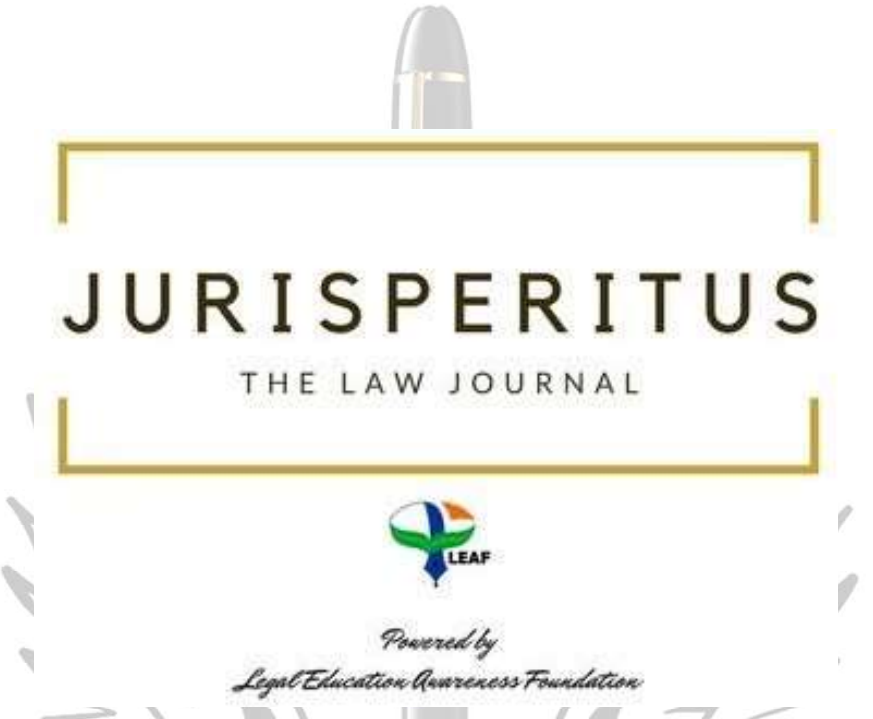

VOLUME 4 ISSUE II

|| JULY 2021 ||

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

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With this thought, we hereby present to you

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RIGHT TO LIVELIHOOD IN THE LIGHT OF CONSTITUTION OF INDIA

- RAIMA TRIPURA

The primary articles in Part III of the Indian Constitution on fundamental rights are Article 21. Fundamental rights referred to in Part III may, in accordance with Article 12 of the India Constitution, be executable against State. State shall include, within the territory of India or under the control of the Government of India, the government and legislature of each state and of all the local or other bodies of the State. Under Article 13 laws incompatible with, or derogating, fundamental rights shall be considered null and void in the extent of such inconsistency or derogation. It is also enjoined that the State not adopt any law to deprive or disregard the rights conferred under Part III of the Constitution of India, and, to the extent of the infringement, any law made in contravention of Article 13 is void. In relation to Article 21, it sets out that, except as provided in the law, nobody shall be deprived of his life or personal freedom. The moot question is what is the right notion in this Article of the word 'life'? Is it right to live, right to work, or is it just a physical existence? It is in this connection useful to take into account the relevant observations made in the introduction to its book by the learned author Justice B. L. Hansaria:[1]

"Article 21's fundamental right to life is the most precious human right, and 'shapes the arc of all other rights.' Moreover the people of India received as much from this Article they wanted. We know that if they would like to, they will be able to give more in future. The founding fathers may have not imagined that they embodied so much potential in the Constitution. Such an arrangement has hardly ever taken such steps as this Article. The great amount of content that has been poured into the sky in Article 21 by lower deaths must make Dr. Ambedkar and a great proportion of the Constituent Assembly, which have been 'dishappointed' with the reach of Article 15a as Article 21 numbers in the draught Constitution, to 'compensate' Article 15A inserted. The journey goes on to her majesty. Law never remains, it can never be. It must also be modelled by skilful hands, as it has well been said that law life is not logical, it is experience."

[1] RighttoLifeandLibertyundertheConstitution,Ed.1993publishedbyN.M. TripathiPvt.Ltd.,Bombay

Article 21 of the Constitution: It is set down in a negative way and the State is obliged, except in accordance with a procedure established by law, to not necessarily deprive a citizen of his life or personal freedom. It is axiomatic that the State may only take a person's life or personal liberty from any law which is a valid law through its operation. Where a procedural law can validly deprive a person of his or her life or personal liberty, it should meet this requirement: As a result of the valid exercise of legislative power by the relevant legislative authority the procedure provided for by said law should be. In other words, such law can only be enacted by a competent legislative body. If such a law finds the procedure to be laid down by an incompetent legislature, such law would be still-born or incompetent and ultra-virtues the powers of the respective legislature. The procedure could be that a procedure that flows grom such an invalid law does not affect the life or personal liberty of any person subject to Article 21; and even though a legislative law competent to enact such law finds that the procedures laid down by the law conflict with any of its fundamental rights under Part III.

With regard to this second type of infirmity, articles 14, 19 and 22 of the Constitution of India are relevant to the law under Article 21 in which such law is to be tested. Article 14 ensures that every person in India is equal before the law or equal protection of the law. Where Article 14 tests the procedure laid down in the law concerned, that law shall not serve the State to deprive himself of his life or personal freedom as guaranteed under Article 21. Similarly, Article 19(1)(g) allows all citizens of India among others to practise or to engage in any profession, business or trade. Such a right is, of course, subject to the provisions of paragraph 6 of Article 19 that provide that nothing in that subclause affects or prevents that the State from making any law that imposes, in the general public's interests, reasonable restrictions on the exercise of the rights conferred on it by that subclause, and in particular, nothing in that subclause.

The proceedings to be followed before any person is arrested and detained are also laid down in Article 22. If there is a procedural violations of the requirements set out in Article 22 under any law of the competent legislature, the deprivation of life and personal liberty of the person concerned shall not be of any procedure. In a person, the fundamental right guaranteed in accordance with Article 21 will remain untouched in this case. In the light of the corresponding State Policy Directive principles found in Part IV of the Constitution of India, Article 21 will also need to be read. As provided for in Article 37, no court shall enforce the

provisions of Part IV, but the principles laid down therein are nevertheless fundamental for the governance of the country, and the State has a duty to apply these provisions.

Principles are witness light to both the executive and legislative capacity of the State to be guided by these principles, and in the light of these guiding principles, those functions must be monitored in the State. Articles 39(a) and 41 contain the guidelines relevant to our purpose. (a) citizens shall have the rights to an adequate means of livelihood for men or women alike; whereas Article 41 stipulates that the State shall make effective measures to ensure, in cases which are not restricted to its economic capacity and development, the rights to work, to education and to public assistance; We need to get rid of the correct connotation of the term 'life' as used in Article 21, taking into account the constitutional obligations of the State as reflected in the aforesaid State duty principles of Articles 39(a) and 41 of the Directive. Therefore, it appears clearly from a joint reading of these provisions that it is the responsibility of the State to ensure that the Constitutional obligation to make effective arrangements for the securing of the right to work and the provision of adequate livelihood to it while adopting legislation on privation of life of anyone under Article 21 does not fail. The overriding question of the right to livelihood or work is now addressing the overriding question of whether Article 21 covers the overriding part of the aforementioned constitutional system.

Salient Features of Article 21: True, originally, the founding fathers stressed the term 'life' or 'personal freedom' with special reference to imprisonment as per the procedure established under every law when this Article was cleared for inclusion in the Constitution by the Constituent Assembly. However, the word 'deprivation of life' used in its present form in Article 21 cannot necessarily mean the complete extinction of physical existence only. In the light of a number of decisions of the Supreme Court, the term 'life' as employed in Article 21 has become more meaningful. For anyone who does not have adequate monetary support or economic support, Life can be extinguished or without value. It is unworthy if the person has life and hunger for him. It might just be "respiring," but it might not be life. Such hungry people are likely to commit all manner of misdeeds to end their miserable lives. It is with a view to avoid such hunger of persons residing in India that the founding fathers can be said to have enacted Article 21 enjoining upon the State not to deprive any person of his ‘life’ except by procedure established by law. Consequently, as laid down in Article 21, the term 'life'

necessarily includes its right to adequate living and working to ensure that the person concerned is not reduced to the shadow of the person and does not remain simply a breathing skeleton. Obviously, Article 21 has been couched in a negative terms, as opposed to the positive paragraph of Article 19(1)(g). That would not however be to undermine the effectiveness and parameters of Article 21, which guarantees every Indian person the right to an effective and dignified life in order to lead a happy and healthy lives by way of the fundamental right. This in turn would necessarily mean that adequate livelihoods and jobs would be guaranteed. Since Article 21 includes a mandate to the State not to interfere, except in accordance with valid legislation, with the fundamental rights of people who have the right to lead a healthy life, the directives enshrined in the aforementioned Article which also function in that very field of the State's legislative practise must necessarily be read in conjunction with the mandates of Article 21 and not d. On reading this it becomes clear that it will be the duty of the country, by being given sufficient livelihoods and the right to work, to make every person in India enabled to enjoy a healthy life. Obviously, it is not permissible for citizens to insist on the carrying out of work that is unhealthy by themselves or illegal as would in Article 19(1)(g) as provided in Article 19(6), and in Article 14 of the Constitution of India, also covering non-citizens. The right to live and to work in an adequate way, as provided for in Article 21, must not be permitted to be exercised. With the combined operations of Articles 14, 19(1)(g) and 21 it would remain well maintained the right to work and to continue to engage in any legally permissible occupation or practise with a view to adequate livelihoods to lead a healthy and meaningful life. The procedure established by the law to cross-cut every person's right to be provided with the appropriate livelihood means or sufficient opportunities for employment by the State cannot, moreover, be an infringement of the altar of Article 14. Therefore, before any legal procedure providing for any person may deny his or her personal liberty and life guaranteed by Article 21, such law must direct the cleat of all restrictions on the power of the law concerned to enact such laws imposed by Articles 14 and 19(1)(g). If any of the aforesaid fundamental rights are in conflict with such a procedural law, Article 13 begins and overturns such a procedural law.

Article 21 contains a further important feature, namely that Article 21 is available only to the citizens of India and not to outsiders to all persons residing in India, whether citizens, whilst the positive rights granted pursuant to Article 19(1)(g). In other words, there is a broader scope for the negative injunction of Article 21, covering even non-citizens, while the positive

mandate of Article 19(1)(g) applies to a smaller section of the residents of India. Article 21 is without exception and, unlike Article 19, is not subject to provisions. It takes car or anyone in India regardless of whether they are a citizen of India as opposed to Article 19. It did not open strongly. Using the words "shall" and 'except,' the command of the Indians is absolutely sovereign.

Article 21 of the Judicial Review: The Supreme Court constitutional bench observed that "In Kharak Singh v. State of U.P.[2], the scope and contents of the case "personal freedom" in Art. 21 are to be considered. "We shall now proceed. In view of art. 19 (l) (d), the expression should be taken as not including the right to move or rather the right to move around the locomotive. The right to move to exclude its narrowest interpretation consists in nothing other than freedom from physical restrictions or the freezing of a prison within the limits of a prison; that is to say freedom from arrest and detention, from miscarriage or illegal detention. On the other hand, the term "personal freedom" is used in the article as a fantastic term, which includes all the variety of rights which make the "personeness of liberty" of man other than that referred to in the various clauses of Article 19, in itself. We cannot take this narrow interpretation for granted (1). In other words, whereas Article 19(l) addresses the specific species or characteristics of this freedom, the residue in Article 21 is "personal freedom." A passage was already taken from the field decision of J. in Munn v. Illinois,[3] where the learned judge pointed out that 'life' is not just the right of a person to continue the animal's life, but a right to the possession of his organs, his arms and legs, etc., as set forth in the fifth and fourteenth amendments of the United States Constitution. We have no doubt the same meaning as the word 'life' in Art 21..." and thus the Supreme Court has allocated a very vast sphere to the operation of the concept of life and liberty enshrined in that Article 21.

While answering the question whether the term 'life' in the case of Olga Tellis and others v. the Munical Corporation and others in Article 21 includes the right to work, or the right to be guaranteed adequate livelihoods Supreme Court[4] repeated, "As we have stated in the summary of the petitioners' case, their main argument is that the right to is the right to live theoretically For the sake of arguments, we shall assume that if the petitioners are expelled from their homes then their livelihood is deprived. The issue we must consider here is

[2] AIR1963SC1295
[3] (1876)94US113
[4] AIR1986SC18

whether the right to life includes the right to livelihood. We can see only one reply, namely that it does. Art. 21 provides a broad and far-reaching sweep of the right to life. It does not just mean that life can be removed or extinguished as, for example, the death sentence is to be imposed and enforced, except under the procedure laid down by law. This is only one aspect of life's right. A facet which is equally important is the right to live, because no one can live without livelihoods, i.e. livelihoods. The easiest way to deprive a person of his right to life is to deprive him of his means of living until abrogation, if the right to a living is not treated as part of the constitutional law of life. Not only would such deprivation deny the life of its effective content and relevance, but it would make life impracticable. However, if the right to livelihood does not form a part of the right to life, such a deprivation should not have to comply with the law-based procedure. That which alone allows you to live must be considered an integral component of the right to life, and leave away what makes life livable. Take away the right of a person to livelihood and take his life. Indeed, this is why rural population migrates massively to big cities. They migrate because in the villages they don't have any livelihood. The motive force behind their abandonment of their hot springs and homes in the village is the fight for life. The evidence of the link between life and livelihood is therefore unquestionable. You have to eat in order to live: just a few can provide luxuries to live. They can only eat that, that is, when they have the means of livelihood. In this connection, Douglas J. at Baksey[5] stated that the right to work is the most valuable liberty that man has. It is the most valuable freedom, because it supports and makes it possible for a person to live; the right to life is a precious freedom. Life, as Field, J. in Munn c. Illinois observes 6, is more than simply animal life, and inhibition of life's deprivation extends to all the limitations and faculties of life. In Kharak Singh v. State of U.P.7 33, this comment was quoted with the agreement of the Court. Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Art. 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 states that, although not enforceable by any Court, the Directive Principles are neverthstanding fundamental to country governance. The Principles contained in Arts. 39(a)

[5] (1954)347M.D.442

and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. By affirmative action, the State cannot be obliged to provide the citizens with sufficient livelihoods or work. Any person without his or her right of livelihood can, however, challenge deprivation as a violation of the right to life conferred by Article 21 except by just and fair procedure established by law.'

In its decision Delhi Transport Corporation D.T.C v. Mazdoor Congress and Other[6], the Supreme Court adopted the same case, stating that "The right to life includes the right to livelihood, and therefore the right to livelihood can not hang up to people's wishes in authority. Jobs are not an offer or can be at their mercy for their survival. The right to work becomes fundamental if work is the sole source of income. Income is the foundation of many fundamental rights. The limbo of undefined premises and unsecure applications could not afford Fundamental rights. That's going to be their mockery. Therefore, the society and individual employees have a desperate interest in well-defined and explicit service conditions, as far as possible. The arbitrary rules, such as those under discussion, sometimes described as Henry VIII's Rules, cannot be used under any terms of service."

In his comparing judgement in the same case, para 267, K. Ramaswamy J. stated, "The procedure for such a deprivation must be fair, fair and reasonable tinder before an employee can deprive himself and his dependents of means of living, i.e. livelihood. Articles 21 and 14 shall be subject to the imposition of reasonable limitations under Article 19(1)(g) and when infringing Article 19(1) (5). Confering power on a senior officer is not always a guarantee, especially if moral standards are generally degenerated that power is exercised objetively, reasonably, conscientiously, equitably and justly without an embedded employee protection. Even officers, who honestly and conscientiously perform their duties, are under great duty. The competing claims of "public interest" against the employees' "individual interests" must therefore be combined harmoniously to meet the societal need in line with the constitutional scheme."

In this context, it must be referred, in connection with Article 21 of the decision made by the Supreme Court in the case of The Board of Trustees of the Port of Bombay v Dilipkumar R.

[6] AIR1991SC101

Nadkaarni and ors.[7]: "...Article 21 requires no one, other than in accordance with the procedure provided for bylaws, to be deprived of one's life or liberty. "Life" has a far broader significance. Therefore, when an investigation in a department is likely to affect a person's reputation or livelihood, some of the finer human civilization graces that make life worthwhile are endangered and the same can only be put at risk by the law that inherits fair procedures."

The law referred to in Article 21 shall stand the test of Article 14, and the procedure referred to in Article 21 shall reply, in case of the Smt. Maneka Gandhi c. Union of India &Anr.[8], to the test of rationality in order to be in conformity with Article 14. It should be fair, right and not arbitrary, fantaisist or oppressive, otherwise there would be no procedure at all and it would not satisfy the requirement of Article 21.

For Indian LIC and another v. Center for Consumer Education and Research and others.[9]The Supreme Court has again reiterated the same principle and observed in paragraph 14 of Article 19 provides for freedoms with the right of residence and settlement in every part of the country. In the case of M.J. Sivani&Ors. v. State of Karnataka &Ors.[10], court held that Article 21 rights to life provide a safeguard for livelihoods, but added that their deprivation may not be extended or projected or extended to lawyers, businesses or businesses that are harmful to the interest of the public or have insidious effects on moral or public order. Therefore, regulating video games or forbidding certain video games of pure opportunity or of mixed chance and skill was not in violation of Article 21 and the procedure was not unreasonable, unfair and unjust. In the case of Chameli Singh &Ors. v. State of the U.P. and Anr.[11], a bench comprising three learned Judges from the Supreme Court had to examine whether all components of right to life would be included in the term 'life' as provided in Article 21. Responding to the question in the affirmative, paragraph 8 of the judgement made the following relevant observations: "The human right to live as a human being is not assured in any organised society only by satisfying the animal needs of mankind. It is only secured when it is guaranteed to develop itself in all its facilities and free from restrictions that inhibit its development. This object is to be achieved by all human rights. In any civilised society the

[7] AIR1963SC109
[8] AIR1978SC597
[9] (1995)5SCC482
[10] (1995)6SCC289
[11] (1996)2SCC549

right to live implies the right to food, water, a decent environment, education, care and shelter...."

The Supreme Court judgement in Dr.Haniraj J. Chulaniv. Bar Council of Maharashtra and Goa[12] reflected the same opinion that, in accordance with Article 21, the right to live includes the right to live. On the facts, the above-mentioned right is not denied to a person who already works as a physician and is not allowed to exercise the law at the same case. The debate can be concluded by quoting the Narendra v State of Haryana decision of the Supreme Court[13] with the like view taken. It must therefore be understood as a settled legislative position that Article 21 guarantees all persons residing on India the right to lead dignified rights, including the right to adequate livelihood and work, without the right of a competent parliamentary legislature to deprive them of such a right, without violating any other fundamental right, in particular Article 14 and 19(1) of the law. Article 21, together with Article 14 and 19, must, therefore, be treated as a trinity of rights designing the golden triangle which guarantees all Indian residents, including their citizens, a healthy and effective life. These three articles offer an assurance that an egalitarian era within the field of fundamental rights is achieved in accordance with the promise made by the preamble.

Findings: It's time to take stock of the situation to push the curtain down. It is now well understood that the word 'life' used in Article 21 is not only the concept of the mere physical existence, but also all the finer values of life, including the right to work and to live. The Supreme Court decisions spread over decades and are now well undersigned. This right is a fundamental right guaranteed, as it contradicts only citizens covered by Article 19(1) The rights of all persons residing in India (g). That right may not interfere with the State except by a procedure derived from a valid law to be passed by the competent parliament and which, in so far as the person who invokes a fundamental right is available to an individual, should not be in conflict with any of the other fundamental rights, particularly those under Article 14 and Article 19(1)(g). Though Article 19(1)(g) addresses the needs of citizens alone, Article 14 is not necessarily available to citizens but to everyone. As a consequence, Article 21 coincides with Article 14 and both serve citizens as well as non-citizens of the same class of humanity residing in India. Obviously, Article 21 is couched in a negative form and cannot be implemented in absolute terms through the provision of substance, as is the case with

[12] (1996)3SCC342
[13] AIR1995SC519

fundamental rights available to the citizens of India under Article 19(1)(g). However, it does remain that, unless there is a procedural law which is subject to the test of Part III of the Constitution of India, and the State has a positive duty to guide it under the provisions of Article 39(a), the State shall not tinker to the right to work, or to a tight livelihood which is guaranteed pursuant to Article 21. It must also be considered that Article 21 is not suspendable during an emergency and cannot be abrogated or amended; hence, it must be guaranteed to ensure that the right to live, including the right to livelihood and work, guaranteed by Article 21, is not reduced by the provisions of Article 21 of Part III, and in part IV of the Directive Principle of State Policy.

References

[1] Kharak Singh v. State of U.P. AIR 1963 SC 1295 para 17 Munn v. Illinois (1876) 94 US 113 at p.142

[2] Olga Tellis and others v. Bombay Municipal Corporation and others AIR 1986 SC 180 para 32-33

[3] Baksey (1954) 347 M.D. 442

[4] Delhi Transport Corporation D.T.C v. Mazdoor Congress and Others AIR 1991 SC 101 para 223

[5] The Board of Trustees of the Port of Bombay v. Dilipkumar

[6] R. Nadkaarni and ors. AIR 1963 SC 109 Para 13

[7] Smt. Maneka Gandhi v. Union of India &Anr. AIR 1978 SC 597

[8] LIC of India and another v. Consumer Education & Research Centre and others (1995) 5 SCC 482

[9] M.J. Sivani&Ors. v. State of Karnataka &Ors. (1995)6 SCC 289

[10] Chameli Singh &Ors. v. State of U.P. and Anr. (1996)2 SCC 549

[11] Dr.Haniraj J. Chulani v. Bar Council of Maharashtra & Goa (1996)3 SCC 342

[12] Narendra v State of Haryana AIR 1995 SC 519

[13] Right to Life and Liberty under the Constitution —Justice

[14] B.L. Hansaria , Ed. 1993 published by N. M. TripathiPvt. Ltd., Bombay.

MEDIATION: ITS FUTURE PERSPECTIVE IN INDIA

- ARPIT BANSAL

MEDIATION IN THE WAKE OF COVID-19

"As already discussed in the introduction, this pandemic has placed us in a situation where we are forced to adapt to survive. Slowly and gradually, we are shifting from the traditional ways to modern and innovative ways.

Mediation provides a viable alternative to resolve disputes. Under the current circumstances, it would be beneficial for the parties to act in cooperation instead of being adversarial, as an adversarial approach may not always yield a beneficial outcome.

In light of the virus outbreak, jurists contemplate that a number of disputes will arise on the interpretation of force majeure clauses, material adverse effect clauses and termination clauses. While doing so, it is not always advisable to knock on the doors of the courts to seek justice, especially when such key clauses are missing or inadequately drafted. Therefore, while the courts are grappling with the existing backlog of cases, the restrictions in its functioning due to the lockdown and the fresh set of disputes arising due to the current scenario, we feel there might be a shift in the manner in which commercial disputes are or will be resolved, with increased reliance on mediation.

Several Indian High Courts, including the High Court of Judicature at Bombay, Delhi High Court, Kerala High Court, etc., and various international organisations like the Singapore International Arbitration Centre, London Court of International Arbitration, International Chamber of Commerce have already formulated mediation rules. These rules are comprehensive, extensive and can be adopted by parties to deal with the procedural aspects of mediation. Parties also have the option of opting for adhoc arbitration, allowing them to decide on the procedure to be followed during mediation.

Keeping in mind the above benefits and the role mediation can play in the times to come, Singapore International Mediation Centre has launched the SIMC COVID-19 Protocol[14], providing business with an effective solution by way of expedited mediation for dispute

[14]http://mediationblog.kluwerarbitration.com/2020/05/21/international-mediation-and-covid-19-the-new-normal/?doing_wp_cron=1591162205.3996729850769042968750 (Visited on April 21, 2021)

resolution. A similar project has been launched by Georgian International Arbitration Centre in collaboration with Resolve and with assistance of European Union and United Nations Development Programme, allowing the parties to either refer their dispute to facilitation or mediation[15]. These moves show the preparedness of various organisations in accepting that mediation will bring the new dawn in dispute resolution, during and even after the pandemic."

Technical Aspect:

In the pre-COVID-19 era also, there were discussions regarding the future of Dispute Resolution and ADR and one of the possible future is using the digital platform. E-filing before the Courts is encouraged to a great extent. In Delhi High Court, there are designated e-Courts where the filing is mandatorily in electronic form. Similarly in Arbitration also, various Arbitrators are comfortable in the filing of pleadings and documents through e-mail in a readable pdf format.

Till date, although e-filing was encouraged but the carrying of physical files and physical hearings are prevalent. However, COVID-19 has posed a further challenge to this physical hearings and meetings. During the initial days of COVID-19, the adjudication of matters either before Courts or Arbitral Tribunal, are almost nil and the Courts are only taking up only the very urgent or urgent matters. But this way will lead to delayed justice, which amounts to the denial of justice. Therefore, now there is a need to find out the solution.

One of the celebrated solutions in this regard is Online Dispute Resolution (**ODR**). Now ODR is considered as the future of Dispute Resolution including ADR. During the COVID-19, now we have seen the Courts taking up the matters through video conferencing. Arbitral Tribunals are also taking steps towards video conferencing.

ODR is already prevalent in the International Commercial Arbitrations, where, the parties reside in different countries. Also, we have seen the recording of evidence of a witness/expert through video conferencing for any international court/arbitration matter. Therefore, although ODR was not a new development, however, the COVIDd-19 has made its implementation faster and much wide.

[15] http://giac.ge/giac-and-resolve-are-joining-forces-to-launch-covid19-business-support-initiative/(Visited on April 21, 2021).

As per the data available in the public domain, globally, various countries have taken various steps in this regard, however, for the present article, we are concentrating only on India and the steps taken by Indian Judiciary or Governments.

Steps taken by the Indian Judiciary

It is pertinent to note that the use of technology has found judicial recognition in **the State of Maharashtra vs. Praful Desai[16] where it was held by the Apex Court that** the term 'evidence' includes electronic evidence and that video conferencing may be used to record evidence. It was further observed that developments in technology have opened up the possibility of virtual courts which are similar to physical courts.

National Green Tribunal, much before COVID-19 started taking up its matters listed before the Zonal Benches through Video Conferencing.

Faced with the unprecedented and extraordinary outbreak of COVID-19, Courts at all levels must respond to the call of social distancing and ensure that court premises do not contribute to the spread of the virus.

The Supreme Court in **Re: Guidelines For Court Functioning Through Video Conferencing During COVID-19 Pandemic[17]** took suo moto cognizance of the issue and directed that courts should adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies.

Various High Courts have laid down Guidelines for on-line filing and also hearing of urgent matters through video conferencing.

Presently most of the Courts in the Country are taking matters through video conferencing and it seems that this situation will prevail for some more time. Furthermore, there is also a threat to the return of the virus every year.

Now we should appreciate the steps taken by the Indian Judiciary to start the hearings of the Urgent matters or in some cases hearing matters, however, the steps taken by the Indian Judiciary are not harmonious in nature and the respective Courts are using the technology as available to it.

[16](2003) 4 SCC 601

[17]SUO MOTU WRIT (CIVIL) NO.5/2020; https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf(Visited on April 21, 2021)

However, there is no such a uniform process and there are also certain challenges, which are faced by the Lawyers throughout the Country. One of the basic examples is that in various Courts, the VC link is shared with only the Advocate on Record of the parties and that link cannot be shared further. Now, as per the practice, normally, the Advocate on Record is not the arguing Counsel and then the Arguing Counsel and the Advocate on record need to come to a place to join the VC with the same link that may pose threat to social distancing. Also, in case, where the Advocate on Record is from one state and the arguing Counsel is from another state, then there are further difficulties. Furthermore, if a party wants to intervene in a matter, then it will become difficult.

Various Courts are using various digital video conferencing platform and there is no uniformity. Also, there is surety regarding data security. Also, the petition needs to be affirmed by the Affidavit, which needs to be attested, however, till date, there is no scope for digital attestation of the affidavit.

The other problem can be trial or recording of evidence. The way, we conduct the Cross-Examination, there is a requirement of an eye to eye contact and also various things including the body language of the witness and others play a vital role while cross-examination. Furthermore, recording of evidence simultaneously is also going to be a big challenge through this online process.

Therefore, the need of the hour is a Robust Uniform Guideline which needs to be followed by all the Courts. The infrastructure also needs to be developed to have a uniform platform to be used by all the courts. The Guideline should also cover the aspect of e-filing, online hearings, data security, Court proceedings and especially the recording of evidence.

In respect to ADR, there is a need for the development of a policy framework that will be followed in both institutional as well as ad-hoc arbitration. In the case of institutional arbitration, that institution should also frame similar Rules in this regard following the policy guidelines. The ICC has already updated its status regarding the virtual hearing. Similarly, SIAC is also scheduling hearings through video conferencing. In India also, certain Tribunal has started hearing through video conferencing.

In arbitration, if the parties agree for a particular process, then the same has supremacy. At the same time, if the parties are not agreeable, then the Tribunal can lay down the procedure under section 19 of the Arbitration and Conciliation Act, 1996. In this regard, in cases of ad-

hoc arbitration, in case one party wants to delay the process by not agreeing for virtual hearings, then the tribunal should suo-moto pass an order for virtual hearing.

Furthermore, there is a need for the amendment of various Codes and Laws to make clear legal provisions for digital hearing and e-Court system. Also, there is a requirement of laying down the penalty/punishment for contravening the new regime of Dispute Resolution and its strict compliance.

Intellectual aspect:

This shift from the traditional method of Court proceedings to this ODR, if need to be implemented for a long run, will take time. Despite all the steps taken by the Courts, the hearing of pending matters is still not there. The time required for the adjudication process has further enlarged due to COVID-19. For example, before COVID-19, even if in a matter final hearing is almost complete by the parties and only a rejoinder or sur-rejoinder argument is left, but now, there is a possibility of re-hearing of the entire matter, which will delay the adjudication process.

So, in civil cases, given that the adjudication process remains unpredictable, parties might decide to settle to conserve time and resources, by shifting to ADR formats that can be easily conducted online, like mediation and conciliation. Imagine logging into an online platform, paying a small token fee (which is far less than what litigation would cost), selecting a mediator and a hearing slot, uploading relevant documents and then attempting to resolve a dispute with the help of well-qualified mediators.

Then, if the case is settled and the mediation/conciliation proceeding took place in compliance with Sections 61-73 of the Arbitration & Conciliation Act, 1996, Section 74 would give the settlement the same effect as an arbitral award.

Therefore, mediation and conciliation pre-arbitration stage or during the pendency of arbitration need to be encouraged. However, where Government and its various departments are involved, then without a detailed Guideline as laid by the Government, it would be difficult to encourage this mediation and conciliation process.

INTRODUCING AND MAINSTREAMING ODR IN INDIA

In order to engage in virtual trade, the proliferation of the Internet brought together people and jurisdictions. This led to a large number of cross-border disputes and thus private

organisations developed innovative techniques to resolve them. In 1999, eBay was the first of these. The eBay platform has allowed a customer to submit a complaint and start a settlement process online. An Online Mediation Process would start if the settlement failed. The platform was designed to diagnose the issue and to carry out automatic mediation or arbitration negotiations.[18] This model, which has developed since then into more advanced variants commonly used by other private states, has been popularly referred to as ODR.

ODR is defined as 'a mechanism for settling conflicts facilitated through the use of electronic and other information and communication technologies' by the United Nations International Trade Law Commission (CITI) ODR Working Group.[19]

ODR is essentially just e-ADR, where technology is used to conduct interactions online. In practise, ODR offers more benefits as parties are not to be present together, and resolution can take place via asynchronous communication than traditional offline ADR mechanisms. 89 This means that parties and the neutral party must not simultaneously communicate and can record their answer at a convenient time and place. Technology has therefore been promoted as the "fourth party" in ODR.[20] In addition, ODR offers some major advantages. First of all, ODR is rentable. Given ODR can drastically lower the costs of settling a dispute, depending on video conferencing and information technology. Secondly, the resolution of cross-border disputes and issues which may arise due to multiple jurisdictions is especially useful. For this reason, early adoption for ODR was used to settle e-commerc transactions where parties have different jurisdictions and where there is low value dispute both in corporate and in corporate-to-consumer transactions, where court courts make little economic sense.

ODR may take two forms in particular – the private and court-annexed ODR. ODR has been created, developed, and offered to the parties online mediation and settlement of trade disputes, in private international organisations, such as Smartsettle[21], Cybersettle and Mediation Room[22]. In general, these organisations worldwide are governed by their own rules. A consortium of public and private sector organisations, which settle disputes or

[18]Gintarepetreikyte, 'ODR Platforms: eBay Resolution Center' (The 15 th ODR Conference, 14 April 2016)

[19] United Nations Commission on International Trade Law, 'UNCITRAL Technical Notes on Online Dispute Resolution' (2017)

[20]E.Katsh and J. Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace (2001).

[21] 'Smartsettle' available at: https://www.smartsettle.com/ (Visited on April 21, 2021).

[22] 'The Mediation Room' available at :https://www.themediationroom.com/ (Visited on April 21, 2021).

conflicts by means of online service providers for the resolution of disputes (ICODR). [23] It works the ODR through the promotion of standards and best practises and through the formation and certification of service providers.

Several governments within various jurisdictions were motivated by the success of private ODR in their own court of public systems. Jurisdictions have increasingly set up annexed courts to ODR centres that can be dealt with quickly in certain classes of cases, such as motor vehicle crash cases, loan default cases and consumer cases with limited legal and factual issues. [24] A number of important examples are the New Mexico Courts Online Dispute Resolution Center in the US to resolve debt & monetary due cases at district level by negotiating,[25] Money online claims by the United Kingdom to settle cash claim disputes[26] and a range of small value disputes by the Civil Administration Tribunal of Canada[27].

Applications of ODR are mapped across various jurisdictions in the following sections. The following are addressed, in line with a thorough analysis of the existing framework, measures required for mainstreaming both the court appended to this and the private ODR in India.

USAGE OF ODR GLOBALLY

While ODR may have started solving e-commerce disputes, a wider range of disputes around the globe, some of which have been described below, have been resolved ever since.

a. Consumer Disputes

The European Online Dispute Resolution platform provides a consumer information link to an ODR web-site for consumers, enabling them to file complaints, for all online businesses across the EU, Norway, Iceland and Liechtenstein.

[23] ICODR, 'About ICODR' available at, https://icodr.org/sample-page/ (Visited on April 21, 2021).

[24] Deepika Kinhal, 'Every Crisis Presents an Opportunity – It's Time for India to Ramp Up its ODR Capabilities' (Live Law 22 March 2020)<https://www.livelaw.in/columns/every-crisis-presents-an-opportunity-its-time-for-india-to-ramp-up-its-odr-capabilities-154196 accessed 22 May 2020. See also, Akankshha Agrawal, 'With judiciary embracing technology, time to push dispute resolution online' (Business Standard, 29 March 2020) available at, https://www.business-standard.com/article/current-affairs/with-judiciary-embracing-technology-time-to-push-dispute-resolution-online-120032901023_1.html (Visited on April 21, 2021).

[25] New Mexico Courts' available at: https://www.nmcourts.gov/ODR.aspx (Visited on April 21, 2021).

[26] Nicolas W. Vermeys and Karim Benyekhlef, ' ODR and the Courts', in Mohamed S Abdel Wahab and others (ed), Online dispute resolution : Theory and Practice : a Treatise on Technology and Dispute Resolution (2012) available at, https://www.mediate.com/pdf/vermeys_benyekhlef.pdf (Visited on April 21, 2021).

[27] Civil Resolution Tribunal, 'Starting a Dispute' available at, https://civilresolutionbc.ca/tribunal-process/starting-a-dispute/#1-apply-from-the- solution-explorer (Visited on April 21, 2021).

A similar endeavour was made in Mexico, where Concilianet[28], an On-line Dispute Resolution Process to address consumer complaints about traders of goods and services, was managed by the Office of the Federal Prosecutor for the Consumer, known as the Profeco. In the context of this system, consumers can submit complaints online or in person and then the Agency can conduct conciliation on the telephone or on the Internet. In addition, at the module installations, consumers may get advice from Profeco itself to accelerate the resolution procedure for each case. One of the system's restrictions is that contractual adherence by the merchant is the only recourse available under Concilianet. Nevertheless, it is quite clear that in the scale of addressing consumer disputes resulting from online and offline transactions, ODR has been widely adopted.

b. Insurance claims

The use of ODR to settle insurance claims has started by private bodies. Cybersettle, the North American website that was launched in 1998, is an example of this. Ten3. This is an automated website that enables parties through several rounds of blind tenders to negotiate. The website determines whether the offers are closed and negotiates to reach the point of settlement. By 2011 over 200 000 disputes, with an accumulated value of over USD 1.6 billion, had been resolved by CyberSettle. The insurance sector has enormous potential for use of AI technology, annexed court support and private negotiation.

c. Intellectual Property/ domain name disputes

Domain name Registration is a competitive process that can lead to conflict as parties wish to protect their intellectual property rights. Accordingly a Uniform Name Dispute Resolution Policy (UDRP) was introduced by the World Intellectual Property Rights Organisation, which is implemented by the Internet Assigned Names & Numbers Corporation (ICANN). This includes a cost-effective online arbitration process for resolving disputes over domain names. The WIPO works to extend this online arbitration to other disputes on intellectual property rights, also involving all submissions, communications as well as electronic payments.

d. Family Disputes

Online tools can encourage efforts to settle geographical and cost barriers by removing them. In addition, it facilitates communication without threats in cases of domestic violence or

[28] Gob.mx, 'PROFECO' available at, https://concilianet.profeco.gob.mx/Concilianet/inicio.jsp> (Visited on April 21, 2021).

hostility. The platforms that provide these services have, however, remained sparse in family disputes. In addition, online tools in divorce cases in most jurisdictions were restricted to online cases filing. In particular, ODR has not been fully developed in the context of family disputes in spite of its enormous potential.

e. **E-Commerce**

Electronic trade disputes also will largely apply the examples we saw previously of ODR's potential and practise in consumer disputes. In South Korea, for example, the Committee on Electronic Commerce Mediation has a panel of mediators, comprising lawyers, patent lawyers, experts, faculty and those working in the field of consumer protection. A process for mediation relating to a dispute in the electronic application, by on-line or e-mail, fax or mail may be filed, although the evidence has to be submitted physically. The process of mediation can be carried out electronically or on a particular location. The online chat method, or a video conférence system, is a cyber-based mediation method. The parties are connected to the centre for cyber media (Electronic Commerce Mediation Committee). The decision can also be electronically rendered. In 45 days of the application of its request, the Committee is required to submit the mediation proposal to the parties. The parties will then either accept the proposal or reject it for 15 days. The mediation document of the Committee shall be forwarded to the parties upon acceptance. This mediation document has the same effect as a judicial composition according to the Civil Procedure Act.

f. Small causes and small claims disputes

Canada's Civil Administrative Court, British Columbia, has jurisdiction in relation to small claims disputes, motor vehicle accidents and low-value injury claims, in relation of small claims disputes, and in relation to companies and cooperative associations. The dispute application is submitted online, and the Tribunal will notify the other party in most cases. After the negotiations are concluded, the parties are appointed to a case manager. If the resolution to grant consent is reached, then an enforceable order is converted.

g. Disputes involving small and medium enterprises.

APEC sponsored a collaborative framework for the resolution of low-value disputes between cross-border B2B companies to help MSMEs (Asia-Pacific Eastern Cooperation).

Under this ODR framework, a business may file a cross-border online complaint in cases in which both firms have agreed that such disputes should be resolved in the ODR framework

against a business in another participating economy. The framework contains a complete set of model rules of procedure and requires the retention of a list of independent ODR providers who are prepared to resolve disputes in terms of the APEC website framework. It demands maintaining the confidentiality of service providers and encourages the use of instruments in the field of private international law, such as the 1958 Convention on Foreign Arbitration Recognition and Enforcement or the United Nations Model Law on International Commercial Arbitration of 2006.

PRESENT STATUS IN INDIA

Some courts have even identified the need for ODR mechanisms through the courts. For example, Justice Ramana stated that ODR could be used to settle consumer, family, corporate and commercial disputes successfully. He noted that the paper must be cut, which for a very long time has formed part of the system. The process started by relying instead of hard copies on the e-filing of digital paper books. Given the COVID-19 pandemic, even the current Chief Justice, Justice Bobde noted the need to take order to make courts virtual so that the top courts are not shut down. Ninety four In the past, he has emphasised the necessity to make mediation agreements binding while acknowledging the many advantages of a dispute resolution system. He also stressed the need for "AI" as a leading alternative to current status quo. international and artificial arbitration. It seems that all this is part of his broad scheme of having more technological intervention in settling litigations throughout the courts like the introduction of 'SUVAS,' a translation engine that translates judgments from English to Indian.

The 2019 Nilekani panel recommended the creation of online dispute resolution systems to deal with complaints resulting from digital payments. In fact the debate on the formal ODR system in India has already been initiated.

The Committee suggested that there would be two levels of the ODR platform – one automated and one human with an appeal. Eleven

The stage, therefore, appears to be set to start as one of the main modes of dispute resolution for ODR in India, partly driven by the emergency caused by COVID-19. NITI Aayog recently convened a meeting with Agami and Omidyar Network India on "Catalyzing online dispute resolution in India" in which key stakeholders were brought together to work together to ensure online dispute resolution effort is made in India. In India, the NITI Aayog meeting

organised Nineteen The meeting recognised that ODR has great potential for India, especially in the case of disputes of small and medium value. It can enhance access to justice and make business easier, as an effective solution to conflicts will be crucial for the economic recovery from COVID-19.

1. Judicial Preparedness

In setting the grounds for ODR entry into the country, the Supreme Court has played a vital role. The document confirmed the validity, and continued to call "violent reality the real reality," of video conferencing as a way of taking evidence and testimony of witnesses in the State of Maharashtra and Praful Desai[29]. The Grid Corporation of Orissa Ltd. v AES Corporation[30] followed a similar trend in which the court held that people did not need to sit in the same physical space if consultations could be achieved through electronic media or through remote conferences. Similarly, in the case of M/S Meters And Instruments Pvt. Ltd. versus Kanchan Mehta[31], it observed that categories of cases that can be concluded "online," in part or in full, without a physical attendance by the parties should be taken into account and the resolution of cases like those related to the traffic challans or check bouncing, was recommended.

Further, in Shakti Bhog v Kola Shipping[32] and Trimex International v Vedanta Aluminum Ltd.[33], the Court recognises the validity of online arbitration. In these two cases, the Court held that an online arbitration agreement is valid, provided that the online arbitration agreement complies with Section 4 and 5 of the IT Act (IT Act), read in 2008 with the Indian Evidence Act, Section 65B, 1872, and with Arbitration, 1996. The simultaneous move to integrate technology into the resolution of disputes and dependence on ADR mechanisms shows clearly that India has a logical transition to ODR.

2. Legislative Preparedness.

As mentioned earlier, an ODR can be implemented in practise through the existing legislative framework. The current laws allow for online processes to be adjusted, especially virtual documents and virtual hearings. There are provisions. As noted above, the Indian Evidence Act 1872 permits the recognition of electronic evidence under Section 65-A and Section 65-

[29] State of Maharashtra v Praful Desai (2003) 4 SCC 601
[30] Grid Corporation of Orissa Ltd. v AES Corporation (2002) 7 SCC 736
[31] M/s Meters and Instrument Private Limited v Kanchan Mehta 2017(4) RCR (Criminal) 476
[32] Shakti Bhog v Kola Shipping (2009) 2 SCC 134
[33] Trimex International v Vedanta Aluminum Ltd 2010(1) SCALE574

B. Similarly, in order for online contracts to be valid, the IT Act recognises digital signatures under sections 4, 5, 10-A and 11-15. The introduction by the UNCITRAL Model Law on Electronic Trade in 1996 and the Electronic Signatures Model Law in 2001 made this possible.

This framework can still serve as the basis for ODR's short-term enforceability. However, in the long term, it would be ideal to recognise the ODR for all forms of settlement of disputes – private or short-term ADRs.

The technological capacity and internet penetration throughout the population are important variables in making ODR a reality in India.

3. Building Capacity and Ensuring Logistical Support

While the number of internet users in India is high, it still accounts for only 34.8% (2016) of its population. This limited access to the internet and the lack of infrastructure like affordable computers are main obstacles to ODR's broad adoption. These infrastructure issues would require extensive resource-intensive government and private intervention to enhance the capacity for ODR adoption in India. ODR also faces mental barrier, besides technological barrier, as it is not easy for people to communicate from the internet to their faces. If there is no change in mentality, ODR cannot receive immediate support from steps taken to move forward. But with more dependence on e-commerce as a key source of trade, India's relationship with online technology certainly seems to be shifting. To ensure that the introduction of ODRs is at least with the internet generation, the methods and strategy adopted by e-commerce companies must be considered.

Capacity building is a long-lasting process, although a few recent developments are tremendously promising with a focus on the above segment of 'trained professionals.' Some success stories in India have previously seen from ODR. For example, in the resolution of consumer disputes, Paypal has an internet dispute resolving centre that acts as a neutral third party, enabling the parties to negotiate their questions first, and to arbitrate the disputes if they fail. NestAway also recently built an ODR platform to settle bill- payment disputes with its tenants. By being one of the early adopted ODR, ICICI Bank was a pioneer in the banking industry. It has already undertaken a pilot project to resolve approximately 10,000 conflicts under Rs. 20 lakhs using ODRs. Thirty-one The Online Consumer Mediation Centrum, sponsored by the Ministry of Consumer Affairs, of the National Law School of India University, aims to resolve consumer disputes through both physical and on-line mediation.

Thirty-one Independent private ODR service providers have also been established in India, providing technology development and capacity development for online dispute resolution. Currently, their services include online consultation, online arbitration and mediation. ODR dedicated services are provided by agencies like Sama, Center for Online Disputes Resolution (CORD), Presolv360, Centre pour Alternative Dispute Resolution (CADRe), etc. In addition, organisations such as the Bombay Chamber of Commerce established Mediation and Conciliation Center conducted remote mediations, which have been helpful before and during the pandemic in easing the burden on the judiciary.

The government seems to be embracing ODR not only private players. The Department of Revenue Taxation has developed an Electronic Assessment Scheme (EAS) to eliminate any human interactions between an IT officer and an income tax assessor[34]. The Domain Name Dispute Resolution Policy (INDRP) has similarly been adopted by the Indian National Internet Exchange (NIXI), which sets out the conditions for resolving disputes between the '.in Internet Domain Name' holder and the plaintiff arising from the registration and use of the.in Internet Domain Name. Ltd.

Some years ago, a list of institutions with an online ability to resolve disputes was published by the Department of Justice.

Several developments in the sector have since taken place. A list of recognised service providers must be published regularly on different government and court websites to encourage ODR platforms and raise public awareness. The government and the private sector must work together to expand and rely more on ODR.

The above list contains some definitely positive progress in ODRs. A few concerns must be addressed immediately in order to really achieve a long-term adoption of ODR. The following are:

- First and foremost, one of the most attractive elements of the ODR is its non-geographical location. In an Internet-provided neutral space, the ODR provides a platform for cross-border parties to resolve disputes. However, there is also an increase in the likelihood of procedures subject to competence challenges. Current national ADR proceedings have already confronted competence problems and

[34] ODR Opportunities in India (Agami and Sama, December 2019) 6 available at, https://static1.squarespace.com/static/5bc39a39b7c92c53642fc951/t/5e13302088456a2a6f7e4c35/1578315811604/ Updated_ODR+Opportunities+in+India.pdf> (Visited on April 21, 2021).

challenges. Any challenge in the current arbitration framework remains with the law, the seats of arbitration, the language of the proceedings and the knowledge of the arbitrator of each jurisdiction. These are only increasing complexities in an online world which still needs a clearly defined jurisdictional contours. Therefore, any ODR law and policy framework will need to address those concerns necessarily.

- Secondly, its confidentiality aspect is one of the key elements that make ADR successful. Naturally, there is some room for concern about data confidentiality during and after this process. One way to protect the interests of parties is to ensure that guidelines and standards for document cryptography and a strict Privacy Policy are in place, which the parties need to be told of. Thirty-six

4. PRICIPLE FRAMEWORK FOR ODR

Other legal and policy challenges can result in the development and implementation of ODR platforms, in addition to the concerns listed above. These challenges include the implementation of the existing legal structures, the establishment of public confidence in ODR mechanisms and the development of a system which can be improved and developed as technology and society changes. ODR frameworks should be based on certain key principles in developing a robuste ODR ecosystem that will assist the mitigation of these challenges and the ecosystem of dispute resolution in the future. For both court-based and private platforms, this applies equally.

These governing principles can be divided up into three categories – legal principles, technology principles and design principles. These principles are indicative and by no means comprehensive.

5. THE FUTURE OF ODR IN INDIA

Richard Susskind suggested that access to justice includes four layers – the promotion of legal health, the avoidance of dispute, the confinement of disputes and the authoritative resolution of disputes.

He notes that only the last two of these were concerned with the traditional court system. This statement also applies to India. The country's judiciary has consistently used dispute resolution technology to keep the court system alive. However, it is time to move from the dispute resolution dispute to the avoidance of disputes, containment and overall legal health improvement.

Technology in ODR can help India advance in a forward-looking system of justice by using more advanced second-generation technologies.

Thirteen 80 As was the case in previous ODR developments, these newer technology will likely come from the private sector, with the ability not just to use legal principles but also to broaden into better economic principles for civil litigation. The judiciary and the executive will therefore have to partner with and accept these capacities for the wider public use. It is as difficult as now to conceive, but the fact is that the technology and even AI are the future of dispute resolution. By developing techniques to improve a neutral assessment of legal relationships for early action, ODR can play a significant role in this.

India clearly already has the key elements to introduce a comprehensive technology framework into dispute resolution processes, namely institutional technology, expertise and, in large part, technological capacity. In the future, a modular strategy for more innovation and transformation must be implemented in ways that meet both immediate and long-term needs. In the upcoming chapter, one such modular strategy was proposed.

5.6 CONCLUSION

During the outbreak of the COVID-19 pandemic, different restrictions and legislative amendments were introduced and the law of the business was thus interrupted. The Indian economy is constantly falling as a result of the lockdown launched as a result of the COVID-19 outbreak. People and companies fend for themselves and strive to survive. The leaders of the Market act the current situation to be a battleground for disputes. Speedy and economic solutions to these new dispute would be required. The courts also worked minimally to contain the impact of the rapidly disclosing virus, making it only a dispute of resolution to hear the Court in order to resolve courts. Following the current situation, mediation appears to be a viable and effective alternative to traditional methods of settling disputes, since it can bring about cost-effective and rapid settlement, particularly for commercial conflicts. In view of the pandemic and its effects, we anticipate that mediation may lead to a change in dispute practise. We need to prepare for this shift and therefore it is vital that the necessary formation and skills are obtained so that we can fulfil changing demands.

The speedy justice system is one of the fundamental requirements of any society. Keeping that in mind, when the Courts were overburdened with cases and the average time required for deciding a lis increased substantially (apart from various other reasons also including the cost-effectiveness), steps were taken to decrease the burden of Courts. Various specialized

Tribunals/Commissions were established under law. Similarly, Alternate Dispute resolution (ADR) came up as a future of traditional dispute resolution system. Arbitration is the most integral part of ADR. Pre COVID-19 era, Arbitration was treated as the future of Dispute Resolution. Now post COVID-19 era, there is a need to find out the future of Dispute Resolution as well as Arbitration.

The future of Litigation and ADR post-COVID-19 can be seen from two angles, i.e., (i) the ways adopted to make the adjudication process much more user friendly and contactless (as far as practicable) and (ii) to adopt other ways to provide faster relief to the parties. So broadly speaking, one is the technical aspect of adjudication and the other is the intellectual aspect.

The virtual hearing may not completely stop the physical hearing and after the effect of COVID-19 goes, there will again be a situation where we will again be attending the physical hearing. However, as the effect of COVID-19 or any other similar situation, none can predict, that's why this is the right time to upgrade the existing law and infrastructure to lay down a uniform procedure towards virtual hearing.

In view of the above, there is a need for having a detailed Guideline for the ODR System, so that there are uniformities and the difficulties faced by the lawyers or litigants, be removed. For Arbitration (until and unless it is required so extremely) it should be encouraged only document-based arbitration, as in present times, most of the cases are covered by the documentation. However, in case of a plea by a party regarding coercion or duress or oral contract, etc. limited oral evidence be permitted.

There is no doubt that all these avenues need recourse to technology and there is a requirement of technological upgrades and updates. But maybe the time has been ripe for a while for litigation and ADR to get over the aversion to technology and embrace it. This can be facilitated by continuously training all players with the necessary software. It is high time we treat this pandemic as a boon and less as an obstacle - adaptability, after all, is the simplest secret to the survival of the fittest.

In order to engage in virtual trade, the proliferation of the Internet brought together people and jurisdictions. This led to a large number of cross-border disputes and thus private organisations developed innovative techniques to resolve them. In 1999, eBay was the first of these. The eBay platform has allowed a customer to submit a complaint and start a settlement process online. An Online Mediation Process would start if the settlement failed. The

platform was designed to diagnose the issue and to carry out automatic mediation or arbitration negotiations.[35] This model, which has developed since then into more advanced variants commonly used by other private states, has been popularly referred to as ODR.

India clearly already has the key elements to introduce a comprehensive technology framework into dispute resolution processes, namely institutional technology, expertise and, in large part, technological capacity. In the future, a modular strategy for more innovation and transformation must be implemented in ways that meet both immediate and long-term needs. In the upcoming chapter, one such modular strategy was proposed.

[35]Gintarepetreikyte, 'ODR Platforms: eBay Resolution Center' (The 15 th ODR Conference, 14 April 2016)

PROTECTION OF THE RIGHTS OF MINORITIES WITH SPECIAL REFERENCE TO NATIONAL COMMISSION OF MINORITIES ACT 1992

- ANSHU ASHOK

ABSTRACT

The presence of minorities primarily based on faith, language, manner of life or ethnicity is a perennial feature of all human societies. These minorities not best cherish the characteristic talents of their sturdy issue but moreover choice to keep them in maximum of the cases. However, the records bears a sworn declaration to the truth that individuals who are in majority and in a dominant role through one-of-a-kind characteristic in their variety impose their thoughts and values upon others who are in a non-dominant function. Thus, the minorities who are commonly in a non-dominant role in democracies face discrimination and occasionally hostility at the part of the dominant majority and consequently, it will become tough for them to recognize their identical rights as citizens. This is the motive that minorities anywhere call for positive assurances, rights and special safeguards and effective institutional preparations for permitting them to stay with dignity as a citizen and as a member of a minority business enterprise. These special rights and safeguards in no case in besides can be termed as appeasement of minorities. As a rely of truth, it's been mentioned via way of all having any quantity of civility and sensibility that those are the legitimate claims of the minorities dwelling in territorial states. The not unusual acceptability of those claims of the minorities is apparent from the numerous worldwide arrangements, treaties, announcement and conventions.

INTRODUCTION

India has continuously embraced diversity, becoming a huge ocean of cultures, religions, ethnicities, ideals and practices. With such range, it becomes important to offer each network their due, without inciting any conflicts. This plethora of range in our democratic nation makes the minority groups at times prone, calling for sturdy felony guidelines to protect their rights. Moreover, it turns into the obligation of the united states of the us to ensure that human rights are to be had to all citizens, regardless of caste, coloration, or creed. The Constitution of India strives to build up a harmony among all of the groups via way of

making sure "justice, social, economic or political" to all citizens and maintaining itself to be a mundane state. While effective prison tips are applicable to all Indian residents, there are personal legal guidelines that exercise to high-quality groups best, preserving their customs and beliefs. Minority rights protection in India has continuously been in limelight with political events garnering votes of diverse corporations thru triggering their feelings upon their minority recognition.[36]

The term "minority", in elegant context, is used to consult non-Hindu groups in India, even though there are various unique implications of this time period. Minorities can be categorized consistent with their religion in addition to language spoken, caste, tribal reputation and so on. But the minority groups as recounted with the useful resource of manner of the authorities of India are – Muslims, Christians, Sikhs, Buddhists, Zoroastrians and Jains as beneath Section 2(c) of the National Commission for Minorities (NCM) Act, 1992. But the term "minority" has neither been described inside the act nor the Constitution, and there may be no broadly traditional definition of the time period globally. Population and faith have been the elements that have determined the scope of the minority reputation in India.

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS REGARDING THE MINORITIES

The Constitution of India uses the phrase 'minority' or its plural shape in some Articles – 29 to 30 and 350A to 350B – but does now not outline it anywhere. Article 29 has the word "minorities" in its marginal heading however speaks of "any sections of citizens… having a incredible language, script or manner of existence". This can be a whole network typically seen as a minority or a fixed interior a majority community. Article 30 speaks particularly of categories of minorities – non secular and linguistic. The very last Articles – 350A and 350B – relate to linguistic minorities only.[37]

In commonplace parlance, the expression "minority" technique a fixed comprising much less than half of of the populace and differing from others, specifically the important section, in race, religion, traditions and life-style, language, and so forth. The Oxford Dictionary defines

[36] "Protection Of The Rights Of Minorities With Special Reference To National Commission Of Minorities Act 1992

[37] Freeman, Michael, Human Rights, An Interdisciplinary Approach, Polity Press Cambridge, 2003.

'Minority' as a smaller amount or thing; a diffusion of or element representing tons much less than half of of of the complete; a incredibly small enterprise corporation of humans, differing from others in race, faith, language or political persuasion". A precise Subcommittee at the Protection of Minority Rights appointed by way of the United Nations Human Rights Commission in 1946 defined the 'minority' as those "non-dominant corporations in a population which non-public a want to hold robust ethnic, non secular and linguistic traditions or developments markedly terrific from the ones of the relaxation of the populace."

As regards religious minorities at the countrywide stage in India, absolutely everyone who profess a religion aside from Hindu are taken into consideration minorities, thinking about the reality that over 80 constant with cent [of the] populace of professes the Hindu religion. At the national diploma, Muslims are the most crucial minority. Other minorities are a notable deal smaller in period. Next to the Muslims are the Christians (2.34 in step with cent) and Sikhs (1.Nine in step with cent); whilst all of the different spiritual agencies are nonetheless smaller. As regards linguistic minorities, there may be no majority on the national degree and the minority recognition is to be basically determined at the country/union territory diploma. At the state/union territory stage – which is quite critical in a federal form like ours – the Muslims are the general public within the us of a of Jammu and Kashmir and the union territory of Lakshadweep. In the states of Meghalaya, Mizoram and Nagaland, Christians represent most people. Sikhs are most people network within the usa of Punjab. No other spiritual community many of the minorities is a majority in another united country/UT[38].

The National Commission for Minorities Act 1992 says that "Minority, for the cause of the act, technique a community notified as such by using the vital government" – Section 2(7). Acting beneath this provision, on October 23, 1993 the treasured government notified the Muslim, Christian, Sikh, Buddhist and Parsi (Zoroastrian) companies to be regarded as "minorities" for the purpose of this act.

The Supreme Court in TMA Pai Foundation & Ors vs State of Karnataka & Ors (2002) has held that for the reason of Article 30 a minority, whether or not or now not linguistic or non secular, is determinable almost about a country and not through considering the population of the united country as a whole. Incidentally, 'scheduled castes' and 'scheduled tribes' are also to be diagnosed on the state/UT degree. In terms of Articles 341 to 342 of the Constitution,

[38] Fried, Charles (ed.). Minorities: Community and Identity, SpringerVerlag, Berlin, 1983.

castes, races or tribes or elements of or organizations inside castes, races or tribes are to be notified as scheduled castes or scheduled tribes in phrases of the us of a or union territory, because of the reality the case can be.

6. The state Minorities Commission Acts normally empower the close by governments to notify the minorities e.g. Bihar Minorities Commission Act 1991, Section 2(c); Karnataka Minorities Commission Act 1994, Section 2(d); Uttar Pradesh Minorities Commission Act 1994, Section 2(d); West Bengal Minorities Commission Act 1996, Section 2(c); Andhra Pradesh Minorities Commission Act 1998, Section 2(d). Similar acts of Madhya Pradesh (1996) and Delhi (1999) however say that authorities's notification issued beneath the National Commission for Minorities Act 1992 will have a look at on this regard – Madhya Pradesh Act 1996, Section 2(c); Delhi Act 1999, Section 2(g); Section 2(d). In several states (e.g. Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Uttar Pradesh and Uttarakhand), Jains had been identified as a minority. The Jain community approached the Supreme Court in search of a route to the essential authorities for the identical recognition on the country wide diploma and their demand modified into supported through the use of the National Commission for Minorities. But the Supreme Court did now not difficulty the preferred path, leaving it to the substantial government to decide the trouble (Bal Patil case, 2005). In a later ruling but, a few other bench of the Supreme Court upheld the Uttar Pradesh regulation recognising Jains as a minority (Bal Vidya case, 2006)[39].

RIGHTS OF MINORITIES

The Universal Declaration of Human Rights 1948 and its International Covenants of 1966 declare that "every body are identical in dignity and rights" and restriction all varieties of discrimination – racial, spiritual, and so on. The UN Declaration in opposition to All Forms of Religious Discrimination and Intolerance 1981 outlaws all forms of faith-primarily based definitely discrimination. The UN Declaration on the Rights of Minorities 1992 enjoins the states to guard the lifestyles and identification of minorities within their respective territories and encourage conditions for marketing of that identification; make certain that human beings belonging to minorities in reality and correctly exercising human rights and critical freedoms with complete equality and without any discrimination; create useful situations to permit minorities to unique their characteristics and boom their way of existence, language,

[39] Fukuyama, Francis, The End of History and the Last Man, Penguin, Harmondsworth, 1992.

religion, traditions and customs; plan and put in force country wide coverage and programmes with due regard to the valid pastimes of minorities; and so forth.[40]

In India, Articles 15 and sixteen of the Constitution limit the us of the united states from making any discrimination at the grounds most effective of faith, race, caste, intercourse, descent, area of begin, residence or any of them every usually i.e. Each shape of state movement with regards to citizens (Article 15) or in subjects concerning employment or appointment to any administrative center underneath the country (Article sixteen). However, the provisions of those articles do take suited enough cognisance of the truth that there have been a notable disparity within the social and academic reputation of numerous sections of a largely caste-based totally, manner of existence-certain society with big-scale poverty and illiteracy. Obviously, an absolute equality amongst all sections of the human beings irrespective of particular handicaps ought to have caused perpetuation of these handicaps. There can be equality only amongst equals. Equality technique relative equality and now not absolute equality.[41]

The Universal Declaration of Human Rights 1948 and its two International Covenants of 1966 declare that "everybody are identical in dignity and rights" and restriction all forms of discrimination – racial, spiritual, and so on

It is however excellent that in the financial ruin of the Constitution regarding Directive Principles of State Policy, Article 46 mandates the dominion to "promote with unique care the academic and economic interests of the weaker sections of the people… and… guard them from social injustice and all styles of exploitation." This article refers to scheduled castes/scheduled tribes "specifically" however does now not limit to them the scope of "weaker sections of the society".

Article 340 of the Constitution empowered the president to appoint a price "to research the conditions of socially and educationally backward schooling" but did now not make it compulsory.

OTHER CONSTITUTIONAL SAFEGUARDS

[40] Chandra, Bipan, Mukherjee, Mridula , Panikkar, K.N., and Mahajan, Sucheta, India's Struggle for Independence, Penguin Books, New Delhi 1998.
[41] Ibid.

The exclusive measures of safety and protect supplied with the resource of the use of the Constitution in Part III or a few region else having a bearing on the popularity and rights of minorities are[42]:

(i) Freedom of ethical feel and unfastened career, exercise and propagation of religion (Article 25);

(ii) Freedom to manipulate spiritual affairs (Article 26);

(iii) Freedom as to rate of taxes for promoting of any specific faith (Article 27);

(iv) Freedom as to attendance at non secular training or spiritual worship in pleasant academic establishments (Article 28);

(v) Special provision regarding language spoken through a segment of the population of a kingdom (Article 347);

(vi) Language for use in representations for redress of grievances (Article 350);

(vii) Facilities for steerage in mother tongue at primary degree (Article 350A);

(viii) Special officer for linguistic minorities (Article 350B).

ARTICLE 29

14. Articles 29 and 30 address cultural and academic rights of minorities. Article 29 gives that:

(1) any phase of the residents dwelling within the territory of India or any detail thereof having a great language, script or manner of life of its very own shall have the right to maintain the same; and

(2) no citizen will be denied admission into any educational organization maintained with the resource of the us or receiving resource out of state finances on grounds best of faith, race, caste, language or any of them.

15. Unlike Article 30, the text of Article 29 does now not especially check with minorities even though it is quite obvious that the thing is supposed to guard and hold the cultural and linguistic identification of the minorities. However, its scope is not continually constrained to minorities. The safety of Article 29 is available to "any section of the citizens residing in the territory of India" and this could as properly encompass most of the people. However, India is a colorful conglomeration of numerous races, religions, sects, languages, scripts, lifestyle and traditions. The minorities, whether or not or now not or not based totally on faith or

[42] Problems of Minorities: Compilation with the aid of the Minorities Commission of India, Delhi, 1988.

language, are pretty understandably keen on preserving and propagating their non secular, cultural and linguistic identity and background. Article 29 ensures precisely that. There may also appear to be some overlapping in language and expressions hired in Articles 15(1) and 29(2). However, Article 15(1) contains a elegant prohibition on discrimination by using the nation in opposition to any citizen on grounds nice of faith, race, caste, intercourse, location of begin or any of them while Article 29(2) affords protection in opposition to a specific species of country action, viz admission into academic establishments maintained by using way of way of the nation or receiving aid out of usa fee variety[43].

ARTICLE 30

Article 30 is a minority-unique provision that protects the right of minorities to set up and administer educational institutions. It gives that "all minorities, whether or not based totally on faith or language, shall have the proper to installation and administer academic establishments in their choice". Clause (1A) of Article 30, which modified into inserted by manner of the Constitution (44th Amendment) Act 1978, offers that "in making any regulation imparting for the compulsory acquisition of any belongings of an educational corporation established and administered through a minority, stated in clause (1), the kingdom shall ensure that the quantity regular thru or decided underneath such regulation for the purchase of such assets is such as may not restriction or abrogate the proper confident beneath that clause". Article 30 further offers that "the dominion shall not, in granting useful resource to instructional establishments, discriminate inside the direction of any educational group on the floor that it's miles under the manipulate of a minority, whether or not based on religion or language".

It might be profitable to phrase that minority academic institutions referred to in clause (1) of Article 30 had been saved out of the purview of Article 15(four) of the Constitution which empowers the usa to make provisions via regulation for the development of any socially and educationally backward schooling of citizens or scheduled castes/scheduled tribes in regard to their admission to academic institutions (which consist of personal academic institutions), whether aided or unaided.

[4343] Gautam, V., Minorities in India Since Independence, Vikas Publications, New Delhi, 1977.

Articles 29 and 30 had been grouped collectively underneath a common head, mainly "Cultural and Educational Rights". Together they confer 4 amazing rights on minorities. These include the proper of:

(a) any segment of residents to keep its very very very own language, script or lifestyle;

(b) all religious and linguistic minorities to set up and administer educational institutions in their choice;

(c) an educational employer closer to discrimination with the useful resource of the use of state in the consider of kingdom resource (on the floor that it is under the manipulate of a non secular or linguistic minority); and

(d) the citizen in the direction of denial of admission to any state-maintained or united states-aided academic institution.[44]

Article 29, especially clause (1) thereof, is greater generally worded while Article 30 is focused on the proper of minorities to (i) installation and (ii) administer academic establishments. Notwithstanding the fact that the proper of the minority to installation and administer academic establishments is probably protected thru Article 19(1)(g), the framers of the Constitution incorporated Article 30 inside the Constitution with the obvious motive of instilling self warranty amongst minorities towards any legislative or govt encroachment on their right to set up and administer instructional institutions. In the absence of such an specific provision, it might were feasible for the dominion to control or modify educational establishments, installation with the resource of religious or linguistic minorities, thru law enacted underneath clause (6) of Article 19.

PERSONAL LAWS AND CULTURAL RIGHTS OF MINORITIES

As a spinoff ofthe freedom of religion one-of-a-kind communities were prison to hold their particular cultural and network practices. Different units of Personal Laws referring to marriage, divorce, adoption and succession of several spiritual companies and denominations and normal criminal suggestions of the tribal groups stipulate the case of felony pluralism. The Hindu Personal Law, the Muslim Personal Law, the Christian Personal Law, the Parsi Personal Law, the Jew Personal Law and the constitutional protection to standard crook hints of the Nagas and the Mizos and unique cultural practices of different tribal agencies are crucial on this regard. Though many provisions of various non-public jail recommendations

[44] Golwalkar, M. S., We or Our Nationhood Defined, Bharat Prakashan, Nagpur, 1939.

had been codified at various factors of time each in the mild of judicial intervention or as a part of social reform manner, those are nevertheless vital in governing the lifestyles of the groups. Laws regarding marriage and/or divorce had been codified in taken into consideration considered one of a type enactments applicable to the people of diverse religions[45].

LEGAL FRAMEWORK FOR PROTECTION OF RELIGIOUS MINORITIES

Legislation collectively with the Protection of Civil Rights Act 1955 [formerly known as the Untouchability (Offences) Act 1955] and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 has been enacted by means of the use of the most government to guard people belonging to scheduled castes and scheduled tribes from untouchability, discrimination, humiliation, and so on. No law of similar nature exists for minorities despite the fact that it could be argued that in evaluation to the latter act, viz the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, the former act, viz the Protection of Civil Rights Act 1955, is relevant throughout the board to all instances of untouchability-related offences regardless of religion. Therefore if a scheduled caste convert to Islam or Christianity (or each exclusive character) is subjected to untouchability, the perpetrators of the offences can be proceeded within the path of underneath the provisions of the act. However, no precise records is to be had in regard to the act being invoked to protect a person of a minority network.

The regulation implementing organizations look like harbouring a misconception that the Protection of Civil Rights Act 1955 has been enacted to defend extraordinary scheduled castes closer to enforcement of untouchability-related offences. There is for that reason a case for sensitising the regulation enforcement authorities/companies in this regard. Having said that, one can not resist the affect that the Protection of Civil Rights Act 1955 has did no longer make a splendid deal of an impact because of its tardy implementation however the fact that the offences underneath this act are cognisable and triable summarily. The annual record on the Protection of Civil Rights Act for the 12 months 2003 (modern day available), laid at the table of every House of Parliament under Section 15A(4) of the act, reveals that only 12 states and UTs had registered times underneath the act in the course of that three hundred and sixty five days.[46]

[45] Hutton, J.H., Caste in India, its Nature, Functions and Origins, Cambridge, 1946.
[46] Iraqi, Shahabuddin, Bhakti Movement in Medieval India, Manohar Publication, New Delhi, 2006.

Articles 15 and sixteen of the Constitution restriction the nation from making any discrimination at the grounds first-class of faith, race, caste, sex, descent, region of delivery, residence or any of them both typically

With a view to comparing development and development of minorities, tracking the running of safeguards provided to them under the Constitution and felony suggestions, and so on, the applicable government had constituted a non-statutory Minorities Commission in 1978. In 1992 the National Commission for Minorities Act turn out to be enacted to provide for constitution of a statutory charge. The National Commission for Minorities have become set up beneath the act in 1993. The features of the fee embody:

(a) evaluating the development of the improvement of minorities below the union and states;

(b) monitoring the jogging of the safeguards supplied in the Constitution and in prison hints enacted by using Parliament and the country legislatures;

(c) making recommendations for the effective implementation of safeguards for the protection of the hobbies of minorities via the valuable government or the country governments;

(d) looking into particular court cases concerning deprivation of rights and safeguards of the minorities and absorb such topics with the correct government;

(e) causing studies to be undertaken into issues arising out of any discrimination in competition to minorities and propose measures for their removal;

(f) wearing out research, studies and evaluation at the problems regarding socio-economic and educational improvement of minorities;

(g) suggesting appropriate measures in respect of any minority to be undertaken via the relevant government or the country government; and

(h) making periodical or special reports to the critical government on any depend amount pertaining to minorities and, specifically, problems faced with the useful resource of manner of them.

JUDGMENTS

1. Re Kerala education Bill[47]- There became an training bill that grow to be introduced inside the Kerala assembly by manner of the schooling minister, Professor Joseph Mundasseri. Several provisions of the invoice seemed to mission the constitutional validity.

[47] [1959] S.C.R. 995

Therefore while the invoice modified into reserved for the consideration of the president, he used the power below Article 143 of the charter and referred the case to the perfect courtroom for its opinion. The Supreme court docket docket's opinion on this was taken into consideration to be one of the most massive steps taken to shield the rights of minorities in India.

2. ***Champakam Dorairajan vs the State of Madras***[48]**–** This case changed into regarding the admission of college students to medical and engineering schools of Madras. The province of Madras end up having an issue with the order of fixation of the range of seats for particular groups. The Supreme Court, in this example, rejected reservation for minorities at the communal floor.

3**.** ***St.Stephen's College vs University of Delhi***[49]**-** Supreme Court, in this situation, held that Saint Stephen's College is a minority organisation that is entitled to protection under Article 30(1). The choice end up taken thru the court docket maintaining in view the information of the set up order of the college.

4. ***S. Azeez basha vs Union of India***[50]- The 1965 alternate turned into challenged in this situation earlier than the constitutional bench of the Supreme Court of India. This is one of the most arguable judgments which raised doubt inside the minds of Minorities approximately the faith of institutions.

CONCLUSION

In a free democracy like India, minorities need to in no way revel in oppressed. To sum up it may be stated that the duties of the constitution to shield the rights of minorities from operation wardens discrimination topics masses. Mahatma Gandhi as quickly as rightly stated that the civilized nature of a country need to not be judged by way of the manner it treats minorities. Though the file of India in this variation for the cause that independence does now not look like first-class we although preference that democratic mind in the preamble of the Indian Constitution will in a few unspecified time inside the destiny be a truth for minorities as nicely.

[48] **1951 SCR 525**
[49] AIR 1992 SC 1630
[50] 1968 SCR (1) 833

SUGGESTIONS

- To provide a revel in of safety and the feeling of self warranty to the minorities through giving unique rights and privileges in a democratic state ..
- Regular checks and balances safeguards and guarantees to guard the rights of minorities in terms of cultural and educational rights and others have to be finished.
- Recommendations from academic institutions which can be run with the resource of minorities are to be taken to guarantee Article 29 and 30 to the minorities.
- Students from non-minority businesses ought to not be compelled to attend any prayers in educational institutions
- The minority business enterprise need to receive the right to control and govern a frame associated with education.
- Besides giving rights to minorities it's also critical to take care that those rights aren't being misused.
- Scheduled castes, Scheduled Tribes and special backward instructions admissions to any company will be allowed to be run through the use of minorities.

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SOCIO LEGAL ASPECT ON THE CHALLENGING DIMENSION OF THE PROBLEM OF DRUG ABUSE IN INDIA: A CRITICAL STUDY

- AKANSHA SHARMA

ABSTRACT

Substance use patterns are notorious for their ability to change over time. Both licit and illicit substance use cause serious public health problems and evidence for the same is now available in our country. National level prevalence has been calculated for many substances of abuse, but regional variations are quite evident. Rapid assessment surveys have facilitated the understanding of changing patterns of use. Substance use among women and children are increasing causes of concern. Preliminary neurobiological research has focused on identifying individuals at high risk for alcohol dependence. Clinical research in the area has focused primarily on alcohol and substance related comorbidity. There is disappointingly little research on pharmacological and psychosocial interventions. Course and outcome studies emphasize the need for better follow-up in this group. [51]

Keywords: *Alcohol, drugs, India, research, substance use*

INTRODUCTION

India is also plagued by drug abuse, and the number of drug addicts is growing daily. According to a UN report, one million heroin fires are registered in India, and illegally there are five million. What started as a rare exploitation among a small number of young people in the highest paid municipal group spread across all sectors of society. Inhaling heroin alone has halted the use of drugs, which are also linked to other painkillers and painkillers. This increased the intensity of the effect, accelerated the addiction process and made the recovery process more difficult. Cannabis, heroin, and chemical-produced drugs in India are the most abused drugs in India. Cannabis products, commonly called charas, bhang, or ganja, have been praised worldwide for their religious sanctity because of their association with other

[51] Gopinath PS. Epidemiology of mental illness in Indian village. Prevalence survey for mental illness and mental deficiency in Sakalawara (MD thesis) 1968

Hindu deities. The International Narcotics Control Board, in its 2002 report released in Vienna, stated that in India opiates are changing from opium to heroin. Drug-containing products are also abused. Injectable analgesics such as dextropropoxphene etc are also reported in many provinces, as they are readily available for 1/10 of the cost of heroin. Codine-based cough syrups continue to be marketed for domestic abuse. Drug abuse is complex, there are many cultures, traditions, environment, environment, history and economics.

EFFECTS OF DRUG ABUSE

The biggest impact of drug abuse is psychological, which clearly affects all other aspects of life in drug addiction. Drugs are primarily chemicals that affect the human brain's communication system. It disrupts the way nerve cells send, process, and receive information. There are many ways drugs do this - they copy natural chemicals in the human brain and increase the reward area in the brain. Drugs such as heroin and marijuana have been linked to similar chemical reactions called neurotransmitters. [52]

These neurotransmitters are naturally produced by the human brain. Because of these similarities, these drugs can regulate human brain receptors and activate nerve cells in an unusual way. In the event of drugs such as methamphetamine and cocaine, nerve cells activate and release excessive amounts of neurotransmitters.

SOLUTION TO DRUG ABUSE

Prevention is one way to deal with drug use. It is actually one of the most preventable diseases according to experts and medical professionals. Protection programs involving organizations such as families, schools and nearby communities are important in this regard. The media - especially the entertainment industry - also needs to understand their role in this context and play a positive role in combating the desire to make millions by dating and promoting drugs. It should emphasize the negative effects of drug abuse. It is important that young people are made to feel that drug use is dangerous in every conceivable way and only then will they stop using it and prevent others in their group from doing the same.

[52] Thacore VR. Drug-abuse in India with special reference to Lucknow. Indian J Psychiatry. 1972;14:257–61

A study found that 90% of street children in Delhi are drug addicts

According to the Department of Justice and Empowerment, 46,440 cases of drug abuse were street children in Delhi last year. Cases of drug use during the year were heroin (840), opium (420), opioid drug (210), and sedatives (210). The figures were based on a recent study conducted by the All India Institute of Medical Sciences (AIIMS).

INITIATIVES TO FIGHT AGAINST DRUG ABUSE

● The Haryana government has implemented a program called the 'Central Sector Scheme of Assistance for Prevention of Alcoholism and Substance (Drug) Abuse' to curb drug use. Under the program, the government has provided financial assistance to eligible NGOs, Panchayati Raj centers and urban areas, which will provide integrated drug rehabilitation services. The advice was issued by the government in all provinces and UT urged them to take steps to curb drug use in children.

● The Charitar Nirman Sewadar Trust, a non-profit organization working to reduce drug use and rehabilitate society, estimates that 80 percent of Tihar's inmates are addicted to tobacco, marijuana, tobacco, or alcohol. He suggested that there should be more counselors in the prison to deal with depression among inmates who have been involved in drug abuse.

● CHETNA is a non-profit organization that runs a private children's entertainment center at the Nizamuddin police station. They focus on building good relationships between police and street children who are at high risk of drug and crime.

● Delhi AIDS Control Society (DACS) has proposed a program in which more than 400 medical personnel working at 260 community centers in Delhi and 150 specialists working at 32 public hospitals in Delhi will receive long-term training at the Institute of Human Behavior & Involvement. Sciences (IHBAS) as there was a shortage of psychiatrists and trained staff to deal with drug abusers. They also advise on keeping a strict check

the sale and purchase of medicines available from pharmacies. Licenses for 20 stores were revoked in 2016 for drug dealers.

DRUG ADDICTION IN INDIA

Status of Drugs in India

The Indian population has reached more than 1 billion people and is rising. The world is growing at an alarming rate. Its cultures, social norms, demographics, and economics are changing rapidly, and these pressures are having an impact on people. Other evidence indicates that there is an increase in drug abuse and the reported numbers point to more than three million drug addicts in India. However, the World Health Organization recognizes that there is a great deal of difficulty in balancing drug use and addiction rates in the country because of poor human management practices and reporting systems.

Cannabis, heroin, opium and hashish are the most widely used drugs in India. However, other evidence indicates that there is also an increase in methamphetamine. Drug addiction is a major problem in many families, communities and legal systems. A large number of addicts are left to manage families such as financial costs, access to services and a lack of appropriate care challenges in the country. This is not the only drug case.

HIV is a major problem for drug addicts in India with over 2.4 million infected people. This ranks India as the third highest country in terms of infection rate in the world. Injury users make up about 10 percent of the affected groups. HIV-positive drug users are often victims of violence, discrimination, rejection by families and communities. Some people with HIV hide their status because of fear and anxiety about being denied medical care, housing or jobs and this puts others at risk. The increase in the number of people living with HIV in all Indian communities has shocked the government, which has introduced a policy of harm reduction associated with circumcision and treatment programs.

LEGISLATIVE APPROACH

THE NARCOTIC CONTROL BUREAU (NCB)

The NCB, which oversees anti-drug activities nationwide, monitors the increase in illegal products and drug trafficking15. The administration of the NDPS Act, 1985, as a precursor to the Act namely, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 is under the Department of Finance, Department of Finance16.

The broad legal policy in this case has three central laws, namely. Drugs and Cosmetics Act, 1940. Drugs and Drugs Psychotropic Act, 1985, and Prohibition of Illegal Vehicles Drugs and Drugs Psychotropic Act, 1988.

The Narcotic Drugs and Psychotropic Substances Act, 1985 empowers the Central Government to establish a Central Authority for the purpose of exercising the powers and

functions under Act20. Using that power the Narcotic Control Bureau was established with headquarters in Delhi. The Office, under the control and control of the Central Government, will exercise the powers and functions of the Central Government in taking this step:

a) Co-ordination of actions by various offices, State Governments and other authorities under the N.D.P.S Act, 1985.

b) Implementation of the obligation in respect of measures to combat illegal vehicles under various countries.

c) Assistance with relevant foreign authorities and international organizations concerned to facilitate co-operation and international measures to prevent and suppress drug trafficking.

d) Co-ordination of action by other relevant departments, departments and organizations regarding substance abuse problems.

e) Diagnosis, treatment, education, aftercare, rehabilitation and community rehabilitation

THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

Legal drug regulation was enforced under The Opium Act, 1852, The Opium Act, 1878 and The Dangerous Drugs Act, 1930. The provisions of these laws were found to be inadequate due to the passage of time and progress in drug trafficking and drug abuse at national and environmental levels. The consolidation and amendment of existing laws regarding drug treatment is considered complete and important legislation. Similarly the Psychotropic Drugs and Drugs Bill was introduced in Parliament.

STATEMENT OF OBIECTS AND REASONS

Legal law on drug trafficking is enforced in India by many central and central State laws. The major laws in the Central Act, namely the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were established long ago. Over time and with advances in the field of illicit drugs and drugs at national and international level, a number of legal errors have been identified, some of which are highlighted below:

(i) The penal system under current Acts does not adequately prevent criminal gangs from meeting with traffickers. The Dangerous Drugs Act, 1930, provides for an additional term of imprisonment for up to three years with or without a fine and 4 years with a maximum penalty for repeated offenses. In addition, there is no minimum penalty for current laws, as a

result of which drug traffickers have been acquitted by the courts from time to time by name. In the last few years the country has been plagued by drug trafficking from neighboring countries in particular and with a strong focus on Western countries.

(ii) Existing laws_Medium does not provide for investment by the authorities in many important enforcement measures such as Narcotic, Customs, Central Excise, etc., with the power to invest under these said laws.

(iii) Since the enactment of the above three Acts, the main communication law in the field of drug administration has emerged with various international agreements and agreements. The Indian government has been a party to treaties and agreements that include many obligations that can be imposed or bound by fraudulent practices.

(iv) In recent years new drug addicts known as magic have emerged and have caused serious problems for national governments. There is no complete law that will allow the use of psychotropic drugs in India in the manner provided for in the Psychiatric Service Agreement, 1971 approved by India and '

In view of the above, there is an urgent need for comprehensive drug and psychological management, including amendments to existing drug laws, strengthening existing abuse control, significantly improving penalties, especially trafficking cases, providing psychological support and better performance. use of international treaties on drugs and psychotropic drugs while India is in power '

The National Demarcation Policy Bill, 2014, amended by the Department of Social Justice and Empowerment, does not accept damages and other measures. As in the National Drug and Psychiatric Policy of 2012, the revised drug reduction policy also uses a drug-resistant approach, educates on drug and drug awareness and provides counseling and rehabilitation to prevent drug use, rather than seeking to prevent drug use.

Amendments to NDPS, 2001

Criticism of this structure of harsh sentencing and inequality sparked a momentum of change. In 1998, the NDPS (Amendment) Bill was introduced in Parliament and reviewed by Parliamentary Finance Committee. The amendments were finally adopted in 2001, charging section 35 for the number of drugs involved - that is, "small", 36 "commercial" 37 or

"medium". The boundaries were determined by the central government by a notice dated 19 October 2001. [53]

NDPS Amendments, 2014

In early 2014, the NDPS Act was amended for the third time and new provisions came into effect on 1 May 2014. Key features include: • The creation of a new "essential medicines" category, a central government that can control and regulate the country. .

• Extend the legitimacy of drug use and improve drug use and the science of drugs and psychotropic41 drugs in line with the principle of 'balancing' between drug use and reaching international drug control agreements.

• It combines the terms "drug administration" and "acceptance and acceptance" with medical institutions, thus allowing for the establishment of legally binding medical standards and evidence-based interventions [54]

• Determining the death penalty in the following case involving a certain number of drugs under section 31A. The court will have another option of imprisonment for 30 years under section [55]

• Advanced punishment for minor offenses ranging from six months to one year in prison

KEY FEATURES OF THE NDPS ACT ON TREATMENT

Section 2 (a): "Addict" means a person dependent on any drug or psychotropic drug

Section 4 (2 (d) and 7 (A): Treatment is one of the steps that the central government must take and allocate funds from the national treasury.

Section 64 (A): People who rely on drugs, suspected drug use or a case involving a small number of drugs can choose treatment and prosecution

Article 39: Instead of sentencing, courts can change people who rely on drugs or criminals who turn small drugs into a popular medical center for removal

[53] Notification S.O 1055(E), dated 19th October 2001 published in the Gazette of India, Extra.,Pt II, Sec 3(ii), dated 19 October 2001

[54] Section 71(1), NDPS Act

[55] . Singh, A. (23 March 2013), 'Only 899 legal opium addicts in India: RTI reply', The Times of India, http://timesofindia. indiatimes.com/india/Only-899-legal-opium-addictsin-India-RTI-reply/articleshow/19137961.cms

PUNISHMENT FOR OFFENSES

NDPS Act considers drug offenses as very grave and serious in nature and so, punishments for them are very stiff. Offenses under this Act are cognizable and non-bailable. The quantum of sentence and fine differs with the offense. For most of the offenses, the punishment relies upon the quantity of drug included – little amount, more than little however not as much as the business amount or business amount of drugs. Commercial and small amounts are notified for each drug.

Under NDPS Act, criminal conspiracy, abetment and even attempt to carry out an offense pull in the same punishment as the offense itself. Habitual or repeat offenses attracts 1 and half times the punishment and capital punishment in some cases. Since the punishments under this Act are rigid and inflexible, a few procedural safeguards have been given in the Act. A few immunities are additionally accessible under the Act.

CRITICAL ANALYSIS OF NARCO ANALYSIS

Narco's analysis has been criticized for a number of reasons. They follow:

1. This test is not 100% accurate. Sriram Lakshman [56] quoted that Dr. B.M. Mohan, Director of FSL, Bangalore says he has data that proves he does not agree that Narco's analysis is 96 to 97 percent on screen. Sriram Lakshman is of the opinion that the analysis of Narco should be underestimated.

2. Dr. P. Chandra Sekharan, a highly regarded director of the Department of Forensic Sciences in Tamil Nadu, described the practice as a non-third party investigation.

3. In Narco's analysis of false tactics certain articles made completely false statements. If a person is addicted to drugs or alcohol it will increase his level of tolerance and he may have a false sense of ignorance and may lie.

4. It is very difficult to increase the actual dose of each drug because it will vary from person to person depending on the condition. It is said that if the drug does not go well with this, it can kill him.

U.N CONVENTION ON NARCOTIC DRUGS

[56] Sriram Lakshman, "We need to talk about narco analysis", the Hindu op-Ed May, 02 2007.

India and the United States took place under an agreement signed between the United States and the United Kingdom in 1931, which was in force in India in 1942. However, a new export agreement between India and the United States came into effect in July 1999. The Legal Aid Agreement was signed by India and the United States in October 2001. India also signed the following agreements:

1961 UN Conference on Drug Abuse

1971 UN Conference on Mental Disorders

1988 UN Conference on Illegal Trafficking in Drugs and Psychiatric Drugs

2000 International Criminal Conference

PROHIBITION AND THE 21st Amendment, which revolutionized change, was a major step forward for the reform movement that came in 1935, when Dr. Bob Smith and Bill Wilson - better known as Dr. Bob and Bill W. - founded Alcoholics Anonymous (AA). Using a spiritually-minded approach to rehabilitation, the AA has introduced a reception area where humble drunks can find comfort and support. From the AA format, various other branches have been formed, such as:

- Narcotics Anonymous (NA).
- Cocaine Anonymous (CA).
- Anonymous Marijuana (MA).

Today, thousands of drug rehabilitation programs offer addicts a variety of treatment options, from traditional care, authorization to testing or related services. Since care should be customized according to the individual patient, the type of treatment always contains a list of treatment options for that individual.

JUDICIAL TREND

CASES

Some Notable Events & Cases of Narco Analysis in India-

In a 2006 decision (Dinesh Dalmia v State) [57], the Supreme Court of Madras held that giving the defendant a narco analysis was not the same as proof that they had been

[57] https://www.lawteacher.net/free-law-essays/human-rights/narco-analysis-test-with-emphasis-on-constitution-law-essays.php?vref=1

compelled. The court said of the defendant: "He may be taken to the laboratory for such tests without his consent, but disclosure during such tests is highly voluntary."

II. In 2004, the Bombay Supreme Court ruled in a statement that placing defendants in certain tests such as narcoanalysis does not violate the fundamental right to self-sacrifice. Section 20 (3) of the Constitution guarantees: "No one shall be compelled to testify falsely against another person." Statements made under narco analysis are not accepted as evidence.

III**. On January 24, 2008, the bench of Chief Justice K.G. Balakrishnan** [58] reversed his decision after hearing arguments for three days from various parties, including Attorney General Goolam E. Vahanvati and attorney general Dushyant Dave, who were appointed by the bench as amicus curiae to assist the court in the case. Telgi and his accomplices are being investigated by various provincial police and other agencies on criminal charges. The suspects challenged the use of polygraphs, a brain map and narco analysis by law enforcement.

IV. The Bombay High Court recently handed down a landmark decision in the case of Ramchandra Reddy and Ors. v. The Maharashtra [59] case has confirmed the legitimacy of the use of the P300 or Brain printer, the testing of false tools and the use of real serum or narco analysis. The court upheld a special court order issued by a special court in Pune as mentioned above, allowing SIT to conduct a scientific investigation into the defendant in a counterfeit stamp paper campaign involving the main defendant, Abdul Karim Telgi. The ruling also stated that the evidence presented under this serum was admissible. When sentencing, a distinction is made between "statement" (made before a police officer) and "evidence" (made under oath in court). The judges, Justice Palshikar and Justice Sure, argued that the researcher's lies and brain map analysis did not include "statements" and that statements made during the narco trial were unacceptable in evidence during the trial. The ruling also said the tests included "minor injuries".

State of Bombay v. Kathi Kalu Oghad [60]The chairperson of the 11-judge Supreme Court said: “It has been found that subsection (3) of Article 20 applies to the administration of the accused. Self-injury should mean disclosing information based on the knowledge of a

[58] Justice K. G. Balakrishnan: Rising From Down Under". Ambedkar.org. Retrieved 19 April 2015.

[59] *Symbiosis Law School, Pune* On February 3, 2015 By amoolya

[60] AIR 1961 Cri LJ , Vol 2, 2007

knowledgeable person and may not include a court-martial procedure that may shed light on any points in the dispute, but contain a statement of the defendant's details. ”The third part of Article 20 (3) states that the defendant is not required to give evidence against him. In Kalawati v H.P. State, the Supreme Court held that Article 20 (3) does not apply at all in a case where the defendant is accepted by the defendant without influence, threat or promise.

