena, Isil Erel, Miguel Ferreira, and Pedro Matos, (2011). Does governance travelaround the world? Evidence from institutional investors. Journal of Financial Economics,100, 154–181.
[232] Agrawal, R.K. (2016). A Comparative Study of Indian Companies Act, 2013 and Companies Act of Republic of Maldives, 1996. IRA-International Journal of Management & Social Sciences (ISSN 2455-2267), 4(1). https://doi.org/10.21013/jmss.v4.n1.p9

our nation, such as "the global financial crisis of 2008" and the subsequent corporate bribery at Satyam, have been concerning flags about India's administrative procedures. So, this is one of the reasons for repeated emphasis by the two controllers. Since it is widely assumed that an economy's institutional setting, i.e. a combination of formal guidelines, informal imperatives, and authorization qualities, are widely different across countries and have an effect on financial and pillars of administration of the body corporate, know-how the state of administration of the corporate research concerning the Indian context is similarly placed.[233] The aim of this article is to comprehend the principle of corporate governance, discuss governance rules under the Companies Act, 2013, and examine several changing trends and the current structure in India.

CORPORATE GOVERNANCE IN THE COMPANIES ACT 2013

The Companies Act of 2013 delves into great corporate governance by extending Board's functions and duties, assuring investors' confidence, establishing a management based on , and promoting intrinsic through self-direction. The 2013 Act had a significant impact on how businesses are portrayed. The following provisions are made possible by the Act:

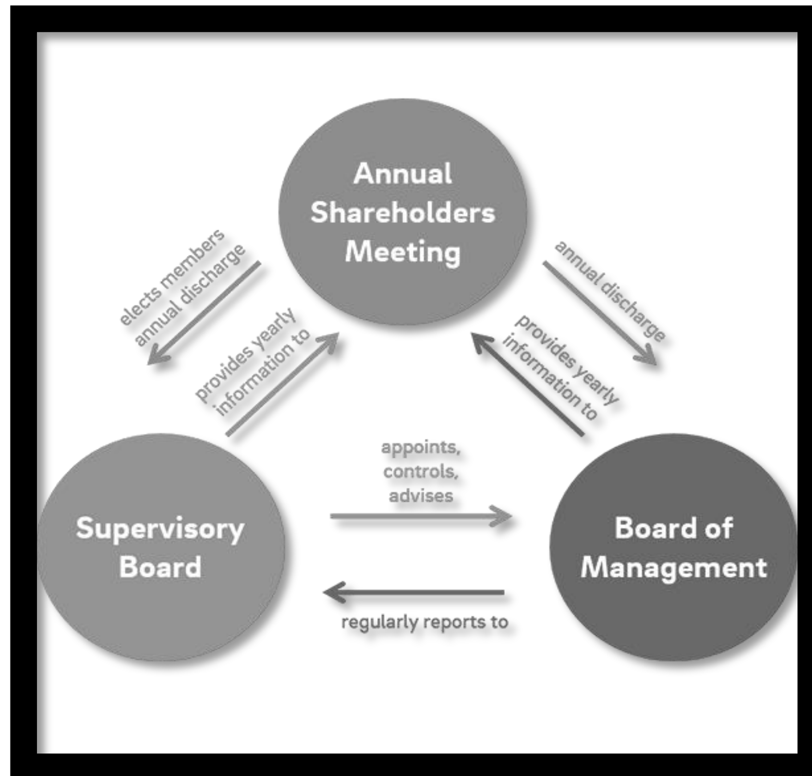
Functioning of the Board

According to the Companies Act of 2013, an inclusive and even a privately held company will have a maximum of fifteen executives on the Board, and appointing more than fifteen executives will necessitate shareholders approval by an unusual decision in the General Meeting. It also allows for the appointment of at least one female executive to the Board of Directors for any class or groups of firms that might be recommended. The Act mandates presence of at least one such executive for a minimum of 182 calendar days in India.[234]

The figure below is a broader example of a company assuring corporate governance in their functioning. The company referred here is "E.ON SE". Publication of such information on website also shows how important legislature had intended corporate governance to be:

[233] Mittal, A., & Jain, A. (2015). Indian Companies Act, 2013 – Changing the face of CSR in India. In Proceedings of the 7th International Conference on Business and Finance. https://doi.org/10.4102/jbmd.v5i1.14

[234] The Companies Act 2013.