In the case of Rojo George v. The Deputy Superintendent of Police, Court [61] while acknowledging the Narco Analysis investigation found that these days the methods used by criminals to commit crimes are high and modern. The usual way of asking questions may not produce results. This is why scientific experiments such as polygraph, brain map, narco analysis, etc. It is now used in the investigation of the case. When such tests are carried out under the watchful eye of an expert, it cannot be said that there is a guaranteed violation of the fundamental rights of Indian citizenship.

E-MPSharma v. Satish Chandra, [62] Apex Court held that since the terms used in Article 20 (3) were to be "witnesses" and not "to appear as witnesses" the protection is transferred to the full evidence obtained outside the Court. In the Indian constitution the protection of health, freedom and liberty has been interpreted worldwide and Article 14, 19, 21 is an excellent example of any constitution that opposes the right to privacy. In the Criminal Code process "injury" is defined in sections 44, 323,324,328 and a sentence of ten years, imprisonment.

CONCLUSION

Investigative organizations have conducted these tests in a number of high-profile cases. Quickly and quickly these investigative tools could be another form of third-degree physical abuse at the hands of the police. Also maintained by the Supreme Court in D.

Basu v. State of West Bengal, that there is a need to create scientific methods of investigating and investigating suspects as the death and torture of suspects is not a matter but a law. Given the complexity of cases that have arisen in recent times these trials can be used as a tool of effective justice. However, these tests should be used with caution. They should be used in very rare cases. As they are complex medical procedures, they can be misused or treated

[61] 2005 Cri Lj 150, Journal section

[62] AIR 1954 SC 300

easily. Court approval and the consent of the parties, especially the person who has to take such tests is very important and should be given first.

SUGGESTIONS

Unless immediate action is taken, the intent to change this law will be in vain. Unless the bright lights and representatives of the public have been introduced to recommend and monitor changes in drug policy, these measures have never been implemented. Exploring cruel arrangements and respecting the rights of individual drug addicts is an undoubted need. Strengthening linkages between government departments and gaining general public representation, for example, medical professionals and patient groups can support an effective drug policy program. Doing research and collecting information about drug addiction, substance abuse, and the effects of drug addiction can help to combat drug abuse. The amendment of the NDPS Act itself is an important step to be taken if the Government is sincerely striving to reaffirm its commitment to eradicating the Indian drug problem.

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(iii) Sections 2 (xxiii) and 3, the NDPS Act and the NDPS Legal Framework

(iv) Notice S.O 1055 (E), dated 19 October 2001 published in the Gazette of India, Extra., Pt II, Sec 3 (ii), dated 19 October 2001

(v) Section 71 (1), the NDPS Act

(vi). Singh, A. (23 March 2013), 'Only 899 opium addicts are legal in India: RTI Response', The Times of India, http: // timesofindia. indiatimes.com/india/Only-899-legal-opium-addictsin-India-RTI-reply/articleshow/19137961.cms

EFFECT OF THE RAPE LAW REFORMS IN INDIA: A CRITICAL STUDY

- GUNIT KAUR

ABSTRACT

In this study I examined rape in India. The current study used data from India's National Crime Record (NCRB). Details of Indian cases released annually by the NCRB. The cases were reported to a police station across the country and were ordered to report and register the crime. The reasons for the crime incidents are not withheld by the Bureau. The NCRB provides information on the basis of recorded criminal cases. In this study I went through the main reason for it, the impact on society and what changes can be made. Rape is a fast-growing crime in India compared to other women's cases. I have also found unknown cases of rape occurring in the community in the name of dignity, for depressed (economically) women, for women working in the private sector or in the public sector.

From the Latin word rape is defined as rapio, which means 'to catch'. It means a violation of his law without his consent or consent, or his consent to intimidation. Rape is the fourth-largest crime ever committed in India. Rape is defined under section 375 of INDIAN PENAL CODE 1860[63]. Minimum of seven years in prison; prior to the Criminal Amendment Act of 2018. Prior to 2005, there were minor rapes in India. With the change of modern people; it is becoming more and more modern and that can be seen in the community. Many Muslim countries such as SAUDI ARABIA carry the death penalty within 24 hours of committing the crime. If we look at the statistics, the details of the rape case we find out how the case grows over time. In India NGO's are working to help the rape victim at the international level.

HISTORICALBACKGROUND

The concept of rape, abduction, seducing, assault and in the sexual sense, makes its **historical** appearance in early religious texts and manuscripts.The rape of women / youth is a common in Greek mythology. The rape of Chrysippus by Laius was known as "the crime of Laius", a term which came to be applied to all male rape. It was seen as an example of hubris in the original sense of the word, i.e. violent outrage, and its punishment was so severe that it destroyed not only Laius himself, but also his entire extended family.

[63] Sec.375 of Indian Penal Code, 1860

Also the rapes or abductions of Europa and Ganymede committed by Zeus, the supreme deity of the Greek had been mentioned.

Ancient Rome

According to Roman law, kidnapping or abduction; sexual violation is a secondary issue are termed as raptus (or raptio). The "abduction" of an unmarried girl from her father's house in some circumstances and situation was a matter of the couple eloping without her father's consent to marry. Stuprum is the term expressed for Rape in the English sense of "forced sex", a sex crime committed through violence or coercion (cum vi or per vim). As per the late Roman Republic legal distinction for "abduction for the purpose of committing a sex crime, is termed as "Raptus ad stuprum.

As a matter of law, rape could be committed only against a citizen in good standing. The rape of a slave could be prosecuted only as damage to the owner's property. People who worked as prostitutes or entertainers, even if they were technically free, suffered infamia, the loss of legal and social standing. A person who made his or her body available for public use or pleasure had in effect surrendered the right to be protected from sexual abuse or physical violence. Men who had been raped "by the force of robbers or the enemy in wartime (vi praedonumvelhostium)" were exempt by law from infamia.

There was no statute of limitations for rape; by contrast adultery, which was criminalized under Augustus, had to be prosecuted within five years. The rape of a freeborn male (ingenuus) or a female virgin is among the worst crimes that could be committed in Rome, along with parricide and robbing a temple. Rape was a capital crime, and the rapist was subject to execution, a rare penalty in Roman law.

The victim's consent was usually not a factor in Roman rape cases, since raptus could refer to a successful seduction as well as abduction or forced sex. What had been violated was primarily the right of the head of household (paterfamilias) to give or withhold his consent. The consequences of abduction or an elopement were considered a private matter to be determined by the couple and their families, who might choose to recognize the marriage.

Christian Empire

Attitudes toward rape changed when the Roman Empire became Christianized. St. Augustine interpreted Lucretia's suicide as a possible admission that she had secretly encouraged the rapist, and Christian apologists regarded her as having committed the sin of involuntary

sexual pleasure. Augustine's interpretation of the rape of Lucretia (in The City of God against the Pagans 1.19) has generated a substantial body of criticism, starting with a satire by Machiavelli. Historian of early Christianity Peter Brown characterized this section of Augustine's work as his most vituperative attack on Roman ideals of virtue. Augustine redefines sexual integrity (pudicitia) as a purely spiritual quality that physical defilement cannot taint; the Romans had viewed rape and other forms of stuprum ("sex crime") within a political context as crimes against the citizen's body and liberty.

The first Christian emperor Constantine redefined rape as a public offense rather than as a private wrong. Since under Roman law raptus could also mean cases of abduction or elopement without the head of household's permission, Constantine ordered that if the girl had consented, she should be punished along with the male "abductor" by being burnt alive. If she had not consented, she was still considered an accomplice, "on the grounds that she could have saved herself by screaming for help." As a participant to the rape, she was punished under law by being disinherited, regardless of the wishes of her family. Even if she and her family consented to a marriage as the result of an elopement, the marriage was legally void.

- **LAWS RELATING TO RAPE ININDIA**

• Under the Indian Payment Code

1. Section 375 of the Indian Penal Code defines a man as "raped" as "raped" if:

(a) It penetrates the inside of his penis, reaches the level of a woman's vagina, mouth, urine or anus or causes her or another person to do so;

(b) Insert, on any level, anything, or part of the body, other than the vagina, urine or anus or cause him or her or any other person[64] to do so or

(c) controls any part of a woman's body to enter her vagina, urine, anus, or any part of that woman's body or cause her to do so; or

(d) Inserts his mouth into the vagina, anus, vagina or vein of a woman or another person,

Under the circumstances that fall under any of the following seven definitions-

The first - against his will.

• Second - without his or her consent.

[64] Source, Bare Act, Indian Penal Code 1860, sec. 375(1)

• Thirdly - with his or her consent, where he or she is obtained by placing him or her or another person of interest to him or her, for fear of death or injury.

• Fourth - by her consent there, the man knows that she is not her husband and that her consent is given because she believes she is another man or believes that she will legally marry.

• Fifth - with his or her consent where, at the time of giving such consent, due to mental illness or intoxication or any other dangerous matter, he or she is unable to understand the nature and consequences of what he or she permits.

• Sixth - with or without his or her consent, when he or she is under the age of eighteen.

• Seventh - when he is unable to pass the permit.

Explanation 1.- For the purpose of this section, "female genital mutilation" will include large labels.

Explanation2.-consent refers to a non-voluntary agreement in which women express themselves verbally, verbally or in any other way through verbal communication, communication and willingness to participate in a particular sexual act.

Provided that a woman who refuses to consent to illicit sex will not, for any reason, be considered a sexual offender.

Explanation 1.-The treatment or invention process should not be rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife being under fifteen years of age, is not rape.

- Section 376 deals with the punishment of rape.

Section 376 (1) any person other than subsection (2) who rapes, shall be imprisoned at any time for a period of less than 7 years, which may be imprisonment for the rest of his life, and he may be fined. (2) Any person, -

(a) Being a police officer commits rape-

(i) Within the boundaries of the police station where a police officer is appointed; or

(ii) on the premises of any station house; or

(iii) a woman under or under the supervision of such officer; or[65]

[65] Sec 376(1) of Indian Penal Code, 1860

(b) by being a public servant, rapes a woman in the public service or under the supervision of a public servant in that public service; or

(c) being a member of an army sent to central or national government rapes an area; or

(d) the detention or detention of a person, detention at home or other place of detention established by law or under any law during the period of employment or in a women's or children's institution; or

(e) Being in the management or staff of a hospital, rapes a person in that hospital; or

(f) Being a relative, caregiver or teacher, or a person in a position of trust or authority, to a woman, rapes her when she is raped; or

(g) Holds public rape or sectarian violence; or

(h) Commitment to a woman who knows she is pregnant; or

(i) commits the offense of raping women under the age of 16 years; or

(j) He commits suicide, rapes a woman who cannot give permission, or

(k) Being in a position of domination or domination by a woman rapes those women; or

(l) is charged with raping a woman with a mental or physical disability; or

(m) Where rape causes bodily harm or injury or disability or endangers women's health; or

(n) of repeated rape of a woman, must be imprisoned for a period of not less than ten years, which may result in imprisonment, which may mean imprisonment for the remaining person, and pay a fine. [66]

- **How NIBHAYA CASE Changes laws on RAPE**

• March 21, 2013 Nirbhaya amends India's rape law. Prior to the Criminal Procedure Amendment Act 2013, the penalty for rape was not more than seven years; after this amendment was life imprisonment or imprisonment for 20 years. [67]

• But apart from this criminal amendment, people's thinking has not changed. Moreover, these men were not cruel. A key factor in rape may be men's illiteracy.

• Unnao, Case in Uttar Pradesh, where a woman was burned by 5 men after being raped by 2 men.

[66] Supra note 3

[67] National Crime Report Bureau,

According to the NATIONAL CRIME REPORTS BUREAU no major changes can be made to the community. In fact, 32,559 rape cases were reported in 2017 by the NCRB, indicating an increase in rape cases.

The Supreme Court itself stated, 'the law has been amended in respect of rape after Nirbhaya but has not yet been implemented'.

Send Nirbai to scare us; even after the suspension of many amendments to the Criminal Code that redefined the status of cases

- **How Nirbhaya Changes TheSociety**

Therefore, by amending the laws there is nothing great that cannot be seen in society or in the same sense. The organization needs to change its mindset compared to women. The following are steps that can be taken to prevent rape:

• Men need to be educated by women.

• They need to change their mind about women.

• Equal punishment should be imposed on the rapist; to be a white collar or professional, or someone else.

• There is no need to show mercy by reducing their punishment.

• Consider the latest rape cases as follows:

• 2018, every 15 minutes one rape case is reported[68].

• In 2019, Kathua Rape Case - in which an eight-year-old girl was raped by men, among them one of the rapists was a retired government official, another a special police officer, and the next a relative of the victim.

• Also, the chief of police, a special officer and a junior inspector are suspended for alleged wrongdoing.

Here, we saw that the rapist gets a profit from a government official; we also see that because the rapist is a government official they get the right.

This is one of the most common rape cases as the incident took place in the temple; when no one else can doubt such a work.

However, action was taken against the rapist. But this is not the solution to reaching the end.

- 2017, Unnao Rape Case-

[68] Reuters Report, 2018

The 17-year-old girl was hanged by MLA named Kuldeep Singh Sengar, her brother Atul Singh and his accomplices. The father of the deceased was arrested without charge; died and was sentenced to cell10. Family members of the deceased were threatened by Atul Singh.

Types of Rape:

• Marital Rape

Even after marriage if a man forces his wife to have sex, without her consent; that type of rape is counted as marriage.

• Known rape When a man is known by a woman.

REASONS BEHIND COMMISSION OF RAPE

- Clothing worn by a woman, her environment and the behavior of another person are an invitation to rape; as mentioned by the famous Indian personality. But this is not a reason for rape; a child, born just before seven days, if raped by an adult man. What was the reason for her rape; at this stage he cannot wear a saree, and he does not know how to behave.
- Human thinking, a woman's character. Older men have not changed over time; these types of men have their own ideas about women and limit the woman.
- **After Nirbhaya** it was said that the most popular personality in the conversation was; what is the need to watch movies at night in the cinema hall this kind of action requires a commission of sexual harassment and rape.
- It should be noted here that watching a movie in a hall does not mean that he is flawless or that he is not part of a good family. No one has the right to judge a woman by her place or by the time she visits that place.
- **Delhi Gudiya Rape Case**; a five-year-old girl was brutally raped by two men. Something went wrong in her vagina. This incident is truly affecting the nation. A country like India where a girl is worshiped. What good is it if a girl is raped and exploited?
- **Muzaffarpur corruption case -**In this case it shows that even the home center is not safe for the woman. Where the girls were raped by government officials. It shows how powerful government officials are. Such work sends a message to the

community; if this happens in a home facility then the girl outside the home is not safe from these people[69].

- **Effect of Rape on Victims**

It helps to get advice and treatment that you are fighting. It is necessary for the victims to begin the treatment process. According to the World Report on Violence and Health, (World Health Organization 2002) the absence of negative psychological effects of trauma persists for at least one year after rape.

Physical Effect

The result of rape can be the result of forced sexual assault. It can cause severe bleeding around the genital area and damage to other parts of the body

Other physical effects are:

• STD / HIV
• Urinary tract infections
• Painful sex
• Pregnancy
• Mental Effect

One of the most common consequences of rape is remorse. In many cases remorse stops the treatment process. It affects not only the victims but also the victim's family, friends and community.

Some emotional effects are:

• Depression
• Fear of being trusted
• Insomnia
• Food therapy
• You are guilty
• Anger

- Criminal Law Amendment Act, 2018 Related to Rape
  - Section 4.

[69]World report on violence and health, (WHO)

In section 376 of the fine code, -

- imprisonment for life, and the fine "will be replaced;

(b) Subsection (2), subsection (i) shall be issued;

(c) After subsection (2), the following subsection shall be inserted, namely: -

"(3) Any person who rapes a woman under the age of 16 years shall be severely punished with imprisonment for a period not less than 20 years, which may result in imprisonment, with a fine: [70]

Provided that such compensation will be fair and reasonable to meet the costs of treatment and rehabilitation of the victim:

If it continues that any charges under this section will be paid to the victim. ".

- Section 5. After section 376A of fine code, the following section will be inserted, namely: -

376AB. Anyone who rapes a woman under the age of 12 will be severely punished in prison for less than 20 years, which can lead to life imprisonment, which could mean life imprisonment, and a fine or death:

Provided that such compensation is unfair and appropriate to cover medical expenses and rehabilitation costs:

If it continues that any fine paid under this section will be paid to the victim.14 ".

- Section 6. After section 376DA of good code the following sections will be included, namely: -

"376DA. When a woman under the age of sixteen is raped by one or more people who form a group or promotes intimate relationships, each of these people will be considered a rapist and sentenced to life imprisonment, which means imprisonment for that person, and accordingly:

Provided that such compensation will be fair and reasonable to meet the costs of treatment and rehabilitation of the victim:

If it continues that any fine paid under this section will be paid to the victim.

376DB. When a woman under the age of 12 is raped by one or more members of a group or group for the same purpose, each person will be convicted of rape and sentenced to life imprisonment, ie life imprisonment, a fine or death:

[70] Sec.4 of Criminal Law (Amendment) Act, 2018 No. 22 of 2018, published by authority,

Provided that such compensation will be fair and reasonable to meet the costs of treatment and rehabilitation of the victim:

If it continues that any fine paid under this section will be paid to the victim15. ".

- **How Rape Can Be Control**

• There are some ways in which girls are abused, sexually abused and raped by men. You may have heard some of these things, or you may have seen them. Here are some points that parents or guardians should consider with their child.

• If a relative is visiting your home for example - uncle, grandmother, grandmother or father or another relative; If your child does not want to stay with you, shake hands, not wanting to get too close to him or her. Is there a problem with the relative; because his doing so shows that he has a problem with this particular relative. A relative may abuse or commit sexual harassment.

• In cases such as rape, we have found that the perpetrators are not other family members or relatives.

EXISTING LAWS AGAINST RAPE IN INDIA.

Indian Penal Code

Under Section 375 and 376 of the Indian Penal Code, only a man can be convicted of committing rape and the victim can only be a woman. Further, the laws relating to stalking, voyeurism and sexual harassment1 are gender specific i.e. the perpetrator can only be a man while the victim can only be a woman. However, the law relating to throwing acid isgender.[71]

The Indian law is based on the belief that a victim of rape can only be a woman. This arises from the assumption that rape is an act of sex alone[72]to satisfy the sexual desire of the perpetrator. However, there is a growing awareness that sexual assault is not only an act of lust and desire but also a manner of showing dominance or superiority of one caste, class, religion, community over the other and are acts of power and humiliation[73]. If this is so,then there is no reason the male gender is excluded from being a rape victim in India.

[71]The Criminal Law Amendment Act 2013 (Act no.13 of 2014)

[72]A. Narrain, *Violation of Bodily Integrity, Economic and Political* 48 (Sage Publications, Delhi, 4th edn., 2013).

[73]*Ibid.*

Another concern while determining what constitutes gender neutral is whether it constitutes bodies are clearly either male or female[74]who violate the normative understanding of what it meanstobe[75]. incorrect. We know that coercive sexual intercourse with men by men is covered under Section 377 of the IPC, as carnal intercourse going against the order of nature. One of the questions I seek to address in this paper is- why coercive men on men intercourse cannot be covered by the rape law? There must be a distinction between coercive and consensual homosexual sexualintercourse.

Supreme Court of India while showing its concern over most heinous crime rape observed "*Rape is a crime not only against the person of a woman;it is a crime against the entire society. It destroys the entire psychology of a woman and pusher her into deep emotional crisis Rapes is therefore the most hated crime. It is a crime against basic human rights and is violation of the victims most cherished rights, namely right of life which includes right to live with human dignity contained in Article 21. Rape for a woman is deathless shame and must be dealt with as a gravest against human dignity; it is violation with violence on the private person of a woman*."

Section 375 and 376, 376-A to 376-D IPC are related with the offenceof rape, which are amendment by Criminal law (Amendment) Act, 2013. The most important change that has been made is the change in definition of rape under IPC.

Section 375[76], deals with the definition of Rape, it says that"A man is said tocommit "rape" if he- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven clauses

[74]N. Menon, *Seeing like a Feminist* 118 (Zubaan and Penguin Books India Pvt. Ltd. 2013).
[75]*Ibid.*
[76]The Criminal Law (Amendment) Act, 2013(Act no.13 of 2013).

CONCLUSION

In the study we suggest that one of these policies is aimed at women and the community to reduce rape crime. First and foremost is that

• While traveling by car or taxi if a woman feels unsafe or suspects that a driver in this situation may use a dupatta or scarf or something similar to wrap the driver's neck and threaten to take him or her to a safe or crowded place.

• The woman should check the man's intent.

• A woman should not trust everyone known or unknown who enters into her relationship with that.

• Not all NGOs are good or safe for women, do not trust these organizations.

• A woman needs to have a broad mind.

• A woman needs freedom or unemployment.

• In education a woman's confidence is needed.

• They beat not only women but also educated women.

Here are some tips to help a woman avoid the crime of rape.

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A STUDY ON GST LAWS IN INDIA WITH SPECIAL REFERENCE TO ITS FUTURE PROSPECTS

- KSHITIJ GARG

ABSTRACT

Taxes are divided into direct and indirect taxes. In India's basic tax system, it is assumed that the central government will receive a tax, property tax, customs and service tax, while the governments of the country will receive a sales tax / value added tax, tax etc. Any matter in the Schedule I am talking about the seventh plan of the Constitution. In terms of section 246 (3), the legislature of any state has the special power to make laws on any matter referred to in Schedule II of the Seventh Schedule to the Constitution.

Economic freedom and reform have played a major role in the development of the Indian economy. In India, property has been taxed for a long time but until 1994 there was no service tax. The service tax was introduced by the then Minister of Finance, Dr Manmohan Singh, in 1994, but only for three services. Over time, the number of services has increased year on year and there are currently more than 100,000 service tax deductions. In the case of indirect tax reform in India the amount of additional taxes at the intermediate and provincial levels is considered a major step forward.

INTRODUCTION

The tax system is the backbone of a national economy that maintains a stable income, controls economic growth, and promotes its industrial activities. The three-state solution framework for India consists of the United States Government, the Federal Government, and local authorities empowered to pay various taxes and duties, operating within the country. Local themes will include local councils and municipalities. The Indian government is authorized to levy taxes on individuals and organizations in accordance with the Constitution. However, Article 265 of the Indian constitution states that the right to a tax is not imposed on anyone other than the judiciary. Article 7 of the constitution sets out the topics of the Union / State or both.

Definition of Tax

Taxes can be defined as a financial burden imposed on individuals or property owners to help supplement government revenue. Taxes, then, are compulsory, not voluntary, or voluntary contributions. It is a payment required by a law enforcement officer. It can be direct tax or indirect tax. Gross Domestic Product (Gross Domestic Product) can be a result of income and effective tax measures.

Characteristics of a good tax structure

A good tax system should be balanced and lead to an equitable distribution of wealth. It must work and produce the money needed by the government. Tax collection is a big job and should be economical. Trade and industry development should not be hampered by the tax burden. Taxes should provide a clear picture of government revenue. The tax plan should be based on complete and up-to-date information that allows for accurate forecasts. The tax system should also be simple and comprehensive to meet the new requirements of the State. As we increase the tax burden, the ability of taxpayers to be considered.

GOODS AND SERVICE TAX (GST):

Individual start with a GST certificate could be a big change in the industry starting with the fulfillment of our previous commitment, our country with a different framework than the one collected at the end of Tom to look for those visionary people to join as objects also that help to explore. This begins with blatant criticism. Possible transfers should be canceled if significant debts are placed in an area focused on people looking for different prices. GST is likely to remain at the level of properties that have joined the commitment to use them in relation to individual stock reductions.

Types of Taxes in India

Two types of taxes in India are direct and indirect taxes. One of the biggest and most successful changes in India is GST (Goods and Services Tax). It acts as a broad indirect tax that helps to eliminate the flow of total tax revenue.

Direct tax

It is a tax levied on corporate units and individuals. It is a type of tax that can be sent or received by another person. Examples of direct taxes are property tax, income tax, gift tax, etc. For the Minister of Finance, the Central Board of Direct Tax (CBDT) is part of the treasury. The Board has a dual role that provides key ideas, key planning inputs, and policies

to be applied in relation to specific taxes in India. The administration of certain taxes levied by the Income Tax Department is assisted by the Central Tax Board in doing so.

Indirect taxes

Indirect taxes on public goods and services are called indirect taxes. Government agencies collect taxes from people who sell goods and services. When a good or good product is sold to the government, sales tax is set and the rate is determined by the government, this is called Value Added Tax (VAT).

The formulation of tax policy, tax collection and service tax is handled by the Central Board of Excise and Custom (CEBC)

The Central Board of Excise and Custom was renamed the Central Board of Indirect tax and Custom (CBIC) after GST came into operation. Its important role is to assist government in the formulation of GST-related policies.

Custom Work

Import duties are collected on all imported goods to ensure that they are taxable and taxable. It is taxable for all exports and imports and is important for regulating trade and public finances.

Goods work

This is a property tax in the true sense as it is charged on the production of goods and not on its sale. Taxes are taxed by the Central Government but only on alcohol / alcohol and drugs / drugs. Unlike custom tax, this only applies to goods made in India. It is also called the Central Value Added Tax (CENVAT).

Service Tax

Here the product is taxed by the service. In India, service tax was originally applied to telephone services, stocks, and general insurance. This circle has incorporated too many services since then and has now been replaced by featured features and service tax.

Additional Taxes

Taxes were levied because the indirect tax structure in India was weak and created a problem. Value Added Tax has self-assessment methods that make managing this tax easier. VAT applies in India to all Union territories and the United States except the Union Territories of Andaman and Nicobar and Lakshadweep.

GST

After the GST came into operation, direct and indirect taxes were collected by the three government agencies until July 1, 2017. Various indirect taxes imposed by the central government and the provincial government were levied by the GST. Both the central government and the state collect indirect taxes on the supply of goods and services internally.

Constitutional Provisions Regarding Taxation in India

The root of all law in India lies in the Constitution, so understanding the provisions of the Constitution is essential to a clear understanding of any law. The provisions of the Constitution regarding taxes in India can be divided into the following categories:

It is only in the hands of the law that the taxable tax is levied. (Article 265)

Taxes and their distribution between institutions and countries (Article 268, Article 269, and Article 270)

1. End of national power (Article 286)
2. The sale / purchase of goods that takes place outside the relevant country
3. Sale / purchase of goods that took place during the import and export process
4. Taxes imposed by the government or the purpose of the state (Section 276, and Article 277)
5. Taxes imposed by the state or the purpose of the union (Article 271, Article 279, and Article 284)
6. Grants-in-Aid (Section 273, Section 275, Section 274, Section 282)

Opportunities For Lawyers After The Implementation of GST

GST in India caused unrest last year. While many experts are concerned about the future of various services through indirect tax changes, some are busy training themselves in current tax administration. There is no denying the fact that any changes take time to stabilize and are not felt at first. GST has far-reaching effects. It will affect the way companies operate and they will have to work now to change their jobs at various levels. Companies, startups, professionals, everyone is skeptical and equally afraid of the potential pandora GST box.

However, the Economic Times report has a different story to sell. An article entitled, "Lawyers are smiling as GST tries to stem the tide of lawsuits" has a positive view that the current GST regime intends to use the speed of legal personnel.

EVOLUTION OF INDIRECT TAXATION IN POST- INDEPENDENCE INDIA TILL GST:

According to a World Bank report, GST is one of the most complex and leading governments. Currently, GST is applied to four slabs or brackets, ranging from 5 to 28%. This type of inequality is likely to entice thousands of cases. According to the Economic Times, India already has a total of 24 million cases. As of May 2015, 1 indirect tax cases have continued in the courts only. In contrast to taxation, the need for stronger cooperation and greater power of the state compared to state or human disputes compared to the country, tax cases are likely to increase.

There is no denying that people continue to fight for tax exemptions as much as possible. For example in the McDonald's case, it was discussed for 12 years whether a soft service should be considered a cream and a tax or not, these are examples that show each individual tax evasion struggle. In an interview with the Economic Times, Arvind Datar, the newly appointed Attorney General of the Supreme Court of India, stated whether he was present or not. ”

Article 273

The grant is levied on India's consolidated fund annually in lieu of income, export duty on jute products in Assam, Bihar, Orissa and West Bengal. The grant will continue and will be levied on the Indian Consolidated Fund as long as the Union government continues to levy export duty on jute, or jute products or on the expiry date of 10 years from the date of commencement of operations.

Article 275

Grants were approved as parliament decided to provide those countries that needed more support and assistance in obtaining these funds. These funds / grants are used to develop the state and to supplement social measures / programs by the national government. It is also used in the social work of organized nations in their territories.

Article 276

This document deals with taxes levied by the state government, which are controlled by the state government and taxes are collected by the state government. However, taxes vary from country to country. This is sales tax and VAT, professional tax and stamp duty to name a few.

Article 277

Apart from cheap fees, levies, taxes or levies levied immediately before the commencement of the constitution by another municipality or other local body for the purposes of the State,

In the case of Hyderabad Chemical and Pharmaceutical Works Ltd. and the State of Andhra Pradesh, the plaintiff produced drugs for the use of alcohol, the licenses of which were purchased under the Hyderabad Abkari Act and had to pay the State Government to administer it. However, parliament passed the Medical and Toilet Preparations Act, 1955 where no application was made but the applicant challenged the state tax after the passage of the Medical and Toilets Act, 1955 because according to Article 277, to enter 84 of Schedule 1 to Schedule 7, the state did not charge . . Explain the difference between taxes and duties. Tax money is used to benefit all taxpayers but money is used for a specific purpose only.

Article 279

This document works by calculating "income" etc. Here 'residual' means the amount deducted after deducting tax collection costs, guaranteed by Comptroller

Article 282

Special, temporary or temporary schemes are often targeted and the power to impose sanctions under them does not diminish. In the case of Bhim Singh v. The Union of India & Ors Supreme Court states that since the enactment of the Indian Constitution, social programs have been aimed at promoting social welfare and public interest in the grants provided by the Union Government. In this regard, the Strategy has been MPLAD (Member of Parliament for the Rural Development Program) and falls under the definition of 'community objective' to implement government development and social projects as set out in the Directive Principles of State Policy to meet constitutional requirements. 275 and 282 documents are sources of funding under the Constitution. Article 282 is usually intended for special, interim or interim schemes and the power to impose sanctions is not limited. In the case of Cf. Narayanan Nambudripad, Kidangazhi Manakkal v. State of Madras, the Supreme Court has ruled that the religion is secret. And donations and donations are therefore not a matter for the state unless the state assumes the responsibility to manage that religious contribution in order to benefit the community and to spend money on social welfare measures. It can therefore be seen that Article 282 may be used for a public purpose but sometimes in the name of a public purpose it may be misused.

Article 286

This document restricts the State's ability to pay taxes

1) The state cannot pay import and export taxes and cannot levy taxes outside the state area.

2) Only Parliament may make regulations to ensure when the sale / purchase takes place during the export or import and export process. (Sections 3, 4, 5 of the Central Sales Tax Act, 1956 are made by this power)

3) Prices / levies may be approved by parliament and the State Government may levy a tax on these most important goods in accordance with these restrictions (Section 14 and Section 15 of the Central Sales Act, 1956. India to African suppliers and to local buyers after consideration. and was not subject to the Central Sales Tax Act, 1956. cashew) could not be identified externally. they are therefore protected from paying taxes under the Kerala General Sales Tax Act, 1963. This decision was opposed by the opposition.

CONCLUSION

India is a large country with people from different communities and different economic and leadership groups. The taxes for all are not the same. This is the reason why the tax system in India has been so difficult for so long. India has been plagued by tax evasion which seems to undermine our tax system. India has a high tax rate but a very straightforward tax yield. Therefore, over the years the government has made efforts to reduce taxes. Also, for the nation to be successful, the tax system must be strong and efficient even if taxes are not high, otherwise their income will be reduced and development programs will be reduced. One of the biggest problems facing the Indian tax system is the government's failure to make restructuring amendments with regard to tax models. The practice began with a high court ruling in the case of Chhotabhai Jethamal Patel & Co v. OI & Others then passed a property tax amendment bill.

After the introduction of the all-inclusive GST tax, the process was smooth and helped prevent the previous effect of cascading. The Constitution of India contains provisions relating to the allocation of funds under Chapter 2 of the twelfth section corresponding to the list of Federal, State and Concurrent under Schedule 7. In summary, the rights of Parliament are not bound and the Constitution of India gives Parliament greater powers and equal powers. Therefore, depending on future needs, there are principles that can change these stated rules of law. Paying taxes may not be the best job, but it pays for all the development and infrastructure that one enjoys.

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INTERNATIONAL PRESPECTIVE REGARDING BOVINE ANIMALS

- AYUSH NAITHANI

INTRODUCTION:

As far as experts have been able to research, they have found evidence of religious faith and practice prevailing in human society from a long time. Analysing these faiths and practices, every religion values animals in a different manner. Every religion is exercised by many people around the globe and has sanctified, primordial roots. Animals have major significance in every religion's sacrifices and rituals. Each religion signifies animals in a different manner. While some beings perceive animals as sanctified emanated on the religion they believe in, others merely perceive them as an alternative of food.[77]

Every religion has progressed over time and is exercised differently across cultures and nations. Major religions across the globe are huge advocate of treating non-human animals with compassion, empathy and respect. In the countries and cultures where these religions are practiced, and animals are to be treated with respect, animals are still used as a food source and sacrificed for religious purposes.

Animals occupy an important place in Hinduism despite of its various traditions and philosophies. Due to this blend of numerous religious ideas there are various perspectives on animal's right. There are numbers of animals holding religious significance in Hinduism as Cow is considered equivalent to mother ,elephant symbolizes Lord Ganesh , Bull is recognized as vehicle of Lord Shiva who is worshipped by devotees individually as a personal god and in association with Shiva as his vehicle. Monkeys also hold major religious significance because of their association with Lord Rama in Ramayana.[78]

For example Elephant is the nationwide symbol of Thailand. As a matter of fact they put silhouette of an elephant on the flag till 1917. As a result, Elephant is firmly connected to the history Thailand. Especially, the white elephant is the utmost sanctified to the Thais. For Five

[77] https://sentientmedia.org/what-each-major-religion-says-about-animal-rights/

[78] https://www.hinduwebsite.com/hinduism/essays/sacred-animals-of-hinduism.asp, (19/03/21) TIME : 7 :51 AM

thousand years, elephants were privileged by connecting them with well- being, royalty and prosperity.[79]

In spite of the common similarities, traditional differences with respect to perspective towards treatment of non-human animals can be seen .Traditional perspective can differentiate regarding the character of quadrupeds about the significance of particular types of quadrupeds, and about our moral and ethical obligations towards animals and how they should be treated.

We live in a multicultural globalized world and in spite of all of our intellectual, traditional cultural differences and therefore we cannot deny the fact that globalization can have a deep impact on the effectiveness of encouragement for the well- being of animals. Attempts in one country to provide effective sanctuary can have involuntary consequences in our globalized world.

Therefore it can be said that due to our conventional and intellectual attitude faith in sacred animals is widespread .Common to all of these is the idea that the non-human animal is an expression of the sacred and thus consists of the dual attributes of beneficent (in curing, hunting, or agrarian magic) or threat (as illustrated in taboos against their obliteration or consumption).

ANIMAL RIGHTS AT INTERNATIONAL LEVEL: COMPARATIVE STUDY

ENGLAND AND WHALE: Current act prevailing in England and Wales regarding security and well beings of animals is The Animal Welfare Act 2006 . The primary focus of this act is on accountable ownership and possession of animals and prohibition on harm to animals by way of 'unnecessary suffering.' One of the major modification under this act is opportunity for early intervention in cases of cruelty and viciousness towards animals rather than the position under previous act which allowed for reactive response to such cruelty. Various categories of animals are protected under the act depending upon activity and offence. Strict provisions regarding fighting, wrestling or baiting of animals are provided

[79] https://myanimals.com/latest-news/news/wild-animals/5-sacred-animals-from-around-the-world (19/03/21) TIME :7 :56 AM

under sec 8 of the act.[80] The act which monitors the circumstances under which an animal can be tested is regulated under The Animals (Scientific Procedures) Act 1986 (ASPA) .Under this act license cannot be granted without giving a sufficient and reasonable cause as why such research cannot be done through (non-animal) methods.

CANADA: In Canada, the provisions regarding protection and welfare of animals are mentioned under sections 444 to 447 of Canada's Criminal Code. Section 444 states than any person constituting an offence by killing, maiming or placing poising in such place from where it may easily be consumed by cattle maybe liable for imprisonment up to eighteen months of fine up to ten thousand dollar or both.

Section 445 contains provisions for offences against animals that are not cattle. Although there are certain statutory provisions for protection and welfare of animals it is It is legal in Canada to use live animals to test cosmetics, household products, pesticides, drugs and other substances.[81] A bill was introduced to the Canadian Senatein December 2015 to prohibit testing of cosmetics on animals

UNITED STATES OF AMERICA: The Humane Methods of Slaughter 1958 was the first major federal law in respect of animals such as cattle, calves, horses, mules, sheep, swine, and "other livestock," It describes the scope of acceptable methods of slaughter. Act has certain limitations as No federal laws regulate the living conditions of farm animals. Food and Drug Administration (FDA) in United States is responsible for provisions relating to animal testing in respect of cosmetics. [82] FDA supports and adheres to the provisions of applicable laws, regulations, and policies and exercise control in respect of animal testing, including the Animal Welfare Act and the Public Health Service Policy of Humane Care and Use of Laboratory Animals.

GERMANY: Germany's Animal Welfare Act contains statutory provisions against individual committing offence against animal willfully or negligently inflicting substantial

[80] https://www.animallaw.info/article/legal-protection-animals-uk (19/03/21) TIME :11 :51 AM

[81] https://www.animallaw.info/article/overview-canadas-anti-cruelty-laws (19/03/21) TIME :11 :57 AM

[82] https://www.fda.gov/cosmetics/product-testing-cosmetics/animal-testing-cosmetics (19/03/21) TIME :12 :00 PM

pain, suffering, or injury. This act contains list of outlawed activities against animals such as requiring an animal to produce performances clearly beyond its strength, practicing the use of animal for purpose of exhibition, filming, or advertising which will result in causing pain and suffering to animals, instructing or testing strength of an animal against another living animal, performing procedures on animals during competition or sports events causing pain and suffering.

Article 9 of the act states that only requisite expertise may perform experiments on animals.[83]

AUSTRIA: The act prevailing in Austria for purpose of safeguarding the rights of animals is Austrian Animal Welfare Act 2004 like most of the acts Austrian Animal Welfare. The act imposes duties on individual of reasonable care of animals on farm. One of the most significant feature of this act is that it bars the practice of breeding and raising animals for fur and also prohibits the use of animals in circus.[84]

LAWS IN RESPECT OF CATTLES IN UNITED STATES:

The US dairy and meat sector claim over forty one million cattle lives on yearly basis. Preceding to slaughter, many cattle capitulate to diseases contracted because of unhygienic circumstances, pressure induced by restrained quarters, undernourishment, and/or the harsh nature of continuous milking, or other numerous insanitary practices. Cattle owners breed cattle for various uses, thus ranchers of beef cows breed their cows to enhance meat manufacturing while dairy farmers breed cattle to accelerate milk production.

Cattle-derived goods that make it to stores for public consumption obtains labels that are supervised by the USDA .The USDA approves labelling parameters to help make sure that beef goods are harmless, nourishing, and rightly packaged and labelled. The FDA follows similar procedure for dairy products. Thus, these agencies supervise and regulate labelling claims. They supervise claims that include antibiotics, hormones and other labelling

[83] https://www.animallaw.info/statute/germany-cruelty-german-animal-welfare-act (19/03/21) TIME :12 :03 PM

[84] https://www.animallaw.info/statute/austria-animal-welfare-federal-animal-protection-act (19/03/21) TIME :12 :10 PM

affirmation. as reported by many critics the FDA and USDA frequently make broad or uncertain labelling standards. [85]

The Humane Slaughter Act is state regulation that was integrated into the Federal Meat Inspection Act (FMIA) in 1967 to reduce suffering of livestock throughout the process of slaughter. The Humane Slaughter Act was sanctioned on August 27, 1958. One of the most significant feature of this act is the requirement to have livestock completely numb and unresponsive to pain. This is to reduce the misery to the point where livestock senses nothing at all. This system varies from animal to animal as their size fluctuates. Bigger animals need stronger method in comparison to smaller animals.

Humane Methods of Livestock Slaughter Act includes livestock animals, such as cows, mules, swine, calves, horses, , sheep, , and "other livestock, which has been construed to include goats and "other quadrupeds.[86]

Tolerable procedures to kill these specified animals insensitive to pain comprises the use of electrocution, captive bolt stunners, carbon dioxide gas and firearms. A specific procedure's acceptability may be subjected to the species of livestock concerned. For example goats, horses and cattle are put to death by a single gunshot to the head or through captive bolt stunner. Carbon dioxide gas is used to give rise to medical anaesthesia in calves and sheep .The Humane Methods of Livestock Slaughter Act's condition for civilised procedures of managing livestock in association with slaughter has also been integrated into the CFR. Such procedures dictate that livestock be driven at a regular walking speed with a slightest of pleasure and discomfort. Whatever that may possibly cause hurt or unnecessary pain, such as pipes or sharp or pointed substances, should not be used to drive livestock.

Furthermore livestock ramps and driveways should be built in such manner so as to avoid wound or agony to the livestock by providing protected footing, lessening sharp corners, or protuberant matters or openings, and protecting livestock from shifting direction while being driven.

Twenty Eight Hour Law: Twenty eight hour law is a law originated in the United States relating to transportation of animals. It states that a express, rail or common carrier or owner of vessel transporting livestock form one state to another cannot confine them for more than

[85] https://www.animallaw.info/intro/laws-affecting-cattle (19/03/21) TIME :12 :20 PM

[86] https://www.animallaw.info/article/detailed-discussion-humane-methods-slaughter-act (19/03/21) TIME :12 :30 PM

twenty eight succeeding hours without unloading the livestock for purpose of feeding, rest and water. Under this provision Time consumed in stocking and unloading livestock is not counted as part of duration of confinement. Livestock shall be unloaded in a gentle way into pens well-appointed for feeding, rest and water for minimum period of five succeeding hours. The owner or person in charge of guardianship of the animals during transportation is bound to feed and water the animals.

Any carrier contravening provisions shall be liable to fine of sum of at least hundred dollars which should not extend more than five hundred dollars for each violation [87]

LAWS IN RESPECT OF CATTLES IN SRI LANKA:

Cattle slaughter, particularly slaughtering of cow is a debatable topic in Sri Lanka just like neighbouring nation India due to cow's sacred status as an esteemed and respected living being to some cults of Buddhism and Hinduism while being considered a suitable cause of meat by Christians as well as Muslims and by few Hindus and Buddhists. Holy cows are often slaughtered for the purpose of consuming beef. Previous year an offer was initiated to prohibit cattle slaughter.

Mahinda Rajapaksa (Prime Minister of Sri Lanka) stood up to a proposal that promulgates against the slaughter of cattle through the island nation. Mahinda Rajapaksa made the proposal in the party's parliamentary group meeting, saying that slaughtering of cattle should be barred since many people are against these kind of practices. He received common support from the parliamentary group.[88]

Finally on 29 September 2020, the government of Sri Lanka declared that the slaughtering of cattle would be officially proscribed after the execution of scheme. The move was reasoned predominantly due to the impact of majority Buddhist population. Buddhist monks have specified they are stalwartly in favour of this decision as the Sinhala Buddhist community discourages consuming cattle meat.

[87] https://www.animallaw.info/statute/us-food-animal-twenty-eight-hour-law (19/03/21) TIME :12 :40 PM

[88]) https://www.trtworld.com/magazine/why-is-sri-lanka-planning-to-ban-cattle-slaughter-39643 (26/03/21) TIME :10 :38 PM

The Cabinet of Ministers granted authorization to administer the applications given by Mahinda Rajapaksa, on prohibiting cattle slaughter throughout the nation with speedy effect, subjected to the enactment of pertinent measures. [89]

The government stated "As a nation with an frugality centred on agriculture, the impact of the cattle resource to cultivate the livelihood of the rural people as well as agrarian society residing in Sri Lanka is immense".

Several parties have identified that the cattle which is required for customary agricultural purposes is inadequate due to the escalation of cattle slaughter and the deficient livestock resource is becoming a hindrance in uplifting the local dairy industry.

Taking these conditions into consideration, the Cabinet of Ministers approved the sanction to implement the following scheme stated by the Prime Minister: Taking instantaneous compulsory arrangements to amend the Animal Act No.29 of 1958 and other interrelated laws and regulations accepted by the local authorities concerning cattle slaughter which are currently prevailing in the nation. Animal Act No.29 of 1958 is an act to regulate and control slaughtering of animals in Sri Lanka. It also regulates sale, transfer and removal of animals from one administrative district to another. The act further contains provisions for the confiscation and detention of cattle which commit trespass and for the valuation and reclamation of damages for such trespass.[90]

LAWS IN RESPECT OF CATTLES IN BHUTAN:

Bhutan is gifted with amusing domestic animal biodiversity including horses, yak, cattle, sheep goat and buffaloes. Out of these species, Nublang, the native cattle breed of Bhutan, is the most significant inherent resources that backs up nearly sixty nine percent of Bhutanese Cultivation farming populations by means of animal traction, dairy products and manure.

[89] http://www.adaderana.lk/news/67603/cabinet-approval-to-ban-cattle-slaughter-in-sri-lanka (26/03/21) TIME :10 :40 PM

[90] http://lk.chm-cbd.net/wp-content/uploads/2015/04/Animals-Act-No.-29-of-1958.pdf (26/03/21) TIME :10 :55 PM

According to (Livestock Census, DoL, 2007) the native cattle population in Bhutan was estimated at 208,783.[91]

The laws relating to livestock in Bhutan are governed by Livestock Rules and Regulations of Bhutan 2017. The act contains provisions regarding supply demand and placement of breeding stock. It states that breeding stock shall be supplied by the government without charging any cost and its placement shall be based on "Guidelines for management of breeding stocks".

Prior to distribution of Cattle in the field which are used for breeding purposes they shall be certified by an authorized veterinarian as to their fitness for breeding and freedom form diseases.

The Technical Department shall carry out "Breeding fitness assessment" regarding approval of breeding stock. Without prior approval of Technical Department no breeding stock shall be castrated.[92]

The act directs establishments to comply with relevant standards regarding hygienic production of products which are derived from livestock for food safety. An official belonging to Regulatory Authority is authorized to check these livestock products. The official is also empowered to collect sample from livestock product for physical or chemical analysis to check whether or not it meets with the standards for food and safety.

EUROPEAN UNION LEGISLATION ON CATTLE:

Over the last thirty seven years The European Union has recognised an extensive range of comprehensive statutory provisions regarding the well-being of farm animals. The European Union Laws has established definite welfare principles for farm animal's on-farm, throughout transportation as well as during the time of their slaughter and have also eliminated some of the most callous aspects of industrial cattle production.

European Union law on calves is specified in Council Directive 2008/119/EC laying down principles for the protection of calves. It defines the term "calf" as a bovine animal up to six

[91] http://www.sapplpp.org/files-repository/information-hub/BHGP04-PotentialGPNote.pdf/at_download/file (26/03/21) TIME :10 :59 PM

[92] http://www.bafra.gov.bt/wp-content/uploads/2015/06/Livestock-Rules-and-Regulations-of-Bhutan-2017.pdf (27/03/21) TIME :9 :00 AM

months old. The most significant aspect of the EU Calves Directive is that it disallows the veal crate system which is also considered as one of the most brutal methods of industrial livestock production. It states that no calf shall be restricted in a separate pen after attaining the age of eight weeks, except a veterinarian verifies that its behaviour or health requires it to be isolated. Separate pens for calves must not consist of concrete walls, but perforated walls through which the calves can have direct visual contact. The Calves Directive also ensures that the length and width of pen for a calf is big enough to enable him to turn around.[93]

Materials which are used in assembling the place for calf accommodation with which calve may come in direct contact must be harmless and must be capable of being exhaustively cleaned and disinfected.

Ventilation and heating of the building must confirm that the level of dust inside the building, air circulation, temperature, relative air humidity and gas concentrations are kept within adequate limits which are harmless to the calve.

Every mechanical or automated kit necessary for the calves' well-being must be examined at least once daily. Where faults are discovered, they must be resolved instantaneously or, if it is not possible, suitable steps must be taken to protect the safety and well-being of the calves until the shortcoming has been resolved.[94] Calves must not be kept back permanently in blackness. To comply with their interactive and physiological necessities, provision must be made, letting calves cultivate in different climatic conditions with suitable natural or artificial lighting.

LAWS IN RESPECT OF CATTLES IN INDIA:

There is no denying in the fact that India is a land of religious pluralism. Since primeval times. Hinduism, Islam, Buddhism, Christianity, Sikhism and quite a lot of other religions have been coexisting and prevailing side by a side in Indian civilisation. Religious diversity might be a characteristic of Indian communal structure but it also gives rise to several conflicts among people. While cows are considered to be sacred holy animal by many religious groups, others consider it as an acceptable source of meat[95]

[93] https://www.animallaw.info/article/european-union-legislation-welfare-farm-animals (27/03/21) TIME :9 :05 AM

[94] https://www.animallaw.info/article/european-union-legislation-welfare-farm-animals (27/03/21) TIME :9 :10 AM

[95] Robert j. Muckle, Laura Tubelle de Gonzale (2015). Through the lens of Anthropology page : 299-300

Out of twenty nine states twenty states have banned cow slaughtering and its meat. However cow meat is legally available in states like Meghalaya, Tripuram, Bengal, Kerala and Assam. At present there are different laws in each state relating to cattle slaughter.

As per article 48 of Indian Constitution the state shall make an effort to organize agriculture and animal husbandry on contemporary and scientific lines and shall in particular take measures for preserving improving the breed, and barring the slaughter, of calves and cows and other draught cattle.[96]

CONCLUSION:

So from above stated facts, it can be concluded that religions are basic institutions of every society consisting of different principles characteristics and features. One cannot deny the fact that ever since humans evolved diversity has been an eternal social condition. To maintain peace, harmony and unity among various religious group, it is duty to every individual to respect the religious sentiments of other. In Hinduism cow is considered as symbol of mother earth as it represents life and nourishment of life .From religious point of view permitting slaughtering of such animal in a nation where that animal is considered as equivalent to mother is completely wrong. Trying to establish principles of secularism in a diversified nation without understanding every aspect of every religion is an erroneous approach. When an animal holds a sacred significance in the cultural beliefs of a group then it should be duty of other religious groups others to avoid hurting their cultural beliefs.

[96] Universal's New Delhi-India The Constitution of India page no- 24 (27/03/21) Time : 9:30 Am

DISREGARDING SEPARATE ENTITY PRINCIPLE PROMULGATED IN SOLOMON'S CASE

- SRISTI NIMODIA

ABSTRACT

A 'company' is a 'separate legal entity' distinct from its 'shareholders', 'directors', 'promoters', etc. It is treated as a 'juristic person' conferred with its own 'rights' and further subject to 'duties and obligations'. Salomon's case was a landmark case which clearly stated the principle of 'separate legal entity'. After this case, the principle of 'separate legal entity' formed the fundamental part of corporate law. The main purpose behind the present paper is to study the trend of disregard of Salomon's principle in India and UK, and to determine the reasons for disregard. The paper further analyses the disregard rate by the 'reasons' for the disregard.

Keywords: 'Separate Legal Entity', 'Salomon's Principle', 'UK', 'India'.

INTRODUCTION

"A 'corporation' is an entity having authority under law to act as a single person distinct from the shareholders who owe it and having rights to issue stock and exist independently, a group of succession of persons established in accordance with legal rules into a 'legal or juristic person' that has legal personality distinct from the natural persons who make it up, exist independently apart from them, and has the 'legal powers' that its constitution gives it."[97]

"The principle that the company is a 'separate legal entity' distinct from the members, who compose it, was established by courts in the Salomon's case."[98]

Mr. Salomon, a sole trader, had a shoe manufacturing business. He incorporated his business into a company named 'Salomon v. Salomon & Co. Ltd.'. A company needs minimum of 7 members, so Mr. Salomon included his family members, his wife and 5 children. He himself took up 99.97% of the share and the remaining 0.029% was were divided among the rest. Later on, the company went through a major loss and the business collapsed. Mr. Salomon

[97] B.A. Garner, Black Laws Dictionary 276 (7th edn. St Paul, MINN, West Group Publishing, 2000).

[98] R Grantham and C Rickett (eds), Corporate Personality in the 20th Century, Hart Publishing, 68-9 (1998).

was one of the debenture holders in the company, thereby a secured creditor. When the company was being liquidated, Mr Salomon recovered his money. Thereby, creating unrest among the unsecured creditors, who were not entitled to any money. The amount paid to Mr Salomon was put in question. It was argued that, Mr Salomon could not be put ahead of the unsecured creditors. It was further argued that the company was an agent to Mr Salomon.

However, in the House of Lords it was ruled that, "the 'debts of the corporation' were not the 'debts of Mr. Salomon', because they were two 'separate legal entities'; and that once the 'artificial person' has been created, it must be treated like any other independent person with its rights and liabilities appropriate to itself."

"The 'company' is at law a different person altogether from the 'subscribers to the memorandum', and, though it may be that after 'incorporation' the business is precisely the same as it was before, and the 'same persons' are managers, and the 'same hands' receive the profits, the 'company' is not in 'law' the agent of the 'subscribers or trustee' for them."[99] he main purpose behind the concept of 'Separate Legal entity' is to encourage corporate enterprises by limiting the risk involved.

LITERATURE REVIEW

- **THE SALOMON PRINCIPLE: OF WHAT RELEVANCE IN TODAY'S BUSINESS WORLD? BY OLUWAFEMI A. OJOSU[100]**

In this article, the researcher has thoroughly examined the Salomon Case[101]. The 'history of the case' has been analysed, the 'decision by the jurist', the 'consequences', 'advantages' and 'disadvantages' of the decision on the 'business world'. After the process of incorporation is done, the company and the members are treated as separate entity and are distinct from one another. Throughout the years various cases have been decided on the basis of 'Solomon's case' and has acknowledged the concept of 'Separate Legal entity'. Through this article the researcher has examined, "How the concept of 'Separate Legal Entity' is relevant to in

[99] Salomon v. Salomon & Co. Ltd. [1897] A.C. 22, [1896] UKHL 1.

[100] OA Ojosu, The Salomon Principle: Of What Relevance in Today's Business World? Legal Aid Oyo: Journal of Legal Issues 1 (1), 102 – 111, 2017.

[101] Salomon v. Salomon & Co. Ltd. [1897] A.C. 22, [1896] UKHL 1.

today's business world". The Corporate business have gained enormous advantages because of the principles given in 'Salomon v. Salomon' ad such advantages undoubtedly outweighs the disadvantages faced by the business. The article has very well explained 'Separate Legal Entity' and the advantages and disadvantages of the same. The paper however, does not talk about the reasons for disregard of 'Salomon Principle' by the court. The following research, studies the reason of disregard through a case study of selected cases.

- **"THE EVOLUTION OF THE 'SEPARATE LEGAL PERSONALITY DOCTRINE' AND ITS EXCEPTIONS: A COMPARATIVE ANALYSIS: BY SNEHA MOHANTY AND VRINDA BHANDARI"[102]**

Through a comparative analysis between the laws of 'America', 'England' and 'India', the paper examines thoroughly the cases when the concept of company's legal personality was applied or ignored. The concept of 'Company's Legal Personality' permits the company to 'act on its own name rather than of its shareholders'. The article examines the issues arising because of 'company's legal personality', by recognising the reason for the emergence of such an issue, the 'legal right' violated and the 'remedy availed'. The theories by eminent jurist regarding the 'company's legal personality' has also been explored. The researched has further analysed the reasons which led to the emergence of the concept and has pointed out the need to impose 'just and reasonable' restrictions on the privileges that come along by separating the company and its shareholders. The article presents the cases where the Salomon's principle was regarded/disregarded in America, UK and India. The paper however, does not talk about the trend of such disregard. The following research studies the trend of disregard in UK and India on year-wise basis.

- **"'SALOMON V SALOMON & CO. LTD. [1897] AC 22' – ITS IMPACT ON MODERN LAWS ON CORPORATIONS – 'SELECTED STUDIES' FROM THE UK AND THE USA: BY RAJIB DAHAL"[103]**

[102] Mohanty, Sneha and Bhandari, Vrinda, The Evolution of the Separate Legal Personality Doctrine and Its Exceptions: A Comparative Analysis (2011). 32(7) Company Lawyer 194-205 (2011). https://ssrn.com/abstract=3371379

The study has dealt with the origin of the concept of 'Corporate personality' under the Salomon case. 'Corporate Personality' has been considered to be the most important and the fundamental principle of Corporate law both in UK and US. Several judicial decisions and pronouncements have been made on the basis of the ruling in the Salomon's case. Modern company law in UK and US is based on the concept of 'Corporate Personality'. However, in both the countries the court has very cautiously exercised the principle and in many cases has refused to apply the principle. The legal developments with respect to the Salomon case in the both the countries has been discussed widely in the paper and how the legal position in both the countries have undergone a change in order to synchronise with the modern business has been thoroughly discussed. The paper however, does not talk about the trend of such disregard in both the countries and also does not talk about the same in India. The following research studies the trend of disregard in UK and India on year-wise basis and also the reasons for such regard.

- **"DISREGARDING THE SALOMON PRINCIPLE: AN EMPIRICAL ANALYSIS, 1885–2014: BY ALAN DIGNAM AND PETER B OH"[104]**

The courts in UK has for a very long time debated on the principles laid down in the Salomon case. In the paper, Corporate cases from 1885 to 2014 have been examined. Over the years the concept of 'separate legal entity' has been disregarded in UK. The study has focused on the 'various aspects of corporate disregard that extend beyond the purview of any individual court or any single case'. The pattern of disregard of the principle by the Judiciary has been observed in the paper. The analysis further tracks, the nature of the company, issues raised, claim aroused, the court's ruling, the tier of the court and further the types of parties involved. The pattern of disregard has been studied by analysis the judicial ruling in a historical pattern. The paper, however is limited only to the UK cases. But the following paper takes into account even the cases in India.

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[103] Dahal, Rajib, Salomon v Salomon: Its Impact on Modern Laws on Corporations (April 26, 2018). https://ssrn.com/abstract=3169431

[104] Dignam, Alan & Oh, Peter B., Disregarding the Salomon Principle: An Empirical Analysis, 1885–2014, Oxford Journal of Legal Studies Volume 39, Issue 1, Pages 16-49 (2019).

RESEARCH OBJECTIVE

1. To understand the trend of disregard of Salomon's Principle in UK.
2. To understand the trend of disregard of Salomon's Principle in India.
3. To analyse the reason behind the disregard of Salomon's Principle.

RESEARCH METHODOLOGY

The study deals with the corporate cases in UK and India wherein Salomon's Principle was disregarded by the courts. All the landmark cases dealing with Separate Legal Entity has been studied and examined. In the database, combination of words such as 'disregarding'/'Separate Legal Entity'/'Salomon's Principle, have been used to make the search more precise. The searches brought up a number of cases, out of which the most relevant ones have been picked.

The first set of data was filtered in order to find the cases from UK. The cases were then examined and the ones after 1897 were listed. Then the most relevant cases were noted down. The final data comprised of 10 cases from UK courts. The facts, issues and the judgement of each case was studied. Then the cases were arranged year-wise. The decision by the court was further studied and the cases were divided into two categories, (1) On the basis of Salomon's Principle. (2) Against Salomon's Principle. Based on this, the timelines were created and the trend of disregard of Salomon's Principle in UK was observed.

Then for the second set of data, the cases from India were filtered. These were then examined and the ones starting from 1886 were noted. The irrelevant ones were left behind and a final data of 10 cases from Indian court was prepared. These cases were again analysed and arranged year wise starting 1886. The facts, issues, parties and the judgment of these cases were studied and the cases were then divided into two categories on the basis of regarding or disregarding the Salomon's Principle. After analysing the same, the timelines were created and the trend of disregard in India was observed.

For the third set of data, the landmark cases wherein Salomon's Principle was disregarded, were filtered out. The cases were from UK, Indian and US courts. Out of these cases, 15 cases were filtered based on their relevance and reference by the courts. These 15 cases have

considered to be landmark in Corporate world. Then these cases were analysed and the issue in each case was studied. The reason for the disregard in each case was further studied. The set of data were the ones most relevant for the research. Then the cases were divided on the basis of the 'reason' because of which Salomon's Principle was disregarded. And then the rate of disregarded due to the 'reasons/issues involved' were studied.

A total of 35 cases have been analysed to understand the disregard rate of Salomon's Principle. The trend of disregard both in UK and India has been analysed and the reason for such disregard has also been analysed.

The principle aim of the present research, is to understand the Solomon's principle, its relevance and development over time, and to understand the reasons behind its disregard. The cases studied, have completely been selected on the basis of its relevance to the research and in order to fulfil the aim of the research. The overall research involves a selected number of cases, which are mostly termed as 'landmark'.

RESEARCH AND ANALYSIS

This section represents the result from the data collection and the analysis of the same. First the trend of regarding and disregarding of the principle of 'Separate Legal Entity' in UK has been studied and analysed. Then the same approach has been used to study the trend in India. The later part deals with the analysis of the issues in the cases where the principle of 'Separate Legal Entity' has been disregarded.

'SOLOMON'S PRINCIPLE' – GENERAL OBSERVATION IN UK (1897-PRESENT)

Since the Salomon decision, the courts have often been called upon to apply the principle of separate legal entity in what might be called difficult situations.[105] The years after 1897 saw a series of trend in regarding and disregarding the said principle. The same has been put into three timelines, '1897-1966', '1966-1989', and '1989-present'.

[105] John Lowry & Alan Dignam, Company Law 34 (3rd ed. Nicola Padfield, 2006).

From 1897 to 1966, 'Salomon v Salomon' bound all court decisions.[106] Veil lifting was only permitted in 'exceptional circumstances', such as in wartime and to counter fraud.[107] The principle upheld clearly stated that "The 'company' is at law a different person altogether from the 'subscribers to the memorandum', and, though it may be that after 'incorporation' the business is precisely the 'same as it was before', and the same persons are managers, and the same hands receive the 'profits', the company is not in law the agent of the subscribers or trustee for them."[108] "Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company."[109] Further, "insurers were not liable under a contract of insurance on property that was insured by the shareholder but owned by a company in which the shareholder held all the fully-paid shares."[110] "The incorporated company is a separate and different entity under the law, although it is possible that the entire share should be controlled by one person, the company should be identified as a distinct personality."[111] "The shareholder, did not have any legal or beneficial interest in the property merely because of his shareholding."[112]

However, during 1960's, the court slowly started disregarding the Salomon principle. It was laid down that, "the doctrine laid down in 'Salomon v. Salomon and Salomon Co. Ltd', has to be watched very carefully. It has often been supposed to 'cast a veil' over the personality of a 'limited liability company' through which the Courts cannot see. But that is not 'true'. The Courts can and often do 'draw aside' the veil. They can and often do, 'pull off' the mask. They look to see what 'really lies behind'. The legislature has shown the way with 'group accounts' and the rest. And the courts follow suit"[113] "A group of company was in reality a single economic activity and should be treated as one."[114] Further it was laid down that "the

[106] A Dignam, Hicks & Goo's, Cases and Materials on Company Law 35 (7th ed. Oxford University Press, 2011).

[107] Ibid.

[108] Salomon v. Salomon & Co. Ltd., [1897] A.C. 22.

[109] Gas Lighting Improvement Co. Ltd. v. IRC, [1923] A.C. 723, 741.

[110] Macaura v. Northern Assurance Co. Ltd., [1925] A.C. 619.

[111] T.R. Pratt (Bombay) Ltd. vs E.D. Sassoon And Co. Ltd. And Anr. AIR 1936 Bom 62.

[112] Lee v. Lee's Air Farming, [1961] A.C. 12.

[113] Littlewoods Mail Order Stores Ltd. v. IRC, [1969] 1 W.L.R. 1241, 1254.

[114] DHN Food Ltd v Tower Hamlets LBC, [1976] 1 WLR 852.

court will use its power to 'pierce the corporate veil' if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration."[115] "The 'corporate veil can be pierced if it is a sham agreement concealing true facts."[116]

Again 1989 onwards, the courts started regarding the Salomon Principle again. The conditions during which the Principle can be disregarded was laid down. "The Corporate veil could be lifted only if (i) the court in interpreting a 'statute or document' and the statute itself is ambiguous, which would allow the court to treat a group as an entity, (ii) a special circumstance indicate that it is a 'mere facade concealing the true facts', the court may lift the veil, (iii) In relation to principle and agency."[117] Finally, the courts returned to a 'more orthodox approach'. Hence the principle laid down in Salomon Case started to be regarded again.

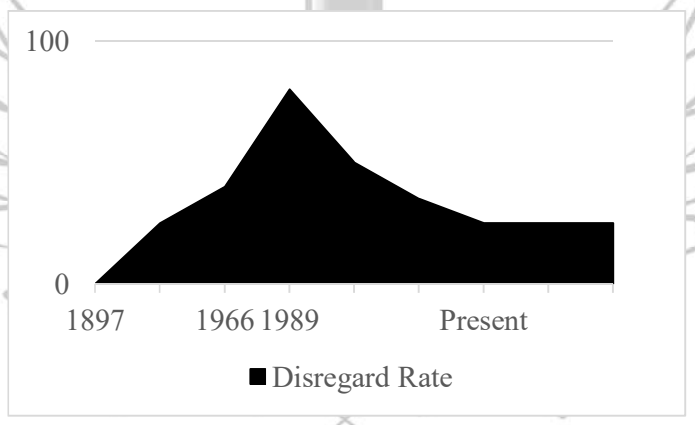

Figure 1

Figure 1 shows the disregard rate of Salomon Principle in UK from 1897- Present. After the Salomon's case the principle of 'Separate Legal Entity' was upheld by the court. However, during the same period due to war and fraud, the principle was being disregarded in few cases. Later on, in the 1960's the principle was highly disregarded by the court. But later on, in 1989 after the Adams case, the conditions during which the principle could be disregarded was laid down. And the courts started upholding the principle again. Today, the principle of 'Separate Legal Entity' is regarded as the fundamental unit of Corporate Law in UK.

[115] Re A. Company, (1986) 2 BCC. 98,951.

[116] National Dock Labour Board v Pinn & Wheeler Ltd, [1989] BCLC 647.

[117] Adams v Cape Industries Plc, [1990] Ch 433.

'SOLOMON'S PRINCIPLE' – GENERAL OBSERVATION IN INDIA (1886-PRESENT)

India, being a colonial country, derives its law from the English Law. Even in India, Salomon's principle is considered to be the fundamental part of Company Law. Much before the Salomon's case, the principle of 'Separate Legal Entity' was upheld by the court in India. "The company is a 'separate legal entity' and the property transferred to the name of the company should be treated as transferred."[118] In 1897, this principle was held in the well-known Salomon's case.

Even after independence the principle was upheld by the courts. It was laid down that, "The corporation in law is equal to 'natural person' and has a legal entity of its own. The entity of 'corporation' is entirely separate from that of its 'shareholders'; it bears its own 'names' and has 'seal' of its own; its assets are 'separate and distinct' from those of its members, the 'liability of the members of the shareholders' is limited to the capital invested by them, similarly, the 'creditors of the members' have no right to the assets of the corporation."[119]

However, in the later years, after the Bhopal Gas Tragedy, the principle began to be highly disregarded in India. The court noted that "although a company is a 'separate legal entity' distinct from that of its members, the 'corporate veil' may be lifted and the corporate personality may be ignored. The 'individual persons' are to be recognized for who they are in exceptional circumstances. It may be lifted where the 'statute' itself contemplates it or in other circumstances such as 'evasion of tax, fraud, improper conduct' and the like."[120] "In the expanding horizon of 'modern jurisprudence', lifting of 'corporate veil' is permissible, its frontiers are 'unlimited' and it primarily depends on the facts and circumstances of each situation."[121] "it was just after the 'corporate body mask' was stripped, the 'adjudicating authority' can decide which of the 'directors' is concerned with escaping the 'excise duty' on the grounds of 'bribery, conspiracy or intentional misrepresentation' or omission of evidence,

[118] The Kondoli Tea Co. Ld., (1886) ILR 13 Cal 43.

[119] Tata Engineering Locomotive Co. Ltd. v. State of Bihar and others, 1965 AIR 40.

[120] Life Insurance Corporation of India v. Escorts Ltd., 1986 AIR 1370.

[121] State of U.P. v. Renusagar Power Co.,1988 AIR 1737.

or breach of the evidence."[122] "Corporate veil maybe ignored if representatives of the company commit contempt of the Court so punishment can be inflicted upon."[123] Further it was laid out that, "where a subsidiary is wholly owned by the principal company which has a pervasive control over it and the former acts as the hand and voice of the latter, the subsidiary would be nothing but an instrumentality of the principal company and wherever public interest demands the court must lift the corporate veil in the interest of justice."[124] "The fact that the 'directors and family members' had formed a vast number of 'corporate bodies' did not dissuade the court from considering all of them as 'one body' owned and operated by the 'director and his family' because it was found that these corporate bodies were 'pure cloaks' and there was the only person in charge of them."[125] " 'Corporate Veil' can be lifted in the cases of not merely of a 'holding company', but also its 'subsidiary' when both are family companies."[126] "The court would ignore the 'corporate character' and will look at the reality 'behind the corporate veil' so as to enable it to pass appropriate orders to do justice between the parties concerned."[127]

Later on, in 2013, the provisions to lift corporate veil was put forth in the Companies Act, 2013. Besides 'Companies Act, 2013', certain provisions of 'Income-Tax Act and Foreign Exchange Regulation Act, 1973' also enables the 'lifting of corporate veil'.

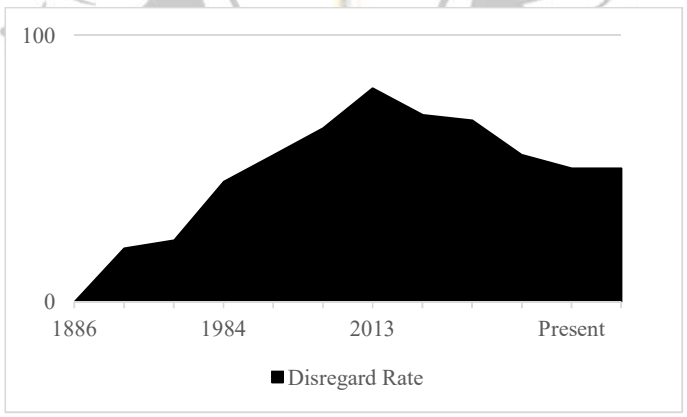

Figure 2

[122] Santanu Ray v. UOI, (1989) 65 Comp Cas 196 Delhi.

[123] Jyoti Limited v. Kanwaljit Kaur Bhasin & Anr, 1987 62 CompCas 626 Delhi.

[124] U.K. Mehra v. Union of India, AIR 1994 Del 25.

[125] Delhi Development Authority v. Skipper Construction Co. (P.) Ltd., AIR 1996 SC 2005.

[126] Bajrang Prasad Jalan And Ors. V. Mahabir Prasad Jalan And Ors., AIR 1999 Cal 156.

[127] Singer India Limited v. Chander Mohan Chadha & Ors, 2004 (7) SCC 1.

Figure 2 shows the disregard rate of Salomon Principle in India from 1886- Present. Much before the Salomon's case the principle of 'Separate Legal Entity' was upheld by the court and even after independence it continued to be a fundamental part of Company Law in India. However, after the Bhopal Gas Tragedy in the 1960's the principle began highly disregarded by the court. Later on, the grounds for disregard of the principle was laid out in The Companies Act, 2013. Today the major challenge faced is in Corporate world is the thrive to maintain a balance between 'the interest of the public and the concept of a separate personality.'

DISREGARDING SOLOMON'S PRINCIPLE – REASONS

As seen above, Salomon' case has been highly disregarded by various courts in both UK and India. "It is impossible to ascertain the 'factors' which operate to break down the 'corporate insulation'."[128] "The matter is largely in the 'discretion of the courts' and will depend upon "the underlying 'social, economic and moral factors' as they operate in and through the corporation."[129] "It can be said that adherence to the Solomon principle will not be doggedly followed where this would cause an unjust result."[130]

A total of 15 cases, which have been considered to landmark cases in Corporate law, has been analysed. And the reason for disregarding the 'Separate Legal Identity' in each case has been studied. The study clearly shows that the main reason for disregarding the principle is public welfare.

The principle has been disregarded in cases where there occurs "misuse of the corporate structure to evade taxes."[131]

In "cases of 'criminal acts of fraud' by officers of a company"[132] or where "dispute arose out of a fraudulently obtained loan"[133] the court has ruled against the 'Salomon's Principle'.

[128] Warner Fuller, The Incorporated Individual: A Study of One-man Company, Harv LR 1373, 1377 (1938).

[129] Tata Engineering Locomotive Co v. State of Bihar, AIR 1965 SC 40.

[130] Odyssey (London) Ltd. v. OIC Run Off Ltd., (2000) TLR 201 CA.

[131] Vodafone International Holdings v. Union of India, (2012) 6 SCC 613.

[132] Shri Ambica Mills Ltd., Re., 1986 59 CompCas 368 Guj.

[133] VTB Capital v. Nutritek, [2013] 2 AC 337.

"To look into the 'economic realities' behind the legal facade"[134] or "to know the real parties of transaction behind the facade of separate entity of the company"[135] or "to see the 'real men behind the veil' who are involved in defrauding others by 'corrupt and illegal means' in deliberate defiance of Court's order"[136] the principle has been evoked.

The court has also pierced the principle in cases where it has held "the parent company liable for the conduct of its subsidiary"[137]

"In cases where the principle of corporate personality is flagrantly opposed to justice, convenience, or in the interest of revenue"[138], "in the interest of 'justice', to prevent the 'corporate entity' from being used as an instrument of 'fraud', and the fundamental principle of corporate personality"[139] or "when the object of an 'entity's establishment or life' is to circumvent 'welfare laws' "[140] then the 'corporate curtain' has been raised by the courts.

The court has also ruled "that it was necessary to lift the corporate curtain to punish for Court contempt."[141]

It has also been observed that "the courts find it difficult to go behind the 'corporate entity' of a company to determine whether it is really 'independent' or is being used as an 'agent or trustee'. If a 'parent' company and a 'subsidiary' company are distinct legal entities under the ordinary 'rules of law' and in the absence of an agency contract between the 'two companies' one cannot be said to be the 'agent' of the other. If 'one company' is held liable as a principal for the acts of 'another company', the relationship of agency should be substantially established."[142] The principle has been disregarded "even solely on the equitable considerations, when faced with situations of mass disaster and assets of the subsidiary being grossly deficient to satisfy the just claims of the victims."[143]

[134] Commissioner of Income Tax v. Sri Meenakshi Mills Ltd., Madurai, 1967 AIR 819.

[135] Subhra Mukherjee & Another v. M/s. Bharat Coking Coal Ltd. (BCCL) & others, AIR 2000 SC 1203.

[136] Delhi Development Authority v. Skipper Construction Co. (P.) Ltd., AIR 1996 SC 2005.

[137] United States v. Best foods, 524 U.S. 51 (1998).

[138] New Horizons Ltd. v. Union of India,1995 (1) SCC 478.

[139] P.N.B. Finance Ltd. v. Shital Prasad Jain, (1983) 53 Comp. Cas.66.

[140] Workmen Working in Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd, AIR 1986 SC 1.

[141] Jyoti Ltd. v. Kanwaljit Kaur Bhasin, 1987 62 Comp. Cas. 626 Delhi.

[142] Smith Stone & Knight Ltd. v. Birmingham Corporation, [1939] 4 All ER 116.

[143] Bhopal Case, 1990 AIR 273.

"Citizenship is available to 'individuals or natural persons' only and not to juristic persons."[144] "Since the 'legal personality of a company' is altogether different from that of its 'members and shareholders', it cannot claim protection of fundamental rights although all its members are Indian citizens."[145]

Figure 3

Figure 3 shows the main issues for disregard of Salomon's Principle. Out of the 15 cases studied it has been found that in Majority of the cases, the principle has been disregarded in order to protect the Fundamental Rights of the citizens and for public welfare. In 52.94% of the cases, the courts have ruled, disregarding the Salomon's principle when it involves either, acts such as fraud, tax evasion, contempt of court r in order to protect the fundamental rights of the citizen. The court has further disregarded the principle in almost 35.29% of the cases studied, in order to find the real offender or in case of a subsidiary company existing. In almost 11.76% of the cases, the court the held that the "company is not a citizen, therefore has no fundamental rights" and ruled against the Salomon's principle.

In terms of the overall observation, it can be said that 'Salomon's principle' has been disregarded again and again by the courts. To ensure justice to the people, the principle of separate legal entity has been lifted. The courts in India has ensured the same through the

[144] State Trading Corporation of India v. Commercial Tax Office ,1963 AIR 1811.

[145] Tata Engineering Company v. State of Bihar, AIR 1965 SC 40.

provisions of 'The Companies Act, 2013', 'The Income Tax Act, 1961' and 'Foreign Exchange Regulation Act, 1973'.

SUGGESTIONS AND CONCLUSION

For over 120 years Salomon's principle has been the fundamental part of Corporate law. It has shaped the present company laws in both India and UK. The main reason behind the principle being preferred is to increase corporate business and to limit the amount to risk involved in business. The ultimate aim behind the principle is to boost the economy. But over the years, undue advantage has been taken because of the principle. The shareholders started committing fraud in the name of the company. Because of such reason, the court started disregarding Salomon's Principle. The principle main behind such a disregard is public welfare. But again, complete lifting of corporate veil will create unrest among businessman and will increase risk. Thereby leading to lesser investments. Such a scenario will affect the overall development of a nation. But again, following the principle blindly will be unfair to the public. Therefore, a mid way needs to be found. Wherein the principle is disregarded under exceptional cases, as rightly laid down under Companies Act 2013 and other provisions.

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PATENTS IN THE FIELD OF OUTER SPACE - INTERNATIONAL INTELLECTUAL PROPERTY LAW CONCERN

- S. MOHAN RAJ

ABSTRACT:

The potential for private technological expansion into space raises questions of how to protect intellectual property rights of inventions that are both brought into space and made in space. While there are international treaties governing space law, none of these treaties discuss how to designate or enforce patent rights in space. The International Space Station has implemented a solution of quasi-territoriality to establish patent rights. This proposal suggests, however, that this solution will be deficient when private entities venture further into space exploration. Moreover it explores the possibility of a universal approach to patent law in space through two proposed solutions for the creation and enforcement of a universal space patent law, arguing that the best approach may be a combination of the two solutions.

INTRODUCTION

As the International Space Station nears completion, the issue of patentability of space-related inventions is becoming increasingly important.[1] Although the final frontier is still out of reach for most individuals and corporations, technological progress is bringing the mystery of space ever closer.[2] Companies like SpaceX are developing private technology to send to space. Technological growth, however, is not sustainable on its own; such technological progress requires the law to progress in kind. In particular, laws surrounding intellectual property (IP) in space are necessary to promote private businesses to continue to develop technologies for, and in, space.[3]

SIGNIFICANCE OF THE STUDY

My research will project the current gaps in space law as it pertains to patents. It then analyses several proposed solutions, which attempt to solve the current problems in space patent law through changes in both statutes and policy. I assure that my research will

concludes and provides the best solution so as to create a unified patent jurisdiction under the governance of the World Intellectual Property Organization (WIPO)

WHAT IS SPACE LAW?

Space law can be described as the body of law governing space-related activities.[146]Space law is based upon a series of international treaties, agreements, and UN resolutions governing the use and exploration of outer space. The treaties work to prevent the militarization of space; prohibit claims of sovereignty over celestial objects, and outline the liabilities of space-faring entities for damages to the surface of the Earth as well as to other objects in outer space.[147] **Whereas current international space law treaties do not, however, consider intellectual property rights in space.**

Current International Space Law Illustrates

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space ("Outer Space Treaty") enumerates in broad terms the rights and limitations pertaining to exploration and real property in space. One of the most important results of this convention is allowing for free exploration and use of space including a non-appropriation clause to ensure that all nations are able to have the same access to space resources. Subsequent international treaties on space law include the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, which describes procedures for the rescue of astronauts and the return of space objects to the launching state. Five years later, the Convention on International Liability for Damage Caused by Space Objects ("Liability Convention") proposed solutions to allocate responsibility and demand compensation when a country's property was damaged in space. In particular, the treaty assigns liability to the launching state for damage in space based on fault and absolute liability for damage on the Earth.

Finally, five United Nations General Assembly resolutions address space law, but none of the resolutions consider IP rights in space. Private agreements have attempted to address

isolated cases, such as the use of the International Space Station (ISS) or satellites, but these agreements do not extend into general terms. Overall, international authorities have not expanded international IP laws to address conflicts that would arise in space, nor have they modified space law on an international scale since1980.

United States Patent Law in Space

In the United States, there has been limited progress developing patent law in space. The only space patent law in the United States is the Patents in Space Act. The Patents in Space Act extends United States patent law to apply to inventions created on space objects registered with the United States.[148] Enacted the act in 1990 to encourage private investment in space projects and to extend extra-terrestrial protections to United States-owned spacecraft.[149]The act does not, however, discuss international enforcement, and, presumably, it applies exclusively to domestic disputes. With such a narrow scope and in the absence of pertinent case law, the determination of whether this act will provide any real benefit remains open.

NEED FOR MORE RESEARCH

Terrestrial International Patent Law

There is substantial international law relating to various forms of IP, and to patents in particular. WIPO first convened in 1967 to govern general international IP laws and enforcement and define evolving IP rights. Additionally, the Patent Cooperation Treaty added to the body of international literature on patent law by creating an international patent that would provide protection in all of the signing states. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also established international guidelines for patent enforcement. TRIPS applies the "most-favoured nation treatment," which is a non-discrimination clause based on the country in which a patent was created. Although none of these treaties directly apply to space, the TRIPS non- discrimination clause may extend to

148 The USA Patent Act (re. 35 U.S.C. § 105(2003)) states that any invention made, used or sold in outer space on board a spacecraft that is under the jurisdiction or control of the USA is considered to be made, used or sold on US territory, except where an international agreement has been concluded that states otherwise.

149 See A brief history of patent of law in united States, Mathew Asbell, https://ladas.com/education-center/a-briefhistory-of-the-patent-law-of-the-united-states-2/

space by requiring that national space patent laws uphold the non-discrimination clause for space patents.[150]

DEFINING "PATENT LAW IN SPACE"

Clarifying law in space would allow for invention and exploration to increase by protecting the rights of inventors and creating incentives to continue their work. Because of the significant financial investment required to break into the market, inventors need to know their legal rights in space. In particular, establishing space patent jurisdiction, liability, and duty to enforce would provide certainty and encourage exploration. Establishing patent law in space would prevent space companies from gaining an advantage simply based on their country of registration

Inventions Developed in Space

The possibility of private companies venturing into space exploration opens an opportunity to develop patentable inventions in laboratories on spaceships. The current standard for determining jurisdiction over a patent, however, is through the country of registration of the space object on which the invention is developed. Thus, for an invention developed in space, successful patent enforcement currently requires obtaining a patent for the invention in every country that has the ability to send an object into space. Otherwise, a company could infringe on the patent with no repercussions simply by registering its space object in a country in which the invention has not been patented. The country of registration method also requires each country to have a comprehensive set of space patent protections. Moreover if a country does not explicitly extend its patent law to space, the applicability of its patent law to space remains doubtful. Moreover, differences in patent law between countries can lead to gaps in enforcement.[151]

Private agreements may attempt to resolve the issue of patent rights through their own methods. The primary example is the Intergovernmental Agreement (IGA), which governs

150 See Agreement on trade – related aspects of intellectual property rights, Article 7,Most – favoured nation treatment.

151 See Intellectual Property and Space Activities, https://www.wipo.int › bispace

the use of the ISS, including allocating patent rights.[152] On the ISS, patent rights are governed using quasi-territoriality, where a country's jurisdiction extends over all activities performed on its registered portion of the ISS. This approach is not, however, binding on any countries that are not part of the IGA, thereby allowing those countries to encroach on patent rights, which were originally obtained on the ISS, on their own space objects.[153]

Inventions Brought to Space

As with inventions developed in space, patent protections for inventions brought into space remain uncertain.[154] Because there is no international space patent law, it is not clear whether inventions patented on Earth and brought into space will be protected against international infringement. Further, current international patent law does not extend protection to patented inventions in space. In the absence of a defined patent law in space, companies considering venturing into space face high levels of uncertainty about their rights and protections.[155]

EMERGING QUESTIONS WITH REGARD TO SPACE PATENT

The question then logically arises: how does one stop someone using their invention in space? Is it possible to obtain a 'space patent'? While it is not possible to get a 'space patent', properly drafted patents can provide protection for inventions that are to be used in space.[156]

The question arises as to whether the territorial jurisdiction under intellectual property law permits the extension of each national (or regional) law to the objects which the respective country has registered and launched into outer space

While recognizing the importance of intellectual property for the exploration of outer space and the further development of science and technology, questions have been raised as to whether the protection and enforcement of intellectual property rights may

152 For example, in Russian patent law, a licensee has a right by law to sublicense and a licensing contract cannot stipulate otherwise, whereas in United States law, sublicensing is a right that must be granted by the licensing contract.

153 IGA defines legal rights and obligations for the operation of the International Space Station).

154 Uncertain in "Intellectual property and space activities"

155 See Space. The final frontier for patents? https://www.barkerbrettell.co.uk/space-the-final-frontier-for-patents/

156 See Patenting Inventions In Space, Advanced Engineering, https://www.reddie.co.uk/category/ip-news/

conflict with the said fundamental principles in terms of access to knowledge and information derived from space activities and in terms of the freedom of exploration and use of outer space.

Another issue relates to the interpretation of Article 5ter of the Paris Convention for the Protection of Industrial Property, which provides for certain limitations of the exclusive rights conferred by a patent in the public interest in order to guarantee the freedom of transport (doctrine of temporary presence). The question is then whether the doctrine of temporary presence also applies to space objects, for example, in the case of the transport of patented articles to or from a Space Station through a launching site in a foreign country.[157]

PROPOSED SOLUTIONS TO THE QUESTIONS

The quasi-territoriality approach of the IGA will be insufficient when more private companies venture into space because it will allow companies to strategically register their space objects to circumvent patent protections, thereby reducing incentives to develop innovative space technology. Both the diversity of national patent law and the opportunity for companies to infringe on patents without any repercussions necessitate a clear method for granting and enforcing space patents. One solution is to create an international method for governing patents in space, thus eliminating quasi-territoriality. Two ways to establish a unified method for granting and enforcing patents in space are, first, to establish a universal space territory that would include a space patent jurisdiction, and, second, to create a universal space patent that would be governed by a United Nations subcommittee.

Establishing a Universal Patent Law

WIPO proposes a universal patent law and a corresponding space patent jurisdiction. This method would establish space as its own territory for the purpose of patent rights with a separate jurisdiction to create and enforce patents. Inventors would file one patent application that would be universally enforceable and protectable throughout space.

157 See patent expert issues, Inventions in space, https://www.wipo.int/patents/en/topics/outer_space.html

Although WIPO has not yet identified a governing body for this system, the primary advantage is that this system provides greater protections to inventors by creating uniform rules and closing the loophole that allows companies to infringe on patents simply by virtue of their country of registration. Furthermore, a uniform system simplifies and clarifies the patenting process by requiring inventors to file only one patent application, instead of a separate application for each country in which they want to enforce their rights. A significant obstacle to the creation of a space patent jurisdiction, however, is the traditional unwillingness of countries to part with their sovereignty in order to give power to an international governing organization.

A Governing Body for Patents in Space

A second proposed solution calls for a new subdivision of the United Nations Committee on Peaceful Uses of Outer Space (COPUOS).This solution proposes a Subcommittee on Patents in Outer Space responsible for granting and enforcing space patents. The subcommittee would have authorization to define the scope of space patents and methods to handle infringement claims. This solution also proposes a universal jurisdiction for patent enforcement, but it goes a step further than WIPO's proposal to outline an actual possibility for implementation and suggests a governing body.

One advantage of this proposal is that COPUOS has extensive experience in space law and will likely be an appropriate governing body for space patents. Much like the WIPO solution, this solution would also allow for the standardization and regulation of patent law in space. This could clarify and improve the patent application process, thus enabling exploration and international collaboration. Although this solution would be extensive, the feasibility of implementing it remains low. Some countries may not want to give up their space patent rights or may not want to allocate them to a United Nations committee.

CONCLUSION

The current status of international space law lacks patent protections in space. One proposed solution, from WIPO, is creating a single patent application and jurisdiction that a governing organization will enforce universally for all patents in space. A second proposal goes further by proposing to create a new subcommittee within the United Nations COPUOS that would

regulate and enforce patent protections in space. Both of these proposals reject the division of patents in space by territory, as is currently the rule on the ISS. Instead, the best approach is to take the notion of a space territory from the WIPO proposal and combine it with the detailed description of the implementation of a space patent from the COPUOS proposal.

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https://www.wipo.int/export/sites/www/patentlaw/en/developments/pdf/inventions_space.pdf

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A STUDY ON CORPORATE CRIMINAL LIABILITY

-ARTI ANEJA

INTRODUCTION

There are large scale corporate bodies in every part of the globe. Corporations are the main source of revenue in a globalised world. Generally, it is said that crimes are committed by only human beings, but the exception to this is Corporate bodies. This paper shall deal with whether corporate bodies are capable of committing crimes and whether such body is liable for the crimes that it commits. The previous notion used to be that corporations are not liable for the crimes that is committed. This was based on "intent" and a corporate body does not have a mind of its own. The Directors and the Authorities are the once who were held liable. The current criminal equity framework isn't adequate to manage these circumstances. There is need to characterize the criminality of corporations and set down penal assents. This examination paper has been taken as an exertion to contemplate the standards of corporate criminal liability and their penal angles.

INSIGHT INTO CORPORATE CRIMINAL LIABLITY

From the years together, the inquiry has emerged for the need of principle of corporate criminal liability. There is no general answer to this question. This is to be decided for each situation and afterward a choice must be taken with respect to the "liability of corporations". Pundits to this idea contend that the precept of corporate criminal liability is totally superfluous on the accompanying two grounds:

First and foremost, they contend that it isn't the corporations that carry out crimes, the people do. Furthermore, that the retributive impact is borne by the shareholders and consumers. It implies that the expense of corporate criminal fines and authorizes is borne by "the shareholders" and "the consumers" for the "acts of corporations". In criminal law, corporate liability decides the degree to which a corporate as a legal individual can be responsible for the acts and exclusions of the characteristic individual it utilizes. It is viewed as a part of "criminal vicarious liability".

TESTS TO DETERMINE CORPORATE CRIMINAL LIABLITY

1. "IDENTIFICATION TEST"

In the case of "Tesco Supermarkets Ltd. V. Nattrass", it was stated: : "The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company."

Also called "Alter Ego Test", :Directing Mind" and "Will Theory", this is generally used in the courts in England to determine the criminal liability of the companies.

2. AGGREGATION TEST

There might be situations where a "corporate wrong" might be the aftereffect of a mix of blameworthy psyche of numerous people. By totaling the acts of at least two people, the "actus reus and mens rea" can be removed from the lead and information on a few people.

3. RESPONDEAT SUPERIOR TEST

The courts have given different motivations to legitimize company's liability for the acts of specialists. A company can be expected to take responsibility for the acts of it's agents

a) perpetrate a wrongdoing

b) inside the extent of business

c) with the intent to profit the company.

IMPORTANT JUDICIAL PRONOUNCEMENT IN INDIA

On account of "Assistant Commissioner v. Velliappa Textiles Ltd[158]", it was held by a greater part choice that a organization can not be indicted for offenses which require inconvenience of an obligatory term of detainment combined with fine. Where the discipline gave is both detainment and fine, the court can not just force fine.

This trouble was seen by the Law Commission of India and in it's 41st report the Law Commission of India proposed a change to "Section 62 of Indian Penal Code" by adding the accompanying lines:

"In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an

[158] Appeal (crl.) 142 of 1994

association of individuals, it shall be competent to the court to sentence such offender to fine only."

The Supreme court in "Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.[159]" made the situation perfectly clear. It had overruled the past sees with respect to the tenet of "corporate criminal liability". The court held that there is no sweeping resistance for any company from the indictment of offenses on the grounds that the arraignment requests an obligatory detainment. The zenith court concluded that in instances of offenses which command both detainment and fine, the corporations ought to be rebuffed with a fine.

In the event of "Iridium India Telecom Ltd v. Motorola Incorporated Co.[160]", the peak court stressed: "… a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so tense that a corporation may be said to think and act through the person or the body of persons."