Appointment of Independent Director

The major characteristics of the posting understanding are included in the meaning of the word autonomous executive as described in the Companies Act, 2013. An impartial leader should be a man of integrity of considerable skill as well as expertise. The Act specifies that autonomous executives should possess no material financial ties to the company, its sponsors, employees, or auxiliaries that might affect the executive's autonomy in the current fiscal year or over the next 2 years. The following arrangements for independent chiefs are included in the Act; according The Act, each registered company must make at least 33 percent of the total executives should be independent chiefs, with any portion being referred off as 1. The central government would be able to propose the fewest number of independent executives in various free company classes.[235]

Some regulations for Independent Directors are included in fourth schedule of the Act, which an independent executive would follow. The "Code for Independent Executives" establishes clear guidelines for leadership, roles, and responsibilities. It includes the following perspectives: Professionalism in conduct; data expertise; safeguarding the rights of all partners;

[235] *Ibid.*

carrying out responsibilities and duties in a practical manner; and evaluation of board and administration execution, among other things. Under The 2013 Act, an independent chief executive and an executive who is not an official and who is not a promoter or KMP will be held liable for any demonstrations of supervision or commission by a company that occurred with his expertise, inferable from board forms, and with his consent, or where he had not acted decisively.[236]

Auditing of Companies

Review panels are required for companies that are listed and other companies who are recommended groups; of companies under Section 177 of The Act, 2013. According to the Act, a selection panel should consist of at least 3 directors, with a given number of independent directors playing a significant role. Executives were not required to have any academic or vocational qualifications under the 1956 Act. The 2013 Act stipulates that members of auditing committee are required to comprehend financial statements to the best of their capabilities.[237]

RELATED PARTY TRANSACTIONS AND ABUSE

Related parties should include organisations that own or are under one superior control of the corporate, major owners, including family members of theirs and key managerial persons, according to the "OECD Principles of Corporate Governance in 2004". Transactions affecting major shareholders (or their immediate family, relatives, etc.) are probably the most difficult to classify, whether directly or indirectly.[238] Shareholders with more than 5% of a company's stock are required to register transactions in some jurisdictions. The existence of the arrangement under which authority resides, as well as the nature and volume of dealings with relevant parties, must both be disclosed.[239] Given the intrinsic opacity of certain transactions, it might be necessary to impose a duty on the recipient to alert the board, which should then report the transaction to the market. This does not relieve the corporation of its responsibility to do its own oversight, which is an essential activity for the board.[240] Below is an example of a company ensuring disclosure requirements for related party transactions.

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[236] *Ibid.*

[237] *Ibid.*

[238] Marianne Bertrand et al., Ferreting Out Tunnelling: An Application to Indian Business Groups, 117 Q. J. ECON. 121, 126 (2002)

[239] La Porta, R., Lopez-De-Silanes, F. & Shleifer, A. (1999). Corporate Ownership around the World. Journal of Finance, 54(2), pp. 471–517.

[240] Mahmood, I. P. & Mitchell, W. (2004). Two Faces: Effects of business groups on innovation in emerging economies. Management Science, pp. 1348–1365.

$ millions	Transactions of operating nature			
	Sales	Purchases	Receivables	Payables
Parent PLC	-	180	-	15
Subsidiaries of Parent PLC	26	-	5	-
Associates of Parent PLC	3	-	1	-
Subsidiaries of Example Ltd.	15	-	3	-
Ventures Ltd.	2	-	1	-
RealEstateMasters Ltd.	-	22	-	2