CONCLUSION

The issue of criminal liability of corporations for corporate acts has been dubious in nature. Legal position of "corporate criminal liability" has developed throughout the long term is as yet advancing and with time the courts in India have attempted severe methodology in deciding liability of a corporate body for the planned acts submitted by its chiefs, people utilized and different specialists. The Indian Courts have consistently attempted to Decide the psyche (controlling and coordinating) of the corporations and this standard is utilized in different cases and resolutions while recognizing the "criminal liability of these corporations". The Indian Legislature should make a few strides as new penal endorses in order to control the criminal acts of the corporations in the country.

[159] Appeal (Civil) 1748 of 1999
[160] CRIMINAL APPEAL NO.688 OF 2005

FEMINIST JURISPRUDENCE

-MARK TRIPATHI

ABSTRACT:

As India approaches the 75th anniversary of her Independence, commemorating her liberation from the yoke of oppression of the British rule in 1947, as well as the resolve of India to stride forward as a nation, progress as a society, and come together as a Democratic Republic, with a will to be governed in accordance with the rule of law, it must be remembered with great pride that the Constitution has withstood the test of time, which, in turn, is a reflection of the will of the people. However, the test has not been easy. The laws have, time and again, been manipulated to subvert the tenet of justice. While the rule of law has stood tall and justice has triumphed over attempts after attempts to defile what it has always sought to defend, it may be argued that at times, even the legal structures, as is the case with all social structures, may not resound the commitment to equality that is a must for attaining a society cherished by all. In this article, the author hopes to portray the meaning and consequently, the important role that feminist jurisprudence has to play in our society, if we are to stay true to our goal of bringing about equality and further the cause of social justice.

A. INTRODUCTION

Against the backdrop of increased calls for women empowerment and in the wake of the rise of the feminist movement, we, as a society, are left to ponder upon a plethora of questions. Those questions may not be easy to answer, but their impact on the society is of vast proportions, and therefore, of immense importance to explore. Some questions revolve around the history of the social structures and how they have come to be what they are today. We could ask ourselves if these very social structures were rooted in inequality since their inception, or why they were allowed to be propagated as long as they did, or how long before it is dismantled. However, it would be most pertinent to examine an arguably plausible solution to the patriarchal setup to which we are all subjects within the domain of law and jurisprudence. To begin with, let us consider the following question:

What is Feminist Jurisprudence?

Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality of sexes.[161] It has touched upon various conversations and debates regarding gender equality and inequality, gender discrimination, violence based on gender, among other things. It deals with a multitude of domains pertaining to employment, domestic violence, harassment, reproductive rights, marriage and divorce, etc.

A prevalent belief in the feminist movement is that women have been historically and traditionally oppressed by men, which became entrenched in the social structure and kept passing on through generations. This influenced the historical narrative to represent the perspective of the dominant males, while relegating women to mainly inconsequential roles in the narrative.

Feminism has a theory of power: sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. This is the social meaning of sex and the distinctively feminist account of gender inequality.[162]

What must be taken into account here is that progressively, distinctions have been made between 'sex' and 'gender'. Feminists believe that sex has more to do with biological designs and features, whereas gender is a social construct. Throughout history, the notion of 'gender' managed to take root in the society. By defining male characteristics as the norm and female characteristics as the deviation, thus reinforcing and perpetuating patriarchal power.[163]

The area of feminist jurisprudence deals with the following[164]:

- Analysis of legal doctrines, processes and rules with respect to the experiences of women.
- Analysis of underlying assumptions of law in male, female and ostensibly gender-neutral distinctions.
- Analysis of denials, distortions and mismatches created by the difference between the existing legal structure and women's experiences.

[161] Feminist Jurisprudence: An Overview, *available at:* https://www.law.cornell.edu/wex/feminist_jurisprudence#:~:text=Feminist%20jurisprudence%20is%20a%20philosophy,feminist%20jurisprudence%20began%20in%201960s. (Visited on: April 4, 2021)

[162] Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, *available at:* https://www.jstor.org/stable/3173687 (Visited on: April 5, 2021)

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[164] *Supra note 3*

- Patriarchal interests served by the mismatch.
- Reforms of law required to tackle these problems.

So, while the feminist goal is committed to bringing about equality in the society by bringing about parity between men, women and various other genders and changing the social narrative in favour of unity and equality, while preserving diversity, there are three major schools of thought in the area of feminist jurisprudence.[165]

THREE SCHOOLS OF FEMINIST JURISPRUDENCE:

1. **Liberal Feminism:**

This school of thought operates on the belief that women are no less rational than men and therefore, should be allowed by right to make their own independent choices and live life on their own terms. Their perspective is that the sex-based distinctions made by the society have no merit or rationale, and therefore, ought not to exist.

The feminists of this school of thought argue for law to not look at gender, for distinctions on the basis of gender defeat the purpose of justice and allow unjust and fallacious logic to prevail and keep women subservient to men whereas it is not warranted. This flows from the chain of reasoning which believes that women, by nature, are not less capable by men.

This school of thought strives for equality between sexes through various reforms, be it political, social or legal. It strives for equal opportunities for all.

2. **Cultural Feminism:**

This school of thought, while acknowledging and celebrating the differences between men and women, strives to shed light on women's values and their specific role in the society, such as institution building and advocate their independence.

The focus of this form of feminism is not to seek inclusion in the patriarchal society, but to reinforce female values while emphasizing on them with reference to their difference from men.

3. **Radical Feminism:**

[165] Growth of feminist jurisprudence in India, *available at:* https://blog.ipleaders.in/growth-feminist-jurisprudence-india/ (Visited on: April 5, 2021)

This school of thought stresses on the idea that the society is fundamentally a patriarchy which is designed by men to subjugate women and non-dominant men, whom they consider as deviants or 'the other' by utilizing social structures in their favour, thus, benefitting from this oppression.

Radical feminists believe that patriarchy must be done away with if equality for all is to be brought about. There must be an alteration of the social structure so as to shift the narrative towards equality and to shift the concentration of social power from men to all. This can be done by opposing sexual objectification of women, vociferously spreading awareness about women's issues, calling for legal reforms and clamping down on crimes directed towards women such as sexual violence, rape, etc. This, in effect, would go a long way in challenging prevalent gender notions and in turn, would spread awareness regarding the fallacy of patriarchy.

B. FEMINIST JURISPRUDENCE IN INDIA

At the outset, it would be pertinent to note that laws do exist which provide for the safety and security of women and aim to hold them no less than men. Article 14 and Article 15 of Constitution of India, 1949, (hereinafter referred to as 'the Constitution') read with Article 12 of the same reflects the thinking of our constitution-makers and further prevent women against gender discrimination. Within the Article 15, clause 3 enables the state to make any special provision for women and children so that the concept of equal protection of law remains stable in the cases where same treatment would have received but was infringed.[166]

Article 39(a) and Article 39(d) of the Directive Principles of State Policy further the case of gender equality. The former provides for equal rights to men and women to have an adequate means of livelihood whereas the latter supports equal pay for equal work for both men and women.[167]

In mentioning this, we keep in mind the tenets of a democracy, where equal opportunities are provided to all in making decisions and deciding their sovereign. We must recognize the fact that women are free and independent citizens and must treat them accordingly, if we are to construe ourselves as a democratic society and uphold that way of life.

[166] Feminist Jurisprudence in the Indian Constitution, *available at:* https://blog.ipleaders.in/feminist-jurisprudence-indian-constitution/ (Visited on: April 5, 2021)

[167] *Supra note 6*

Here, it would be pertinent to analyze certain case laws which have shed light on the much-needed realm of Feminist Jurisprudence:

Bodhisattwa Gautam v. Subhra Chakraborty

In this case, the court spoke of the need for laws which would curb the dominance exercised by males against the female section of the society. It was held by the court: "Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status." [168]

It was held that rape is against the Fundamental Right to Life under Article 21 of the Constitution.[169]

The significance of this case is that it touches upon the idea that laws, though may be worded in a gender-neutral, equality-seeking manner, it could be bypassed to cater to benefit the dominant male stratum of the society and if the law does not stick true to its own tenets, then its promises would be vague at best and void at worst. Recognizing that such provisions of law are not as gender-neutral as they seem is just the tip of the iceberg. Further cases have laid more stress on this need for more just laws, to bring about more transparency and legitimate equality.

The Vishaka Case

By extension of this line of reasoning, one may conclude that any form of violence against women runs counter to the Right to Life guaranteed to them, among all, by the Constitution, and the discrimination meted out to them at the workplace, based on the notions created of women by the patriarchal setup, which affects their professional lives, livelihood earning capacity and their very mental health, thus violating the Right to Freedom of Trade and Profession under Article 19 and Right to Equality under Article 14 of the Constitution. This view was espoused in the Vishaka case[170], a landmark case which saw the Supreme Court

[168] Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty (1996) SCC (1) 490, *available at:* https://indiankanoon.org/doc/642436/ (Visited on: April 5, 2021)
[169] Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty, *available at:* http://lawtimesjournal.in/shri-bodhisattwa-gautam-v-miss-subhra-chakraborty/ (Visited on: April 5, 2021)
[170] Vishaka & Ors v. State of Rajasthan & Ors AIR 1997 SC 3011

laying down guidelines to prevent sexual harassment at the workplace, which did not exist in any Indian legislation at the time.

The court observed in this case that the fundamental rights under Article 14[2], 19[3](1)(g) and 21[4] of the Constitution that every profession, trade or occupation should provide a safe working environment to its employees.[171] In connection with this case, it was stated by Justice Arjit Pasayat that "while a murdered destroys the physical frame of the victim, on the other hand, a rapist defiles the soul of a helpless female."[172]

A significant aspect of this case is that it sees the judiciary step up and lay down guidelines for prevention of crime against women, in light of the absence of any legislation of the same, which is a duty of the legislature. Therefore, this proactive stand represents the increasing need of feminist jurisprudence in the legal sphere because it has proven its potential for setting the record straight and helping right the age-old wrongs of the society.

The Law of Adultery

In the case of W. Kalyani vs State Tr. Insp. Of Police & Anr.,[173] it was held that only men could be prosecuted for the crime of adultery under Section 497 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC'). At the core of it, this verdict goes on to reinforce the notion that married women are akin to a husband's property, where women are denied the agency of choice and the possibility of the wife independently choosing a relationship with a person other than her husband is conveniently ignored. It may also be seen as an attempt to cement men as instigators of extramarital affairs, while rejecting the tangible factor of a woman's free will as a driving factor.

This issue was tackled in the case of Joseph Shine v. Union of India[174], which saw the unanimous decriminalization of adultery and the striking down of Section 497 of the IPC. The five-judge Constitution bench, led by the then-Chief Justice of India Dipak Misra, observed: "Prima facie, on a perusal of Section 497 of IPC, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence, but the other is absolved... Ordinarily,

[171] Case Analysis- Vishaka and others v/s State of Rajasthan, *available at:* http://www.legalserviceindia.com/legal/article-374-case-analysis-vishaka-and-others-v-s-state-of-rajasthan.html (Visited on: April 5, 2021)
[172] *Supra note 11*
[173] W. Kalyani vs State Tr. Insp. Of Police & Anr., (Criminal Appeal No. 2232 of 2011)
[174] Joseph Shine v. Union of India (2018), Writ Petition (Crl.) 194/2017

the criminal law proceeds on gender neutrality, but in this provision, as we perceive, the said concept is absent."[175]

The most notable feature of this verdict is that it redirects the dynamic of marital relationships to both the husband and wife, as equals. There is no data to back claims that abolition of adultery as a crime would result in "chaos in sexual morality" or an increase of divorce.[176] The then-Chief Justice Misra wrote that how married couples deal with adultery is "absolutely a matter of privacy at its pinnacle." Justice R.F. Nariman opined that Section 497 is archaic in nature and it made a husband the licensor of his wife's sexual choices. Justice D.Y. Chandrachud termed this section as "codified patriarchy."[177] This verdict also recognized the need to do away with antiquated legislations which went to the extremes of criminalizing women's choices, thus revealing the propensity of trying to intervene in the personal lives of women.

The Bombay High Court Interpretation of POCSO

In a darker episode of Feminist Jurisprudence in India, there has been a judgement in the case of Satish Bandu Ragde v. The State of Maharashtra[178], where it was established that it "skin-to-skin" contact was necessary to constitute the offence of sexual assault under Section 7 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act)[179]. Section 7 of POCSO Act defines sexual assault as "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault." It provides for a minimum of three and maximum of five years of imprisonment. Instead, it was held by the single-judge bench of the High Court, led by Justice Pushpa Ganediwala, that Section 354, which pertains to outraging the modesty of a woman, and provides for a lesser sentence (minimum one year of imprisonment), would be applicable.

[175] Decriminalization of adultery, *available at*: https://www.scobserver.in/court-case/constitutionality-of-adultery-law (Visited on: April 5, 2021)
[176] Krishnadas Rajagopal, "Adultery no longer a criminal offence as SC scraps Section 497 of IPC", *The Hindu,* September 27, 2018)
[177] *Supra note 16*
[178] Satish Bandu Ragde v. State of Maharashtra (Criminal Appeal No. 161 of 2020)
[179] Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012)

This is a particularly flawed verdict because it opens up a plethora of avenues for sexual offenders to get away with their actions by utilizing this particular interpretation of the POCSO provision to be absolved of sexual assault charges. Moreover, it disregards the trauma that will plague the minor victims of sexual assault and will, in all probability, be a monument to letting down minor children by creating a loophole of catastrophic magnitudes and making them vulnerable to the very actions this legislation was created to protect them against.

This, in itself, lays down a very dangerous precedent. Other actions, which would thus escape punishment under this Act, could include intrusive touching of vagina through an underwear or forcing a child to touch a penis through a cloth or even a condom which are all extremely violative acts. Therefore, if such an interpretation is followed, there is a threat that the POCSO Act in itself might become redundant as a wide range of sexually violative activities would be excluded from its ambit due to lack of "skin-to-skin" contact.[180] This verdict has ever since been stayed.

The Story of An Open Letter

In 1979, against the backdrop of the controversial verdict in Tukaram v. State of Maharashtra (1979)[181], Professor Upendra Baxi and others wrote an open letter[182] to the Supreme Court, expressing their displeasure with the verdict that overturned the judgement of the Nagpur Bench of the Bombay High Court, which convicted two police officers for having raped a woman. The Supreme Court overturned that verdict on the grounds that it did not believe the testimony of the girl and believed that it was fabricated and that the consent was given freely. According to Professor Baxi, "this is an extraordinary decision sacrificing human rights of women under the law and the Constitution. The Court has provided no cogent analysis as to why the factors which weighed with the High Court were insufficient to justify conviction for rape."[183] Another pertinent thing to note regarding this case is that it has, in essence, hinged the entire question of the case on the woman's character, which is in contradiction to the facts of the case, such as where a co-accused, Ganpat's "sexual habits gave him the benefit of the

[180] Mukta Sathe, "Letting Down the Vulnerable", *The Indian Express*, January 29, 2021
[181] Tuka Ram & Anr. v. State of Maharashtra, 1979 AIR 185
[182] *Available at*: https://aud.ac.in/uploads/1/admission/admissions2014/open%20letter.pdf (Visited on: April 5, 2021)
[183] *Supra note 22*

doubt of having 'raped' Mathura whereas her sexual habits made the court disbelieve her story of the rape altogether."

Such a verdict would bolster the conceptions of patriarchy and augment the notion that a woman's character would be a determinant in a case of sexual violence. The need for feminist jurisprudence can be resounded when we think about such conceptions creeping into the hallowed halls of justice, for this would only lend strength to the ever-increasing belief that social institutions are rigged exclusively in favour of the dominant male class.

C. CONCLUSION

As we stand here at a crossroads, we are left to ask yet another pertinent question: what can we, as a society, do about the problems that plague us all?

The answer may not sound so simple, but the truth is that nothing is set in stone. Our laws, our social structures and everything that goes with it will change. It all has to change for us, by us and because of us. It falls to us to change our ways, our laws and our society. We ought to ensure that women raise their voice, for it is their imperative and their prerogative. We need them to help us reshape the society in the image of the democratic values we all cherish. We are now and more than ever in need of an egalitarian society. Change can be brought about by legal means, but it is more deeply rooted in the society. Feminist jurisprudence will give women their chance to utilize law to reclaim the power that has for so long been whisked away for generations, and lay the foundation for the much-needed restructuring of the social order that has been so long overdue.

AN ANALYSIS OF TORT OF MEDICAL NEGLIGENCE IN INDIA

- SHREY SAHAI

INTRODUCTION

The medical profession is one of the most respected professions in India. In the patient, the physician is like God. But that is what the patient thinks. In fact, doctors are human. Also, making a mistake is human. Doctors can make a mistake. Doctors can be negligent. Actions of negligence can cause a serious problem. It may be due to gross negligence. Anything can happen. In such a case, it is important to find out who did, and under what circumstances. In a country that is committed to law enforcement, such cases are taken to court and the judges have to decide. However, negligence on the part of physicians is difficult to determine by judges as they are not trained in medical science. Their decisions are based on expert opinion. Judges use the basic principles of the law in conjunction with the law of the land to make a decision.

Consideration and understanding are guiding factors. We like to go beyond these principles by going through certain court judgments and trying to understand what is expected of a doctor as a rational person. As these issues are at the core of medical technology and hospitals are directly involved in the new interpretation of existing legislation regarding medical personnel, it is important to address them at the level of each physician and at the level of the employer ie. hospital. It is very difficult to describe negligence; however, the concept is officially adopted.

Negligence is the violation of a duty resulting from the abandonment of a rational person, being directed by those responsible for the conduct of human affairs, or by doing something that a wise and rational person cannot do. The description includes three categories of negligence:

(1) The legal obligation to provide adequate care to the party complaining about the behavior of the former employee;

(2) Violation of a specified function; and

(3) Consecutive injuries.

In an act of negligence, the complainant must disclose the following:
The defendant owed the plaintiff;
The respondent has violated that duty;
The respondent was injured as a result.

MEDICAL IGNORANCE IN INDIA: AN IMPORTANT LESSON

The complainant (consumer) must ensure that the perpetrator owed him or her a particular legal duty to take care of it. A person needs to meet the level of care when he or she has an obligation or obligation to be vigilant. It can therefore be called a "job" "relationship between people who place a legal obligation on the benefit of another". In other words, job placement is "an obligation, recognized by law, to avoid conduct that is fraught with unreasonable risk to others." The existence of the plaintiff's obligation, therefore, becomes an essential element of the redress of the abuser's obligation. The function depends on the appropriate foresight for the injury: Whether the respondent is responsible for the complainant or not depends on the plausible appearance of the plaintiff. If at the time of the act or omission, the defendant may foresee the damages of the plaintiff who owes the debtor work to prevent such injury and failure to do so will result in the liability. A duty of care is the duty to avoid doing or exaggerating to do anything, to do or to overdo it which may have a moderate and potentially harmful effect on others, and the duty is charged to those who may be expected if the work is not maintained.

Lord Macmillan explained the standard of foresight for a sensible man in Glasgow Corporation:
“The level of foresight a person with a sensible mind is, in a sense, a non-human test. It removes personal equation and is independent of the idiosyncrasies of the individual whose behavior is referred to. Some people naturally save time and think of all the ways that lions walk. Others, with a strong sense of humor, fail to anticipate or even ignore the most obvious dangers. A sensible man is thought to be free from both anxiety and overconfidence, but there is a sense in which the level of care of a sensible man applies to his object for less. It is still

up to the judge to decide whether, in the case of a particular case, what a reasonable man would be in the right mindset and what is right, the party that wanted him to be charged with what he should have foreseen. Here, there is a place for diversity what may come from one judge may seem too far away from the natural and possible.

Establishing negligence is not enough to prove that the damage was obvious, but there are good chances of injury to be demonstrated because "foresight does not include any idea of the possibility". The job is to protect the potential of empty possibilities. In the case of Fardon v. Harcourt Rivington, court ruled that a man should be tested for foresight. “In the unlikely event of an accident, taking precautionary measures is negligent; but if the chances of an accident are simply a chance that will never come to the mind of a reasonable person, then there is no negligence in taking unusual precautionary measures. ”

In Devi v. Uttam Bhoi a boy aged about 7-8 was hit by a truck at about 2.30pm. during the day, as a result, you get a lot of injuries. It was argued that the driver, while discussing the area frequented by children, should have been more careful as the children's behavior was not expected. In the nature of the injuries sustained, negligence on the part of the driver was presumed to be the culprit.

In Balton v. In Stone16, a batsman hit the ball and the ball passed over the fence injuring a man on the highway. The soil has been used for nearly 90 years and during the last 30 years, the ball has been hit on the highway about six times but no one has been injured. The Court of Appeal ruled that the defendants were responsible for negligence. But the House of Lords said the defendants were not guilty of negligence. The second important requirement for prosecuting the perpetrator to be negligent is that the respondent must not only owe the complainant maintenance work but must also break it. A test to determine whether there was a breach of duty was placed on Alderson B's repeatedly quoted dictum, in the case of Blyth v. Birmingham Waterworks Co., where it was held that “negligence is a breach of duty caused by the failure of a rational person, to be guided by those standards that govern the performance of human affairs, may, or do something that a rational and sensible person cannot do.”

In the above definition of breach of duty, the emphasis is on the conduct of the "intelligent man" who is a mythical lawmaker, and his conduct is the standard by which the courts measure the conduct of all other persons and find it to be so. appropriate or inappropriate in certain circumstances as they may from time to time. The House of Lords, Arland v. Taylor summarizes the characteristics of a 'sensible man 'in the sense that he is not a strange, or strange creature; he is not a superhuman being; he does not need to demonstrate the highest level of ability that anyone can use; he is not a clever man who can perform strange miracles, nor does he have supernatural powers of foresight. "Instead he is,, a man of common sense who makes wisdom a guide to his conduct. He does nothing that a wise person would not do and would not stop doing whatever the wise man could do. You act in accordance with the normal and permissible practice. His behaviour is guided by the considerations that govern the conduct of human affairs. His conduct is a standard that is universally accepted by people with common sense and wisdom. "Therefore the level of care that should be determined by the defendant's infringement, the courts are guided by a standard standard that will vary depending on the case, that is, to determine the magnitude of the risk the maximum level of care that will be required. In addition there are two factors in determining the magnitude of an accident, e.g.

(i) the severity or severity of the risk of injury; and

(ii) the probability that the injury was actually caused.

The Bolam test was first recognized in the case of English law Bolam v. Friern Hospital Management Committee. The facts of the case are that the plaintiff is being treated with electroconvulsive therapy as a treatment for his mental illness. The doctor did not give her any cold medicine and the complainant was severely broken. Opinions were divided between experts as to whether they should be given sedatives. If given there is a very small risk of death, if not given there is a small risk of cracking. The plaintiff stated that the physician had violated the duty of care by not using resting drugs. It was concluded that the doctor did not violate the duty of care. The court ruled that if the doctor had complied with the relevant and acceptable law, he was not guilty of negligence. There have been a number of misconceptions about the level of care that needs to be used by medical personnel to eliminate a criminal debt that may arise as a result of their actions or omissions. It is now a well-established legal principle that a doctor will bring to his or her work the right level of

skill and knowledge and must apply the right level of care. It is not the highest level of care or the lowest level of care and the ability to judge by circumstances in each case is what the law requires. The level of care and limited competence means that the level of care and ability of the "ordinary member of the profession who has the ability to apply those skills will apply to the situation in question." At this stage, you may need to note the difference between the level of care and the level of care.

The level of care remains constant and remains the same in all cases. It is imperative that the physician's behavior be appropriate and does not have to be in line with the highest level of care or the lowest level of possible care. The level of care varies and depends on the situation. It is used to refer to what is the equivalent of being reasonable in a particular situation.

CONCLUSION

It is not said that doctors are careless or problematic but while performing a task that requires great patience and care, many doctors fail or break their obligations in relation to the patient. Medicines that are one of the best jobs require the establishment of a state that can benefit victims of various diseases. Many doctors and even specialists sometimes focus on the little things that need to be done while working, which can lead to injuries that could have been avoided or sometimes even to the death of patients. This type of negligence requires more focus than the inclusion of other laws or regulations. An independent and separate legislature will be set up to regulate inefficiency. In our country recently in the case of Krishna Iyer v. The State of Tamil Nadu and Others Apex Court granted compensation for 1.8 crores on July 1, 2015, as they lost their eyesight in 1996. This is the highest compensation issued in the country. Many activists and victims of medical malpractice have been saying that they are being corrected by the misconduct of medical staff and doctors.

Not only medical, but the law will also be made applicable to all professionals working in various fields that require the required amount of skill and care work. People in our country are already victims of many diseases and are dying for the same reason, let us make an effort to reduce these deaths and focus on improving this work so that people do not die in the area they come to for treatment.

ELECTORAL REFORMS NEEDED TO REGULATE FUNDING OF POLITICAL PARTIES IN INDIA

- SHRIRAJ DUSANE

ABSTRACT

To conduct more free and fair elections, we need independent and powerful election commission, more specific laws and efficient enforcement of these laws by various government bodies. Yet, no election system can ever be perfect. Electoral reforms are changes in electoral systems for efficient transformation of public desires into election results and make the system better. Any democratic society has to keep searching for mechanisms to make more free and fair elections. It is seen that political parties contesting elections, do not maintain proper transparency and accountability in monetary aspects like funding and donations. Political parties in India tend to hide, represent incorrect and incomplete numbers while making declaration about the donations and funding they receive. This misleads innocent citizens, causes corruption, misuse of money and power in election, and gives unethical advantage to political parties that leads to election of wealthy and powerful candidate rather than righteous and deserving candidate. Electoral reforms enacted previously tried to stop these corrupt, non-democratic and unconstitutional practices, by limiting parties' spending in election and mandating political parties to declare donations, This article gives solutions for various problems in the existing system like the problem of no information available about actions taken by Central Board of Direct Taxation (CBDT) against parties defaulting to release the contribution reports. This article also gives remedies to tackle incorrect, incomplete or non- disclosure of information in donation statements of national and regional parties that are available in public domain. Moreover this article provides model to ensure accountability and transparency in funding of the political parties in India.

1. INTRODUCTION AND BACKGROUND

As per the rules laid by Section 29C of Representation of People's Act[184] (hereafter refereed as RPA) and Election Commission of India (hereafter referred as ECI), political parties must publish information about all the donations received by them that exceeds ₹ 20,000 (US $264

[184] The Representation of People Act, 1950, § 29C, No. 43, Acts of Parliament, 1950 (India).

approx.) in given financial year in a set format. Failure to do so makes the defaulting parties not eligible for tax relief. These contribution reports shall be made available on public domain to increase transparency in the governing system. Now let's look into the issues on this matter: Firstly, there is no information available about the actions taken by Central Board of Direct Taxation (hereafter referred as CBDT) against parties defaulting to release these contribution reports. Secondly, an analysis of the donation statements of regional and national parties that are available on public domain shows that in several cases there is incorrect, incomplete or non- disclosure of PAN information.

The treasurer/individual appointed by political party, prepare a report of donations more than ₹ 20,000 got by national party from any individual or organizations in that fiscal year and to keep record of donor's amount, name and address. Under Section 139 of the Income-tax Act[185], such report as mentioned above, shall be submitted to ECI for furnishing return of its income. And, political party will not get any tax relief under this act, if fails to submit that report.[186] The Sec. 13A of Income Tax Act[187] states that "a political party's any income that comes under the income by the way of voluntary contributions/ donations is exempted from tax." The Finance Act, 2017[188] introduced Electoral Bond. Under this, "the donations/contributions received in form of electoral bonds isn't mandated to be disclosed in the report that goes to ECI. Maintenance of any details of the names and addresses of donors of these bonds, is not required by the Political parties."[189] The electoral bonds and this scheme inhibits people from knowing about who has contributed, how much, and to what party. This is unethical.

2. ANALYSIS OF DONATION AND INCOME STATEMENTS PUBLISHED BY PARTIES

"From 1546 donations in FY 2012-13 to 2015-16, political parties had got ₹ 355.08 crore which didn't had address information in the contribution form. As per the audit reports, the total income of political parties is ₹ 1559.17 crore in the FY 2016-17. Out of the total income of 7 top parties in India in FY2016-17, ₹ 710.80 crore were from anonymous sources

[185] The Income-tax Act, 1961, § 139, No. 43, Acts of Parliament, 1961 (India).
[186] *Supra* note 1.
[187] The Income-tax Act, 1961, § 13A, No. 43, Acts of Parliament, 1961 (India).
[188] The Finance Act, 2017, No. 7, Acts of Parliament, 2017 (India).
[189] *Electoral bonds: secretive and opaque*, THE HINDU (May 1, 2021, 10:00AM), https://www.thehindubusinessline.com/opinion/electoral-bonds-secretive-and-opaque/article23323002.ece

(sources of income specified in the IT Returns are anonymous) i.e. 45.59% of entire income of all Indian political parties. The 4 parties from those 7 parties, namely INC (Indian National Congress), CPM (Communist Party of India- Marxist), BJP (Bhartiya Janata Party) and CPI (Communist Party of India) did not disclosed PAN details of 166 donations from which they collected ₹ 2.86 crore."[190] Hence, of the total donations received by major National Parties during this time, total donations with undeclared, in complete, or incorrect PAN details amount to hundreds of crores.

"In FY 2016-17, the most favourite unidentified income source for INC was 'Sale of coupons' by which it received ₹ 115.64 crore i.e. 91.69% of INC's total funding from unidentified sources. In FY 20-16-17, 99.98% of the total income i.e. 454.84 crores of BJP in the unidentified sources were collected under 'Voluntary Contribution' by BJP."[191] Now how can someone collect ₹ 115.64 crores just by mere sale of coupons? What is even the use of such coupons and who has bought these coupons? How can 99.98% of all the funds be collected just from voluntary contribution? This all is very mysteries. "The Bahujan Samaj Party (BSP) declared that it didn't get any donations more than ₹ 20,000 in FY 2016-17, as it had been declaring for the last eleven yrs."[192] Now this is very impractical and furtive that how can big party like BSP receive crores of donations, all below ₹20,000, that also for so eleven years? It's like to take donation of ₹19,999 to escape from the declaring the donations as for declaring it should be ₹20,000. Moreover, there is also delay of many months after the due date, for submitting the audit reports to the Election Commission.

3. PROBLEM ANALYSIS IN LIGHT OF RECENT DEVELOPMENTS

No information given by Central Board of Direct Taxation (CBDT) about action taken against defaulting parties who fail to submit and delay in submission of contribution reports and donation statement is a botch to curtail black money and frauds in political funding and inhibits the people from knowing who has contributed, how much and to which political party. Further, the ECI will have no information of the funds received by such defaulting

[190] ADR Team, *Analysis of Donations Received above ₹ 20,000 by National Political Parties – FY 2016-17*, ADR (May 1, 2021, 11:30AM), https://adrindia.org/content/analysis-donations-received-above-rs-20000-national-political-parties-%E2%80%93-fy-2016-17.
[191] *Supra* note 7.
[192] *Supra* note 7.

political parties. The Section 139 4(a) of Income-tax Act 1961[193], by which a political party is required to show all incomes, including donations/contributions from bonds. Still, it's also not certain if the CBDT will have an opportunity to get all the details of the contribution in spite of the applicability of the above mentioned Section 139 4(a)[194]. Political funding will become more opaque. This Corporate-Political Nexus is fatal for democracy. Over 70% of their donations are from anonymous sources.

An amendment to Sec. 13A of Income Tax Act was done in 2017 that states "political parties shall declare all donations above ₹2,000 to Dept. of Income Tax for getting the tax exemption". But it didn't amend Sec. 29C of Representation of People's Act 1951[195], which states that report of donations/ contributions above ₹20,000 to the political parties shall be declared to the ECI. The limit of ₹20,000 should have been lowered to ₹2000 for Sec. 29C of RPA too. So, by this now the Income-tax Department (under Govt. of India which is in control of the political party in power) will know about all details about donations above ₹2000 to all the political parties in India, but the ECI won't know any details of the donations to political parties above ₹2000. It still has to follow the old ₹20,000 limit and now after electoral bonds the ECI will not know details of the donors i.e. who donate above ₹20,000 by means of electoral bonds.

The ECI has probably highlighted this issue to Ministry of Law, but still no action has been taken yet. The Election Commission (ECI) has investigated the apprehensions on electoral transparency which has currently increased as an outcome- with filing reports of contribution of above ₹ 20,000, still done by the political parties. This implies that, a political party would have to declare all donations received above ₹ 2,000 to the Dept. of Income Tax in order to get of tax exemptions, but it's not bound to declare names and other details of donors for the same to ECI in its donation statement. In recent case, "BSP in 2017-18 declared that it hasn't got any contributions more than ₹ 20,000, skipping all mention of the new ₹ 2,000 limit."[196]

If incorrect, incomplete and undeclared information about PAN, names and other details in the report is found then exemptions in tax shall be deprived of to such political party. A revolutionary statutory provision announced by the Union govt. is that any donations/funding

[193] The Income-tax Act, 1961, § 139 4(A), No. 43, Acts of Parliament, 1961 (India).
[194] *Ibid*
[195] *Supra* note 1.
[196] Anubhuti Vishnoi, *Non- amended RPA prevents Funding Transparency,* THE ECONOMIC TIMES (May 2, 2021, 09:00AM), https://economictimes.indiatimes.com/news/politics-and-nation/non-amended-rpa-prevents-funding-transparency/articleshow/66036321.cms.

above ₹2,000 can only be done by the means of net banking, electoral bond, cheques, etc.[197] Sec. 13 I-T Act deal with tax exemptions for political donations and contributions. And, Sec. 139 (4B) of I-T Act[198] deals with the furnishing of income returns by political parties for such cases. But there are not many actions taken if incomplete/incorrect information in the declaration by political parties. As per latest Sec. 13A of Income-tax Act, as amended in 2017, there's no necessity to declare record of electoral bonds or details of such donors. This amendment lessened discrepancies about incomplete/incorrect declaration as now transactions will be done via electoral bond, but this would hide the identity and amount donor gave to the party.

4. SOLUTIONS FOR THESE ISSUES

The orders of Central Information Commission that deemed political parties to be public authorities under Right to Information (hereafter referred as RTI) Act should be implemented by political parties and they shall be open for public scrutiny under RTI Act, 2005. To bring Central Board of Direct Taxation (CBDT) under purview of RTI Act, by ordinance or amendment in legislature. So that information about the action taken against the defaulting parties in known. Institute of Chartered Accountants of India (ICAI) had made certain suggestions in 2010 to Election Commission under its "Guidance Note on Accounting and Auditing of Political Parties"[199] to refine scheme of auditing followed by Indian political parties. This Guidance Note shall be legalised by an act of the legislature. If any discrepancy regarding incorrect, undeclared or incomplete PAN details arise in donation statement than license of the respective accountant working for that political party shall be cancelled by ICAI.

During period of election, there should be a fixed limit on amount of donation and contribution which can be collected by political parties. Moreover, to make limit on the number and amount of electoral bond that can be issue by a person or a company or other bodies. The suggested limit is maximum 10% of the quarterly net profit of a company and maximum of 10% of annual income of a person to set for the number and amount of electoral bonds that can be issued. To develop intra-party democracy in the political parties. All the

[197] *Supra* note 4.
[198] The Income-tax Act, 1961, § 139 4(B), No. 43, Acts of Parliament, 1961 (India).
[199] Institute of Charted Accountants of India, *Guidance Note on Accounting and Auditing of Political Parties*, ICAI (2012).

donation and financial matters in the party to file the Contribution Reports and Donation Statements shall be done with consent and supervision of majority of the members of party. Insert recommendations of the Law Commission in Report 255[200] like inserting Sec. 29C, 29D, and 29E in Representation of People Act, 1951 mentioned in it. This will guarantee transparency, accountability and endow public to make righteous choices about electing their representatives.

Supreme Court and ECI shall issue guidelines to Income Tax Department and UIDAI to share the data of tax returns and PAN number and Aadhar details to the Election Commission, so that it the verification of incorrect, undeclared or incomplete PAN details in the contribution reports and donation statements can be done by ECI appointing team and nominate NGO to verify these using technology. To file more and more PILs in Supreme Court and grievances to the Ministries against electoral bonds to bring pressure on government to either scrap the use of electoral bond or make the information of who issued to electoral bond available to the Election Commission and make the system of electoral bonds more transparent and accountable. To involve United Nations Fair Elections Commission as international observer over these issues. Hence, little international pressure by the contemporary democracies can ensure some transparency and accountability of the political parties.

Unknown donation equal/above ₹2000 should be prohibited. Even if Sec. 29C of the RPA, 1950 mandates the political parties to declare their incomes, nevertheless such declaration is only required for contributions more than ₹20,000. This is insufficient for ensuring accountability and transparency of political parties in the monetary administration. Hence, the political parties should be bound to quarterly publish their accounts, maintenance of such accounts and their auditing to ensure their accuracy and for information of the citizens. Those contributors who donated ₹ 20,000 above as a sole/multiple donations must give details of their PAN. Political parties should be mandated to keep proper accounts in a prescribed format and such accounts should be audited by accountants approved and recommended by the Comptroller and Auditor General of India (CAG) to avoid incorrect, undeclared or incomplete details in the contribution reports and donation statements of political parties.

5. CONCLUSION

[200] Law Commission of India, *Electoral Reforms*, 255 THE LAW COMISSION REPORT, March 12, 2015.

Still there's vagueness in data of donations declared by political parties as incomplete declaration of data in the donations reports. On Sept. 13, 2013, the Supreme Court held that no part of the affidavit of candidate shall be left empty.[201] Likewise, Form 24A that is submitted by political parties to ECI, any part providing details of donations above ₹ 20000, must not have to be left blank. Date on which the funding was done shall recorded in Form 24A. As present in US, France, Bhutan, Japan and Brazil; all details of all donors shall be made accessible for civic inspection. In India more than 50% of the source of incomes are unidentified, which is not with in case with these countries. Political parties that fail to submit its donation statements before the due date to the ECI, shall be not tax-exempted and penalized severely.

A huge amount was collected by the political parties from corporate donors without obtaining their address and PAN details. These unfinished contributions reports shall be returned to the parties by the ECI, to daunt them from giving incomplete data. Similar to USA, corporates must make information of their political contributions presented to public on their websites or annual reports for snowballing transparency in political financing. To daunt financing by shell companies or illegitimate bodies, a special department under CBDT shall be made for investigate donation reports of regional and unrecognised parties. This will go a long way in consolidating democracy, elections and political parties.

[201] Resurgence India v. Election Commission of India and Anr., W.P. (C) No. 121/2008 (S.C.).

A STUDY ON THE CONCEPT OF NOTIONAL PARTITION

- ARUNAV BHATTACHARJYA

1. INTRODUCTION

Section 6 of the Hindu Succession Act, 1956, dealt with the devolution of the interest of the deceased coparcenar in the Mitakshara coparcenary property. This provision of the Hindu Succession Act 1956, dealt with the question of the coparcenar's undivided share in the Mitakshara coparcenary property, dying intestate without any testamentary disposition. Section 6 of the Hindu Succession Act 1956 provided that when a Hindu male coparcenar dies intestate, who had an interest in the Mitakshara coparcenary property prior to his death, the interest which he had shall devolve upon the remaining surviving coparcenars by the application of the rule of survivorship and not in accordance to the provisions of the Act. The proviso to this section stated that, when a deceased Hindu male coparcenar leaves behind him any female relative specified in Class I of the Schedule or any male relative who can claim through such a female relative, the interest of the deceased coparcenar shall devolve in accordance to the provisions of the Act and not by the rule of survivorship. Explanation I to this section provided that, the interest of the deceased coparcenar is the share of the coparcenar in the property, that would have been allocated to the deceased if a real partition of the property would have taken place immediately before the death of the coparcenar. This is irrespective of the fact that whether or not he was entitled to a share in the property.

This assumption of ascertaining the share of the deceased in the Mitakshara coparcenary property and working out on the consequences of allotting the shares to the remaining coparcenars and heirs as if a real partition has taken place is known as notional partition or a deemed partition. After 1956, daughters and widows of a Hindu Joint family were considered to be Class I heirs listed in the Schedule, but was not recognized as coparcenars, and they could get their father's or their husband's share in the Mitakshara coparcenary property upon their death. With the Hindu Succession Amendment Act 2005, daughters were treated as coparcenars on par with the sons with the same set of rights and liabilities on the coparcenary property.

The aim of notional or deemed partition was to demarcate the share of the deceased coparcenar, which would then go by the provisions of the Hindu Succession Act 1956, with inheritance by Class-I heirs that included females and not by the rule of survivorship to the surviving coparcenars as was the law prior to the amendment The intention behind the introduction of this fictional or notional partition was to give a share out of the ancestral property to the widows, daughters and other female members, that was till then denied to them.

2. COPARCENARY UNDER TRADITIONAL HINDU LAW

In the Mitakshara School of Hindu law, son acquires by birth an interest in the ancestral property. This interest in the ancestral property is held along with the father, and upon the death of the father, the son acquires the property the father had as a coparcenary not as a heir but by the rule of survivorship. This interest which the son acquires is never fixed and is open to fluctuations. It is only when there is a partition or upon the death of a coparcenar that the share in the ancestral property is ascertained. A coparcenar is referred to the heirs who shares equally, inheritance rights to the estate of a common ancestor. In a Hindu joint family, the male member along with his son, grandson and great son (i.e , three generations from the last surviving male ancestor) constitute a coparcenary. Coparcenary is not a creation of parties, and in a Hindu joint family, females (until the 2005 Amendment) were not regarded as coparcenars in the ancestral property of their father.

Under the Mitakshara School of Hindu law, within the coparcenary, joint family property devolves by the rule of survivorship. This means that with every birth or death of a male member in the family, the share of the other surviving male members in the ancestral property either diminishes or enlarges. If father and his two sons comprises a coparcenary, each would get a one third share, unless there is a death of a coparcenar or a male member is born within the coparcenary.

2.1. PROPRIETARY RIGHTS OF WOMEN UNDER TRADITIONAL HINDU LAW

The status of females as regards inheritance rights of property in a traditional joint Hindu family was negligible. Various socio-religious influence prevailed in limiting the

transmission of the passive juristic efforts to uplift women with regards to their proprietary rights during the British colonial rule and even today, ramifications are felt in certain sections of the society. An analysis of the legal systems over the world would reveal how a male dominated system was built to limit the proprietary rights to women. This resulted in deterioration of their standing in the society and being reduced to a 'mere inferior' being.

Various schools of thought that prevailed in India since ancient times, systematically denied rights to women in a household, with proprietary rights being one of them. An analysis of the different provisions regarding property rights to women would reveal the male bias, and discriminatory provisions towards women, which prevented them to be on par with men.

Under ancient Hindu law, only Vijaneswara advocated that women should have absolute rights over her property, howsoever acquired. This then came to be reflected in Section 14 of the Hindu Succession Act 1956. Under the British rule, the Privy Council preferred the rule in Dayabhaga School of Hindu law, which limited the proprietary independence of the females and Vijaneswara's view on absolute rights of women over their property was discomfited. The Privy Council in *Mussamat Thakoor Deyhee v Rai Baluk Ram* held that the movable property inherited by a widow can be disposed off but the same was curtailed for immovable forms of property. Thus, the absolute right of the widow over the property inherited from her husband was restricted. The rule applied by the Privy Council in this case, albeit prevalent in the Benares School of thought, the same was absent in the Bengal School, where widow were not allowed to dispose off any kind of property inherited from her husband. This led to an air of confusion. However, the Judicial Committee of the Privy Council later in 1867, decided on curtailing the power of a Hindu women to dispose off her property (in Benares School) in toto. The Privy Council in the case of *Bhugwandeen Dubey v Mynabee* held that by the rules of the law prevailing under the Benares School of thought, stridhan of the widow does not comprise of the movable and immovable estate of the husband and hence the widow has no power to alienate the same to the prejudice of the heirs of the husband.

These two cases reconciled the existing contradictory interpretations on the issue of stridhan. The Bengal School of thought accepted the restricted interpretation of *Yajnavalkya* and thus

in 1937, the concept of limited estate of a woman was given statutory recognition in the form of Hindu Women's Right to Property Act. Thus, two kinds of property arose for Hindu women under the law- *1) limited estate and 2) stridhan.* Nonetheless, the alleged dependent position of women, and of wives in particular, a wife could hold stridhan property, and in the same, her husband had no control over the stridhan property and the wife could alienate the property at her will and pleasure. The non-saudayika stridhan property was always subjected to the control of the husband. The husband was entitled to use the non-saudayika stridhan property at his own pleasure even if there was no economic distress in the family.

The earliest legislative enactment which gave women the right of inheritance to a property in the Hindu Law of Inheritance Act, 1929. The Act gave Hindu women, inheritance rights to three female heirs to the deceased male, namely the son's daughter, the daughter's daughter and the sister. The introduction of this legislation led to a partial restriction on the rule of survivorship. The 1937 Hindu Women's Right to Property Act was a landmark legislation which conferred upon women, ownership rights over their property albeit not absolute. The Act removed the prohibition of a widow to succeed to the property of the deceased husband along with the surviving son. The widow can now inherit equal share on par with the son, but the interest in this share was not absolute in nature. Nor was the widow given any coparcenary rights despite possessing a right akin to an interest of a coparcenar in a joint family. Even the daughters were yet to be accorded with any rights of coparcenary which was till then an exclusive rights of the male member of a joint family. Therefore, the widow was eligible to a limited estate in the property of the deceased husband along with the right to claim partition. The judicial creation of limited estate was later done away with in the Hindu Succession Act, 1956, in which Hindu women were given absolute rights over stridhan, both movable and immovable property.

2.2. INHERITANCE RIGHTS AFTER THE HINDU SUCCESSION ACT 1956

Members of the Constituent Assembly, who framed the Constitution, took notice of the fact that women held a discriminatory position in the society and were subjected to differing shades of inequality and prejudiced notions in the society; and, therefore to ensure them equal status, provisions were made in Article 14, 15 and 16 of the Constitution. State took an active

interest in promoting the welfare of women to inhibit discrimination against them in all forms apart from the constitutional safeguards to ensure equality.

The Hindu Succession Act, 1956 came into force on 17th of June 1956, and it applied to Hindus, Sikhs, Jains and Buddhists. The Act laid down a encompassing and a homogeneous system of inheritance to property which applied to all those being governed by the Mitakshara School of thought, the Dayabhaga School of thought and those of South Indian systems of Hindu law. Despite Section 6 of the Hindu Succession Act, 1956 retaining the rule of survivorship, several changes were brought in the overall enactment which gave significant rights to women, marking a departure to the law which existed prior to this legislation.

The limited ownership rights blossomed into full ownership with respect to the property possessed by a Hindu female by virtue of Section 14 of the Hindu Succession Act 1956. With regards to the property of a male Hindu dying intestate, the female Hindu were now being given rights by treating her as a Class I heir along with the son of the deceased. The Hindu Succession Act, 1956 made the widow eligible to succeed to not only to the intestate's separate property, but also to his interest in the coparcenary property.

The Hindu Succession Act, 1956 did not expressly provide for devolution of interest in the coparcenary property as Section 6 of Hindu Succession Act, 1956 made it clear that in the event of the death of a male Hindu dying after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by the rule of survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act. Explanation I to Section 6 provided that, the interest of the deceased coparcenar is the share of the coparcenar in the property, that would have been allocated to the deceased if a real partition of the property would have taken place immediately before the death of the coparcenar. This is irrespective of the fact that whether or not he was entitled to a share in the property.

3. THE CONCEPT OF NOTIONAL PARTITION

Besides the provisions of inheritance to the separate property of an intestate, the Hindu Succession Act of 1956 contained provisions for the devolution of interest of a coparcenar in the coparcenary property by the rule of survivorship. The Act retained the concept of Hindu Joint family, the rule of survivorship along with separate and coparcenary property. When the Act was reckoned to usher in gender parity in terms of devolution of interest of a coparcenary property, but rather it retained the system of son-preference and perpetuation of the patriarchal ideologies that stood in the society. It is in this regard, that the concept of notional partition came into being, as Explanation I, appended to the proviso Section 6 of the Act. Prior to the Hindu Succession (Amendment) Act, 2005, the concept of Mitakshara coparcenary and a right by birth was exclusive only to a son. The Act recognized the rule of survivorship and its application upon the death of Hindu male coparcenar.

Proviso to Section 6 incorporated the concept of notional or a fictional partition to ascertain the interest the deceased coparcenar had in the coparcenary property. This interest of the deceased coparcenar is the interest he would have got in the coparcenary property if there was to be a partition among the coparcenars and regardless of whether he was entitled to claim partition or not. After ascertaining the undivided interest in the coparcenary property that the deceased has left behind, it will be then divided among the heirs by effecting a partition. This partition is not a real but a deemed partition. It is a legal presumption that right before the death of the coparcenar, a partition was effected at the instance of the coparcenars.

The law presumes that just before the death of the coparcenar, he demanded to severe the status of the joint family by enforcing the partition, irrespective of whether or not he was capable to claim partition. It should be noted that every major coparcenar, who is of a sound mind , is competent to claim a partition at his pleasure. It is only a minor coparcenar who is not capable to demand a partition from the Karta on his own account, but has to take the help of a next friend and file a suit for partition in a court of competent jurisdiction. Section 6 clearly stipulates that this legal presumption of a partition before the death of a coparcenar is a partition that has taken place, and is applicable in the case of all coparcenars, irrespective of whether they were competent to claim for a partition or not. The presence of a disqualified Class-I heir in the Schedule will not result in the presumption of a notional partition.

To initiate a notional partition after the death of a coparcenar and to defeat inheritance by the rule of survivorship, it is a necessary corollary that the deceased has left behind a Class-I female heir or in cases, a male heir who is entitled to claim through such a female heir. Class-I heirs in the Schedule provided for eight female heirs prior to 2005. And the presence of any one of them would necessitate the presumption of a notional partition and defeat the rule of survivorship.

The inclusion of this legal presumption of a notional partition, in order to ascertain the interest of the deceased coparcenar prior to his death is a result of a compromise by the Indian legislature. The legislative intent of the incorporation of the concept of notional partition in the Hindu Succession Act, 1956, was to provide a preferable condition to the near female heirs and cognates of the intestate, so as to prevent the passing of the interest in the coparcenary property to the coparcenars much to the exclusion of such female and cognate relations of the deceased.

The legal presumption of a notional partition has not been expressly stated in the Explanation I to the proviso to Section 6, but rather it was a result of various judicial pronouncements. The questions which arose as to notional partition was, whether it was a real partition, what would be the consequences of effecting a notional partition and its scope. Courts in India felt it necessary to answer these questions as from the point of view of a woman getting a share after the partition, the issue of gender parity could be leveled to a certain extent if not wholly. Another crucial point was whether a notional partition was to be done simply to ascertain the share of the deceased coparcenar or whether proper steps has to be carried out to ensure a full fledged partition by metes and bounds. If the later was to be done, how would the female get their share of the interest of the deceased.

In the narrow approach to a notional partition, the presumption would be to simply find out the interest of the deceased coparcenar which would be open to succession after his death. Once the interest is ascertained, there is no need to go beyond since it would be a reasonable certainty that not every family members are divided and thus there is no need to give any shares to them. However, it is in the wider approach that the legislative intent behind Section 6 could be worked out. In the wider approach, after the interest of the deceased is ascertained,

the consequences of a real partition would follow. Female members who would have got a share if a real partition would have been effected, they would be entitled to a share even if the purpose was to ascertain the interest of the deceased coparcenar.

3.1. JUDICIAL APPROACH TO NOTIONAL PARTITION AND THE LANDMARK GURUPAD JUDGMENT

The debate as to the correct interpretation of notional partition, whether in the narrow or in the wider sense started right after the enactment of the Act. in the case of *Srirambai v Kalgonda Bhimgonda* where the Court sought to interpret Section 4 and Section 6 of the Act. The Court in its ruling held that the reason females were given a share at the time of the partition along with provisions for providing marriage expenses for daughters was denial of inheritance rights to them. After the Act, this inability is removed to a certain extent by making them primary heirs and succeed through intestate succession and the earlier rule of giving them a share during partition was abrogated. This ruling was considered to erroneous in the interpretation of the concept of notional partition. This was overruled by the subsequent case of *Rangubai v Laxman.* Justifying the wider approach, the Court in this case held that the widow is to be given a share due to her entitlement during notional partition. Along with this, provisions for maintainance and expense incurred during marriage of a daughter has to be meted out and then their share as Class-I heirs were to be given. According to the Court in this case, this interpretation is in conformity with the legislative intent behind Section 6 in the Act.

With varied interpretations in different cases, Court sought to make a difference between cases where there would be two or more coparcenars and cases where there is a sole-surviving coparcenar. In the former scenario, the situation permits effecting a notional partition, as there lies a possibility that the two surviving coparcenars can claim partition and women can get a share; but in the later there is no such. In case of a sole-surviving coparcenar there can be no partition and hence, the women will not get their share at all.

YV Chandrachud CJ, in the landmark *Gurupad,* adopted the wider approach held that Section 6 of the Act provides for determining the share of the deceased coparcenar, thus creating a fiction of a notional partition. In this case, he held that a state of affairs has to be imagined in which prior to the death of the coparcenar, a partition of the coparcenary property was effected between the coparcenars and the wife, even though, is not entitled to demand a

partition but was entitled to receive her share in the property if a partition were to take place between her husband and the sons.

In her own right, she will get 1/4th of the property in the notional partition and of the 1/4th interest of the husband, she is entitled to 1/24th share by inheritance as a Class-I heir. The case involved the father(deceased), the wife, two sons and three daughters.

He held, that with regards to the interpretation of Section 6 of the Act, it has to be assumed that a real partition had taken place between the deceased prior to his death with the coparcenars thus giving due and full effect to the fiction created by Explanation 1. This legal assumption once made is irrevocable and the partition that has now taken place must imbue the whole process of computing the shares of the heirs, through all its stages and the consequences following have to be worked out The allocation of this share is not a mere methodological step simply formulated for the purpose of working out a meaningful conclusion, but rather it has to be treated as a practical reality, and cannot be revoked. Therefore, the legal heirs will get her share at the time of the notional partition along with the share at the time of inheritance.

The Supreme Court took into account the various reforms to enhance and improve proprietary rights of the woman and noted that if a narrow approach was to be taken to interpret Section 6, it would be a retrograde step against the interest of women. The reforms which were enacted in this regard were the Hindu Law of Inheritance (Amendment) Act 1929, which gave heirship rights to certain section of women. Section 3 of the Hindu Women's Right to Property Act 1937 gave Hindu widow the right to a share in the joint family property and to claim partition like other male member. Section 14 of the Hindu Succession Act 1956 provides for provision by which a Hindu female would have absolute rights over her property. Therefore, in the opinion of the Court, if a narrow approach was to be relied upon, it would imply putting back the clock of social reform that enabled Hindu women to acquire an equal status with men in terms of their proprietary rights. While interpreting any provision, that approach should be preferred which would further the legislative intent behind Section 6 and in the process, remedies the unjust treatment and the wrings which were being meted out to women since ages.

The Madras High Court held that once notional partition is effected after the death of the coparcenar and the coparcenar has left behind him Class -I female heirs, the female members are to be given their share to which they are entitled to at the time of a real partition and this in no means would imply severance of the joint family status and the coparcenary would continue. But, the mere fact of continuance of the coparcenary would not mean that the share of the widow would be that of a coparcenary property. The widow would have full power of disposition on her separate property.

In the case of *State of Maharashtra v Narayan Rao,* the Apex Court, observing the ruling in *Gurupad,* held that the Gurupad case has to be treated as an authority in a situation where the female member of the joint family, entitled to a share in the same under Section 6 of Hindu Succession Amendment Act, files a suit to separate from the family. In such circumstances, she would be entitled to both the interest she would inherit as a heir and the share she would otherwise notionally get under Section 6. Reiterating the ruling in the Gurupad, the Court reaffirmed that the legal fiction of notional partition should be carried out to its logical end to carry out the purpose for which it was enacted. Upon inheriting the interest in the family property under notional partition, she would be ceased to be a member of the joint family without her volition., which otherwise, would be in contrary to the legislative intent of the Parliament.

3.2. CHANGES AFTER HINDU SUCCESSION (AMENDMENT) ACT 2005

The Hindu Succession (Amendment) Act 2005 made sweeping changes to the Hindu Succession Act of 1956. The most significant of them was conferring coparcenary status to the daughters of a Hindu Joint family limitation with respect to her marital status. However to avoid unnecessary confusion and litigation, proviso to Section 6(1) states that married daughter even though might have been a coparcenar, would not be entitled to reopen the partition Already effected, nor would be entitled the challenge the alienation effected before such date i.e. 20th December, 2004. She could succeed if the male members have not affected partition before such date. Further, Section 30 provides that a female coparcenar may also make a testamentary disposition of her undivided interest in the joint family property.

Prior to the Hindu Succession (Amendment) Act 2005, daughters were considered to be their father's legal heirs only and could only receive the father's share of the notional partition after his death, not during his lifetime. Although the Hindu Succession Act 1956 sought to eradicate the gaps that existed before 1956 between male and female heirs, it failed to succeed entirely. The 2005 Amendment Act, in this regard gave the daughters equal status to that of the sons. Daughters now enjoy the same rights as the son, and are equally subjected to the rights and liabilities over the coparcenary property. The Hindu Succession Amendment Act of 2005 has thus, opened up new doors of opportunities for women to gain a fair share in the society.

The Hindu Succession (Amendment) Act 2005, retains the concept of notional partition, for computing the share of the deceased coparcenar in the Mitakshara coparcenary property. Once the share has been computed, it shall devolve upon the heirs as per the intestate or testamentary succession, depending on the facts and circumstances, and not in accordance with the rule of survivorship. It is immaterial as to who the survivors are. In all cases where a male coparcenar dies as an undivided member of a Mitakshara coparcenary, his interest calculated after effecting a notional partition must go by intestate or testamentary succession.

4. CONCLUSION

The landmark Gurupad judgment heralded a change in the proprietary rights of the widow/mother in the joint family. By treating notional partition as an actual partition, the widow was eligible to her share after the partition as well as an heir by succession. This brought them on par with the sons in the family in case of inheritance rights to the joint family property and the interest of the deceased in the coparcenary property. The Supreme Court judgement of the *Gurupad* has been acting as a judicial law in terms of ensuring property rights to the widow/mother.

The amending Act of 2005 was a step in the right direction by granting equal rights to the daughters in the coparcenary property, thus setting up an equal pedestal of ownership by birth. The amending Act of 2005, by retaining the concept of notional partition, further strengthened the resolve of the legislature to ensure equal inheritance rights to the women. However, a gendered analysis of the law relating to inheritance rights to women reveals that the fruits of such legislative provisions are yet to ripe. There are numerous loopholes in

various provisions which can be easily exploited to prevent the women in a joint family the right to inherit the property. For instance, Section 30 of the Hindu Succession (Amendment) Act 2005, permits a coparcenar to bequeath his interest in the coparcenary property, thus nullifying the provisions of Section 6 which allows Hindu females to succeed to the interest of the deceased coparcenar. Unless there is an enforced limitation on the power to bequeath interest in a coparcenary property, there is less impact on the proprietary rights of women in a joint family.

Therefore, although law can be an important instrument of social change and improve the existing state of affairs, but removal of such legal constraints to legitimize reforms to ensure proprietary benefits to women would be a very consequential step.

THE CRUCIBLE: A SOCIO LEGAL PERSPECTIVE

- PRATHAM MALHOTRA

1. INTRODUCTION

On January 22, 1953, Arthur Miller's "The Crucible" made its debut on Broadway. The Play is set in 1692 in Salem, Massachusetts. It is a historical recreation and embellishment of the popular or perhaps notorious witch-hunt that occurred in a Salem. The Play examines political issues in Western culture during the McCarthy age of paranoia and conformity, which was sparked by Sen. Joseph McCarthy's dramatic accusations of communists being involved with people at high positions. (The Editors of Encyclopaedia Britannica). It premiered on Broadway on January 22, 1953, at the Martin Beck Theatre, starring Beatrice Straight, E. G. Marshall, and Madeleine Sherwood. This production, according to Miller, was too sophisticated and cold, and the ratings were mostly negative (Abbotson). In 1953, the Play was awarded the Tony Award for Best Play, and it became a classic. Miller's dissatisfaction with the current political situation motivated him to speak out for the other artists and compose a play that allows people to challenge their representatives when those political actions prove to be irrational.

1.1 THE LEGACY OF ARTHUR MILLER

On October 17, 1915, Arthur Asher Miller was born in New York, US. Miller was an unintellectual child who wanted to have a career in writing and studied writing at the University of Michigan. He was awarded several times for his writings at the University. Miller's illustrious literary career extends more than 60 years. Miller published 26 plays, a book called "Focus" (1945), numerous travel journals, a series of short stories called "I Don't Need You Anymore" (1967), and an autobiography called "Timebends: A Life" during this time (1987). Miller's plays usually deal with social problems and revolve around a character who is caught in a social crisis or a person who is at the whim of society (Bigsby).

"All my Sons" in 1947 got Miller his first big hit, and he further rose to fame after writing *"Death of a Salesman"* in 1949. Both of these plays won the Tony Award for Best Play, while the latter also won the Pulitzer Prize for drama. The Crucible premiered in 1952 and was widely seen as a rebuke to the anti-Communist McCarthyism that was raging in

America. It has since been adapted for tv and film many times. When Miller was called before the Congress in 1956, he declined to mention people he had met at a supposed communist writers' conference ten years before. Congress found him guilty of contempt, but this decision was later appealed to and reversed (Britannica).

1.2 HISTORICAL CONTEXT

The Crucible is a dramatization of the 1692 Salem Witch Trials, in which 19 innocent males and females were hanged, and several were arrested before the hysteria died down. The Crucible represents one witch hunt, while it was written during a different one. During the early years of the Cold War, in the 1950s, a Senator named Joseph McCarthy came to prominence by instilling fear of communists in the American public (Aziz). McCarthy was the chairman of the "House Committee on Un-American Activities," which was tasked with locating Communists in the United States (Parry 3). During these times “habeas corpus was suspended and detention without charge a familiar tactic. Some of those detained were not permitted to know the precise nature of the charge against them or to speak in their own defence” (Bigsby et al. 1). McCarthy was on a mission to discover, investigate, and prosecute all American citizens who had ties to the Communist Party in the past or present. This expansive agenda of terror and repression serves as the backdrop for the writing of The Crucible. Many identified as Communists were put on "Blacklists," which made it difficult for them to find jobs (Aziz 171). McCarthy was eventually censured after the fervor died down, but not until hundreds of people's lives were lost, especially those in the film industry.

Both the witch trials and McCarthyism concerned law and order, and thus, "failure to protect itself from incrimination was considered evidence of seditious acts against the state" (170). In an essay titled “Are You Now or Were You Ever,” Miller claims, “I am glad that I managed to write The Crucible, but looking back I wish I’d had the temperament to do an absurd comedy, which is what the situation deserved” (Miller, “Are You Now or Were You Ever...? | Books | The Guardian”). In the end, The Crucible could perhaps be a satirical allegory because, the judges in both eras, while claiming to wish to reveal the realities, actually misrepresent and manipulate the situation and pass on blame in order to conceal their personal agendas for political influence.

1.3 THE CRUCIBLE: A BRIEF NARRATION

Reverend Parris, the town minister in Salem, Massachusetts, finds his niece Abigail, daughter Betty, and other girls dancing in the forest with his slave Tituba in 1692. Betty passes out with fear of being discovered and does not wake up. Rumors of witchcraft circulate across town, and a crowd gathers at Parris' home, where Parris, concerned about his image, interrogates Abigail about the girls' activities in the jungle. Abigail claims they were only dancing, but it quickly becomes clear that Tituba was attempting to summon the dead. Parris flees to appease the crowd, leaving Abigail alone with a nearby farmer called John Proctor. Abigail and Proctor had an affair when she was a servant in the household of Proctors. Abigail assures Proctor that there was no ritual and that he loves her. Proctor informs her that their affair is done due to his remorse and guilt. Betty continues crying when the audience downstairs begins to sing a hymn, and Giles Corey, Thomas Putnam, Proctor, Rebecca Nurse, and Ann Putnam rush into the building. A debate over whether witchcraft caused Betty's illness quickly devolves into a discussion about other local political matters. Reverend Hale, a well-known witch hunter and witchcraft investigator, returns about the same time, and Giles Corey, Rebecca Nurse, and Proctor depart.

Tituba breaks down and reveals she interacted with the Devil after being threatened with imprisonment if she declines to confess. She starts naming several witches in the region. When Abigail realizes she'll be imprisoned unless she follows Tituba in naming witches, she leaps to her feet and starts naming more witches. Betty wakes up and joins in the game. Soon afterward, Proctor and his wife Elizabeth address the several persons accused of witchcraft by a court presided over by the province's deputy governor. Mary Warren, Proctor's servant, who was one of the girls accusing citizens of witchcraft, informs them that Elizabeth has been accused of witchcraft as well. Proctor is supposed to reveal Abigail as a con, but Elizabeth suspects he already has feelings for her. Hale arrives to prosecute the Proctors, despite Proctor's vehement denial. Francis Nurse and Giles Corey, whose spouses had been convicted of witchcraft and jailed, are shortly after him. The officials arrive shortly after and escort Elizabeth to the prison. Proctor insists that Mary reveal the other girls as liars when they're alone, and he vows to challenge Abigail if necessary.

Proctor takes Mary to court to disprove the allegations. The ladies, led by Abigail, vehemently refute the accusation. To prove Abigail's dishonesty, Proctor admits his adultery with her. Deputy Governor Danforth brings out Elizabeth, whom Proctor claims would never cheat, to bring Proctor's argument to the test. When questioned whether Proctor had an

inappropriate relationship with Abigail, Elizabeth flatly rejects it to preserve her husband's reputation. Abigail and the remaining girls take the opportunity to act as though Mary's spirit is threatening them. Mary succumbs to the pressure and follows them, dismissing Proctor as a man of the Devil. Danforth issues a warrant for Proctor's detention. Hale, who now trusts Proctor, criticizes the court's behavior and quits. Anger and protests break out in local towns as a result of the witch trials. Abigail takes money from Parris and disappears a few days prior to the day when Proctor and several others are to be hanged. Danforth refuses to halt or delay the killings, claiming it will be unjust to those who have already been hanged. Parris and Hale continue to persuade those guilty of witchcraft to admit it to spare their lives. Danforth does, however, encourage Elizabeth to speak with Proctor when she is pregnant and therefore protected from hanging for a few weeks. Proctor offers to confess after meeting with his partner but declines to incriminate anybody else. He declines to fork over his confession until he has signed it. He claims that his reputation is what he has left and that he would not ruin it by signing false documents. Danforth claims he won't consider Proctor's confession if he isn't telling the truth. Proctor rips the sentence to shreds. Parris and Hale are terrified when Proctor is led outside where he is to be hanged, but Elizabeth claims that he has regained his "goodness."

2. THE LARGER-THAN-LIFE CHARACTERS

Characters play an important role in a play. These characters are used by writers to create the plot and express a core theme. Characters offer a skeleton for the plot, because the writer uses them to make his text attractive. In The Crucible, characters reflect Miller's concepts of immorality, corruption, and discrimination. The following paragraphs address each of the Play's main characters.

2.1 JOHN PROCTOR: THE IDEAL ARISTOTELIAN TRAGIC HERO

For any lover of literature, The Crucible's John Proctor poses one crucial question: 'Does John Proctor's character do justice to the Aristotelian concept of an ideal tragic hero?' This question can be answered if we delve deep into John's character and analyze the conflict that went within his mind. Every character in this Play is either misleading to preserve their own life or to end the lives of others, or they are dying because they refuse to confess to a lie. John Proctor, a tragic hero, is one of the characters that sticks out in the chaos. It is important to

note that Proctor is depicted as being in his thirties, although his actual age at the time of the Salem Witch trials was sixty. But before we go on further, we need to understand what a tragic hero is.

A tragic hero is the main character in a tragedy which is *"a form of drama based on human suffering and, mainly, the terrible or sorrowful events that befall a main character"* (Conversi and Sewell). Aristotle argues in Poetics that the protagonist of a tragedy would elicit feelings of pity and terror in the audience. He establishes the idea that sympathy or pity is a sentiment that can be triggered when a character suffers undeserved suffering as a result of his behavior, while terror is a feeling that can be felt by the viewer when they consider that such suffering might afflict them in similar scenarios. According to Aristotle, such a reversal in fortune *"should not be from bad to good, but, to the contrary, from good to bad"* (Aristotle). Tragedy befalls the unfortunate hero *"not by vice or depravity, but from certain mistake in judgement"* (22). This blunder, known as hamartia, applies to a weakness in the hero's behaviour or a mistake of the character. John Proctor best suits this definition. Because of his qualities and noteworthy characteristics, such as purpose and personal sacrifice, the tragic hero in The Crucible is definitely John Proctor. He also matches the term because of his devastating shortcomings, which contributed to his fall from grace, such as his pride and his lust for Abigail.

His lust for Abigail contributed to their adultery, which sparked Abigail's envy of his wife, Elizabeth, and set off the witch hunt. When the trials started, Proctor discovers that the only way to save Abigail from destroying Salem is for him to admit to his adultery. After his effort to expose Abigail as a fraud through Mary fails, he eventually confesses, branding Abigail a "whore" and openly admitting his guilt. Just then does he know that it's too late, that things have gone too deep, and not even honesty would be able to stop the powerful frenzy he's allowed Abigail to create (Palmer). Towards the end of the Play, on pen and paper, Proctor must choose between life and death; signing his name means life; refusing means death. *"Because it is my name! Because I cannot have another in my life! Because I lie and sign myself to lies! Because I am not worth the dust on the feet of them who hang! How may I live without my name? I have given you my soul, leave my name"* (Miller 62).

His personal image is more essential to him than his public image. Further, Proctor wants to maintain his reputation due to religious and personal reasons and not for the public. His failure to include a false confession was an inherently moral decision. If he gives a

confession like that, it will betray others who sacrificed their lives. It is also imperative to note that making a false admission will disgrace him, and tarnish not just his public image and spirit. Finally, Proctor is able to let go, forgive his own self and restore his self-respect and good reputation thanks to his final conversation with Elizabeth and his understanding about the situation. For the first time in the Play, he finds himself at peace and calm when they take him to the gallows (Scheidt and Bean).

2.2 Abigail Williams

17-year-old Abigail Williams had an affair with John Proctor in October 1961, about seven months before the Play starts. It's worth noting that Abigail was eleven years old in actual life, and Miller increased her age in the Play to make everything more realistic. She is the Play's antagonist and is seen lying, manipulating her friends and the whole community, and ultimately murdering nineteen innocent citizens. Throughout the uproar, Abigail's motives appear to be limited to plain envy and a thirst for vengeance against Elizabeth Proctor (Ross and Weibloom).

Abigail's ability to abandon Puritan societal constraints distinguishes her from the other people, but it also adds to her demise. Abigail is self-sufficient and believes that nothing is out of her reach. These admirable traits also contribute to her innovation and a strong desire to live; nevertheless, Abigail lacks the necessary self-control and conscience. As a consequence, she does not consider her affair with Proctor to be foolish. In reality, Abigail resents Elizabeth for keeping her from being with Proctor. To bolster her point, she first targets others of witchcraft who haven't gained the same level of integrity as Elizabeth, ensuring that they'll be quick to prosecute based on her courtroom stunts (Bloom 16). Abigail is unconcerned with the possibility that she is condemning innocent civilians to death; such people are just tools for her to use in carrying out her scheme.

She incites the whole village to hate witches, much like her twentieth-century contemporary, Sen. Joseph McCarthy, incited Americans to hate communism. She doesn't show much regret in the story, "making her seem almost inhumanly diabolical" (*Abigail Williams in The Crucible | Shmoop*). And if Abigail's acts are inhuman, they are understandable in certain respects. Firstly, Miller gives the audience a fascinating description of Abigail's upbringing that hints at the source of her ruthlessness. Abigail saw her parents being murdered while she

was just a child. "I saw Indians smash my dear parents' head on the pillow next to mine" (Miller, *The Crucible* 17), she tells the other ladies. Unsurprisingly, anyone who has been subjected to such cruelty at a young age would inevitably behave violently. Abigail's ruthless and dishonest methods may also be attributed to her poor socioeconomic status. The death of parents made her an orphan and She is an unmarried adolescent. And, the worst part is that she's a woman in a strict Puritan patriarchal society. The only one under her is most likely Tituba, a black slave. Given all of this, it's logical that Abigail will take any opportunity to obtain influence and power.

3. THE SETTING OF THE PLAY

It would be unjust to write about The Crucible without addressing the Play's dynamics and more fundamental facets. The setting of the Play must be addressed in great depth to clearly understand the writer's intent and the tone that he/she wants to achieve.

Puritans looked at the world in binary terms, i.e., Good vs Bad, populated Salem in 1692. To them, the forces of evil were tangible forces that could cause chaos on humanity if left unchecked. Being a theocratic state, people thought that the Lord was the natural leader of humanity and conveyed his messages through different people. Salem was under the governance of men who were meant to be closely linked to the Lord. This should work in theory, but in reality, men crave dominance regardless of their values. There were strict criteria on what it means to be a Christian and to worship God within those laws. The Puritan belief held that the jungle where Abigail danced with the other girls, was dominated by the Devil, while God governed Salem (The Editors of Encyclopaedia Britannica). The entire Play revolves around the spiritual ambiguities that existed in Salem and how its conservative biblical theology became corrupted, leading to the executions of innocent citizens.

4. EXPOSITION: THE CONVERGENCE OF LITERATURE WITH LAW

The people of Salem in Arthur Miller's The Crucible appear to believe that law and justice are identical concepts. Many people, including the Salem citizens, feel that if anyone violates the law, they should be prosecuted. This isn't always the case, however. The existence of a statute allowing or prohibiting an action does not imply that the particular action is right or wrong. Judge Danforth, in Act 3, comments that *"a person is either with this court or he must be counted against it, there be no road between"* (Miller, *The Crucible* 84). The fact

that the Bible states any woman who practises lechery must be "stoned to death" does not make it reasonable or justifiable. The people of Salem seem to be unable to grasp this, and they still conclude that God was speaking through the girls to expose crimes that would otherwise go unnoticed. Danforth opted to ignore several facts that would prove the accused's innocence or, at the very least, cast doubt on the accusers' claims. Whatever the conditions of the allegations, it seems that the complainants are indeed correct. It is ignored that Putnam had his eyes on Giles Corey's estate, which motivates him to accuse Corey of practising witchcraft.

When anyone is found guilty of witchcraft in Salem, their property is sold for a fraction of its true value. Giles Corey suspects Thomas Putnam of being a ruthless opportunist, claiming that his land would be sold and Putnam would have first dibs. *"My proof is there! Pointing to the paper. If Jacobs hangs for a witch, he forfeits his property —that's the law! And there is none but Putnam with the coin to buy so great a piece. This man is killing his neighbours for their land"* (Miller, *The Crucible* 86). Francis Nurse also makes repeated efforts to submit testimony in court but is unable to do so. Since Danforth finds his 'self' in the court that executes the law, he resists any criticism of law and court. Any critique of the legal system, whether subtle or blatant, is seen by him as an assault on his "self." Danforth is hesitant to accept the existence of any new information apart from his own. He is unaware of the importance of intuition in comprehending the phenomena surrounding him (Hooti 72). Accusers are presumed to be speaking the facts without needing to have any evidence. They can be called into question, but they are still thought to be correct. In today's judicial system, this form of law is unethical as a person is thought to be innocent unless proved guilty. Although Salem has a legal system, the city lacks a sense of justice.

Every person has the right to be considered innocent unless proven guilty, which is a core pillar in our judicial system. There are clauses of India's penal code that act on this principle, but they are not expressly enshrined. Sections 101 and 102 of the Indian Evidence Act state that anyone seeking a court's decision on a legal right or shall establish and prove the existence of the facts asserted. As a result, the burden of proof is still placed on the individual who asserts it. However, certain rules and constitutional laws contradict this idea and put the duty of proof on the defendant rather than the plaintiff (Rai). The Supreme Court upheld the common law principle *"ei incumbit probatio qui dicit, non qui negat*", which states that "the burden of proof is on the one who declares, not on the one who denies." This presumption of

being innocent protects a person's right not to be wrongfully convicted. Reversing the presumption makes the convicted a presumed convict, denying him his liberty and freedom, and thereby breaching Article 21, which guarantees an individual the right to life with dignity. Wrongful convictions deprive a person of their integrity and respect in society (Brooks and Greenberg).

5. CRITICAL ANALYSIS

Many common critiques can be applied to The Crucible. Analyzing the play from various perspectives gives the reader a fresh viewpoint on the plot and allow them to gain insights into the characters' behaviour. The Crucible is set in 1692 in Salem, Massachusetts. The world was governed by men. They held every place of authority and were farmers who earned bread for their families. Women were supposed to provide for the child and family. They have no excuse to leave their households except to go to church. Since they scarcely met with others outside their homes, most women did not have a chance to express their feelings. As a result, many women, including young children and adolescent girls, tried to create excitement in the village in any way they could. It was all the same for Abigail, who was obsessed with her lover that she did not mind putting innocent lives at risk to achieve her goals. At an early age, she saw her parents getting murdered right in front of her, which taught her the absolute darkness that persists in humans. Being a woman in Salem's male-dominated society, she also had trouble expressing her true feelings, and as a result of all these factors, she started accusing people of witchcraft. Thus, the feminist criticism of the Play states that if there had been no discrimination and oppression based on gender in Salem, Abigail would not have resorted to levying false allegations that fuelled the 1692 witch hunt.

Stephen Marino has rightly stated that Miller has achieved perfection with John Proctor. The character is perfect because he understands his imperfections. This is why he appeals to us, and as the Play progresses, Proctor understands that no one is perfect and it is OK to live with a few imperfections, that one may sin and still be good at the same time. Further, Arthur Miller's The Crucible epitomizes the axiom that great suffering often yields excellent art. The testimony of Elia Kazan before the HUAC, Miller's dear friend, led to the birth of this legendary Play. Plaula T. Langteau further comments that The Crucible by Arthur Miller is timeless because it reveals how, deep inside the human mind, indifference and mistrust of the "other" can be transformed into raw terror and hysteria. Though the individuals and

circumstances may vary over time and place—"from Salem witches to McCarthy communists, World War II Jews in Europe or Japanese in America, and now modern-day Muslims and Sikhs" (Bigsby et al. 8)—the pattern is all too common. As a result of this spaceless and timeless quality, it has become a legendary play that still holds relevance in contemporary society.

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JURISPRUDENTIAL NATURE OF INTERNATIONAL CRIMINAL LAW

- **PAVAN KUMAR**

ABSTRACT:

What is less valid is the argument advanced by proponents of international justice that this moral claim should be treated differently in the context of ICL than it is in any other criminal justice system. However, doing so has been informed, on the one hand, by the explicit intention of the ICC to limit its exercise of jurisdiction to the most serious violations of the relevant criminal prohibitions, and, on the other hand, by the determination to uphold a certain perception of mens rea based on the highest ethical standards of the legal concept. The diversification of international law and its judicial forums necessitates a greater commitment to legal diversity and the symbiotic relationship between criminal justice and human rights. Through explicit description of crimes and formulation of "general principles of criminal law", including applicable legislation, the Rome Statute has addressed certain concerns about specificity. However, it has left the door open for other non-statutory developments. In this Research Article author tries to explain the Legal Philosophy of International Criminal Law through the concept of Principle of Legality.

KEYWORDS: International Criminal Law, Principle of Legality, Customary International Law, Lex Specialis.

INTRODUCTION

The criminal-law system in underdeveloped communities is notable for emphasising the outward act that creates the actus reus of a crime while almost totally ignoring the subjective element of blame as a requirement of guilt. criminal responsibility. The International Criminal Court's Statute (ICC Statute) affirms the premise of no culpability without blame and goes on to define mens rea, a limited expression of purpose that must be applied as a rule. International commissions of inquiry are increasingly called upon to determine whether international crimes such as genocide, crime against humanity or war crime, have been committed in each situation of armed conflict or Distress. International Criminal Law can be

traced back to the unsuccessful attempts at Versailles in 1919 or even earlier to the trial of Peter Hagenbach in 1474.[202]

However, it is only since its renaissance in the 1990s that international criminal law has been acknowledged as a specialised field of law, if not a self-contained regime.[203] Concerns about 'fragmentation' have been raised by the emergence of international criminal law as a new specialty regime. Over the last few decades, international criminal law has evolved into a more comprehensive tool for international crisis management. Issues concerning its link to general international law and other specialised regimes such as collective security, international humanitarian law, and human rights law have been increasingly sensitive during this process. These fears emanate partly from the fact that the distinction between lex generalis (general international law) and lex specialis (specialised legal regimes) has been questioned considering the dynamic and partly self-referential development of bodies of law such as human rights law, international criminal law, and international humanitarian law.[204]

The human rights era, which began with the Nuremberg trials, has been plagued with amnesties. Tyrants have historically been hesitant to relinquish power without assurances of safe passage or pardon, while insurgents have been hesitant to discuss capitulation without some form of immunity.[205] What should happen in such instances is a matter of some debate that is so contentious and complicated that the Rome Treaty negotiators were unable to reach an agreement on any provision.[206] States are required to pursue and punish perpetrators of at least some international crimes, such as genocide and grave violations of the Geneva

[202] T.L.H. McCormack, 'From Sun Tzu to the Sixth Committee', in T.L.H. McCormack and G.J. Simpson (eds.), The Law of War Crimes; National and International Approaches (1997) p.37

[203] 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law', Report of the study group of the International Law Commission, UN. Doc A/CN.4/L.682, 13 April 2006, (hereinafter ILC Fragmentation Report)

[204] Foundations of a polycentric vision of international law can be traced back to George Scelle. Scelle acknowledged international law encompasses a spectrum of diverse 'legal orders. For a survey, see A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" in International Law', (1990) 2 EJIL 210. For a critical assessment of the use of the 'lex specialis' imagery, see D. Koller, 'Moral Imperative: Toward a Human Rights-Based Law of War', (2005) 46 Harvard International Law Journal 231; See on this theme also A. E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', (2007) 56 ICLQ 623.

[205] Jack Snyder & Leslie Vinjamuri, Trials and Errors: Principle and Pragmatism in Strategies of International Justice.

[206] Mohamed M. El Zeidy, The Principle of Complementarity: A New Machinery to Implement International Criminal Law, 23 MICH. J. INT'L L. 869, 941–42 (2002). The Rome Treaty established the ICC and promulgated its governing law, the Rome Statute.

Conventions. States would be able to define the scope of their international obligations if they were allowed to choose their own criminal responsibility age.

CRIMINAL RESPONSIBILITY.

In order to be guilty of a crime, specifically with respect to serious offences, it is not enough simply to have done a particular prohibited act, there must be the requisite mens rea (guilty mind) as well as actus reus (wrongful act).[207] All criminal justice systems across the globe believe that a person's behaviour must have some element of fault before he may be judged culpable and so punished. As a result, it is possible to avoid criminal culpability by demonstrating that one lacked a guilty mentality, for example, by demonstrating that the act was performed by accident rather than on purpose, or when in a condition of automatism. Almost international crimes, on the other hand, do not require proof of particular purpose. They only need to be aware of the existence of specific situations. Crimes against humanity require proof that they were "done as part of a widespread or systematic attack intended at the international community," but all that is required is that "the criminal knew the conduct was part of" such an assault.[208] The unlawful behaviour must take place in the context of and was associated with an armed conflict, but only proof that "the criminal was aware of factual circumstances that created the existence" of the conflict is required for war crimes.[209]

INTERPRETIVE ASSUMPTIONS

International Criminal Law jurisprudence asserts that it adheres to especially severe criteria in interpreting definitions of criminal law and inculpatory rules, employing only norms that are 'clearly' and 'beyond question' customary law.[210] While fundamental norms are naturally evaluated in light of universal norms and standards or external frames of reference, interpretative approaches in the realm of procedure have historically been more "inward-looking." In this case, international criminal courts and tribunals have relied on the idea of "independent interpretation."[211] International Criminal Law highlights its similarity to the concept of rigorous construction, which states that ambiguities must be resolved in the

[207] Andrew Ashworth, Principles of Criminal Law, Oxford: Oxford University Press, 3rd ed., 1999.
[208] ICC Elements of Crimes, Article 7: Crimes against Humanity.
[209] Ibid., Article 8: War Crimes.
[210] Prosecutor v. Tadic´, Appeals Chamber Judgement, supra note 4, at para. 662.
[211] C. Safferling, International Criminal Procedure (2012), at 111.

accused's favour. The ICC Statute stipulates in Article 22(2) that "the concept of a crime shall be rigorously defined and shall not be enlarged by analogy." In the event of an ambiguity, the meaning must be construed in favour of the person being investigated, prosecuted, or convicted.' Despite these declarations of principle, it appears that ICL is highly affected by the distinctly 'liberal,' 'broad,' 'progressive,' and 'dynamic' approach to interpretation that is a characteristic of human rights. Vienna Convention on the Law of Treaties is concerned with the interpretation of commitments entered between nations rather than criminal restrictions aimed at individuals. Nonetheless, the application of the Vienna Convention's self-evident elements (textual, contextual, and purposeful) is not always difficult.[212] The fact that treaties and legislation contain a variety of standards with fundamentally diverse characteristics complicates the choice of interpretive approaches even further. For example, the ICC Statute has a "mix" of institutional, criminal, and human-rights or quasi-civil elements (e.g. reparation). It has features of a traditional punitive instrument, such as crime definitions and forms of punishment.

JURISPRUDENCE OF INTERNATIONAL CRIMINAL LAW.

When the institutionalism and functionalism of the positivist approach are merged, they form the basis for what it is termed as quantum theory of positivism. It should be noted right away that the notion of legality is only treated as an operative characteristic of criminal law, and more particularly ICL. This has two ramifications. First and foremost, this chapter is predicated on the notion that today's criminal law must contain the principle of legality. In other words, the moral or justifications that led to the establishment of the legality concept in the first place will not be addressed.[213] The reality is that the idea is now widely recognised in a wide range of legal systems. [214] Gallant presents several rules that might constitute the

[212] Art. 31 of the Vienna Convention on the Law of Treaties provides that treaties shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty. The latter aspect imports a purposive element.
[213] Larry May, "International Criminal Law and the Inner Morality of Law", in Peter Crane (ed.), The Hart-Fuller Debate in the Twenty-First Century (Hart Publishing, 2010) 79-96 and the response Christopher Kutz, "On Visibility and Secrecy in International Criminal Law", in the same volume.
[214] Kenneth S. Gallant, The Principle of Legality in International and Comparative Law (Cambridge University Press, 2009), Chapter 5 ; Cherif Bassiouni, Introduction to International Criminal Law (Transnational Publishers, 2003), 182 – 198.

Principle of Legality in his extensive examination of it.[215] However, All of these rules are not rigorously present in all systems that acknowledge the legality principle.

- No conduct that was not illegal under a law applicable to the actor at the time of the act (pursuant to a previously enacted statute) may be penalised as a crime.
- No conduct may be penalised by a penalty that was not permitted by a law applicable to the actor (in accordance with a previously issued statute) at the time of the act.
- No conduct may be punished by a court whose jurisdiction did not exist at the time the act occurred.
- No act may be penalised based on evidence that is less or different than that which might have been utilised at the time of the conduct.
- No conduct may be penalised unless it is punishable by a law that is explicit enough to provide notice that the act was banned at the time it was performed.
- The interpretation and application of the law should be based on consistent principles.
- Punishment is directed only at the offender. Individual crimes may not be punished collectively.
- Everything that is not banned by law is permissible.

The concept of legality allows for one exception to this, that of the subsequent implementation of more favourable legislation (rule of leniency)[216] In addition, another dimension of non-retroactivity may be addressed, that of non-retroactivity not only of the law, but also of the exercise of jurisdiction by a Court. While this element is considerably less prevalent in discussions on the idea of legality, it can become highly crucial in the context of ICL, with its widespread practise of establishing tribunals after the facts have been established. However, while this may be an acceptable theory in principle to describe the long-term and ever-changing law-making process, it cannot be seen as directly acceptable as a challenge to positivism in criminal law, given the requirement that one be able to identify the actual "frozen" subject matter of the law at a specific point in time in order to conform with the principle of legality.[217] Applying this concept of the principle of legality as a rule of conflict of ideas, it is safe to say that, on balance, the present approach to the principle of

[215] Kenneth S. Gallant, The Principle of Legality in International and Comparative Law (Cambridge University Press, 2009)
[216] ICCPR, Article 15.
[217] Yannick Radi, "Standardization: A Dynamic and Procedural Conceptualization of International Law-Making" 25 Leiden Journal of International Law (2012) 283-307

legality tips the balance towards positivism in the domestic setting. It remains to be seen whether this holds true for ICL.

PRINCIPLE OF LEGALITY IN THE NUREMBERG TRIAL.

The International Military Tribunal (IMT), being the first international tribunal dealing with the prosecution of international crimes, was confronted with the question of whether its Charter did not violate the concept of legality. The tribunal had authority over three types of crimes: atrocities against peace,[218] war crimes,[219] and crimes against humanity.[220] While it is undeniably the case that both crimes against humanity and crimes against peace were new crimes whose prosecution could be deemed to contradict the principle of legality, given the decades-long history of the development of the laws of war, it is undeniably the case that both crimes against humanity and crimes against peace were new crimes whose prosecution could be deemed to contradict the principle of legality, a challenge that the defendants at the time did not face.[221]

The IMT Judges were ready to base convictions on the fact that the defendants should have known their behaviour was "bad" rather than "illegal," thereby including a moral as well as a legal assessment of the conduct. The Nuremberg Trial was thus viewed as hauling a moral outrage of the accused, not only as a symbolic result of a guilty verdict, which is uncontroversial in and of itself because criminal trials inherently carry this moral symbolic dimension, but also within the actual workings of the tribunal, which is unquestionably more problematic. With taking everything into account, it is difficult to claim that the idea of legality was a reality in ICL shortly following WWII. However, its later incorporation in Human Rights treaties meant that by the time the succeeding international criminal courts were established in the 1990s, things had changed.

INTERNATIONAL RECOGNITION OF THE PRINCIPLE OF LEGALITY.

In 1948, the Universal Declaration of Human Rights provided that: *"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence*

[218] Article 6(a), London Charter of the International Military Tribunal.
[219] Article 6(b), London Charter of the International Military Tribunal.
[220] Article 6(c), London Charter of the International Military Tribunal.
[221] Antonio Cassese, International Criminal Law, 2nd Ed (OUP, 2008), at 43

was committed".[222] The 1966 International Covenant on Civil and Political Rights (ICCPR) adopts essentially the same formulation, adding that *"if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby".* [223] Given these developments, the idea of legality could not be simply overlooked when ad hoc courts, and later the International Criminal Court (ICC), were established.

THE PRINCIPLE OF LEGALITY AT THE ICC.

The International Criminal Court (ICC) is the first permanent international criminal tribunal, established by treaty in Rome in 1998.[224] Nevertheless, Article 22, titled "nullum crimen sine lege," states that:

- A person shall not be criminally liable under this Statute unless the act in issue constitutes a crime within the jurisdiction of the Court at the time it occurs.
- A crime's definition should be rigorously construed and shall not be expanded by analogy. In the event of uncertainty, the term shall be construed in favour of the person under investigation, prosecution, or conviction.

Additionally, Article 23, titled "nullum poena sine lege," states that "a person convicted by the Court may only be punished in conformity with this Statute." The concept of legality (nullum crimen sine lege), which states that persons may not be punished if their actions have not previously been criminalised by law, has been so widely asserted in international human rights treaties in relation to domestic laws, and so frequently upheld by international criminal courts in relation to international prosecution of crimes, that it is justified to claim that it now has the status of a peremptory norm (jus cogens), requiring its observance both within domestic legal orders and at the global arena.[225] This non-retroactivity ratione personae is strengthened by a temporal provision that states: *"The Court has jurisdiction only over offences committed after the entrance into force of this Statute."* [226] However, the official acceptance of the principle of legality in ICL throughout time has not resolved the issue over

[222] Article 11(2), 1948 Universal Declaration of Human Rights
[223] Article 15(1), ICCPR
[224] The Statute of the Court entered into force, when the required number of 60 ratifications was reached (Article 126, ICC Statute).
[225] STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, Case No. STL-11-01/I.
[226] Article 11, ICC Statute.

whether it should be applied equally in international criminal law as it is in national legal systems.

CUSTOMARY LAW AND THE PRINCIPLE OF LEGALITY.

In several ways, customary law appears to contravene the norm of specificity. The most apparent reason is that customary international law rules are not written down in principle, making it impossible to envisage them being detailed enough to fulfil the need of specificity. In the past, international criminal tribunals relied on a mix of practises from many sources, including treaty practises, international organisation resolutions, national publications such as army manuals, and decisions from domestic courts and tribunals.[227]

It is claimed that the legality concept cannot apply in the same manner as it does in national systems. This argument, however, may be refuted on two counts. To begin with, this analogy appears to imply that such difficulties do not exist in the national context, which is plainly not the case. Domestic legislators are rarely attorneys, and legislation is frequently the outcome of political compromise. More fundamentally, it turns the problem on its head.

The concept of legality, not the principle of equality, should be the starting point of international law. If an international standard fails to comply to that principle, it is inapplicable, regardless of the reasons for the failure to conform. Finally, as will be explored briefly in the end, the fundamental justification for all suggested restrictions to the concept of legality will be in relation to the teleological purpose of criminal law.[228] The topic of foreseeability is a second component of the criterion of legality that is difficult to reconcile with customary law.

The process of forming customary law is, by definition, an ambiguous process in which the line between law and non-law is blurred is impossible to ascertain, and when, in fact, such regulations are destined to being "dangerously ambiguous, at least so long as they have not been validated by a law-applying body.".[229] The effect of the customary law procedure on predictability is exacerbated by international tribunals' very permissive use of material that predates the actual behaviour under inquiry. The fact that international tribunals differ in their

[227] Lorenzo Gradoni, "Nullem Crimen Sine Consuetudine: A Few Observations on how the International Criminal Tribunal for the Former Yugoslavia has been Identifying Custom".
[228] Beth Van Schaak, "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals" 97 The Georgetown Law Journal (2008)
[229] Jean d'Aspremont, Formalism and the Sources of International Law (Oxford University Press, 2011), at 164

assessment of the relevance of State Practice and opinio juris has been widely explored in the literature, with many explanations advanced. One prominent interpretation is that there is a moral sliding scale in which the more ethically charged the matter, the more likely judges are to depend on opinio juris and disregard state practice to the contrary.[230]

In fact, it generally takes judges hundreds of pages of analysis of dozens of national laws and rulings, as well as treaties, to establish whether a norm has become conventional. Furthermore, this is frequently followed by forceful dissents from several of the judges on the same bench,[231] other tribunals.[232] Given this, it is difficult to take seriously the notion that an alleged offender is supposed to know that his action was unlawful at the time it happened when confronted with a conventional norm. Despite if one does not adhere to a rigorous application of the concept of legality, which, for example, necessitates a written law, customary law frequently fails to meet the foreseeability and specificity requirements that are typically necessary for observance of the principle of legality. As a result, it may be claimed that, to the extent feasible, customary law should be avoided as a source of International Criminal Law.

CONCLUSION

Whoever does an activity that the law proclaims to be criminal or that is deserving of punishment based on the fundamental notion of a criminal law and popular perception shall be punished. If no directly applicable criminal law is immediately relevant to the activity, it should be punished in accordance with the legislation whose essential principle best matches it. All legal systems are riven by the conflict between moral censure and criminal legislation. In reality, by expecting us to consider these issues only from an international perspective, we are being asked to disregard centuries of national system evolution that have placed protections in place to prevent judges, and institutions of power in general, from imposing their moral beliefs. A more positive perspective would see international criminal justice procedures as a unique nonviolent solution to crisis situations, and therefore as an addition to and refining of the international community's peace and security arsenal. Finally, once the

[230] Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", 95 American Journal of International Law.
[231] ICTY, Prosecutor v. Galic, Judgment, Case No. IT-98-29-A, Appeals Chamber, 30 November 2006
[232] ECCC, Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan, decision on the appeals against the co-investigative judge's order on joint criminal enterprise (jce), Pre-Trial Chamber, 20 May 2010 (rejecting the Tadic finding that JCE III was customarily established as a mode of liability).

criminal law logic has been transplanted to the international level, it becomes clear that there is a propensity to overstate the uniqueness of the international environment in order to justify restrictions to the legality principle.

EMERGENCY: THE DARKEST VISION OF INDIAN POLITICS

– GAURAV GUPTA

ABSTRACT

Article 352(1) of *The Constitution of India*[233] talks about the emergency that if the President is satisfied by the existence of grave emergency where the protection of the country or the other region is threatened, whether by war, or external aggression, or armed rebellion, he may, by proclamation, make a declaration to it effect.

First proclamation of emergency occurred during the war with China and it remained for a period of six years from October 1962 to January 1968. The war with China came to an end on 21st October 1962 and during the emergency another war started with Pakistan. Finally, after foreign intervention within the matter there was Tashkent agreement and therefore the government dismissed the emergency in January.

Second proclamation of emergency was due to the war with Pakistan. During this era three acts viz. Maintenance of SA, Coffee POSA act and Govt defence of Rule was adopted with a thought to forestall detention. But these three acts were highly misused and this time witnessed many arrests, custodial deaths and encounters. The war which was going on with Pakistan ended but the emergency was still there and before the second emergency could end, the third emergency was declared.

The third emergency was declared on the grounds of internal disturbance and it is the prominent controversial emergency in India. By this emergency it was meant a period of 21 months between 1975 and 1977 when a state of emergency was declared throughout the country by the Prime Minister Mrs. Indira Gandhi.

When an emergency is proclaimed, the federal distribution of powers are practically suspended and all the powers get concentrated in the union government. Secondly, the govt. also gets to curtail or restrict all or any of the fundamental rights during the emergency. From

[233] https://en.wikipedia.org/wiki/Constitution_of_India (Last accessed on 21st May, 2021 at 7.45 pm)

the wording of the provisions of the Constitution, it's clear that an emergency is seen as an
extraordinary condition during which normal democratic politics cannot function. Therefore, special powers are granted to the govt.

The research question of this article is that as to how the Emergency proved to be the darkest phase of the Indian Politics.

INTRODUCTION

The India Prime Minister in 1975 had declared an emergency across the country. The emergency was issued by President Fakhruddin Ali Ahmed under Article 352(1) of *the Constitution of India*[234] and lasted 21 long months beginning 25th June 1975 and lasted till 21st March 1977.

The background of the emergency is that in 1974 there was a student agitation by the Bihar Chatra Sangharsh Samiti which received the support of Gandhian socialist Jayaprakash Narayan, against the Bihar government. Meanwhile, in Patna, Shri J.P. initiated a total revolution in which he asked the students, farmers and labour unions to involve themselves in non-violent acts so as to change the Indian society. He also demanded the dissolution of the authorities, but this wasn't accepted by Centre. There was another Nav Nirman movement in Gujarat, between December 1973 and March 1974.

The case of Indira *Nehru Gandhi v. Raj Narain*[235] was a landmark judgment. It had been the first time in the history of independent India that a Prime Minister's election was set aside. It had also been the first time a constitutional amendment was struck down by applying the doctrine of basic structure triumphed in the *Kesavananda Bharati case*[236] . It had been also the first time that election laws were amended retrospectively to validate the nullified election

[234] Supra n.1
[235] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299
[236] Kesavanand Bharti v. State of Kerala, AIR 1973 SC 1461

of the Prime Minister.

Shri Jayaprakash Narayan and a coalition of opposition leaders didn't want to wait for the results of Mrs. Gandhi's appeal to the Supreme Court. On June 25, Shri Jaiprakash Narayan announced a week-long nationwide campaign of civil disobedience from June 29 to remove Mrs. Gandhi from Prime Ministership.

Another prominent reason for the emergency was the railways protest. There was a railway strike led by socialist leader George Fernandes which lasted for 3 weeks, in May 1974 and therefore the strike resulted in the halt of the movement of goods and people. Million railway men participated in the movement. The govt. was harsh on the protesters and thousands of employees were arrested and their families were driven out of their quarters. The aim of the country's 21-month-long Emergency was to stop "internal disruption," and constitutional rights were suspended and freedom of speech and also the press were revoked. Mrs. Gandhi defended the severe move as in the national interest. The imposition of emergency brought the agitation among the common public, the strikes were banned and lots of opposition leaders were put in jail. The political situation became very quiet though tense. The govt. also suspended the liberty of press by using it's special powers under emergency provisions.

Newspapers were asked to obtain prior approval for all material to be published which is called press censorship. Apprehending social and communal disharmony, the govt. banned Rashtriya Swayamsevak Sangh (RSS) and Jamaat-e-Islami. The people were not permitted to do the protests and strikes. Under the provisions of emergency, the Fundamental Rights of citizens stood suspended, including the right of citizens to approach the Court for restoring their fundamental rights. A forced mass-sterilization campaign was headed by Shri Sanjay Gandhi, the son of the Prime Minister against which there were many human rights violations.

The government made extensive use of preventive detention. Under this provision, people are arrested and detained not because they committed any offence, but on the apprehension that they would commit an offence. Using preventive detention acts, the govt. made large scale

arrests during the emergency. Arrested political workers couldn't challenge their arrest through habeas corpus petitions. Many cases were filed before High Courts and Hon'ble Supreme Court by and on behalf of arrested persons, but the govt. claimed that it was not needed to tell the arrested persons about the reasons of their arrest. Several High Courts gave judgments that even after the declaration of emergency the courts could entertain a writ of habeas corpus filed by someone challenging his/her detention.

In April 1976, the Supreme Court did not accept the High Court decision and passed the decision in favour of the government. It meant that in an emergency the govt. could seize the citizen's right to life and liberty. This judgment was one of the controversial judgments of the Supreme Court. Many of the journalists were arrested for writing against the Emergency and new changes were also made in the Constitution. An amendment was made declaring that elections of Prime Minister, President and Vice-President couldn't be challenged before the
Court. The change in the constitution was that the duration of the legislatures of the country was extended from 5 to 6 years. This change was not just for the emergency period, but was intended to be of a permanent nature. Besides this, during an emergency, elections could be postponed by one year. Thus, effectively, after 1971, elections were needed to be held only in 1978, than in 1976.

Thus, Criticism and accusations from the Emergency era could also be summarized because of the detainment of individuals by police without notification of families, abuse and torture of detainees and political prisoners, use of public media institutions, as national television network Doordarshan, for state propaganda, forced sterilization, destruction of the slum and low-income housing at Turkmen Gate and Jama Masjid area of old Delhi and large-scale and illegal enactment of recent laws.

CONCLUSION

From the aforesaid analysis of the emergency period we are able to conclude that the emergency proclaimed in 1975 by the then Prime Minister Mrs. Gandhi was indeed the darkest phase of the Indian politics. However, this Emergency made everyone more

responsive to the worth of civil liberties. The Courts too, have taken an important role after the emergency in protecting the civil liberties of the individuals.

WE SHOULD ALL BE FEMINISTS' BY THE NIGERIAN AUTHOR CHIMAMANDA NGOZI ADICHIE

- DIVYA NAND

INTRODUCTION :-

This book holds great relevance in today's time as it talks about a topic which is often ignored and undervalued. The book throws light on issues which women face every single day in her life. The author understands the problems in a woman's life because she herself is a woman and has gone through all of these. She wants all women to make remark in their fields and stand head to head with men in everything they do or aspire to do. The topic of feminism is something which the author strongly feels for. She had delivered a talk on feminism in a conference for which she received standing ovation from the audience. I personally liked the book very much as the thoughts are very mature and something that is worthy of being recognized globally.

A DEEPER INSIGHT :-

Many years before, the author had a very close friend whose name was Okoloma. The author used to share everything with him as he was like a big brother for her. He was the first person to call the author a feminist but the author could make out from his tone that it was not a compliment. She didn't even know the meaning of this word as she was just 14 so she searched its meaning in the dictionary. Unfortunately, Okoloma died in a plane crash later.

In 2003, she wrote a novel 'Purple Hibiscus' which was about a man who used to beat his wife. While she was promoting her novel, a journalist came to her and advised her that she should not call herself a feminist as according to him, a feminist is a female who is upsent and sad because she is unable to find a husband. Hence, she started calling herself a 'happy feminist.' Then a Nigerian lady told her that feminism was un-African and hence she should not call herself a feminist. Therefore, the author then called herself a 'happy African feminist.' After this, one of her dear friend told her that feminists are those who hate men. Hence, she then called herself a 'happy African feminist who does not hate men.' Through this, she realized that the word feminist is wrongly interpreted by maximum number of people.

One of the childhood incidents in the life of the author is about the time when she was in primary school in Nsukka. Her teacher told everyone that she would take a class-test and whosoever gets the highest marks in the test would be the class monitor. Interestingly, the author scored the highest marks in the test but she was denied being the class monitor just because she was a girl. Her teacher said that only boys have the authority to become a class monitor. Therefore, the boy who scored second highest in the test was made the class monitor. Through this story of her life, the author wants to emphasize on the fact that anything we see or do time and again, it becomes normal. Witnessing such incidents during her lifetime, somewhere in her mind she realized that if these things continue, people would take it to be normal.

Another incident in the author's life is prudent to mention. The author often used to enjoy her time with friends & family in the city Lagos. One evening, her friend Louis accompanied her along with other friends. In places like Lagos, there's a lot of rush which makes it difficult to find a place to park cars or vehicles. There are people to help and guide the visitors so that they're able to park their cars safely. It's basically made a business out of it. So that evening, the author and her friend Louis were guided by a man to park the car safely. The author then gave a tip to him. Surprisingly, the man thanked Louis for the tip instead of thanking the author. To this, the author realized that the man had thought that since Louis is a man, whatever money the author had, was given to her by Louis.

The author has mentioned that females are not given as much respect and honour as the males. She says that in the US, a man and a woman are doing the same job with same qualifications but still the males are paid more than the females. This is due to gender stereotypes. She also says that men being physically stronger than women is no reason to treat both the genders differently. True potential is measured by the level of knowledge, creativity and intelligence of a person and not by physical strength.

Another incident which the author mentions is about a Nigerian hotel where she was harassed by the guard of the hotel by asking numerous questions to her like which room she is going, what's the name of the person she has come to visit, did she know that person, proof that she is a guest by showing the key card etc. The reason for this was that such females entering a hotel alone were considered to be sex workers. The author says that she could not go alone to reputed bars and clubs because women were not allowed to enter alone. It was necessary for a woman to be accompanied by a man if they wished entry to the bars and clubs. The author

expressed her emotions of grief and sadness about how it feels to be treated so unequally. She says that she was never greeted by waiters in a restaurant and the man accompanying her would get all the attention and respect. She was frustrated and angry with such things happening in the society and strongly desired to bring a change.

The author has mentioned about her female American friend who took over a managerial position from a man. Just in a week's time, she disciplined an employee about a forgery on a time sheet. The employee then complained to the top management that she is too aggressive. Other employees agreed too. Nobody gave it a thought that the same thing if done by a man would be appreciated. The author then talks about another female American friend who had a good pay job in advertising. Once when she gave her comments on a certain theme, she was ignored by her boss but when similar comments were given by her male colleague, he was appreciated and praised by the boss. She didn't say anything that time, but felt extremely bad and cried later.

The author has tried to explain that females are human beings too, they too have hearts and they too feel everything. Being biased and discriminatory towards women is too bad for the society and must not be accepted at any cost. We must look towards a broader perspective where all of us can live freely, happily and peacefully. The author wishes to make our future a better place to live where men and women are treated equally with love and respect.

The author says that we teach our daughters to be in a certain way, to behave in a certain manner, to do something in a certain style, but we never teach our sons what are really important for them to learn. There shouldn't be any difference between both the genders is what the author tries to put before us. The author says that the society tends to link masculinity with money as people expect only men to be earning & paying bills. The author wants people at large to have a broader mindset because what she experienced in life was very much male-centred & male-dominated. She has heard people saying that women should not be more ambitious or successful than a man because if women become more successful, it would be considered as bringing the prestige of a man down. The author says that girls should not be taught only to think of getting married, because there's whole lot of things which she is capable of doing. By saying this, the author doesn't mean that marriages are bad, what she is trying to put across is that, women should be made independent and strong so that she is free to make her choices & live a dignified life. The author mentions that wearing a wedding ring will not bring respect to a woman, but having confidence and independence

will surely bring. She says that women are only expected to compromise whereas men are not expected the same. She says that the society blames only the females for every wrong thing that happens in the society, for example, if a girl is raped, people say that the girl was not wearing proper clothes, her behaviour was not proper, so on & so forth. To have such mentality is not justified in today's changing times. Women should be set free to be their own selves and have their own individuality. The author says that the society expect women to do all the household chores like cleaning & cooking but do not expect men to do the same. She wonders as to how people think that women are inherently born with household skills. People should focus more on abilities & interests rather than dividing tasks based on gender. The author also says that a thing like cooking is a basic practical need in today's time, so why only girls be asked to cook & why not boys! Girls are always judged by the way they dress-up which lowers down their confidence. They are not allowed to be the way they want to, because ultimately the key of control is with the people around her.

The author proudly says that she is a feminist & she is not hesitant about it. She said that people asked her to use a word like 'human rights' rather than using a word like 'feminism'. But the author believes that in order to bring a change, one has to be specific about the idea where the change is required.

The author says that men need to change themselves and start recognizing the issues faced by women at large. Taking a small example of a waiter greeting only the man, in such a situation, the man must ask the waiter as to why he ignored the lady accompanying him. These are small aspects which should be looked into very minutely. Cultures & traditions should not rule human beings, human beings should rule the cultures & traditions.

CONCLUSION :-

After reading the book, I got to know about the author's view points and what exactly she has tried to bring into everyone's notice. Undoubtedly, women are facing a lot of challenges in numerous fields stretching from her workplace to her home. Gender disparity is still prevailing in most of the places which require immediate attention. The author has very nicely explained the need of having equality in status through various incidents experienced by her during her childhood and adulthood which has helped her understand feminism in a wider sense. Feminism is not about considering women greater to men, it's about considering both men and women equally worthy of respect and dignity.

INTERPLAY BETWEEN RIGHT TO EQUALITY AND RELIGIOUS RIGHTS IN INDIA

- VASUCHIT ANAND

INTRODUCTION

As the issue regarding entry of women of menstrual age in Sabarimala temple was being debated in Supreme Court, the streets of Kerala were filled with fervent and passionate supporters, from both sides agitating for their viewpoint. [1] The Sabarimala case, along with a host of other cases, such as right of muslim women to pray in a mosque, entry of parsi women to fire temples, genital mutilation of Dawoodi Bohra girls, has shone the limelight on conflict between rights of individual specifically women of these communities and the right of communities to regulate their religious affairs.

Recognising the inherent conflict between rights of individuals and right to communitities to regulate their internal affairs, the Honourable Supreme Court, while hearing review petition of its Sabarimala judgement, framed seven questions of law, and referred it to a constitutional bench, seeking to clear the smoke between Article 14 of constitution prescribing right to equality, and Religious rights(Article 25 and Article 26). The seven questions of law drawn up by the Supreme Court are: [2]

I) What is the scope and ambit of religious freedom under Article 25 of constitution?

II) What is the interplay between religious freedom and rights of religious denominations under Article 26 of constitution?

III) Whether religious denominations are subject to fundamental rights?

IV) What is the definition of "morality" used in Articles 25 and Article 26?

V) What is the ambit and scope of judicial review of Article 25?

VI) What is the meaning of phrase "sections of Hindus" under Article 25(2)(b)?

VII) Whether a person not belonging to a religious group can question the practices, beliefs of that group in a Public Interest Litigation petition?

ESSENTIAL RELIGIOUS PRACTICES DOCTRINE

The Supreme Court has historically relied on the "Essential Religious Practices" doctrine to decide on cases involving religious affairs. Originally conceived by the Supreme Court in the case of "The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt (Popularly known as the Shirur Mutt case, and hereinafter referred to as the same). [3] Under the Essential Religious Practices Doctrine, the Supreme Court came to a juristic conclusion, that, the Constitution protected not only the freedom of religious opinion, but also all acts done in pursuance of such religion, as was indicated in Article 25. However, only those religious practices were deemed to be worthy of constitutional protection from state or private interference, which were of essential nature or intrinsic to the religion concerned. [4] The power to determine what constituted "essential " religious practices was bestowed on the Supreme Court, thus taking away the right of religious communities to their religious matters as per their wishes. Further refining, the doctrine in Sri Venkataraman Devari v. State of Mysore case, the Supreme Court, opined that, while determining the essentiality of any practice, it would take into account the views of the religious community, but such views would not be determinative and the final power to examine essentiality rests with the Supreme Court. [5] In the Durgah Committe Ajmer v. Syed Hussain ors., the Supreme Court expanded the scope of religious practices, to include those, which it considered as superstitions. [6] Thus, the Supreme Court bestowed itself of the powers of not only determining essential practices of a religion, but also sought to make religions more "rational" by purging them of superstitional practices. This is exactly what Justice Indu Malhotra in her dissenting judgement in the Sabarimala case advised Supreme Court to guard against. Justice Malhotra cautioned that "Notions of rationality cannot be invoked in matters of religion." [7]

Another question is of the theological competence of judges to decide what constitutes essential practices of a religion. Again quoting Justice Malhotra from her Sabarimala judgement, "What constitutes essential religious practice is for the religious community to decide, not for the court. Religious practices can't be solely tested on the basis of right to equality. It's up to the worshippers, not the court to decide what's religion's essential practice". [8]

In the absence of any guidelines for application of essential religious doctrine, it has been left to the whims of individual judges to check for essentiality of any practice to a religion. This has led to a highly inconsistent and judge centric approach in application of the doctrine. In 2014, The Supreme Court upheld a ban by Shimla High Court on animal sacrifice during Kullu Dussehra, terming it as non essential to Hindu religion. However, a year later, while hearing a PIL on animal sacrifice during festivals, the Supreme Court, reversed its stand, claiming that it cannot "close its eyes to centuries old religious tradition". [9]

ARTICLE 14, RELIGIOUS RIGHTS AND SABARIMALA JUDGEMENT

Article 14

Article 14 of the Indian Constitution prescribes right to equality for all individuals, that is, right to be not discriminated against on various grounds such as race, religion, caste, sex, gender etc etc. [10] Concurrently, the Supreme Court has allowed the state to reasonable classify persons, objects and transactions by the law. Traditionally, the reasonable classification criteria has been used by the state to undertake affirmative action measures like reservation, for groups such as Scheduled Caste, Scheduled tribes, Women etc. [11]The pertinent question to be answered by the Supreme Court, in relation to, Right to Religious freedom, is whether, only the state has the power to reasonably classify persons, or a religious community can also treat itself as a seperate class, while not violating Article 14. If the answer to the above question is in affirmation, then surely, a religious denomination like, a community of Lord Ayappa worshippers, can treat their members, as of a special class, and bestow special religious rights on them, such as exclusive entrance to the Sabarimala temple.

Article 25 and 26

Article 25 and 26 of the Indian Constitution provide the bedrock of religious freedom in India. While Art 25 protects individual religious rights, Art 26 protects religious rights of a community.

Article 25 has a second clause attached to it, which is more consequential to the concerned topic. Art 25(2)(a) empowers the state to regulate a secular activity associated with a religious practice. [12] The Indian state has regularly used this provision to extend its tentacles, to control the management of Hindu temples, and, a case concerning freeing up of

Hindu temples currently lies with the Supreme Court. Though the provision clearly restricts the regulating power of state to activities of secular nature, states like Tamil Nadu and Andhra Pradesh have clandestinely used this provision, to appoint temple administrators, who not only control secular activities, but also religious practices in the temple like method of organising a pooja, constituent of prasad to be distributed in a temple etc etc. [13]

Article 26

While Article 25 protects the individual freedom of religion, Article 26 protects the religious freedom of communities. Article 26 provides religious dominations right to establish and maintain institutions for religious and charitable purposes as well as right to manage its own affairs in matters of religion. [14] The second point is crucial, in matters of our interest, where the right of religious communities has been repeatedly challenged in courts.

Sabarimala Judgement

The Sabarimala judgement has been singularly responsible for pushing the subject of conflict between religious rights and right of equality into national consciousness. While, the petitioners, desiring permission, to women of all ages to enter into the temple. Hence, it becomes imperative that we undertake an enquiry, into not all, but some of the novel reasons, espoused by the Highest Court, for allowing women of all ages to enter into temple.

- Right to freedom of religion

In his sabarimala judgement, Justice D.Y. Chandrachud opined that the women petitioners had a right to freedom of religion, which provided them right to enter the temple, irrespective of their age, thus effectively limiting the right of religious domination, to manage their religious affairs, given to them by constitution under Article 25. [15] However, a close reading of the Article 25 suggests otherwise. Article 25(1) allows freedom of religion to be curtailed on grounds of public order, health and morality and other provisions relating to fundamental rights. [16] Thus, this would mean that, in case application of Article 25, clashes with other articles, enumerated in Part III, Article 25 would have to make way. Article 26 on the other hand can be curtailed on the grounds of public order, health and reasoning. Hence, It can be argued that whenever Article 25 clashes with Article 26, Article 26 would have to

given primacy ie right of freedom of religion for religious denominations stands on a higher pedestal, compared to freedom of religion for ordinary individuals.

Even not accounting for the above stated, legal understanding of Article 25 and 26, it is important to ask, to whom is the Supreme Court actually granting the right to freedom of religion and subsequently, right to enter the Sabarimala temple for all female devotees. When the Sabarimala judgement was being abjudicated in the court, thousands of women devotees of Lord Ayappa, were demonstrating on the streets of various cities of Kerala. They were not demonstrating for the claiming the right to enter the temple, but for preserving the tradition of not entering the temples for women aged between 10 to 50 years. Their line of reasoning, was their abstinence from temple premises, was too a form of religious devotion to their Lord Ayappa. The petitioners who were contending for a right to enter the temple in the court, had almost no relation, either spiritually, emotionally or religiously with the traditions of the temple. This led to legal experts debating whether, any individual, can file petitions in the name of Public interest, challenging religious traditions, when practitioners of the faith, are fully comfortable with whatever, tradition is being followed.

- Right against Untouchability

Justice D.Y. Chandrachud in his judgement opined that excluding women from entering the temple, was a form of untouchability, hence needing to be struck on grounds of violating Article 17 of the Constitution. [17] On the same subject, of whether, not not allowing women entry into the temple, constituted untouchability, Justice Indu Malhotra, in her dissenting judgement, wrote that, the analogy of Untouchability is "misconceived" in this case. She said "The rights asserted by Dalits was in pursuance of right against systematic social exclusion and for social acceptance per se. In the case of temple entry, social reform preceded the statutory reform, and not the other way about". [18] In a decades, old judgement, the Mysore High Court took on the onerous task of defining "untouchability". The High Court said that the "subject matter of Article 17 is not untouchability in its literal or grammatical sense, but the practice as it had developed in the country". [19] Hence, untouchability would be viewed as restrictions imposed on individuals of certain clasees on grounds of getting birth in certain castes. It does not include within its scope, a situation, where certain groups are being excluded from religious services.

CONCLUSION

The attitude of Supreme Court of treating religious rights as inferior to other rights and bestowing itself with power to "reform" religions reeks of a patronizing attitude. The Supreme Court rather than focusing on the theological question, of determining which practices are essential, should stick to constitutional limitations of public order, health and morality, for striking down those religious practices, irrespective of whether they are essential to the religion or not.

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THE INDIAN CONSTITUTION AND THE ESSENCE OF JUSTICE

- VIVEK V RAJAN

JUSTICE

The word justice is derived from the Latin word "justus" means that which is "just", "right", "honest", "appropriate", or "correct".

What is Justice? Justice is an indivisible concept. A proper definition for justice can't be coined for the concept of justice is something that changes over time in consonance with the rhythm of the society. In the most common terms, justice is an ideal representing something that is just and right. It basically means being just, impartial, fair and right. What is just may depend on the context, but its requirement is essential to the idea of justice. Jurisprudence or the philosophy of law studies the origin of law and different schools of jurisprudence. The natural law school of jurisprudence believes that justice means the implementation of religious laws while modern jurisprudence says justice means the implementation of concepts like equality and liberty. However, some peoples define justice as the concept of moral rightness based on ethics, rationality, law, natural law, religion, fairness, or equity.

In modern days, justice basically means the recognition and proper implementation of laws made by legislatures and the function of justice mostly lies in the hands of judicial organs and quasi-judicial bodies.

Salmond defines law as "The body of principles recognised and applied by the state in the administration of justice."

Bentham defines law as "Law is a command which obliges a person or persons to a specific course of conduct."

Therefore, justice generally means the recognition, application and enforcement of laws by courts. This is different from the understanding of justice in the ancient period when it was given a religious and moralistic meaning.

The concept of justice and its administration can commonly be of the following types:

1) Public justice

Public justice is basically that kind of justice which the state administers through its tribunals and courts. It explains the relationship between courts and citizens of a state. Courts usually enforce laws that the states make under public justice.

2) Private justice

Private justice regulates the legal relationship between individuals. It is limited to people enforcing concepts of justice amongst each other without approaching courts.

3) Civil justice

Civil justice generally refers to private wrongs that affect specific people or entities. The remedy of civil wrongs is generally to approach civil courts

4) Criminal justice

Criminal justice, on the other hand, affects society in general even if specific people are victims. A feature of criminal justice is that it relates to laws made by a legislature. Only acts that are defined as crimes can be the subject matter of criminal justice.

According to **Aristotle** , "Justice is a social virtue which is concerned with relationships between persons ..... Justice alone is the good of others, because it does what is for the advantage of another.''[237]

Anciently morality and religion were primary basis to govern the relationship between peoples. And there was no need to search for a law maker to enact laws that govern social relations. It was based on natural law that human relations were regulated. But, after a long and serious debate between legal scholars and philosophers it is determined that there must be a human made law to regulate human relations. Rights and duties are usually acknowledged through laws made by human beings. But, should a right be acknowledged and clearly indicated by law to be considered as a human right or is it enough to simply be a human being to enjoy human rights is debatable by itself. According to John Lock the state of nature is not a state of war. It is not a brutal regime but pre-eminently social in character, governed by the law of nature, or reason. The result is uncertainty and chaos. Some means of

[237] Aristotle, Nichomachean Ethiest, Transt H. Rackham, Edn. 195, BKV.117

escape must be found and it is here the social contract emerges. But this contract unlike the contract of Hobbes represent the rather the triumph of reason than of hard necessity. Locke does not believe in the unlimited all-powerful sovereign of Hobbes. Whereas according to Rousseau, the state of nature was a golden age of freedom, free in the fullest sense of the word; but the necessities of self-preservation and the jealousies which arose after the institution of private property prompted primitive men to enter to a contract among themselves by which they surrendered their rights not to an individual but to the community as a whole for the general good of the whole. The community or the general will, however, is not party to the contract and therefore sovereign in the Hobbessian sense of the term. The actual ruler however, is a servant of the general will with certain duties imposed on him. He is thus under the contract and if he breaks this contract with the community he can be deposed. Some says primitive men have not entered to a contract or '*articles of peace'* and did not deliberately agreed to give up their natural rights to the sovereign, but, strong and powerful individuals established their way over the weak settled them in a specified territory; the strong had imposed their will upon the weak and then had thrown the cloak of pretended legitimacy over their disregarded of the rights of the other. One way or another the social contract is a law between those groups, individuals and citizens; and we need this law to regulate the overall interaction of peoples. Where there is any violation of this contract or law, the state is responsible in punishing violators based on the contract. If there is no law and state, the state of nature will come back again and only those having the physical and intellectual fitness will survive over the weakest. And just because human beings are selfish by their nature, not operating based on morality and not living for their conscience the need to have law is so essential. Meaning, if human beings are operating based on morality, fairness and their conscience, usefulness of law would be minimal and there would be no need of police, office of prosecution and courts. Therefore, we can say that life is impossible without the existence of law. According to Aristotle, justice which implies making good the loss of a person to whom some wrong has been done. Justice stands against injustice. The term "unjust" according to Aristotle, applies both to man who breaks the law and the man who takes more than his due, the unfair man. Hence, it is clear that the law-making man and the fair man will both be just.[238] This is where the role of Justice comes into play. We all

[238] Ibid. Book V.IV

want a free society where we can lead a life with dignity and pride. And this is the soul reason behind the origin of state and law.

The discussion about the concept of justice will not he complete without reference to the ideas of philosophers of ancient India. The Hindu legal system is embedded in Dharma as propounded in the Vedas, Puranas, Smritis and other works on the topic The word Dharma is used to mean justice (Nyaya), what is right in a given circumstance, moral, religion, pious or righteous conduct, being helpful to living beings, giving charity or alms, natural qualities or characteristics of properties of living beings and things, duty, law and usage or custom having the force of law, and also a valid Rajashasana.[239]

Thus the Indian or Hindu concept of justice is to preserve or conserve a just, social order. From the "Varna" system of the Indian society the concept of justice can be drawn out easily. Justice or Dharma stood for the Varna system. This concept of Varna system is similar to Platonic concept of justice to some extent. In Hindu thought the State or King is the protector of Varna The four fold division of society existed at that time are - Brahmins Kshatriyas, Vaishyas and Sudras. Brahmins are like "the l o v e r s of wisdom1', in Plato, Kshatriyas are like the warriors, in Plato, Vaishyas are like the appetite element in Plato and Sudras are also the slave class m Plato - unfit for any work except to serve others. The discussion about the Indian concept of justice will not be complete without the concept of justice explained by Manu and Kautilya Both of them were in favour of protection of social order in accordance with the system of Varna and Dharma.

There is a close connection between law and justice. The main thing that connects law and justice is the origin and foundation of law. Law is related with nature and God; and its basement is that of justice. True justice is found in nature and nature has ordered what human beings should do and not to do. And where human beings search and found this from the nature include it in their law then human law is considered as holding justice and compatible with natural order. In this respect the naturalist and positivists theory followers have their own view. That is the natural law theory followers argue that justice is the source and basement of law. Whereas the positivist theory followers argue that law is the source and basement of justice; and a rendered justice has its source from law. One way or another it can

[239] Justice M. Rama Jois : Legal and Constitutional History of India, p. 3, Universal Law Publishing Co. Pvt. Ltd. (2001)

be taken that there is unbreakable tie between law and justice in terms of origin and foundation. Legal and political theorists since the time of Plato have wrestled with the problem of whether justice is part of law or is simply a moral judgment about law. There are no universal principles by which justice or injustice can be defined other than the way in which the government has made its laws. Thus, in different societies and under different authorities, justice is different. Others who don't like laws made by governments on the other hand argue that there is some sort of universal natural law or justice. But looking into the current practical laws and situations of our world every government has its own different laws that are assumed to serve justice.

JUSTICE AND OUR CONSTITUTION

The Constitution of India has entered into its 70th year of its operation. Our Constitution is a fundamental law which lays down the basic goals and objectives which are to be fulfilled. In our country's structure of government, the legislature is the law making forum and the executive takes the directions of the legislature for its implementation. The judiciary under our Constitution is a watchdog of the Constitution. It looks into both law making and the law implementation by the other two wings of the Constitutional democracy. The functions and role of these three wings of our government are essential for the successful operation of Constitutional democracy in our country. A democracy means and provides a government at the wish of the common majority. The representatives of people voice the wishes of the people for smooth operation of the socio-economic development thinking and their policy making work.

Modern democracy are inconceivable without judiciary. This organ is not only guardian of the Constitution but also protector of fundamental rights of the citizens. Bryce observed; "There is no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his knowledge that he can rely on the certain and prompt administration of justice." This organ is not only guardian of the Constitution but also protector of fundamental rights of the citizens. According to Alan Ball in 1978 there are two main reasons why this point, that the judicial system is part of the political process has to be emphasised. Firstly, liberal

democratic theory has traditionally put a premium on the necessity of protecting the citizen from a too powerful state and therefore emphasised the impartiality of the judicial process, to increase the independence of the judiciary and to deepen the respect and confidence with which judicial decisions are received. Secondly, it has led to the emphasising of the aspects of the doctrine of separation of powers, both to prevent too much concentration of political power in the hands of government and guard against the 'of democracy' or the 'tyranny of the majority'

Our constitution for this purpose has put across certain fundamental policy choices in the Constitution, in the form of **Parts III and IV.**

According to Granville Austin the Indian Constitution is first and foremost a social document. Its founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society. The new society was to be achieved through a socio-economic revolution pursued with a democratic spirit using constitutional, democratic institution.[240] Thus unity, social revolution, and democracy, were goals, which were mutually dependent and had to be sought together and not separately. The above observation aptly describes the Indian State, as contemplated by the framers of the Constitution. In fact the Preamble to the Constitution, which is based on the objectives resolution" of Pandit Jawaharlal Nehru, asserts that 'We the people' of India, through this Constitution, aim at establishing a Sovereign, Socialist, Secular, Democratic, Republic of India and to secure to all its citizens, justice-social, economic and political.

The Indian Constitution for this purpose has put across certain fundamental policy choices in the form of Parts III and part IV of the Constitution furthers the guarantee of justice-social, economic and political, by providing for judicially nonenforceable obligations, on 'the State' in the form of Directive Principles of State Policy. But the fact that Principles stated in Part IV are judicially non-enforceable should not lead one to the conclusion that they are any less important than the Rights mentioned in Part III. A reference to the definition of the term 'State' in Parts-III and IV is enough to disperse any such notion. The fact that 'the State' has

[240] G Austin The Indian Constitution: Cornerstone of a nation (1966);

been defined in the same manner, in both Parts III and IV, is possibly an indication, that the founding fathers of the Constitution, were of the opinion that the nation's ideals viz, national unity and integrity and a democratic and equitable society, to be achieved through a socio-economic revolution pursued with a democratic spirit using constitutional, democratic institutions. The Supreme Court in Minerva Mills v. Union of India, observed, There is no doubt that though the courts have always attached very great importance to the preservation of human liberties, no less importance has been attached to some of the Directive Principles of State Policy enunciated in Part IV. The core of the commitment to the social revolution lies in parts III and IV. These are the conscience of the our Constitution.

The term social justice implies a political and cultural balance of the diverse interests in society. Democracy is the only means by which is indeed a dynamic process because human societies have higher goals to attain. Social justice is an integral part of the society. Social injustice can not be tolerated for a long period and can damage society through revolts. Therefore the deprived class should be made capable live with dignity. Social justice is a principle that lays down the foundation of a society based on equality, liberty and fraternity. The basic aim and objective of society is the growth of individual and development of his personality. The concept of social justice is a revolutionary concept which provides meaning and significance to life and makes the rule of law dynamic. When Indian society seeks to meet the challenge of socio-economic inequality by its legislation and with the assistance of the rule of law, it seeks to achieve economic justice without any violent conflict. The ideal of a welfare state postulates unceasing pursuit of the doctrine of social justice.

The significance and importance of the concept of social justice today that Social justice is not a blind concept . It seeks to do justice to all the citizen of the state. A democratic system has to ensure that the social development is in tune with democratic values and norms reflecting equality of social status and opportunities for development, social security and social welfare. The caste system acts against the roots of democracy in India. The democratic facilities like fundamental rights relating to equality, freedom of speech, expression & association, participation in the electoral process, and legislative forums are misused for maintaining caste identity. It is true that India has been an unequal society from times immemorial. There are enormous inequalities in our society which are posing serious challenges to Indian democracy. Therefore, must not show excess of valour by imposing

unnecessary legislative regulations and prohibitions, in the same way as they must not show timidity in attacking the problem of inequality by refusing the past the necessary and reasonable regulatory measures at all. Constant endeavour has to be made to sustain individual freedom and liberty and subject them to reasonable regulation and control as to achieve socio-economic justice. Social justice must be achieved by adopting necessary and reasonable measures. That, shortly stated, is the concept of social justice and its implications. The basic aim of social justice is to remove the imbalances in the social, political and economic life of the people to create a just society. It means dispensing justice to those to whom it has been systematically denied in the past because of an established social structure. These are five basic principles, of Babasaheb Ambedkar , through which justice can be dispensed in the society. These are first establishing a society where individual becomes the means of all social purposes, second establishment of society based on equality, liberty and fraternity and third establishing democracy political, economic and social, forth establishing democracy through constitutional measures and fifth establishing democracy by breaking monopoly of upper strata on political power. These are main principles of Ambedkar's theory of social justice, Ambedkar was of the opined that Social Justice can be dispensed in a free social order in which an individual is end in itself. Associated life between members of society must be regarded by consideration founded on liberty, equality and fraternity.

When social justice has failed to have its effect. The answer to this is simple. To enunciate the principle of justice is one thing. To make it effective is another thing. Whether the principle of social justice is effective or not must necessarily depend upon the nature and character of the civil services who must be left to administer the principle. The solution to social injustice lies within us only. We should be aware of the expressions for the poor, for the backwards class. social justice which are being used to undermine standards, to flout norms and to put institutions to work. We should shift from equality of outcomes to equal of opportunities and in striving towards that, politicians should be doing the detailed and continuous work that positive help requires, the assistance that the disadvantaged need for availing of equal opportunities. Social processes are constantly changing the society, a good legal system is one which ensures that laws adapt to the changing situations and ensure social good. Any legal system aiming to ensure the basic dignity of the human being and the inherent need of every individual to grow into the fullness of life.

Today our judiciary is the protector of civil rights, it is the custodian of fundamental rights, it is the guardian of the Constitution, its role in a federal system as the arbitrator is well known and the power of judicial review has reposed faith of the people in the judiciary. Both legislative anti-people law making and the executive excesses can come under judicial scanner. The importance of judiciary is more for the citizens than for the States. The judicial system is a part of the judicial process for the welfare of people and for social justice.[241]

CONCLUSION

The relationship between law and justice is unbreakable and there is a direct relationship between the two. It is also highly believed that they are two faces of a coin. And many people consider the proper implementation of laws as a justice. However, all laws are not just laws and entitle rights to all human beings. Since every law has its own political, sociological, philosophical and historical background in a given society, it will definitely benefit and harm different groups in a society and cannot uniformly serve justice to all the society. It cannot also uniformly treat all human beings. Finally, we can generally conclude that if laws are enacted for the interest of the whole society, it can be considered as a means of serving justice. In this sense for a law to be considered as a means of serving justice the law should in the first place indicate equal distribution of goods, opportunities, resources and rights and should not be the utility of few. Secondly this law should be properly and effectively applicable without any kind of differentiation to all similar cases in a similar manner. But, coming to the reality there are laws that are against the law of nature and there are also instances in which there are no effective implementation of laws. In such instances it is impossible to serve justice through laws. Therefore, since law is the means to an end, the law itself should be a just law as a pre-requisite to use it as a means of serving justice.[242]

[241] Social Justice in Indian Democracy: A Prograssive Concept under Indian Constitution, http://www.madhavuniversity.edu.in/, https://madhavuniversity.edu.in/social-justice.html (last visited Jun 28, 2021).

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P. GOPALKRISHNAN V. STATE OF KERALA

- MANAV SRIVASTAVA

In P. Gopalkrishnan v. State of Kerala, (2020) 9 SCC 161, the Hon'ble Supreme Court has examined "intra-conflict of fundamental rights flowing from Article 21, that is, right to a fair trial of the accused and right to privacy of the victim".

Name of the Judges on the Bench – Justice A.M. Khanwilkar, Justice Dinesh Maheshwari
Name of the Judge authored judgement – Justice A.M. Khanwilkar

FACTS

The present case which is being adjudged by the apex court of India, the appellant is accused for an alleged offence of rape and related offences. The prosecution in this case proposes to rely on the contents of the memory card as evidence which was given to the magistrate through a police report by the investigating officer under Section 173 CrPC. According to the prosecution the contents of the memory card contains the sexual abuse which is allegedly done by the accused on the victim. According to Section 207 CrPC, if any evidence which is qualified as 'Document' then in that case a clone of such document should be given to the accused party. The appellant have approached the Supreme Court in order to get the cloned copy of the memory card in order to make required argument to defend against the accusations of the prosecution. The case has already been in favour of the prosecution's side in the District court which is the court of first instance and the High court and this appeal is before the supreme court of India.

ISSUE

1. Whether the contents present in the memory card can be treated a 'Document' to attract the rules mentioned in section of 207 CrPC?
2. The second issue being dealt in the present case is if the contents of the memory card are to be referred as 'Documents', then in that case whether it was obligatory on the

part of the court to give the cloned copy of that electronic evidence to the accused in order to give him the right to fair trial as mentioned in Article 21.

3. Whether the court has power to decline the request of accused in order to get the clone of the document which has been laid in the Section 207 CRPC in cases where there is a question related to the infringement of the privacy of the victim.

ANALYSIS

The first question which the courts decides in order to proceed further with the case is establishing the fact that whether the Content of memory card can be classified as a 'Document'. The court was of the opinion that in order to classify an article as a 'document', it is necessary to see the information which is inscribed and not the subject on which it is inscribed. If we see the Section 3(e)(1) of the Evidence Act, we can see the definition of evidence which include documents which also include electronic records. Electronic evidence which is produced for the inspection of the court is documentary evidence by the above mentioned section.[243]

Section2(1)(t) &(1)(o) of the Information Technology Act, 2000 further tells us that when it comes to electronic records it is not confined to "data" but it also includes the record or data generated, received or sent in an electronic form.[244] The data which is being referred herein represents that information or the knowledge and facts. According to this Section the video footing which was present in the memory card is considered as electronic record which is a 'Document' as it contains data which is merely stored in the memory card.

A reference was made to the 42nd & 156th Law commission Report which concludes that the material present in the memory card would be "matter" and the memory card would be "substance". As the material present inside is considered as 'matter', it would be considered as a 'Document'.

According to the Section 207 of the CrPC, the cloned copy should be provided to the accused but a contention was raised by the respondents. The contention raised was that by giving the clone it will reveal the identity of the victim. It was countered by the arguments of the appellant by giving explanation that the identity of the victim is already disclosed by the

[243] R. *v.* Dave, (1908) 2 KB 333.
[244] Tukaram S. Dighole *v.* Manikrao Shivaji Kokate, (2010) 4 SCC 329.

prosecution by stating the name in the FIR. This explanation by the appellant was accepted by the court.

Article 21 of the Constitution of India gives the person the right to fair trial. In order to have a fair trial the accused should be provided with all the material and evidences in advance, which are being used by the prosecution during the trial.

As this memory card contains video footings of the alleged sexual abuse. The problem in this case is if the matter of the memory card is cloned and is provided to the accused then in that case it could be misused and the privacy of the victim will be compromised. There are 8 accused in this case, once the relief is granted to the accused 8 who is the appellant in this case the cloned copy of the content of the memory card would be available to all the accused and the chances of the misuse increases.

The court in this situation where there is conflict between the fundamental right of the accused under Article 21 of the constitution of India and right to privacy of the victim, has reiterated the rule which was laid down in the case of ***Tarun Tyagi v CBI***.[245] In this case Section 207 of the CrPC is being explained as it puts an obligation on the prosecutor to provide the accused the copies of the documents. Proviso of Section 207 states further that if the documents are voluminous, then in that case the magistrate can let the accused inspect the document personally or through pleader in the court and no clone copy will be provided in this case.

The statute is interpreted in a plain and natural manner and on a bare reading of this section no other outcome is possible. The liberty of the accused cannot be interfered expect by the due process of law and this due process of law includes fairness in trial.

The court took the option of harmoniously constructing and imposing certain conditions in this case, so that the balance is maintained both the side.[246] In order to solve the intra-conflicts of the fundamental rights the test of larger public interest was implemented which was laid down in the case of ***Asha Ranjan v. State of Bihar***.[247] No fundamental right is absolute in nature and can has certain limitation to them, in order to find a solution between the intra- conflict the courts have the duty to see the interest at large which promotes the "rule of law". It can be stated that the rule of primacy is based on legitimacy and has to be judged

[245] Tarun Tyagi *v.* CBI, (2017) 4 SCC 490.
[246] Asha Ranjan *v.* State of Bihar, (2017) 2 SCC (Cri) 376.
[247] Ibid.

on the basis of facts of different cases. The right to fair trial which is envisaged in the article 21 of the constitution of India, takes in its ambit the society at large.

Furthermore, the court emphasised on the ruling laid down in the case of ***Asha Ranjan***,[248] in which it was stated that the principle of primacy cannot be given to one right in on the same time the right of the other gets totally extinguished. This is not considered as a balance, as the right of the other is being totally extinguished. Balancing means that right of one person is curtailed to some extent so that the right of the other class is also protected. In order to maintain a balance in this present case, the court tweaked the prayer of the appellant. The court stated that the appellant can seek a second expert opinion from an independent agency such as Central Forensic Science Laboratory. The cloned copy can be analysed by this independent agency and can satisfy the queries of the accused for reassuring the credibility and genuineness of the content of the memory card. Only the accused or the legal representative can ask the magistrate to inspect the content of the memory card in the court without having any means to record the content. This kind of balance will keep both the sides on an equal rights footing, as the accused is able to inspect the content of the memory card and has the right to free trial under Article 21 and on the other hand the right to privacy is being saved to an extent by not providing the cloned copy.

DECISION

The Supreme court held that the content of the memory card is considered as a document as it is an electronic record. In ordinary course of time, if the prosecution relies on such kind of evidence then the same should be cloned and provided to the accused according to the section 207 CrPC. But in cases where the right to privacy is involved, courts have the power to only provide inspection of the documents to the accused/his or her lawyer/ expert. The apex court gives the ruling in the favour of the appellant by providing a relief to them in which they can only inspect the content of the memory card in the court itself with having any device which can record.

OPINION

The Supreme Court harmoniously constructed the tussle between the fundamental right of Article 21 and Right to Privacy. The court laid down a middle path by which both the

[248] Supra note 4.

fundamental rights of both the parties are not being violated. The requisites of Section 207 CrPC is being fulfilled and the right to privacy is also not being violated as the evidence is being shown to the accused but inside the courtroom, which restricts the further circulation of the video of the victim.

The Right to fair trial of the accused is also not being tampered as he has the access to the evidence and can see the video in order to prepare his side of arguments. Furthermore, the point which the court raised that right to primacy cannot curtail other's right will act as an important precedent in future. The Apex court interpreted the provisions of law in manner which would benefit both the parties and would not lead to the violation of their rights.

NAVTEJ SINGH JOHAR VS. UNION OF INDIA

-SAMETA SANGWAN

SUPREME COURT OF INDIA

AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016

BENCH: Dipak Misra, CJI; Rohinton Fali Nariman, J. A. M. Khanwilkar, J; D. Y. Chandrachud, J; and Indu Malhotra

DATE OF JUDGEMENT: 6 September 2018

PETITIONER: NAVTEJ SINGH JOHAR & ORS.

RESPONDENT: UNION OF INDIA THR. SECRETARY MINISTRY OF LAW AND JUSTICE

ACT REFERRED: INDIAN PENAL CODE (SECTION 377)

'To be punished by life imprisonment or imprisonment for up to 10 years and a fine if you are committing wilfully sexually against the natural order with a man, woman or animal,' specifies **Section 377.**

The **Buggery Act**, which was enacted in the 16th century, framed Section-377 of the IPC.

This act was brought into India by **Thomas Macaulay's first law commission**, which wrote it as Sec-377 of the Indian Penal Code of 1860.

In 2009, The Delhi High Court heard a case in which the **Naz Foundation (India) Trust** challenged the validity of Article 377 under Articles 14, 15, 19, and 21.

Section 377, according to the Foundation, represents an outdated conception of sex's purpose, primarily as a method of breeding, and has no place in modern society. Furthermore, the provision has been weaponized by the police, obstructing attempts to stop the spread of HIV/AIDS. In Lucknow in 2001**,** HIV prevention workers who were giving condoms to homosexual males were detained on the charge of planning to commit a crime, according to the Foundation. The Naz Foundation also claimed that the clause was being misused to penalize non-peno-vaginal consensual sex activities.

Here, Delhi High Court declared that Section 377 of the Indian Penal Code, which prohibits consensual intercourse between two adults, is unconstitutional.

However, this judgment was challenged in 2013 in the Supreme Court by **Suresh Kumar Kaushal,** and the Court justified the Section by stating that it does not discriminate against any particular group of individuals or identity, but rather criminalizes specific conduct that, if performed, would constitute a crime. The Court went on to state that the LGBT community made up a "minority" of the overall population.

The Section has become a weapon for the persecution and torture of the LGBT community, according to one of the reasons presented to the Court. The Court dismissed the claim, noting that the abuse of the Section by police officers is not a reflection of the Section's vires.

FACTS OF THE CASE

Several curative petitions were filed in response to the Supreme Court's decision of Suresh Kumar Kaushal. While the curative petitions against the Suresh Kumar Koushal decision were pending, five members of the LGBT community, **On April, 2016** – Bharatanatyam dancer Navtej Singh Johar, Restaurateurs Ritu Dalmia and Ayesha Kapoor, Hotelier Aman Nath, and Media person Sunil Mehra – filed a new writ petition calling for the repeal of Section 377 IPC, which criminalises consensual sex between same-sex.

Navtej Singh Johar alleged that Section 377 of the Penal Code infringed his constitutional **rights to privacy, freedom of speech, equality, human dignity, and protection from discrimination.**

Non-governmental organizations, religious organizations, and other representative bodies, in addition to the Petitioner and Respondent, submitted petitions to intervene in the case.

ISSUE RAISED

- The major question here was the legality of section-377 of the Indian Penal Code.

CASE INVOLVED

These cases laid down the basic platform and emerged as the four pillars of the case:

- **NALSA VS UNION OF INDIA, 2014,** First time in Indian History, third gender got recognition.
- **JUSTICE K. S. PUTTASWAMMY (RETD.) VS UNION OF INDIA, 2017,** where right to privacy is protected as a Fundamental Right, under art.14, 19 and 21.

- **Hadiya case (Shafin Jahan case), 2017 AND Shakti Vahini case, 2018**, where the right to choose life partner became a Fundamental Right.
- **Common Cause vs. Union of India, 2018,** where individual dignity of a person came under Article 21 and became a fundamental right.

ARGUMENTS INVOLVED

PETITIONER'S ARGUMENTS

- Criminalizing homosexuality, which is a reflection of human choice, will undermine Articles 14, 15, 19, and 21 of the Indian Constitution.
- Section-377 is founded on Victorian-era morality and societal ideals, in which sexual acts were only seen as a means of reproduction and nothing more.
- This part is the only reason that the LGBT community has faced prejudice and abuse throughout their lives, and will continue to face discrimination and abuse if homosexuality is criminalized once more.
- No definition of "carnal intercourse against nature's order" can be found anywhere.

RESPONDENT'S ARGUMENTS

- Individuals who engage in such behaviours are more likely to develop HIV/AIDS, increasing the country's AIDS victim population.
- It will lead to the violation of Article 25.
- What will be of Marriage Institutions?
- Section-377 of the IPC does not violate Article 15 since it forbids discrimination on the basis of sex but not sexual orientation.
- It does not violate Article 14 because the section solely addresses a specific offense and its punishment.

JUDGEMENT

The five-judge Bench partially struck down Section 377 of the Indian Penal Code on September 6, 2018, decriminalizing same-sex relationships between consenting adults. Individuals who identify as LGBT are now legally permitted to engage in consensual

intercourse. The Supreme Court affirmed Section 377 rules that make non-consensual activities or sexual acts on animals illegal.

In reading down Section 377, the judgments uniformly identified breaches of fundamental rights. They discovered that Section 377 discriminates against people based on their sexual orientation and/or gender identity, in violation of the Constitution's Articles 14 and 15.

They also found that Section 377 breaches Article 21's rights to life, dignity, and personal decision autonomy. Finally, they discovered that it obstructs an LGBT person's capacity to fully realize their identity by breaching Article 19(1)(a)'s right to freedom of speech.

AFTERMATH

The Supreme Court has rendered its decision, but what about our societal norms? Will they approve and consent to it, or will the LGBT community's fight for freedom continue, and if so, for how long?

Because Though Amnesty International, RSS, CPI(M), and the United Nations are among the organizations and groups who are happy with the ruling. Certain organizations, like the All-India Muslim Personal Law Board and the Jamaat-e-Islami Hind, expressed their dissatisfaction with the Apex Court's decision on section-377.

CRITICAL ANALYSIS

Courts are critical in ensuring that when a basic right is violated, constitutional morality triumphs over social morality. Because of the prominence of societal morality, members of the LGBT community have been prohibited by society for a long time. In the Suresh Kumar Koushal case, the court failed to defend the community's Fundamental Rights. These aspects of majoritarian social morality against the LGBT community should be addressed, just as the Constitution intended to correct discrimination against the minority group. The infringement of fundamental rights cannot be justified by social morality.

Also given that the provision struck down as part of a colonial-era law, and since comparable provisions still exist in several Commonwealth countries, the judgment is likely to be persuasive in those countries as well.

CONCLUSION

In Navtej Singh Johar, the Supreme Court of India has taken a bold and major step toward a judicial system that upholds the egalitarian ideals of the Indian Constitution. It uses transformative constitutionalism to try to change the status quo and present social views while preserving constitutional morality over and above the morality of the majority culture. The Court acknowledged the importance of the right to privacy in the private, voluntary behaviour of homosexual adults while doing so. For many individuals and organizations that have long advocated for equal rights for homosexuals, the decision was a cause for joy.

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CONSTITUTIONALITY OF DEATH PENALTY

- SIMRAN KANG

ABSTRACT

Death penalty or capital punishment is an age old topic and the debate upon its constitutionality has been going on since time immemorial. Murders and other heinous crimes have been known to exist in the history of mankind and the philosophical approach for the same has been blood for blood or eye for an eye. But this approach has been misconstrued off-late, since taking away a person's life is the most heinous crime a person can commit, the sanction or the commitment has to be equally severe in the form of taking away the life of the murderer. But the modern day penologists are of a different opinion and terms and it is such that a murderer must not be put to death because the state must not commit a murder. They more inclined towards the philosophy that two wrongs do not make a right and has come up with the reformative approach as the only basis for punishment. No matter how heinous a crime is, the state must give a chance to the offender to reform himself. Well, roughly, this forms the idea behind not awarding death penalty in the most of the jurisdictions across the world. The judiciary has taken the charge, and has evolved the Rarest of Rare principle, which continues to hold the fields firm. In light of the judgments and law commission reports, it is eminent to study the study with analyzing the basic ideology behind it, its application and execution in India today.

OBJECTIVE OF THE STUDY

Death penalty is a controversial topic and has led to many debates amongst the penologists across the world. The main objective of the study is:

- *To study meaning, extent and application of death penalty.*
- *To know the constitutional validity of death penalty.*
- *To study the rarest of rare principle.*

RESEARCH METHODOLOGY

Qualitative approach as well as analytical methods has been used in used to compare the judicial decisions relevant to the subject. Comparisons have been made as well as doctrinal approach has been used for the content taken from law journals and articles etc.

SCOPE OF THE STUDY

The study aims to know the constitutional validity of death penalty and whether it should be made selectively applicable or be completely abolished. The study focuses on the application of death sentence keeping in mind the rarest of rare principle.

INTRODUCTION

Capital punishment or death penalty is a form of state-sanctioned practice of executing the offender after holding a just and fair legal trial. Etymologically, the word *capital* means "head" and derives its origin from the Latin word *"capitalis"*.
In India, a capital punishment is given when the offender has committed a capital crime such as murder, dacoity, rape, treason, mutiny, waging a war against the country etc.

Punishment, be it any punishment, is used to enforce the law of the land which acts as an important aspect of the modern civilization. Today, it is the duty of the state to punish the criminals in order to uphold the rule of law and to impose a deterrent in the society. The sentence condemning a person of the death penalty is called "death sentence" and the carrying out of it is known as "execution".

In the olden days, the punishment and its extent depended upon the king, who in the most cases decided what punishment to impose. As the time advanced, there emerged several theories upon which, the punishment was decided by the jurists. Even though there has been a change in the outlook, capital punishment, being the most brutal and the highest punishment, is still practiced by many countries across the world.

United Nations has taken a firm stance upon the issue and has regarded it as a violation of human rights. Many other organizations like Amnesty has come in support of the death sentence convicts and asked for leniency and human approach to be practiced while deciding the sentence.

Today, whenever the court decides any case, it gives its judgment keeping in mind the theories of punishment, which include deterrent theory, reformative theory, preventive theory, retributive theory and expiation theory.

LITERATURE REVIEW

Provisions related to death penalty in India

Constitutional provisions

Indian constitution is the amalgamation of many constitutions of countries like USA, Britain, Canada, Japan etc. We adopted the best provisions in order to govern one of the largest democracies in the world. The Indian Constitution guarantees fundamental rights to its citizens but they are subject to reasonable restrictions by or under the authority of law.

Article 14 provides for equality before law and equal protection of the laws within the territory of India.[249] It emphasis on the fact that every person is equal before the law, unless there is a requirement of discrimination to achieve equality.

Article 19, Protection of certain rights regarding freedom of speech, etc. All citizens have a bundle of rights promised under this article. Namely:

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) to property [omitted]
(g) to practice any profession, or to carry on any occupation, trade or business[250]

Article 21 Right to life says that no person shall be deprived of his life or personal liberty except according to procedure established by law. [251]

[249] *Article 14 of the Indian Constitution*
[250] *Article 19 of Indian Constitution; indiankanoon.org*

It is an inalienable right having an evidentiary value. These rights are as much available to non-citizens and to those whose citizenship unknown[252] and our courts have assigned them paramount position among the rights.[253]

Article 72 and article 161 of the constitution of India, empowers the president of India and the governor of the states to suspend, remit or commute sentences in certain cases. They may grant pardons, reprieves, respites or remissions of punishment or suspend, remit and commute the sentence of any person of any offence-

(a) In all cases where 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 extends;
(c) In all cases where the sentence is a death sentence.

In the case of *Madhu Mehta*[254] *and Triveni Ben*[255], the death sentence was commuted due to unreasonable delay of disposal of mercy petition, which extended for about nine years and lacked reasonable justification, which indeed violated the article 21 of the Indian constitution. These two judgments are the pillars of speedy trial and disposal of mercy petition.

Statutory Provisions

Indian penal code, 1860 provides for a number of offences, which are punishable by death sentence. There are basically 11 sections under IPC namely:

1. Section 121 "Treason, for waging a war against government of India.
2. Section 132 "Abetment of mutiny actually committed.
3. Section 194 "Perjury resulting in the conviction and death of an innocent person"
4. Section 195 "A threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person".
5. Section 302 "Murder".
6. Section 305 "Abetment of a suicide by a minor, insane person or intoxicated person".

[251] *Article 21 of the Indian Constitution*
[252] *National Human Rights Commission v. State of Arunachal Pradesh, 1996 1 SCC 742.*
[253] *Kehar Singh v. Union of India, 1989 1 SCC 471.*
[254] *Madhu Mehta v. Union of India, 1989 4 SCC 62.*
[255] *Smt. Triveniben and others v. State of Gujrat and others, 1989 SCR (1) 509.*

7. Section 307 (2) "Attempted murder by a serving life convict"
8. Section 364 "Kidnapping for ransom".
9. Section 376A "Rape and injury which cause death or leaves the woman is a persistent vegetative state".
10. Section 376E "Certain repeat offenders the context of rape".
11. Section 396 "Dacoity with Murder". [256]

Death penalty may also be imposed if any person is found guilty of criminal conspiracy to commit any the crimes mentioned above.[257] Besides IPC, There are some other laws in India, which have death penalty as a punishment. They are as follows:

- The air force Act, 1950.
- The Army Act, 1950.
- The Assam Rifles Act, 2006
- The Bombay Prohibition (Gujarat Amendment) Act, 2009
- The Border Security Force Act, 1968
- The Defence of India Act, 1971
- The Explosive Substances Act, 1908
- The Indo-Tibetan Border Police Force Act, 1992
- The Karnataka Control of Organised Crime Act, 2000)
- The Maharashtra Control of Organised Crime Act, 1999
- The Narcotics Drugs and Psychotropic Substances Act, 1985
- The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962
- The Sashastra Seema Bal Act, 2007
- The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
- The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002
- The coast guard Act, 1987.
- Commission of Sati (prevention) Act, 1987.

[256] *Source: 262nd law commission report, 2015.*
[257] *Section 120B, Indian Penal Code, 1860.*

- The Geneva Convention Act, 1960.
- The navy act, 1957,
- The unlawful activities prevention act, 1967[258]

RESEARCH

The procedure established by law was initially interpreted as procedure established by law of the state. It required,[259] *firstly* existence of an enacted law authorizing interference with the life or personal liberty; *Secondly*, it should be valid; *thirdly* the procedure laid down by the law must be followed. In the absence of non-compliance of any of these conditions any deprivation of life or personal liberty of a person by any authority violates article 21.

In *Jagmohan singh v state of U.P.*[260], the constitutionality of imposing death sentence was challenged. The Supreme Court held that if the entire procedure for the criminal trial under the CrPC for arriving at a service sentence of death is valid then the imposition of death sentence in accordance with procedure established by law cannot be said to be unconstitutional.

In *Maneka Gandhi's case*[261], the Supreme Court changed the existing understanding of article 21. The court did that by establishing a relationship Article 14, 19 and 21 which apparently been denied in A.K. Gopalan particularly in respect of Articles 19 and 21. In the impugned case, Chandrachud J said that:

"The procedure in Article 21 has to be fair, just and reasonable, not fanciful, oppressive or arbitrary".

In *Jolly George Varghese v. Bank of Cochin*[262], krishna Iyer J. said that,

[258] *Source: 262nd law commission report, 2015.*
[259] *A.K. Gopalan v. State of Madras, 1950 SC 27*
[260] *1973 1 SCC 20: AIR 1973*
[261] *Maneka Gandhi v. Union of India, 1978 SCC 248.*
[262] *1980 2 SCC 360.*

"The high value of human dignity and the worth of the human person enshrined in article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence".

In *Bachan singh v. State of Punjab*[263], the court by 4 to 1, upheld the validity of death penalty under section 302 IPC read with section 354 CrPC against the challenge based on Article 14, 19 and 21, wherein, it was held that:

"Article 19 unlike article 21, does not deal with the right to life and personal liberty and is not applicable for judging the constitutionality of the provisions of Section 302 IPC".

In their words, they said that to commit a crime is not an activity guaranteed by Article 19(1). Considering Article 21, the founding fathers recognized the right of the state to deprive a person of his or personal liberty in accordance with fair, just and reasonable procedure established by valid law.

Rarest of rare principle

It evolved in the landmark judgment called *Bachan Singh v. State of Punjab*.[264]

The case was heard by 5 judges' constitutional bench and the issue before the court was on-

- Constitutionality of death penalty in light of Article 14, 19 and 21.
- Whether death penalty should be used frequently or reserved for only special cases?

Yes, it is constitutional, no doubt, but at same time the court agreed that death penalty is such a severe sanction, it is irrevocable and irreversible, and must not be used commonly. Now this imposes a question as to when it must be used and which cases qualify for a death penalty?

So, the court used the expression *"Rarest of Rare".* It has not been defined anywhere because the statute law doesn't use these terms and for its application, court laid down certain conditions saying that:

[263] *1980 2 SCC 684.*
[264] *1980 2 SCC 684.*

"Although welfare all murderers are cruel but cruelty varies in its degree and when it approaches extreme degree of cruelty or culpability, it becomes depravity".

So, they are for the help of one to decide from the factual matrix, whether these six adjectives or some of them apply to the given case.

"The taking away of life through instrumentality of law should be preserved only in rarest of rare cases because the dignity of life supervises every other consideration".

In *Machhi Singh's case*[265] too, the Bachan Singh's judgment was upheld and it was yet again retrieved by the court that death penalty should only and only be imposed in rarest of rare cases and in nothing short of that.

In *Kehar Singh's case*[266], replying upon the justice Bhagwati's dissent upon the constitutional validity of death penalty, but the court rejected the plea by holding itself bound by the law laid down in Bachan Singh.

There are several other indications in the constitution which show that the constitution makers were fully cognizant of the existence of death penalty, such as, entries 1 and 2 in List II, Article 72 (1)(c), Article 161 and Article 34.

However, the practice of keeping dead body suspended for half and hour after the execution of death sentence is in violation of article 21.[267]

In *T.V. Vatheeswaran v. State of T.N.*[268], it was held that the delay exceeding two years in the execution of death, entitles a convict to get it commuted to life imprisonment. But the same was overruled in Sher Singh v. State of Punjab[269] that *no such limit could be fixed for execution of death sentence without regard to the facts of each case.*

[265] *Machhi Singh and Others vs State Of Punjab, 1983 SCR (3) 413.*
[266] *Kehar Singh And Anr. Etc vs Union Of India And Anr, 1989 AIR 653.*
[267] *Pramanand Katara v. Union of India, 1995 3 SCC 248.*
[268] *1983, 2 SCC 68.*
[269] *1983, 2 SCC 344.*

In *Triveniben v. State of Gujrat*[270], the constitutional bench expressly overruled *Vatheeswaran* and held that:

"it may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life".

The court repeated that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of *Article 21* and thereby entails the ground for commutation of sentence.[271]
However the dispensation was initially denied to a convict of terrorist activities[272] but was later extended to him too.[273]

In *Mithu v. State of Punjab*[274], a constitutional bench for the first time and unanimously invalidated a substantive law i.e. section 303 IPC, which provided for a mandatory death sentence for murder committed by a life convict. The court consulted that it is difficult to hold that the prescription of the mandatory sentence of death answers the test of reasonableness and added-

"a provision of law which deprived the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and therefore, regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair".

Expanding the horizons of *Article 19*, in Bachan Singh's case the court also held that the validity of laws criminalising or penalising certain activities has to not be tested under article 19(1)(a) because the article doesn't give any right to commit crimes.

[270] *1989 1 SCC 678.*
[271] *Shatrughan Chauhan v. Union of India, 2014 3 SCC 1.*
[272] *DPS bhullar v. State (NCT of Delhi), 2013 6 SCC 195.*
[273] *Navneet Kaur v. State (NCT of Delhi), 2014 7 SCC 264.*
[274] *1983, 2 SCC 277.*

However, it's not true, the test for article 19 is not whether a law is a penal law or not, instead the test is whether the law penalises an activity protected by Article 19. If it does, its validity shall have to be tested under the article 19 though it may be tested under Article 21 if reasonableness of procedure for penal sanctions is also questioned.

The contention that the prisoners are also humans and must be kept in with all dignity, it's imperative to consider that in *State of A.P. v. Challa Ramkrishna Reddy*,[275] it was held that a prisoner is entitled to all his fundamental rights unless his liberty has been constitutionally curtailed. So, as long as a particular act by the authority is constitutionally valid, it doesn't violate any fundamental rights.

ANALYSIS

Chance to reform oneself is imperative. However, I believe that the state also needs to be efficient as to acknowledge to what extent is reformation even possible or worth investing in for an individual. A state's job is to ensure autonomy to the individual but at the same time how many consequences the entire society bear for the same state.

We must never forget that the government is answerable to the victim as well. There is no doubt that along with victim, the family too suffers and it is not always for the quest of blood that a capital punishment is asked for. Only and only if a crime is so heinous, the judge sentences a death penalty, that too even after carefully evaluating each and every aspect of the case.

The famous judgment of *Bachan Singh* still continues to hold the fields and since then the death penalty is used with great caution and that too only in the cases that includes gruesome, brutal, diabolic, murder with pre- meditation involved in its factual matrix.

Considering the options available to the accused, it is very much clear that the court has always intended to be extremely cautious so as to avoid miscarriage of justice. Article 72 and 161 of the Indian constitution also contain provision to the effect of death penalty to avoid miscarriage of justice.

[275] *2000, 5 SCC 712.*

When it comes to the diminishing effect of the deterrence that death penalty holds with itself, in my opinion is due to non-execution and the loopholes that needs to be abridged. Today, there are more options available to an accused which are leading towards misuse of the law which were very much made to punish them. The floating example of Nirbhaya case can be taken wherein the defence has been rather misusing the law to their advantage. In my opinion, changes must be brought and such practice must be restricted.

35th law commission report suggested that, considering the current scenario it is not advisable to get away with this penalty since there exists a huge income gap between the masses, where literacy rates are so low.

In 262nd law commission report, it has been however suggested that the penalty should be only used in terrorism related crimes. It is no where mentioned that it has been violating the fundamental rights of the accused.

India has time again voted against abolition of death penalty in UN, with recently voting against the UN general assembly draft resolution, contending that it goes against the statutory provisions of the law of the land.

Death penalty has been a proven deterrent and an example for those who involved in honor killings. Justice Katju, in many of his interviews, has time again emphasized on the importance of death penalty for a country like India.

SUGGESTIONS

- It is often contended that it is almost only the poor who are hanged, and the rich gets away with bribe or by hiring a good lawyer, whereas the accused is provided a lawyer by the legal aid, who are, often, not at par with that of the prosecutor. Hence, considering the extra-ordinary nature of the case, a lawyer with minimum work experience of eight years must be provided to the defence.

- In order to counter the diminishing effect of the deterrence that death penalty holds, death convicts must be executed within one year of the declaration of the sentence.
- The mercy and the pardon petitions must be moved quickly so as to avoid delay in execution.
- The prime objective of the state should be towards prevention of crime and for the judiciary, it is to avoid miscarriage of justice, so that no innocent is hanged.
- Diverting from death penalty and declaring it as unconstitutional is not the solution, government must aim at educating masses and encourage respect for law. Because if today, for many, death penalty has been turned out to be in violation of human rights, then that day is not far when life imprisonment will also be get done away with due to obvious reasons.
- Supreme in one of the latest judgment had held that death by hanging is not unconstitutional, though alternative options like lethal injections may be used to ensure painless death.
- In the year 2019, the state of Madhya Pradesh had introduced a bill to introduce death penalty for the cases involving rape and murder of minors of 12 years or below. In 2018 the state had the most number of death penalties awarded than any other state. Other states should also introduce such a law.

CONCLUSION

Death penalty has been practiced since time immemorial. Even though the major organizations oppose it, but in my opinion it is crucial to have a highest punishment of such nature.

The crux of the whole issue is that everybody is guaranteed right to life under Indian constitution, but when someone divest someone from this precious right, it has to be on the cost of his own life.

The execution rates are too less and that is the proof that even though the penalty as such exists, its execution has been nullified by non-compliance of the sentence. In order to have a

deterrence for the same in the society, it has to be restored by executing the sentences already been given.

CRIMINOLOGY: A HISTORICAL OVERVIEW

- AYUSH SHARMA

ABSTRACT

In this article I analyse the evolution of criminology from an ancient period. I examine the incidences of crime and the methods to deal with it at the ancient times in India. The article consist a brief study of the provisions related to crime in the ancient text of "yajnavalkya". The article also gives some light on the fact about the existence of demonology before the actual establishment of criminology as a science where there were no logical and rational parameters to study the causation of crime and everything was blamed to the existence of devil, demon and Satan. In this study, I am comparing the evolution and historical development of criminology with the process of historical evolution proposed by Thomas Kuhn in his book "The Structure of Scientific Revolution" in which he proposes that any form of science is evolved in different stages of paradigms. The study is about the four basic paradigm periods which includes the period of pre-paradigm, period of crisis; etc. The existence of the fourth stage of paradigm of the development of criminology in the present time is also considered and studied.

KEY WORDS: Criminology, Paradigm, Demonology, crime

INTRODUCTION

Existence of a society without crime is inevitable or it won't be incorrect to say that crime is an indispensable element of every society. In fact it's a myth to think of a crimeless society. Not only the crime is indispensable, absurd it may sound, some jurists have even said that the crime, to some extent, helps in promoting social solidarity among the people of the society. It is a general fact that man's interest is best protected as a member of the society. Everyone owes certain duties to his fellowmen and at the same time has certain rights and privileges that he expects others to ensure for him.[276] As per to the views of Emile Durkheim "There is no society that is not confronted with the problem of criminality. It's form changes; the acts thus characterized are not the same everywhere; but, everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repressions... No

[276] N.V. Paranjape, criminology & penology with victimology at p. 3 (Central Law Publication, Darbhanga, 16th edn., 2015

doubt it is possible that crime itself will have abnormal forms, as for example when its rate is unusually high. This excess is indeed undoubtedly morbid in nature. What is normal, simply, is the existence of criminality, provided that it attains and does not exceed for each social type, a certain level... to classify crime among the phenomena of normal sociology is not to say merely that it is inevitable, although regrettable, phenomenon, due to incorrigible wickedness of men, it is to affirm that it is a factor in public health, an integral part of all healthy societies."[277] Durkheim believed that even if a society is composed of persons possessing saint like qualities would not be free from violations of the norms of the society

Historically, the concept of crime seems to always been changing with the variations in social conditions during the evolutionary stages of human society. This can be illustrated by the fact that early English society during 12th and 13th centuries included only those acts as crimes which were committed against the State or the religion.[278] Thus treason, rape and blasphemy were treated as crime whereas murder was not a crime.[279]

Primitive societies didn't recognise that there is any difference between the law of crimes and law of torts but only knew the law of wrongs. Particularly on this, Fredrick Pollock and Maitland observed that before the dawn of 10th century people confused the crimes with torts because the bond of family was stronger than that of community,[280] the injured party and his friends could take revenge of the wrong by the private retaliation and punishment. At that time, practice of revenge was an alternative of a proper legal remedy. In earlier times kings were also authorised to receive compensation in lieu of a wrong from the wrongdoer.

Another characteristic feature of this period (1000 to 1200 AD) in the history of crime was the preponderance of the system of ordeals by fire or by water[281] to establish guilt or innocence of the accused. This was perhaps due to the dominance of religion inn early days

[277] Steven Lukes (ed.), Emile Durkhiem, Rules of Sociological Method (THE FREE PRESS, New york , 1st ed. 1983

[278] Supra note 1

[279] L. T. Hobhouse and E. A. Westermarck(ed.) Heinrich Oppenheimer, The Rationale Of Punishment (University Of London Press, 1913)

[280] Radcliffe and Cross, The English Legal System(1954) p. 6

[281] In the ordeal by fire the accused was to carry a red hot iron to a distance of nine feet. Thereafter his hands were bound up unbandaged. After three days if the wound was healed up, he was considered to be innocent. In ordeal by water, the accused was bound lowered in a pool, if he sank a certain distance, he was innocent otherwise he was considered guilty and punished.

and superstitions of the people who believed that their social relations were governed by some supernatural powers which they regarded omnipotent.[282]

As per to the Dharamshastra writers these tests were living institutions in India. The ancient records show that these ordeals were followed very strictly with the rules since very early times. These ancient writers have stated these ordeals as divine methods and named them as samaykriya, sapatha, divya, or pariksa. These tests were substantial proof of the guilt or innocence of the accused. The two approaches of these tests were:

1. They indicated the holy and divine procedure of trial, and
2. The main object behind following the method was the need of super natural intervention to secure the ends of justice.

Thus, these tests were followed in India since ancient times, and have been evolved into customs followed by the ancient Indian society. Yajnavalkya mentions five kinds of ordeals:

i. Balance,
ii. Fire,
iii. Water,
iv. Poison, and
v. kosa[283]

With the pace of time, the reasoning by the people of the society was evolved and he emperor of the state was expected to have a great responsibility to deal with the offenders and a duty to provide justice to the aggrieved. Human society being a dynamic entity has led to the changes in its diversified culture and enhancement of scientific and technical knowledge resulting in the emergence of criminology as a separate branch of knowledge.

EVOLUTION OF CRIMINOLOGY

In the early medieval period, the ancient societies of the world at that time believed that whatever the human beings think at that time was because of the supreme power or the deity or the almighty's predominance. All the relationships existing in the society or which were prevalent at that time in the society were regulated with orthodox religious precedents and the

[282] N.V. Paranjape, criminology & penology with victimology at pp. 4 and 5(Central Law Publication, Darbhanga, 16th edn., 2015

[283] Dr. Pendse S.N. ,Oaths and Ordeals in Dharamsastras at p.24 (M.S. University, Baroda Publications,1985)

other myths and superstitions. In that primitive society, the factors such as malice, psychology or environment were least bothered or discussed for the reasons possible to be for the causation of crime. And because of the lack of any parameters or principles for the determination of crime done by the individual seeking for criminal justice, they were penalized with irrational and unjust means. Till the dawn of 18th century the conditions of the society were still same. With the pace of time, the men became more reasonable, their thought process was evolved. With the development of modern society, new scholars and researchers made their efforts to focus on the actual reasons that were responsible for the causation of crime. The efforts made by those scholars and researchers gave birth to the criminology as a subject of knowledge by establishing the different schools and theories of criminology.[284]

It could be suggested that development of criminology has happened in four stages. Kuhn has rightly said that every science starts with a pre-paradigmatic period; such period can be envisaged with the presence of such paradigms which were contrary and incompatible to each other. Each of such paradigms came up front with major questions in different fields. Criminology, being a science, was also not untouched with the same and has begun in a pre-paradigm period.[285]

In the second phase of criminology, Kuhn explains that the modern science is the outcome of victory and supremacy of one of the paradigms among the competing paradigms by defeating all the other paradigms of the same field. This is how Kuhn explains the second phase of development of any science and calls it as the "paradigm period". It won't be wrong to say that both the stages where the principles of modern criminology came into being and the stage where the one paradigm got the victory over the other paradigms competing to each other. The paradigm which had the supremacy; authorised the research and lead to the direction of criminological studies while the other defeated paradigms went to dormancy. "Positivist paradigm" is the name that has been given to the supreme dominant paradigm in question.

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285 J. Lin, *The Historical of Criminological Thought and Theory as a Series of Successive Periods* at p 8 (McGill University, Montreal, 2012)

In the third phase of development of criminology as science, Kuhn observes that history of any science is the history of succession and replacement of one paradigm by another. It is general that a revolution can take place before any such succession that is why Kuhn believed that for these purposes "crisis" is very important. This succession and replacement takes place when the existing dominant paradigm is questioned by a number of different scholars and such existing paradigm fails to justify the foundations laid by him. In that case an alternative paradigm which has the ability to answer the scholars and justify such foundations and principles is replaced with the existing failed paradigm. The science of criminology is also an outcome by the state of crisis. This stage is expected in the 1960s and 1970, when a new alternative paradigm which is the critical criminological paradigm; challenged the existing foundations and principles of the existing positivist paradigm. The questions and challenges by the criminologists which followed the critical paradigm were considered as reasonable and just-+' by the criminologists who were the followers of positivist criminology. Hence the dawn of critical criminologists gave rise to debate, insecurity and crisis to the existing foundations and principles of criminology.

The fourth stage of development of criminology as science is when the positivism got the victory over other competing thoughts, theories and paradigms. It is the period where the positivism evolved and developed and the scholars and the criminologists got a direction along with that. However this phase cannot be compared with the second stage of paradigm period similarly. This is because a period of paradigm is considered as conclusive when it is universally and ultimately accepted by the community of science and the foundations and principles of the paradigm are also recognised and universally accepted by the scientific community. Positivism is the supreme paradigm in the science of criminology; however all the other paradigms consistently challenge the positivism. All other contrary paradigms give increase to all those paradigms of critical criminology which emerged in 1960s and 1970s, but they have also renewed the earlier alternative paradigms and have established new paradigms for example post-modern criminology. Even after having the other contrary paradigms and other competing schools of thought, this phase cannot be considered as the stage of crisis like in the third phase. Most of the criminologists are the followers of positivism and are positivists; hence the positivism remains ultimately accepted.

The historical model of the development of criminology as science becomes ineffective when it comes to explain the fourth and final stage of criminology as science.

PRE-CRIMINOLOGY: DEMONOLOGY

The history of criminological theories and thoughts has started before the dawn of 18th century as per the criminologists. The ideas of such criminal acts before 18th century were known as "pre criminological thoughts" and were also called as "demonological". It was that thought or theory that was believed to be true before the time of 18th century. The complete thoughts and theories before 18th century come under the ambit of pre-criminological demonology.

Present day criminologists claim that pre-criminological demonology was completely irrational, unreasonable and was based on theology. The reason given by the criminologists of that time for the occurrence of crime was the "evil" present among the offenders and such evil occurred was nothing but because the presence of super natural powers. They believed that there was some connection between the offenders and the supernatural powers such as demons, bad spirits and devils. Einstadter and Henry, through their studies in pre-criminological demonology claimed that in which crime is believed to be the result of the forces from otherworld. They believed that supernatural forces disturbed the natural form of life which included the human and human behaviour in the society due to these devil forces. The devils got their energies from these forces of the otherworld.[286]

Such forces are considered as the root cause of the transgressions committed by the individual in the society. These forces either possess the man's body or try to abet him to commit such act by making him believe that such act gives pleasure.[287] However, Einstadter and Henry believed that demonology is not the sole reason for every such behaviour causing transgression though the demonology was universally accepted during pre-criminological period.[288]

From the term "pre-criminological demonology", criminologists suggested that all the criminological theories before the time of 18th century were kind of similar in a way. All the theories of criminology were based on the same paradigm before the time of 18th century. This means that the theory of demonology was the paradigm which was supreme and universally accepted and other alternative paradigms challenging the foundation and

[286] W.J. Einstadter and S. Henry, Criminological Theory: an analysis of its underlying assumptions 32 (Lanham, Md. : Rowman & Littlefeild, 2nd ed., 2006)

[287] Id at p 34

[288] W.J. Einstadter and S. Henry, Criminological Theory: an analysis of its underlying assumptions 31 (Lanham, Md. : Rowman & Littlefeild, 2nd ed., 2006)

principles of the supreme/dominant paradigm did not existed at that time. Hence from this statement it could be said that like the development of any other science, the science of criminology, it is research and development started normally.

It is believed that Ceasare Bonesana Marchese de Beccaria, an Italian scholar was the first scholar to start a systematic study of criminology and is also known to be the founder of modern criminology. He was the first one who started his study on the basis of science and concluded by giving different ways to deal with the crimes and criminals. After Beccaria's study, the schools of criminology or the theories of criminology came into existence. Sutherland explained the term schools of criminology as it refers to the different ideas and thoughts that are related to a particular or specific theory for the causation of crime and were related to the methods dealing with the control over the factors responsible for the causation of crime. The supporters of each and every school made efforts to elaborate and explain those factors causing crime in criminal psychology with the help of the principles established by their particular school. Hence it could be said that each school has its own way for the justification of causation of crime and gave reformative measure according to the ideologies of their particular school. Each school of criminology explains the psychology and the reaction of the people of the society against incidences of crime and the offender in a specific time.

A number have theories have been given from time to time for giving a reasonable explanation for the causation of crime. While following the multiple factor approach many factors have been taken into consideration of causation of crime either singly or together such as disease, heredity, sins, evil spirits etc. With the enhancement of the study of behavioural psychology, many sources have been taken into consideration for causation of crime rather than the traditional factor approach. Though, for justification of such crimes, many scholars still in belief of the physical factors exclusively while dealing with the reformative ways that could be given to the offenders.

It would be very vague to rely on any particular single factor approach for the determination of causation of crime. Multiple factors such as physical, mental, biological, economical, social, psychological, etc are best and altogether responsible for the explanation of causation of crime which has also been accepted worldwide. A scholar named G.B. Vold, discussed about the various factors that are responsible for causation of crime and criminality such as

lust for sex, money and power, religious faith, immorality, emotional instability, frustration, etc[289]

These multiple factors needs to be organised in a systematic form and should be arranged with the help of reasonable theories which could explain the factors causing crime and criminality. Scientific based study of criminal behaviour can be done with the help of different theories of criminology which is also known as "schools of criminology"

CONCLUSION

In this present article I have examined the historical development of criminology. I have tried to to explain the fact that like any other sciences, criminology has also been developed in different stages as also been observed by KUHN in his book "The Structure of Life". I have pointed out in this research that the development of criminology has been done through different successive periods which primarily include the stage of crisis.

The history of criminology consists of four major stages that are: (1) the period of pre paradigm where many paradigms fought for their existence and dominance, (2) period of paradigm where positivism got accepted universally by the criminologist's community, (3) period of crisis in which critical criminology came into existence and challenged the positivism, (4) period of triumph where the positivism defeated other existing paradigms that have challenged the foundations and principles of positivism. It could also be noted that forth period of criminology is yet a stage and further development of criminology can be accepted in the future.

[289] Vold G.B., "Criminology at the cross-road", 42 CLJ 157 (1951).

CRYPTOCURRENCY AND ITS LEGAL ASPECTS

- **HIMANSHU KOHLI**

Cryptocurrency or call it virtual currency, is a value which is digitally represented and traded, which can function as a medium of exchange, store of value or unit of an account, although it isn't a legal tender in India.

These are abstract currencies which can be exchanged from peer to peer I.e., a system of network in which each computer can act as a server for others, allowing shared access to all the files, data etc. Without any need of central server.

Simply, this means that there is going to be a network in which all the computers present will be connected to each other through which data could be seamlessly transferred from on computer to the other without the need of central server. Unlike earlier times, where all the data was to be stored in a central server or it acted as a medium through which data was to be transferred.

Example – if A needs to send some data to C, then A will send the data to B (central server) and then B will send it to C. but in this *Peer to Peer,* in this network all the computer remains already connected to each other, one does not need a central server and it can directly send it to the other computer.

Need of virtual currency

With changing times our needs also get changed, in this new era of transformation where earlier we did most of the transactions in cash, now India stands as a leader worldwide in digital cash transfers. But we need more advancement in our money transfer eco system, and to tackle these virtual currencies comes into the picture.

Traditional banking system had some flaws, they are: -

- Huge transaction charges, which are fixed by a central authority regulating them.
- No instant transfer.
- No worldwide reach.
- Complex and dependency over one central authority.
- Identity theft.
- Easily prone to fraud.

To tackle these flaws, virtual currencies have several advantages: -

- While transacting in virtual currencies, the charges are very less.
- Instant settlements.
- Transfers cannot be done to anyone throughout the world.
- Fraud proof.
- Easily accessible.
- You are the owner.

If you count on the pros of the virtual currency then the fact that if you are living in India, and for your daily transaction if you use Indian currency I.e. Then if you want to do some transaction in reference to America then you'll have to buy U.S Dollar

LAW OF SEDITION AND ITS JUDICIAL APPROACH IN INDIA

- JYOTI CHAUHAN

ABSTRACT

In our country, section 124A of IPC that is law of sedition always stay in discussion. It has been a burning issue of debate since India got it's independence. The objective of this paper is to study about the law of sedition and it's judicial approach in India. It is a study on how sometimes the law of sedition is misused by the government for some political gain. The paper also tells about the approach of judiciary towards the law of sedition. Law of sedition when get misused it exploit the lives of innocent people of the society. To reduce the misuse of this law, the government must be responsible and the people should also understand their limits that to what extent their right to freedom of speech and expression do not become the offense of sedition. The correct judicial approach towards the law of sedition would help in making this law more beneficial.

Keywords: law of sedition, judicial approach, government, political gain, misuse, freedom of speech and expression.

INTRODUCTION

It was the British who introduced section 124A in IPC. Basically, it can be said that section 124A is the product of colonial times. Lord Macaulay introduced this offense in the draft of 1837 but this offense was removed in the draft of 1860. It was the Wahabi movement after which the offense of sedition was added in the year of 1870 in the penal code.[290]The word "sedition" does not come in the section but it can be seen in the marginal note of the section which states, "Whoever, words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be

[290]NiveditaSaksena& Siddhartha Srivastava, "An Analysis of the Modern offense of Sedition", Manupatra, 2015, p.123

punished with imprisonment for life, to which fine may extend to three years, to which fine may be added, or with fine."[291]

Those who were aware of the fact that the British Government was exploiting the rights of the people of India and doing arbitrary acts, raised their voice against their suppressing propaganda and they made others also to understand this fact and raised their voice too. When the British government realized that the people of India would raise their voice against the acts of the then government they felt an urgent need for creating some laws which will ensure their longer rule in India. After the Wahabi movement there was a fear in the British government to loose their power in India. So they thought of making some strict laws which will help the British government in controlling the Indian masses. Many writers, nationalists, poets through their piece of art tried to spread awareness and education among the Indian masses regarding the situation and struggle for India's independence.

Mahatama Gandhi, Bal GangadharTilak and MaulanaAbulKalam Azad are some famous leaders and freedom fighters who were charged under the offense of sedition. After non-cooperation movement, Mahatama Gandhi was charged under the offense ofsedition and when he pleaded guilty he said 'this government is cruel and for every right-thinking individual it is the duty to promote disaffection against that cruel government'.[292]The biggest sarcasm is that the world's largest democracy is still having such rules and laws which at the time of their struggle for independence created barriers in their own way to attain the freedom for themselves. Although after India got its independence from the British rule, at the time of framing the new constitution of India for its people a committee on fundamental rights was constituted and Sardar Patel was made the chairman of the committee.[293]Where the committee formed for fundamental right, at the beginning adjoin sedition as one of the grounds on which freedom of speech and expression under article 19(1)(a) can be constricted that means constitution of the country would have given us the right to freedom of speech and expression but it was not meant to be complete there would be just and reasonable limitations on the enjoyment of the right to freedom of speech and expression. One such limitation was sedition but when the provisions of sedition as a basis for limitation on the

[291]Section 124-A, The Indian Penal Code ,1860.

[292]Stanley A. Wolpert, Tilak and Gokale: Revolution and Reform in the Making of Modern India, University of California Press, Berkley and Los Angeles, 1961, p. 101.