A related party transaction may create a possible or real conflict of interest, and it may not be in the company's or its shareholders' best interests, especially minority shareholders. It may lead to circumstances in which such transactions are used as a funnel to route funds out of the business and into a "related party."[241] This deals can also be seen as a commercial advantage denied to a related party at the expense of the company's and its shareholders' interests. As a result, these conflicts of interest are inextricably tied to a company's governing system, which may either improve or limit the board's efficacy.[242] The board is responsible to the corporation and its owners and is in charge of updating and directing strategic policy as well as actively controlling management.[243] Not all RPTs are harmful to the company's or its shareholders' interests. Some sales are legal and satisfy realistic economic objectives. Companies' ability to maximise shareholder value can suffer if they are prevented from engaging in such transactions.[244] Consider a big production corporation X and a tech behemoth Y, all of which are believed to hold a major part of the shares. If Company X decides that it can get the best value in terms of finance and economy as well as the pricing of the program from Company Y, and both X and Y are selling their goods solely on predominant market terms based on reasonable bidding, so it will be against X's commercial interests to not but the article or program from Y simply since there is a sharing of ownership. As a result, depending on the terms of the contract, connected party transactions can be useful. The majority of businesses in India are family-owned and/or tightly held[245]. As a result, India's corporate governance system should place a premium on tracking and overseeing relevant activities affecting controlling owners (also known as "promoters") and related agencies.

[241] OECD. (2009). Guide on fighting abusive Related Party Transactions in Asia s. Paris: Organisation for Economic Cooperation and Development.
[242] *Ibid.*
[243] *Ibid.*
[244] Ramaiya, A. (1988). Guide to the Companies Act, 1956. Wadhwa Publication
[245] Saha, J. (2006),. A Study of Related Party Transactions in Indian Corporate Sector. Unpublished Ph.D. Dissertation. IGIDR.

A variety of reasons are important to any discussion of related party transactions in India, and they help to explain why there are so many of them. Given the large number of family-run companies, it stands to reason that they would be more closely linked to other businesses owned by the same family or its descendants. There will be a greater desire and opportunity to deal with a known party.

THE INDIAN CONTEXT: CONVERGENCE DEABTE

The Indian government began undertaking a major reform of the structure of governance by the company in the late 1990s. This system produces changes which were aimed at "making Boards and Audit Committees more autonomous, powerful, and concentrated monitors of management," according to a research on Clause 49, as well as assisting shareholders, particularly investors from abroad as well as institutions, while being in the management and monitor tasks.[246] India's reformative structure with respect to corporate governance initiative has taken a variety of directions and has been marred by major disagreement between Securities Board and the MCA[247]. SEBI adhered to important reforms of corporate governance, however, the actual effect of those changes has been slow. Clearly, India's reforms show formal alignment with the Anglo-American governance structure; however, data remains half cooked as to whether this debate on the convergence of corporate governance in India has progressed beyond the usual stage.[248] The following is how this section is structured. Section A examines the events leading up to the implementation of Clause 49, as well as the disputes that occurred between SEBI and the Ministry during the reform period.

Section B then shows how Clause 49--which was amended many times since its original implementation in 2000 and 2005 to improve its effectiveness—is similar in several respects to governance changes implemented in developing countries, including the USA as well as the UK. Section C also moves on to examine the shortcomings in the application and compliance of Clause 49, and how such shortcomings show that changes are currently largely procedural changes. SEBI established a series of committees in 1998 to assist in the overhauling of governance regulations and principles for publicly traded Indian corporations.[249]

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[246] Pratip Kar, Corporate Governance in India, in CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE PERSPECTIVE 249, 251, 272-73 (Org. for Econ. Co-Operation and Dev. Ed., 2001).

[247] Jayati Sarkar & Subarata Sarkar, Debt and Corporate Governance in Emerging Economies: Evidence from India, 16 ECON. OF TRANSITION 293, 295 (2008).

[248] *Ibid.*

[249] Shleifer, A. & Vishny, R. (1997). A Survey of Corporate Governance. Journal of Finance, 52, pp.737–783

The lobbying activities of Indian corporate giants, especially those who are under this regime of Indian governance of corporate structure, resulted in SEBI's reforms. SEBI followed the suggestions and guidelines of the 1st committee which was created to maintain a code of governance of body corporates and implemented unforeseen reforms in the corporate governance through Clause 49 of the Listing Agreement after a robust corporate code of governance was recommended by one of the top associations. The MCA replied to SEBI's initial implementation of Clause 49 by forming its own committees to recommend corporate governance requirements for Indian public corporations by changes to the Companies Act, continuing its long-running feud with SEBI. However, the MCA's process was marred by disagreements with SEBI, which ended in being not so fruitful in any attempt to change the 2013 Act.[250] The inability of SEBI and the Ministry of Corporate Affairs to collaborate is particularly clear in the way the agencies handled India's corporate governance system. SEBI has specifically avoided urging to bring amendments to the companies act to incorporate corporate governance clauses. Given the competitive existence in stock market and SEBI's need to stay agile and sensitive to changing circumstances, the fact that SEBI prefers to implement reform by changes to the Listing Agreement and committees may not be a challenge. The MCA's opposition to the creation of these commissions, on the other hand, demonstrates that the two institutions are clearly not on the same page.[251]

Despite the efforts of the Ministry to update the Act, the Clause 49 continues to be the one of the most changing reform to corporate governance to date. Clause 49 ushered in a modern era of corporate governance. India's corporate governance reforms adopted a fiduciary and agency expense model, similar to those of the first world countries like the UK and the USA. Clause 49 amendments contained specific provisions on the functions and composition of the corporate board of directors, as well as internal controls, with an emphasis on the agency model of corporate governance.[252] The Clause 49 amendments were phased in for many years, affecting bigger corporations first and then smaller publicly traded firms. Thousands of publicly traded Indian corporations were eventually forced to conform with a new regime of corporate governance.

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[250] Ananya Mukherjee Reed & Darryl Reed, Corporate Governance in India: Three Historical Models and Their Development Impact, in CORPORATE GOVERNANCE, ECONOMIC REFORMS, AND DEVELOPMENT: THE INDIAN EXPERIENCE 25, 31-36 (Darryl Reed & Sanjoy Mukherjee eds., 2004).

[251] *Ibid.*

[252] Rajesh Chakrabarti, Corporate Governance in India-Evolution and Challenges 20 (Jan. 17, 2005) (unnumbered working paper), available at http://ssrn.com/abstract-649857.

CONCLUSION

Despite the existence of extensive governance regulations, many corporations showing reluctance to conform with modern requirements of governance, and regulatory authorities in India have found themselves unable to implement these changed guidelines at all. According to the Asian Corporate Governance Association's latest analysis of India's governance, the country's compliance and execution of Clause 49 is at best mediocre: "Most mid- and small-cap corporations do not see the importance of corporate governance." The majority of publicly traded firms, including many big ones, take a check-box style.[253] A variety of reasons, inclusive of a competition of regulations between two authorities of the Government, an ineffective justice regime, and Indian firms' continued closed ownership structure, have established challenges to the implementation and enforcement of these stringent structured laws. India's reform attempts therefore offer a fascinating trend of corporate governance convergence, since they can be classified as either systematic convergence against Anglo-American governance traditions or continued continuation of India's long-standing lax corporate governance norms. Despite the initial enthusiasm for Clause 49 and assurances of strict compliance, its implementation and application show that, while structured convergence has been accomplished, full convergence demands further structural reforms. It becomes clear that the reform process is futile until an appropriate mechanism for execution and compliance is in place, even though comprehensive governance guidelines are carefully crafted by a community of elites with a thorough knowledge of corporate governance principles around the world. As a result, when developing new corporate governance principles, these restrictions must be considered. True convergence cannot be achieved only by the application of formal rules; it also necessitates similarity in application and compliance.[254] Local considerations will undoubtedly affect the course of India's reforms to governance of the corporates and whether full convergence to the Anglo-American paradigm occurs. The history of India's corporate governance structure demonstrates that important factors in the political and social angle influence the evolution of a country's corporate governance system. These dynamics put so much pressure on countries that integration of unidirectional system of the nation is impossible in the short future, irrespective of how apt positioned each national structure is to emulate one

[253] Asian Corporate Governance Association, Library, Country Snapshots, India, http://www.aega-asia.org/content.cfm?SITECONTENTTYPEID= 1 &COUNTRY_ID =264

[254] Gerard Hertig, Convergence of Substantive Law and Convergence of Enforcement: A Comparison, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 328 (Jeffrey N. Gordon & Mark J. Roe eds., Cambridge University Press 2004).