[293]Gautam Bhatia, 2016, Offend, Shock, or Disturb: Free Speech under the Indian Constitution. 1st Edn., Oxford University Press, USA. p.88

right of freedom of speech and expression was instituted in the draft constitution a large number of people who were present in the constituent assembly raised their voice against it and objected.[294]Finally sedition was not kept as a ground for restriction on freedom of speech and expression but the offense of sedition is still mentioned under section 124A of Indian Penal Code.[295]

JUDICIAL APPROACH

Pre-independence

The concept of law of sedition has emerged from common law. When the amendment was proposed, some said that this amendment is a new and finer form of the current "Sedition Act" in England. Sir James Stephen, when presenting the amendment, gave valid reasons for its incorporation in the Act by stating that it was "*free from a huge amount of blurriness and insignificance with which the Law of England was hindered*".[296]

Contrary to what Sir Stephens said, Indian Courts have had complexity elucidating the word "disaffection". The complexity occurred in 1892, when it was the first sedition operation. In this case[297], the court of law made it crystal clear that what is the difference between these two terms i.e. disaffection and disapproval. The term disaffection has been defined in the following words by the hon'ble court:

"*It the utilization of spoken or written terms to make a disposition in the minds of those to whom the terms were addressed, not to obey the lawful authority of the government, or to withstand that authority*."[298]

[294]Constituent Assembly of India Part I Vol. VII, 1-2 December 1948, (Jan. 10, 2019) http://parliamentofindia.nic.in/ls/debates/vol7p16b.htm

[295]ManeeshChibber, How our Constitution makers debated & rejected the draconian sedition law https://theprint.in/opinion/how-our-constitution-makers-debated-rejected-the-draconian-sedition-law/183548/ (accessed 10 Mar. 2019)

[296] Walter RusselDonogh, A treatise on the law of sedition and cognate offences in British India, http://archive.org/stream/onlawofsedition00dono#page/n23/mode/2up. (accessed 28 Mar. 2019)

[297] Queen Empress v. JogendraChunder Bose ILR (1892) 19 Cal 35.

[298]Walter RusselDonogh, A treatise on the law of sedition and cognate offences in British India, http://archive.org/stream/onlawofsedition00dono#page/n23/mode/2up. (accessed 28 Mar. 2019)

The term "disapprobation" means disapproval or condemnation of government actions. It is worth mentioning that this case delineated the condemnation of the government and created malice among the people. The court of law also mentioned the need of this section. The first requirement of this section is "to be able to inspire malice against a sovereign country or government". Secondly, these words should be designed to arouse people'shatred and feeling of contempt. Finally, mens rea i.e. obvious intentions to produce this feeling of hatred or malice.

In addition, this position has been clarified in various judgements such such as In Re, Bal GangadharTilak[299], Ramchandra Narayan[300], Amba Prasad[301], etc. All these decisions expanded the limit of law of sedition and action of sedition. This judgment blurs the line between disaffection and dissatisfaction. It is necessary to mention some views of the courts.

Post-independence

After the independence of India, it became very perplexed for the co-existence of the offense of sedition and freedom of speech and expression. With the first constitutional amendment in the year of 1951 the words 'public order' and 'relations with the friendly states' were added in the provision of the exceptions to the freedom of speech and expression and the term 'reasonable' was also added in before the term 'restrictions'. Therefore, the terms added by the first amendment of the constitution may not be utilized as a reason for the present prevailing law of sedition, because the government at that time did not want to pass the law to verify the law of sedition. The provisions related to the law of sedition were misused even after the independence of the country when there was no rule of the British government. There are a lot of illustrations of such misuse. On the one hand, section 124A of the IPC was considered as unconstitutional, and on the other hand it was considered as constitutional. There are a huge number of decisions of the hon'ble High Court and hon'ble Supreme Court which support it.

[299] Queen Empress v. Bal GangadharTilak, ILR 22 Bom 112 (1898).
[300] Queen Empress v. Ramchandra Narayan, ILR 22 Bom 152 (1898).
[301] Queen Empress v. Amba Prasad, ILR 20 All 55(1898).

In Ram Nandan's Case[302], the constitutionality of section 124A of the Indian Penal Code was challenged and the court held the section section-124A as unconstitutional. In the case of KedarNath v. State of Bihar, the decision of Ram Nandan;s case was overruled by the Apex court of India. The hon'ble Supreme Court held that:

"A government which is established by law is a visible sign of the country. If the government established in accordance with the law is subverted, the survival of the country will be threatened. Therefore, the consistent presence of a government established by law is an important condition for national stability. This is why the 'crime of sedition' (the crime in section 124-A of Indian Penal Code has been identified) is included in Chapter VI, which involves crime against the state. Therefore, any action referred to in Section 124A of IPC, if it causes contempt orhatred towards the government, subverts the government, or cause disaffection with it, will be included in the penal statute, because the sentiments of disloyalty or disaffection with government established by the law introduces the idea of using actual violence or incitement to violence that tends to cause public disturbances. In other words, any written or spoken language implies the idea of subverting the government by violent means. These ideas violently included in the word 'revolution' and have been fined by the section in question. However, this section has carefully pointed out that well- built language is used to demonstrate disapproval of government standards in order to ameliorate or change them through legal means. In a similar manner, no matter how strong the wordings are, conveying disapproval on government acts, which do not excite the sentiments of people and also not which generate the violent behavior to cause public unrest will not be punished."

RECENT DECISIONS

- **Binayak Sen v. State of Chhattisgarh:** It is one of the utmost well-known cases of law of sedition in the recent time, the hon'ble high court of Chhattisgarh made history for many incorrect reasons. Sentencing the blamed for the offense of sedition, the hon'ble High Court has passed a judgment for which the court has made many assertions. The denounced that was in possession of and had requested the dispersion of certain letters consisting data with respect to police abominations and Naxal writing was indicted of sedition keeping in mind the widespread Naxalite savagery

[302] Ram Nandan v. State, AIR All 101 (1959).

against the State of Chhattisgarh. Obstrusively ignoring the aforesaid principle of coordinate "incitement to violence" built up in Kedarnath, the High Court denied to permit an objective application of the regularly abused provision of law interfacing the denounced with the Naxals and their offenses. In an interesting incident, however, the Supreme Court approved the grant of bail to Dr. Sen on the receival of an appeal and commented on the merits of the case, emphasizing the significance of preserving the basic freedom of speech and expression, while appreciating the basic rule of "guilt of association" as well.

- **P.J. Manuel v. State of Kerala[303]:** The current case was decided by the hon'ble High Court of Kerala, in this case there was an involvement of a poster urging people to boycott the elections of legislative assembly of "masters who have become swollen exploiting the people". This mentioned poster and its distribution brought the allegation against the accused under section 124A of India Penal Code i.e. the law of sedition and point out that even reading of Article 124A must have the intention and soul of the Constitution of India, not the colonists of the past era. Moreover it acknowledged the significant element of "inciting violence", the real meaning of modern "dissatisfaction with the government", and acquitted the defendant. However, it is very intriguing to note this thing that the hon'ble court also applies section 196 of CrPc,[304] and according to which the hon'ble court can take the offense against state into cognizance only if the Government expressly authorizes it.
- **Gurjatinder Pal Singh v. State of Punjab[305]:** In this present case the accused gave some "ProKhalistan" speech in a religious gathering and also marked some unpleasant comment on the Constitution of India, which was continued with some anti-India slogans and sword- raising. The Chandigarh High Court adopted and insisted on the precedent of similar facts and circumstances that the Supreme Court had in the case of Balwant Singh v. state of Punjab[306] and ruled that arbitrarily raising the slogan shall not be regarded as incitement of sedition. It does not point to direct

[303] P.J. Manuel v. State of Kerala, ILR (2013) 1 Ker 793.
[304] Code of Criminal Procedure, 1973, Section 196 .
[305] Gurjatinder Pal Singh v. State of Punjab (2009) 3 RCR (Cri) 224.
[306] Balwant Singh v. Punjab 1976 AIR 230.

incitement to violence or public order. The accused get acquitted of the allegation which was imposed of him under section 124A of the Indian Penal Code.

Another well-known ridiculous satire is that the widely acclaimed Bollywood actor and film producer Amir Khan was charged with inciting the offense of sedition because of his statement on "intolerance" in the country.[307]

The very latest illustration of what can we consider as a misuse of legislation is the incident which took place in Kerala where a person was booked under the offense of sedition because by using his facebook account he made a deprecatory facebook post on Lt. Col. E K Niranjan, who laid his life for the nation and gave the supreme sacrifice of his life in the terror attack which took place at the Pathankot Air Force base.[308]

As mentioned above, all the above discussed incidents have missed the basic elements of the offense of sedition proposed by the courts in India. At best, these incidents seem to have one thing in common, that is, an expression made within the obvious safety range of fundamental freedom.

CONCLUSION

Many countries which are democratic in nature have strike down the provisions of sedition from their statutory acts. They have removed the offense of sedition from their laws. In these countries the offense of sedition does not exist anymore. A large number of democratic states have decriminalized the offense of sedition. That means if a person commits an offense of sedition then he will not be punished for it. The valid cause for removing the offense of sedition from the statues of the country is that this law was the product of colonial rule in various nations and the law was made to suppress the voices of people so that they could not ask for their rights and freedom. But as in the contemporary world, the need of sedition is no more. In the present time sedition becomes a mode to gain the political benefits and the law of sedition is basically use for the political gain only. The law of sedition never imparts the

[307] Omar Rashid, "Sedition case filed against Aamir Khan", *The Hindu*, 25 November 2015; http:/ /www.thehindu.com/news/national/sedition-case-filed-against-aamir-khan/article7916139.ece. (accessed 11 May. 2019)

[308] Vishnu Varma, "Kerala man arrested for seditious FB comment insulting Pathankot martyr Lt Col Niranjan", *The Indian Express*, 05 January 2016, http://indianexpress.com/article/india/ india-news-india/kerala-man-arrested-for-seditious-facebook-comment-insulting-pathankotmartyr-lt-col-niranjan/. (accessed 11 May. 2019)

justice rather it causes harm to the voices which are raised against injustice in the state. In the current scenario, it is observed that sometimes the provisions of sedition get in inflict with one's right to freedom of speech and expression. Sometimes, it becomes a matter of controversy to decide that to what extent one's right to freedom of speech and expression does not become the offense of sedition.

The repeal of the law criminalizing the offense of sedition seems to be the final and inevitable result of any modern democratic system. However, what actually matters is the way this democracy gets there. Associations such as Amnesty International have called for the cancellation of such laws overnight, but it also necessary to consider whether these countries are made for the deficient of law of sedition. In a State where religious the feelings related to the religion is very high, grumpy, and the relation between distinct sections of people is fragile at best, the country must continue to act as a monitor to ensure that there is no dispute within the State. To do this, some laws related to sedition are required to be made.

Repealing the section 124A of Indian Penal Code is not a solution. The section 124A of the Indian Penal Code is required in our country where we consider diversity as our strength but it must be amended with certain necessary changes.

To conclude, a law must be of such nature which maintain the law and order in the state and also strengthen the unity within the country.

RELATIONSHIP BETWEEN DRUG ADDICTION AND CRIMES IN INDIA

– PRIYANKA GUPTA

ABSTRACT

Drug addiction amid people of India as well as in foreign countries is spreading at a very fast rate. The aim of this paper is study about the relationship or nexus between drug addiction and criminal activities committed under the influence of drugs. It is a study on how the problem of crime results from drug addiction either it be alcohol or other drug abuse. In this paper we talked about the change in behaviour of drug addicts with time. Drug addiction not only harms the addict but also changes the life of his family and children. This path of drug addiction or abuse leads the addict to commit violent and heinous crime. To deal out with is problem of drug addiction and to break the link between drug addiction and crimes strict punishment is to be given to criminal or the offender and various strategies and methods should be used in order to come out from this problem of criminal activities committed under influence of drugs or narcotics.

Keywords: drug addiction, relationship, crimes, drugs, influence, behaviour

INTRODUCTION

There is a very close relationship between drug addiction and crimes in India. One of the most rigid social problem in India is drug addiction and drug related crimes. Drug addiction and drug abuse is not a new event or phenomenon, drugs like alcohol, cannabis, opium, Heroin, and many other have been used since distant past by man to find feeling of well being , happiness and excitement and to escape himself from the feeling of hopelessness, depression and anxiety.

The issue of drug addiction was not so grave in distant past because of which it did not received that much attention or consideration as it was used by only few sections of society and the other reason was that drugs used in past were not that harmful as it is presently but today the drug addiction and abuse needs to be noticed keenly as the drugs used by man toady like heroin, LSD, amphetamines and Methaqualone are very harmful. One of the most

dreadful issue is the use of these dangerous drugs by the young children that is by the school going children and adolescents. This drug addiction is destroying their future which is a problem to be given attention and is to be solved.

In opinion of World Health Organization (WHO) "substance abuse is persistent or sporadic drug use inconsistent with or unrelated to acceptable medical practice". If the world statistics on drug addiction is taken into account than the picture is frightful. With the income or profit of around $500 billions, drugs or narcotic abuse is the third largest business in the world, after petroleum and arms trade. Around 190 million people in whole world intake one drug or the other. On record one million heroin addicts are found in India, and of the record there are as many as five million.[309]

A large number of individuals were found to be using Psychotropic drugs and narcotic which was about 1.08% of 10-75-year-old Indians (approximately 1.18 crore people) of the Indian population. The report also mentioned that Uttar Pradesh, Maharashtra, Punjab, Andhra Pradesh and Gujarat were the top five states using drugs in form of sedatives of Inhalants. According to a survey held by the Ministry of Social Justice.[310]

Presently, there is no part of the word which is free from drug addicts or abusers. There are millions of drug addicts all over the world and this curse of drug trafficking and addiction has entered in India too as drug addicts are increasing in India gradually and steadily.

DRUG RELATED CRIMES

Drug addiction is basically a sort of disease that leads to a disability to control the use of licit or illicit substance use and it also influence or affects a person's brain and behaviour. Addiction means continuing the use of drugs or substance use without worrying about the harm or loss it causes. Drug addiction and crime is correlated as drug abuse causes immense human suffering and illicit production and supply of drugs has given birth to crime and violence in the whole world. Drug addiction leads to various social, biological, historical, cultural, and economic aspects. Increase in the crime rate due to drug addiction or drug abuse has created harmful effect or impact on the society at large. Drug addicts generally commits crimes so as to pay for their drug or purchase drugs. What drug addiction do is that it takes

[309] http://www.legalserviceindia.com/legal/article-2844-drug-addiction-and-crime.html

[310] Ministry of Social Justice, Government of India, Magnitude of Substance Use in India 2019, http://socialjustice.nic.in/writereaddata/UploadFile/Magnitude_Substance Use_India_REPORT.pdf(last visited Apr 10 ,2021, 6.33PM).

away the controlling power and decision making power as to what is wrong and what is right of the drug abuser or addict encouraging him to commit offense. Another effect of drug addiction is on the family because drugs addicts engage themselves in various illicit or illegal activities which are not accepted by family as well as by the society. In educational institutions too drug related crimes like theft, prostitution and illicit trafficking have marked its presence. Drug addiction is a crime itself and in order to purchase more drugs, addicts of drugs get into committing crime.

Not all drug addicts are criminals but there are a considerable amount of people who under the impact of drugs commit various criminal offences. Around 40% of the crime is committed by people under the effect of drugs. The crimes are committed to purchase or buy more drugs.[311]

Criminal activity and drug addiction or abuse goes together. The use or intake of drugs and their relationship with crime committed have many other features. Drug abuse or addiction basically leads to commission of crime and vice versa.[312]

The very first problem with drug addiction is that it leads to destroying home, disregarding children, increased divorces and dissolution of smooth going families. It has been seen many times that drug addicts often sell their household belongings in order to fulfill their drug needs. Secondly, drug addiction encourages the addict to commit crimes like theft, burglary, robbery, prostitution, auto larceny, money laundering etc. There has been a continuous change in the act or behaviour of Narcotics or drug addicts.

Study shows that in 1950s addicts were not over committing harsh or heinous crime, at that time addicts used to commit petty offences and offences which were against property and not against person such as shoplifting, stealing on the job, robbing from cars, as well as congames. The drift towards violent offences came into existence in 1960s, for example armed robbery, purse snatching, yoking, dacoity, bank robbery and auto larceny. Prostitution came as a source of income for many women addicts in 1970s as at that time prostitution became more open, cheaper and less discriminant. After 1970s till today, crimes have feature of violence, lack of knowledge and skill and use of firearms like guns, pistols and rifles as the narcotics or drugs got expensive with time. Study also depicts that most of the heroin users

[311] Quadros V And Yadav R, 2017, Victims Of Drug Abuse And The Law Enforcement: A Field Intervention, National Seminar On Victims And The Criminal Justice System.

[312] Chapter – 5 Nexus Between Drug Addiction, Alcoholism, And Criminality, Shodganga.

were having high cost heroin habits for which they need more money and apparently they commit violent and heinous crimes.

To use, sell, buy, manufacture, posses and distribute or supply drugs or narcotic is also a crime and on top of it due to change in behaviour of the addict after the intake of narcotic, he tends to commit more violent and heinous crime. It is seen that that the amount of crime committed during the time of non addiction is less than the aggregate of crime committed during the time period of active addiction. Sometimes the improper use of legal substances can also lead to commission of crime, one of the example is prescription drug abuse such as prescription forgery, illicit internet pharmacies and drug theft. It is clear that drug addiction and abuse leads to crime but do you know that a criminal activity committed by a person can also take him to the path of drug addiction. One such example of criminal activity leading to drug addiction is accidental crime. Suppose a person commits a crime and because of which he gets hit by depression and to get out from that depression that person gets under the influence of drugs or narcotics, so this is how a criminal activity could lead to drug addiction. There are mainly two circumstances when a drug addict gets involved in a criminal activity; firstly, when he is intoxicated with drugs. Drugs affect the nervous system of the addict due to which he loses his controlling power and ability to think as to what he is doing is right or wrong which leads them to commit crime. Secondly, a drug addict gets involved in criminal activity so as to earn money to purchase more drugs. Drugs now a days are very expensive for which money is needed. So this is how drug addiction could drive a drug addict into the path of crime.

The Narcotics Control Bureau contested an actor for the possession of drugs or narcotics which was connected with her supposed entanglement in a suspicious drug abuse angle in SSR Death case and her remand, this is one of the recent legal case of drug possession and drug possession is a also a crime.[313]

CONCLUSION

Clearly the nexus between drug addiction and crime is very complicated and intimate that effects the whole life of the drug addict. As the addicts of drugs and narcotics is increasing daily in return the crime rate in India is also increasing at a faster rate. The causes and impact

[313] https://blog.finology.in/recent-updates/drug-abuse-in-india#:~:text=The%20most%20recent%20legal%20case,drug%20victims%20are%20neurotic%20individuals.

of drug addiction are very much evident. The only way to curb this problem is to take steps or methods for treatment of drug addiction. Drug addiction and drug related crimes are spreading like wildfire at national as well as international level.

Though there are various legislative policies in India for drug related matters like:

- The Narcotic Drugs and Psychotropic Substances Act, 1985.
- Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.
- Drugs and Cosmetics Act, 1940.[314]

And there are various drug law enforcement agencies in India like, The Central Bureau of Narcotics (CBN), The Narcotic Control Bureau (NCB), The Narcotics Control Division and other agencies like Central Bureau of investigation, Border Security Force and custom commission which helps in preventing, curb and punish for all the drug related crimes and drug trafficking but this is not enough to control this situation, there is a need of more stringent laws and punishments. The change in present drug related laws could contribute a lot to root out India's growing drug related problems. Conducting awareness programs, creating health care centres would also help in breaking this relationship between drug addiction and crime. Treatments directed by the court has also shown some positive results and are effective. Taking into account the present Indian situation harm reduction principles of drug policy are fruitful ways to curb out drug addiction from our country which would automatically help in reduction of criminal activities.

"Mere building of treatment centres will not be enough, and millions of drug users in the community will have to be motivated, informed, and encouraged to come forward to seek treatment," said Dr Rajat Ray, head of the Centre for Behavioural Sciences at the All India Institute of Medical Sciences, New Delhi, and the main author of the report. He also stated that, Currently India does not have a system of national or local monitoring for drug misuse.[315]

At this moment, government or authorities should concentrate on execution of strategies and models or methods which would treat a drug addict as a victim and not as an offender, in order to decrease the amount of drug addicts in India. Legislature should focus on building up new prevention approaches to reduce the risk of drug addiction and drug related crimes. It is

[314] https://www.helplinelaw.com/national-and-social/DNITI/drugs-and-narcotics-in-india-and-their-illegal-consumption.html

[315] "HTTPS://WWW.NCBI.NLM.NIH.GOV/PMC/ARTICLES/PMC443486/

rightly said, better late than never, so it is not still late for everyone of us to take a move against the evil of drug addiction or abuse. It is everyone's duty to help in breaking this connection or relationship between drug addiction and crime.

Not all drug addicts engage themselves in criminal activities and it is also true that not all criminal activities are committed under the influence of drugs or narcotics but by looking at all the above facts it can be concluded that the is a relationship between drug addiction and crimes.

CHILD LABOUR AND THEIR RIGHT TO EDUCATION

- NAVJOT KAUR

ABSTRACT

India is a developing country who still needs to develop in terms of education of children and child labour. The basic reason behind child labour is poverty, illiteracy , unemployment, ignorance and lack of awareness. People who are not educated do not send their children to school .Instead of sending them to schools, they force them to earn money by working at a tender age. Thus, small children cannot get the education, as a result they lack behind in their whole life. This Article has analyzed child labour, their circumstances and their right to education and also it's impact on child labourers.

INTRODUCTION

"We are guilty of many errors and many faults, but our worst crime is abandoning the children, neglecting the foundation of life. Many of the things we need can wait. The child cannot wait. Right now is the time his bones are being formed, his blood is being made, and his senses are being developed. To him we cannot answer 'Tomorrow' his name is 'Today'".

- Gabriela Mistal

Noble Prize Winning poet from Chile

Children are like mirror who reflect the future image of a nation. If anybody wants to know a nation, he should see its children. Children are not only the future of any nation but also strength in reserve for a nation. They are the crops which feed the future. If they are healthy and active, educated and informed, disciplined and trained, the future of a nation is well insured, and if they are wanting in the above aspects the future of the nation is doomed to disaster. Labour is worship, no doubt, but it must be expected from and exacted upon these who are fit for it. Misplaced labor is dangerous to one who does it and to those who gets the

fruits of it. History instances when nations have come up or gone down the basis of the treatment the younger generation got the hands of those into the saddle.[316]

Children are the greatest gift to humanity and childhood is an important and impressionable stage of human development as it holds the potential to the future development of any society. Children who are brought up in an environment, which is conducive to their intellectual, physical and social health, grow up to be responsible and productive members of society.[317] But those who are brought up in an environment which is not good for their mental and physical development grow up with diseases, weaknesses, drug addiction and criminal attitude. It is very necessary to provide healthiest environment to children. Child Labour is the denial of children's rights.

Child Labour in some form or the other has always existed in societies all over the world. Children used to accompany their parents while working in the fields. Moreover they were also expected to help with household chores as well as taking care of the sick and elderly. As most of the work was being done under the watchful eyes of the parents, instances of exploitation were rare. Even today work of this sort is not considered exploitative.[318] In most of the developing countries parents depend upon their children. These children not only perform important work in house or outside it but in many cases they are the main or only source of support for parents in their old age.[319]

MEANING OF CHILD LABOUR

To understand the term Child Labour, it is very necessary to understand the meaning of 'child'. General meaning of this word is that child is, who cannot understand the technicalities of law or who is mentally or physically not mature. As far as the word child is concerned it has various meaning under various concepts which are as follows:

316 Abdul Majid, *Legal Protection to Unorganised Labour*, Deep and Deep Publications Pvt. Ltd, New Delhi 2000 p.42.

317 Available at *child labor.doc(*Working group 12th-plan) last visited on April7, 2013.

318 Available at *http://india holic.blogs.spotin* last visited on 2010/09

319 B.K.Sharma & vishwa mittar, *child labour in urban informal sector*, Deep and Deep publications, New Delhi,1990,p.11.

The Oxford Dictionary of English defines the term 'child' as a young human being below the age of full physical development.[320]Article1 of the Convention on the Rights of the child, 1989 defines "A child means any human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".[321]Section2 (e) of the Children Act, 1960 defines 'child' means a boy who has not attain the age of eighteen years.[322]Child labour is found in poor as well as wealthy economies.[323]The definition of child labor is not uniform all over the world. However, the working child, who is below the age of 14 and who is paid either in cash or kind, is normally considered as a child labourer. A child is classified as a labourer if the child is in the age group of 5-14 years and is economically active. As per the ILO and Census (2001), a person is treated as economically active or gainfully employed if he/she does work on a regular basis for which he or she receives remuneration or if such labour results in output for the market. A large proportion of the world's child labourers live in India.[324]Various definitions on child labour are as follows:

"When the business of wage earning or of participation in self or family support. Conflicts directly or indirectly with the business of growth and education, the result is child labor".[325]Child Labour includes children prematurely leading adult lives, working long hours for low wages under conditions damaging to their health and to their physical and mental development, sometimes separated from their families, frequently deprived of meaningful education and training opportunities that would open up for them a better future.[326]Child means a person who has not completed his fourteen years of age.[327]The term child labour is commonly interpreted in two different ways: First as an economic practice, second as a social evil. Homer Folks, Chairman of the united nation Child Labour Committee-Child labour as or

320 Catheire Soanes and Angus Stevenson(edited), Oxford Dictionary of English,Oxford University Press, New Delhi, 2004, p.300.
321 Mamta Rao, *Law Ralating to Women &Children*, Eastern Book Company, Lucknow, 2005, p.394.
322 Section 2(e)
323 Cathryne l. Schmitz.Elizabeth kimjin trover and Desi Larson(edited),*child labour : global view(*2004),p.1.
324 Human Development Report,2011.
325 Encyclopedia of social sciences
326 International labour organization (1983)
327 The child labour prohibition and Regulation Act,1986.

any work by children that interferes with their full physical development, their opportunities for a desirable level of education of their needed recreation.[328]

If there is no proper growth of child today, the future of the country will be in dark. It is thus, an obligation of any generation to bring up children who will be citizen of tomorrow in a proper way. Today's children will be the leaders who will hold country's banner and maintain prestige of the nation. If a child goes wrong for want of proper attention, training and guidance, it will indeed be a deficiency of the society and of government of the day. Every society thus must therefore devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they would receive adequate training, education and guidance in order that they may be able to have their rightful place in society when they grew up.[329]

CONSTITUTIONAL PROVISIONS

Constitution of the Country includes provisions which deal expressly with the protection and welfare of children. The provisions dealing with protection and welfare of children may be mentioned as under:

1. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.[330]
2. The state shall direct its policy towards securing the health and strength of workers, men and women, and the tender age of children are not abused and the citizens by economic necessity to enter avocations unsuited to their age and strength.[331]
3. That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that children and youth are protected against exploitation and against moral and material abandonment.[332]
4. The state shall endeavor to provide within a period of ten years from the commencement of this constitution for free and compulsory education for all children until they complete the age of fourteen years.[333]

[328] V.V.Giri,Labour problems in Indian Industry(1958),p.360.
[329] Ashhad Ahmad,*child labour in India*, Kalpaz Publications, Delhi, 2004, p.20.
[330] Article 24 of Constitution of India.
[331] Article 39 (e) of Constitution of India.
[332] Article 39 (f) of Constitution of India.

ROLE OF EDUCATION

Child Labour and illiteracy go hand in hand as one trends to breed the other. Numerous studies have examined the impact of education on the incidence of child labour. Most of the child labourers are either illiterate or partially literate. The parents of child labourers are also more often than not, illiterate. No study has ever found a child labour coming from an educated family.[334]

The child labour and education is strongly interlinked. According to National Human Rights Commission of India, child labour can never be eradicated unless compulsory primary education up to the age of 14 years is implemented. The concept and definitions of child labour are varied and sometimes vague. Child labour is regarded as a social construct which differs by actors, history context and purpose. Basically the child labourers are the child workers involved in the odd jobs that are harmful to their overall development. These children are economically active and play a role in contributing to the family income. Child labour is closely associated with poverty. Many poor families are unable to afford fees or other school costs. The family may depend on the contribution that a working child makes to the household's income, and place more importance on that than on education. And when a family has to make a choice between sending either a boy or a girl to school, it is often the girl who loses out. Most child labour is rooted in the poverty. The way to tackle the problem is clear.[335]

Education is a crucial component of any effective effort to eliminate child labour. There are many interlinked explanations for child labour. No single factor can fully explain its persistence and, in some cases, growth. The way in which different causes, at different levels, interact with each other ultimately determines whether or not an individual child becomes a child labourer.[336]Nearly every study on the relationship between child labour and education compares the educational outcomes of children who don't work, or who work less, and those who do work, or more work. The first hurdle that needs to be surmounted of both these variables. "Education" is difficult to define and measure because it is multi-facet, it can take

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[333] Article 45 of Constitution of India.

[334] Thomas Paul, "Child Labour- Prohibition v. Abolition" *Jounal of The Indian Law Institute,* Vol.50.,p.143-175.

[335] Kusum Sharma, "The Right to Free Education Act:some views",*Journal of Legal Studies,*Vol.XLII,(2011)206.

[336] Available at *http://www.ilo.org/ipec/Action/Education/lang--en/index.htm,* last visited on 2-6-13.

the form of school attendance, school performance or skill acquisition, and each of these can be approached in more than one way.[337]

Modern states regard education as a legal duty, not merely a right. Parents are required to send their children to school, children are required to attend school, and the state is obliged to enforce compulsory education. Compulsory primary education is the policy instrument by which the effectively removes children from the labour force. The state thus stands as the ultimate guardian of children, protecting them against both parents and would be employers.[338] No doubt the children's rights have been given a central place in all the international as well as national bodies. As the universal declaration of human rights (1948) under its Article 26 states," everyone has the right to free education at least at the elementary and the fundamental stages and it shall be compulsory".[339]

RIGHT TO FREE AND COMPULSORY EDUCATION ACT, 2009

The Right of Children to Free and Compulsory Education Act or Right to Education Act (RTE) is an Indian Legislation enacted by the parliament of India on 4 August 2009, which describes the modalities of the importance of free and compulsory education for children between 6 and 14 in India under Article 21a of the Indian Constitution. India became one of 135 countries to make education a fundamental right of every child when the act came into force on 1 April 2010. The basic objective of the RTE Act is stated as follows: "Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighborhood school till completion of elementary education."

One of the primary objectives of Right of Children Free and Compulsory Education Act, 2009 is improving quality education. The quality of elementary education, particularly in government schools, is a matter of serious concern. The quality of school education depends on various variables which includes physical infrastructure, method of teaching, learning environment, type of books, qualification of teachers, number of teachers, attendance of teachers and students and so on.[340]

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[337] ILO:Child labour, Education and Health, A review of the literature,Geneva,2008.

[338] Myron Weiner,Neera Burra&Asha Bajpai,*Born unfree,child labour,Education and the State in India* Oxford University Press, New Delhi, 2006, p.1.

[339] Surjit Singh Paur, "Right to Education Act: A Critical Analysis"International Journal Of Educational and Psychological Research, Vol.1, Issue 2,PP.27-30,OCT, 2012.s

[340] *Ibid.*

MAIN FEATURES OF THE RTE ACT

1 Every child of India in the 6 to 14 years age group; has a right to free and compulsory education in a neighborhood school till the completion of elementary education.

2. Children who have either dropped out from the school or have not attended any school will be enrolled in the schools and no school can deny them for taking admission.

3. Private and unaided educational institutes will have to reserve 25 percent of the seats for the students belonging to economically weaker section and disadvantaged section of the society in admission to class first (to be reimbursed by the state as part of the public-private partnership plan).

4. All schools except government schools are required to be recognized by meeting the specified norms and standards within 3 years, failing of which they will be penalized for up to Rs. one lakh. It also prohibits all unrecognized schools from practice and makes provisions for no donation or capitation fees and no interview of the child or parent at the time of admission.

5. For the purpose of admission in a school, the age of a child shall be determined on the basis of certificate issued in accordance with the provisions of the Births, Deaths and marriages Registration Act, 1856 or on the basis of such other document, as may be prescribed.

6. The National Commission for Protection of Child Rights (NCPCR) and state commissions will monitor the implementation of the Act.

7. All schools except private unaided schools are to be managed by school managing committees with 75 percent parents and guardians as members.

8. Child's mother tongue as medium of instruction, and comprehensive and continuous evaluation system of child's performance will be employed.

9. Financial burdens will be shared by the centre and the state governments in the ratio of 55:45 and this ratio is 90:10 for the northeastern states.

If we see the critical side of the act, The act has been criticized for being hastily-drafted, not consulting many groups active in education, not considering the quality of education, infringing on the rights of private and religious minority schools to administer their system, and for excluding children under six years of age[-].Many of the ideas are seen as continuing the policies of Sarva Shiksha Abhiyan of the last decade, and the World Bank funded District Primary Education Programme DPED of the '90s, both of which, while having set up a

number of schools in rural areas, have been criticized for being ineffective and corruption-ridden.

It is crucial for building human capabilities and for opening opportunities. The social benefits of education spread in many directions. Education leads to better health care, smaller family norms, greater community and political participation, less income inequality and a greater reduction of absolute poverty.[341] The abolition of child labour must be preceded by the introduction of compulsory education, since compulsory education and child labour laws are interlinked. Article 24 of the Constitution bars employment of child below the age of 14 years.[342] Article 45 is supplementary to Article 24 for if the child is not to be employed below the age of 14 years he must be kept occupied in some educational institution. Now Article 45 is amended. The State is obliged to duty bound to provide free and compulsory education to all children of age 6-14 years in such manner as the state may by law determine. It was also provided that, it is the fundamental duty of a parent or guardian to provide opportunities for education to his child between the ages of 6 to 14 years.[343]

JUDICIAL RESPONSE TO CHILD LABOUR AND RIGHT TO EDUCATION

The response of the judiciary with regard to child labour is highly commendable. Supreme Court has played an important role to control the problem of child labour. Time and again it has pronounced glorious judgments for eliminating the problem of child labour in various leading cases namely: Menaka Gandhi v Union of India, [344]People Union for Democratic Rights v Union of India,[345] Labourers Salal Hydro Project v State of Jammu and Kashmir,[346] M.C. Mehta v State of Tamil Nadu and Others.[347]

Child Labour cannot be abolished unless and until the education is made compulsory. The Constitutional Bench of Supreme Court in the case Unnikrishnan v State of Andhra

[341] 165th Report of the Law Commission of India on Free and Compulsory Education for Children 1998.p.3

[342] Article 24 of Constitution : *" No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment"*

[343] Amendment of Article 51-A of the Constitution by inserting clause (K) by Constitution (86th Amendment) Act, 2002, Sec. 4.

[344] AIR, 1978,SC 597; 1978(ISCC248).

[345] AIR 1982 SC 1473; (1982)3.SCC.235;1982 SCC (L&S)275.

[346] (1983) 2 SCC 181;AIR 1984 SC. 177.

[347] AIR 1997, SCC 283.

Pradesh[348] ruled that the right to education is a fundamental right that flows from the right to life in Article 21 of the Constitution. Every child has a right to free education up to the age of fourteen years and thereafter the right would be subject to the limits of the economic capacity of the State. It has been further upheld and confirmed by the 11 judge Constitutional of the Supreme Court, in TMA Pai Foundation v Union of India.[349]Now the Right of Children to Free and Compulsory Education Act, 2009 which provides for free and compulsory education to all the children of the age of 6 to 14 years. But this Act was, unable to suggest specific amendments necessary in the Child Labour (Prohibition and Regulation) Act, 1986. This Act excludes children less than six years and more than 14 years and Union Government is not intended to shoulder the economic responsibility in respect of these excluded children. In *University of Delhi* v *Ramnath,*[350] The Supreme Court held that "Education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development".

CONCLUSION:

Education is the effective remedy to eradicate child labour from the society. Government has enacted the Right to Free and Compulsory Education Act and there is a reduction in the drop-out rate of children from schools after passing of the act but the situation is not under full control. Child labour is existing because the parents of these children are playing important role for making them as child labourers. The attitude of the parents show that they want their children must work, and for this purpose they are not even ready to listen the importance and benefits of education. The most important need is to create awareness among parents regarding education so that they may understand the importance of education and they must send their children to school. Actually poor parents want money. This is the reason that still inspite of this Act coming into force, child labour is going on and children instead of coming to schools are going to join their workplaces.

The need is to create effective awareness among parents along with their children so that they can understand the value of education. Parent's willingness to send their children at work

[348] (1993) ISCC 645.
[349] AIR 1996 SC 2652.
[350] AIR 1963 SC 1873 at p.1874.

places is one of the reasons for enhancement of child labour. Employers, in these circumstances, have the opportunity to exploit children by not giving holidays and long hours of work and with fewer wages. The Government's Right to Free and Compulsory Education Act is meaningless in such circumstances. Need of the hour is to create awareness by organizing seminars, one-act play, through media, even door to door surveys to create awareness among parents, children, public etc.

RIGHT TO SELF-DETERMINATION IN INTERNATIONAL PERSPECTIVE

- ABHAY UNIYAL

ABSTRACT

Right to self-determination is a topic which is hotbed for the disagreement and dissent of the arguments emanating from the various principles evolved in the civilized states such as territorial sovereignty, provincial autonomy, right to express one's opinion etc. History has always seen the deprived people suffering infringement of their rights and entitlements. The principle of self-determination can be traced back to World War-1 and the principles laid down by Woodrow Wilson at the Paris Peace Conference in 1919. Right to self-determination means the right of a person or group of people to decide freely, for their present and future, without facing any hinderance or obstruction from the other sources. Implementation of self-determination has always been more controversial than its content. It has served as a powerful slogan for the independence of many peoples, primarily the independence of colonial people. This article seeks to clarify to the readers about the meaning of the right to self-determination, about its scope and applicability in the international legal system. The article mentions about the international efforts which have been directional in the adoption of the right to self-determination in various political documents from time to time, signed by various nation states of the world, coupled with the factors that have been instrumental in the growing demands pertaining to the right of self-determination worldwide by the people belonging to various organized add unorganized groups.

KEYWORDS USED: Rights, Self-determination, UN Charter, Resolution, Court, International law.

INTRODUCTION

Principle of self-determination is one of the most important and ever-evolving concepts in international human rights law, it exerts a strong influence on all the political and social aspects of the human society and is continuously gaining wider popularity and acceptance among people imbibed with the humanitarian instincts, which has also been embodied in

international law. This right gives peoples a free choice which allows them to determine their own destiny.[351] It is the people who should determine freely their present and future and being able to determine for themselves also means to decide freely their political status and to freely pursue their economic, social, and cultural development. A Professor of Political Science who went on to become the President of the United States, Woodrow Wilson, enunciated a doctrine at the Paris Peace Conference in the year 1919, which was widely accepted as a sensible postulation, the doctrine of self-determination.[352]

The right of self- determination is the legal attribution of the authority of people to freely determine their political status in relation to becoming an independent nation. Self-determination allows people or a group of people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. Self-determination is a core principle of international law, arising from customary international law, but also recognized as a general principle of law, and enshrined in number of international treaties. It is protected under the United Nations Charter and the International Covenant on Civil and Political Rights as a right of all people. The idea of "popular sovereignty" lays the foundation for the idea of self-determination.[353]

The 20th century witnessed a significant growth in the scope and purpose of the principle of self-determination. Which subsequently led to the successful secessionist movements during and after the WWI, WWII and further laid the ground for decolonization in the 1960s. Right to Self- determination has been of a prime importance, having a reasonable justification behind it for the independence of peoples, most importantly the independence of people belonging the colonies of western powers(nations). Colonial context is in fact what comes to mind when the right to self-determination is talked upon and it is the colonial aspect of the right to self-determination that is undisputed, as there being several aspects of the right to self-determination.[354] Self-determination represents the absolute legal right that people should freely decide their own destiny in the international order and is linked to many of the

[351] A. Bayefski (ed.), Self-determination in International Law: Quebec and Lessons Learned, The Hague: (Kluwer Law International 2000).
[352] Available at: https://en.wikipedia.org/wiki/Self-determination(Last Modified April 08,2021).
[353] T.D. Musgrave, Self-Determination and National Minorities (Oxford University Press, New York,1997).
[354] Maya Abdullah, The Right to Self-Determination in International Law: Scrutinizing the Colonial Aspect of the Right to Self-determination (University of Gooterborg, 2006).

most important and fundamental principles of public international law. It preserves and promotes the concept of the right of peoples to determine their own destiny without any outside interference or subjugation, with the idea that all people are equal as there can never exist any sort of standard classification to differentiate among the people.

Being one of the most controversial and cardinal principle of the international law it accompanies with it fundamental principles of public international law like State sovereignty, territorial integrity, the equality of states including the prohibition of force and principle of non-intervention.[355] Self-determination has been a slogan for the minorities or indigenous group of people to demand either secession from an already sovereign State, of which such minority group or indigenous group of people are a part of, or complete independence from a foreign power having dominance over them and their resources. This right is not only limited to public international law but also exists under international human rights law, which talks about equal right of people within a state.

The aspect of economic and political self-determination is associated with the principles of non-intervention and non-interference aimed particularly towards guaranteeing territorial integrity. It is used as an argument in diverse situations in international law such as questions relating to liberation movements, rebels, aid and assistance or intervention against these groups and movements.[356] There are various circumstances where the right to self-determination is of great importance, ranging from serious human rights violations to the aspirations of people to form their own political unit and pursue an identity distinct from that of their nation they are residing within.

An important characteristic of the right to self-determination is that it can be external or internal. External self-determination is understood particularly in the colonial context, which means the aspiration of people or group of people to form their own independent nation in relation to other States and the international community. The external form of self-determination imposes obligations on States to support and facilitate people's aspirations to attain independence. Whereas, outside the context of decolonisation it has an internal nature that encompasses people's right to freely pursue their economic, social and cultural development through their active participation in the democratic governance.

[355] *Ibid.*
[356] *Ibid.*

Whereas Internal self-determination falls short of secession and allows people a broader control over their political, economic, social and cultural development. Internal self-determination purports absence of any outside interference with the territorial integrity of a state.

The idea that people have a right to decide for themselves in matters of politics, territory, livelihood, and thus have a right to self-determination has probably existed since the day mankind came into existence, but the practicality of the ideal can be traced back to the French revolution and the awareness created among people by its emergence. It then continued to take shape on the international scene as the modern Nation States emerged as a result of a growing awareness of national identity in Europe during the nineteenth century, not only by virtue of the bourgeois nationalism but also by virtue of socialist forces in Russia in the beginning of the twentieth century.[357]

LEGALITY OF RIGHT TO SELF-DETERMINATION

The UN Charter

Chapter I, Article 1(2) of the charter contains the purpose of the Organization and Article 55, Chapter IX, of the charter talks about international economic and social cooperation. According to Article 1(2) one of the purposes of the United Nations is: 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.[358]

Article 55 provides that: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal

[357] *Ibid.*
[358] UN Charter 1945

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'[359]

Considering the object and purpose of the United Nations Charter it can be said that the principle of self-determination as proclaimed in Article 1(2) was meant to express one of the goals of the United Nations. The principle of self-determination was believed to further the prospect of the development of friendly relations among States and to strengthen the idea of universal peace and security in practice.[360]

Also, According to Article 73 of the charter, members of the United Nations who were at that time administering non-self-governing territories put under an obligation 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement'.[361] Thus, self-determination which has been laid down in the Charter was merely a guiding legal principle for the nation-states rather than a binding right under international law.

The International Bill of Rights

The International Bill of Rights includes the Universal Declaration on Human Rights adopted on 10 December 1948 and the two International Human Rights Covenants namely, The International Covenant on Civil and Political Rights (ICPCR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR) that were adopted on 16 December 1966. Withstanding the persistent efforts of the Soviet Union, the Universal Declaration of Human Rights did not accommodate any provision regarding self-determination. Nevertheless, one cannot help but to notice elements of self-determination in the Declaration. The preamble of the declaration referred to the need to protect human rights, 'if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression'. Article 21 (3) of the declaration read as, 'The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure'.[362]

[359] *Ibid.*
[360] Article 31(1) of the Vienna Convention on the Law of Treaties 1969.
[361] Article 73 (b) of the UN Chartet,1945.
[362] UN Charter,1945.

It took nearly two more decades, after the adoption of Universal declaration of Human Rights 1948, for the "right to self-determination" to be enumerated explicitly in any legal text. This delay in inclusion of right to self-determination in any legal text of international importance was primarily due to the strict resistance from the Western nations, as it would have jeopardised their colonial interests.[363] The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) in their article 1 states as follows:

1. All peoples have the right of self-determination. By virtue of that right they are entitled to determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. People shall not be deprived of their own means of subsistence in any circumstance.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[364]

The principle of self-determination has developed into a positive rule of international law with its inclusion in the provisions of the two Human Rights Covenants, and it cannot be denied that since this development its concept has been evolving. Further, Article 1 of both the covenants granted the 'right of self-determination' to 'all people' which is not only limited to colonial people, but also covers within its ambit the people outside the colonial context.

The General Assembly Resolutions of UN

The international community became more concerned about the fight against colonialism with the adoption of the UN Charter. The General Assembly contributed in an important way to the development of customary rules with the adoption of numerous resolutions linking

[363] M.K. Addo, 'Political Self-Determination Within the Context of the African Charter on Human and Peoples' Rights', (Journal of African Law, Vol. 32, 1988) p.183-184.
[364] Available at: http://www.un.org (Last visited on- 23/04/2021).

self-determination to decolonisation.[365] It has been argued that 'General Assembly resolutions can contribute to the creation of rules of international law' in number of ways.[366]

The adoption of General Assembly Resolution 1514 (XV) titled 'Declaration on the Granting of Independence to Colonial Countries and Peoples', by the General Assembly on 14 December 1960 has been called 'the beginning of a revolutionary process within the United Nations' and 'an attempt to revise the Charter in a binding manner'.[367] According to its preamble, the resolution was aimed at 'bringing to a speedy and unconditional end colonialism in all its forms and manifestations' and in paragraph two it declared that 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

In 1961 the Special Committee on Decolonization was established by the General Assembly, to monitor the implementation of Resolution 1514 (XV) and to make recommendations on its application. This trailblazer resolution on decolonisation was followed by another resolution that was adopted the next day by the General Assembly: Resolution 1541 (XV) concerning the 'Principles which should guide Members in Determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter'. As the title indicates, this resolution was meant to provide number of 'guiding principles' to enable members to determine whether they were under an obligation to transmit the information requested by Article 73 (e) of the UN Charter.[368]

CASES OF SELF DETERMINATION

The African Commission on Human and Peoples Rights, Katangese Peoples' Congress v Zaïre (1995)

In this case the African Commission on Human and Peoples' Rights seemed to acknowledge the possibility of a right of unilateral secession if there exists a concrete evidence of violations of human rights to the extent that the territorial integrity of Zaire should not be put into jeopardy or if there was an evidence showing that the people of Katanga are denied the

[365] *Supra* Note 1, p.115.
[366] *Id*. at p.121-122.
[367] M. Pomerance, Self-Determination in Law and Practice. The New Doctrine in the United Nations, (Martinus Nijhoff Publishers, Hague,1982).
[368] Available at: http://www.un.org (Last visited on- 23/04/2021).

right to participate in Government as guaranteed by Article 13 (1) of the African Charter'.[369] As there was absence of any such evidence , Katanga was obliged to exercise a variant of self-determination that is in harmony with the sovereignty and territorial integrity of Zaire. This decision indicates that the remedy of unilateral secession may be available if a people is barred from exercising its internal right of self-determination or when it suffers from gross violations of human rights.[370]

Supreme Court of Canada, Reference re Secession of Quebec (1998)

In this case, the Supreme Court of Canada has addressed the right of external self-determination. The Court laid down two clear and precise circumstances on the occurrence of which external self-determination can be exercised under international law. The first case being the right of colonial peoples to claim independence by exercising their right of self-determination.[371] The second being the right of external self-determination for peoples 'subject to alien subjugation, domination or exploitation outside a colonial context'.[372] The Court further observed that international lawyers have identified a third case in which demand of external self-determination by people may be legitimate and that although it has been described in several ways, the idea lying at the core of this third principle is that, when people are blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.[373] In all these situations mentioned above, the people are entitled to the exercise of their right to external self-determination because they have been denied the exercise of their right to self-determination.

The Court found the third case completely and explicitly inapplicable in this case, as a result of which Quebec was not permitted under international law to secede unilaterally from Canada. Court did incline to recognise a constitutional obligation for the parties to negotiate the possibility of a secession, especially after a lucid expression signifying clear majority of the people of Quebec that they no longer wish to remain in Canada.

[369] Katangese Peoples' Congress v. Zaire 1995.
[370] *Supra* note 1, p.374.
[371] Reference re Secession of Quebec.
[372] *Ibid.*
[373] *Ibid.*

Furthermore, the Court attempts to draw attention towards the importance of recognition by the international community for a declaration of independence to be successful.[374] If either party has been unwilling to negotiate, this may influence the recognition process in case unilateral secession takes place. Therefore, the conduct of both parties in a self-determination conflict is crucial, for it may or may not influence the international community to consider a secession legitimate, which will further influence their decision to recognise the newly established State as legitimate or not.[375]

Western Sahara Case, Advisory opinion 1975.

The Western Sahara, is a desert area measuring over 260,000 square kilometres, sharing its border with Morocco, Mauritania and Algeria. Having a tribal nomadic population, it was the under the occupation of Spain from the year of 1904 until 1975. Following the second world war, the rise of nationalist sentiment had a destabilizing effect on the European colonial powers. The United Nations eventually responded to the growing demands for self-determination by adopting a resolution on decolonization in 1960.[376]

However, Spain did not take any action in order to hold the referendum. For the purpose of struggle for Saharawi independence from Spain, the Popular Front for Liberation, known as the Polisario Front, was created on 10 May 1973. Spain decided to establish a United Nations after two years of guerrilla warfare. Referendum sponsored and planned for 1975 on the territory. In 1974, Spain carried out a census of the people present in the region in preparation for the procedure.

Morocco has in the meantime made its own claims on Western Sahara statehood. On 13 December 1974, the UN General Assembly requested an advisory opinion from the International Court of Justice for seeking an advisory on whether Western Sahara was terra nullius (no man's land) and, if not, what legal relations existed between the territory of the United Nations and the Kingdom of Morocco and Mauritania during the colonising period of Spain?[377]

[374] *Ibid.*
[375] *Ibid.*
[376] Available at: https://www.wikipedia.org/wiki/Advisory_opinion_on_Western_Sahara (Last visited on-23/04/2021)
[377] Malcolm Shaw, The Western Sahara Case, (British Yearbook of International Law, Volume 49, Issue 1, 1978) p.119–154.

The opinion of the Court, published on 16 October 1972, found that no evidence of any bonding of territorial sovereignty was made between Western Sahara or Morocco and Mauritania, but that the Moroccan sultan and some, although only a few, of the tribes of the territory had indications of a legal bond of allegiance. The Court further established "the existence of rights and of certain rights in respect of territory, which formed legal relations between the Mauritanian entity and the Western Sahara area." However, the court concluded that it has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the colonization of the Western Sahara, particularly the principle of self-determination.[378]

CONCLUSION AND SUGGESTIONS

It is a well-established fact that the right to self-determination is a legal right under public international law and human rights law, though its scope not being clear as of now, also it is doubtful that it ever will be given the political nature of the right. It has also been made clear that the one element that is more or less free from contentions is the right to self-determination in the colonial context, since the actual emergence of the right took place in the light of colonialism and the process of decolonization. It is also this aspect that has become the benchmark for ascertaining whether this right to self-determination is still relevant today or whether it belongs to the pages of history books. whether this right, no matter how legalized can be enforced separately from political will and advantage, the right does not just belong to the books of the annals of history. It is a right readily placed fresh on the shelf of world politics, available to be tested at any given time.

Thus, the mentioning of the right to self-determination in the United Nations Charter was of prime importance. Though being laid down vaguely but was included in the charter which has rendered possible the future developments in its scope and made it an important topic for discussion and debate.

The right to self-determination, as a fundamental human right under international law, is severely hampered by a lack of effective enforcement measures. In the meantime, the Special Committee of 24 on decolonisation is in charge of the execution of the decolonization declaration, so safeguarding the right to self-determination of colonial peoples, appears to have gained traction in recent years while the right to self-determination of peoples living

[378] *Ibid.*

outside of colonial contexts, has been forgotten. For this reason, and for the moral and legal reasons stated in the previous Chapter, it is proposed in this thesis that peoples have the right to unilateral secession as a "self-help cure."

States have always been hesitant to recognise such a right, fearful that it would jeopardise the painstakingly constructed state system of international law. States have traditionally dreaded an avalanche of secessionist claims if a right of remedial secession is recognised, which is why this thesis argues that the right of remedial secession should only be used as an emergency escape if a set of severe requirements is met. Many of the countries who have recognised Kosovo have already stated that this is a one-of-a-kind circumstance that should not be considered precedent setting. This also explains why a large number of countries have recognised Kosovo while refusing to do so for Abkhazia. It is critical to emphasise that each claim for self-determination must be evaluated on its own merits.

The potential threat of misusing this power is reduced if an impartial agency will inspect every claim of this right to self-determination. The urgent need for a new international agency has been asserted because it would be easy to extend its scope to cover aspirations for self-determination outside of the colonial framework by a special Committee of 24 on Decolonisation. In this regard, it is vital to emphasise once again that secession is the ultimate remedy, which means that it is surely not always the best or the only method to solve a problem of self-determination. The Committee of Investigation will therefore first evaluate whether the organisation seeking international recognition for its claim has further opportunities to attain internal self-determination, e.g. more autonomy.

The International Court of Justice may also be an appropriate body for handling complaints about self-determination. Since only States are before the Court, only by advisory opinion that the General Assembly would require the assistance of the Court could the Court have been entrusted with the job of hearing claims of self-determination. It is stated here that, for instance with the adoption of the General Assembly Resolution, an international community should likewise work towards developing a consistent view on recognition.

Although the recognition of an organisation which fulfils the conditions for redress cannot be forced by States, the international community must be in a position to agree on a series of 'Recognition Guidelines' similarly to the EC's in a number of recognition requirements. In addition to the preservation of this right, a common methodology of recognition based on

respect for human rights, especially the right of self-determination, will also de-politically increase recognition and therefore make it less arbitrary and more just.

THE WORLD CONFERENCES ON CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT AND HUMAN HEALTH: A CRITICAL ANALYSIS WITH HUMAN RIGHTS PERSPECTIVE

- GOURANGA DEBNATH

ABSTRACT

The plethora of rapid development of Scientific innovations, myriads of technical developments in all walks of life has to a large extent endangered the human existence itself. Scientific innovations, environment and the sustainable development are now on the crossroads. There have been a large scale discussions, debates on the world's vision and commitment regarding sustainable development. Science with its development is searching the answers to what are the causes and consequences of climate change across the globe**.** During the past three decades, a series of international treaties, conventions have entered into force to address the pressing global concerns on the social and economic development and majorly on environmental protection. Newer phenomena on environmental issues like climate change, biodiversity and biosafety, desertification, agriculture and seeds on the one hand and trade and investment following liberalization policy on the other have been made to implement the global policies related to sustainable development. The world treaties have given much importance on successful domestic implementation. This is the challenge of the time. All round development that provides economic, social and environmental benefits for the future generations also have been stressed upon. The World Commission on Environment and Development in 1987 defined 'Development' as: *'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.*

This paper focuses on the gradual development of ongoing global debates by conducting a detailed analysis of how many of the new treaty regimes is giving due importance on the climate change, sustainable development goals that lays much importance on Human Health as Human Rights.

Keywords: Sustainable Development, Climate Change, World Treaties, Human Rights and Human Health

I. INTRODUCTION

"sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: - the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given, and - the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet the present and future needs."[379]

The **World Commission on Environment and Development** (WCED), the mission of the **Brundtland Commission** December 1983.

SUSTAINABLE DEVELOPMENT:

THE CONCEPT AND INTERNATIONAL PERSPECTIVE

There have been many discussions, conferences, conventions about Sustainable Development. But it is a bitter irony that however the world talks much about the development, it is seen that poverty is increasing day by day. The haves and the have nots are widening a far. Here lies the need of more intensive and bottom line discussion at micro level as to why and how this development is not taking place in reality.

The terminology that is widely used now-a-days "sustainable development" was first used at the time of Cocoyoc Declaration on the issue of Environment and Development in the early 1970s. From then it has become the hallmark of international organizations dedicated to work for achieving environmentally benign or beneficial development for the people. It is a fact that Sustainable development means an integration of developmental and environmental imperatives that covers all aspects. It means, to be sustainable, development must possess simultaneously both economic and ecological sustainability and integrity. It indicates and suggests the way in which developmental planning should be approached for the betterment. Both the environment and development are means not ends in themselves ever. Since the dawn of the civilization it is an effort that the environment and development are made for people, never people are for environmental and development anywhere.

[379] *Our Common Future, the Brundtland Report*

It is obvious that Sustainable Development is essentially a policy and strategy for continued economic and social development without causing detriment to the environment and natural resources on the quality of which continued human activity and further development depend. So, while thinking of the development measures of the environment the need of the present and the ability of the future to meet its own needs and requirements have to be kept in mind. While thinking of the people of the present society, the future should not be forgotten.

We have a duty to future generations, and for a bright present, a bleak tomorrow cannot be countenanced. We should learn from our past experiences, mistakes from the past, so that they can be corrected for a better present and the future generations. The modern society has seen numbers of laws to protect Environment. Thus 'Environmental Law' is an instrument to protect and improve the environment and to control or prevent any act or omission polluting or likely to pollute the environment where we inhabit.

The United Nations Commission on Sustainable Development:

It is known to all that the United Nations Commission on Sustainable Development (UNCSD) is a functional Commission of the United Nations Economic and Social Council (ECOSOC). This is originated from Chapter 38 of the Agenda 21, the most extensive document of the Rio Summit of the world. The Commission was set up on 16th February, 1993. It started working as a Commission of the Economic and Social Council in pursuant to article 68 of the U.N Charter. While 53 temporary members were elected for this commission, particular care was taken, in regard and accordance with the practiced principle of "equitable geographical distribution", to maintain a balance among the continents and between the developed and developing world. The first substantive session was held in the month of June, 1993 in New York city of United States of America.

The main task of the Commission was to ensure the required effective follow-up of the Rio Conference. This was also assigned to enhance international co-operation and rationalize the inter-governmental decision-making capacity for the better implementation. The function of the commission was also to look after the integration of environment and development issues and to examine the progress of the implementation of Agenda 21 at all levels whether it is the national, regional and international level. Quite naturally, to this end, the Commission is expected to assess reports from the member countries of the United Nations. It always remains concerned of all the UN Committees which are supposed to work for environmental

and developmental issues and of the relevant non-governmental organisations of the member countries. The Commission gathers information that is provided by the governments of different countries regarding the activities they undertake to implement Agenda 21 and the problems they face. They try to probe into depth to understand the problems related to financial resources and technology transfer and also other environment and developmental issues, they find relevant to consider. The necessity of having dialogue within the framework of the United Nations, and also with non-governmental organisations. They talk with the other independent sector as well as other entities outside the United Nations system that help to curb the issues. The Commission quite often provides necessary and appropriate suggestions, recommendations to the General Assembly. They always work through the Economic and Social Council, on the basis of the integrated consideration of the reports and issues given by the member states related to the implementation of Agenda 21. It gives the commission an opportunity for working through the broad-based Commission to come closer to a solution to at least some of the problems linked with putting sustainable development into practice. Thus, the commission can help and provide this instrument for action with a more clearly defined problematic areas.

II. MAJOR WORLD TREATIES, AGREEMENTS AND CONVENTIONS ON CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT AND HUMAN HEALTH

The Maltese Proposal at the U. N. General Assembly [1967]

The idea that for the benefit of future generations, present generations should shape their thinking in their exploitation of natural resources has found wide spread international approval since the Maltese Proposal at the UN General Assembly of 1967. The idea contended that there was a common heritage of mankind across the world and that this also required legal protection by the international community under the auspices of the United Nations Organisations. This whole concept of it is based on the idea that natural resources such as sea bed are very much limited and this cannot be earned through the fruits of the labour of present generations. And thus, these resources can only be exploited with adequate consideration of the "rights" of future generations, failing which the future earth will be destroyed by our present generation.

The United Nations Environment Conference & Sustainable Development or Stockholm Declaration [1972]

The people of the world started to think about the environment of the world gradually. It is after the tragedy of commons and limits to growth theories, the world leaders organized itself regarding global politics on environment. The first historical august conference about environmental concerns was organized in Stockholm in 1972. The world leaders, then met to discuss the human impact on the environment and it was discussed as to how it was related to economic development of the world. It is a fact that the one of the main goals of this gathering was to find a common outlook and common principles to inspire and guide the world's population to give a lesson that the preservation of the "human environment" is of prime need.

This notion of sustainable development further received impetus in the Stockholm Declaration on Human Environment that was resulted from the United Nation Conference on Human Environment in 1972. The United Nations Conference on human environment marked a watershed in international relations. Because it placed the issue of protection of biosphere on the official agenda of international policy and law. The conference at the primary stages saw the emergence of two conflicting approaches. The first approach insisted that the primary concern of the conference should be regarding the human impact on the environment with emphasis on control of pollution and conservation of natural resources, whereas the second approach laid emphasis on social and economic development as the real issue. The two apparently opposite approaches were bridged by the development of a concept that environment protection was an essential element of social and economic development for all. Both of environment protection and development were conceptualized as two sides of a same coin inseparable from each other.

The conference achieved a remarkable achievement as 114 nations participated in it and they agreed unanimously on declaration of principles and an action plan. These principles are contained in Stockholm Declaration, which propagated that that the world has just one environment in common for all the countries.

The 1st World Climate Conference [1979]

In the year of 1979, a group of UN based organisations comprising the World Climate Organization (WMO), the UN Environment Programme, the Food and Agricultural Organizational (FAO) and the World Health Organization (WHO) organized the First World

Climate Conference in Geneve, Switzerland. The conference was held with the one of the main goals to assess the knowledge of climatic change as for how natural and anthropogenic causes influenced it. Another objective was to analyze possible future climatic variability and its implication on human society and how it affects the people. The importance it holds for it was the first conference on World Climate issue.

The Montreal Protocol (Ozone Treaty) [1987]

The Montreal Protocol, 1987 which is also known as Ozone Treaty, came into force from January 1, 1989 was aimed at the elimination of ozone-depleting substances like CFCs (Chlorofluorocarbons) at a uniform rate irrespective of the development status of a country. The treaty was signed by 48 nations, most of which were developed countries. India and other developing nations like Malaysia and China refused to sign it. They gave the logic on pragmatic considerations and discriminatory clauses in protocol.

The World Commission on Environment and Development (Brundtland Commission and Sustainable Development) [1987]

The coinage "sustainable development" was brought into common parlance by the World Commission on Environment and Development that is also named as the Brundtland Commission. It in its seminal 1987 report **'Our Common Future',** used this term rampantly. It is a fact that the World Commission on Environment and Development was set up by the General Assembly of the United Nations in the year 1983. And in course of time the Brundtland Report has given a very comprehensive definition of sustainable development that is very accurate in its drafting. General Principles, rights and responsibilities for environment protection and sustainable development adopted by the Brundtland Commission are as under:

A. **The Fundamental Human Rights:** In most of the constitutions of the countries of the world it is accepted that all human beings have the fundamental right to a green environment adequate for their health and well-being of all the people.
B. **Concept of Inter-Generational Equity:** The States must conserve and use the environment and natural resources for the benefit of present generations in such a way so that the rights of the future generations are not curtailed.
C. **The need of Conservation and Sustainable Use:** It is the responsibility if the state to maintain ecosystems and ecological processes. This is very essential for the functioning of the biosphere. It will preserve biological diversity, and shall observe the principle of

optimum sustainable yield in the use of living natural resources and ecosystems for the betterment of the environment.

D. **Setting up Environmental Standards and Monitoring:** It is the duty of the States to establish adequate environmental protection standards to protect the environment. The state must monitor changes in and publish relevant data on environmental quality and resource use and must report it to the UN.

E. **The necessity of Prior Environmental Assessments-** It is an imperative responsibility of the states to make or require prior environmental assessments of proposed activities.

F. **The role of Prior Notification, Access, and Due Process:** All of the member States shall inform the people of the country beforehand likely to be significantly affected by a planned activity. The state must grant them equal access and due process in administrative and judicial proceedings regarding the environment.

G. **Necessity of Sustainable Development and Assistance:** All of the states shall ensure that conservation is treated as an essential part of the planning and implementation of development activities.

H. The States shall provide assistance to other States, particularly to the developing countries to support environmental protection and all out sustainable development.

I. It is the general obligation to Co-operate the fellow States. They will do it in good faith with other States in implementing the preceding rights and obligations. Because the goals cannot be achieved singly.

It is quite clear from the above-mentioned principles, it is evident that for achieving sustainable development, economy and ecology will have to be viewed from a comprehensive manner. The Environmental concerns should be an integral part of the policy-making at all levels. The govts of all levels should accept the sustainable development as an overriding goal for major changes in development.

The World Conference on the Changing Atmosphere [1988]

The Changing atmosphere of the world became a serious concern among the environment scientists of the world. So, in Toronto of Canada the World Conference on the Changing Atmosphere was organised in 1988. From the different parts of the world more than 300 scientists and policy-makers participated in the conference with the goal of taking specific actions to reduce the threatening crisis endangered by the pollution of the atmosphere. The

purpose of the was also to develop a comprehensive framework for protocols on the protection of the atmosphere of the earth from severe pollution.

The Montreal Protocol (Ozone Treaty) [1987]

Among so many international initiatives to save the green earth another stem was adopting the the Montreal Protocol on Substances that Deplete the Ozone Layer. This is a global agreement among the countries to protect the Earth's ozone layer by phasing out the chemicals that deplete the ozone layer. This phase-out plan which includes both the production and consumption of ozone-depleting substances has been of substantial development for the cause of the saving the atmosphere. This historic as well as landmark agreement among countries was signed in 1987 and entered into force since 1989.

The signatory countries not only made the agreement but also made plans to execute the agreement adopted in the conference. Every year the parties to the Protocol meet once to renew and review their decisions for the implementation of the agreement successfully. Either through including the necessary amendments to the protocol, or taking new measures the parties are working properly. Till date six times it has been done since its adoption. Very recently in the year of 2016 an amendment for the phase-down of hydrofluorocarbons (HFCs) has taken place. This amendment is popularly known as the Kigali Amendment. The HFCs were responsible for a batch of ozone-depleting substances and this was eliminated by the original Montreal Protocol. It is the fact that the HFCs do not deplete the ozone layer. But they are very much powerful greenhouse gases and they cause contributors to climate change to a great extent.

The significance of the Montreal Protocol is that it provided a set of practical, actionable tasks that were accepted and adopted universally. Thus, this Protocol has successfully met its objectives. The protocol has been a continuous safeguard of the ozone layer today. It has been successful only for the collective collaborative effort by the member parties to the agreement.

The Rio de Janeiro Earth Summit & Sustainable Development [1992]

It is after the twenty years of the Stockholm Conference, the United Nations tried to help the world leaders rethink, revisit the discussions about economic development held earlier in several occasions. They started anew with solutions to prevent the destruction of irreplaceable natural resources and the pollution of the planet that became a major concern of

the world. The sole purpose of the conference was that a transformation of attitudes and behaviour was the need of the time to bring the necessary changes. The conference was a reminder to the parties to the conference that the unplanned and excessive consumption of the environment was taxing heavily. They had an aim to make awareness among the people about it and with this growing consciousness the people will act with a conscious mind. Most of the governments acknowledged the call to restructure the ongoing international and national projects and policies to assure that economic decisions took environmental impacts into consideration.

The Kuala Lumpur Conference [1992]

Out of many international conferences, a ministerial level conference of developing nations held in 1992 at Kuala Lampur, Malaysia. In this conference they adopted certain far-reaching declarations, for example, setting up of an international 'green fund" for greening the earth. The meeting upheld the notion that each country should have 30% of its area with forests by 2000 AD to fasten the proposals of greening the earth. It was also decided that the developed nations would come up with a higher share. The United States of America differed with this stand. They opined that the existing Global Environment Facility (GEF) was sufficient, and a country receiving funds may utilise the required money for the purposes. India, in this conference also agreed with the idea of environment tax on developed nations to pay for the global environment clean up programme.

The United Nations Conference on Human Rights & Sustainable Development [1993]

The United Nations Conference on Human Rights and Sustainable Development held in Vienna, Austria. The programme that was adopted in the conference was the Vienna Declaration and Programme of Action. In this document it was vindicated that the universal nature of all human rights and fundamental freedoms was unquestionable. It also vehemently stated that all human rights are universal, indivisible, interdependent and inter-related. This is the modern notion of Human Rights. In this historic Conference the member parties ensured, confirmed that international policies, planning, actions would be undertaken to promote, protect and propagate Human Rights across the world. There is no denying of the fact that this Conference holds an important milestone in regard to the Human Rights Concerns of the world.

The 1st Conference of the Parties & Sustainable Development [1995]

The first United Nations conference on Climate Change was held in 1995 in Berlin. In this conference it was argued that each of the nation had the capability of taking policies and the implementation of the same to fight the causes of the climate change. It was the responsibility if the leaders of the nations to negotiate for legally binding obligations for all of the developed countries to come to an agreement to reduce the emissions of greenhouse gases. This conference of the parties held by the United Nations aims to gather each year to prepare framework Convention on Climate Change (UNFCCC). They try to assess the development in dealing with the climate change in the world. This conference, however, materialized in the Kyoto protocol.

The World Food Summit & Sustainable Development Conference [1996]

In spite of already holding many conferences, the most of the developing and underdeveloped countries witnessed hunger, poverty, malnutrition etc. The cry of the world was for the sustainable development. So, the World Food Summit took place in Rome, Italy, in 1996 with the purpose of eradication of poverty. The summit was organized by the United Nations one of the Organisations namely, Food and Agriculture Organization (FAO). The outcome of the meeting came up with the written conclusions in the Rome Declaration on World Food Security. The main purpose of this document is to provide food to each and every one so that no one is unfed. All of them must be provided with safe and nutritious food. Right to food is one of the fundamental Human Rights accepted throughout the world. The world leaders were asked to ensure that they would undertake several programmes in national and in international sphere to eradicate hunger from the world and they would guarantee to reduce the number of the downtrodden people from the world. The Hunger should be abolished from the world.

The Kyoto Protocol & Sustainable Development Conference [1997]

After the first Conference of the Parties in the year 1995, The Kyoto Protocol was adopted. The Kyoto Protocol is an international treaty that lengthens the 1992 United Nations Framework Convention on Climate Change and was adopted in Kyoto. It was implemented since 2005. This conference urged the nations to make the commitments that state parties made to reduce GHG emissions. The member parties recognized the fact that the threat of GHG emissions to global warming is really alarming and how human activities had been

increasing these emissions. To put it in other words, the purpose of this protocol was to ensure the stabilization of the greenhouse gases (GHG). The concentrations (specifically CO2, methane, nitrous oxide, sulphur hexafluoride, hydrofluorocarbons and perfluorocarbons) in the atmosphere should be at such a level that prevents dangerous anthropogenic interference with the climate system of the earth.

The Millennium Summit & Sustainable Development Conference or Earth Summit Plus Five [2000]

The goal of this 3-day conference that was held in New York, USA, was to discuss the role of the United Nations at the turn of the 21st century. 189 member states of the United Nations, the largest gathering of world leaders in history up to that date, agreed on the need of helping the world's poorest countries to develop. All of them came to a conclusion that by the year 2015 the underdeveloped countries should be able to achieve a better life. All of the global issues on various agenda were summarized in the millennium declaration. This historic declaration is called the Millennium Development Goals (MDGs). Compiling all of the goals eight MDGs were summed up.

The following are the MDGs that was adopted as a policy to be implemented:

I. Eradication of extreme poverty and hunger;

II. Achievement of universal primary education;

II. Promotion of gender equality and empowerment of women;

III. Reduction in child mortality.

IV. Improvement in maternal health;

V. Combatting HIV/AIDS, malaria and other diseases;

VI. Ensuring environmental sustainability;

VII. Developing a global partnership for development.

The Johannesburg's Conference on Sustainable Development [2002]

The Johannesburg Earth Summit on Sustainable Development 2002 was really a mammoth gathering of tens of thousands of participants to discuss, debate the issues on SDGs. This conference gave importance on the discussion as to how all out improvement on people's lives can be made faster. They also discussed on the importance of preserving natural resources. They laid emphasis on the global problems such as the demand for food and water or the improvements needed in the energetic and economic fields to expedite the

development. It is notable that for the first-time representatives from different companies and NGOs representing as a partner to the Govt participated in the conference.

The World Summit on Sustainable Development [2005]

The World Summit on Sustainable Development that held in New York in the year 2005 raised some newer issues on development. The International conference wanted to make concrete planning and find newer ways to fight poverty. They discussed the new threat of all forms of terrorism to the world. They wanted to make a common mandate on the need of protection of all the civilians from all crimes committed against humanity such as genocide or war crimes. It was declared that genocide is the greatest crime and to fight it out both the Peace building Commission and the Human Rights Council were established according to the resolution in the meeting. They avowed to work in the time of war to build up negotiation for peace building.

The Copenhagen Summit on Sustainable Development [2009]

In the Copenhagen Conference on the Sustainable Development a number of issue were discussed. This was a two-year negotiation that started in COP13 in Bali. The target of this conference was to enhance international climate change cooperation to reach to the target adopted in earlier conferences. It was the requirement of the world that the Copenhagen Climate Conference should come to the concrete conclusion on the climate change. Since Kyoto Protocol had its deadline and the newer policies were to be framed up to prevent and fight climate change. A lot of discussions and debates were there in the conference but no specific consensus on policy making could be made on climate change. Many countries promised of they will implement the Copenhagen Accord but the conference could not adopt any the accord even after the discussions.

The Rio20+ UN Conference on Sustainable Development [2012]

It is a fact that the United Nations hold so many conferences on the issue of Sustainable Development. But this conference was fundamentally different in nature. The United Nations Conference on Sustainable Development or Rio+20 held in Rio de Janeiro. The world leaders of the member countries decided to launch a process to develop a set of sustainable development goals (SDGs) built upon the millennium development goals MDGs that were adopted in the conference of the United Nations held in New York in the year of 2020. The

aim of these goals was to promote sustainable development in an organized, integrated and global way so that the result can be enjoyed globally. The participating nations agreed on exploring different measures of wealth other than GDP that is considered for environmental and social factors. The clear attempt was made to utilize nature's environmental services like carbon absorption or biodiversity. All of them acknowledged the fact that these services as crucial for sustainable development of the world.

The leaders who were representing the countries signed the Framework Convention on Climate Change and the Convention on Biological Diversity. All of them endorsed the Rio Declaration and the Forest Principles. They also and adopted Agenda 21 for achieving sustainable development at the local, national, regional and international levels.

In the Agenda 21, adopted at Rio de Janeiro, addresses the ongoing pressing environment and development problems of today. Not only this. This agenda also aims at preparing the world for the challenges of the next century in order to attain the long-term benefit with the goals of sustainable development. In the preamble to Agenda 21, it is stated that: "*Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can - in a global partnership for sustainable development.*" [380]

The document of the conference prepares an agenda for sustainable development in four sections. The sections are:

I. The social and economic dimension,

II. The conservation and management of resources for development,

III. Strengthening the role of major groups and

IV. Means of implementation.

The conference also made the provisions for Objectives, activities and means of implementation that is set out for a number of programme areas.

The United Nations Climate Change Conference & Sustainable Development [2014]

[380] The Preamble to agenda 21 adopted at Rio de Janerio

The repeated attempts to control climate change by the United Nations went on unending. As a part of this initiative, United Nations Climate Change Conference or COP20 was held in Peru in 2014. In this conference, discussions and negotiations towards a global climate agreement started to be accepted. The main focus of the conference was to reduce the greenhouse gases emissions. The limit of the global temperature increase should be confined maximum to 2º Celsius.

The COP21 & the Paris Agreement for Sustainable Development [2015]

The Paris Agreement for the Sustainable Development is a great landmark conference in the history of the United Nations so far.

A global agreement was highly required with high in diplomacy and with the ammunition to combat climate change. And this requirement got fulfilled with the adoption at the Paris summit of the UN Framework Convention on Climate Change. The final agreement came up with 31 pages. Out of the 31 pages of the resolution, the decisions of 11 page were legally binding portion and while other 20-pages were set of "decisions" by the assembled delegates to follow. In this conference, the long-term goal in the agreement is to expedite the global GHG emissions to be stopped as soon as possible.

According to IPCC, if the reading can be done with the goal of limiting temperature rise to two degrees Celsius, the governments will have to phase out fossil fuels from electricity generation by 2050. In this conference of COP21 the Parties to the United Nations Framework on Climate Change reached a landmark unanimous agreement. The member states agreed to accelerate and argued in favour of intensification of the actions and investments needed for a sustainable low carbon future. In reality, the Paris Agreement brought for the first time all member nations to reach to a united cause. They took bold efforts to fight climate change collectively and adopted the resolution. It marked a new significant phase in the global climate effort.

This historic Paris Agreement gives the responsibility to the developed countries to provide financial and technological support for this purpose of protecting the climate. Even though there were differences, but overall, it was of a great success. The then UN Secretary General Ban Ki-moon concluded the summit by saying, *"The time has come to acknowledge that national interests are best served by acting in the global interest. We have to do as science dictates. We must protect the planet that sustains us."* With the dd exception of Nicaragua,

all countries participated there expressed their support for the agreement. The Paris agreement got overwhelming response globally and support to implement the policies were assured.

The Sustainable Development Goals SDGs [2015]

The Millennium Development Goals (MDGs) were adopted in the Millennium Summit in the year of 2000. Though many things were done through the Millennium Development Goals MDGs, adopted in the year 2000, but a lot were left to be done. In December 2015, the Millennium Development Goals (MDGs) came to the end of their official term, and a post-2015 Agenda, were to be decided. After the official ending of the MDGs the journey of the SDGs started. World stood at the threshold of a new era as on 1st January 2016. While progress towards the MDGs has been quite impressive in some ways, much work remained to be done. It can be quoted here one of the best poets of the Victorian England, Robert Browning, "The Petty done, The undone vast". Then came the plans and policies of the Sustainable Development Goals by the United Nations. In the year of 2015, 193 member states of the United Nations General Assembly met in three days in the conference. The General Assembly discussed at length about several goals for the world and adopted the much awaited 2030 Agenda for Sustainable Development. Obviously, this agenda is a course of action for people and the planet to be able to flourish in a peaceful and wealthy world. The world leaders in the conference agreed that eradication of poverty was the biggest global challenge to sustainable development they faced. They upheld that to achieve success for the implementation of this agenda the collaboration from all nations and stakeholders is required. This program is made a distinction of the goals and targets. The conference pointed 17 goals and 169 targets before the leaders of the countriescountries. All of these goals and targets are related, integrated and conducive to the social, environmental and economic dimensions of sustainable development that is the moto of the United Nations. It is quite obvious that the Sustainable Development Goals (SDGs) or the "2030 Agenda" is the universal call for implementing the action for better health, eradicate poverty. It was their target to ensure that all people enjoy peace and prosperity that is their Human Rights. Out of the proposed 17 Goals and proposed targets of the SDGs to be attained within 2030 only the goals have been mentioned below:

Goal 1: No Poverty

Goal 2: Zero Hunger

Goal 3: Good Health and Well-Being for people

Goal 4: Quality Education

Goal 5: Gender Equality

Goal 6: Clean Water and Sanitation

Goal 7: Affordable and Clean Energy

Goal 8: Decent Work and Economic Growth

Goal 9: Industry, Innovation and Infrastructure

Goal 10: Reduced Inequalities

Goal 11: Sustainable Cities and Communities

Goal 12: Responsible Consumption and Production

Goal 13: Climate Action

Goal 14: Life below Water

Goal 15: Life on Land

Goal 16: Peace, Justice and Strong Institutions

Goal 17: Partnerships for the Goals.

The COP24 in Katowice, Poland [2018]

In this conference some of the important announcements were made to warn the parties of the conference. The UN general director. António Guterres vehemently condemned the role of the countries to protect the environment. He warned humankind that they are not walking through the proper path to protect the environment and required steps to prevent the climate change.

He also reiterated that most of the parties to the conventions are not following the agreements and are thus responsible for GHG emissions. They are becoming very late to take initiatives to accomplish the tasks adopted in the Paris Convention.

III. ON THE CLIMATE CHANGE

The issue of the climate change was the major concern of the Sustainable Development Goals of the United Nations. A safe and peaceful environment was the greater need to the people of the world. Thus (SDGs) are the United Nation's policy for a more sustainable and a bright future for all. With the adoption of the SDHs the US wanted to put an end to environmental degradation and bring into sustainability, climate change and water security under the

international focus. Through these visions it was accepted that no one should be kept behind of the scope of the developments across the world. The urge of a developing economy to be established by countries that will work for the betterment for both of the planet and the people. The corporates can take a leading role in materializing the 2030 agenda and can make a significant contribution for the betterment of the planet. Among the proposed 17 Goals and proposed targets of the SDGs to be attained within 2030, major of them in regard to climate change have been discussed below:

SDG6: Ensuring access to water and sanitation for all of the people:

It has been seen that industry accounts for over 19% of global water consumption, and agricultural sector requires supply chains for 70% more. So, in near future access to water for all can be of a greater crisis. Keeping it in mind all the corporate sectors should take necessary measures to cope up this possible problem. It is hopeful that what gets measure gets managed, and at CDP, we have seen an increasing number of companies tracking, managing and taking various implementing measures for water solutions.

SDG 7: Esurance of access to affordable, reliable, sustainable and modern viable energy

The amount of energy supply accounts for around 60% of global greenhouse gas emissions. It is a fact that some of 17% of energy consumption is now met with renewable energies. The warnings given by the inter-governmental panel on Climate Change says that this needs to hit around 85% by 2050 otherwise the worst impacts of climate change will have to be faced.

SDG 11: Planning to Make cities inclusive, safe, resilient and sustainable

It is estimated that nearing 50% of our global population live in various cities. Around 70% of the global energy related emissions are caused by the cities. If the city people are not aware of this fact then it will be of a greater risk to the planet. They are the frontline activists for making of the planet a greener and safer one. They can contribute a lot for the implementation of the sustainable development goals for all.

SDG 12: Ensuring sustainable consumption and production patterns

It is obvious that the sustainable consumption and production promote all round resources and energy efficiency. This also enhances sustainable infrastructure and access to green and decent jobs opportunity and a better quality of life of the people. For the sustainable progress of a stable economy that will serve the need of both the planet and the people in the long term to be planned out and implemented.

SDG 13: Taking urgent action to combat climate and its impacts on the planet and the people

The conference also stresses upon the fact that global warming should be reduced to that of below 1.50C and through this only the worst impacts of climate change. The target they have declared that by the year 2050 this greenhouse gas emissions must be reduced down to zero. This is the study by the scientists across the world. To achieve this the urgent need of corporate awareness is to be stressed upon by measuring and disclosing environmental impact is essential to the management of carbon and climate risk that will adversely affect the planet.

SDG 15: Sustainable management of forests, combating desertification, halting and reversing land degradation, and stopping biodiversity loss

The main resource of greenery that is the forests are crucial to global sustainable development. The forests contribute to a large extent the protection of the natural environment and the prosperity of the economy of a country. To preserve forestry is a grat challenge across the world. Unplanned urbanisation and industrialisation are affecting the forests in a huge amount.

The forests cause 80% of the world terrestrial specific. It is the cause of the provision of clean water, prevention of soil erosion and flood. It alone can provide one third of carbon mitigation efforts of the world.

IV. SUSTAINABLE DEVELOPMENT GOALS ON HUMAN HEALTH

Now-a-days, the Sustainable Development Goals (SDGs) are taken as an accepted landmark of judgment of measuring developmental progress among and within countries of the world. To Achieve the health-related SDGs has been a primary concern of many countries including the developing one. Out of the 17 important goals that are to achieve within 2030, the 3rd goal is devoted specifically to health. And the concept of health is inclusive with boarder meaning in essence. This is meant for all populations of all countries. This goal envisages the slogan, *"Ensure healthy lives and promote well-being for all at all ages".*

In the field of health, a lot of progress has been made starting from reducing maternal and child mortality and also in the fight against infectious diseases. Out of several challenges in the health, notable among them are the challenges of acute epidemic diseases, disasters, conflict situation the newly spreading epidemic of non-communicable diseases. The newer

issues of mental health disorders, and large inequalities in all parts of the world are also tough targets to achieve.

One of the most important other selected goals which highlights health related targets includes end of malnutrition in all form. Malnutrition itself is a great disease today. A bulk number of people of the world is suffering from this. The achievement of universal and equitable access safe drinking water and, hygiene and sanitation is far to achieve even today. The 2030 Sustainable Development agenda is of unprecedented scope and ambition provided it is implemented successfully. This must be implemented by all the member countries of the UN. Right to food, education, habitation, poverty eradication, health, and security and nutrition remain in the list of priorities. Yes, it is true, the concept of the Sustainable Development Goals (SDGs) comprise a broad range of economic, social and environmental objectives and offer the prospect of more peaceful and inclusive societies across the world.

India though lagging far behind in the field of health, can progress towards sustainable development in health if health is given proper attention and importance on the national and state agenda. The political will of the Govt in power both in the centre and the state is the ultimate in this field. In public health sector throughout the country the situation is very pathetic. India should invest in public health and implement the agenda through in further improvement in maternal and child health. It is quite often happening in India that the people have to confront neglected tropical diseases, eliminating malaria, AIDS and hepatitis and increasing the fight against TB at the high-tech age even.

In the field of all these tough challenges, the health care implementing authorities need to have interventions with quality services for the looking after the implementation of the programmes. Implementing universal health care system should be given the top most priority. This is the need of the hour that India needs to build robust heath system in all aspects and strengthen both the urban and rural components, with primary health care at its centre so that all the grassroot people can get the benefit. More involvement of private health sector under the control or the supervision of the concerned govt is also vital. Thus, all of the new goals are unique in that they call for action by all countries to promote prosperity while protecting the planet for our benefit itself.

The proposed 2030 Agenda is designed to benefit all the people of the world. Universal in its scope, the historic agenda will require an all-out, comprehensive and integrated approach to sustain development, as well as collective action at all levels of the govts. “Leaving no one

behind" will be an overreaching theme of the goals. The goal regarding health in the paragraph 26 of the 2030 agenda addresses health as thus:

"To promote physical and mental health and well-being, and to extend life expectancy for all, we must achieve universal health coverage and access to quality health care. No one must be left behind. We commit to accelerating the progress made top date in reducing new born, child and maternal mortality by ending all such preventable deaths before 2030. We are committed to ensuring universal access to sexual and reproductive health-care services, including for family planning, information and education. We will equally accelerate the pace of progress made in fighting malaria, HIV/AIDS, tuberculosis, hepatitis, Ebola and other communicable diseases and epidemics, including by addressing growing anti-microbial resistance and the problem of unattended diseases affecting developing countries. We are committed to the prevention and treatment of non - communicable diseases, including behavioural, developmental and neurological disorders, which constitute a major challenge for sustainable development". [381]

The 2030 agenda mentions prominently a number of Human Rights like right to development, self-determination, an adequate standard of living, food, water and sanitation, good governance and the rule of law etc. But it is quite disheartening that it does not specifically mention that health is a human right. In India also Right to health is there but it is not included in the fundamental rights of the constitution.

IV. INDIA AND SUSTAINABLE DEVELOPMENT GOALS

Since the Millennium Development Goals reached their December 2015 deadline, the new targets of Sustainable Development Goals are being propounded by India also. Since, in India a new Govt has come in power so there is now a paradigm shift of vision underlying the prioritizing for the proposed SDGs.

Depending on the Millennium Development Goals Sustainable Development Goals propose to end poverty. Along with these, it sets its goal to eradicate deprivation in all forms so that no one is left out behind. Through this process economic, social and environmental development will be made sustainable. Though criticisms are there still, the government of India is claiming to have adapted the principle of Sabka Sath Sabka Vikas (Meaning "inclusive development together with all, development for all").

[381] ***The paragraph 26 of the 2030 agenda***

The Govt has decided to upgrade the status of the poor and all out development for the underprivileged. The government has undertaken several projects for improving education system, food programming, habitation, sanitation, health etc. Also, they have kept in mind for people's increasing income, their security and dignity for all, especially women. The Central Govt. has taken a project namely 'Beti Porao, Beti Bachao' (Educate the girls, save the girls) aiming at the improvement of the backward women hood. Along with the Central Govt, several state Govts of India has given special attention on the protection of the women. Women's reservation in different layers of the policy making system of our country is very much notable. It is a hopeful picture with a developing country like India that the Govt is prioritising to improve environmental development with respect to water, air, soil and biosphere. The problem of the environmental degradation has been accepted as a collective challenge viewing it to be a scope to improve upon our planet.

It is noteworthy that to implement the millennium goals in India the Govt, though with its limited capacity, is trying level best in all out developmental programme. India has seen enactments of several laws or acts to protect, promote the green environment. Deforestation is taken up seriously by the National Green Tribunal. The GDP rate of India on the rise. Thus, it can be concluded that though a lot has been done but 'miles to go' in this regard. India is yet to develop a strong monitoring system so that proper evaluation can be done. It is admitted by all that the environment has no national barrier. No single country can make the environment better to live. Air, Water, Sound are not space bound. To protect the green earth a collective initiative is urgently required. Thus, India also cannot be beyond of its purview. If the sustainable development is to be achieved globally then India also must take its responsibility. Without India's role, to achieve the sustainable development goals will be a far cry.

IV. **CONCLUSION:**

"In order to sustain our global environment and improve the quality of living in our human settlements, we commit ourselves to sustainable patterns of production, consumption, transportation and settlements development; pollution prevention; respect for the carrying capacity of ecosystems; and the preservation of opportunities for future generations."[382]

[382] Paragraphs 10, Istanbul Declaration on Human Settlement 3 to 14 June, 1996

It is an admitted fact that the challenges of environment protection and sustainable development are really very tough. The journey of the concept of sustainable development has grown from Stockholm Conference to Rio Summit and thereafter through various national and international conventions, treaties it has developed to a large extent. While some of the salient principles of the sustainable development have been identified, but the real task of implementation is quite far to achieve. The need of the political will of the countries in general and developed countries in particular is the determining factor to implement all the accepted policies in the World conferences. The developed countries should come ahead and take major role to act in co-ordination to protect this planet Earth from further deterioration. It has been admitted in the world conference that the eradication of poverty can be successful only through economic development of the people. Economic growth of a country is very crucial. Today, most people are jobless, they don't have money in their hand, their purchasing power is about zero, so the sustainable growth is not possible. If the SDGs are to be materialized, the social needs including education, health, social protection, raising basic standards of living, job opportunities must have to be resolved. The issues of climate change and environment protection also should be taken care of. Five Ps of the new agenda are people, planet, prosperity, peace and partnership.

SDG 13 ensures healthy lives for all and promote well-being for all ages. Climate change or the environment protection as a whole has been given due importance globally. It can be summarised with the hope that the World leaders will come up and will implement the policies adopted for the sustainable development of the Environment and the people. The development will go hand in hand and to make the earth a treasure trove of rich natural beauty along with the people's rights of food, shelter, clothing, health, education etc. And thus, the world will be a happy and prosperous global village in the lap of the earth. This is a dream of paradise to be created on the earth.

GENDER JUSTICE SYSTEM AND IT'S HISTORICAL EPILOGUE

- AASHI VERMA

ABSTRACT:

In our country the problem of gender justice will always stays in a discussion. It has been a statement of problem which has arises between both men and women in an patriarchal society. The objective of this paper is to study the Gender Justice System and its Historical Epilogue in India. It is the study of the evolution of humanity, for that we need both men and women. It is the way to check who is better from the other.

In this article you will read the position of women in Vedic period, Post Vedic period, British period, Mughal period, Manusmriti and Medieval period. On the other hand, you will see how the law are been changing over the years. There should be the creation of harmony according to the Hindu Scriptures. After considering all these factors, this article are been studied to give a comprehensive critique to the changes in the women position in India.

Keywords: gender justice system, historical epilogue, polygamy, fundamental right, freedom and equality.

INTRODUCTION

Meaning:

"Gender Justice" is defined as a human right, which shows that every woman has a privileged to live their life without any fear, but with peace, harmony, integrity, dignity and freedom. Gender Justice is a key area for poverty reduction, and it is also important for achieving human progress. Gender refers to the roles, behaviors, sports and attributes that a given society at a given time considers suitable primarily based totally on organic sex. These attributes, opportunities and relationships are socially built and are found out through socialization processes. Gender determines what's expected, allowed and valued in a female or a person in a given context. In maximum societies there are variations and inequalities among men and women in duties assigned, activities undertaken, access to and manipulate over resources, and decision making opportunities. In patriarchal societies, political, financial

and social power lies with men, and attributes related to with manliness are valued over the ones associated with women.

- Gender justice seeks to gain a lifestyles of dignity and freedom to girls as a fundamental human right. It consists of sharing of strength and duty among men and women at home, within side the workplace, and within side the wider country wide and global communities.
- Gender justice is critical for development, poverty reduction, and is essential to reaching human progress.

All the women and the men are only applicable towards the right to equality but general sense the world is not in touch accordingly When we are in show off towards the modern scenario and scientific technological expert, the right to equality to female is sadly a reality and it was not considered as one of the major problemastic situation. India has a long and a continuing tradition extending over centuries of oppression of women. Women enjoyed an honorable position in the distant past. Subsequently patriarchy deprived of women of their rightful status in India. During the Vedic period female 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.

Concept:

India does not considered as an exception even when the women are as been treated bloody minded in the society. The irony lies in truth that in our society where women are treated as goddess as well as worshipped at the same time as Durga that's why the brutality of women are to be worshipped in all areas of the society like the same. In some of the society women are considered as less effective towards their work in the eyes of men, as the women is the only personality that does not free from her work, or does not lost its dignity, self respect and relish towards their work through these kinds of acts as the women does not treated good in their society however their act of brutality were not the same in the society They were used as an item of male sexual leisure and procurement of children. These kinds of men were considered their women just for their priority because in the eyes of men they think that women are just only for their sexual purpose. Just through these kinds of activities they are discriminated one after the other, first thing was that both men and women were undergo through their gender or they consider poverty as their second priority.

In some of the societies where the women are housewife are disadvantaged of financial assets and are depending towards guys for his or her livelihood. Men thinks that women works are frequently restricted into the four walls of the home, as the women needed to keep their residence and does not come out of the society to help others through their thoughts, that too diagnosed as well as they are not payable. Though in contemporary-day instances some of the ladies building their career through the creativity of paintings due to lack of extra-curricular work, women's responsibility have become of such kind; through these kind of activities women are bound to the liabilities to perform the both work. Firstly the work of paintings in which the management has hired her and on the other hand additionally responsible to do other work of her residence, moreover, it is finalized to be taken into consideration to be much less effective than her counterpart. Her fashionable reputation within side the own circle of relatives and within the society has been low and unrecognized.

Nature and scope:

When both men and women are to be treated equally, then the societies thinks that there was not the compatibility of the arisen of dispute, due to these kinds of act if a women suffers injustice through the act of sex, that type of women would be considered as a victim through the occurrence of gender injustice. When it comes to the proper explanation of gender injustice then that too only relates to the matters which are well versed, controversial and disputed.

When it comes to identified the injustice into the proper gender then there are some of the different types which are easily to recognize. There are some societies where women do the job as well as their earning are more than as that of men, these kinds of earning are recognize in some parts of international areas. As in that type of area, societies believe that women rights are lower as that of men. There are some of the international designation where women work for their live and earn more as compare to men, although there are many international designations, by that kind of act there are some type of violence that are arise by the men against their women in the higher manner to obtained some rights that she are not allowed with that right which the men hold. In some of the societies, women face these kinds of problem in different aspects. Widely endorsed conceptions of liberal democratic justice uphold people's moral rights to venerable treatment and physical integrity, to equal compensation for equal work and to equality in front of the law. If those responsible for the

above injustice are partially motivated by hatred or prejudice against women, the victims of violence and discrimination do not just happen to be women- rather, they become victims of injustice because they are women. Hence, these examples are clear illustrations of gender injustice.

Apart from this, gender justice requires that no one requires if they were allowed to carry better version of themselves that too expect with the burden of their life with lesser compensation as well as the lesser amount of benefits as compare to others that evolved due to gender. When we talk about of present scenario we see that both men and women walk shoulder to shoulder and enjoy equal level of benefit in all over their life. When we talk about gendered division labor, there is a perfect example of a heterosexual family which intact all the time by adopting their equal rights that are utilized by both men and women. When we talk about of a women as a housewife as compare her with the working man there can be some or other kind of misunderstanding arise due to this kind of concept where there are both men and women work together and if the women earn more than man then the dispute arise between them. As if we talk about of a present scenario, there can be a situation like if the women is a house wife and of the care also at the same time if she work while doing her job this simply shows that women is a multitasking personality as she manages both the work and the man manage only the full time job this may also result the dispute. If both men and women work in the same proportion of time and enjoy the same benefits, as if it amount to wallop? For answering this question I squabble that if not any kind of injustice arise by certain act that may amount with certain arrangement-which may cost least with other kind of labor division of a gender[383]. When on the other hand, if the couple thinks equally that the amount of the work should not be share, in equal proportion then the couple should not bothered while spending the money on each other. Through this allegation, the parties thinks ok by voluntarily prefer to divide their work equally, and after passage of time they don't feel such kind pressure upon them as of a gender rules or regulation that may arise in the form of individuals' expectations by the labor market.

1.2 GENDER JUSTICE SYSTEM IN INDIA: A HISTORICAL EPILOGUE

[383] For simplicity, I shall henceforth use "cheapest" instead of "least costly". It is important to bear in mind, however, that not all costs are financial or even material. (21/04/2021) TIME: 7:00 PM

Sociologists described women by propounding different views. In India, the history speaks that the women are recognize as a divine force but the multi-cultured Indian society allocate the women at different positions. Thus, there is no uniform reputation of women within the Indian society. Though, society showed the overall upliftment of women reputation. According to historian ROMILLA THAPPER-

"Within the Indian sub-continent there have been infinite variations on the status of women diverging according to cultural malices, family structure, class, caste property rights and morals."

The Indian beliefs poses the women with dual nature. On the other hand, she is considered fertile, patient and generous but on the other hand, she is considered invader and represents 'shakti'.

Vedic Period:

Certainly, the position of women during the Vedic period was magnificent on report of freedom and equality. Throughout this period, the women participated in each walk of life. Women studied in Gurukuls and enjoyed liberty in every field. The great women like Apala, Visvara, Yamini, Gargi and Ghosa stole the lime-light and became front runners in society. They acquired competency in art, music and even welfare. In Upanishad, the wife has been regarded as a true companion of husband. The wife has been blessed to live as a queen in the husband's house in Rig-Veda. This shows a high reputation of women. The wife is known as the origin of Mahabharata's prosperity, pleasure and Dharma. The man was not consistently capable to perform religious duties without his wife. There was no *pardah* system, as there is no right to select life partners. However, the system of polygamy and dowry was only prevailing in the system of ruling class. There was no prohibition in the remarriage of widow and also no discrimination between a boy and a girl. As a consequence, women are authorized to go through thread ceremony (Upanayana Sanskar).[384] If we want to understand how women and girls are treated during the Vedic Period, then we must analyze ancient Hindu scriptures, hymns, religious books, and various literary works that reflect the social customs of India at that time.

Post Vedic Period:

[384] S.C. Tripathi , Women and Children 1 (Central Law Publication, Allahabad, 5th edn., 2012 (21/04/21) TIME: 1:00 PM

During the post Vedic period, these women suffered great hardships and restrictions due to the helplessness of their Manu. According to ancient Hindu scriptures and texts, women enjoy considerable freedom and high status in Indian Society. However, in the next thousands years, the status of women in all fields deteriorated greatly. In the post-Vedic era, the status of women began to degenerate due to variety of factors. Child marriage began in the Smriti Era, and the self immolation known as Sati began in the Middle Ages. Until the beginning of the Mughal Period, many people like Nanak, Chaitanya and others advocate equal rights for women. Thanks to their support, women have achieved religious freedom and, to a certain extent, social freedom. In terms of economic status, women are completely dependent on male members of the family. When we enter the post-Vedic and Mughal periods from the Vedic Period, the status of women deteriorates from a sacred state to an object of satisfaction. Daughters were grew up under the supervision of the father, the wife under her husband and as a mother of her son. On the other hand, Manu believes that where women are respected, all gods are happy, and where women are humiliated, all religious activities are fruitless.

Surprisingly, in the post Vedic period, it was considered that women has their right to their property and the concept of "stridhan" prevailed. As Manu defined- "Stidhan" means- "that which was given to her before the nuptial fire, in bridal procession, in token of love and which she has received from father, mother, brother and husband."[385]

Medieval Period:

During the Middle Ages, the invasions of India by Alexander and the Huns further expanded the status of women. The society observed that the invading soldiers were threatened by their security while roaming the countryside, so women were placed behind the veil. Women are deprieved of their education and participation in community affairs. During the Middle Ages, social maladies such as child marriage, sati, and female infanticide quickly spread. In addition, social curses such as dowry have become inevitable, especially in Rajasthan. Devdasi and polygamy has also spread widely in rural areas. So, in the Middle Ages, women were oppressed in all fields.

Although there are not as many historical materials about women in the Middle Ages as there are about men, they are much richer than usual. Through the surviving documents, literature, and other texts and images, it is clear that medieval women are resilient, resourceful and

[385] A.S. Altekar; The Position of Women in Hindu Civilisation, Motilal Banarsidas, Delhi 1962. (21/04/21) TIME: 12:00 PM

skilled. In addition, under special circumstances, they have the ability to exercise political power, learning and creativity outside the family.

British Period:

At the beginning of the British rule in India, the status of women reached the lowest level in society. The position of the wife in the family is regrettable. The literacy rate is so low that almost no women can read or write. Evil social customs, dogmatic religious beliefs, inhuman superstition and sinister customs have caused the greatest deterioration. Child marriage, forced widowhood, husband, Devadasi, pardah, dowry, female infanticide and customs. There were two major movements during the British regime. These are:

i. Social Reforms Movement; and
ii. Nationalist Movement.

*Social Reforms Movement***:** This movement emerged in the 19th century and raised the issue of women's equal status. Social reformers expressed concern about satisfaction, prohibition of remarriage, deprivation of property rights, child marriage and women's education.

*Nationalist Movement***:** The nationalist movement has attracted the attention of many people and has generated confidence among women to raise their voices against the oppression system. In 1927, the National Congress of India was established. Facts have proved that this a key movement towards the realization of women's equal rights.[386]

Mughal Period:

Hindu women have respect in the family, participate in religious ceremonies, are educated, and many of them have also gained academic reputation. However, in general, their position has deteriorated in society and they have suffered many social maladies. Generally, monogamy is common in society, but among the rich, one man can have many wives. The widow can no longer get married. Either they were on the fire of their husbands, or they passed away as female hermits. Muslims are always ready to harass or capture Indian women, which leads to child marriage and the Purdah system.

This has also undesirable effect on their education and social monuments. Therefore, education can only be provided in homes that only the rich can afford. The birth of a daughter was considered a bad premonition and led to female infanticide. Though, the lower caste still do not have many of these social ills. They have no universal system, and their women arte free to divorce and remarry. Even widows are allowed to marry.

[386] A.S Altekar, The Position of Women in Hindu Civilization (22/04/21) TIME: 9:45 AM

The Devadasi system is a different social evil that prevails among Hindus. Beautiful unmarried girls were offered portraits of the Sin Temple, where they passed away as servants of the gods. This is not only severely of the gods. This is not only severely damaged their lives, but also led to the corruption of the temple.

Muslim women also do not enjoy their due status in society. Polygamy is common among Muslims. Every Muslims has the right to keep at least four wives or slaves. Strict adherence to the Purdha system among Muslim women.

Because of this social custom, they have no education. However, compared with Indian women, they are in a better position in some respects. They can divorce their husbands, remarry, or claim their parents' property. There is no sarcasm among Muslim women.

Therefore, it can be concluded that during the Sultanate, the status of Indian women was much lower than that of men, and they suffered many social maladies and other obstacles. Initially, women were considered happy objects.

Manusmriti:

People are at a loss as to Manu's view on the status of women. On the other hand, he respected and honoured women and acknowledge her importance. On the other hand, Manu's code actually regarded her as the embodiment of evil and ignored her. Some contradictory arguments about the status of women were discovered in "Manu Smriti." Women should not be independent. Manu believes that the father of the daughter who does not arrange menstruation to marry is damned. A husband who lives with his menstruating wife will be cursed, but a son who cannot take care of a widowed mother eewe1will be cursed. Therefore, it can be seen that although Manu does not oppose women in general, he believes that women's physical and mental abilities are not as good as men. Manu believes that a women who is fickle and lustful is also a seducer of men. Her body is the gateway to hell. Her thoughts and desire are impure. Therefore, he advices wise men to avoid being alone with women. He even forbids his disciples to be alone with his guru's wife. [387]

Post Independence Period:

[387] http://nirmukta.com/2011/08/27/the -status-of-women-as-depicted-by-manu-in-the-manusmriti/ (24/05/21) TIME: 4:48 PM

In the back to back period of history, neither man nor women does not treated same as well as does given one of the same status. In the period of history women are always struggle for their rights or power and liabilities towards the society.

Women repeatedly struggle for equality in order to live exactly the same lives as men. If it comes to the status of women in Independence India, then it will definitely improve. In India, the structural and instructive changes, the women that are represent into the fields of education, employment and politics were enhance many opportunities.

Because in the field of status that women has been given the same as that of men were ultimately exploit the change in the reduction towards the status of that of women. Since Independence, major changes in parliament, monetary sectors, communal and enriching life and other fields can be analyzed for the improvement of women's status.

Conclusion-

From the above discussion, it can be concluded that since independence, the status of women are undergone from slight fundamental changes in Indian society. The government has taken huge initiatives to change and women's social, economic and political conditions after being aware of their disadvantages in society and the situation of women. There was no gender discrimination towards the men and women during the Vedic Period in India. Women are respected and respected by the male members of the society and are considered goddesses. During that period, women are participated in some occupations, and they were free to choose to get married, and receive education until they got married.

Though, in the post independence era, the status of women has undergone major changes, and they have gained some basic rights. The law protects everyone's rights. Nevertheless, women on the ground still suffer due to maladies such as gender inequality and immoral beliefs. From the Veda to the post-Veda, and then to the present age, things have changed a lot. Living in the society it was considered that we are living exact like patriarchal society. As a part of India, we must work together to make women's lives safe and happy. This can only be achieved with the help of 3E's (Empowerment, Education and Enablement).

PROBLEMS ON SUPERSTITION AND THEIR LAWS AS SOLUTION IN INDIA

- SOHAM BANERJEE

INTRODUTION[388]

Considering the impact of superstition in the country it is evident from the fact that people have long ignored the basic idea of scientific temperament. We have continuously encouraged things which are not permissible in this modern 21st century where we continuously use gadgets and are in the process of developing or using new technologies day after day; it is pathetic to see people in social media flaunting their capabilities and views on various issues but they remain silent whenever it comes to this arena because there is fear of the unknown and people trust these as a part of life and feel that these things have a different form solution. Practically, there is no solution to this until we realize the fact that no religion in this world preaches violence or to harm others, at least I haven't come across any such doctrine or dogma which preaches to do or act so as to harm others. Therefore, it is clear that religion is not involved in this rather a false theory rather a hypothetical dogma forces the people to think and act superstitiously. In this case, it is interesting to see that many people enjoy sadistic pleasures by inflicting harm on others and there these kind of inhumane activities become the helping hand for these mentally unstable goons. Therefore, it has become a necessity in this year of 2021 to analyze and react to the thing which is acting like a parasite and harming the one who embrace it as well polluting the surrounding by harming the innocent for their own greed and benefits.

Actions like forcing an innocent to feed on excreta cause sexual harassment to a lady in order to give her a child from the divine and claims of having supernatural powers with which for a heavy amount of emolument can be used to inflict harm on the enemy as desired. The main problem here is our greed, lust and the feeling of jealousy that forces our thoughts to undertake the version of the wrong in order to satisfy something which is not acceptable, we tend to harm an innocent just for the sake of our own personal benefit by using methods we

[388] https://en.wikipedia.org/wiki/Anti-Superstition_and_Black_Magic_Act#:~:text=The%20Maharashtra%20Prevention%20and%20Eradication,Nirmoolan%20Samiti%20(MANS)%2C%20Narendra

find in the texts describing "black magic"; entertaining the use of such practices which claim to bring in the influence of negative energies that can harm or afflict destruction on someone or their whole family. There lies the chaos of what we call as the act of superstition. We forget the basic principle of humanity and perform one after the other inhumane act. Clearly, these actions threaten the human society as not only the frauds get a genuine chance to exert their undue influences but also in the name of such low-grade actions they extort huge amount of money by falsely luring the person who wants an unjust thing to be done on someone just because he/she is unable to control their jealousy, lust and greed. Each year the mighty nation like India, experiences actions like human slaughter, child molestation, sexual harassment on females and what not and sadly a significant section of these actions have motives which are superstition-based. For instance, a child being slaughtered can gift you riches which you couldn't even dream of and for couples with no child in the name of divine powers molest the female etc. these are just some known causes but there are many more which we are yet to know. And each day, each moment while someone plans a nasty criminal plot we tend to put some innocent to the hands of the criminal without even being able to curb or counter it properly.[389]

INFERENCE AND UNDERSTANDING

In terms of regulations and the laws present in the country, I believe the Indian legal system is far away from comprehending these criminals who run away and create a disaster in many lives. The regulations fail to strengthen the basic nature of these kinds of activities: superstition and its associated practices thereby delaying the factor of rising cases in this regard. I strongly appreciate the step taken by the founder of Maharashtra Andhashraddha Nirmoolan Samiti (MANS), Narendra Dabholkar (1945-2013) in 2003 and the Government of Maharashtra in the **Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013** which I believe is an exemplary step to curb the instances of these kind of inhumane activities in the State. The provisions of this Act is so strong that it acts as a blanket to cover almost all of the illegal and inhumane activities done in the name of fake powers and maligning the image of our holy religions where there are people who spend their lives in practicing and teaching its followers

[389] https://blog.ipleaders.in/antisuperstition/

the importance of good faith, the actions in conformity with humanity, to be good and of course to do good to others. This Act criminalizes almost all types of acts in superstition dogma viz., human sacrifice for material gain, claiming to invoke ghosts and threaten to harm someone with ghosts, sexually harassing someone and many more. The range of punishments and the nature of provisions for investigations create a scope for the successful step in reducing these crimes as we see that in the NCRB report of 2019 there has been not a single case recorded with the motive "human sacrifice". And this itself explains the scope and impact of this Act. However, there many other states in the country which suffer from the same problem and thus, I personally believe there should a uniform law that strengthens the **Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954** because even on this century we find a significant number of cases in this regard.

The **Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954** is an important act though its scope in the modern times is as handicapped as we can expect it to be. Being rarely enforced we find a need for another stronger provision in order to curb and cure this disease need superstition to save our future generations in falling in trouble to this harmful disease. We need to have some stronger regulations to prevent frauds from extorting money from the innocent and lure people into the wrong path. It is necessary that persons performing such Acts be apprehended and thus, implies that the Indian society will not entertain these kinds of actions.

Let us consider the following data as per the NCRB report 2019[390] where it is clear that motives in lieu of witchcraft and human/child sacrifice are still present with significant figures such as there are a reported of total 102 cases on witchcraft in India with another 10 cases of human/child sacrifice in the country, though in terms of total number of crimes and other motives this is a small number but if we continue to ignore this everyday then itself this will account to a significant rise as though on curbing it this can reduce a small yet significant number of crimes in the country. Though there are many cases which are not heard in the daily news but there are headlines on events where the an entire village accuses an innocent of practicing witchcraft or something like that and there we come across the fact that people are still uneducated about the truth of this superstition and thus, harm an innocent one

[390] https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf

without applying a rational mindset, we need to understand things in a scientific manner and thus it is necessary to develop scientific temper. States in India like Assam, Karnataka and Maharashtra has been a victim of this problem since ages and there are many more states not in the limelight but of course have issues with regard to this phenomenon of darks spells and superstition. While Maharashtra being the first state to enact such laws, the state of Karnataka too now has a similar law in this arena. Though each year there are cases of human sacrifice in the states of Andhra Pradesh, Assam, Bihar, Karnataka, Kerala, Tamil Nadu and Uttar Pradesh and others we have not yet witnessed any appropriate law or regulation in this regard which itself is another serious matter because in the year 2019 as per NCRB report we have seen the number of cases with regard to human/child sacrifice as motive in the state of Bihar to be the highest with 4 cases. Therefore, we need to pay attention to this aspect as we cannot expect to allow these inhumane activities done by a greedy, lustful or revenge-seeking mind to go on as the people who fraudulently exercise these activities create a system of extortion of money from their clients which allows many other criminal motives to bloom and thereby generate more criminals and affect a few more innocent people in the name of false benefits and false claims.[391]

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SUPREME COURT AND MEDICAL NEGLIGENCE, NECESSARY PROTECTION OR LICENSE TO KILL?

- BINISH BANSAL

INTRODUCTION

"Karmanye Vadhikaraste Ma Phaleshu Kadachana." Bhagwat Gita

When Lord Krishna delivered these words to Arjun he wanted to highlight the fact that when a man works with the thought of the consequences, his work never furnishes desired results. Interpreting these words we may agree that the absence of fear is a prerequisite for a medical professional to perform his divine duty and abide by this Hippocratic Oath. In pursuance of this notion the Supreme Court has come out with two consecutive landmark judgments where it has categorically stated that medical professionals can be held criminally liable under section 304A of Indian Penal Code (IPC) only for "gross" negligence. The term "gross" requires special attention because it defines the degree of negligence. The essay delves into the meaning of "gross" and provides ways in which this ambiguous term can be interpreted and construed. It also discusses the crucial factors which may have been a source of such a decision from the Apex Court. The alternative remedies in civil cases, with the newly created option of the Consumer Protection Act, have given substantial opportunities to the patients to proceed against the negligent doctor. As the Supreme Court has given a decision considering the intricacies involved in medical profession, it can be comprehended that the attitude of the Supreme Court is to provide "Necessary Protection" and "Not Licence to Kill".

NECESSARY PROTECTION

If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason—whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine.

Per R.C. Lahoti, C.J.

in *Jacob Mathews v. State of Punjab* MANU/SC/0457/2005: (2005) 6 SCC 1 at para 29.

The Supreme Court of India after having analytically ruminated over the issue of bringing medical practitioners under the umbrella of criminal charges in the matter of negligence has

held that until and unless the negligence of the doctor in question is of "gross" nature, he cannot be criminally prosecuted under section 304A[1] of IPC.

This view has emanated from *Dr. Suresh Gupta v Government* of *NCT of Delhi* [2] which was reiterated by the court in *Jacob Mathew's* case (supra).[3] The parties in the latter had presented two major issues:

(*i*) is there a difference in civil and criminal law on the concept of negligence? and

(*ii*) whether a different standard is applicable for recording a finding of negligence when a professional, in particular a doctor is to be held guilty of negligence?[4]

The Apex Court wanted to settle the obfuscation regarding the law of negligence.[5] Therefore it clearly demarcated between tortuous and criminal negligence when medical practitioners are involved. A higher degree of negligence has always been required to establish a criminal offence than is sufficient to create civil liability.[6]

While judging in torts the amount of damage[7] becomes the decisive factor whereas the degree of recklessness[8] forms the determinative element in crime. A key issue here is to provide a clear definition for what constitutes "gross negligence" because then only we will be able to estimate the "degree" required to constitute such negligence. It will be prudent to note that the expression "gross" has no basis in criminal law and it is not sufficient to merely say that it is a form of negligence that goes beyond the lack of necessary care. But the Court's ruling, which was delivered in the face of an increasing number of doctors being subject to frivolous criminal prosecution, was focussed on laying down safeguards against medical professionals being harassed.[9]

The judgment was delivered on the apprehension that doctors may start to look at every patient as a potential litigant[10] and may practice defensive medicines and hold back proper treatment/surgeries.[11]

Thus, to impose criminal liability under section 304A of IPC, it is necessary that the death should have been the direct result of a rash and negligent act of the accused and that act must be a proximate and efficient cause without the intervention of another's negligence.[12] The court also said that it must be the *causa causans*[13] though it may have been *causa sine qua non*.[14]

Actus non facit reum nisi mens sit rea, the basis of criminal law talks about a guilty mind. If there is a guilty mind, a practitioner will be liable in any case. But if, under the criminal law,

rashness and recklessness amount to crime, then also a very high degree of rashness would be required to prove charges of criminal negligence against a medical practitioner.[15]

The Supreme Court has followed another English judgment in the case of *R v. Adomako*[16] while considering the criminal liability in *Jacob Mathew's* case, where the House of Lords had given a different interpretation and had said that a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient 'as to amount to a crime against the State'.

Now an important question is that what shall be the tests which would determine whether an act of recklessness falls within the ambit of being "gross"? And also that who shall fall under the liability? To shed clouds of ambiguity over this problem the court has probed into this matter with a hawk's eye. The court answered the latter question in *Dr Laxman Balakrishna Joshi v. Dr. Triumbak Godbole* [17] that: "A person who holds himself out to give medical advice and treatment impliedly undertakes that he is in possession of skill and knowledge for the purpose." It is thus clear that even a person who misrepresents himself as a doctor or as a doctor having knowledge of a specified field shall fall under the liability.

To prosecute a medical professional for negligence under criminal law must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary sense and prudence would have done or failed to do.[18]

The other question is, can the doctrine of r*es ipsa loquitur* be used? There may be a case where the proved facts would speak of themselves but whether such findings would constitute the sole ingredient of an offence is not clear. The Supreme court in *Syad Akbar v. State of Karnataka*[19] opined that a case under section 304A of IPC cannot be decided solely by applying the rule of *res ipsa loquitur*. Thus, the universal applicability[20] of this doctrine has been subject to circumstantial measurement. Though this doctrine has had wide applicability in the civil cases, it fails to qualify as an evidence in criminal matters.

The other test of liability in respect of a doctor's duty could be that whether the doctor has acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion.[21] Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not acquired this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.

A man need not possess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.[22] The above test is popularly known as "Bolams Test"[23] which has had wide applicability in cases of medical negligence. But one aspect that is to be considered is that in medical treatment ample scope for genuine difference of opinion exists and one man clearly is not negligent because his conclusion differs from that of other professionals.[24]

When a case fulfils all these requisite tests seen in consonance with the circumstances available, then only it can be termed gross.

It is evident that proving grossness of an act is quite a tedious task. Does this mean that the court has not followed the principle of *actus curiae neminem gravibat*?[25] Certainly not. The court has taken a much broader view in the light of the probable misuse of such liability against the doctors who are considered in this country as being second to god.

Some prominent views in favour of the doctor need to be addressed. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.[26]

Legal proceedings for medical injury frequently progress in an atmosphere of confrontation, acrimony, misunderstanding and bitterness.[27] We need to understand that medical science had immensely benefitted mankind, but this had been attended by considerable risks. Since we cannot take benefits without taking risks, every advance in technology is attended by the risks. Doctors, like rest of us, have to learn by experience.[28] The Court observed that allegations of rashness or negligence are often raised against doctors by persons without adequate medical knowledge, to extract unjust compensation. This results in serious embarrassment and harassment to doctors who are forced to seek bail to escape arrest. If bail is not granted, they will have to suffer incarceration. They may be exonerated of the charges at the end; but in the meantime they would have suffered a loss of reputation, often irreversible.[29] From a doctor's point of view, the reasons things go wrong are often quite understandable. Doctors are human and everyone makes occasional errors, especially when under immense pressure. Of course, gross negligence is indefensible, but illness is never totally as it appears in medical textbooks. Important things may be hidden or happen unexpectedly.[30] Speaking to *The Hindu* on behalf of the medical profession, Dr. T.N. Rao[31] said: "We are trained in such a way that we take due care and caution to save a patient

by all means. But despite our efforts we may not succeed in all cases. That does not mean we have not given our best to the patient."[32] A doctor may be liable in a civil case for negligence but mere carelessness or want of due attention and skill cannot be described as so reckless or grossly negligent as to make her/ him criminally liable. The courts have held this distinction to be necessary because the hazards of medical professionals being exposed to civil liability may not unreasonably extend to criminal liability and expose them to the risk of imprisonment for alleged criminal negligence.[33] The relationship between the doctor and the patient is not always equally balanced. The attitude of a patient is poised between trust in the learning of another and the general distress of one who is in a state of ambivalence naturally leads to a sense of inferiority and it is therefore the function of medical ethics to ensure that the superiority of doctors is maintained.[34] In the ordinary case, the law will not assist an innocent plaintiff at the expense of an innocent defendant.[35]

Thus, while determining that a medical practitioner is criminally liable we need to comprehend the element of social welfare involved from the perspective of getting medical treatment. We have to give the doctors the benefit of the doubt because one judgment may deter the whole community from administering proper dose. The error of judgment should be considered in view of the situation at hand. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment.[36] A patient goes for a treatment only when the prospective benefit outweighs the inherent risk. The law understands the limitations of humans and, therefore, it does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.[37]

In *Paramanand Katara v. Union of India,*[38] Supreme Court had declared that the duty of the courts is to see that doctors are not harassed in the course of performance of their duties towards the patient. Considering the above reasons the Supreme Court in *Dr. Suresh Gupta v. Government* of *NCT of Delhi* [39] concluded that, "the legal position is almost firmly established that where a patient dies due to the negligent medical treatment by the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and also at the same time if the negligence is so gross and his act was reckless as to endanger the life of the person, he would also be criminally liable for offence under 304A of the Indian Penal Code." *Ex abundanti cautela*,[40] it is clarified that we are affirming are the legal principles laid down and the law as stated in *Dr. Suresh Gupta*'s case.[41]

The Supreme Court though has clarified in *Laxmanan Prakash (Dr.) v. State*[42] that the quashing of a criminal proceeding is no bar to the institution of a civil suit. Though the judgment makes the arrest of doctors for medical negligence harder but leaves intact the existing provisions for patients to claim compensation under consumer laws.[43]

The Supreme Court has opened a number of avenues for the patients by having brought medical practitioners under the Consumer Protection Act (CPA)[44] by broadly interpreting the meaning of the terms "services"[45] and "deficiency"[46] in services in *VP. Shanta v. Indian Medical Association*[47] where the court had clarified: "The fact that the medical practitioners are governed by the Medical Council Act[48] is no solace to the person who has suffered due to their negligence."[49] The court by widening the scope of the CPA has replenished the victims with not only a strong but also a cost effective alternative. The court has agreed that compensation must be given in civil cases where negligence has been proved reasonably. The landmark inclusion of CPA as a remedy has come from the firmly established consumerism in medical practice. The notion that blame must be attributed and compensated[50] aptly has been the intention of the court in this regard. The court has in many cases awarded compensation not only for the negligence but also for the mental agony suffered as a result of that negligence.[51] The cases of improper sterilization[52] have also been no exception to the above rule.

The test of negligence in the civil cases is not that high. The approach of the courts is to examine that professionals should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional owes to a client a duty in tort as well as contract to exercise reasonable care in giving advice or performing services.[53]

Even the government has not been spared by the declaration that 'negligence is writ large' and there is no case of sovereign immunity involved in the matter of government hospitals.[54] The Supreme Court has also brought Article 21[55] to rescue the patients from any breach of duty arising out of the government-run hospitals. It has expanded the contours of Article 21, so as to subserve the right of health and medicare in it. Though fundamental rights are negative rights and can be invoked only when they have been violated without the due process of law, in health care the damages are irreparable and cannot be brought back. So the court took the positive step and interpreted this negative as positive right under Article 21 of the Constitution.[56] In *Paxchim Banga Khet Mazdoor Samiti v. State of WB,*[57] the Supreme

Court has held that providing adequate medical facilities for the people is an essential part of the obligation undertaken by the government in a welfare State.

It is, thus, clearly established that the Supreme Court has taken cognizance of the grievances of the patients as well and has given them alternative remedies against the doctor who has been alleged of negligence. So, the question of preferential treatment in favour of doctors is very well negated.

CONCLUSION

A multu fortiori, the Supreme Court of India for greater good of the society has bestowed upon the medical practitioners a protective shield called 'gross' negligence. The judgment has weighed the potential benefits of a treatment with the inherent risks. The benefits were undoubtedly at a higher pedestal and thus the Apex Court has opined so. But it does not give any indication as to the permanency of this ratio.

If we do subject doctors to criminal liability then it becomes a high probability that they may feign away from treating emergency cases giving a major setback to the policy of fundamental health care of the government. Will the judiciary take the blame for such a catastrophe (if it does occur and is bound to occur)? The end result will not be detriment to either the legislature for creating such a section (section 304A) or the judiciary who interpreted it that way but will be to the innocent patient who comes to the doctor believing that he would be treated and treated perfectly.

The Indian Penal Code is based on the principles of utilitarianism but if the principles argue for inflicting pain upon the guilty then certainly doctors do not qualify under this principle because they do not draw any pleasure out of their patient's death; so a pain inflicted upon them is not justified under the principles of our substantive criminal law.

REFERENCE:

1 *Causing death by negligence*—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extent to two years, or with fine, or with both.

2 MANU/SC/0579/2004: AIR 2004 SC 4091, Judges: Y.K. Sabharwal and D.M. Dharmadhikari.

3 *Jacob Mathew v. State of Punjab* MANU/SC/0457/2005: (2005) 6 SCC 1.

4 *Ibid*.

5 Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Ratanlal & Dhirajlal, '*Law of Torts*', Twenty-fourth Edition 2002, edited by Justice G.P. Singh, at pp.441-2.

6 Walton Christopher, Cooper Roger, Wood Simon E. and Percy R.A., '*Charlesworth and Percy on Negligence*', Sweet & Maxwell, 10 Rev Ed edition, November 2, 2004, para 1.13.

7 Damage is loss that results from unlawful Act, damages is compensation for legal injury.

8 The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. Supra 2.

9 Among them are that doctors should be arrested only as a last resort and that private complaints should be acted upon only after obtaining "credible" medical opinion that supports charges of rashness or negligence. The Centre has been directed to frame a comprehensive set of statutory rules that will govern the prosecution of doctors. Such rules must strike the right balance — one that prevents doctors from being subject to vexatious litigation and, at the same time, permits aggrieved patients and their relatives to initiate criminal proceedings against them wherever justified.

Medical Negligence and Prosecution, *The Hindu*, Online edition, Friday, Aug 12, 2005.

10 Misra Bejon, Chairman of the Consumer Coordination Council, http://www.bmj.com/cgi/content/full/331/7514/422-f?etoc.

11 Section 304A of IPC was a sword hanging on the doctors working both in Govt. hospitals as well as private sector. Since long, this has been made a malady and the doctors were practicing defensive medicine so much so that even proper treatment/surgical procedures were being held back with the fear of untoward results because of which doctors could be sued for no fault of theirs. Bhullar D.S., Gargi J., '*Medical Negligence - Majesty of Law*' http://medind.nic.in/jal/t05/i3/jalt05i3p195.pdf.

12 Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap*, 4 Bom LR 679.

13 An immediate or effective cause, Garner Bryan A, '*Black's Law Dictionary*', Thompson West, 8th Edition, 2004, P.233.

14 A necessary cause; the cause without which the thing cannot be or the vent would not have occurred. Garner Bryan A, '*Black's Law Dictionary*', Thompson West, 8th Edition, 2004, p.233.

15 Theme Article: Medical Negligence - A Comparative Analysis of the Law in India and UK, http://news.indlaw.com/uk/ focusdetails.asp?ID=26.16(1994) 3 All E.R. 79.

17 MANU/SC/0362/1968: 1969 (1) SCR 206.

18 Iyer Suganthi, '*Criminal negligence vis-à-vis medical professionals, a Supreme Court Ruling*', http://www.expresshealthcaremgmt.com/ 20051015/legalities01.

19 MANU/SC/0275/1979 : (1980) 1 SCC 30.

20 No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule *of res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter productive. *Jacob Mathew v. State of Punjab* MANU/SC/0457/2005: (2005) 6 SCC 21.ibid

21 *Sidaway v. Bentham Royal Hospital Governors and Others* [1985] All ER 643.

22 *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 121.

23 The water of Bolam test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, and has continued to be well received by every shore it has touched as neat, clean and well-condensed one. *Jacob Mathew v. State of Punjab* MANU/SC/0457/2005 : (2005) 6 SCC 1.

24 Lord President Clyde, *Hunter v. Henley* 1955 SLT 213 at 217 as referred to in *Maynard* v *Midlands Regional Health Regional Health Authority* [1985] 1 All ER 638.

25 An act of the court shall prejudice no man, as propounded in the case of *State of Gujarat v. Jagan Bhai* AIR 1996 SC 1631. 26 *Dr. Suresh Gupta v. Government of NCT of Delhi* MANU/SC/ 0579/2004: AIR 2004 SC 4091 27 Luckham Mary, '*Making Amends an overhaul of compensation for medical negligence*,' http://www.spr-consilio.com/arttort11.

28 *Roe* v *Minister of Health* (1954) 2 All E.R.131.

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33 Murthy K K S R, 'Medical negligence and the law', *Indian Journal of Medical Ethics*. http://www.ijme.in/153oa116.

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35 Pashman J. in *Anderson v. Somberg*, http://www. healthlibrary.com/ reading/law/part2.html

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37 Supra 6, para 8.04.

38 MANU/SC/0423/1989: AIR 1989 SC 2039, see also *State of Punjab v. Mahinder Singh Chawla*, MANU/SC/0277/1997: AIR 1997 SC 1225.

39 MANU/SC/0579/2004: AIR 2004 SC 4091.□40 Out of abundance of caution, Infra note 41.□41 *Jacob Mathew v. State of Punjab* MANU/SC/0579/2004: (2005)

6 SCC 1.

42 MANU/TN/0100/1999: 1999, CrLJ 2348 Mad.

43 Mudur Ganapati, "Indian Supreme Court ruling makes arrest

of doctors harder", http://www.bmj.com/cgi/content/full/331/ 7514/422-f?etoc

44 1986, Act No. 68 of 1986.

45 *Ibid*, *Section 2(o):* "Service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

46 *Ibid.* 45, *Section 2(g)*: "Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be

maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

47 MANU/SC/0836/1995: (1995) 6 SCC 651. From the term 'potential users' in Section 2(1)(o) it cannot be inferred that that the services rendered by medical practitioners are not contemplated by the legislature to be covered within the expression "service".

48 Act No. 102 of 1956.

49 Relying on the judgment of *Lucknow Development Authority v. M.K.Gupta* MANU/SC/0178/1994: (1994) 1 SCC 243 para 22.

50 Mason & McCall Smith, *Law and Medical Ethics*, 4th Edn.as reffered to in *VP. Shanta* v *IMA,* Supra 47.

51 *Sring Medows v. Harjot Ahluwalia, K.S. Ahluwalia & Anr*. MANU/ SC/1014/1998: (1998) 4 SCC 39.

52 *State of Haryana v. Smt. Santra* MANU/SC/0295/2000: AIR 2000 SC 1888.

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RURAL CONSUMERISM IN INDIA- THE NEED FOR CONSUMER EDUCATION AND AWARENESS

- **SUKANYA BHAT**

ABSTRACT

Majority of India's population lives in villages. Due to the lack of facilities in the rural areas the rural consumers have to head to urban markets. But the marketers have realized that rural market have enormous potential. The rural consumer is exploited in many ways. However due to lack of awareness and education they are unable to take immediate action and are sacred to exercise their rights. The aim of the researcher is to study the buying behavior of the rural consumers, the ways in which they are exploited and to suggest ways in which a rural consumer can be empowered. Th researcher also aims to understand if the Gram Panchayat can be used as a grievance redressal mechanism.

INTRODUCTION

In a country, the areas which are not urbanized are called as rural areas. In India, about 70 percent of the population resides in villages. Rural India depends upon the consumer goods manufactured in industries.[392]

The contemporary world is a world of global consumerism. In both rural and urban markets people as consumers are exploited, especially those who are in the category of lower middle-class family or below poverty line.[393] Rural consumers are highly dependent on rural markets in which local as well as industrial goods are sold. The Consumer Protection Act has been defined as "Consumer means a person who buys a commodity or is a user of such commodity on price paid or promised from a shop, fair price shop, business house to the use of private or public service." The Honorable Supreme Court stated in the case of *Morgan Stanley Mutual Fund v. Kartick Das* [394] that the consumer can be said to be the one who consumes. The goods may be purchased for private or public use. The scope and meaning of the word

[392] Dr. S.C. Roy, *Empowering the Rural Consumerism,* Manupatra (18th April, 2021, 6:00 PM) http://docs.manupatra.in/newsline/articles/Upload/B2469A0D-3179-4073-9161-6DBD4AF2E888.pdf

[393] Mohindar Singh and Amit Kumar, *Rural Consumers Protection: Need for Awareness*, Indian Journal of Political Science, 441, 441-442(2009)

[394] *Morgan Stanley Mutual Fund v. Kartick Das*. 1994 4 SCC 225

'consumer' were amplified in the case - *Lucknow Development Authority v. M.K. Gupta*[395] wherein it was stated that the beneficiary of the goods and services with the prior approval of the actual consumer is also deemed to be a consumer.

Even though rural people are mostly food grain producers, they are bound to purchase processed and branded goods, without being sure about their quality, price or result. Most of them do not know the term Maximum retail Price. Moreover, the rural population lacks market expansion. Therefore, the rural consumer is forced to buy whatever is available in the market and have to agree the terms and conditions of the vendor. The term consumer according to the major problem is that the vendors have their own unions. The purchasers are disorganized and end up paying the standard price for substandard goods. Rural consumers are usually victims of low measurements and weights. Sometimes adulterated goods are sold to them, some of the sellers also take undue advantage of the consumers being unaware. Sometimes there is a shortage of essential commodities causing black marketing and increase in price of goods. Besides, the quality of fertilizers and packaged seeds are inferior coupled with prohibitive prices. Therefore, the shrewd dealers easily trick the rural consumers.

The Consumer Protection Act gives six major consumer rights to safeguard the consumers against unfair practices. Following are the rights:

1) **Right to Safety:** Consumers deserve to be protected against commodities or services which are dangerous to their life and assets.

2) **Right to be informed:** Consumers possess the right to be apprised about all details of the product right from quantity, quality and price. This protects them against unfair trade practices.

3) **Right to choose:** Consumers have the right to choose and have access to a diverse range of commodities and services at reasonable prices.

4) **Right to be heard:** The consumer deserves to be heard for the grievances he has faced.

5) **Right to seek Redressal:** A consumer has the right to pursue grievance redressal against any unfair trade practice.

6) **Right to seek Consumer Education:** Consumers have the right to be well informed and acquire knowledge about consumer rights.

[395] *Lucknow Development Authority v. M.K. Gupta* AIR 1994 SC 787

RESEARCH QUESTIONS

1) What are the problems which stop the rural consumers from practicing their rights as a consumer.

2) Are there any provisions made for the rural consumers, to empower them and make them aware of their rights?

3) Why is there is a need felt to educate the rural consumers about their rights?

4) Is there any grievance redressal mechanism in rural areas?

5) Can the Gram Panchayat be used as a forum where the rural consumers can lodge their complain and seek relief?

RESEARCH OBJECTIVE

The objective of this study is as follows:

1) To know the problems faced by rural consumers and the barriers due to which they are unable to practice their rights as a consumer.

2) To understand the need to educate rural consumers and make them aware of their rights.

3) To learn about the provisions made for their empowerment and to bring about awareness among rural consumers.

4) To find out whether a grievance redressal mechanism is available in rural areas if yes, the mode of operation.

5) To understand if the Gram Panchayat can be used as a forum where rural consumers can lodge their complaints.

LITERATURE REVIEW

1) *Rural Consumers Protection: The Need for Awareness*[396] a paper by Mohinder Singh and Amit Kumar, which in detail describes the buying behavior of a rural consumerism and the way the rural consumerism are exploited. The authors have not only described the problems but have also given the solutions as to what can be done to strengthen the consumer, what action can be taken by the Government, NGO'S and media to tackle malpractices such as corruption. The authors have also described the Consumer Redressal mechanism in detail. The detailed study makes the paper effective and interesting to read.

[396] Supra Note, 2

2) *Rural Market: The Core of Indian Market*[397], a research paper by Meenu Rani, has done a detail analysis of the rural markets , the potential of such markets, accessibility of such markets and other features which are related to the rural market. The data presented in the form graphs and tables makes the paper more effective and easier to understand.

3) *Rural Consumers Awareness about Consumer Rights*[398] a paper by Dr. G. Rambabu Vinod Kumar, is a detailed study about the awareness of the rural consumers in the Ranga Reddy district of Telangana state. Before the study the author has described the consumer rights in detail and has given a brief background of the Consumer Protection Act, 1986. The author has made a detailed study and has given the data on awareness of the rural consumer on every right individually. The author has also concluded that there no relation between Age, education, income and in being aware about the consumer rights. The presentation of data in the form of tables makes it more effective to understand.

4) *Rural Consumers and Role of Local Bodies in Consumer Protection*[399] a research paper by George Cheriyan is a detailed study on the challenges faced by rural consumers and also the potential of the rural markets. The researcher has explained how the lack of consumer mechanism has made the rural consumers vulnerable. Moreover, the researcher has provided solutions as to how Gram Panchayats can be used a s mechanism to spread awareness among the rural masses.

1. Rural Consumer and Their Buying Behavior

A consumer as defined by the case of *Morgan Stanley Mutual Fund v. Kartick Das*[400] can be said to be the one who consumes. The buying behavior of an individual household for personal consumption is called as consumer behavior. A rural consumer is the one who belongs to a rural area. A rural consumer is highly dependent on the "local market" for his household needs. A rural consumer is said to have a particular buying behaviour:

1) Cultural factors strongly influence the opinion of the rural consumerism regarding the product.

[397] Meenu Rani, *Rural Market the Core Of Indian Market*, G.J.C.M.P, 123, 123-125(2013)
[398] Dr. G. Rambabu Vinod Kumar, *Rural Consumers Awareness About Consumer Rights,* IOSR-JBM, 36-42 (2017)
[399] George Cheriyan, *Rural Consumers and Role of Local Bodies in Consumer Protection,* Cuts-Cart (17th June, 2021,7:00 PM), https://cuts-cart.org/pdf/Rural_Consumers_and_Role_of_Local_Bodies_in_Consumer_Protection.
[400] Supra Note, 3

2) A rural consumers behavior is strongly impacted by the geographical location. For examples nearness to the feeder towns and industrial projects.[401] Lack of electricity in many rural households acts as a hindrance to purchase consumer durables.

3) The buying behavior of the rural consumers is also influenced by their exposure to the urban lifestyle. Such exposure and interaction are seen to rise in the recent years.

4) The way in which the rural consumers use the products also influences their buying behavior. For eg lack of electricity automatically makes them purchase more batteries, or they may prefer using detergent bars instead of washing powder.

Many other factors such as the place of buying, the involvement of others in purchase and marketers' efforts to promote and give market in rural areas influence the buying behavior of a rural consumer.

1.1 The Barriers Faced by Rural Consumers in Exercising Their Rights

The Consumer Protection Act, 1986 played a significant role in bringing awareness in the consumer regarding their rights. However, most of the rural consumers are faraway and find it hard to access the redressal mechanism. The reasons are as follows:

Most of the rural consumers do not have do not have enough knowledge of their rights. They are not aware and are not educated about the various redressal mechanisms that exist. Many of the rural consumers lack confidence to go against the organized business associations. Even though some consumers may have the knowledge of what is to be done, they lack confidence and are scared of complaining and raising their voice. Sometimes, the consumers complaint but there is a delay on the part of the redressal forum in responding. The consumers may lose confidence in the redressal and machinery and also it may cause them a lot of money expenditure. Some consumers feel it is a waste of time and money spent on litigation for small purchases. The provision of Consumer Council in the Consumer Protection Act, 1986 is also neglected.

1.2 The Ways in Which a Rural Consumer is Exploited

Some of the prevailing ways in which a rural consumer is exploited are given below

1) The goods sold in the market are sometimes not weighed and measured properly.

2) Selling defective products or expired medicines.

[401] Supra Note, 8

3) Selling products at a rate higher the maximum retail price

4) Duplicate or fake items are sold

5) In order to earn high profits, the goods such as oil, milk etc. are adulterated. Moreover, the locally produced goods lack inbuilt safeguards which may prove to be hazardous.

6) Often there is a false shortage created by businesses in order to earn high profits. They create scarcity by hoarding the goods and then sell them at a high price.

Various other ways such as: providing incomplete information, improper after sale services, harassing the consumer in matters such as telephone bills etc are used to exploit the rural consumers.

2 The Need and The Steps that Can Be Taken to Empower Rural Consumers

There is a dire need to educate the rural consumers and make them aware of their rights as a consumer. They should not only be educated but also be given the confidence to stand up against the injustice done to them, otherwise the people who adopt unfair practices will keep exploiting the consumers.

Some of the steps that can be taken by the consumer are as follows:

1)The consumer must be well aware of his rights. This can be done by educating the consumers and making provisions regarding rural consumerism in the Consumer Protection Act. Only knowing rights is not enough. The consumer must have the confidence and the will to enforce them.

2) Consumers can also practice self-help. Self help will ease the problems the consumers have and the legal action should be their last resort. They can do it through the process of mutual negotiation and give and take.

3) The consumers should be aware and ask for an invoice or a guarantee card. Keeping a guarantee card or an invoice will help the one proves himself as a consumer and he can take help from the consumer forum whenever needed.

4) The consumers should be aware of the terms and conditions which are printed on the product, also one should check for ISI mark on electronic products and Fruit Product on canned fruits. The consumer should also make sure that the seller is reliable.

5) Incase the consumer finds any defect or deficiency in the goods or services; he should immediately report it or bring it to the notice of the seller. If no compensation is given then

he should immediately lodge a complaint. However, the consumer must be courageous nd make his company with and place his point of view with emphasis.

2.1 Steps that Can Be Taken By the Government.

1)The plans that Government has implemented should be implemented effectively, monitored and evaluated timely. This will help in reach outing out to more and more consumers.

2) The Government can take the help of the Panchayats, NGO'S, Civil societies etc.. those who function at the grass-root level to spread awareness to the rural consumers.

3) Government should give more funds to the organizations, institutions etc. This will help the organizations to provide services more efficiently.

2.2 Steps that Can Be Taken By the Media

1) The media can find out the cases in which an innocent consumer was denied compensation and help in bringing it to the notice of the concerned authority.

2) May contribute in keeping a proper watch and help in reporting cases.

3) The media may arrange talk shows and discussions where the problems related to consumer awareness can be addressed.

3. Dispute Redressal Mechanism

The Consumer Protection Act on 15th April 1986 amended 2004 and 2005. Under the Act the Government had devised a three-tier mechanism.

1) **District Forum:** District Forum at the lowest level and is established in each and every district[402]. The district Forum has the authority to consider complaints, of goods and services and compensation if claimed should not exceed Rs 20 Lakh.

A complaint can be filed only if the person against whom the complaint is filed, lives or carries his business or works for gain where the cause action arises.[403]

2) **State Commission:**

The State Commissions are established in states and have the authority to address grievances relating to goods and services and the compensation if claimed exceeds Rs 20 Lakhs but is less than 1 crore.

3) **National Commission:**

[402] *Supra* Note 2.

[403] Agarwal, V.K., *Consumer Protection (Law & Practice)*,36 (B.L.H. Publishers Distributors2 PVT. LTD., New Delhi, 2003)

The National Commission have the authority to address grievances relating to goods and services and the compensation if claimed if exceeds Rs 1Crore.

3.1 Role of Local Bodies in Consumer Protection

Considering the fact that most of the consumers were unaware of the, existing consumer redressal forums, a Civil Action Group conducted a survey IN 2006 to find the status of the COPRA (1986). 82% of the consumers were not aware of the COPRA and 66% were not aware of their rights. It was found out that ignorance is the primary factor which is responsible for exploitation being common in rural masses. In all the villages there is an available constitutional mechanism and is spread in 627 districts known as the Gram Panchayat. The consumer movement can get a boost and awareness can be spread among the rural consumer by the help of the Gram Panchayats. The initiatives by the Central and State Departments of the Consumer Affairs should involve Panchayati Raj Institutions in the various programs relating to consumer awareness programs. [404] Consumer Councils must be set up in Gram Panchayats. The members should be given awareness materials in their regional language.

The Ministry of Panchayati Raj was in the process Bharat Nirman Rajiv Gandhi Seva Kendras (RGSK) in the Panchayat headquarters in each of the states to bring a change in the techniques and resources. The RGSK will well support the 'Complaints Handling, Information and Advisory Services' (CHIAS), which acts as a complaint handling mechanism between consumer and consumer forum.

4 Conclusion and Suggestions

There is a dire need to educate the rural consumers about their rights to prevent them form being exploited. The best possible way is to involve the Panchayats and educate the members, give them awareness manuals in their regional language and give them the task of holding consumer awareness sessions time to time. Setting up of local redressal consumer forums will help solve grievances to a large extent. The Government should strengthen the vigilance machinery to detect corrupt practices, impose heavy penalties on those indulging in malpractices. Village level cells can be constituted by the educated villagers. Accept the recommendations of the proposed committee and take the appropriate action. The rural consumers must also be aware and confident to action against any injustice done to them.

[404] Supra Note, 9.

Steps should be taken in order to make the atmosphere corruption free. The consumer courts also should not differentiate between a rural consumer and a urban consumer in terms of hearing a case. If all the actions are taken the situation of rural consumers will improve to a large extent.

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THE EVOLUTION OF TRANSIT ANTICIPATORY BAIL IN INDIA

- MOHAMMAD SHAYAN USMANI

I. INTRODUCTION

Criminal Justice System in India is based on the principle to eliminate crime by punishing the criminals but at the same time also to safeguard the liberty of the individual until he is proven guilty. The concept of Bail is the prairie on which the fundamental principle of presumption of innocence of the accused until he is proven guilty resides. This paper aims to study the evolution of transit anticipatory bail. In the course of the study, the meaning of transit anticipatory bail has been defined as per the precedents of the High Courts. It also deals with the statutory relevance of transit anticipatory bail with the key factors which are sine qua non while dealing with such bail application. There are certain principles which the state and courts must ensure and determine while dealing with the arrest of an accused. The same principles must also be adhered to while dealing with anticipatory bail. A critical analysis is drawn between the fundamental right to protection against arrest and transit anticipatory bail. The paper also tries to analyze Supreme Court of India's contemporary views on transit anticipatory bail. A quintessential question whether transit anticipatory bail should be granted in serious offences is also discussed aptly.

II. BAIL UNDER THE INDIAN CRIMINAL JUSTICE SYSTEM.

The law of bails, which constitutes as important branch of the procedural law dovetails two conflicting interests, on the one hand, the requirement of shielding the society from the hazards of those committing the crimes and on the other, the fundamental principle of criminal jurisprudence, namely, the presumption of innocence of an accused till he is found guilty.

With a view to fulfilling the above objectives the legislature has provided directions for granting or refusing bail. Where law allows discretion in the grant of bail, it is to be exercised in accordance with the guidelines provided therein; further the courts have evolved certain norms for the proper exercise of such directions. Indian Criminal Justice System recognises two types of bails Ordinary Bail and Anticipatory Bail.

Though the Code of Criminal Procedure has not defined bail, the terms "bailable offence" and "non-bailable offence" has been defined. Bail in essence means security for the appearance of the accused person on giving which he is released pending investigation or trial. The Supreme Court in Moti Ram v. State of M.P. has held that bail covers both release on one's own bond, with or without securities."[405]

The provisions for bail are dealt by the Code of Criminal Procedure, 1973. Sections 436 to Section 450 deal with the provisions pertaining to bail and bonds. "Bail is a very vital institution in criminal justice system. It carries a twin objective of enabling an accused to continue with his life activities and, at the same time, providing a mechanism to seek to ensure his presence on trial. The current problem of large number of undertrials is an outcome of a large number of indiscriminate arrests and the non-use of the option of bail in preference to jail."[406]

The SC has made it clear that the basic rule is to grant bail except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences, or intimidating witnesses and the like.[407]

The Law Commission of India was asked in 2015, by the Department of Legal Affairs, to examine the need for a Bail Act in India. However, during the 10th meeting of the Advisory Council for Justice Delivery and Law Reforms held on 18.10.2016, it was decided that there is no need of a standalone Bail Act and the reforms can be suggested as amendments to the relevant statutes.

III. TRANSIT BAIL: MEANING

Section 438 of the Code of Criminal Procedure, 1973 talks about grant of bail to a person anticipating arrest. An application for such a bail can be made before a high court or a sessions court whenever any person apprehends that they may be arrested on accusation of having committed a non-bailable offence. *The difference between an ordinary bail order and an anticipatory bail order is that the former is granted after arrest and, therefore, leads to the release of the accused from custody, while an anticipatory bail is granted in anticipation of the arrest and is therefore, effective at the very moment of arrest*.[408]

[405] Moti Ram Vs. State of M.P (1978) 4 SCC 47
[406] 177th Law Commission Report, Chapter 10, Para 4, p.117
[407] State of Rajasthan Vs. Balchand (1977) 4 SCC 308
[408] Gurubaksh Singh Sibbia Vs. The State of Punjab, AIR 1980 SC 1630.

Transit Bail or Transit anticipatory bail are neither defined under Code of Criminal Procedure or any law in force, nor they do find any specific reference in the Criminal Procedure. However, the roots of this concept can be traced in the Cr.P.C. This concept does not have a specific or single source of provision because the concept is a "judge made law".

A transit anticipatory bail is when a person is apprehending arrest by police of a state other than the State where he/she is presently situated. As the word "transit" suggests, it is an act of being moved or carried from one place to another. The word *in transitu* means on the way/passage or while passing from one person or place to another.[409]

The purpose of transit anticipatory bail is to grant bail to a person till the time he/she reaches the appropriate Court so that in case the police wants to effect the arrest, the person will be released on bail. However, such bail is given at the condition that the accused person has to cooperate in the investigation throughout the investigative process.

Historically, bail was a tool to ensure the appearance of the person accused of an offence at trial or to ensure the integrity of the process by preventing such person from tampering the evidence or witness. Under the Criminal Procedure Code of 1979, the police, the prosecutor magistrates and judges have been enjoined to exercise the best judgement and discretion within the confines of the law for ensuring the appearance of the person accused of an offence without jeopardizing the interests of the society. Transit Anticipatory Bail may be considered as a tool to ensure the person accused of an offence residing in a state other than in which the offence was committed, to appear before the competent court to seek appropriate remedy.

IV. STATUTORY RELEVANCE OF TRANSIT ANTICIPATORY BAIL: EXAMINING JUDICIAL PRINCIPLES.

Sec. 438 of the Code of Criminal Procedure deals with "direction for grant of bail to person apprehending arrest." Although the provision does not directly indicate the grant of pre-arrest bail, it provides that when any person has the reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.[410]

[409] *In Transitu,* Black's Law Dictionary.
[410] The Code of Criminal Procedure, 1973, s. 438

1.Apprehension of Arrest-the key factor

The apprehension of arrest is the key factor in such applications. The only fact that is required to be considered as to whether the applicant can be granted liberty by way of transit bail to approach to the competent authority to seeking appropriate relief.[411] The non-inclusion of the police having the jurisdiction over the case, a party in the transit anticipatory bail application is not a ground to reject such application.

In *N.K. Nayar and Ors. Vs. State of Maharashtra and Ors.*[412] the division bench of Bombay High Court ruled that the court will have jurisdiction to consider an application under Section 438 of the Code of Criminal Procedure if the applicant is apprehending arrest within its jurisdiction.

Whenever an application for anticipatory bail is made before a court, where an FIR has been lodged elsewhere i.e. outside the territorial jurisdiction of that court, the court is duty bound to consider whether the applicant is a regular or bona fide resident of a place within the local limits of that court and is not a camouflage to evade the process of law. If the court is not satisfied on this aspect, the application deserves to be rejected without going into the merits of the case.[413]

Transit anticipatory bail is granted to allow the petitioner avail an opportunity to have a *recourse to remedy available* to them in the court in whose jurisdiction the alleged offence was committed and registered.[414] When the personal liberty of a person is under threat and stake there is an apprehension of arrest, the petitioner can seek relief before the court invoking S. 438 of Cr.P.C.[415] The strong apprehension of arrest is a requisite, and in such cases, if temporary protection from arrest to approach the competent court is not granted, the liberty of individual would be jeopardized.[416]

2. Power of Courts to examine if the applicant is a bona fide resident within its jurisdiction

[411] Shantanu Shivlal Muluk Vs. The State of Maharashtra, 965 ABA No.154 of 2021.
[412] N.K. Nayar and Ors. Vs. State of Maharashtra and Ors.,
[413] Honey Preet Insan Vs. State 2017 SCC Online Del 10690
[414] Vijay Latha Jain V. State 2007 SCC Online Del 1723
[415] Priya Mukherjee Vs. State of Karnataka
[416] Nikitha Jacob V. State of Maharashtra, ABA 441 of 2021.

The court hearing the application under S. 438 of CrPC in an FIR lodged outside its territorial jurisdiction, is duty bound to examine the whether the applicant is a bona fide resident of a place within local limits of that court and not a camouflage to evade the process of law. If the court is not satisfied on this aspect, the application is bound to be rejected without going into the merits of the case.[417] The courts have upheld and safeguarded the liberty of an individual by granting transit anticipatory bail nevertheless it cannot used as a tool to evade arrest and gain time with mala fide intentions.

3. Limitation of time

Protection of anticipatory bail under S. 498 of CrPC is not invariably limited to a fixed period. Normally it should enure in favor of the accused without any restriction of time.[418] However, in the facts and circumstances of the case if the court so consider it warranted, it may grant anticipatory bail only for a fixed period. The law on the point of duration of anticipatory bail remains highly divergent and ambiguous. It is pertinent to note that parliament has not prescribed any duration for an anticipatory bail. It is vague, as it does not mention whether the order should be limited in time or if it is transient in nature until regular bail is obtained. With regards to the determination of operational period of the anticipatory bail, some courts follow the *Gurubaksh Singh Sibbia*[419] stance where it was held that the court may limit the operation of the order if there are cogent reasons, keeping it operational for a short period after filing of FIR (First Information Report). In such eventuality the applicant must move the court under S. 437 of Cr.P.C within a reasonable time after filing of the FIR. However, the court has stated that there cannot be an absolute rule to limit the operation of the order and make it time bound. After the precedent in *Gurubaksh Singh Sibbia*[420] and prior to 1996, there was no practice of limiting the duration of anticipatory bail (with an exception to Gujarat High Court Judgement). However, this was changed by the Supreme Court judgement in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*[421]. However, it can be deduced that the Supreme Court has indeed consistently held that the anticipatory bail should be for a limited period and it should come to an end on the expiry of

[417] *Supra* note 9 at 3.
[418] Sushila Aggarwal Vs. State (NCT of Delhi) 2020 SCC OnLine SC 98.
[419] *Supra* note 4.
[420] *Id.*
[421] AIR 1996 SC 1042.

the duration or extended duration fixed by the court granting anticipatory bail. Hence, it can be assumed that the courts have limited the duration of anticipatory bail and have also allowed anticipatory bail until regular bail is obtained.

However, this is not the case with transit anticipatory bail. Transit anticipatory bail can only be granted for a limited period. *The exercise of Jurisdiction of anticipatory bail by any other court namely the High court or the Court of Sessions beyond the local limits of the jurisdiction is limited to the extent of consideration of a bail for the transitional period but has no jurisdiction to transgress into the limits of the local jurisdiction of the court within which the offence alleged to have been committed.*[422] Such order of transit anticipatory bail be expressly made operative for a limited period of time making the petitioner to surrender before the appropriate court having jurisdiction in the meantime whereupon it will be for that court to deal with the matter thereafter in accordance with law.[423]

V. BENCHMARK PRINCIPLES FOR STATE AND VARIOUS AUTHORITIES

A. Presumption of Innocence

Presumption of innocence and the duty of the prosecution to prove the guilt of the person accused of an offence, is the golden thread in criminal law jurisprudence.[424] Every individual charged with a crime has a right to be presumed innocent until proven guilty.[425]

The guideline that bail be the general rule and jail an exception, is the "logical and consistent adaptation of the principle of presumption of innocence to the pre-trial stage."[426] The principle is enshrined in Article 11 (1) of the Universal Declaration of Human Rights, 1948 (UDHR), Article 6 (2) of the European Convention on Human Rights (hereinafter ECHR), Article 48 (1) of the Charter of Fundamental Rights of The European Union (hereinafter EU Charter) and Rule 111 of the United Nations Standard Minimum Rules for The Treatment of Prisoners also known as the Nelson Mandela Rules.[427]

[422] Sailesh Jaiswal vs The State of West Bengal, 1998 (2) ALD Cri 924.
[423] *Ibid*; Dr. Augustine Francis Pinto v. State of Maharashtra.
[424] 8 Woolmington v. DPP [1935] UKHL 1; See also Golbar Husain &Ors. v. State of Assam & Anr. (2015) 11 SCC 242 and Vinod Kumar v. State of Haryana (2015) 3 SCC 138.
[425] Smirnova v. Russia, Applications nos. 46133/99 and 48183/99 (2003).
[426] Christoph J. M. Safferling, Towards an International Criminal Procedure 46 (Oxford University Press, Oxford, 2001).
[427] These rules were recently amended in 2015, the right to be presumed innocent until proven guilty was first found in Rule 84, but in the new rules it is to be found in Rule 111. These rules are also known as the Nelson Mandela Rules.

Another view has also been acknowledged by the courts with regard to this principle. The Supreme Court of Canada in *R. v. Hall*[428] held that the denial of bail has a detrimental effect on the presumption of innocence and liberty rights of the accused. However, in *R. v. Pearson*[429], the court clarified that this principle must be applied at the stage of trial and not at the stage of bail because during bail, guilt or innocence is not determined and hence, penalty must not be imposed.

The stance taken by the Supreme Court of Canada in Pearson is in consonance and conformity with the perspective of the Kerala High Court in *State v. P Sugathan*[430] where the court held that the salutary rule is to balance the defendant's liberty with public justice. Pre-trial detention in itself is not opposed to the basic presumptions of innocence. It observed that:

Ensuring security and order is a permissible non-punitive objective, which can be achieved by pre-trial detention. Where overwhelming considerations in the nature aforesaid require denial of bail, it has to be denied.

Consequently, it may be surmised that pre-trial detention beyond the strictly necessary limits, poses a serious threat to the principle of 'presumption of innocence of the accused'. The Supreme Court of India has opined that the presumption of innocence would be effective by favouring bail.[431]

B. Right to non-discrimination

Under the Indian Constitution, the Rule of Law is perceived as an indispensable tool to avoid discrimination, and arbitrary use of force.[432] The UDHR in Article 2 states that every person is entitled to all the rights and freedom in the declaration without any discrimination. Article 2(1) of ICCPR also reiterates the same and further obligates each State party to respect and ensure to all persons within its jurisdiction the rights recognized in the Covenant without discrimination. 34 More importantly, Article 26 not only provides for equality before the law but also equal protection of the law. Thus, it prohibits any discrimination based on capricious factors such as race, colour, sex, language, religion, political or national origin.

[428] 5[2002] 3 S.C.R. 309.
[429] [1992] 3 S.C.R. 665.
[430] 1988 Cr.LJ 1036 (Ker).
[431] Siddharam Satlingappa v. State of Maharashtra, AIR 2011 SC 312.
[432] INDIA CONST. art. 14.

C. Right to Liberty, Security and freedom from arbitrary detention

The UDHR[433] along with ICCPR in Article 9(1) echoes the fundamental rights to liberty, security and protection against arbitrary detention. By virtue of this fundamental right the state is placed under an obligation to protect and preserve the liberty and the security of the citizens against arbitrary arrest and detention. In order for the detention to be lawful and not arbitrary, it must be consistent with the substantive rules of national and international laws as well as the principles and guidelines preserving fundamental rights.

In *Maneka Gandhi v. Union of India*[434], it was held that the procedure under Article 21 must be just, fair and equitable. Before a person is deprived of his life and personal liberty, the procedure established by law must be strictly followed, and must not be departed from to the disadvantage of the person affected.[435] In the case of Joginder Kumar v. State of Uttar Pradesh,[436] the Supreme Court has given directions on the rights of the arrested persons in the light of Articles 21 and 22. Similarly, in *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*,[437] Justice V.R. Krishna Iyer observed that refusing bail deprives a person of 'personal liberty' guaranteed under Article 21. Granting bail is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community.

D. Right to speedy and fair trial

The right to a speedy trial can be said to be an extension of right to liberty, security and protection against arbitrary detention and a precursor to the right to be presumed innocent until proven guilty. This right is ubiquitous and is not conditioned on any request or invocation of such right by the accused person. Such accused is entitled to be produced before the Court without undue delay in order to enable the court to determine whether the initial detention is justified and whether the accused must be released on bail. In case where transit anticipatory bail is sought, the right to speedy and fair trial may be ensured by granting

[433] Article 3 reads: "Everyone has the right to life, liberty and security of person…"; Article 9 reads: "No one shall be subjected to arbitrary arrest, detention or exile."
[434] AIR 1978 SC 597.
[435] Bashira v. State of Uttar Pradesh, AIR 1968 SC 1313; See also Narendra Purshotam Umrao v. B.B. Gujral, AIR 1979 SC 420.
[436] AIR 1994 SC 1349.
[437] AIR 1978 SC 429.

such bail with a limitation of duration during which the accused must approach the court having the lawful jurisdiction of the offence. Subsequently the competent court having the jurisdiction may decide on anticipatory bail of the person as per the procedure established by law under S. 438 of IPC.

In relation to bail, the guarantee of speedy trial serves many objectives- provides protection against oppressive pre-trial detention; relieves the person accused of an offence of the anxiety and public suspicion due to unresolved criminal charges, protects against the risk of loss of evidence, and enables such accused to defend himself.[438] A bail inquiry is a judicial process that has to be conducted impartially and judicially and in accordance with statutory and constitutional prescripts.[439] Paucity of funds or resources is no defence to denial of right to justice emanating from Articles 21, 19 and 14 and the Directive Principles of State Policy—Article 39A.[440] The basic objectives traditionally ascribed to the institution of bail, is to ensure the presence of the person accused of an offence at trial while maximising personal liberty in accordance with the principles of the constitution.[441] Similarly transit anticipatory bail will ensure the liberty as well as the presence of the accused at the competent court having the constitutional jurisdiction of the offence.

VI. FUNDAMENTAL RIGHT TO PROTECTION AGAINST ARREST AND TRANSIT ANTICIPATORY BAIL.

Article 22(2) of the Constitution of India requires an arrested person to be produced before a magistrate within 24 hours of his arrest.[442] It thus ensures that a judicial mind is applied immediately to the legal authority of the person making the arrest and regularity of the procedure adopted by him. The policy of the law is that the magistrate before whom the prisoner is produced must be in a position to bring an independent judgement to bear on the matter.[443] In a criminal matter, in which the arrests are to be made in a state other than in which the offence was committed, transit remand is to be secured from the nearest magistrate. The concept of transit remand like transit anticipatory bail is neither mentioned nor defined in the Cr. P. C and is rather a term that has evolved through its usage in common

[438] Ranjan Dwivedi v. CBI, Through the Director General, AIR 2012 SC 3217.
[439] Majali v. S (41210/2010) [2011] ZAGPJHC 74 para 33.
[440] P. Ramachandra Rao v. State of Karnataka, AIR 2002 SC 1856.
[441] S v Dlamini & Ors.; S v. Joubert; S v. Schietekat [1999] ZACC 8; 1999 (7) BCLR 771 (CC).
[442] INDIA CONST. art. 22, cl. 2.
[443] Hariharanand V. Jailor, AIR 1954 All. 601.

parlance. It is implicit in S. 167 of Cr. P. C. The concept is also in compliance with Ss. 79, 80, and 81 of Cr. P. C. In such cases it becomes difficult for the accused to approach the competent Court having the jurisdiction of the offence for anticipatory bail. The only right available to protect the liberty is, to approach the Court in whose jurisdiction there is apprehension of arrest, to seek transit anticipatory bail.

The Courts have safeguarded the fundamental right enshrined under Art. 22(2) of the Constitution of India and the liberty of individual by acknowledging the concept of transit remand. Similarly, transit anticipatory bail has been recognized by the Courts in plethora of cases to safeguard those rights.

VII. SUPREME COURT'S VIEWS ON ANTICIPATORY TRANSIT BAIL

The transit anticipatory bail is a concept that is yet to be completely utilised in order to provide equity and justice to the citizens of the country. Transit bail is not a statutory provision or a codified law but a judicial precedent. It is granted solely on the judicial discretion of the judge. Hence, in plethora of cases the High Courts have granted transit bail to the accused. The Supreme Court of India had a quandary of opinion on this issue. For instance, in the infamous Gurugram School[444] case the Supreme Court has rejected the transit anticipatory bail application by stating that in the view of the court there is no such provision under the Code of Criminal Procedure. In a subsequent order in the same case, the SC iterated that it's earlier observations in this case or in any other such cases will not cause any prejudice to any accused in this matter for anticipatory or regular bail before High Court or any other appropriate court. Both the observations are evident to infer that the Supreme Court has, for discussion on question of law, kept the point of transit bail open.

VIII. TRANSIT ANTICIPATORY BAIL IN SERIOUS OFFENCES

The Delhi High Court in *Dr. Sumit Gupta V. State of NCT of Delhi*[445] granted four weeks of transit anticipatory bail to a doctor husband who was apprehending arrest in a case registered against him in Madhya Pradesh under S. 498A and 34 of IPC along with various provisions

[444] Sandeep Sunilkumar Lahoriya V. Jawahar Chelaram Bijlani, vide order dated 14.06.13 in Special Leave to Appeal (Cri.) No. 4829 of 2013.
[445] 2021 SCC Online Del 409.

of Domestic Violence Act. The Court granted him bail on the ground of his apprehension of arrest in a case registered against him in Madhya Pradesh under sec. 498A and 34 of IPC along with various provisions of Domestic Violence Act. The Court granted bail on the ground of his "apprehension of arrest" with a direction that he may not be arrested on his way to reach Bhopal prior to applying for anticipatory bail in the Court of competent jurisdiction.

In another case, the *Delhi High Court in Suraj Pal v. Vijay Chauhan*[446] observed that while granting transit bail, the nature and gravity of offence has to be taken into consideration. The Court observed thus, "Without considering the nature and gravity of the offence in question, transit bail has been granted for inordinate period of three weeks and not only this, it has been extended by another two weeks. Granting transit bail for such an inordinately long period amounts to virtually granting pre-arrest bail. Impugned orders do not provide any justification for granting transit bail for such a long period. The nature and gravity of the offence has not been considered. The discretion to grant transit bail is exercised by the Additional Sessions Judge in a most inappropriate manner, which needs to be deprecated."

Therefore, what falls from the above-mentioned cases is that there cannot be straight jacket formula while dealing with transit anticipatory bail applications. The Supreme Court has not yet embarked upon the question of devising principles to be adhered by the courts while dealing with transit anticipatory bail applications. The precedents infer that the courts must show variance in serious and non-serious offences while granting transit anticipatory bail.

IX. CONCLUSION

The provision of transit anticipatory bail is not available under the Code of Criminal Procedure; however, the concept can be derived from the various provisions of the Code which speaks about the power of a police officer to execute a warrant beyond the local jurisdiction of the Court issuing the same and such person, if arrested, is to be produced before the nearest Magistrate of District Superintendent of Police or Commissioner of Police and if the offence is bailable, the said Court is empowered to allow such arrested person to go on bail. This is commonly known as transit bail and the relevant provisions are Sections 79, 80 and 81 of the Cr. P. C.[447]

[446] 2015 SCC Online Del 10285

[447] Akash Gupta V. State of Meghalaya, AB No. 3 of 2021.

The Core Statutory provision for transit bail is S. 438 of Cr. P. C. Apprehension of infringement of personal liberty due to the apprehension of arrest is a ground for seeking transit anticipatory bail. Courts must ensure that due process of law is not abused while granting transit bail. It is granted only for a limited period of time to enable the accused to approach the Court having regular jurisdiction to seek bail.

The Evolution of transit anticipatory bail over the time is an indication of evolving criminal justice system in strong adherence to establishment of a balance between shielding the society from the hazards of the criminals and safeguarding the liberty and reputation of an individual by submitting to the fundamental principle of criminal justice system i.e., presumption of innocence of an accuse until he is found guilty.

Courts may show variance while dealing with serious and not serious offences while granting transit bail. Such bail is purely granted on the discretion of the judge. It should be a tool to safeguard the liberty of the citizens rather than a loophole to evade arrest. Hence, it is for the Supreme Court of India to frame principles with respect to transit bail for its effective and bona fide use.

PLEA BARGAINING IN INDIA AND USA -A COMPARATIVE STUDY

- DIVYA SINGH

ABSTRACT

The concept of Plea Bargaining has been recognised in many countries and it has been incorporated in their Criminal Procedural Law. The word 'Plea- Bargaining' refers to a person charged with a criminal offence negotiating with the prosecution for a lesser punishment than what is provided in law by pleading guilty to a less serious offence. The concept of plea bargaining in India was of recent origin and it was introduced in the year 2005 to protect the right of the accused. This concept was introduced to reduce the number of criminal cases where trial do not commence for three or four years. This concept is dealt under Chapter XXI A of CRPC 1973. This paper deals with the process of Plea bargaining in India and U.S.A.

KEYWORDS*: Plea bargaining in India & U.S.A, Criminal justice system.*

INTRODUCTION

The delay in conducting a trial of a criminal case by the criminal courts is rising day by day and it has come to a state where the disposal of criminal trials takes so much time and in many cases trial procedure does not start for so many years after the accused was being sent to a judicial custody. The criminal justice system in India shows that there are many under trial prisoners who are forced to remain in prisons throughout our country. According to the National Crime Records Bureau in the year 2011, the number of persons who were in jails was almost 50,000 more than its capacity and most of them were under trials and some were detained in jail for more than five years. There are many accused of an offence who are not able to get bail because of many reasons and one such reason is that they have been inside the jail for so many years as an under- trial -prisoners and during the course of detention as under- trial prisoners they have to undergo a lot of mental stress and burden. One of the other

reasons is that if there is no sufficient evidence to prove that the accused has done the offence, it ultimately results in acquittal of him. Hence, the courts have introduced this system of pre- trial bargaining and settlement and it was followed in United states and now this system is generally called as plea bargaining. In this system, the suspect or the accused may admit either part or whole of the crime charged against him and can claim lesser punishment instead of waiting for the trial to complete. The main motive of plea bargaining is to avoid unnecessary expenses, unpredictable trials and harassment and it also reduces the flow of criminal cases and helps in saving time. Another purpose of this system is that it reduces the pendency of the suit by resorting the case for alternate settlement instead of trial under the supervision of the judiciary to ensure fairness. This practice is accepted in the United States, England, and Australia. The concept of plea bargaining has gained very high popularity in the USA but it is used only in a restricted sense in the other two countries. This concept was inserted to the Criminal Procedure Code vide the Criminal Law amendment Act, 2005 w.e.f 5th July 2006, and it is dealt under chapter XXI A which consists of Sections 265A to 265 L on the recommendation of Malimath committee.

Black's Law Dictionary[448] define the term "Plea Bargaining" as: "*The process whereby the accused and the prosecutor in criminal case work out a mutually satisfactory disposition of the case subject to the Court approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the courts of a multi-count indictment in return for a lighter than that possible for the graver charge.*"

Types of Plea Bargaining

There are three types of plea bargaining:

1. Fact bargaining;
2. Sentence Bargaining;
3. Charge Bargaining.

1. Fact Bargaining:

According to fact bargaining, it attempts to bargain for the facts of the case. This plea-bargaining deals with alternate contentions on the facts of relevance in the case. Both the

[448] Plea Bargaining, Black's Law Dictionary, 8th Edition, 1190(2004)

parties negotiate on the facts which are to be admitted by them. This type of plea bargaining is said to be against the spirit of the Criminal Justice System. This is because negotiating the facts of the case is opposed to the spirit of criminal justice system. Facts of a case cannot be changed; a fact remains a fact. If negotiation is done on changing the facts of the case it becomes no less than a fiction.

2. **Sentence Bargaining:**

The purpose of this plea bargaining is to plead for a lighter sentence. The accused agrees to plead guilty to the offence charged for and in return he is promised a lighter punishment. This is the most popular form of plea bargaining and is codified in the current regime applicable to India.

3. **Charge Bargaining**

This bargaining is done to negotiate for getting lesser charges, where the accused pleads guilty to a lighter charge, as opposed to a graver one. The difference between the sentence bargaining and charge bargaining is that sentence bargaining is done to bargain on the time period for which the sentence will be pronounced, whereas charge bargaining is a bargain on the charge which is levied on the accused. An example of the former is punishment for a period of 7 years or 8 years. An example for the latter is levying the charge of kidnapping on the accused or that of theft. These two are essentially different.

ORIGIN OF CONCEPT OF PLEA BARGAINING

Plea Bargaining in India

In India, the concept of plea bargaining can be traced since Vedic times as in Dharamsashtras, there is a chapter called *Prayaschitta* which means corrective measures for self-purification by confessing his guilt. In Post Vedic period, plea bargaining was prevalent in Mauryan period where it was practiced in the form of conciliation and in Mughal period also it was in the form Quisas system where an accused has to give money to deceased

victim's next kin in case of homicide. Later in post-independence, the concept of plea bargaining was formally introduced on the recommendations of Law Commission's reports by way of The Criminal Law Amendment Act,2005.

Plea Bargaining in US

The idea of plea bargaining is evolved in United States and has become a well-known feature of American criminal justice system throughout the years. There are many examples which show that this concept took place in historical time also, one of the examples is during the period 1431 when St. John of Arc confessed in order to avoid burning at the stake. But modern concept of plea bargaining is different from historical form. Plea bargaining was adopted with the result of classic case of Martin Luther King Jr[449]. In 1969, James Earl Ray was accused with murder of Martin Luther King Jr. He pleaded guilty to avoid the death penalty. After his plea he got 99 years of punishment. He later retracted his confession and tried unsuccessfully to gain a new trial. In the US criminal justice system, the accused has three options with regards to plea:

a) to hold guilty

b) to hold himself not guilty

c) nolo contendere, i.e. I do not wish to contend.

In Brady v. United States[450], the constitutional validity of plea bargaining was challenged and the Supreme Court upheld its constitutionality by saying that a plea of guilty is not invalid merely because to avoid the possibility of a death penalty. The Supreme Court also hold that award of lesser punishment in pursuant to plea bargain is not invalid. After a year in Santobello v. New York[451], the US Supreme Court held that plea-bargaining was necessary for the operation of justice and was to be encouraged when properly managed.

LAW COMMISSION'S OBSERVATION ON PLEA BARGAINING

The Law Commission of India supported the concept of plea bargaining in the 142nd, 154th and 177th reports. The 142nd report of the Law Commission of India proposed the

[449] William Bradford Huie, "He Slew the Dreamer: My Search for the Truth About James Earl Ray and the Murder of Martin Luther King, Jr (Revised ed.)", 1997 available at Montgomery: Black Belt Press, ISBN 13: 978-1- 57966-005-5, last seen on March 19, 2021.

[450] Brady v. United States, 397 U.S. 742 (1970)

[451] Santobello v. New York, 404 U.S. 257 (1971)

introduction of the concept of "concessional treatment for those who choose to plead guilty without any bargaining" under the authority of law with the objective of some remedial legislative measures to reduce delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under-trial prisoners in jails awaiting the commencement of trial were called for. This report dealt with various issues regarding the concept of plea bargaining. It also checked the concept of plea bargaining exercised in the US and Canada. The report also took into consideration the objections to the introduction of the concept of plea bargaining in Indian Legal System to all offences.[452]

The Law Commission of India in its 154th report also recommended the concept of plea bargaining in the Indian criminal justice system. The report also said that the justification of the introduction of the concept of Plea Bargaining cannot be expressed any better than 142nd report of the Law Commission of India. It observed that the court, after hearing the public prosecutor and the accused, may accept the application of plea bargaining and pass an order of sentence to the tune of one-half of minimum sentence provided. It also recommended that a separate chapter XXIA on Plea Bargaining be incorporated in the Code of Criminal Procedure. Subsequently the Law Commission of India in its 177th report suggested that the recommendations of the 14th Law Commission contained in their 154th report on Criminal Procedure Code, should be implemented at an early date.

PROCEDURE OF PLEA BARGAINING UNDER THE CODE OF CRIMINAL PROCEDURE

The procedure for plea bargaining was introduced as a result of the Criminal Law (Amendment) Act, 2005. It introduced a chapter XXIA containing section 265A to 265L into the Code of Criminal Procedure, 1973 which came into effect on 5th July 2006. According to section 265A, provisions of chapter XXIA shall apply to an offence appears to have been committed by an accused for which the maximum punishment does not exceed seven years. This chapter does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman or a child below the age of fourteen years.

[452] 142nd Law Commission of India Report, "Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining", 1991, available at http://lawcommissionofindia.nic.in/101-169/Report142.pdf, last seen on March 21, 2021

The Central Government has the powers to determine the offences affecting the socio-economic condition of the country.

According to section 265B, application for plea bargaining may be filed by an accused in a court where the trial for such offence is pending. Such application shall contain brief description of the case including the offence to which the case relates and shall be accompanied by an affidavit by an accused of his voluntarily preferring the plea bargaining and that he has not previously been convicted by a court in a case in which he had been charged with the same offence. Thereafter the court shall issue notice to the Public Prosecutor or the complainant and to the accused to appear on the date fixed for the case. Then the court satisfy itself that the accused has filed the application voluntarily by examine him and then the court shall provide time to the Public Prosecutor or the complainant and to the accused to work out a mutually satisfactory disposition of the case. If the court finds that the application has been filed involuntarily or the accused as previously been convicted by a court in a case in which he had been charged with the same offence, it shall proceed further in accordance with the provision of this code from the stage such application has been filed under sub-section (1).

According to section 265C CRPC, the Court has to follow some procedures such as issue notice to the public prosecutor, the police officer, the accused and the victim to the case to participate in the meeting to work out a mutually satisfactory disposition of the case. It is the duty of the court to ensure that the process of working out a satisfactory disposition of the case is completed voluntarily by the parties participating in the meeting. After the satisfactory disposition has been worked out, the court shall prepare a report signed by its presiding officer and other participated parties in the meeting.

According to section 265 E, The Code of Criminal procedure, after a satisfactory disposition of the case has been worked out, the court has power to dispose of the case by awarding compensation to the victim in accordance with the mutually agreed disposition and hear the parties on the quantum of the punishment. The court can also release the accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 or any other law for the time being in force. The court may sentence the accused to half of minimum punishment. If the court find that the offence committed by the accused provides for maximum punishment, then the court may sentence one-fourth of the punishment provided for such offence.

Section 265F provides that judgement of the court shall be delivered in an open court and signed by the presiding officer of the court. The judgement delivered by the court shall be final and no appeal shall lie against it but one can file special leave petition under Article 136 and writ petition under article 226 and 227 of the Indian constitution against the judgement. For the purpose of discharging functions under this chapter, the court has all the powers vested in relation to the disposal of a case in such Court.

Section 265I provides that the provisions of section 428 shall apply for setting off the period of detention by the accused undergone by the accused against the sentence of imprisonment imposed under chapter XXIA in the same manner as they apply in respect of the imprisonment under other provisions of the code. The statements or facts stated by an accused in an application for plea bargaining filed under section 265B shall not be used for any other purpose except for the purpose of plea bargaining. Section 265L states that the chapter XXIA shall not apply to any juvenile or child.

Plea bargaining in India Vs. United States of America

The concept of Plea Bargaining in India is considered a progeny of the concept of Plea Bargaining in the United States of America by many. This is predominantly true, however, there are some differences between the two countries, which are pointed out as under:

1. **Nature of offence**: In the United States of America adopting the process of plea bargaining by the accused does not depend upon the offence that he or she is accused of. But this is not the case in India, here plea bargaining can only be treated as an option when the offence that the accused is charged with has a maximum punishment of less than seven years.
2. **Procedure**: In America, the negotiation regarding plea bargaining is done between the prosecutor and defendant, out of the court. But, in India, this process is necessarily preceded by an application made by the defendant. This is done to ensure that the application is filed voluntarily by the accused.
3. **Discretion of the Judge:** Another difference that exists is that in India there is a provision for the judge to decide on the admissibility of the application for plea bargaining. If the court is of the view that the punishment awarded for in plea

bargaining is not satisfactory or is mitigated by the factor of unfairness, it can be set aside. This is not the situation in the United States of America.

4. **Finality of the judgement:** Under the Indian legal system, if the Court thinks the punishment awarded in any case of Plea Bargaining is insufficient or is guarded by unfair circumstances, then special leave petition under article 136 and writ petition under article 226 & 227 of the Indian Constitution can be filed against such judgement. But, in USA, it reaches its finality.

Therefore, the concept of plea bargaining in India and the United States of America, though essentially the same has some significant differences as well.

Case Laws on Plea Bargaining

- The concept of plea bargaining was examined by the Hon'ble Supreme Court for the first time in **Murlidhar Meghraj Loya v. State of Maharashtra**[453]. In this case the Court held that the idea of plea bargaining is immoral or at best a necessary evil. The State can never compromise with the accused. It must enforce the law. Therefore, open methods of compromise are impossible.

- **State of Uttar Pradesh v. Chandrika**[454]

The Supreme Court in this case held that it is a settled law that a criminal case cannot be disposed-off merely on the basis of Plea Bargaining. It was further noted that it is the constitutional duty of the Court to consider the merits of the case and award appropriate sentence despite the confession of the guilt by the accused person. And Mere confession of the guilt by the accused person cannot be a reason for awarding lesser punishment.

- But in **State of Gujarat v. Natwar Harchanji Thakor**[455], the Hon'ble Gujarat High Court recognised the concept of plea bargaining and held that "the object of law is to provide easy, cheap

[453] (1976) 3 SCC 684
[454] 2000 Cr LJ 384
[455] State of Gujarat v. Natwar Harchanji Thakor, (2005) Cr.L.J. 2957

and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. Thus, it can be said that it is really a measure and redressal and it shall provide a new shape in the judicial system."

- In **Vijay Moses Das v. CBI**[456], it was alleged that sub-standard items were supplied by the petitioner and that too in wrong port. ONGC got the matter investigated through CBI. Charges were framed against the accused. Offences alleged to have been committed by the petitioners were punishable under Section 420, 468 and 471. All the three offences are punishable with maximum imprisonment for a period of seven years. Application for plea bargaining was moved before the trial court. CBI and ONGC had no objections against an application. Trial Court rejected the application as an affidavit under section 265B was not filed along with an application. But the Hon'ble High Court of Uttarakhand directed the trial court to accept the 'plea bargaining' sought by the accused as he is not the previous convict.

- In **Ranbir Singh v. State**[457] The Petitioner moved an application for plea bargaining. In the course of proceedings mutually satisfactory disposition was arrived at by paying compensation to the wife and daughter of the deceased in addition to the compensation of Rs. 8 lakhs awarded by the learned MACT. After mutually satisfactory disposition, the trial court awarded maximum punishment to the petitioner. The petitioner presented an application under article 223 before Hon'ble High Court against the judgement of the trial court. The High Court held that the trial court failed to consider the mitigating factors after awarding maximum punishment. The trial court

[456] Crl.(Misc.) Application No. 1037/ 2006
[457] Ranbir Singh v. State, Crl. M.C. 1705/2011.

was duty bound to consider the mitigating factors. The petitioner is the first -time offender and he has compensated the victims to their satisfaction. Hence, the court held that the petitioner would have undergone sentence of imprisonment for a period of four months for offence punishable under Section 304A IPC and a fine of Rs. 1,000/- for offence punishable under Section 279 IPC.

ADVANTAGES OF PLEA BARGAINING

i. **Speedy justice:** At present, the Indian Judiciary is over burdened with so many litigations and it has no time to deal with all the cases. Hence, resorting to plea bargaining would provide a speedy justice and can reach a decision quickly.

ii. **Low cost:** A large amount of money along with the time is spent on preparing for the arguments in the Court only to find that other party is seeking extension of date of hearing. Plea bargaining is cheap and would render justice.

iii. **Better working relationship**: Plea bargaining may also satisfy what some scholars argue is "an irrepressible tendency toward cooperation among members of the courtroom work group." It allows this "courtroom work group" to satisfy their "mutual interest in avoiding conflict, reducing uncertainty and maintaining group cohesion.

iv. **Alternative Dispute Resolution**: This concept of plea bargaining is considered to be another mode of alternate dispute resolution and Advocates maintain that it is desirable to afford the accused and the State an option of compromising factual and legal disputes.

DISADVANTAGES OF PLEA BARGAINING

- **Unjust Sentencing**: this concept is some -what against the objective of criminal proceedings because it results in unwarranted leniency for offenders and it also promotes arsenical view of legal process i.e., after committing an offence, the accused can claim plea bargaining and can escape severe liability and put the victim in a disadvantaged position where the loss suffered by the victim or his family.