 ISSN 2581-6349

form of governance.[255] The condition in India in terms of minority rights and RPTs must be analysed in view of the prevalence of large corporate groups with powerful controlling shareholders and an overburdened judiciary system. The use of independent directors on the audit committee to manage RPTs may not be successful, since independent directors continue to feel that they are consultants to the controlling shareholders in practise. The right of shareholders to have a vote on such material transactions must underpin the position of the board and its independent directors. Furthermore, considering the Indian ownership structure, it is important that interested shareholders are not allowed to vote in the shareholder meeting. These elements should be included in the current Company Law and introducing regulations. To prevent future hold-ups by a limited number of investors, such a right would need to be supplemented by protections.

[255] Curtis J. Milhaupt, Property Rights in Firms, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 210 (Jeffrey N. Gordon & Mark J. Roe eds., Cambridge University Press 2004).

HUMAN RIGHTS AND SOCIALLY WEAKER SECTIONS STATUS

- ***Dr. Atul Kumar Sahuwala*[256]**

Abstract

Human Rights are come into existence through the international laws and treaties. In our Indian Constitution adopted Human Rights provisions from universal declaration of Human Rights and they are preserve and protected by the constitution of India, judiciary, National Human Rights commission, National commission for scheduled castes, National commission for scheduled tribes, state commissions, SC & ST Prevention of Atrocities Act, 1989 and other laws. In India Human Rights violated of lower caste and SC, ST people by the upper caste people. So it is the question arise that how to safeguards and protect the Human Rights of SC and ST? behind the state.

Keywords: human rights, constitutions, schedule caste preservation

Introduction

Human Rights are the rights which are possessed by human being that are basic and inalienable rights. The Indian constitution bears the impact of the universal declaration of human rights and this has been recognized by the supreme court of India. Fundamental rights are contained in part III of Indian constitution. There are special provisions regarding vulnerable groups such are women, old age persons, SC and ST people mentioned in Indian constitution for the protection of their Human Rights. The state also formed many commissions and organization to protect the Human Rights of SC and ST people.

The duty of state is to protect the Human Rights of SC and ST people. It is an important task before the state, but in reality the mis-perform and not perform this important task. Then judiciary steps into enforce to protect Human Rights of SC and ST people.

Objectives

1) To study the meaning of Human Rights and its nature under Indian constitution.
2) To study the provisions of constitution regarding Human Rights.

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3) To study the incidents of Human Rights violated of SC/ST people.

Research Methodology

The analytical and historical method is used for the purpose of this research paper, for this research Secondary method used for the date collection and most of data taken from textbook and reference books and Internet.

Meaning and nature of human rights

Human beings possess certain basic and inalienable rights which are commonly known as Human Rights. Universal declaration on Human Rights adopted in Indian constitution such are civil, socio economic, political, cultural rights under Indian constitution mentioned below.

1. Equality before law - Art.14
2. Prohibition of discrimination -Art.15 (1)
3. Equality of opportunities – Art.16 (1)
4. Freedom of speech and expression – Art.19 (1) (a)
5. Freedom of peaceful assembly – Art.19 (1) (b)
6. Right to freedom of movement within the border – Art.19 (1) (d)
7. Protection of life and personal liberty – Art.21
8. Protection slavery & forced labour – Art.23
9. Remedy for enforcement of rights – Art.32
10. Right to social security – Art.29 (1)
11. Right to equal pay for equal work – Art.39 (d)
12. Right to education – Art.21 (A), 41, 45, 51 (A)(K)

Indian constitution provides Reservation to SC and ST people for the protection of their Human Rights. These Human Rights are protected by the constitution and judiciary and State organizations.

Incidents of human rights violated of SC/ST people in India Some incidents of Human Rights violation are given mentioned below.