- It is unconstitutional short-cut as it may amount to waiver of the right to fair trial by the accused.
- Sometimes an accused is released on probation in serious offences.
- It may result into corruption as an accused may bribe the prosecution to get reduced term.
- Victims can be bribed to agree to settle for a lesser charge.
- Plea bargaining would encourage criminals, increase crimes and breed corruption as it condones criminal activities on payment of fine or compensation or both.
- In India where literacy rate is low, concept of plea bargaining may be misused.

CONCLUSION

In countries such as United States, Plea bargaining is the first preferred mode of dispute resolution in criminal matters. Plea bargaining has developed over the years and today more than 90% cases are dissolved by way of plea bargaining in the USA. Therefore, it is observed that it is the USA that started the concept of plea bargaining and has proven to be an example for other countries as its application of plea- bargaining system has caused reduction of pendency in criminal courts around the country.

The concept of Plea Bargaining has been introduced to reduce the burden upon the courts but it does that in an unconstitutional manner because the victim is put to a disadvantaged position and his right is violated by providing a lesser sentence to the accused on an application of plea bargaining. Even this concept does not reduce the crime rates because it sets a mindset on the accused that he can do an offence and can get lesser punishment by plea bargaining. But considering the burden on the Courts, the Indian Courts have felt the need of plea bargaining in Indian legal system. Everything has advantages & disadvantages and both have to be examined in order to reach a conclusion. There should be an in-depth study of its working, it's impact on crime rate, conviction rate and how the rule of law is affected.

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FALSE RAPE ACCUSATION

- PARTH NAUKARKAR

Rape laws today have become stronger from past due to unfortunate incidents but as they have become powerful, they are being used against its set purpose which defies its whole purpose of being there. Many men are being who didn't do anything have faced situation wherein they have to be in court for not doing anything and just because of one lie the person has to go through all suffering. In the current society as women after being raped faces many problems but at a point of time they do also have sympathy but in the case of men who face false rape accusation are ostracized by society, their jobs are taken away. Many people who go through these phases loses 2 things either their precious years of life or their life itself. False rape accused people are seen as rodents of society even after they get off these charges.

Keywords: Rape Laws, False rape accusation, Court, Suffering, Rodents, Ostracized.

INTRODUCTION

In India Rape law were strengthen after many incidents and the people had reached to thier pinnacle of their anger and had to strengthen rape laws. But as rape laws were strengthen many women found loophole or biases in the law which led to using of rape laws against its defined purpose. False rape allegation should also be considered a heinous crime as if rape takes away the identity, respect and many things as it has been alleged by many people then same goes with false rape accusation as an innocent gets cornered in the eyes of society and also his social life gets destroyed and even if he is proved innocent but the damages done by social media platforms remains there and the person suffers. These false rape accusations if taken as a joke and not given much importance may lead to loss of life and precious years of their and also of their family.

If a complain is placed for rape against a woman Section of 375 of Indian penal Code (IPC) Section 376, 376(2)(n) and 376 C (b) rape of IPC is invoked in order to prove that he has done rape. But it can be seen that there is no specific section regarding false rape accusation

due to which there is no standard or certain point to prove that it is a false rape case. As there is no specific section regarding rape laws, lawyers have to disprove rape using other section such as Section 182, 186, 191, 192, 193, 195, 196, 199, 200, 211 of IPC and as every situation is not similar to that of another interpretation of sane section may different and may create a confusion in the legal fraternity. But as such there is no solid section in IPC which is named or contains punishment for false rape accusation

It is known that if charges of rape are instituted against accused and is proved guilty then the guilty has to suffer rigorous imprisonment not less than 10 years and may get extended upto life imprisonment but on the other hand false rape accusation has a impriosnmnt of maximum 6 months or has to pay a fine. If the victim is guilty in rape, he is impriosned but if defendant proved innocent he is paid and the counter party does not get impriosnment for at least 3 years. It can be said Article 14 Right to equality is getting violated.

This research paper will mainly dwell in False rape accusation and will try to substaitae on the rape law history and how the current changes affected it and how a weapon for self defense is used for attacking innocents. What are the views of judiciary on it and how the lacking of system could be covered up? It will also deal with how images of such innocent person can be protected.

RESEARCH METHODOLOGY

The researcher is thankful to The Amikus Qraie for providing an opportunity to present my views about such a topic which deals with false rape acquisition. This research paper deals with the all above aspects mentioned in the introduction of this research paper in a doctrinal method. For this the researcher had used various types of journals and websites to gather information about the research topic of the research paper. It uses descriptive way of methods to let others understand about topic.

RAPE LAWS

Before 2013 rape the essential condition for rape was ejaculation without penetration. Ejaculation without penetration consist to attempt to rape and not actually rape. These conditions were held down in case of state of Uttar Pradesh v. Babulnath[458]. In this case it

[458] 1994 SCC (6) 29.

was held that "To constitute the offense of rape it is not at all necessary that there should be complete penetration of the male organ with the emission of semen and rupture of hymen. Even Partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purposes of section 375 and 376 of the Indian Penal Code. That being so it is quite possible to commit legally the offense of rape even without causing any injury to the genitals or leaving any seminal stain".

And the punishment for rape before 2013 according to Section 376 of IPC was minimum punishment of 7 years of jail which may extend to life imprisonment. And in cases of gang rape the punishment would be not less than 10 years and it would be a rigorous punishment.

But after the horrific gang rape and murder case in 2012 also denoted as the Nirbhaya case people reached the pinnacle of their anger and the system asked for change in rules and punishment for rape. Earlier section 375 of IPC prescribed Penile Vaginal penetration as rape. But after 2013 recommendation were given that any penetration should be considered as rape and it also helped in widening the term rape. The Criminal Law (Amendment) Act 2013 this act mandated changes in IPC as well as CrPc. This included new type of sexual harassment which was voyeurism which means recording or taking pictures of a person without the person permission.

One more section was added under Section 354 of IPC in addition to Sexual Harassment at workplace Act 2013.

From some of the above-mentioned amendments after 2013 it is evident there was rage over people which controlled their emotion and finally judiciary had to change laws. It can be said to be a movement where humanity as well as feminism were at peak of their anger.

MOTIVE FOR FALSE RAPE ACCUSATION

Marriage

After 2013 there was a flow of emotion for women and Nirbhaya but seeing many other took the opportunity to blackmail male to get into marriage or use false rape charges in order to get away from a relationship which was not known to their parents. Delhi Commission Women revealed the statistics about the false rape case, around 53.2% of rape case were alleged to be false during the year 2013-2014. The report says that between April 2013 and

July 2014, of the 2,753 complaints of rape, just 1,287 cases were discovered to be the case, and the leftover 1,464 cases were discovered to be bogus.[459]

In the case of YOGESH S/O SADU PALEKAR Vs. STATE, THROUGH AGASSAIM POLICE STATION, AGASSAIM, GOA a criminal appeal No 16/25, the chef Yogesh Palekar took the woman to introduce her to family but family was not at home, they had a sexual intercourse with consent of woman. The next day woman filed case for rape Yogesh denied to marry her as they both belong different sect of caste. "The Goa branch of Bombay High Court held that man cannot be convicted for a rape or having a sexual intercourse with a woman by "a misrepresentation of fact" where there is evidence of deep love and affair between the two"[460]

Similarly in the case of Shri Kunal Mandaliya v. The State of Maharashtra[461] the petitioner had been charged of cheating, criminal intimidation and assault and since it was a consensual relationship petition was alleged of rape after their relationship turned sour. Though the court held that "Consenting adults indulging in sexual relationship are fully aware of consequences and must bear the same"

Clearly in the case of Arif vs State (Govt. Of Nct Of Delhi)[462] the High Court observed that number of cases where both persons, out of their own will and choice, develop a consensual physical relationship, when the relationship breaks due to some reason, the women use the law as a weapon for vengeance and personal vendetta". Calling out for a clear demarcation between rape and consensual sex, the judge said: "They tend to convert such consensual acts as an incident of rape out of anger and frustration, thereby defeating the very purpose of the provision."[463]

It is clearly evident from the above three case that after having power in form of rape laws that many men who didn't conduct any act to disrespect or harm women or physically assault her gets charges of rape in order to take revenge against men.

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[459] 53.2 per cent rape cases filed between April 2013-July 2014 false, says DCW (India Today 29 Dec, 2014) https://www.indiatoday.in/india/north/story/false-rape-cases-in-delhi-delhi-commission-of-women-233222-2014-12-29, accessed on 7 June, 2021.

[460] Murari Shetye, Sexual relations due to deep love not rape, Bombay High Court Says (The times of India 2 April, 2018) https://timesofindia.indiatimes.com/city/goa/sexual-relations-due-to-deep-love-not-rape/articleshow/63572102.cms, accessed on 7 June 2021.

[461] 2016 SCC OnLineBom 10600.

[462] 268 (2020) DLT 506.

[463] #MenToo: Law used for vendetta in many break-ups, say HCs (The Economic times 9 May 2019) https://economictimes.indiatimes.com/news/politics-and-nation/mentoo-law-used-for-vendetta-in-many-break-ups-say-hcs/mutual-for-one-abuse-for-another/slideshow/69247967.cms, accessed 7 June 2021.

Money

Many of the men tend to fall in a trap where the women tend to shows fake affection to the man and man falls for the trick and later intimate images are captured of both and the women tries to extort money by giving the fear of pressing charges of rape. And in such a society where sometime a man is already declared scum is not given sometimes chance to tells his side of story.

It can be evident from an incident wherein "a National level Basketball player was booked by Rohtak on order of court or allegedly filling multiple rape cases gainsay men in order to extort money rom them. In this case the court observed that blackmailer was habitual in getting false rape case registered in order to extort money, after getting the money she either withdraws the case or endorses the bail of the accused"[464].

Adultery

False rape cases could be said to be a consequence of adultery, as in order to protect self from shame or the curses which would be given by society after the adultery is discovered, for women false rape case here act as a one way defense wherein they shift the blame on the other person and as being a women she would be only seen as victim rather coconspirator in a crime.

In the case of State v. Samir the man was blamed for raping a wedded lady on the bogus promise of marriage has been absolved by a Delhi court, which noticed it was an instance of an "extra-marital issue being changed over into rape. The court said that as the women had 4 children in order to save herself from embarrassment, she filed a case against her paramour when it came to knowledge of her husband ."[465]

CONSEQUENCES OF FALSE RAPE ACCUSATIONS

If more than half of the rape case which are filed are false then many things which acts as support to prove rape and groups who help in upbringing such issues loses credibility. Such false rape allegation creates a stereotype against the male population and label them as rapist and creates an image wherein if a woman is walking alone at night and sees a man then the

[464] Hardik Anand, National-level basketball player booked for filing false rape cases to extort money (Hindustan Times 29 May 2019), https://www.hindustantimes.com/india-news/national-level-basketball-player-booked-for-filing-false-rape-cases-to-extort-money/story-ThhupzN8ijNDfmiSG7kDaK.html, accessed on 7 June 2021.

[465] Man freed in rape case, court says it was extra-marital affair, (Business Standard 15 Sept 2013), https://www.business-standard.com/article/current-affairs/man-freed-in-rape-case-court-says-it-was-extra-marital-affair-113091500088_1.html, accessed on 7 June 2021.

first thought comes of rape. This happens due to hoax created by women of rape. the guys who have not done anything unlawful and are not in struggle with law are described as culprits too. This further wipes out that reality that there are men who regard ladies and the law and ultimately every one of the men are clubbed together as misogynists and chauvinists. If such allegation are given in more number it strengthens hold of male controlled society as it is supporting and distorting the advancement that the nation has made to correct and take out the arrangement of man centric society. The way that the greater part of the cases enlisted with the authorities are bogus, exposes the way that correction of the general public has truth be told had appeared changes in that angle.

The repeated false rape cases create an obvious polarity in the Feminist development which is in any case at an incipient stage in India. The meaning of woman's rights from correspondence has become fascism. The way that ladies are documenting false rape cases and all the while getting the help of such gatherings that help ladies who have really been misled, horribly downplays the goal of accomplishing balance and common perception between the different sexes. On one hand, the development is attempting its level best to spread mindfulness in regards to correspondence and then again when individuals become more acquainted with that assault cases generally are bogus, the general public starts to connect that measurement with the women's activist development and which in the long run delegitimizes the endeavors of women's liberation through and through.[466]

CRITICISM

It can not always be said that false rape accusation are made with motive of revenge, martial affairs or money some people such a psychological state where they assume that they are being raped.

In a recent research by research by Kelly has found another category of technically false, but non-malicious allegations of rape. They found a group of no-crimed cases that arose from complainants who thought they might have been sexually assaulted while asleep or intoxicated, but subsequent forensic examination indicated that no sexual contact had taken.[467]

[466] Philip N. S. Rumney. "False Allegations of Rape." *The Cambridge Law Journal* 65, no. 1 (2006): 128-58. Accessed June 8, 2021. http://www.jstor.org/stable/4509177.

[467] 4 L. Kelly et al, A gap or a chasm? Attrition in Reported Rape Cases, Home Office Research Study 293 (London 2005), 46 .

There may be non-malicious allegations from people with particular medical conditions who genuinely believe they are victims of rape or other sexual offences, but who are mistaken, as opposed to being malicious.[468]

As false rape accusation has come in light of new rape laws many feminist groups who support rape victims to come up and show their story become skeptical of rape victims as they don't want to lower their image of group in the eyes of public or they want to maintain their genuine due to which honest rape victims against whom rapes have been done are sometime ignored by such groups.

METHOD

The researcher has mainly used website of newspaper and journal and used up cases in order to substrate his point. There has been no empirical research involved wherein data is directly collected.

SUGGESTION

In order to curb the false rape cases a separate section has to be added to wherein all the parameters regarding false rape should be noted. Parameters should be decided on the basis of other section which are currently used to prove false rape case to case. As this will help in bringing all the set promoters under one section and after deducing all the section, which are used to solve false rape cases, a base line or parameter could be establish which would be a very helpful task.

The biggest problem false rape case is of media circulation of personal information which result into regarding image of the innocent and also which forms a view that the person should be held guilty. It was clearly depicted in movie Section 375 wherein it was shown how al the evidence directed it was false rape case but just due to media pressure and other groups the decision was swayed. Though the movie don't depict the same scenario but it can't be never said what may happen. Until the person is proved guilty or if there has been review petition till that time media should be refrained from posting anything and other social

[468] P.Hays, , "False But Sincere Accusations of Sexual Assault Made by Narcotic Patient, " (1992) 60 Medico-Legal Journal 265; M. Matas and A. Marriott, "The Girl Who Cried Wolf: Pseudologia Phantastica and Sexual Abuse" (1987) 32 Canadian Journal of Psychiatry 30

media platforms. It can be contended that such type of things can under restriction of right to expression wherein under Article 19 it can be counted it comes under reasonable restriction.

Whenever a rape case comes investigation is done leniently as it is preconceived that he might have done rape. Such un-biased investigation must be stopped. Most of the accused are beaten in lock up, police should be refrained against which an order should be passed courts as we may never know if it is false case or not.

False rape accusers should be given strict punishment as they play with precious years of life of person. A punishment equivalent to rape should be given and compensation should be awarded by state in order to have proper backing to Strat a new life or to get boost in order to continue the previous life.

CONCLUSION

The rights given to ladies under area 375 were given to assurance of ladies so they can feel secured and could live with opportunity and will be dealt with equivalent to men and thus it would have fostered a libertarian culture in India, yet things turned out badly after The Criminal (Amendment), Act of 2013 was passed which gave over the top forces in the hand of ladies and afterward the general public confronted a huge change. The demonstration that was made with the target of securing ladies transformed into a danger for menfolk. From that point forward the quantity of unfounded incriminations has been encountering a sharp ascent. Segment 375 of Indian Penal Code and The Criminal (Amendment), Act of 2013 isn't just about equity any longer; it is additionally about representing a danger to menfolk.

The creators of the segment 375 and The Criminal (Amendment), Act of 2013 had just uneven vision in regard to the section 375, they just considered ladies security however didn't develop any solution for protecting guiltless men in the general public.

The model utilized for giving equity in assault cases is very old. Living in a unique society, laws ought to be shaped so that it suits the need of great importance and that can be more effective in impending occasions.

The harms gave and ladies enduring punishment(imprisonment) will guarantee that the men can get back the respect lost by them during trial as of when ladies will endure detainment it will convey the noisy and clear message that the accused was honest, reality will take off and

will assist man with recuperating the injury looked by him during the trial. Notwithstanding, it may not be satisfactory for everything except still this model will serve to the greatest advantage of "Equity" and will be more productive in the present society then the model effectively being used.

A STUDY ABOUT MEDICAL NEGLIGENCE IN LIGHT OF THE LANDMARK V.P. SHANTA JUDGEMENT

- VARAD YEOLE

CHAPTER 1

INTRODUCTION

The case of Indian Medical Association v. V.P. Shanta and Ors. is considered as the landmark case which changed the dimensions of the field of medicine. This very case actually redefined the relationship between a doctor and a patient. A new dimension was unleashed which actually made the doctor or medical practitioner responsible towards his profession. This landmark case highlighted the role of patients and ratifies them to file complaint under the Consumer Protection Act in cases of any kind of negligence resulting in any kind of loss to the patient due to wrong treatment.[469] The Hon'ble judges in the landmark case taken into consideration, other cases such as the Dr. C.S. Subramanian v. Kumarasamy & Anr. and the case of Dr. A.S. Chandra v. Union of India which were dealt on a similar issue. The definition of the term 'service' as mentioned in Section 2 (1) (o) of the Consumer Protection Act, 1986, is interpreted in such a form which makes it ambiguous in nature. The term service does not sufficiently explain its ambit and contents. It does not expressively exclude nor includes medical services. The apex court clarified all the ambiguities regarding the term 'service' under the Consumer Protection Act, 1986, and regarded the process of giving paid treatment by a medical practitioner to a patient as a service[470] which can be made actionable in the rule of law by the patient himself. The medical practitioner was rendered liable for the treatment given by him. After the landmark judgement, the patient could bring action against the doctor, if the patient suffered injuries in the due course of treatment[471]. In law of tort, the negligence of the doctor should be successfully proved by the plaintiff beyond reasonable doubt[472]. The tort which was committed in the case of Indian Medical Association

[469] Divya kuntal Desai, Indian Medical Association v. V.P. Shanta, (Oct. 5, 2020), https://indianlawportal.co.in/indian-medical-association-v-vp-shantha/.

[470] Shiv Shankar Singh, Medical Negligence : A Study in Indian Context, 6 Indian J.L. and Just. 77 (2015).

[471] Talha Abdul Rehman, Medical negligence and doctors' liability, Indian Journal of Medical Ethics, (April 1,2009), https://doi.org/10.20529/IJME.2005.031.

[472] Anto Nio Dias v. Fredrick Augustus, AIR 1936 PC 154.

v. V.P. Shanta and Ors. was of medical negligence. Whenever, a patient approaches a doctor with his medical problem, there are certain duties levied upon the doctor which must be followed. These duties include deciding whether or not to undertake the patient's treatment, deciding the type of treatment to be administered and finally successfully administering the treatment to the patient[473]. Medical negligence basically is the failure to act in accordance to the situation where a reasonable prudent individual would act. There are many standard operating procedures and these SOPs depend and vary with every scholar mind. If the medical practitioner tries and follows any of these SOPs during the required instances, then he would not be liable for medical negligence only because he did not follow the particular standard procedure which a certain expert or individual thought he should have. When it comes to adopting a reasonable and standard course of treatment for a patient, there is always a scope of obscurity as to what actually constitutes the 'reasonable' or 'ordinary' course of treatment or care. Medical practitioners are always required and bound to practise an ordinary degree of treatment or care and not the highest degree of the same that exists. After assessing the present scenario regarding medical negligence, it can be undoubtedly admitted that it has become almost impossible for medical practitioners to evade their responsibility when it comes to proper treatment as well as care. These all the changes were observed after the landmark judgement of Indian Medical Association v. V.P. Shanta and Ors.

RESEARCH QUESTIONS

- How did the landmark case of V.P. Shanta open up new dimensions in the cases of medical negligence?
- What basically amounts to medical negligence and why wasn't it well received by the medical fraternities?
- What was the impact of Consumer Protection Act in landmark V.P. Shanta case and what was it that relived the victims of medical negligence?
- How were the cases involving medical negligence dealt after the revolution instituted by the landmark V.P. Shanta case?

[473] Dr. Laxman v. Dr. Trimbak, AIR 1969 SC 128.

RESEARCH OBJECTIVES

The following objectives would be researched upon in the paper:

- Swotting of the landmark case of V.P. Shanta and reviewing the role of Consumer Protection Act in the same.
- Probing in dept about the concept of medical negligence and its impact on the class of the medical practitioners practicing within the country.
- Analysing the role of the Consumer Protection Act in the transpose of the plight of common masses falling prey to medical incompetence.
- Studying the antecedents of medical negligence and reviewing landmark judgements adjudicated by the apex court for better understanding.

LITERATURE REVIEW

The concept of medical negligence is thoroughly explained by M.S. pandit and Shobha Pandit in their research article. The duties and the line of treatment which a medical practitioner has to keep mind while treating every patient has been enunciated by the authors in their work. In the article written by Jyoti Dharm, she has explained the importance the importance of the landmark judgement of Indian Medical Association v. V.P. Shanta. She has dilated the contentions of the Consumer Protection Act and has linked the same with the concept of medical negligence. S.V. Joga Rao in his research, has laid down a detailed analysis about how under the contentions of the Consumer Protection Act, a patient who avails the medical services steps into the shoes of a consumer has the rights of a consumer are entailed by the patient. Abhipsha Mohanty in her article explains about the coverage of the medical service under the purview of the Consumer Protection Act. The basic definition of a consumer is explained. The contentions as to what amounts to the negligence in a medical service is enunciated by the writer. Debkanya Roy Choudhary and Radhika Rajagopal explain the aftereffects of the landmark V.P. Shanta case in the medical field. The reasons as to why was the act not welcomed by the doctor community and the drawback of the same are thoroughly discussed.

RESEARCH METHODOLOGY

The researcher has incorporated the doctrinal method of research in order to carry on the research on the aforementioned topic. This method of research involves analysis of case laws and systematizing the legal provisions. The existing statutory provisions are looked upon and reasoning ability is exhaustively used. This kind of a research is alternatively termed as purely theoretical research. It takes into consideration the legal authorities and the rationale behind every legal provision researched upon. Conventional sources like law reports, judicial pronouncements, research works or any kinds of facts produced by the parliament are the resources of a doctrinal research. The topics which are selected for the research in this kind of methodology are narrow or restrictive in nature. The epicenter of the topics involved here mainly revolve around the field of law.

CHAPTER 2
INTERPRETATION OF THE LANDMARK V.P. SHANTA JUDGEMENT

The rudiment highlighted in the landmark judgement pertains to that of the inclusion of medical profession and paramedical services under the ambit of the Consumer Protection Act, 1986. Admittedly, a doctor is accountable for the wrongs caused in the due course of treatment as a result of non-compliance of the standard operating procedure or any other act of negligence. It thus constitutes the preliminaries of the tortious liability levied upon the medical professionals. It was until this judgement that the answerability of the medical professionals and the redressal of the suffered ones was at issue. The entire commercialisation of the health industry steered the process of transforming a patient into a consumer. The issues that were dealt in the judgement were as follows:

1. Whether the aid provided by a medical practitioner, hospital or a nursing home could be brought under the ambit of 'service' in the Consumer Protection Act, 1986.
2. Which episodes could conclude that the service preferred by the hospital would fulfil the criteria of 'service' under the Consumer Protection Act,1986?[474]

[474] Debkanya Roy Choudhari, Radhika Rajgopal, Indian Medical Association v. V.P. Shanta, 72 NLISR. 33, 33 (2017).

The landmark judgement elucidated a significant dimension by levying the profession of healthcare to the intricacies of the Consumer Protection Act, 1986. It was though a fact that the judgement was not well received by the medical practitioners who apprehended the vulnerability of the noble profession to excessive suits, in turn harassing the professionals.

The judgement acknowledges the provision of summary procedure facilitated by the Consumer Protection Act 1986, would be applicable only the cases of glowering negligence and in cases of compound nature which would necessitate the admission of expert evidences. It was subsequently after this landmark judgement that the government as well as private hospitals including the doctors rendering their service as a part of these and the independent medical as well as dental practitioners were legally vulnerable for their inoperative service and could be solicited under the Consumer Protection Act, 1986.

CHAPTER 3

MEDICAL NEGLIGENCE: AN ELEMENTAL STUDY

In the words of S.S.W. Davis, the word 'medical negligence' is an incongruity itself. According to him, in the expanse of the topic of 'negligence' a bifurcation such as the 'medical' is itself a misnomer. He kept it simple and denoted that "Negligence means more than needless or careless conduct, whether in omission or commission: it properly connotes the complex of duty, breach and damage suffered by the person to whom the duty was owing."[475]

A doctor/medical practitioner is tendered after his atypical practice in the field. Patients prospect the treatment in a bifold nature. It includes:

1. The medical practitioner or the hospital is expected to deploy entire knowledge as well as skill they possess, and
2. Nothing otherwise would be resorted to, which would cause injury to the patient.

It is not always perceived that the doctor would be able to save the patient's life but it is exponential that thorough intelligence, knowledge, care and skill must be exhausted in order to treat the patient who has endowed his life in the hands of the concerned doctor. It is mandatory for a doctor to put together a research report concerning the treatment of the patient. In addition to that, a prior consent is a mandate before performing any major surgery.

[475] S. S. W. Davis, Medical Negligence, 3 Legal Service Bull. 175 (1978).

Failure of adherence to the abovementioned mandate by the hospital would attract tortious liability.

In the cases of Dr. Lakshman Balkrishnan Joshi v. Dr. Trimbak Babu Godbole and Anr. [476]and A.S. Mittal v. State of U. P[477]., the court principled duties to be followed by the doctor upon consulted by a patient: -

"a. duty of care in deciding whether to undertake the case,

b. duty of care in deciding the nature of treatment, and

c. duty of care in administrating the treatment."[478]

Any discrepancies in the adherence of the abovementioned duties would be chargeable for negligence and would create a room for the patient to recover the damages. Black's Law Dictionary recounts the word 'negligence' as "conduct, whether of action or omission gross negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid Municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoyed by law for the protection of person or property, so constitutes."

CHAPTER 4
MEDICAL NEGLIGENCE UNDER THE CONSUMER PROTECTION ACT

The consumers of goods and services seeking redressal for the sharp practices they fall prey to, have been relieved by the Consumer Protection Act. The act in its bare reading defines the terms 'consumer' and 'service'. The term 'service' though does not explicitly mention the services pertaining to the health industry, it is primarily assumed that the defined legislation outstretches its array including all the services provided in the medical field too. In the landmark case of Indian Medical Association v. V.P. Shanta And Ors., the apex court had pronounced a judgement which included the medical services within the array of services in the Consumer Protection Act, 1986. This was a celebrated judgement which was one of its

[476] Dr. Lakshman Balkrishnan Joshi v. Dr. Trimbak Babu, 1969 AIR 128.
[477] A.S. Mittal v. State of U.P., 1989 AIR 1570.
[478] Jyoti Dharm, Medical Negligence Liability under the Consumer Protection Act: A Judicial Approach, B.L.R. 12, 15 (2014).

kind. In the case of Nihal Kaur v. the Director, P.G.I.M.S.R., [479]the court favoured the plaintiff who suffered losses due to doctor's negligence, and was awarded damages too. The apex court talked through the concept of "medical negligence" and "the standard of care required to be exercised by the doctor." The court, formulated some statutes and in case of any discrepancy regarding manifestation of the medical negligence, the courts would go by the following directions:

"1. No guarantee is given by any doctor or surgeon that the patient would be cured.

2. The doctor however must undertake fair reasonable and competent degree of skills, which may not be the highest skill.

3. Adoption of one of the modes of the treatment, if there are many and treating the patient with due care and caution would not constitute any negligence.

4. Failure to act in accordance with the standard, reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.

5. In a complicated case, the court would be slow in attributing negligence on the part of the doctor, if he is performing his duties to be best of his ability.[480]"

The looming of the Consumer Protection Act, 1986, inaugurated the Consumer Disputes Redressal Agencies (C.D.R. A's) which resolved all the grievances of the consumers. It was immediately after the introduction of the act, that it was begrudged by all the medical professionals and they demanded revocation of the act. "The reason being threefold:

- The first reason was concerning the interest of the patient. There would be a sense of disinclination in order to undertake extremely complicated cases due to the apprehension of attracting criminal charges for the slightest wrong in the treatment which would drag them into the consumer protection case for medical negligence. The overall expenditure for the treatment would be severely affected as an indirect effect of the act. Doctors would have to bear the cost of insurance for being at the safe-side which would in turn be racked up from the patients.

[479] Nihal Kaur v. Director P.G.I.M.S.R., (1996) CPJ 112.

[480] Abhipsha Mohanty, Medical Negligence under Consumer Protection Act: A Judicial Approach, The Latest Laws, (Aug. 11, 2018), https://www.latestlaws.com/articles/medical-negligence-under-consumer-protection-act-a-judicial-approach-by-abhipsha-mohanty/.

- The second reason concerned with the relationship between a doctor and a patient, trust as well as faith between a doctor and his patient. The profession of a doctor was more than just a job, but was a selfless service for the betterment of the patient and it ought not be juxtaposed with that of a trader providing service with the self-possessed urge for earning profit.
- The third reason was concerned with the very compatibility of the bodies created by the act for discernment of the medical cases. The body did not constitute a single doctor as its member. Adding to that, two out of three members were non-judicial who could establish a majority and rule out an erroneous judgement due to zero proficiency in the medical field.[481]"

CHAPTER 5
CONSTITUENTS OF MEDICAL NEGLIGENCE

It was since the age of Lord Denning that an averment of medical negligence against a medical practitioner could not be measured with the same yardstick as a charge of a motor car driver. Since the assertion of medical negligence appends the very question concerning the life of a patient, the burden of proving the negligence in the treatment is much greater. Even with the impeccable knowledge and unmatched skills, there arises a chance where things don't go as planned. In such a case it was regarded that the doctor could not be held accused merely due to the unplanned turn of events. As discussed earlier, it was beheld by the apex court as well as the National Commission that a doctor cannot be held responsible on a ground that some other professional with more expertise would have employed a non-identical approach. [482]He cannot be held guilty for negligence if he has followed the due procedure recognised by the medical professionals as a reasonable one. The judgement in the V.P. Shanta case certitude that in case of medical negligence the onus of proof would be on the shoulders of the complainant in order to prove the fact that the doctor did not follow the

[481]David Annousany, Medical Profession and the Consumer Protection Act, N.H.S.R.C., (May 13. 2018), http://qi.nhsrcindia.org/sites/default/files/Medical%20Profession%20and%20the%20Consumer%20Protection%20Act%20%20(460-466).pdf.

[482] S.V. Joga Rao, Medical Negligence Liability under the Consumer Protection Act: A Review of Judicial Perspective, 17 I.J.U. 361, 365 (2009).

course of treatment in the prescribed manner resulting into injury to the patient. The court held that, when it comes to medical negligence, things are not the same as other cases of negligence and the profession is all about the application of knowledge and skills in testing times which would rely entirely upon the doctor's own expertise and the course of treatment would differ from doctor to doctor. On the grounds of non-adherence of the recognized reasonable line of treatment can a doctor be held guilty of medical negligence.

The Indian Consumer courts and the National Commission do not undertake the proposition of *Res-Ipsa Liquitor* under the act. In the light of catena of judgments, it has been established that mere lodging of a complaint for medical negligence would do no good to the complainant. He would have to adduce expert evidence in order to prove his claim.

Clearing the misnomer, it is established that the miscarriage of an operation or the offshoots of the same are no negligence. It is the failure to follow the reasonable procedure for treatment and absence of due care and caution that summon up the term 'negligence.' Negligence cannot and should not be surmised but has to be proved.

CHAPTER 6
LANDMARK CASES PERTAINING TO MEDICAL NEGLIGENCE

a. Achutrao Khodwa v. State of Maharashtra and Ors.[483]

In the case, the deceased lady Chandrikabai was admitted to a maternity hospital for the purpose of her delivery. The respondent who was a doctor in the Department of Obstetrics and Gynaecology attended the patient. The respondent operated on the patient and delivered a male child. It was soon after the surgery that the patient started experiencing severe pain in her abdomen which was highly unusual after a minor surgery. Later on, it was gathered that the doctor accidentally left a mop inside the body of the patient after the process of sterilisation was performed. This was enough to cause death of the patient. The appellants alleged the reason of death as sheer negligence on the part of the doctors.

The apex court employed the principle of *Res-Ipsa-Liquitor* and held the doctor guilty for negligence who failed to act with reasonable skill and care.

[483] Achutrao Khodwa v. State Of Maharashtra, 1996 SCC (2) 634.

b. Spring Meadows Hospital and Anr. v. Harjol Ahuwalia and Anr. [484]

The facts of the case include the admission of a minor in the hospital. After a thorough prognosis, the doctors pointed out the fact that patient endured typhoid fever and the required dose of medicines was prescribed. A nurse in the hospital suggested the father of the patient for administering him an injection of 'Inj Lariago.' The patient was injected with the same. Immediately after the drug kicked in the body of the patient, he was knocked unconscious. Upon the drastic turn of events, the patient was immediately attended by the doctors. It was established that the patient suffered a cardiac arrest. The condition was declared as extremely critical and was shifted to ICU of another hospital. The minor suffered irremediable damage leaving almost zero chances of any amelioration. The parents of the minor filed a suit complaining vehement negligence course of treatment by the doctors and claimed an amount of 28 lakh rupees as damages.

The apex court observed that 'if parents approach a hospital for the treatment of their ward by a doctor, the parents would be inclusive in the ambit of that of a 'consumer' within the Consumer Protection Act, 1986. This makes them totally beneficial for receiving compensation for the inadequacy in the treatment offered by the hospital.

c. Jasbir Kaur and Anr. v. State of Punjab and Ors.[485]

The mentioned case represents the brink of sheer mismanagement and negligence on the part of the professionals who are trained at the job at hand and have been in the concerned field of healthcare for decades. The facts of the case include the admission of the complainant in the Shri. Guru Tej Bahadur Hospital, Amritsar, for her delivery. Later on, she delivered a healthy baby boy. It was alleged that the hospital authorities did not care to organise a cradle for the baby. Moreover, the parents of the infant were informed that the baby and the mother could not share the same bed due to possibilities of infection. The child was shifted to the maternity ward. The light bulb in the mentioned ward suddenly fused in the night. After restoration of the same, the sleeping attendant discovered the absence of the infant. After a thorough search in the premises of the hospital, the authorities found the infant in a despondent state near wash basin in the washroom. The infant was lying in a pool of blood with his eye scooped out

[484] Spring Meadows Hospital and Anr. v. Harjol Ahuwalia and Anr., AIR 1998 SC 1801.
[485] Jabir Kaur and Anr. v. State of Punjab and Ors., 1995 ACJ 1048.

entirely from the skull. Later on, a suit was filed against the hospital authorities for an ignominious display of incompetence.

The court held the hospital authorities guilty of negligence and a compensation of 1 lakh rupees was awarded to the complainants.

d. State of Haryana and Ors. v. Smt. Santra[486]

In the mentioned case, the complainant being a daily wage labourer had a precarious financial situation. She culled the process of sterilisation. Having significant number of children, she did not expect more as it would be an arduous job to manage the family with such a meagre income. But even after the sterilisation surgery, she gestated and further gave birth to a baby girl. It was a clear indication of failure of the sterilisation surgery. The complainant filed a suit for medical negligence and demanded a sum of 2 lakhs as damages.

In the light of the facts mentioned above, the court gauged the situation and ordered a decree compensating the complainant for falling prey to horrendous negligence as well as medical incompetence.

CONCLUSION AND SUGGESTIONS

Upon recapitulation, it can be gathered that medical negligence is a concept which is extensively consequential. Gauging the locale and enunciating whether the doctor is actually guilty of medical negligence is formidable. There lies a very gaunt demarcation between the liability and innocence of a doctor in a matter pertaining to medical negligence. The medical practice of a practitioner entirely banks on the goodwill as well as the image of the practitioner. If one is falsely accused in the matter of medical negligence, it can severely affect his reputation which in turn would affect his practice. At the same time, it not ethical on the part of the people as consumers of the medical services, to falsely accuse the doctor for medical negligence in order to ransack him. In the light of the argument stated above, it is suggested that a strict system of checks and balances must be established which would interdict the bogus claims which would waste the time of the court. Stricter punishments along with hefty fines need to be levied upon false claims of medical negligence. The present scenario pertaining to the criminal liability of a medical practitioner is that there emanates a

[486] State of Haryana and Ors. v. Smt. Santra, (2000) 5 SCC 182.

prima facie evidence proving sheer negligence and impetuous behaviour of the doctor to charge him under the same. On the basis of plethora of judgements passed by the Supreme Court some basic guidelines are drafted which upon implementation would succour the legislative bodies draft an effective law for resolving the cases of medical negligence which at the moment is at an impasse. At such instances, the Consumer Protection Act relives the burden by facilitating economic and quick adjudication of the claims.

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A LEGAL ANALYSIS ON SEXTING AND PORNOGRAPHY

- SUBHRONIL GHOSH & ARNAB DAS

ABSTRACT

In today's generation sexting and watching pornography has been very common. This paper is written on the laws relating to sexting and pornography. In this paper the authors had tried to bring out the fact that how some of the laws related to sexting and pornography violates the fundamental right of personal liberty and more specifically the right to privacy. The authors have given case references to point out the fact that minors as an individual citizen of the country also have a privacy and they can decide some acts for themselves, controlling them all the time under the law make it look like their bodies are owned by the State. The authors have also pointed out the fact that now a days it's more important to see if somebody under the age of 18 is matured enough to initiate a sex chat or if the minor has claimed a false age of his or her then in such cases instead of adhering by the rule of strict liability, Courts should try and find if the other person or the stranger involved in the chat knew that he or she is a minor because every criminal proceeding requires mens rea. The authors of this article have also observed the fact that laws made before the right to privacy came into force should go through amendments so that the Constitution and its basic structure is upheld, because at the end of everything else it should not be forgotten that the Constitution is the Supreme law of the land.

Keywords: Sexting; Pornography; Right to privacy; Mens Rea; Minor.

INTRODUCTION

The term sexting has been derived from two different words "sex" and "texting". Sexting is sharing, sending or forwarding of any kind sexually explicit content between two or more person. In India the act of sexting has been increasing among the younger generation in the country. In this lockdown period where everybody is sitting at home alone more people are engaging in sexting some with their partners and some with strangers whom they have meet online. In today's world sexting has become very common among adults as well as teenagers.

Now the question that arises from this is whether sexting should be allowed to be continued or not.

Whereas pornography and adult film are portrayal of sexual subject matter used for sexual arousal. In present day pornography depicts pornographic models, who possess for photographs and pornographic actors who engages in a filmed sexual act. The act of pornography also includes pornographic materials available in writing, animation, magazines and adult video games. There are different laws in the country related to sexting and pornography, there are also drawbacks in some of the laws. The major laws directly or indirectly relating to sexting and pornography are present in the POSCO Act, IT Act, IPC.

LAWS RELATING TO SEXTING

Section 67A of IT Act says, "Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.[487]"

Section 354 of IPC, "Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with impris-onment of either description for a term which may extend to two years, or with fine, or with both.[488]"

Section 11 of POSCO lays down, "A person is said to commit sexual harassment upon a child when such person with sexual intent, – (i)repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or (ii)entices a child for pornographic purposes or gives gratification therefore.[489]"

Section 12 lays down, "punishment for sexual harassment with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.[490]"

[487] The Information Technology Act, 2000, s. 67A.
[488] Indian Penal Code, 1860 (Act 45 of 1860), s. 354.
[489] The Protection of Children from Sexual Offences Act, 2012, s. 11.
[490] The Protection of Children from Sexual Offences Act, 2012, s. 12.

Section 14 and Section 15 of POSCO Act lays down, "punishment for using child for pornographic purposes and punishment for storage of pornographic material involving child. Whoever uses child or children for pornographic purposes shall be punished with imprisonment for a term which shall not be less than five years and fine.[491]"

Section 67B of IT Act says, "if a person transmits or publishes content which depicts children in a sexual act or conduct, then that person will be punished by imprisonment for a period which may extend to five years and with fine which may extend to ten lakh rupees. In case of a repeat offence, the person will be punished with imprisonment which may extend to seven years and also with fine which may extend to ten lakh rupees.[492]"

Section 66E of IT Act says, "Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.[493]"

PROBLEMS WITH THESE LAWS AND HOW THIS CONTRADICT WITH RIGHT TO PRIVACY

Sexting between two individuals or group of individuals is very common in these days and in this modern generation. Any third-party interfering between two individuals on this matter is breach of privacy. In the case of Puttaswamy vs Union of India, privacy was recognised as a fundamental right under Article 21(Protection of life and personal liberty[494]). It was in this case that it was decided that everyone in the country has the right to privacy. Under the right to privacy the court has also pointed out correctly that bodily integrity also comes under the right to privacy[495]. Now if anybody who has given consent to sexting or is sharing any obscene material of his or her own or from any website which contains such type of materials with somebody with his or her permission then it is fully their private right to do so. It fully depends on oneself that what he or she wants to do with her body and what kind of pleasure one wants from one's own body. We always have to remember one thing, that the laws should not be such that it seems that the body of any individual is owned by the state. If

[491] The Protection of Children from Sexual Offences Act, 2012, s. 14, 15.
[492] The Information Technology Act, 2000, s. 67B.
[493] The Information Technology Act, 2000, s. 66E.
[494] The Constitution of India, art. 21.
[495] Right to privacy, https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/ (Last visited July, 10, 2021)

watching pornography and sexting is banned or is discouraged by the law it will seem that the body of an individual is owned by the state, and it is not only a violation of democracy but also a violation of privacy (bodily integrity).

If a girl or boy or woman or man involves in sexting with consent of each other there should not be any problem. The problem should arise when one of them has not given any consent for such chat but still the other person is sending such obscene material or when somebody captures any private image of any person and share it with others without his or her consent or materials which depicts a child in it or when these materials are used as revenge porn. These are the problems that should be dealt with in the law and not something which seems like the state is claiming the ownership over someone's body or is trying to control their physical life or is breaching the fundamental right of privacy.

Sometimes we have heard people saying that when we see pornography or share pornography with anybody it is said that the person sharing the video has outraged the modesty of women, but people never understand that in a pornography video or adult film there are both male and female involved consensually and that pornography is not made to outrage anybody's modesty but is known as adult films depicting sexual activities to sexually arose somebody and is made with consent of the individuals acting in such film. The problem in our society is that everybody has an opinion that, sex is very bad and it should only be talked about between married couples and should not be depicted in videos and one should not talk about it with the younger ones. India has a lack of sex education because of such thinking and is right now going through a sexual revolution. A women modesty is obviously hurt when somebody without her consent or forcefully take such private videos of her and put it on the internet. But adult films, pornography, sexting all these things if done with consent or shared with consent of the person to whom you are sharing it with, is fully their private rights. A married woman sexting with her husband is their private life, the same way when two other individuals even not married doing sexting is their private matter. Its ok until and unless one of them is being forced into such kind of chats or talks. We would never go and ask a married couple and would not force them to talk about the last time they had sex because sex between two individuals is considered as private. The same way the chats or talks which consists of sensitive materials are also private among the individuals engaged in sexting.

In a case to ban pornography the then Chief Justice of India H.L Dattu observed orally that "Such interim orders cannot be passed by this court. Somebody may come to the court and

say look I am above 18 and how can you stop me from watching it within the four walls of my room. It is a violation Article 21[right to personal liberty] of the Constitution.' Yes, the issue is serious and some steps need to be taken…the Centre has to take a stand...let us see what stand the Centre will take." [496]

Later in a case where a minor girl was raped by four minor boys after watching porn the Uttarakhand High Court directed the government to ban all such websites depicting obscene material.[497] According to the Court's view pornography promoted to such act of those minor boys. But according to me, the Court didn't recognise the fact that a fundamental right would be violated for passing such order. The Court could have asked to restrict such websites for those who are under the age of 18 and also should have banned pornography which depicts a child in it but instead it asked the government to ban all such websites breaching the right to personal liberty of all the citizens of the country. All fundamental rights come with limitations but that does not mean that because somebody had caused something serious so everybody's fundamental right of liberty would be snatched away. The motive of the Court was to stop such crimes which it could have done just by blocking the sites for minors and banning child pornography. Because anybody who is a major and after watching porn if he or she commits rape, then he or she had committed it after knowing the seriousness of the act they are committing, because they are considered to be matured enough for such things, they just can't take the defence that the pornography video has caused them to act like that as they are above 18 years of age and are matured to know what is wrong and what's right. There is also no law in the country which punishes an individual for seeing pornography content and according to me there should not be any law restricting to see or watch pornography material as it would challenge our own Constitution, right to personal liberty. But yes, there could be laws preventing people from watching pornography content in a public place where there are minors around them and also at places where there are people who does not give consent to watching pornography content in front of them. But again, if in a room two or three adults are watching pornography with consent of each other and there is no one else in that room then

[496] Chief Justice of India H.L Dattu's oral observation, https://economictimes.indiatimes.com/news/politics-and-nation/government-says-followed-supreme-court-observation-rejects-charge-of-blocking-porn-sites/articleshow/48337543.cms?from=mdr (Last visited July, 10, 2021)

[497] Uttarakhand High Court on banning of adult websites, https://www.indiatoday.in/india/story/uttarakhand-hc-orders-strict-implementation-of-ban-on-porn-sites-after-dehradun-gangrape-case-1351772-2018-09-28 (Last visited July, 10, 2021)

again it is their private rights to do so, as none of them has any objection to anybody watching such materials. For example, people watching pornography in a public bus should be punished as there may be minors in the bus as well as adults who does not want to watch such content being played or watched next to them. But in a room where two or three friends are sitting and watching pornography with the consent of each other then, it should be allowed as it is not causing harm to anybody as all of them have their consent to it. We also have to see to the fact that something which is considered as an obscene material or content today may not be obscene after 5 or 10 years. Obscene materials or obscene contents are those which are against the moral values of the people and those materials or contents remains obscene until a large group of people in the society accept those materials or contents as not an obscene material and that it does not hurt their moral values. For example, 10 -15 years back, we rarely used to find kiss scene in movies but now a days we find intimate scenes in the movies, because as time passes and with change in generations and modernization the definition of what is obscene and what is not an obscene material change. In India today a lot of youth consumes pornography content and engages in sexting and during the lockdown period (covid-19) these things has increased more.[498] [499]

Sexting or watching pornography could not be a defence for those committing rapes and banning the act of sexting or pornography is also not a solution to it. Many people use to comment things like, rape is increasing because the girls or women are wearing short dresses and jeans, will the Court ask the girls and women in the society not to wear such dresses and jeans or whether the Court and the government will try and find solution to stop rapes and not to stop the girls and women in the society from wearing short dresses. In a recent incident in Uttar Pradesh a state women commission member while responding to a question on rising rape cases said that girls should be kept under strict watch of their families and also claimed that their phones should be checked by their families and also her statement made it clear that phones are causing increase in rape cases[500]. So, according to her girls and women don't have

[498] Increase in Sexting in India, https://www.news18.com/news/buzz/62-of-desi-women-engage-in-sexting-19-use-apps-to-find-partners-research-2890657.htm (Last visited July, 10, 2021)

[499] Increase in consumption of pornography, https://www.indiatoday.in/news-analysis/story/pornography-gets-a-pandemic-boost-india-reports-95-per-cent-rise-in-viewing-1665940-2020-04-11 (Last visited July, 10, 2021)

[500] UP women commission member on increase of rape cases, https://www.hindustantimes.com/india-news/girls-should-not-use-mobile-because-up-women-commission-member-s-comment-sparks-row-101623311192401-amp.html (Last visited July, 10, 2021)

any privacy their phones should be checked and if possible, they should not be given a phone at all. But this cannot be the solution of rape, why deprive the girls and women in the society for somebody else's wrong doing. So, we should always find a proper solution instead of asking to stop the usage of everything which people take as defence for their crimes. Otherwise, we would find that people taking defence like I have seen a fighting scene in a movie and the hero or the villain received lot of fame after that fighting scene so it motivated me and promoted me to do the same for fame, then what will the Court and government say ban fighting scenes in movies.

The same way if two adult individual shares any video or image of herself or himself or any video from any adult website with somebody who has no objection to such videos or images comes under their personal liberty of what they are watching and sharing with consent of each other. It would not be wrong to say that in India not only males but females also are watching pornography[501] or are visiting such adult websites on a regular basis[502]. So, it would be wrong if we say that adult films or pornography increases crimes against women, because males are not the only ones watching or visiting such websites or sharing such videos among themselves. Moreover, these adult films itself don't promotes any crime against any gender, or it doesn't hurt anybody's modesty (making others watch such content forcefully or making such videos without consent is when the modesty of that person is breached), it's the person watching it who commits the crime of rape. Not everyone who watches adult films commit crimes like rape.

So, from this we can understand that neither sexting nor sharing of adult films promotes violence against anybody or everybody. Rather asking individuals to not visit or watch any adult film or not to involve in sexting would cause a violation of right to personal liberty (Article 21).

WHAT HAPPENS WHEN A MINOR INVOLVES IN SUCH ACTS?

Now, after the judgement of Puttaswamy v. Union of India where the Supreme Court has mentioned privacy as a fundamental right for everyone including minors. Now here

[501] Women and girls also watch pornography content, https://timesofindia.indiatimes.com/life-style/relationships/revealed-types-of-porn-women-watch/photostory/59306712.cms (Last visited July, 10, 2021)

[502] Women and girls also watch adult films, https://www.hindustantimes.com/sex-and-relationships/boys-ain-t-having-all-the-fun-indian-women-watch-more-porn-now/story-01PoEcLjM39oury8eLXSlL.html (Last visited July, 10, 2021)

according to me sexting with a minor with consent also comes under the privacy of the two individuals one of which may be a minor or both of them may be a minor. The fundamental rights in the Constitution are granted to the all the citizens irrespective of age, gender, caste, colour, and religion.

In a case[503] where a 22year old was accused of kidnapping and raping a 15year old girl, whom the boy(accused) latter married. According to the POSCO Act anybody under 18 is considered as a child. The girl has said in her statement that she had willingly gone with the boy and got married and was living together.

The judge in this case said, "In my opinion, it would neither serve the object of present enactment (POCSO Act) nor the purpose of criminal laws to hold the accused guilty on the ground that he had sexual intercourse with the girl below 18 years."

The Additional Sessions Judge, Dharmesh Sharma, "I am afraid, if that interpretation is allowed, it would mean that the human body of every individual under 18 years is the property of State and no individual below 18 years can be allowed to have the pleasures associated with one's body."[504]

In another case Sabari v. Inspector of Police[505], the Madras High Court had the opinion that, "the consensual sexual activity between minors above the age of 16 years of age should not be considered to be a criminal activity."

So, we can understand from these cases that, everyone should be allowed to choose what they want, instead of fixing or forcing it upon them through the law. Though these judgements and interpretations of these courts may change with time and with other judges of different Courts in the country. But at least we can understand that this topic of sexting with minor is highly controversial and at different times the consent of minors may also be taken depending on the maturity of the minor. For example, if a minor started sexting with a stranger and the minor was the one who had first initiated the chat or talk then it is not always possible for a stranger online to know the perfect age of someone just by talking or chatting and no one is going to clarify the age of somebody in between such lustful chats or talks. In this situation as we all know that there was no mens rea on part of the stranger to do sexting with a minor but there

[503] Human body not property of State, https://www.dailypioneer.com/2013/delhi/human-body-under-18-not-property-of-state-court.html (Last visited July, 10, 2021)

[504] Human body not property of State, https://timesofindia.indiatimes.com/city/delhi/Consensual-sex-with-minor-not-crime-Delhi-court-says/articleshow/22056783.cms (Last visited July, 10, 2021)

[505] Sabari v. Inspector of Police, https://lawbriefcase.com/sexting-may-get-you-in-trouble/ (Last visited July, 10, 2021)

was actus rea, but in a criminal proceeding both mens rea and actus rea is required to be proved, we should not just put the theory of strict liability in such cases because the stranger has not started the chat it was the minor who initiated it and the stranger went with the flow without knowing the age and in some cases we also find when a stranger initiate the chat the minor claims her age to be more than 18 in such cases also strict liability should not be adhere as it would be unconstitutional as in both cases the stranger was in no intention to have such explicit chat with a minor. If a minor has initiated such chat, it also has to be considered if he or she is matured enough to engage in such chats because an immature child would never ask a stranger for such private chats, images or videos because he or she would not know what to do or how to act with those chats or images. A 7-year-old will never know what such images or chats are used for and how they are helpful to them. In Section 82 of the IPC[506], it is clearly mentioned nothing is an offence if done by someone under the age of seven. Also, in Section 83 of IPC[507] it is given that nothing is an offence done by someone from the age of seven to twelve, if he or she does not have the maturity to understand the nature and consequence of the act. So, we can see that Section 83 points to the fact that the maturity of a minor from seven to twelve years old should be considered. There is no law protecting someone from the age of thirteen and above, but if we consider checking the maturity of a minor from the age of seven to twelve then it is for sure that anybody above twelve should be checked for maturity. It has to be understood that everyone starts to have sexual desire and get sexually attracted once they reach puberty.[508] So, it's not uncommon for a minor to engage into sexting or watching pornography. We should value their privacy too and should consider giving them their personal liberty instead always choosing for them as if we own the body of every individual under 18years. Another thing we should try more is that, make our children comfortable so that they can speak with us on these private matters, because sex education is highly recommended for these youngsters. We should try and stop the spread of child pornography and make their private data safe by modifying the laws instead of asking them to sacrifice their liberty and bodily integrity. For example, if two minors did sext, the law should be made to protect the data, they shared with each other instead of asking them not to share any private data as such. If a major unwillingly or not

[506] Indian Penal Code, 1860 (Act 45 of 1860), s. 82.
[507] Indian Penal Code, 1860 (Act 45 of 1860), s. 83.
[508] Sexual desire and attraction of minor from the early age of attaining puberty, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3761219/ (Last visited July, 10, 2021)

knowingly involves in sexting with a minor the law should try that such explicit materials of a child should not become public and should try to keep it private by making necessary laws instead of blaming the major who did not have any clue about the age of such person. In some cases, we see 18 years old has a partner (girlfriend or boyfriend or just casual friend) of 15 or 16 years old in these cases the law should try to make sure that the data shared between them should be kept away from becoming public and respect their privacy because both of them are not doing such chat to harm each other but it is done out of love or bodily pleasure and what matters more is if the 15- or 16-year-old was matured enough to understand what he or she is engaging in.

CONCLUSION

So, I would like to conclude my paper by saying that sexting is increasing on a daily basis and the legislature should try to make less laws which violates the fundamental rights and make more laws to stop the crimes that really are concerning. Its high time that the legislature should try and make new laws to prevent crimes like revenge porn, child pornography, forcing someone to send private images or videos of themselves, or taking images or videos of others without their consent instead of banning pornography and sexting as this two comes under personal liberty of what one would watch for his or her pleasure and with whom he or she would involve in a sex chat for pleasure or for making love or just sharing pornography video with another person with his or her consent. None of this harm anybody as two or more individuals are sharing images of themselves with their own consent (privacy over bodily integrity) or is sharing videos available in adult websites with consent of each other and not to hurt anybody's modesty. Privacy is added as a fundamental right in 2017 but there are laws made before this so it's time to amend those laws and respect each other's privacy. Moreover making laws related to these acts alone cannot stop such crimes of revenge pornography, child pornography and forceful sexting, we have to find other innovative ways in the technical world to be able to stop such crimes.

CHRONOLOGICAL ANALYSIS OF REFUGEE SITUATIONS UNDER IHL: AN INSIGHT ON EXODUS DUE TO VARIOUS IHL SITUATIONS (INCLUDING TERRORISM AND THE PREVAILING CHALLENGES)

- **RUPREET KAUR**

INTRODUCTION

International Humanitarian Law, or *jus in bello* is a set of rules which seeks, for humanitarian reasons, to limit the effects of armed conflict. International Humanitarian Law is purely based on seeking to limit any suffering that is caused in war/hostilities. It is made for protecting the people who are not or no longer participate in the hostilities and also restricts the means and methods of warfare. IHL, also known as the law of war and the law of armed conflict was officially codified in the year 1977, in the Additional Protocols to the Geneva Conventions.

Some scholars state that IHL has to deal with one of the most terrible problems humans can face with one of the most complex mechanisms in which the species can plunge. The historical perspective states that IHL tries to develop the idea of Stoics to reduce the atrocity, fundamentally distinguishing between combatants and non-combatants.

The legal framework of IHL basically highlights two main principles and as stated by the International Committee of the Red Cross(ICRC)[509], these are humanity[510] and military necessity[511]. The Hague Conventions[512] of 1907, particularly Convention IV respecting the Laws and Customs of War on Land and the Regulations annexed to it, as well as the four

[509] International Committee of the Red Cross (ICRC), 'What is IHL' (18 September 2015) <https://www.icrc.org/en/document/what-ihl> accessed 9 April 2020.
[510] prohibiting the infliction of all suffering, injury, or destruction deemed unnecessary for achieving such purposes
[511] permitting the degree and kind of force required to achieve legitimate purposes of a conflict
[512] Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations, 18 October 1907, AJIL Supplement, 2 (1908), 90–117.

Geneva Conventions of 1949 and their two Additional Protocols of 1977[513], are the primary sources of conventional international humanitarian law.

In addition, an authoritative study published in 2005 under the auspices of the ICRC identified over 160 customary rules of international humanitarian law applicable in international and non- international armed conflicts.

REFUGEES CAUGHT IN WAR

Implementation of the IHL in lieu of past refugee crisis

"No one puts their children in a boat until the water is much safer than the land, i.e. their home country"

Refugees have faced mass human rights violation and forced exodus in home country as well as in host country, much greater in magnitude since the past decade with the initialization of two major cases:

- **The western invasion of Iraq:** Disrupting the socio-political paradigm of the Middle East and North African Region (MENA), inter-state conflict increased which led to 5 member nations to intervene, making this region a game of "power play". This situation resulted in intra-state disputes giving rise to civil wars, terrorist groups and refugee crises since these once respected citizens were under crossfire of power monogamy.

With their houses destroyed by airstrikes and shelling, they were forced to abandon their properties. According to the IHL, this case presents itself in international armed conflicts and is sanctioned to be implemented by the United Nations.

- **Rohingya Crisis:** A most recent and classic example of intra-state conflicts. With increased genocidal psychology and authoritarianism by the armed forces, this state

[513] Protocol Additional to the Geneva Conventions, 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions, 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609.

has gained attention in lieu of massive human rights violations(). Contrary to the above case, this situation presents itself with non-international armed conflict with the legality mentioned in article 3, common to additional protocol 2.

These cases give an example of failure of international organizations in management of these crises. Nevertheless, the doctrine of International Humanitarian Law still protects the rights of refugees and may present a case in the International Court of Justice (ICJ) for crimes against humanity under terms of IHL, Universal Declaration of Human Rights (UDHR) and the Geneva Convention. By virtue the IHL protects those which do not take part in action of warfare in any sort, such as Internally Displaced People (IDP) and more importantly the refugees in question.

VIABILITY AND IMPLEMENTATION OF IHL FROM A RECENT PERSPECTIVE:

When it comes to jurisdictional boundaries, the IRL and IHL work both simultaneously and sequentially. It is pointed out that when refugees are caught up in armed conflict, they are both refugees and conflict victims, and should theoretically be entitled to "dual protection" under both legal regimes. Refugees profit from the protections under the Fourth Geneva Convention as "protected persons."

In international armed conflict, refugees are protected as "civilians not taking an active part in warfare," while in non-international armed conflict, refugees are protected as "civilians not taking an active part in hostilities." As stated, Article 5 of the 1951 Convention provides for and anticipates that refugees would be entitled to additional rights not covered by the Convention.

However, since states may temporarily waive any of the 1951 Convention's provisions "in time of war or other grave and extraordinary circumstances," IHL could be the only safeguard available in such situations. However, any new legislation must be adapted to each person rather than applied as a whole.

REFUGEES FLEEING WAR

This section would be focusing on formulating an answer to three primary questions: a. why do refugees flee? b. Their socio-economic and health wise state during the forced migration and c. What rights are they protected under during the period of migration?
These answers would help us understand the in depth analysis of the framework of refugee fleeing war in an ongoing crisis.

(a) Why do Refugees Flee?

After the analysis of empirical data available on forced migration, many efforts and studies have been inculcated to study the condition of refugees in conflict zones[514]. The pathology could be based on two paradigms, first being personal intentions and second being dynamic or external factors contributing to forced displacement[515]. Intentions might include personal benefits based on socio-economic condition[516] and personal wishes, whereas the second one seems to be influenced by external factors such as and most commonly, an armed conflict whose examples were given above.

(b) Health and Socio-economic stature while fleeing

One of the major health concerns which arises is the spread of a communicable disease or virus such as Ebola, COVID19 etc since refugees move and reside together in large groups. Another challenge is the efficacy of healthcare service in deployment of field clinics and hospitals. Non-Profit Organizations like Red Cross have provided medical equipment and resources to camps set up by UN sub-organizations and the host country.

As far as socio-economic conditions are concerned, the refugees are forced to abandon their properties which leave them with very low economic hold. Interestingly, the majority of the

[514] Schmeidl, S. (1997). Exploring the causes of forced migration: a pooled time-series analysis, 1971–1990. Social Science Quarterly, 78, 284–308.
[515] Davenport, C., Moore, W. H., & Poe, S. C. (2003). Sometimes you just have to leave: domestic threats and forced migration, 1964–1989. International Interactions, 29, 27–55.
[516] Adhikari, P. (2012). Conflict-induced displacement, understanding the causes of flight. American Journal of Political Science, 57, 82–89.

refugees have vocational skills and are highly educated which came into Georgia[517] in 2015.These skills can be further exploited to make constructive use and generate income and develop new skill sets in UN/NGO Refugee Camps given the condition that these facilities are available.

As observed in the 2005 Human Security Report: "For four decades the number of refugees around the world has tracked the number of armed conflicts – growing inexorably, though unevenly, from the 1960s to the early 1990s, then falling commensurable as the numbers of wars declined in the 1990s[518]."

Many refugees who have been displaced by armed conflict have returned to the path. Others want to return to their country of origin and face the abuse all over again, while others become internally displaced within their state of asylum. By explicitly banning forced migration, international humanitarian law protects people from becoming internally displaced persons or refugees. The question remains whether international humanitarian law adequately protects civilians in armed conflict from all forms of forced displacement. In the absence of this, how does international humanitarian law protect displaced people trapped in a conflict[519]?

As civilians, refugees and internally displaced persons trapped in the midst of an armed conflict are entitled to international humanitarian law protection. The scope of this defence will be determined by a number of factors, including the essence of the dispute and their relationship with the force in whose hands they find themselves.

According to the Secretary-Representative General's on the Human Rights of Internally Displaced Persons, most of the displacement was triggered or resulted from violations of

[517] UN High Commissioner for Refugees (UNHCR), Study on the Socio-Economic Situation of Refugees, Humanitarian Status Holders and Asylum-Seekers in Georgia, May 2016

[518] In a 1992 report, the Secretary-General on Internally Displaced Persons identified 'armed conflict and internal strife' as a major cause of displacement. UNCHR, 'Analytical report by the Secretary-General on internally displaced persons' (14 February 1992) E/CN/4/1992/ 23, para. 18. Similarly, a group of governmental experts observed, in 1986, that 'wars and armed conflicts have been and continue to be a major cause of massive flows of refugees' (UNGA, 'Report of the Group of Governmental Experts on international cooperation to avert new flows of refugees' (13 May 1986) A/41/324, para. 31)).

[519] Phuong, International Protection of Internally Displaced Persons.

international humanitarian law committed by the parties to the conflict, such as the deliberate destruction and looting of ethnic Georgian settlements[520], as well as the use of weapons in urban areas that were inaccurately enlisted enough to tell the difference between military and civilian goals International humanitarian law, especially the Fourth Geneva Convention, seeks to protect civilians in times of armed conflict.

As a basic concept of international humanitarian law, civilians are entitled to general protection from the dangers posed by military operations. As a result, the warring sides must always differentiate between civilians and soldiers, as well as civilian objects and military goals. Attacks that indiscriminately target combatants and civilians, as well as direct attacks on civilians, are prohibited under international humanitarian law[521].

Collective punishment, pillage, hostage-taking, kidnapping, and any other act aimed at terrorising civilians are also forbidden. As a result, most forced population movements[522] could be stopped if belligerents followed these humanitarian laws.

DEPORTATIONS, FORCIBLE TRANSFERS AND EVACUATIONS IN THE 1949 GENEVA CONVENTIONS

Because of the Second World War's experience, especially the mass deportation of millions of civilians from German-occupied territories[523], The ICRC and the drafters of the Geneva Conventions felt obligated to discuss the question of population movements in occupied territories, whether for the purpose of forced labour or extermination.

[520] UNHRC, 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Follow-up to the report on the mission to Georgia
[521] Protocol I, Art. 48.
[522] Protocol I, Art. 51(2) prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population', while Protocol II, Art. 4(2)(d) prohibits acts of terrorism in non-international armed conflicts.
[523] Meron, 'Deportation of civilians as a war crime', p. 218; de Zayas, 'Mass population transfers', 213–19.

As a consequence, Article 49(1) of the Fourth Geneva Convention bans deportations and forcible transfers into and out of occupied territories, while Article 49(2) requires civilians to be evacuated 'if the population's protection or imperative military reasons so warrant.'

FORCIBLE TRANSFERS

In accordance with Article 49(1) of the Civilians Convention:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Deportations and involuntary transfers are specifically forbidden under Article 49(1). It should be remembered, however, that this clause does not preclude all types of transfers[524].

It only prohibits 'forced' or 'involuntary' transfers of people. In this context, forced transfers may include "threats of force or coercion, such as those caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons, or by taking advantage of a coercive atmosphere," as well as "threats of force or coercion, such as those caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons, or by taking advantage of the environment.

Regardless of the reason or excuse, all deportations or forcible transfers are unconstitutional.

The prohibition is absolute, with no exceptions allowed for military necessity. Alternatively, the existence of an illegal purpose, such as slave labour, is not necessary for a deportation or forcible transfer to be illegal. Similarly, the location[525] of the deportation or transfer is unimportant in determining the legality of the measure. Article 49(1) expressly forbids deportations "to the territory of the Occupying Power or to the territory of any other country, occupied or not."

[524] Prosecutor v. Krstic, IT-98-3-T, Trial Judgment, 2 August 2001, para. 529. For a discussion on the involuntary nature of deportations and forcible transfers in the ICTY jurisprudence.
[525] Henckaerts, 'Deportation and transfer of civilians', 472.

Furthermore, Article 49(1) prohibits all deportations from and forcible transfers within occupied territories. Despite the fact that they both include forced relocation, deportation and transition are two distinct concepts:

"Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State[526]."

Nonetheless, the ICTY noted that the distinction between expulsion and forcible transfer "has no effect on the rejection of such practises in international humanitarian law."

Indeed, Article 49(1) is written in such a way that it stresses the distinction between 'individual or mass forcible transfers' within a territory on the one hand, and 'deportations of protected persons from occupied territory' on the other, and emphasises that both are prohibited under international humanitarian law[527].

This is clearly the interpretation adopted by the International Committee of the Red Cross, which states: "Article 49 of the Fourth Convention prohibits all forcible transfers, as well as deportations of protected persons from occupied territory[528]."

Finally, Article 49(1) forbids any compulsory transfer or expulsion of civilians from occupied territory, regardless of whether the transfers are collective or individual in nature. The topic has been extensively debated in relation to Israeli deportations of Palestinians from the West Bank and Gaza. Israel has been deporting Palestinians, including suspected terrorists, since the beginning of the occupation of the Palestinian Territories.

[526] ILC, Draft Code of Crimes against the Peace of Security and Mankind, 'Report of the International Law Commission on the work of its 48th Session' (6 May–26 July 1996), UN Doc. A/51/10, 100.

[527] As stressed by Henckaerts, if it was to be otherwise, there would have been a comma after deportations, so as to read: 'Individual or mass forcible transfers, as well as deportations, of protected persons from occupied territory' ('Deportation and transfer of civilians', 472, fn. 8).

[528] Sandoz et al., Commentary on the Protocols, p. 1000. The Commentary also adds in a footnote: 'In fact, by using the word "nevertheless", paragraph 2 . . . clearly shows that paragraph 1 also prohibits forcible transfers within occupied territory'.

On security grounds, political leaders and other "subversive" individuals are being targeted. The Israeli Supreme Court has repeatedly upheld the validity of the deportations, interpreting Article 49 as only banning mass deportations, such as those carried out during WWII, rather than individual deportations for security purposes.

INTERNATIONAL HUMANITARIAN LAW'S APPLICABILITY CHALLENGES

The difficulties in implementing and enforcing IHL in actual conflict situations are frequently cited as a flaw in this body of law. What is the purpose of the law of armed conflict in the absence of and the effective enforcement of the rules?

Why should the aggressor countries as well as states which have their own right to self-defence apply the same rules or both law-abiding aggressors and those which intentionally break the law? Why should belligerence be curbed at all when the entire aim of war is to overcome a life-threatening enemy threat? In fact, in nearly all armed conflicts and by practically all warring parties the IHL is being violated.

Some of the war atrocities have brought indescribable horror and suffering to both civilians and combatants. However, even in the most challenging circumstances, belligerents regularly demonstrate extraordinary restraint and humanity, often going above and beyond what is needed by IHL.

A wide range of events during battle influence IHL compliance[529], including:

- **Self-regard**: Military, economic and administrative self-interest has always been the oldest and most effective motivator for limiting combat instruments and methods. The destruction of the enemy's logistical, industrial, and agricultural infrastructure, as well as the killing or displacement of large numbers of civilians, makes military invasion and occupation more difficult, and necessitates extensive humanitarian assistance and reconstruction efforts in the affected areas, particularly in territorial conflicts.

In addition, the tolerance of widespread infractions and abuse by individual soldiers undermines and drastically decreases the discipline of operating forces as a whole.

[529] International Humanitarian Law and the challenges of contemporary armed conflicts - Recommitting To Protection In Armed Conflict On The 70th Anniversary Of The Geneva Conventions - World [Internet]. ReliefWeb. [cited 2021Jul10]. Available from: https://reliefweb.int/report/world/international-humanitarian-law-and-challenges-contemporary-armed-conflicts-recommitting

- **Assumption of cooperation**: Even while IHL is binding regardless of whether an adversary respects it, the expectation of reciprocity continues to impact the behaviour of belligerents, at least in traditional conflicts involving uniformed military forces or organisations. If a belligerent is sure that the other party will treat captured civilians and prisoners of war with kindness and consideration, the belligerent is more likely to do the same.

- **Public sentiment**: especially since communication technological developments have been rapidly growing over the two last decades, the omnipresent reports by the media of continuous armed conflict can have a dramatic impact[530] on the domestic public opinion. Such reports may also spark national or international investigations, as well as domestic or international criminal prosecutions against alleged perpetrators in some situations.

TERRORISM AS A CONCERN IN INTERNATIONAL HUMANITARIAN LAW

What does terrorism entail?

There is currently no legal definition of terrorism[531] that is universally acknowledged. Terrorism, according to some people, is a subjective concept that "exists in the imagination of the beholder, depending on one's political opinions and national origins."

When the media and the average person hear this phrase, they seem to think of violent and threatening activities meant at coercing a government or a community to agree with the offenders' political demands - frequently directed against innocent targets. Is it possible that this common understanding will serve as the foundation for a worldwide legal definition of "terrorism"?

[530] Geneva D. International humanitarian law and the challenges of contemporary armed conflicts Excerpt of the Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent.

[531] Elizabeth Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Confl ict 2 (1996); Andreas Zimmermann, Commentary to Article 5: Crimes within the Jurisdiction of the Court, in Commentary on the Rome Statute of the International Criminal Court 97, 99 (Otto Triff terer ed., 1999).

Perhaps IHL will be able to help.

Article 33 GC IV, Article 51(2) AP I, and Articles 3 and 14 AP[532] II all allude to "acts of terrorism[533]." They denote an act of violence in violation of the norms of military necessity, proportionality, and distinction, with the primary goal of instilling fear in the civilian population. This definition comprises the same parts as the frequently used definition: innocent victims (civilians) as targets, a violent act as conduct, and a political objective as triggering motive, which, contrary to the Machiavellian motto, does not justify the means.

Proportionality is, in fact, one of the key principles of IHL. Terrorist acts are deemed war crimes under Article 33 GC IV, Article 51(2) AP I, and Articles 4 and 13 of AP II[534] as long as they are principally intended at civilian targets. However, the extent of application of these laws is limited: a) They only apply during armed conflict, which is defined as situations with a higher level of violence than riots and internal disturbances; b) They often refer to civilians as protected persons.

CONCLUSION

Despite the fact that international humanitarian law is meant to be a yet another solution to armed conflict, it does not support the most protective principles. It instead lays down a minimum standard within the limits of its particular purpose (namely the treatment of non-nationals in the hands of a party to the conflict).

The application of all other applicable branches of international law enhances the minimum, if not minimalist, protection provided by international humanitarian law. The re-establishment and strengthening of the role of IHL within legislation on counter-terrorism will not only result in better humanitarian results but in more compliance with the IHL, not only among States but also by non-state-armed groups subject to legislation on counter-terrorism.

[532] Elizabeth Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict 2 (1996); Andreas Zimmermann, Commentary to Article 5: Crimes within the Jurisdiction of the Court, in Commentary on the Rome Statute of the International Criminal Court 97, 99 (Otto Triff terer ed., 1999).

[533] Orina NM. A critique of the international legal regime applicable to terrorism. Strathmore LJ. 2016;2:21.

[534] Antoine Hildbrand ed., 2005). 14 Th e four 1949 GCs and the 1977 AP I apply to international conflicts (the latter including self- determination wars). Th e 1977 AP II only applies to non-international conflicts between a state and the insurgents and Article 3 common to the four GCs applies to all types of non-international conflicts.

The correct balance will help to achieve the requirements of Common Article 1 in respect and to ensure respect for the humanitarian imperatives laid down by Geneva Convention and Additional Protocols between these two legal frameworks.

NEED FOR REVAMPING THE FRAMEWORK: A REALISTIC AND ANALYTICAL APPROACH TO THE OPPOSITION PROCEDURE UNDER THE INDIAN LAW

- SHIVRAM C S GANESAN

ABSTRACT

An evaluation of the existing framework of the opposition proceeding in India under the Trade Marks Act, 1999, and comparison of the opposition procedures in the United States Switzerland and EUIPO. The Author has suggested three propositions for redesigning a realistic and analytic approach in form of Suggestion thereto.

Prologue:

In India, during the process of registration of a trade mark, one encounters two instances where the rejection or refusal of the trade mark can be invoked. The two instances can be either objection and/or opposition. The former entails the examination of the applied trade mark of the person for the registration by the examiner(s) appointed under the Trade Marks Act, 1999 (Act) who examines whether the said applied trade mark meets the requirements of the Act and the Rules made there-under namely the Trade Marks Rules, 2017 (Rules) and may also raise objections upon the scrutinize of the said applied trade mark on any ineligibility under section 9[535] of the Act (absolute grounds for refusal of registration) or

[535] Absolute grounds for refusal of registration.— The trade marks—
(a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;
(b) which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;
(c) which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade, shall not be registered: Provided that a trade mark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trade mark.
(2) A mark shall not be registered as a trade mark if—
(a) it is of such nature as to deceive the public or cause confusion;
(b) it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India;
(c) it comprises or contains scandalous or obscene matter;
(d) its use is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950).

section 11[536] of the Act (relative grounds of refusal of registration), whereas the latter is the process initiated by the brand-owner/third party (Opponent), who may be registered proprietor /right holder or prior user of the trade mark, using as enforcement remedy or strategy to protect their trade mark by opposing the said applied trade mark. An Opponent may be able to put into effect of such enforceability approach within a predetermined time when the applied trade mark (Impugned Mark) of the person (Applicant) is identical or deceptively similar (having phonetic/ aural elements and/or, structural/ visual appearance or conceptually) or is likely deceive the public and cause confusion among the general public so as to the Opponent's trade mark or filed the Impugned Mark by the Applicant with bad faith and with the intention to trade upon the goodwill of the Opponent. Alternatively, there are instances where the Opponent are simply using their rights by filing frivolous and vexatious oppositions for the purpose for claiming exclusivity and to harass/create an obstacle to the registration of the Applicant's Trademark, when on comparison the two marks may seem to be poles apart and dissimilar.

It is therefore imperative for the Applicant to choose their trade mark/ brand name carefully and should seek the opinion and advise from an IP attorney before filing it. It usually takes 6 to 15 months for registration subject to the Examination Report issued by the examiner i.e.

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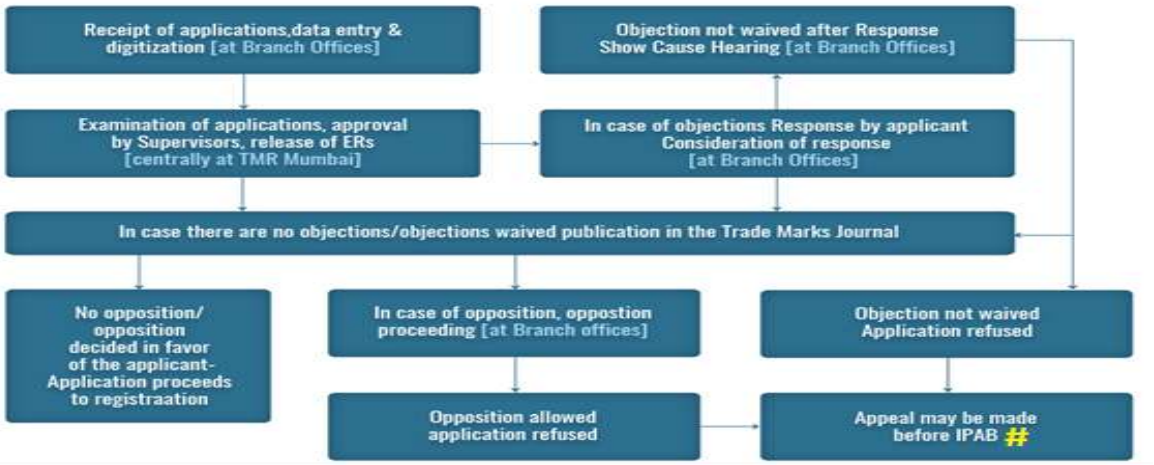
(3) A mark shall not be registered as a trade mark if it consists exclusively of—
(a) the shape of goods which results from the nature of the goods themselves; or
(b) the shape of goods which is necessary to obtain a technical result; or
(c) the shape which gives substantial value to the goods. Explanation.—For the purposes of this section, the nature of goods or services in relation to which the trade mark is used or proposed to be used shall not be a ground for refusal of registration.

[536] Relative grounds for refusal of registration.—
(1) Save as provided in section 12, a trade mark shall not be registered if, because of—
(a) its identity with an earlier trade mark and similarity of goods or services covered by the trade mark; or
(b) its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.
(2) A trade mark which—
(a) is identical with or similar to an earlier trade mark; and
(b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, shall not be registered, if or to the extent, the earlier trade mark is a well-known trade mark in India and the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.
(3) A trade mark shall not be registered if, or to the extent that, its use in India is liable to be prevented—
(a) by virtue of any law in particular the law of passing off protecting an unregistered trade mark used in the course of trade; or
(b) by virtue of law of copyright. (10) While considering an application for registration of a trade mark and opposition filed in respect thereof, the Registrar shall—
(i) protect a well-known trade mark against the identical or similar trade marks;
(ii) take into consideration the bad faith involved either of the applicant or the opponent affecting the right relating to the trade mark.

regarding the objection raised thereto and no Notice of Opposition is filed against the Applicant by any Opponent. By this way, the Applicant will avoid unnecessary obstacles and would be able to accelerate their application/registration process and obtain statutory rights and trademark protection as a result.

Existing framework under the Trade Marks Act, 1999 and the Rules made there-under:

On a flow chart, the trademark registry has described the steps[537] for processing trademark registration applications and they are listed as follows



#[538]: Appeal procedure has been transferred to the respective High Court(s). There has been no direction by the respective High Court(s) except the Hon'ble Delhi High Court[539] which has established Intellectual Property Division to deal with intellectual property matters.

An Opponent may initiate opposition(s), cancellation(s) and rectifications against the applied trade mark, as provided by the Act. Oppositions refer to the situation where the applied trademark is published in the trademark journal while cancellations and rectifications refer to the situation where the applied trademark has been received the registration.

A Report of Opposition/Rectification Applications filed at the various offices in India for the Last three years and disposal thereof is reproduced below:

Year	2018-19[540]	2017-18[541]	2016-17[542]

[537] https://ipindia.gov.in/workflow-chart.htm
[538] https://egazette.nic.in/WriteReadData/2021/226364.pdf
[539] https://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_4W1UGE3WNT9.PDF
[540] https://ipindia.gov.in/writereaddata/Portal/Images/pdf/IP_India_Annual_Report_2019_Eng.pdf
[541] https://ipindia.gov.in/writereaddata/Portal/IPOAnnualReport/1_110_1_Annual_Report_2017-18_English.pdf

TM Office	Opposition/ Rectification filed	Cases disposed	Opposition/ Rectification filed	Cases disposed	Opposition/ Rectification filed	Cases disposed
Ahmedabad	5774	4737	6228	6161	3078	2561
Chennai	9773	7356	7414	7361	5498	1776
Delhi	18176	24965	17065	16633	16885	7914
Kolkata	3419	1964	2421	2406	1695	4002
Mumbai	13692	11741	9591	8970	6726	7649
IR Division	1141	65	731	4	Not available	Not available

Under section 21[543] of the Act read-with Rule 42 to 51 of the Rules, specifically, the process of opposition is outlined, together with the detailed time-period pertaining to the opposition proceedings. The process is outlined below:

Rule 42: Notice of Opposition: *To be filed within four months from the date of advertisement in the trademark journal where the Impugned Mark is advertised by way of Notice of Opposition in Form TM-O by the Opponent.*

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[542] https://ipindia.gov.in/writereaddata/Portal/IPOAnnualReport/1_94_1_1_79_1_Annual_Report-2016-17_English.pdf

[543] Opposition to registration.—
(1) Any person may, within three months from the date of the advertisement or re-advertisement of an application for registration or within such further period, not exceeding one month in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee, allows, give notice in writing in the prescribed manner to the Registrar, of opposition to the registration.
(2) The Registrar shall serve a copy of the notice on the applicant for registration and, within two months from the receipt by the applicant of such copy of the notice of opposition, the applicant shall send to the Registrar in the prescribed manner a counter-statement of the grounds on which he relies for his application, and if he does not do so he shall be deemed to have abandoned his application.
(3) If the applicant sends such counter-statement, the Registrar shall serve a copy thereof on the person giving notice of opposition.
(4) Any evidence upon which the opponent and the applicant may rely shall be submitted in the prescribed manner and within the prescribed time to the Registrar, and the Registrar shall give an opportunity to them to be heard, if they so desire.
(5) The Registrar shall, after hearing the parties, if so required, and considering the evidence, decide whether and subject to what conditions or limitations, if any, the registration is to be permitted, and may take into account a ground of objection whether relied upon by the opponent or not.
(6) Where a person giving notice of opposition or an applicant sending a counter-statement after receipt of a copy of such notice neither resides nor carries on business in India, the Registrar may require him to give security for the costs of proceedings before him, and in default of such security being duly given, may treat the opposition or application, as the case may be, as abandoned.
(7) The Registrar may, on request, permit correction of any error in, or any amendment of, a notice of opposition or a counter-statement on such terms as he thinks just.

Rule 44: Counter Statement: *To be filed within two months from the receipt of the notice of opposition by the Applicant in Form TM-O. If the Applicant does not opt to file the Counter Statement within said two months, the Applicant is deemed to have abandoned the applied trade mark.*

Rule 45 Evidence in Support of Opposition: *If the Applicant files the Counter-Statement, within 2 months (Extendable by One Month[544]) of the receipt of the counter-statement the Opponent can file evidence, by way of an Affidavit. The Opponent can also opt to write to the Registrar stating that they do not desire to file evidence but instead intends to rely on the facts stated in the Notice of Opposition (Reliance Letter by the Opponent).*

Rule 46: Evidence in Support of Application: *Upon receipt of the evidence of the Opponent or the Reliance Letter by the Opponent, the Applicant shall within 2 months (Extendable by One Month[545]) file evidence, by way of an Affidavit. The Applicant can also opt to write to the Registrar stating that they do not desire to file evidence but instead intends to rely on the facts stated in the Counter Statement (Reliance Letter by the Applicant).*

Rule 47 Evidence in reply: *Thereafter, the Opponent is allowed by 1 month from the receipt of evidence filed by the Applicant to give rebuttal on the evidence filed by the Applicant or the Reliance Letter by the Applicant (commonly known as the rejoinder in the principle of pleading).*

Rule 50: Hearing: *Based on the notice of opposition, counter statement, and evidences/ Reliance Letter by the Opponent, Reliance Letter by the Applicant filed by the parties, the Registrar shall call for a hearing. Within fourteen days of receipt of the notice of hearing, the parties are required to notify the Registrar of their intention to appear in the matter. Finally, the matter is heard by the Registrar and decided upon merits.*

Registration or rejection: *If the registrar decides in favour of the Applicant, the Impugned Mark will be registered and registration certificate will be issued. If the registrar decides in favour of the Opponent, then the Impugned Mark shall be rejected.*

It is evident to note from the above that the entire pleading to be completed in the opposition proceeding by the Opponent and Applicant takes about 9-11 months and the adjudication of the proceeding also takes years to reach a conclusion. Thus, the underlying question is

544 Sahil Kohli v. The Registrar of Trade Marks & Anil Verma (IPAB – OA/6-8/2018/TM/DEL)
545 Sahil Kohli v. The Registrar of Trade Marks & Anil Verma (IPAB – OA/6-8/2018/TM/DEL)

whether the opposition serves as an effective remedy for the Opponent if they are the registered proprietor of the trademark or prior user.

Setbacks in the existing framework for opposition proceedings:

Nonetheless, the opposition proceeding primarily gives the Opponent an advantage by giving them a legal right to oppose against the Applicant who applied for the Impugned Mark based on legitimate grounds (absolute grounds under section 9 of the Act or relative grounds of refusal as provided under section 11 of the Act or infringement of registered trade marks of the Opponent as provided under section 29[546] of the Act) after the Impugned Mark is

[546]Infringement of registered trade marks.—
(1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.
(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of—
(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or
(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or
(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.
(3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.
(4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which—
(a) is identical with or similar to the registered trade mark; and
(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and
(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.
(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.
(6) For the purposes of this section, a person uses a registered mark, if, in particular, he—
(a) affixes it to goods or the packaging thereof;
(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;
(c) imports or exports goods under the mark; or
(d) uses the registered trade mark on business papers or in advertising.
(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.
(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—
(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or
(b) is detrimental to its distinctive character; or
(c) is against the reputation of the trade mark.

published in the Trade Mark Journal. The pleas, claims and contentions in the Notice of Opposition must be in accordance with Rule 43 of the Rules. However, upon the Impugned Mark been opposed there are several ways to categorize for the setbacks:

Setbacks faced			
Opponent	**Applicant**	**Trademark Registry/ Judicial process**	**General Public**
• Multiple proceeding to be initiated by the Opponent to safeguard their lawful right by filing civil suit or criminal complaint;	• Aggrieved with frivolous and malicious proceeding and to wait for the statutory rights of the trademark; • Uncertainty and clarity of the future of the trademark and to alternative remedy except by	• Lack of adequate officers to adjudicate the opposition; The same is only required to adjudicated either by Assistant Registrar/ Deputy Registrar or the Registrar • Excess backlog of the pending matter • Limited power to the Registrar for adjudication[547].	• Confusing in the market when the Opposition proceeding is sub judice

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly.

[547] Section 127 In all proceedings under this Act before the Registrar,—
(a) the Registrar shall have all the powers of a civil court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of documents and issuing commissions for the examination of witnesses;
(b) the Registrar may, subject to any rules made in this behalf under section 157, make such orders as to costs as he considers reasonable, and any such order shall be executable as a decree of a civil court:

• Increased cost of litigation • Relief under opposition do not give ad-interim injunction for unfair usage of the Impugned Mark by the Applicant • No cooling period to stop the unfair usage of the Impugned Mark by the Applicant	way of settlement with the Opponent • Fear of losing the trademark and amount time, money, energy and hard work wasted in creating the brand • To defend generic trademark registered by the Opponent and the same may lack inherent inherently distinctive and being common to trade.	• Right to appeal from the decision of the Registrar (accepting/rejecting the opposition is to be transferred to the respective High Court(s) or to appropriate forum, in view of abolishment of the Intellectual Property Appellate Board[548] • Excessive burden to be faced by the respective High Court(s) • Requires judicial mind by necessity of technical member(s) be appointed	

Provided that the Registrar shall have no power to award costs to or against any party on an appeal to him against a refusal of the proprietor of a certification trade mark to certify goods or provision of services or to authorise the use of the mark;
(c) the Registrar may, on an application made in the prescribed manner, review his own decision

[548] *ibid:* https://egazette.nic.in/WriteReadData/2021/226364.pdf

and the same continuously to be in the market • No cost for damages are awarded			

International perspective:

There is no standard procedure for opposition set out under the TRIPS agreement and member countries are free to have their national laws pertaining to the opposition procedure. However, in the Opposition procedures are shall be impliedly governed by the general principles set out in paragraphs 2 and 3 of Article 41 wherein it is obligated to the member countries to give fair and equitable procedure and the same not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delay in the enforcement of the intellectual property rights.

However, in a working document on trademark opposition procedures prepared by the Secretariat for Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) has following observation[549] were made:

- in addition to the publication of a trademark application or a trademark registration in paper form, the application may be published in electronic form;
- the opposition may be examined by an examination officer, a collegial body of examiners or a board including a trademark judge;
- the opposition system may permit any person to lodge an opposition, limit the entitlement to file an opposition to persons having a legitimate interest, or specifically define the circle of persons entitled to bring an opposition;

[549] https://www.wipo.int/edocs/mdocs/sct/en/sct_17/sct_17_4.pdf

- the opposition period may consist of one single, non-extendable term, or of an initial term and several extensions;
- the different procedural steps may be as follows:
  - notice of opposition submitted by the opponent;
  - formal examination of the notice of opposition by the Office;
  - notification of the opposition to the applicant or holder;
  - exchange of further evidence;
  - final decision by the Office;
  - settlement negotiations may take place between the parties during the time the initial opposition period is extended, while the opposition proceedings are suspended on joint request of both parties, or during a so-called "cooling-off" period starting after the opposition has been notified to the applicant or holder;
  - an extension of time limits may particularly be available in the period during which the parties exchange arguments and evidence;
  - against the final decision of the opposition body, an appeal to a specific board of appeals at the Office, a specific government commission, an appointed appellate tribunal, the courts in general, or a specific trade or patent court may be possible.

India has ranked 48th in the list of top 50 innovative countries in the World Intellectual Property Organization (WIPO) global ranking[550] for 2020. In view of the above an analysis and comparison on the opposition procedure adopted by the United States of America, Switzerland and European Union Intellectual Property Office (EUIPO) are set out forth:

USA

USA has ranked 3rd in the list of top 50 innovative countries in the World Intellectual Property Organization (WIPO) global ranking[551] for 2020

Upon the applied trademark is published in the Official Gazette, the Opponent can file a notice of opposition on relevant grounds (Absolute grounds; non-compliance of formal requests; Abandonment of mark; Fraud; Dilution), within 30 days (extendable up to 30 days

[550] Ibid: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf
[551] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf

and maximum up to 180 days) before the Trademark Trial and Appeal Board (TTAB) of the USPTO. If no opposition is filed within the prescribed period, the application proceeds for registration.

If a notice of opposition is filed, the TTAB issues an institution order and the same is duly served upon the applicant and the applicant is required to file an answer within the prescribed period of 40 days (extendable upon request)[552]. If no response is filed, a Notice of Default is issued and the applicant is required to show cause for the same, failing which the application is abandoned.

Afterwards, the parties are required to enter a Discovery Conference within 30 days, wherein the parties discuss their respective claims and evidences and subsequently are required to file their respective evidences within the prescribed period of 30 days and 15 days for the opponent to file a rebuttal to the applicant's evidence.

Once the pleadings are complete, the matter proceeds ahead for hearing with the TTAB, which can be reconsidered upon request of any party within 30 days. An appeal against the decision of the TTAB may be filed by any party in the Court of Appeals for the Federal Circuit or request a new trial before the U.S. District Court within the prescribed period of 2 months[553].

India has almost identical procedure when compared to the procedure adopted by the USA.