Abuse by Armed group in which killing of 14 people by National democratic front of Bodoland. Khairlanji Hatyakand of Maharashtra state in which women of the Mahar caste family unnaturally and cruel rapped and latterly killed them, destroyed by the community of

upper caste people and this incident is a very big stigma for all human beings. Many other incident happened in which the many person killed by the upper caste people in Maharashtra state. Most of the incident happened against the Mahar Caste and SC people. Caste based discrimination and violence more than 56,000 crimes were committed against scheduled caste and scheduled tribes in 2015, according to report. In 2016 dalit student Rohith Vemula committed Suicide. It was not the incident of accident its suicide committed because of the caste discrimination. Many dalit people were attacked by the vigilante cow protection groups Chhattisgarh, resulting in grabbing of Adivasi land without their consent. Most of the Human Rights violated incidents in which SC/ST faced intimidation, physical attacks and harassment in India.

Protection of human rights and national human rights commission

Human Rights are better protected at the national level with adequate laws, independent judiciary and other effective mechanisms. In India the Human Rights commission formed in 18 states. The primary function of National Human Rights Commission to conduct inquiries into violation of Human Rights for the following violation.

- Violation of right to life, liberty, equality and dignity.
- Abetment of violation of Human Rights by a public servant.
- Negligence of public servant in prevention of Human Rights violation

SC and ST commissions for protection of their human rights

The National Commission for scheduled castes and scheduled tribes was formed into two separate commissions namely the National commission for scheduled castes and National commission for scheduled tribes on 19/02/2004.

Both the commissions are same functioning for the protection ofHuman Rights of SC and ST people. For effective implementation of various safeguards provided in the constitution for the SC and ST. Provided that appoint of a special officer under the Art.338 of the constitution. This special officer called commissioner for SC and ST, was assigned to duty to investigate the matters relating to the safeguards for SC and ST in various statutes and report to president. This commission consist 1 chairman, 1 deputy chairman and other 5 members.

Role of this SC and ST National commissions

To investigate and monitor relating to safeguards for SC and ST

To inquire of specific complaints with respect to deprivation of rights and safeguards of SC and ST.
To participate and advise on planning process of socio- economic developments under union and state
To present to the president reports upon the working of those safeguards annually.
To effective safeguards and other measures for the protection, welfare and socio-economic development of the SC and ST.

Headquarters of state offices under National Commission for Scheduled Caste (NCSC)
1. Ahmedabad, 2. Bangalore, 3. Kolkata, 4. Guwahati, 5. Patna, 6. Hydrabad, 7. Pune, 8. Chennai, 9. Luchnow, 10. Thiruvanthpuram, 11. Chandigarh, 12. Agartala.

Headquarters of state offices under National Commission for Scheduled Tribes (NCST)
1. Bhopal, 2. Bhuvaneshwar, 3. Raipur, 4. Ranchi, 5. Shilong, 6. Jaipur.

Conclusion
Regarding Art. 46 of the Indian constitution.Today 70 years after independence as dalit continue to bear the brunt of violence and discrimination. The tragic suicide of Rohith Vemula a Ph.D student who hanged himself in Hydrabad central university. Rohith is not the lone tragedy. A spectre of suicide deaths by several dalit students are hunting in India. There are many laws and commission formed for protection of Human Rights of SC and ST, but still the Human Rights of SC and ST are violated.
It is necessary to that implement the SC and ST prevention of Atrocities Act 1989 for the protection of Human Rights of SC and ST people. The state shall strictly implement the different policies through the National commissions for the protection of Human Rights of SC and ST.
The National commission for scheduled caste (NCSC) and National commission for scheduled tribes (NCST) are the main agency through of all necessary actions taken on the matter related to the SC and ST people and their all the issues. The commissions play a vital role in protecting and safeguarding of Human Rights of SC and ST people. Commission are separately handled the incidents in which the Human Rights violated of SC and ST people. In the task of state for the protection of Human Rights of SC and ST people the very contributory role played by the SC and ST commissions at state and National level.

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