Switzerland: Switzerland has ranked 1st in the list of top 50 innovative countries in the World Intellectual Property Organization (WIPO) global ranking[554] for 2020. In Switzerland, trade marks are protected by the Federal Act on the Protection of Trade marks and Indications of Source ("Swiss Trade Mark Protection Act") as well as the Trade mark Protection Ordinance. The Swiss Institute of Intellectual Property (IPI) issues guidelines on opposition proceedings.

Opposition Procedure at IPI, Switzerland

The opposition proceeding must be initiated in writing within three months. From this point on, the formal opposition is filed with the IPI. The IPI subsequently carries out an examination and, in this context, evaluates the identification of the opponent, the register or

[552] https://ipo.org/wp-content/uploads/2015/02/Trademark-Oppositions-in-the-United-State_CKrechevsky_Final_As-Published-by-ECTA_052714.pdf
[553] https://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct17/us_1.pdf
[554] Ibid: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf

application number of the relevant trade marks, and the legal scope and the grounds of the opposition. In addition, the IPI checks whether the required opposition fee has been paid by the opponent in due time.

In the event all requirements are met, the IPI sets a time limit for the counterparty to submit a written response. The counterparty's statement is usually followed by a second exchange of correspondence. The opposition proceedings are thus exclusively conducted in writing and are terminated at the latest after the second exchange of correspondence by means of a decision of the IPI, resulting in rejection or approval.

Requirement of the Opposition: The owner of an earlier trade mark may file an opposition against the registration of a later trade mark with the IPI on the basis of so-called relative grounds for refusal. In this case, the opposition must be filed within three months after the publication of the registration, stating the legal grounds for the opposition. An extension of the time limit for filing an opposition is not provided for by law. Within the same period, the opponent must also pay the official opposition fee. In the case of an international registration designating Switzerland, the opposition period begins on the first day of the month following the month of publication in the IR-register. In addition to an earlier registered trade mark, a well-known trade mark is also considered to be an earlier trade mark. Furthermore, the owner of a filed – but not yet registered – trade mark is authorised to file an opposition. Hence, owners of unregistered trade marks (in Switzerland) are entitled to file an opposition against a later trade mark, provided that the trade mark either qualifies as a notorious or well known trade mark in Switzerland or has at least been applied for with the IPI.

India has almost identical procedure when compared to the procedure adopted by Switzerland.

European Union Intellectual Property Office (EUIPO)

From the date of publication onwards, third parties i.e. Opponent who believes the trade mark should not be registered have three months to object. The underline motive for objecting can be earlier right or absolute ground.

Earlier right: The Opponent has an earlier right (or more than one) and believes that Impugned Mark will, if registered, conflict with it

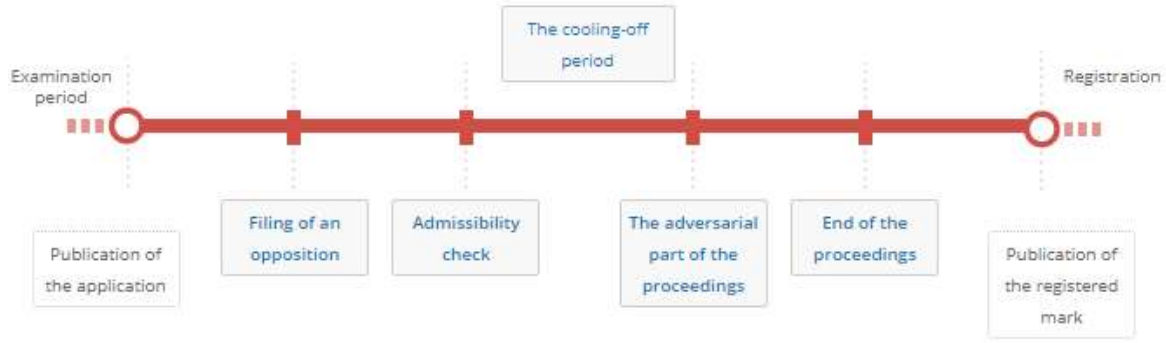
Absolute Ground: The Opponent considers that mark s Impugned Mark should not have been accepted, then they can invoke any ‘absolute ground' that they deem see fit. Absolute grounds are requirements that Impugned Mark needs to satisfy like being distinctive, non-descriptive

of the business the Applicant are in and clearly represented. To oppose Impugned Mark, they should send a corresponding communication to the Office explaining why they believe the trade mark should not be registered. This method is called 'third party observation' and it is free of charge. However, it should only be used when a serious reason for contesting the trade mark exists. Once the observations are received, the Office will issue a receipt to the person making the observations (the 'observer'), and the observations will be communicated to the Applicant. Thereafter, the observer will not receive any further communication from EUIPO. In particular, the observer will not be informed about the outcome of any re-examination of the application.

Opposition procedure in EUIPO[555]

As a matter of fact, one in five applications for EU trade marks is opposed by the owners of trade marks that are already on the market. Decisions on these disputes are made after both parties, the applicant and the opponent, have submitted evidence and arguments. The applicant can minimise the risk of opposition by searching for potential conflicts before they apply.

The following diagram will give an overview of the various steps of the opposition proceedings:



India does not have the pre- registration method for objecting as adopted by EUIPO.

REVAMPING FRAMEWORK IN THE INDIAN OPPOSITION PROCEEDINGS: NEED OF THE HOUR:

There is the need of the hour in revamping the existing framework as a suggestion the Rules pertaining to opposition may be amended to the following:

- **Suggestion No. 1**

[555] https://euipo.europa.eu/ohimportal/en/registration-process

Rule 42: Notice of Opposition: To be filed within Three month from the existing Four months from the date of advertisement in the trademark journal where the Impugned Mark is advertised by way of Notice of Opposition in Form TM-O by the Opponent.

Rule 42A: Preliminary maintainability of the Notice of Opposition: The right to object to Preliminary maintainability of the Notice of Opposition should be adjudicated before the Notice of Opposition is served upon the Applicant. The frivolous can be dismissed straight-way and the Applicant Impugned Mark would b get the registration at the earliest.

Rule 44: Counter Statement: Only upon the maintainability, of the Notice of Opposition Applicant to file Counter Statement within One month from the existing Two months from the receipt of the notice of opposition on merits by the Applicant in Form TM-O. If the Applicant does not opt to file the Counter Statement within said two months, the Applicant is deemed to have abandoned the applied trade mark.

- **Suggestion No. 1A**

Alternatively,

Merger Rule 42: Notice of Opposition (Initial Notice of Opposition) To be filed within Three month from the date of advertisement in the trademark journal where the Impugned Mark is advertised by way of Notice of Opposition in Form TM-O by the Opponent

Rule 42A: Preliminary maintainability of the Notice of Opposition: To be filed within Fifteen days: The right to object to Preliminary maintainability of the Notice of Opposition should be adjudicated before the Notice of Opposition is served upon the Applicant. The frivolous can be dismissed straight-way and the Applicant Impugned Mark would b get the registration at the earliest.

Rule 45 Evidence in Support of Opposition: within One month to be file evidence, by way of an Affidavit. The concept of Reliance Letter be deleted.

And **Merger Rule 44: Counter Statement with Rule 46: Evidence in Support of Application:** Applicant to file Counter Statement along-with evidence by way of an Affidavit within One month from the receipt of Notice of Opposition.

Rule 47 Evidence in reply: Thereafter, the Opponent be allowed by 15 days from the receipt of the Counter Statement evidence filed by the Applicant.

Rule 50: Hearing: Based on the notice of opposition, counter statement, and evidences filed, the Registrar shall call for a hearing. Within fourteen days of receipt of the notice of hearing, the parties are required to notify the Registrar of their intention to appear in the matter. Finally, the matter is heard by the Registrar and decided upon merits.

Rule 50A: Expedite Hearing: The parties should be allowed for expedite hearing, in case of urgency by filing application for preponement of hearing and to be heard at the earliest.
The above suggestion would help in reducing the time-line and the process of the pleading would be completed within 3- 5 months as compared to the existing 9-11 months.

- Suggestion No. 2

For a speedy decision in the Opposition procedure, it is necessary to appoint a Fast Track Redressal Mechanism Forum in addition to the Registrar and technical members

- **Suggestion No. 3**

A cooling-off period should be given where the opponents and applicants seek to resolve their issues through arbitration and the applicant has the fair level of exclusivity over the exploitation of innovation except when there is bad faith or deception or causes confusion among the general public. During this Cooling-off period settlement agreements and no coercive should be taken.

CONCLUSION:

Fact-Check: The number of trademark applications in India has reached over five million, as of June 10, 2021. M/s. Greenstarline Udyog Private Limited has applied to register the trademark "SONALI FOOD" in class 30 under the trademark application number 5000000[556] and as on July 15, 2021 a trade mark bearing application 5046500 has be applied to register the trademark ROXXIT in class 21[557]. In the interest of stakeholders, the opposition proceeding should be revamped and streamlined. The suggestion would help in better enforceability actions by the Opponent without going to the Courts and the more innovation which will ultimately India's ranking at the global level.

[556] https://ipindiaonline.gov.in/eregister/eregister.aspx
[557] https://ipindiaonline.gov.in/eregister/eregister.aspx

THE INDIAN JURISPRUDENCE OF THE RIGHT TO PRIVACY AND ITS IMPLICATIONS FOR THE WOMEN OF INDIA TODAY - A CRITICAL ANALYSIS

- **JOANNA ESTHER SHALINI**

ABSTRACT

Article 21 of the Constitution of India states that no person shall be bereft of his life or personal liberty except consistent with procedure established by law. The Constitution of India doesn't explicitly perceive the "right to privacy" as a fundamental right under this article. Recently, in the case of ***K. Puttaswamy v. Union of India (2017)****, a nine-judge seat of the Supreme Court held that the right to privacy is an inalienable fundamental right that is founded on values such as dignity which underlie all our fundamental rights. At its center, it implies the "right to be left alone." Likewise, this fundamental right protects a person's personal decisions and information from interference.*

What are the ramifications of this judgment for women's rights in the present day context? As Justice D.Y. Chandrachud states, "feminist legal theory has always had an ambivalent relationship with the right to privacy". In what follows, I argue that the right to privacy as conceived within the Puttaswamy judgment has the potential to rework the landscape of the legal regulation of women's lives.

This paper will cover three main areas, the first part will trace the evolution of the Right to Privacy in the Indian jurisprudence. The second part will critically analyse the judgement put forth in the Puttaswamy Case. And finally, the third part will revolve around the extent of application of the judgement for protecting a woman's right to privacy, in the present day context.

Keywords: *Right to Privacy, Feminism, Puttaswamy Case, Fundamental Right, Women's Rights, Constitution of India*

1.1 Introduction

Privacy is an inherent human right that is enjoyed by every human being and enables an individual to lead a dignified life. Black's Law Dictionary defines privacy as the "right to be let alone" and the Anglo–Saxon jurisprudence stated that the right to privacy focuses mainly on protecting "private" spaces, being the home, from state interference on the belief that "a man's home is his castle" and he exercises absolute power within that space[558]. When this protective boundary of an individual is invaded, mishandled or intruded illegitimately by the Government or other individuals, it becomes a problem.

Privacy is a fundamental human right recognized in Article 12 of United Nations Declaration of Human Rights (UDHR), Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and in many other international treaties. In India, Right to Privacy has not been explicitly mentioned as a fundamental right in the Indian Constitution. However, in the light of recent judicial pronouncements of the Supreme Court, the Right to Privacy has been recognized as a fundamental right under Article 21 of the Indian Constitution.

The Puttaswamy Case was considered a game changer in this regard as it expanded this right to protect intimate relationships, such as the family and marriage from state intervention. It also covered within its ambit individual autonomy by preserving a person's bodily integrity, as well as his/her autonomous decision making capacity. Privacy was also seen to extend to other aspects, including bodily protection from state surveillance, dignity, confidentiality, compelled speech and freedom to dissent or to move or think. The most important highlight of this judgement was that all the nine judges unanimously placed the 'individual' in the heart of privacy and that a "private space" is a creation of the individual and that it warrants constitutional protection. It acknowledged that privacy at its core, is the inalienable right of an individual, intrinsically bonded with his/her life.

What does this judgement mean for a woman in India ? Are we asking 'the woman question'?

As Justice D.Y. Chandrachud states, "feminist legal theory has always had an ambivalent relationship with the right to privacy". In what follows, the author aims to trace the evolution

[558] Peter Semayne v. Richard Gresham, 77 ER 194

of the right to privacy in India and to analyse whether the judgement as conceived in the Puttaswamy case has the potential to reshape the landscape of legal regulation of privacy in women's lives as opposed to the judgements from the latter years.

1.2 The Indian Jurisprudence of Right to Privacy

The Right to Privacy isn't explicitly stated within the Constitution. Hence, it is not mentioned in Part III of the Constitution that deals with Fundamental Rights. The right to privacy was a concept that was birthed in the field of Tort law. Under this law, a replacement explanation for action for damages as a result of "unlawful invasion of privacy" was recognized.

Right to Privacy has never been listed as a fundamental right and has always been a subject of interpretation by the judiciary. The 1954 case of **MP Sharma v. Satish Chandra**[559], was the first privacy dispute that arose. This was the primary major judgement which addressed Right to Privacy in India. In this case, the petitioner challenged the constitutionality of search and seizure of documents from a person against whom a first information report had been lodged. The Court was to ascertain whether search and seizure activities of the Government would in any way breach the right to privacy. The Apex Court in this case held that the right to privacy was not a fundamental right under the Indian Constitution. It was considered to be a reasonable restriction of the freedoms and it could not be held unconstitutional. Thus, the Supreme Court decided in favour of the practice of search and seizure.

In 1962, in the **Kharak Singh v. State of UP**[560] case, the Court examined the power of police surveillance when dealing with acquitted criminals. The case dealt with the issue of state surveillance. The petitioner was a dacoity accused who was let off citing lack of evidence. However, he was regularly surveilled by police authorities and he approached the court. The petitioner claimed an infringement of Article 19(1)(d) and Article 21 of the Indian Constitution. The judgement was ruled in favour of the police, saying that the right of privacy is not guaranteed under the Constitution.

[559] MP Sharma v. Satish Chandra, 1954 AIR 300
[560] Kharak Singh v. State of UP, 1963 AIR 1295

Both **M.P. Sharma**[561] and **Kharak Singh**[562] followed the law set by **A.K. Gopalan v. The State of Madras**[563]**.** Here, the Court stated that privacy is ensured according to the "procedure established by law". This meant that protection of privacy can be claimed by an individual under Article 21 only if a procedure is laid down in an enacted law. However this judgement was overruled 1978 in **Maneka Gandhi v. UOI**[564] by relying on the judgement of the **R.C. Cooper v. UOI**[565]**.** In this case the ambit of Article 21 was broadened to include within it a variety of rights. This paved a way for an interpretorial change in the jurisprudence of privacy.

The first case where the Supreme Court expressly declared Right to Privacy as a fundamental right was the case of **Gobind v. State of MP**[566]**.** The Supreme Court held that the right to privacy arises from both article 21 and article 19, the freedom of speech and movement. The Court further observed that the right to privacy included "personal intimacies of the home, the family marriage, motherhood, procreation and child bearing". However, the Supreme Court held that Right to privacy was not an absolute right and is subject to "the procedure established by law". The judgement of **R. Rajagopal v. State of T.N.**[567] case also held that the violation of the right to privacy is a fundamental rights violation.

Fast forward to 1997, the case of **PUCL v. Union of India**[568] popularly known as telephone tapping cases, the Supreme Court extended the ambit of this right and unequivocally held that individuals had a privacy interest in the content of their telephone communications. Some other cases include the **District Registrar and Collector, Hyderabad & Anr. v. Canara Bank & Anr**[569], **Petronet LNG Ltd v. Indian Petro Group & Anr**[570] **and Selvi & Ors. v. State of Karnataka & Ors.**[571] In these cases, the Supreme Court traced the roots of the right to privacy to personal liberty, freedom of expression and freedom of movement which are

561 Ibid, 2
562 Ibid, 2
563 AK Gopalan v. State of Madras, AIR 1950 SC 27
564 Maneka Gandhi v. UOI, AIR 1978 SC 597
565 RC Cooper v. UOI, AIR 1970 1 SCC 248
566 Gobind v. State of MP, 1975 AIR 1378
567 R. Rajagopal v. State of T.N.,1994 SCC 632
568 PULC v. Union of India, AIR 1997 SC 568
569 District Registrar and Collector, Hyderabad & Anr v. Canara Bank & Anr, AIR 2005 SC 186
570 Petronet LNG Ltd v. Indian Petro Group & Anr, 5 CS(OS) No. 1102 of 2006
571 Selvi & Ors. v. State of Karnataka & Ors., (2010) 7 SCC 263

fundamental rights guaranteed by the Indian Constitution. The Court concluded that right to privacy deals with persons alone and that a State can intrude upon a person's privacy only in three cases, if there's a legislative provision, by way of administrative or executive order or by complying with a judicial order. The bench also held that the right is only available to persons and thus corporations and companies cannot claim a fundamental right to privacy. The Court further held that a right to privacy claim can be only brought against a State. The Supreme Court also acknowledged the distinction between physical and mental privacy through these cases and stated that, "Subjecting a person to techniques such as narco analysis, polygraph examination and the Brain Electrical Activation Profile test without his or her consent violates the subject's mental privacy."

Thus, through these series of judgements, it can be observed that the right to privacy was slowly being recognised in Indian jurisprudence as a fundamental right primarily through Article 21. In want of a specific law on privacy, this right is legally claimed under the Information Technology Act, 2000.

1.3 A Critical Analysis of the 'Puttaswamy Case'

1.3.1 Case Brief

On August 24, 2017, the Supreme Court pronounced the landmark judgement for the case, **Justice K.S. Puttaswamy v. Union of India.** The case began with addressing the issue of whether the right to privacy was a fundamental right. This issue was raised in 2015 regarding the legal validity of the Aadhaar database. The Court unanimously declared without even a single dissenting opinion that the Right to Privacy is a constitutional right and an integral part of Part III of the Constitution of India. The Bench also held that the Right to Privacy falls within the ambit of Article 21 of the Constitution. The Apex Court while deciding this judgement, overruled the judgements of the **M.P. Sharma**[572] case and the **Kharak Singh**[573] case through a bench of 9 judges. The Supreme Court, however, held that Right to Privacy is not an 'absolute right' but a partial one.

[572] Ibid, 13
[573] Ibid,11

1.3.2 Facts of the case

This case began when a petition was filed by Justice K.S. Puttaswamy, a retired judge of the Karnataka High Court with regard to the Aadhaar Project. This project was led by the Unique Identification Authority of India (UIDAI). The Aadhaar number was a 12-digit recognizable proof number given by the UIDAI to the citizens of India. The Aadhaar project was connected with a few government assistance plans, so as to smooth out the cycle of administration conveyance and eliminate bogus recipients. Thus, the appeal initiated by Justice Puttaswamy was a case which tried to challenge the constitutional legitimacy of the Aadhaar Card program.

In 2015, the argument for the procurement of demographic biometric data by the government was presented before a three judge bench of the court on the grounds of infringement of the right to privacy. The Attorney General of India argued against the existence of this fundamental right. He referred to the judgements in M.P. Sharma and Kharak Singh. The three Judge Bench went against this opinion by observing a few judgments of the Supreme Court in which the right to privacy had been held to be an intrinsically ensured basic right.
The case was then alluded to a Constitution Bench to examine and determine the accuracy of the judgments set down in **M.P. Sharma**[574] and **Kharak Singh**[575]**.** On 18 July 2017, a Constitution Bench of nine adjudicators addressed the issue.

1.3.3 Decisions

The Puttaswamy case judgment is 1047 pages in length. The Supreme Court conveyed the judgment through six separate opinions. To summarize the whole judgment in a couple of lines, the Supreme Court held that security is an intrinsically shielded right arising principally from Article 21 of the Constitution. The court unanimously held that life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of an individual, equality between human beings and the quest for liberty are the underlying pillars of the Indian Constitution.

[574] Ibid, 2
[575] Ibid, 2

Like different rights which structure the freedoms secured by Part III, including Article 21, protection is certifiably not a flat out right. A law which infringes upon protection should withstand the standard of reasonable limitations on fundamental rights. Be that as it may, the Court did pronounce three tests which are to be fulfilled in order to encroach upon an individual's basic right to protection of privacy. They are the legality of the object, the need for a legitimate aim and proportionality. If the given tests are satisfied, the State can encroach an individual's key right to privacy. In the event that protection is disregarded with regards to a subjective State, the activity would draw in a "reasonability" test under the Article. For example, phone tapping guidelines would embroil both a resident's ability to speak freely (Article 19(1)(a)) just as her own freedom (Article 21). Under the Court's investigation, such a law would need to be legitimate under one of the particular limitations in Article 19(2), as well as being "reasonable, just and fair" as needed by Article 21. This was held in the **PUCL case**[576]. The Court, likewise proclaimed that privacy is innate to every single principal freedom in Part III of the Constitution, for a dignified existence subject to reasonable restrictions of public health, morality and order. Privacy thus, has both a positive and a negative connotation. The negative aspect controls the state from intruding upon the life and individual freedom of a citizen. Its positive aspect forces a commitment on the state to take all fundamental means to secure the protection of the person.

The judgment further asserted three parts of the crucial right of privacy, specifically, interruption with an individual's physical body, informational privacy and privacy of choice and thereby covered the body and mind, including decisions, choices, information and freedom. The court augmented the ambit of protection and said it incorporates at its center the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation which enable an individual to live a dignified life. The court stated that privacy likewise implies a "right to be left alone". Personal choices governing a way of life are intrinsic to privacy. Privacy is not lost only in the light of the fact that the individual is in a public spot. Privacy attaches to the person regardless of the place he/she finds herself in. The court also implied that this is a right which ensures the internal circle of

[576] Ibid, 8

the person from obstruction from both State, and non-State entertainers and permits the people to settle on self-ruling life decisions.

This judgment overruled the choice in **MP Sharma**[577] which holds that the right to security isn't ensured by the Constitution. The choice in **Kharak Singh**[578] to the degree that it holds that the right to privacy isn't ensured by the Constitution was overruled too. The judgement also acknowledges technological advancements and urges that the understanding of the Constitution should be tough and adaptable to permit people in the future to adjust its substance, remembering its fundamental highlights. By making privacy an intrinsic part of life and liberty under Article 21, it is not just a citizen, but anyone, whether an Indian national or not, can move the constitutional courts of the land under Articles 32 and 226, respectively, to get justice.

1.4 Privacy and Women's Rights in India

1.4.1 Are we asking the "Woman Question"?

Gender structures our mind of what is private and what isn't. For instance, sexual relations are by and large viewed as a private issue and though the state doesn't wish to meddle in marital rape, it then again enforces restitution of conjugal rights through its courts and regulates adultery through criminal sanctions. Unmistakably the limit of the private isn't sex, but marital sex. Sex outside marriage, for example, in adultery or sex work, is denied a similar degree of security assurance as sex inside marriage. After **Suresh Kumar Koushal v. Naz Foundation**[579] case homosexual conduct is likewise inside the domain of public guideline. Taken together, these models show that the comprehension of security with regards to sexual exercises depends on sexual hetero normativity. Women's activist researchers have exposed the thought that there is no distinction between the domains of public and private. Ideas of privacy safeguard certain spaces, for example, the home and connections like marriage from state scrutiny. This limit can leave people inside these spaces and relations defenseless against abuse, coercion and discrimination. Originations of the

[577] Ibid, 3
[578] Ibid, 3
[579] Suresh Kumar Koushal v. Naz Foundation, Civil Appeal No. 10972 of 2013

home as a position of "repose" and "sanctuary" crush lived encounters of women for whom these spaces are frequently destinations of persecution and brutality[580]. Terming something as private can likewise prohibit it from the open arena. For instance, stamping homosexuality as private can genuine the assessment that homosexuality is adequate, as long as it's anything but out in the general population and transgressing such boundaries of the public and private can invite social and legal backlash in the form of violence or the deployment of legal sanctions. Spatial thoughts of privacy additionally assumes that everybody has access to private spaces. This may not be the situation for some because of financial failure, or for same-sex, intercaste, or interfaith couples. In these circumstances, the private space of the home can be stifling in its control and the open arena may be a position of relative autonomy.

In the light of the above stated issues, 'different voices' of women should be incorporated in the predominant constitutional discourse. The notion of sisterhood and the assumption that there can be a commonality of interests and aims amongst all women must be done away with[581]. In other words, the author argues that each feminist struggle is incomplete without its specific ethnic and historical context. The tendency to assume a fixed definition of woman or a rigid standard for women's experiences that is homogenizing, exclusionary and oppositional and treating them as a single analytical category has serious implications especially with the issue of privacy. This problem urges us to ask the "woman question". The 'woman question' as suggested by Katherine Bartlett asks about the gender implications of a social practice or rule. In law, the question aims to examine if the values and experiences specifically adhering to women have been taken into account, if existing legal standards put women in a disadvantaged position or how these legal fallouts can be rectified[582]. The Puttaswamy judgment clearly addresses 'the woman question'. The move away from spatial and relational framings of the right to privacy, to decisional and informational privacy, has opened up new dimensions for women's rights and empowerment. By grounding the right to privacy in individual autonomy and control over important areas of one's life, this right empowers women to question social and legal structures that limit their ability to exercise control over their body, mind and livelihood. All around, the Puttaswamy judgment accepts this thought

[580] Harvinder Kaur v. Harmander Singh, 1984 Del 66

[581] Devangana Kuthari, Revisiting Puttaswamy : A Feminist Critique - The Woman Question and the Physiological Paradigm of Abortion in Privacy, 2 IJLT 5, 6 - 9 (2020).

[582] Katharine T. Barlett, *Feminist Legal Methods*, 4 HarvLRev 829, 837–850 (1990).

that protection is grounded in singular self-determination. The view that privacy also attaches to persons and not places and a person enjoys a degree of privacy even in public spaces opens up a whole new ambit of the right to privacy.

The judgement attempts to ask and address the 'woman question'. By grounding the right to privacy in individual autonomy, this right empowers women to question the social and legal structures that limit their ability to exercise control over their bodies, minds, and lives. The Puttaswamy judgment considers to be fundamental the personal choices protected by the right to privacy. This includes decisional, informational, sexual and reproductive autonomy. The author now aims to probe into the extent of application of the judgement in the aforementioned areas of autonomy.

1.4.2 Informational Autonomy

The Puttaswamy case emerged with regards to the forthcoming test to the lawfulness of the Aadhaar. A significant worry with the Aadhaar is that by amassing and conglomerating data about people, it can make frameworks of surveillance over the whole populace. Be that as it may, surveillance as a procedure of force and a strategy for social control is authorized every day upon womens bodies. Women are subject to constant scrutiny of their bodies, actions, and choices. This surveillance operates through peer policing, and results in judgment, shaming, ridicule, exclusion, and abuse, or threat for the nonconformity with gender norms[583]. Social surveillance pushes women towards self-censorship and adherence to gender norms. Accordingly, policing of women's bodies and conduct is fundamental to the support of male centric society. This likewise hinders self determination and self-development, the ideas that are foundational to the right of privacy. [584]

While the implementation of sex standards through peer policing isn't restricted to women, they, alongside sexual and gender minorities, are more powerless to constrained congruity since they are more susceptible to coerced conformity since they face a higher likelihood and

[583] Neil M Richards, "The Dangers of Surveillance," 126 HarvLRev 1934, 1934–65 (2013).
[584] Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics," 89 CalLRev 643, pp 643–740 (2001).

increased severity of social sanction. Surveillance gives public authorities power over an abundance of data about an individual and can deliver such people helpless against dynamic compulsion, through behaviors like stalking or extortion. The lived encounters of women as subject to social observation of their bodies and the resultant requirement of sexual orientation standards gives a vital illustration of how Aadhaar-empowered reconnaissance systems may smother rebelliousness and difference. These encounters likewise feature autonomy and equality-based concerns with other data collection exercises, such as mandatory registration of all pregnancies and early terminations[585]. In a social setting where society passes judgment on women for their sexual and contraceptive decisions, obligatory divulgence of such data may compel women in settling on such decisions and also in accessing safe and legal reproductive health services.

The gendered impact of surveillance on the autonomy of women as well as the autonomy of sexual and gender minorities to govern life with agency and autonomy also emphasises the need for strong decisional and informational privacy protections not only for individual autonomy, but also for group equality. The Puttaswamy judgment doesn't straightforwardly address the lawfulness of observation components. Nonetheless, it gives an informational tool stash to perceive the damages of observation as itemized previously. The majority judgment discovers privacy to be an "intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity." Likewise, privacy is important to protecting the "plurality and diversity of our culture". Justice Kaul in the judgement briefs about new innovations that empower surveillance and profiling and warns that "knowledge about a person gives power over that person," and that the state may utilize individual data to control people, in this way stifling contradiction. Regardless of such reformist language, be that as it may, the judgment leaves open a wide window for data collection about individuals for purposes such as national security, crime prevention and investigation, public interest, and revenue protection.

1.4.3 Sexual Autonomy

[585] Chetan Chauhan, "Govt to Monitor Pregnancies, Abortions," Hindustan Times, (Jul. 18, 2021, 8:32 PM), http://www.hindustantimes.com/india/govtto-monitor-pregnancies-and-abortions/storykHk4KcRCIswkzHNZS6qqAJ.html.

The judgment has effectively struck the passing chime for the criminalisation of homosexuality by naming the judgment in the **Suresh Kumar Koushal case**[586] as a "harsh note" in the bend of Indian privacy jurisprudence. Likewise, laws that don't perceive womens consent to sex as significant inside a marital relationship[587] can likewise be tested for abusing the right to decisional and sexual privacy. After the passing of the Protection of Children from Sexual Offenses (POCSO) Act, 2012 and the Criminal Law (Amendment) Act, 2013, the age of consent for sex has been raised from 16 to 18. This complete denial of sexual autonomy to all persons below the age of 18 may be open to constitutional scrutiny as it is a valid infringement of their right to privacy. The denial of sexual autonomy to all minors becomes especially significant in light of Section 19 of the POCSO Act, which requires healthcare professionals to mandatorily report to the police any case of sexual abuse that has taken place or is likely to take place. This means that when a minor approaches a healthcare professional for contraception, or for abortion or antenatal care, the case has to be mandatorily reported to the police, regardless of her wishes in the matter. This constitutes not only a control over an individual's fundamental personal choices but also an infringement of informational privacy. Similarly, Section 357C of the Code of Criminal Procedure expects doctors to obligatorily report sexual violence cases involving adult women victims, may also be constitutionally challenged after the Puttaswamy judgment. Likewise, the framework for the regulation of sex work under the Immoral Trafficking (Prevention) Act, 1986 will also be brought into scrutiny as it limits the autonomy of persons who engage in sexual labour out of their own volition. For example, lower class women provide financial stability for their families through the income garnered through prostitution.

1.4.4 Reproductive Autonomy

Reproductive independence includes mainly the fundamental individual decisions that are secured by the right to privacy. In the event that choices around reproduction are secured by the right to privacy, this can raise doubt regarding rules that seek to enforce a two-child norm, such as the Haryana Panchayati Raj (Amendment) Act, 2015, which disqualifies a person with more than two children from being elected to posts in institutions of local self-

[586] Ibid, 27
[587] Indian Penal Code, § 375 Exception 2, 1860 (India).
Hindu Marriage Act, § 9, 1955 (India).

government. The draft Panchayat Regulation, 2021 unveiled on the 25th of February proposes to disqualify any person from the panchayat regulations with more than two children and seeks to remove a person with more than two children from the panchayat, can also be brought under constitutional scrutiny for the right to reproductive autonomy.

1.4.4.1 Abortion

If procreative decisions are truly within the boundary of privacy according to the Puttaswamy judgement, and given that women continue to bear the bulk of childcare responsibilities, should it not be the woman's decision whether or not to abort a child for whatever reasons she deems fit? The Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 criminalises sex determination, and not abortion. However, if a woman has a right to choose to know the foetus' sex, then can the state prevent her from accessing information that will enable her to make the decision of abortion? [588]

No statutory law or court decisions recognise the right to abortion. Abortion is regulated by the Medical Termination of Pregnancy (MTP) Act, 1971. The act prohibits abortions unless medical opinion supports the need for the same on certain limited grounds granted under sections 3 and 5 of the act. A woman cannot exercise her autonomy when choosing to abort a child at any stage of the pregnancy. Thus, shifting an "intimate decision" to abort from the woman to her doctor is antithetical. The Puttaswamy judgment will, subsequently, have huge ramifications for the law on abortions and can totally overturn the MTP Act regime.

If the legal system recognises the right to abort, as Justice J Chelameswar's states in the Puttaswamy judgment, it will also have to determine the extent to which the state can intervene in the exercise of this right. Right to privacy is often framed in negative terms, as the "right to be let alone". The obligation inferred on the state is to refrain from interfering within the private boundary. But the state must be able interfere in order to create a space when an individual can exercise her autonomy. For example, in the United States, the right to abortion is protected as an "intimate decision". Feminist scholars have found it problematic that under the privacy framework the state has no affirmative obligation to provide access to

[588] Nivedita Menon, "Abortion as a Feminist Issue," Outlook (Jul. 9, 2021, 3:00 PM), https://www.outlookindia.com/website/story/abortion-as-a-feminist-issue/280902

abortion services to those who cannot access these services due to impoverishment or for other reasons.[589] The plurality opinion in the Puttaswamy judgment has addressed this concern by asserting that the state has an affirmative obligation to ensure the creation of conditions for the effective exercise of the right to privacy.

1.4.4.2 Surrogacy

Another reproductive rights issue that has as of late involved the spotlight is that of surrogacy. With the emergence of Assisted Reproductive Technology (ART), surrogacy has become more common, especially amongst couples who are unable to conceive. Surrogacy is a complex issue which poses multiple legal and ethical questions. Commercial surrogacy has been criticised within a specific stream of feminist discourse for commodifying the reproductive capacities of women.[590] Scholars have highlighted race and class considerations, since women living in abject poverty and women of colour are more vulnerable to exploitation through surrogacy.[591] Numerous cases of abandonment of babies, exploitation of surrogates and egg donors, and non-payment of promised monetary compensation are reported[592]. In India, similar conditions were voiced adding to this, the Indian judiciary had to resolve legal issues concerning the "statelessness" of youngsters born out of surrogacy[593]. Given these issues, the Union Cabinet approved the Surrogacy (Regulation) Bill in 2016. The bill attracted heavy criticism from the outset.

[589] Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 Faculty Scholarship Series 815, 817-822 (2007).

[590] Katherine Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*,68 IndLJ 205, 205-232 (1992).

[591] Judith Warner, Outsourced Wombs Opinionator, The New York Times, (Jul. 12, 2021, 9:32 AM), Outsourced Wombs - The New York Times (nytimes.com)

[592] Bindu Shajan Perappadan, A Setback for Surrogacy in India?, The Hindu, (Jul. 3, 2021, 9:30 PM), http://www.thehindu.com/opinion/op-ed/a-setback-for-surrogacy-in-india/a.
Commercial Surrogacy in India Engenderings, (Jul. 15, 2021 5:30 PM), http://blogs.lse.ac.uk/gender/2016/12/21/commercial-surrogacy-in-india/

[593] Baby Manji v. Union of India, AIR 2009 SC 84
Jan Balaz v. Anand Municipality & Ors, AIR 2010 GUJ 21

The bill allows surrogacy just for married couples and excludes LGBTQ or live-in couples, single, divorced, or widowed parents, criminalising their exercise of reproductive autonomy during this matter. The surrogacy bill also severely limits the autonomy of married couples and potential surrogates with stringent conditions and requirements for eligibility certificates for both parents.[594] This bill is vulnerable to constitutional challenge under the purview of the Puttaswamy judgement for violating the right to privacy. The nine judge bench didn't explicitly mention surrogacy, but it affirmed existing privacy jurisprudence, which has recognised personal decisions about birth and babies as being a part of reproductive autonomy.

1.5 Conclusion

The Indian jurisprudence on the right to privacy has evolved in ways unimaginable. The Puttaswamy judgement has reshaped the purview of privacy by considering it an inalienable right intrinsically wound in every individual. The judgement has emphasised on informational, decisional, sexual and reproductive autonomy enabling the individual to have better control over the decisions that shape his/her livelihood. This judgement has opened up a new paradigm with regards to the rights of women by enabling women to ask the "women question" thereby empowering her to question the constitutionality of social and legal structures that limit their ability to exercise control over their bodies, minds, and lives and to hold the state accountable for intrusion into her privacy. The court through this judgement recognizes the need for protection of privacy for the ever evolving gender identities and gender minority groups in the country to tackle issues such as surveillance. The societal norms and practices stifling abortion, surrogacy, sexual labour can now be constitutionally challenged on the notion of autonomy.

The nine judge bench have thus provided a broad and categorical affirmation of the centrality of individual liberty to the Indian constitutional regime and have stated that privacy attaches to the individual and not on the space or the relationship one holds. This paper has not analysed the fallouts of the Puttaswamy judgement. But some opinions in the judgement strike a discordant note, and hark back to references of spatial and relational notions of

[594] Surrogacy (Regulation) Bill, 2016, § 2, 3, 4, (India)

privacy, stating that "privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation". Such language can prompt a contention between the rights of an individual when pitched against the "preservation" of the institution of family or marriage. This discordance in the Puttaswamy judgment, between the logic of privacy grounded in individual autonomy and its reiteration of the language of spatial and relational privacy, leaves open the possibility that future conflicts of this nature might be resolved in favour of protecting social institutions over individual freedom. This is not a far fetched assumption as seen in the case of **Saroj Rani v. Sudarshan Kumar[595].**

Certain laws, such as the marital rape exemption, are outrightly based on gender stereotypes and normative gender roles. In other cases, gender structures the implementation of laws through judicial interpretations. Therefore, when courts categorise gender nonconforming attitudes such as being a "career-oriented" woman[596] or not cooking for one's husband[597], or asking the husband "without cause" to live apart from his parents[598] as "cruelty" for the purposes of granting divorce, they actualize and reinforce gender norms under the power of the law. This is the case when courts do not believe women speaking up about sexual violence. Such adjudicatory practices encode these gender norms into the law and thereby into the livelihood of women in general.

These laws are open to constitutional scrutiny after the Puttaswamy judgement but this is not enough to invalidate the laws. If the state can show that the infringement is a valid limitation upon the right, the law will survive nonetheless. The right to privacy simply enables the ability to question these laws and seek justification from the state for their enactment. Thus, this judgement can have an impact on the existing constitutional order only when the subsequent courts read the judgment and translate its essence into concrete constitutional protections. Particularly taking into consideration the fact that the judgment speaks in multiple voices on what amounts to permissible limitations on the right to privacy.

[595] Sarojini Rani v. Sudarshan Kumar, AIR 1983 AP 356
[596] Suman Kapur v. Sudhir Kapur, Appeal (Civil), 6582 of 2008
[597] Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511
[598] Narendra v. K Meena, Civil Appeal No. 3253 OF 2008

Determining what constitutes the rationale of the court on this issue will shape the extent of protection offered by this right. Applied consistently, this simple yet radical idea can unravel significant parts of our laws and regulations, especially those relating to gender and sexuality.

"The old order changeth yielding a place to the new." - Justice Kaul

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Puttaswamy v. Union of India, (2017) 10 SCC 1, AIR 2017 SC 4161.

MADHU KISHWAR V. STATE OF BIHAR AIR 1996 SC 1864

-VEDIKA JADHAV

Introduction

The Chota Nagpur Tenancy Act of 1908 was questioned in the Supreme court with the three-Judge bench for not giving women inheritance in some of the areas of Bihar in 1996. Under Article 14 of the Indian Constitution, it was mentioned that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."[599] This article clearly explains that no one, not even the state has any right to discriminate between people. The foundation of independence was freedom and equality for every human in Indian society. Even the creator of the Indian Constitution had to face discrimination based on Caste. In the Case of ***Madhu Kishhwar v. the State of Bihar,*** it was said that the Chota Nagpur Tenancy Act is so discriminating based on gender and it was also mentioned that this act violates the right equality of any human and the right to life. When this case was put in front of the High Court Bihar state said that it would take a long period of steps to amend the act and remove the discrimination and on this basis, the case was adjourned. Also said that if they give the right to transfer the property to female members it will increase the malpractice of Dowry which is mostly followed by the non-tribal societies.

The tribal or indigenous people are dependent on natural sources like water, forest, and land for their complete life as their lifestyle, traditions, culture, and their earning also depends on it. The Chota Nagpur Tenancy Act is mostly known as the CNT Act. The tribal women also work in farms as a farmer and also as farmer labors but even working for cultivating the land they were not been recognized. So the women suffered a lot due to the inequality for the income they get by working on the farm and long working time. The women were not given title to any land even they were not considered part of their ancestral lands. And hence there should be a government policy for the tribal women to recognize their name for their inheritance land or any other Natural sources. Around 1982 the editor of magazine Manushi named Madhu kishwar challenged The Chota Nagpur to act sections 7, 8,

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[599] https://indiankanoon.org/doc/367586

and 76 saying that they violate the right of equality and life. There only the male progeny were considered to claim the land of the jungle who have their real founders of the village and it was considered as the Riyat. In the protection of human rights act 1993 it was said that it is right to life equality liberty and dignity of every single individual which was guaranteed by the constitution and it was enforceable all the Indian courts. As a human, even the state doesn't have any right to discriminate against any person on any kind of basis. As per article 15 Women also have equal rights like any other male person. Also in the Hindu Succession Act and the Indian succession act, it was mentioned that women from the scheduled tribe can also get the instead of their parent's husband or any brother as Women's are also equally part of their family and also equal part of any property from their inheritance.

The fact of the case

In the petition by the editor of magazine Madhu kishwar that the provisions of Chota Nagpur Tenancy Act 1908 was challenged in the supreme court under article 32 of the Indian Constitution which only provides succession property to the male person of any family and this is the discriminating fact against women which violates the article 14 of Indian Constitution. The state of Bihar set up a committee that examines the matter in detail and also considered all the problems and legislation to amend the law. The Bihar state government said that no one is not in the favor of changing any of the provisions of the act as the land of tribal may be alienated which will not be in the interest of the tribal community at the present. Then the council recommended that the Proposal should be published all over the tribal community in their various sub-caste and their opinion should be taken if they wanted to change the existing law.

Procedural history

Around 1986 the state of Bihar said that they would take some steps to amend the act and remove the gender discrimination matter from 8 and the case was adjourned at that time. The state government forms a committee of Chief Minister cabinet minister and legislators and parliamentarians as the tribal advisory board to survey the appeal of amending the acts of Chota Nagpur tenancy act to form the gender equality and equal rights for the inheritance

property rights for tribal women's.[600] The committee said that even if the tribal community was dominated by male people the women were not completely neglected from the society. They said that females have the right to usufruct in the father's property till she not get married.

And after marriage, she has the right to her husband's property. But she does not have any right to share or transfer the property to anyone else.

When the widow died without any issue the property she has was given to the legal heirs. The committee said that if they give the right of inheritance property to the women's it can cause to increase the number of alienation of the jungle land of tribal people to the non-tribal people. They also estimate that if they give the right to transfer the property to the women in the tribal community can cause in increasing the number of dowry like traditional issues. And therefore the majority of the court's judgment decline the provision to Amen the act as it violates the right to equality. And also said that the amending of the provisions will cause huge chaos in the state laws. The court felt that saying the customary laws of the tribal community peoples violates the right to equality under Articles 14 and 15 and the right to life under Article 21 of the Indian Constitution. And they said that it would form an abundance of similar claims to bring out the personal laws with the Hindu Succession Act and Indian succession act of India. Then they observed that the living of a widow after her husband's death was dependent completely on that property from her husband's and so they will lose their livelihood. The livelihood was the right to life. Hence the court decided that any female relative of the last men of their family could hold the property as far as she is depending on it and her livelihood. But the rights in sections 6 and 7 for the males were made as suspended as far as the right to life as livelihood is valid.

Argument on behalf of the Appellant

The Chota Nagpur Act discriminates based on gender. Every woman has the right to life and the right to equality under the constitution of India. The person having different religion or caste but they all are same in front of the Indian constitution. Women are always treated unequally with a male even in the there inheritance property they were not given a share of it and all their land and property was given to the men leading in their family which is biased for women. Women's before the marriage depends on her father and after marriage

[600] Julufa Islam Choudhary, complied by Ahmed Raza, published by Human rights law network, January 15.

on her husband. So after the death of her father or husband, she will face a lot of problems for her living as not having anything of her on which she can spend her day to day life. The Hindu Succession Act, Indian Succession Act, and the Shariat law all have equal rights for the women of that religion but there was not mentioned the tribal community and hence it comes under the constitution of India. Under Articles 14 and 15 both the male and women should treat equally and under article 21 the women have the right to life. And also it was mentioned that even the state cannot discriminate based on sex, caste, religion, or language.

Argument on the behalf of the Defendant

Under the Chota Nagpur Act, women are not discriminated against based on gender, and also it does not violate any right of the women under the constitution. The Act was followed by the customary laws of the tribal people. The women of the tribal community have the right to the property of the father till she gets married and after the marriage, she depends on the husband and his property. The committee established examined the tribal situation and was said that the tribal people feel that if they give the inheritance right to property to the women then the land of the jungle held by the tribal people will slowly get alienated and the property will slowly transfer to the hands of the non-tribal people from the tribal people. And also if the right to transfer the property is given to the tribal women's the malpractices such as dowry taking will get increased in a large percentage. Hence it is not right to amend the act.

The issue before the court

The issue presently before the court was that is amending the act right or wrong? Is these Chota Nagpur Act Discriminate tribal women's right to life and equality and does can it get result dangerous for women's life without any property owned for her livelihood. Under the right to equality before the law under the Indian constitution consist of equality for all Indian Citizens based on gender, caste, religion, and language. Does this law apply to the tribal communities?

Judgment

The judgment passed by k Ramaswamy for gender equality before the law for all tribal community people. The tribal declined the right of women for the inheritance of the

property. And they follow these customs as their laws as the customary laws. After the formation of the constitution, the fundamental mental rights were considered as the main natural rights for the Indian citizens as the birthright and they cannot amend or can't violent by any other state laws or customary laws. Under article 14 the constitution of India said that the right to equality is the fundamental right of the citizens of India. And under Article 15 it was mentioned that even the state can not discriminate between any person or the citizens of India based on gender, caste, religion, and language. Also, article 39 provides the state to ensure that men and women are given equal rights for livelihood. Article 38 said that the state should take initiative to promote the welfare of the people's securing all the social orders and justice. Under human rights, women's including the child girls and old ladies they declared as an integral, inalienable, and indivisible part of the universal human right. In the protection of human rights act 1993 it was said that human rights are the right to liberty, equality, life, and dignity.

In the Hindu Succession Act, it was said that it is only applicable to the large majority of the Indian citizens of religions Hindus, Sikhs, Buddhist Jains, etc.[601] The females were put on a par with the male peoples of the communities. Under the Shariat law which is only applicable to the Muslim citizens of India said that female heirs have an unequal share of inheritance property by and large half of what a male heir gets. And under the Indian succession act which applies to the Christian and people not covered under the other two conferring in certain heirship on females and males. And hence neither the Indian succession act nor the Shariat law nor the Hindu Succession Act applies to the tribal community peoples for the issue of inheritance property rights for tribal women. The judgment also provides that the Chota Nagpur Tenancy Act was related to the law to amend and consolidate some of the enactments relating to the landlord and tenants and the settlement of rent in Chota Nagpur. This act was only related to the classes of tenants and not the owners of any land.

We know that most tribal peoples live in agriculture society. All their expenditure of life and their families were made by their agriculture. In the family, every person was worked for cultivating their land. Mostly the family was headed by men of the family. All the decisions were taken by the dominant person of the family which was male. Even in the agricultural, the men were treated more superior than that of the women. Till a male is

[601] https://www.casemine.com/judgement/in/5609ace0e4b014971140fea0

leading the family the women's life goes pretty good but after the death of the male person his wife, daughter, daughter-in-law granddaughter all suffer as everyone was dependent on that male person and after his death, the relatives and all take away all the property on which the livelihood of females was dependent which cause them to suffer so hard. Article 21 of Indian Constitution said that every person has right to life or livelihood.[602] And these customary laws violets the laws. And by amendment of the Chota Nagpur Tenancy Act, will secure the women's right to life or livelihood under article 21. By providing the females to hold the land even after the death of the male heir as long as she is depending on it for her daily life expenditure and these will protect their right to life or livelihood.

Hence the court decides that rights of male succession including sections 7 and 8 of the Chota Nagpur Tenancy Act must be suspended as long as the right to livelihood for women of the last male heirs holding the property. The court said to the state of Bihar that to examine all the questions put and the violation of rights under the constitution of India. And take the right actions to protect the rights of every person being male or female.

Analysis of the case

The case presents the question of the rights of equality and the right to life of tribal women for the inheritance of the property right. Article 14 and 15 of the Indian constitution deals with the right to equality before the law and also states that the state should protect the right of every person and also it should not discriminate between any person based on the sex, caste, religion and the language. The tribal peoples follow their customary laws and the Chota Nagpur Act supporting it violates the right to life and equality of the tribal women. In the Hindu Succession Act, Indian Succession Act, and the Shariat Law the tribal peoples were not included at all.

We know that tribal people's life is dependent on the natural sources and mainly their expenditure was run on the agriculture. Being men or women all the family persons work in their farms for cultivating the crop. But after the death of the last male person of the family every single woman even if she is his wife, daughter, or any other they all suffer to death as all their relatives take away all their property holdings on which their life was dependent. So these types of laws affect the lives of women and their birthrights. Being a woman doesn't mean that she should be given less value than men as men having muscular power can

[602] https://www.casemine.com/judgement/in/5609ace0e4b014971140fea0

discriminate and dominate everywhere. Under the Indian constitution every single person has the right to life under article 21.

THE CURIOUS CASE OF THE GOVERNOR AND HIS POWERS TO NOMINATE MEMBERS OF THE LEGISLATIVE COUNCIL

- MILIND PRAKASH PARAB

I. Introduction

The office of the Governor has been at different points of time subject of a cause celebre due to the manoeuvring of its powers to facilitate a particular objective. The origin of the position of Governor and the debate over its discretionary powers are in the colonial past of India, the Company's rule introduced the Governor akin to the Governor of a crown colony and later owing to the erratic demeanour of the Governors, increased power was given to the Central administration of the Company making the Governor the agent of the Centre.[603] Even after independence the new Constitution did not lacerate the position of the Governor and appointed him as a figurehead and also as the agent of the centre making him essentially a "watch-dog" of the Centre.[604] India was ruled by the same party in the Centre and many of the States for a long period and so there was no room for the burgeoning of solid federalism in the country and therefore, there were no precedents to be adopted to create a code of conduct for the Governors probably there may be no conceivable need for it at the time.[605] The circumstances changed with the advent coalition governments after the fourth general election and controversy started revolving around the office of the Governor[606] and is still in continuance.

When Maharashtra was grappling with the horrors unleashed by COVID-19, a Constitutional crisis also lingered around the state, the nomination of the newly elected Chief Minister to the Legislative Council.[607] As the new Chief Minister was not a member of either of the houses of the state legislature, it was imperative for him to get elected within six months to one of

[603] Daljit Singh, The Position of a State Governor in India, Vol. 22, No. 3, The Indian Journal of Political Science, pp. 232-238 (1961)
[604] *Id.*
[605] Dalip Singh, THE ROLE OFTHE GOVERNOR UNDERTHE CONSTITUTION AND THE WORKING OF COALITION GOVERNMENTS, Vol. 29, No. 1, The Indian Journal of Political Science, pp. 51-61 (January-March 1968)
[606] *Id.*
[607] https://www.constitutionofindia.net/blogs/uddhav_thackeray_s_nomination_to_the_state_legislature__can_the_governor_disregard_the_state_cabinet_s_recommendation_

the houses and in his case, it was the Legislative Council.[608] As the elections were postponed due to the growing spread of the pandemic, the newly formed coalition in Maharashtra had no other option but to nominate the Chief Minister to the legislative council to save the nascent government, however the Governor refused to act on the recommendation of the state cabinet twice inviting a Constitutional predicament.[609] Finally, a formal request was sent from the Governor to the Election Commission and elections were held and the Chief Minister and eight other candidates were declared the winners unopposed in May 2020.[610] As one crisis was resolved, another emerged regarding the nomination of 12 members to the legislative council under Governor's quota, the government in this case too, expected inexplicable delay by the Governor and was seeking legal opinions from experts.[611] This question has now landed before the Bombay High Court in the form of a PIL and the Court had directed the Government and the secretary to the Governor to file a response in this matter,[612] and now have asked the Central Government to coney its view on the matter.[613] So, the State is at an impasse with the question that does the Governor owns any discretion of not appointing nominated members on the advice of the Council of Ministers?[614] In this backdrop, it is vital to understand pertinent questions pertaining to the role of Governor in nominating members to the legislative council, the repercussions of his decisions and the qualifications of the members appointed.

[608] Apoorva Mandhani, The Print (24 April, 2020 10:21 am), https://theprint.in/india/unelected-uddhav-thackeray-has-a-month-to-save-cm-job-constitution-gives-him-these-options/407530/ (last visited July. 2021)

[609] Manoj Dattatrye More, The Indian Express (May 16, 2020 3:05:03), pmhttps://indianexpress.com/article/explained/uddhav-thackeray-maharashtra-legislative-council-6411649/ (last visited July. 2021)

[610] PTI, The Print (14 May, 2020 7:47 pm), https://theprint.in/politics/maharashtra-cm-uddhav-thackeray-8-others-elected-unopposed-to-legislative-council/421824/ (last visited July.2021)

[611] Krishna Kumar, The Economic Times (Nov 16, 2020, 10:40 PM), https://economictimes.indiatimes.com/news/politics-and-nation/mlc-nomination-maharashtra-government-readies-itself-for-a-legal-battle/articleshow/79250783.cms?from=mdr (last visited July. 2021)

[612] Vidya, INDIA TODAY (May 22, 2021 07:24 IST), https://www.indiatoday.in/law/story/bombay-hc-maharashtra-govt-reply-plea-governor-mlc-names-1805542-2021-05-22 (last visited July. 2021)

[613] Sharmeen Hakim, Live law.in (17 July 2021 8:10 AM), https://www.livelaw.in/news-updates/whether-governor-has-discretion-not-to-nominate-members-to-legislative-council-based-on-advice-of-council-of-ministers-bombay-high-court-to-decide-177620 (last visited July. 2021)

[614] *Id.*

II. Who is the Governor?

Article 153 of the Indian Constitution mandates that there shall be a Governor for each state.[615] The Governor is appointed by the President and holds office as per the pleasure of the President, with no guarantee of a tenure and can be removed anytime by the President.[616] According to Article 163 (1) the Governor shall be advised by the Chief Minister in capacity of the head of the Council of Ministers to discharge the functions of the Governor except in cases where he has to exercise his discretion permitted by the Constitution[617] and as mentioned under Article 163 (2) the decision of the use of discretion of the Governor shall be final and cannot be subjected to any questioning, whether the Governor ought or ought not to have exercised the discretion in a particular way[618], even the advice given by the ministers cannot be inquired in any court as per Article 163 (3).[619]

Mahatma Gandhi also supported the idea of continuation of the position of the Governor and considering it an important office said, *"The Governor had been given a very useful and necessary place in the scheme of the team. He would be an arbiter when there was a constitutional deadlock in the State and he would be able to play an impartial role. There would be administrative mechanism through which the constitutional crises would be resolved in the State."*[620] The offices of the Chief Minister, head of the government and Governor, head of state are vital for the proper functioning of the state and the people reposit power in both and expect the former to be conscientious and the latter to be constitutional.[621]

The mist around the use or rather misuse of the power of discretion of the Governor is not novel, even before independence in 1937 when the Congress won the popular legislatures the Governors used their notorious reserve powers to prohibit them from forming the Government, the Congress refused to assume office until assurances were given that the Governor would not use his discretion.[622] As the Governor later became an agent of Centre,

[615] Indian Const. art. 153

[616] A consultation paper on 'THE INSTITUTION OF GOVERNOR UNDER CONSTITUTION', NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION (May, 11, 2001)

[617] Indian Const. art. 163, cl.1

[618] Indian Const. art. 163, cl.2

[619] Indian Const. art. 163, cl.3

[620] S.R. Bommai vs Union of India, 1994 AIR 1918

[621] Gopalkrishna Gandhi, Why we need Governors, The Hindu, (JULY 06, 2018 00:02 IST), https://www.thehindu.com/opinion/lead/why-we-need-governors/article24343299.ece (last visited July. 2021)

[622] Daljit Singh, supra note 1 at 234

naturally the Governors submitted their loyalties to the Centre and the office then worked as a stratagem of the Centre to interfere in the politics of the State. It was misused by dissolving the house arbitrarily, applying favouritism in calling the Chief Minister to form the Government, creating circumstances forcing parties to prove majority and recommending Presidents Rule. This was somewhat controlled by the Judgement in Bommai's case, where in the Court endorsed the Sarkaria Commission's recommendations and held that until the Governor explores all the possibilities of formation of an alternative Government in the event where Ministry of the State resigns or suffers loss of majority or is dismissed, he cannot recommend Presidents Rule.[623] The Supreme Court in Rameshwar Prasad v Union of India, held that, the Court can investigate the proclamations issued by the Governor on the disputation that the proclamation is ultra vires or is based on male fide, which has no extant before law, provided that the Government satisfies the Court.[624] Earlier the courts were reluctant to get involved in the intellectual deliberation on whether the Governor acts in his own discretion or whether is Constitutionally bound to accept the advice of the Council of Ministers.[625] But in Nabam Rebia's case, where the Court rescinded the President's rule and reinstated the previous State Government, a precedent first of its kind, the Supreme Court observed that the scope of the discretion of the Governor is limited, it does not bestow widespread powers to the him to act without the advice of Council of Minsters or in opposition of it, this restricted discretion should also emerge from "reason, actuated by good faith and tempered by caution" and not from arbitrariness or from the whims of the Governor.[626] The Court further observed that in a parliamentary democracy, the powers of a formal head of State cannot be expanded at the expense of the actual executive.[627]

III. What is the Legislative Council?

Article 169 (1) of the Constitution allows the parliament to either formulate or abolish the Legislative Council in state where no such Council exits, if the Legislative Assembly of that State passes a resolution with an objective of establishing such Council by a majority of the Total membership of the Assembly and by a majority of members, not less than two thirds of

[623] S.R. Bommai vs Union of India, *supra* note 18
[624] Rameshwar Prasad v Union of India, AIR 2006 SC 980
[625] Vidyasagar Singh vs Krishna Ballabha Sahay and Ors, AIR 1965 Pat 321
[626] Nabam Rebia, and Bamang Felix v. Deputy Speaker, 2016 SCC Online SC 694
[627] *Id.*

the Assembly present and voting.[628] Article 171 (1) prescribes the structure of the Council, wherein the total number of members in such a Council shall be less than one third of the Legislative Assembly of the State creating such a Council and the members in the Council shall never be less than forty.[629] One third members of the Legislative Council are elected by local authorities such as municipalities and district boards, one twelfth by graduates inhabitant of that State possessing at least a three years degree from any university in India or equivalent qualifications stipulated by Parliament, one twelfth by teachers, one third members shall be elected by the Legislative Assembly who are not the members of the Legislative Assembly of the State and the rest by the Governor.[630] In theory, the State Council is designed to inculcate scholars and academicians incapable of the scrimmage of electoral politics but the criteria of just being a degree holder does not encapsulate the idea of inclusion of the scholastically inclined because acquiring a degree today is not a very tough task.[631] Moreover, the virtuous objective of incorporation of talent from outside to enhance the level of discussion in the House has been replaced with the accommodation of those who lost elections.[632]

Currently, The States of Andhra Pradesh, Bihar, Karnataka, Maharashtra, Telangana and Uttar Pradesh have Legislative Councils in addition to Legislative Assemblies. Recently West Bengal has passed a resolution to re-establish the Legislative Council, fifty-two years later after its termination.[633]

IV. Who can be nominated as members of the Legislative Council?

Article 171 of the Constitution deals with structure of the Legislative Councils, sub clause (e) of clause 3 gives the Governor the power to nominate members in consonance with provisions in clause 5, which says persons having special knowledge or practical experience in respect of matters such as Literature, Science, Art, Co-operative movement and Social

[628] India Const. art. 169, cl.1
[629] India Const. art. 171, cl.2
[630] India Const. art. 171, cl.3
[631] Council conundrum: on States having a Legislative Council, The Hindu (August 26, 2018 23:18 IST), https://www.thehindu.com/opinion/editorial/council-conundrum/article24786733.ece (last visited July. 2021)
[632] *Id.*
[633] WHAT IS LEGISLATIVE COUNCIL, Business Standard, https://www.business-standard.com/about/what-is-legislative-council (last visited July.2021)

Service shall be nominated by the Governor.[634] Often there are contentions posed regarding the qualifications of the persons nominated and mostly such nominations are alleged to be political nominees, furthering the agenda of the party in power. The Governor must largely act according to the advice of Council of Ministers and avail discretion in circumstances where he thinks he needs to, by the effect of Article 163(3) the court cannot examine the advice provided by the Council of Ministers to the Governor and Article 361 gives complete immunity to the Governor against any Court proceedings.[635] Pandit Jawaharlal Nehru described nominated members as those who "*do not represent political parties or anything, but they represent really the high watermark of literature or art or culture or whatever it may be*."[636]

In Vidyasagar Singh v Krishna Vallabh Sahay, the Patna High Court, where the primary argument of the petitioner was that it is only the Governor, who should use his discretion under Article 171 (3)(e) and not the executive and if the Governor does not invoke his discretion, then it would be a "colourable exercise of power".[637] The Court went into the Rules of Executive Business framed by the Governor under Article 166 and read them along with Article171(3)(e) and concluded that the Council of Ministers under 171(3)(e) will contemplate on the proposal of nominating members.[638] It was difficult for the court to derive the occurrence amidst the selection of nominated members by the Chief Minister and the declaration of the names by the Governor, as the advice given by the Ministers cannot be questioned and therefore, the Court could not determine the exact discretion exercised by the Governor in nominating the members.[639] The petitioner further contended that some of the nominees were not qualified in any manner for the Legislative Council as opposed to the view of the Chief Minister, who filed an affidavit stating some are social workers and one has special knowledge in Hindi literature.[640] The Court declined to probe this contention stating that the Court cannot be expected to deal with the factual aspect of the submission by the

[634] India Const. art. 171, cl. 5, cl. 3 (e)
[635] V. Venkateswar Rao v The Government of Andhra Pradesh, General Administration Department Represented by its Principal Secretary, Hyderabad and others, 2012 SCC Online AP 286
[636] NOMINATED MEMBERS OF THE RAJYASABHA (2005) https://rajyasabha.nic.in/rsnew/practice_procedure/book2.asp (last visited July. 2021)
[637] Vidyasagar Singh vs Krishna Ballabha Sahay and Ors, *supra* note 23
[638] *Id.*
[639] *Id.*
[640] *Id.*

petitioner regarding the qualifications of the nominated members.[641] Another assertion which was also denied that the nominations must include all categories enlisted in the clause and should be represented but the Court mentioned that it is not possible in every case to strictly cover all categories.[642] Therefore, the Court has no authority to probe the viability of the nominated members by the Governor and whether such nominated members have the requisite qualifications or not.[643] Recently, the Supreme Court dismissed a writ petition[644], where the petitioner requested to stipulate guidelines in the nomination of members to the Legislative Council. The counsel for the petitioner argued that it is the machination of the parties in Government to nominate people who are powerful or can be made by using the ambiguity in the law to their advantage.[645] The court said that by insisting on the petition of this nature, the petitioner is indirectly asking us to amend the Constitution.[646]

Generally, majority of the members nominated are politically coloured and are back door entrants to the House and are inducted on the pretext of contributing to social work, this social work is nothing but their mere existence in politics and a particular political party.[647] Whatever work they might have done was through the influence of their party or any previous office they might have held which is then equated to social work. Social workers, in general, abhor 'power politics', 'spoils of office' and 'selfish quarrels' which are termed as "legitimate graft" and also have finite influence, if any, and the 'machine politicians, have no consideration for it.[648] Committed social workers are not interested in rhetoric and are concerned with real human predicaments[649], whether the same could be said of the nominated members is a matter of perception. There are instances where disqualified members of Legislative Assembly were nominated, which is not permissible, with an intention of making

[641] *Id.*
[642] *Id.*
[643] V. Venkateswar Rao v The Government of Andhra Pradesh, General Administration Department Represented by its Principal Secretary, Hyderabad and others, *supra* note 33
[644] Jagannath Shamrao Patil v Union of India, Writ Petition(s)(Civil) No(s).176/2021
[645] Supreme court rejects plea on Maharashtra legislative council nominations, The Free Press Journal, https://www.freepressjournal.in/india/supreme-court-rejects-plea-on-maharashtra-legislative-council-nominations (last visited July. 2021)
[646] Outlook (02 JULY 2021, 12:23 PM), https://www.outlookindia.com/newsscroll/sc-refuses-to-entertain-plea-seeking-guidelines-for-nomination-to-maha-legislative-council/2113144 (last visited July. 2021)
[647] The Indian Express, (November 7, 2020 11:05:30 am), https://indianexpress.com/article/cities/mumbai/nomination-of-mlcs-maharashtra-govt-submits-list-of-12-names-to-governor-6986382/ (last visited July, 2021)
[648] "Politics and Social Workers." Social Service Review, vol. 26, no. 1, 1952, pp. 102–102. JSTOR, www.jstor.org/stable/30021381. Accessed 19 July 2021.
[649] *Id.*

them ministers.[650] It is not the endeavour to say that they are not grass root workers but the suspicion that the grass root struggle that they engaged in might be to occupy public office one day cannot be overlooked.

V. Can a Chief Minster be nominated to the Legislative Council?

According to Article 164(4) if a minister appointed fails to obtain the membership of the State Legislature within a period of six consecutive months shall cease to be a minister after the elapsing of the period of six consecutive months.[651] Chief Minsters also come under the same provision, but, generally in such circumstances Chief Minsters get themselves elected in the Legislative Council, this exercise was undertaken in case of Chief Ministers like Yogi Adityanath and Prithviraj Chavan.[652]

In Har Sharan Varma v Chandra Bhan Gupta, the petitioner requested the Court to interfere in the appointment of Chandra Bhan Gupta as Chief Minister of Uttar Pradesh as he had lost the assembly election twice and got himself nominated to the State Legislative Council, using the "back door entry" to remain the Chief Minister.[653] The Court, however, declined to interfere as there was no case made out by the petitioner to show whether the Governor had no power to nominate him or he was not a citizen of India or Chandra Bhan is disqualified, in any of the cases the Court would have issued a writ of quo warranto declaring him not qualified to be a member of Legislative Council.[654] The Governor appoints the Chief Minister and upon the advice of the Chief Minister, he also appoints the Council of ministers, there are no qualifications prescribed for a person to be appointed as Chief Minister but clause 2 of Article 164 states that the Council of Ministers are mutually responsible to the Legislative Assembly.[655] It is a possible scenario that there may be Chief Minister and Ministers who are not the members of either of the houses of the state legislature and yet are appointed by the Governor as Chief Minister and Ministers, in such a case if the state legislative assembly

[650] The New Indian Express, (26th November 2020 04:22 AM), https://www.newindianexpress.com/states/karnataka/2020/nov/26/prashantbhushan-slams-backdoor-entry-into-legislative-counci-2228152.html (last visited July. 2021)
[651] India Const. art. 164, cl.4
[652] Sughosh Joshi and Sushrut Kaplay, Uddhav Thackeray's Nomination: Least Risky Option or Subversion of Democratic Process? The Wire (April, 2020), https://thewire.in/law/uddhav-thackeray-legislative-council (last visited July. 2021)
[653] Har Sharan Varma v Chandra Bhan Gupta, AIR 1962 All 301
[654] *Id.*
[655] Har Sharan Verma vs Tribhuvan Narain Singh, 1971 AIR 1331

validates this appointment of the Chief Minister and ministers, then there is nothing Constitutionally that makes such appoint illegitimate.[656]

A case was made out in favour of current Chief Minister of Maharashtra that he is completely eligible to be nominated to the Legislative Council as he heads a variety of socio-economic initiatives and trade unions affiliated to his party and has been in public life for a considerable time[657], is also a professional photographer and in addition to it, it was in his name the elections were fought by his party and the Council of Ministers duly nominated him. But at the same time question of putrescence of democracy is also raised in reference to the use of this back door entry.[658]

The recent elections held in West Bengal, where the Trinamool Congress won a landslide victory but the previous Chief Minister, who could not retain her seat in Nandigram, has assumed the office of Chief Minister again by virtue of Article 164(4)[659] but there are uncertainties regarding the by polls in the State[660] and there is possibility of an occurrence of a similar situation as Maharashtra in West Bengal with respect to the role of the Governor. The demand for the Legislative Council in West Bengal, along with several other reasons has been connected by political commentators to the apprehension of the current Chief Minister in case of delay in the by polls[661] and the exhaustion of the prescribed six months within which she has to get re-elected to the Legislative Assembly, even if the Legislative Council is created the possibilities that she will face such a scenario where she needs to be nominated seem scarce.

VI. Conclusion

[656] *Id.*

[657] Santosh Paul, Uddhav Thackeray cannot be unseated by constitutional chicanery, The Economic Times (April 29, 2020, 11:25 AM), https://economictimes.indiatimes.com/blogs/courts-commerce-and-the-constitution/uddhav-thackeray-cannot-be-unseated-by-constitutional-quibbling/ (last visited July. 2021)

[658] Sughosh Joshi and Sushrut Kaplay, *supra* note 50

[659] Saubhadra Chatterji, How Didi can remain CM despite losing Nandigram, Hindustan Times (MAY 03, 2021 07:49 AM), https://www.hindustantimes.com/elections/west-bengal-assembly-election/how-didi-can-remain-cm-despite-losing-nandigram-101619981876282.html (last visited July. 2021)

[660] Meghnad Bose, Decoded | Mamata isn't alone: Why many have sought upper houses in states, but few have got it, India Today (July 9, 2021 00:45), https://www.indiatoday.in/india/story/decoded-mamata-banerjee-legislative-council-upper-house-bengal-other-states-1825387-2021-07-08 (last visited July. 2021)

[661] *Id.*

Although the legal balance appears to hang in the favour of the State Government in the quandary of nominating members to the Legislative Council but the role of the Governors is still consumed by uncertainty with the presence of the discretionary power even after narrowing it to a certain extent and is contingent on the prevailing context and politics. The main issue is the compromise of honesty and integrity displayed in the approach by the Governor and the State Governments, the problem will persist till the Governor plays the role of facilitator of quid pro quo for the Centre and the State Governments continue to nominate persons violating the spirit of the aim of nominated members who are expected to illuminate and enrich the discussions with their expert knowledge and perspective. It is difficult to ascertain what really conspires between the trio of Governor, State and Central Government through political channels and the courts do not wish to enter into the realms of political skirmishes and address political questions rather than legal ones. The courts are not privy to any consultations between the Governor and the Chief Minister but various courts have repeatedly held that the Governor has to act according to the advice of the Council of Ministers which is headed by the Chief Minister. The Governor's hands are tied by the Constitutional compulsions of his office and ultimately has to give in to the Executive's will, the delay on acting on it is just an opportunity to buy time for vested interests. The Legislative Council itself has come under a cloud for losing its real purpose and turning into a rehabilitation centre for politicians but the regenerated demand for its revival in states is a sign of its growing political relevance. Therefore, the real plight in this muddle appears to be more political than legal and the actions of the dramatis personae in this matter create circumstances leading to a Constitutional cliff-hanger.

THE EPOCH OF PLANNED OBSOLESCENCE: AN OVERVIEW

-MAEEN MAVARA MAHMOOD & ROHAN SUBBIAH

ABSTRACT

Planned Obsolescence, frequently interchanged with terms such as technological, programmed or psychological obsolescence, is a business marketing strategy often applied by manufacturers in the production and supply phase of their product. It refers to a situation where products are designed to not be sustainable in order to induce demands for newer and better models. It has been observed to take place in three ways: (i) by shortening the lifespan of the product (ii) by increasing it's repairing costs (iii) by creating incompatibility to new software updates (mainly applied in electronic products) and (iv) by making drastic design/style changes to models creating a sense of need among customers to invest in newer models (also known as psychological obsolescence).

In recent times, this distinctive marketing strategy has been applied more frequently. While the strategy has gained supporters from various fields it is not free from criticism where some critics have termed it to be an unsustainable activity. This article, therefore, aims to analyze this habitual strategy by looking at its historical relevance and trace it down to modern day practices to understand its relevance in today's world. It aims to give a holistic approach of both pros and cons of the strategy by studying its Legal, Economic and Environmental Implications globally as well as understanding its stance today specifically in India.

INTRODUCTION

"In an age of multiple and massive innovations , obsolescence becomes the major obsession" - Marshall Mcluhan.

Planned Obsolescence, under the Cambridge Dictionary, is a "situation in which goods are deliberately made or designed so that they do not last for a long period of time".[662]

[662] *Planned Obsolescence*,Cambridge Business English Dictionary (Illustrated ed. 2011)

Though the term is used often today, it finds its origins far back in the 19th century.[663] The first documented situation where planned obsolescence was employed was that of the humble lightbulb. Lightbulbs and the technology used in them can easily last for decades, however, it is believed by many that lightbulb manufacturers instituted artificial lifespan in order to inflate profits. Although the term “planned obsolescence" hadn't been commonly used until the 1950s, this strategy had been in practice from way back in the 19th century. The phrase received widespread recognition when it was first coined and used by American industrial designer Brooks Stevens.[664]Although this began with lightbulbs, this business strategy has permeated almost all industries in today’s modern consumerist society.

Vance Packard, in his work *The Waste Makers*[665], popularly draws a distinction between obsolescence of desirability and obsolescence of function, wherein the former connotes a marketer’s attempt to quell the desire for a product in the mind of a consumer, the latter focuses on functional alterations. The obsolescence of today has become one that bears greater resemblance to that of desirability rather than functionality. It is due to all these factors that planned obsolescence poses a myriad of socio-legal and economic implications.

PLANNED OBSOLESCENCE

Over the years obsolescence as a concept has evolved many folds. Although different terminologies have been applied to the concept of obsolescence such as built-in, programmed, physical, planned, psychological etc. the two main categories that can be said to consist are: (i) technological obsolescence (including physical obsolescence and purposeful) and (ii) style obsolescence (also known as psychological obsolescence).

While the former refers to the act of manufacturers of deliberately altering the physical aspects of a product such as shortening the life span of products or making certain products incompatible, the latter refers to scenarios created by manufacturers that induce

[663] Adam Hadhazy, *Here’s the Truth about ‘Planned Obsolesence’ of tech*, BBC, (13th June 2016), https://www.bbc.com/future/article/20160612-heres-the-truth-about-the-planned-obsolescence-of-tech

[664]Glenn Adamson and David Gordon, *Industrial Strength Design: How Brooks Stevens Shaped Your World* (MIT Press 2003) 4–5

[665]Vance Packard, *The Waste Makers* (New York: D. McKay Co., 1960)

consumers to replace products even though they still retain substantial usefulness[666] such as using marketing techniques to introduce new styles or designs of products very frequently creating the notion in the minds of the consumers that they need to replace their existing model.

It can be inferred that the two categories go hand in hand and are intertwined to help give the concept of Planned Obsolescence a complete structure.

A. HISTORICAL ANTECEDENTS:

The historical antecedent of planned obsolescence as an organised activity can be traced back to the incandescent bulb in the 19th century. The manufacturers of the lightbulb began to realise that the larger the lightbulb customer base grew the larger the market became. They noticed that by making lightbulbs disposable more profits could be reaped. They began to understand that in order to inflate profits it was necessary to artificially limit the lifespan of the bulb. Out of this economic avarice the infamous "Phoebus Cartel" was born. The Phoebus Cartel was a group which comprised representatives of the top lightbulb manufacturers in the world at the time, including Germany's Osram, Netherlands' Philips and United States' General Electric. These companies acted in consort by signing a document called, "Convention for the Development and Progress of the International Incandescent Electric Lamp Industry"[667] to artificially reduce the lifespan of the electric bulb to 1000 hours. Before this, a lighbulb's lifespan was as long as 2500 hours until the early 1920s.[668]

It is believed that it was this cartel that hatched the industrial strategy now known as planned obsolescence. However, the cartel's strategy was short-lived and the details of their strategies were revealed decades later where papers of correspondence between the companies of the cartel were found through several governmental and journalistic investigations. Giles Slade stated in his book Made to Break: Technology and

[666] The author refers to 'purposeful obsolescence'. See Paul Gregory, *'A Theory of Purposeful Obsolescence'* (1947), 14 Southern Economic Journal 24. See also Taiwo Aladeojebi, *'Planned Obsolescence'* (2013), 4 International Journal of Scientific and Engineering Research 1504.
[667] Markus Krajewski, *The Great Lightbulb Conspiracy*, IEEE Spectrum, (24th September, 2014; 19:00) https://spectrum.ieee.org/tech-history/dawn-of-electronics/the-great-lightbulb-conspiracy
[668] Hadhazy, *supra* note 2 at 1

Obsolescence in America, a history of the strategy and its consequences that " This cartel is the most obvious example of planned obsolescence's origins because those papers [of correspondence] have been found".[669]

B. CONCEPT DEVELOPMENT AND MODERN RAMIFICATIONS:

The activity of planned obsolescence, however, did not cease to be employed despite the Phoebus cartel exposé. This activity continues to be employed by manufacturers in several industries in the modern scenario. A very pertinent example would be that of smartphones. Companies oftentimes intentionally slow down the functioning of older handsets to induce consumers to purchase newer models.[670] These activities however are not exclusive only to tech companies. Another manifestly evident circumstance of planned obsolescence is regarding that of printer cartridges, where the cartridge is disabled by microchips or batteries before all of the ink can be utilised. Thereby, compelling consumers to purchase a new product. Circumstances of planned obsolescence are prevalent in almost all industries today. At this juncture it would be pertinent to explore the socio-legal and economic implications of this seemingly harmful activity.

IMPLICATIONS OF PLANNED OBSOLESCENCE:

The Implications and impacts of planned obsolescence are far reaching, they are not merely confined to the impact it has on consumers but transcends all spheres and is in a limited capacity a genuine methodology that can be employed as an effective fiscal tool.

The following paragraphs will delve into the legal, economic and environmental implications of planned obsolescence.

A. LEGAL IMPLICATIONS

The law regulating the activity of planned obsolescence is disorganised and virtually non-existent. However, the expansive growth of multinational corporations has forced

[669] *Ibid*

[670] Katie Canales, *Apple will pay $113 million to settle a 'batterygate' investigation into its practice of intentionally slowing down old iPhones*, Business Insider India, (19th November 2020, 04:29 PM), https://www.businessinsider.in/tech/news/apple-will-pay-113-million-to-settle-a-batterygate-investigation-into-its-practice-of-intentionally-slowing-down-old-iphones/

countries and their governments to entertain the possibility of instituting laws to regulate these activities. The first country which instituted legislation which attempts to tackle the activity of planned obsolescence is France. The "Hamon Law"[671] introduced by the French government is aimed at improving the contractual and economic rights of consumers and supporting the concept of sustainable electronic products. It provides for a class action to be brought against manufacturers if their actions fail to comply with the obligations, legal or contractual, as prescribed under the law in the context of either sale of goods and services or against anticompetition practices. In pursuance of the same, a french organisation *Halte à l'Obsolescence Programmée (*HOP) filed a legal complaint against printer manufacturers Canon, HP, Brother and Epson. The claim made by HOP was that the devices produced by these companies were altered in such a way that cajoled users to change their ink cartridges before they were empty as the margins earned by printer companies by way of replacement of cartridges far exceeds the margins from printer sales[672]. The European Union (EU) does not prescribe any specific law tackling the activity of planned obsolescence. However, the European Consumer Protection Legislation will be applicable. The EU consumers are entitled under the Sale of Consumer Goods and Associated Guarantees Directives to repair or replace any goods which fall outside of the purview provided by the seller. The lacunae here, however, remains the two years' limitation period during which the guarantee subsists.There is an amended draft directive expected to come into effect in the following year. Yet another commonly employed technique used by producers to perpetuate planned obsolescence is to inordinately increase the price of repair of commodities, thereby indirectly compelling producers to purchase another product. However, recognising the tendencies of companies to resort to such activities the European commission has stepped in to hold that consumers should be able to make an informed choice, including lifetime pricing of products, in advance[673]

The United States of America much like the EU has no exclusive law to deal with planned

[671] Sonia Cissé, Caitlin Potratz Metcalf, Adrian Fisher, Guillaume de Meersman and Marly Didizian, *In the Crosshairs: Planned Obsolescence*. Linklaters LLP, (March 31 2020), https://www.linklaters.com/en/insights/blogs/digilinks/2020/march/in-the-crosshairs---planned-obsolescence

[672] Jurgita Malinauskaite, Fatih Buğra Erdem, *Planned Obsolescence in the Context of a Holistic Legal Sphere and the Circular Economy*, *Oxford Journal of Legal Studies*, 2021, https://doi.org/10.1093/ojls/gqaa061

[673] *Pelikan International Corporation v Kyocera Corporation* [1995] SG(95) D/11872. See also *Info-Lab Ireland v Ricoh Company Ltd* [1998] Case No IV/E 2/36.431

obsolescence. However, if looked at explicitly through a legal lens it is evident that a manufacturer selling a product with an artificially predetermined lifespan would fall within the scope of the "Lemon Laws". The "Lemon Laws" are a set of consumer protection laws aimed at preventing the sale of defective consumer products. A product with a predetermined lifespan at the date of its sale is clearly a defective consumer product.

In recent times, however, this extensively practiced business strategy has come to the fore in the landmark suit[674] brought against the tech-giant "Apple Inc." by *Halte à l'Obsolescence Programmée* ("HOP") a French consumer group. The brief circumstances which led to this case were that the manufacturer (Apple Inc.) had intentionally slowed down older models of their flagship product the iPhone in a bid to artificially create demand. Upon investigation the DGCCRF considered that this behaviour would not constitute a planned obsolescence offence but it was termed as a 'deceptive commercial practice by omission'. Subsequently, smartphone companies Apple Inc. and Samsung were fined EUR 5 million by the Italian authorities in relation to software updates which slowed down older smartphone models.

It is clear from the recent legislations and decided case laws of various countries, as mentioned above, planned obsolescence is a pertinent and contemporary legal issue which requires exclusive regulation.

A. ECONOMIC IMPLICATIONS

Today's modern world is one dominated by consumerism. One of the chief mechanisms which have galvanized this has been modern marketing strategies. The role of marketing in modern society can hardly be understated and its influence can be felt in almost all industries. Multinationals have identified the importance of marketing and the impact it has on consumer culture, it has become the predominant vehicle by which the activity of planned obsolescence is peddled.

Consumer's Sovereignty:

The Consumer Sovereignty Theory as developed by the economist Ludwig von Mises, propounds that an economy primarily acts in response to the aggregate behaviour of

[674] *supra* note 10 at 4

consumer demands.[675] The nature of consumer sovereignty mainly comprises two elements: options available to the consumer in the market and the capacity of consumers to choose freely among the options. Here, certain economists are of the opinion, that as per behavioural economics consumers usually end up making irrational decisions[676] as they possess 'bounded rationality'. Upon studying the decision-making methods of consumers, several empirical findings have shown that consumers can be easily misled in certain situations,[677] which may lead to market failure termed in literature as 'confusopoly'.[678] Under confusopoly, companies instead of competing based on price, indulge in several confusing marketing techniques to make it difficult for consumers to shop effectively and make sound decisions.[679]

Therefore, by studying the behavioural patterns of consumers it can be inferred that in the practice of planned obsolescence the two major elements of consumer sovereignty are curtailed as companies may use marketing techniques to convince consumers to buy a new product that they may not necessarily need.

Furthermore, as per the opinion of the European Economic and Social Committee, consumers may lose trust in the market as a result of dissatisfaction from low quality products since the essence of the planned obsolescence strategy is to decrease the lifespan of products by using of low quality materials[680].

However, on the other side of the spectrum the activity of planned obsolescence has led to widespread innovation, with companies rapidly innovating in order to produce newer products to compete in innovation driven markets. The ultimate beneficiaries of this innovation race remains the consumer who is the recipient of the benefit by way of

675 Jeffrey Herbener, '*Ludwig von Mises and the Austrian School of Economics*' (1991), 5 Review of Austrian Economics 33

676 Dan Ariely, *Predictably Irrational: The Hidden Forces that Shape Our Decisions* (HarperCollins Publishers 2009); Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Books 2011).

677 Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin Books 2008)

678 A confusing marketing technique used to prevent consumers from making an informed decision. It is defined by Adam Scott in his work *The Dilbert Future as '"a group of companies with similar products who intentionally confuse customers instead of competing on price"*; See also Paolo Siciliani, Christine Riefa and Harriet Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019) 141

679 *Ibid* 142

680 European Economic and Social Committee, 'Towards More Sustainable Consumption: Industrial Product Lifetimes and Restoring Trust through Consumer Information' (Opinion of the European Economic and Social Committee and the Committee, CCMI/112, Brussels, 17 October 2013).

receiving an improved product.

Producer's Sovereignty:

The concept of Producers' Sovereignty refers to the techniques employed by manufacturers enticing consumers to buy what they wish to sell. In other words, producers deliberately influence the market conditions, and don't merely respond to consumers' demands.[681]

During the production of a commercial product it has been observed that in the maturity phase certain problems are faced by the producers. Significant parameters such as consumption habits and brand loyalty pose major roadblocks.[682] Due to this, in order to avoid any decrease in sales, manufacturers employ reduction in product life spans via planned obsolescence[683] in order to incorporate newer innovations so as to avoid the saturation of the market and thereby increase their revenues through replacements.

It would however be erroneous to suggest that the activity of planned obsolescence is devoid of its benefits. Historically planned obsolescence has served a myriad of functions. In a paper authored by Bernard London in 1932, planned obsolescence was suggested as a possible mechanism which could be employed to stimulate consumer demand and bring an end to the great depression, he suggested that modern economies had to find a symbiotic balance between the supply and demand and in order to achieve the best way to stimulate demand would be to chart the obsolescence of products.[684] This forms the foundational basis of employing planned obsolescence as an economic tool.

B. ENVIRONMENTAL IMPLICATIONS:

The foremost criticisms that the planned obsolescence strategy has recently come to face is based on its negative environmental implications. The increase in production in order to constantly replace older products with newer models has led to an increase in wastes from every industry that has popularly employed planned obsolescence. For instance, in the production of electrical and electronic equipment such as smartphones, televisions,

[681] Tim Cooper, '*The Value of Longevity: Product Quality and Sustainable Consumption*' (Global Research Forum on Sustainable Production and Consumption, Rio de Janeiro, 13–15 June 2012)
[682] Luis Cabral, *Introduction to Industrial Organization*, (2nd edn, The MIT Press, 2017) 6
[683] Giles Slade, *Made to Break: Technology and Obsolescence in America,* (Harvard UP 2007) 3.
[684] Bernard London, '*Ending the Depression through Planned Obsolescence*' (1932), (accessed 19 July 2021) https://babel.hathitrust.org/cgi/pt?id=wu.89097035273&view=1up&seq=7

computers etc. the waste from the production process has rapidly increased. In the EU alone, industrial wastes from electrical and electronic equipment was approximately 10.1 million tonnes in 2016 which was an increase of 2.9% from waste collected in 2015[685] and it was estimated to grow more than 12 million tonnes in the year 2020 (to be assessed in 2021)[686]. Waste from electrical and electronic wastes is considered to be the fastest growing waste stream in the EU nations.

Not just industrial wastes, but the Fashion Industry has also contributed a fair share to negative impacts on the environment. Fast Fashion as a concept is mainly based on the principal of planned obsolescence[687] or more specifically style obsolescence (also known as psychological obsolescence)[688]. Fast Fashion is defined as "an approach to the design, creation, and marketing of clothing fashions that emphasizes making fashion trends quickly and cheaply available to consumers."[689] Therefore, the main object behind fast fashion is to create demand among consumers for clothing through quick and constant replacement of products by introducing newer models. Major fast fashion companies such as H&M and Zara mainly base their business models on seasonal fashion where each company releases over 24 new collections of clothing products within a single year. This fast paced replacement of products has exacerbated the problem of wastes by increasing the pace of design and production. As per a report by the World Bank that analyses statistics released by the United Nations Environment Programme (UNEP) it is estimated that the production of a single pair of denim jeans requires the use of about 3,781 liters of water alone. It also equates to emissions of around 33.4 kilograms of carbon equivalent.[690]

Statistics by the United Nations Environment Programme and the Ellen MacArthur Foundation state that almost 20% of the world's global water waste comes from fabric

[685] Eurostat, '*Waste Statistics—Electrical and Electronic Equipment'* (May 2019), (accessed 17 July 2021), https://ec.europa.eu/eurostat/statistics-explained/index.php/Waste_statistics_-_electrical_and_electronic_equipment

[686] Commission, *'Waste Electrical & Electronic Equipment (WEEE)*' (accessed 17 July 2021), https://ec.europa.eu/environment/waste/weee/index_en.htm

[687] Robert Givhan, '*Fashion in the age of climate change*', The Washington Post Magazine, (November 18 2019), https://www.washingtonpost.com/magazine/2019/11/18/troubling-ethics-fashion-age-climate-change/

[688] *supra* note 11 at 5

[689] *Fast Fashion*, Merriam-Webster Dictionary (2021)

[690] '*How much do our wardrobes cost to the Environment?*',The World Bank, September 23 2019, https://www.worldbank.org/en/news/feature/2019/09/23/costo-moda-medio-ambiente

dyeing and treatment.[691] Further according to the Foundation it was noted that since the year 2000 the production of garments (around 50 million garments in the year 2000) has doubled as a result of which consumption has doubled as well. Due to such high consumption levels, wastage has increased especially since only 1% of garments are actually recycled and the rest is merely discarded.[692]

Therefore, it is evident that the negative implications of planned obsolescence cannot be confined merely to injuring the rights of consumers , but the same has far reaching effects which necessitates some form of regulatory action to be undertaken by states to control the practice of planned obsolescence.

PLANNED OBSOLESCENCE IN INDIA

At this juncture it would be relevant to analyse the legislative framework which governs planned obsolescence in India. Currently there is no definitive and comprehensive legislation pertaining strictly to planned obsolescence in India.[693] However, recourse maybe taken to the Consumer Protection Act wherein Sec 2(10) defines the term "*defect" as any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" shall be construed accordingly.* [694]

Additionally u/s 2(9)[695] of the Act a consumer has the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices.[696]It is clear from these provisions that under Indian Consumer law, the consumer has a right to be made aware of quality of a product, this would naturally include the requirement for a

[691] *Ibid*
[692] *supra* note 27
[693] Shifa Quraishi, 'Planned Obsolescence and the Apple iPhone Case', LegalBots, April 16 2021, https://legalbots.in/legal-blog/planned-obsolescence-an-overview
[694] Consumer Protection Act, 2019, § 2 sub-section 10, No. 35, Acts of Parliament, 2019 (India)
[695] Consumer Protection Act, 2019, § 2 sub-section 9, No. 35, Acts of Parliament, 2019 (India)
[696] *Ibid.*

manufacturer to disclose a defect in a product wherein the natural lifespan of the product has been artificially shortened.

In addition to the aforementioned statutory provisions, the concept of reasonable expectation has been brought to the fore by the Indian judiciary. In *Jaswant Rai vs Abnash Kaur*[697] it was held that a material defect would be one which could be reasonably supposed that if the purchaser was made aware of it, he might not have entered into the contract at all for he would be getting something different from what he contracted to buy.[698]It is therefore clear that if the lifespan of a product was artificially shortened it would be a relevant defect which would alter the decision of the buyer and therefore would be a material defect falling within the purview of the Consumer Protection Act, allowing consumers in India the right to Judicial recourse in case of violation of their rights.

CONCLUSION

Planned obsolescence, an activity which has transcended time now finds itself holding a place of great importance in modern society. It is clear from an analysis of its legal , economic and environmental implications that governmental regulation over this activity is the need of the hour. It can be said with conviction that planned obsolescence as an activity does have its place in the economic milieu of the 21st century, what remains an area of concern however is the extent of its permeation into society and its subsequent effects on consumers. The natural next step for governments around the world would remain how far would their interference in the sphere of producers sovereignty extend and whether the French model of Hamons Law should be emulated, the other side of the same coin poses an equally vexing question, namely how far could the implied contractual relationship between buyer and seller, one of the fundamental tenets of free market economics, be regulated.

[697] Jaswant Rai vs Abnash Kaur, ILR 974 Delhi 689
[698] *Ibid*.

LEGAL PROVISIONS FOR THE PROTECTION OF WOMEN

- AISHWARYA KORDE

ABSTRACT:

In the past few years, India has witnessed a large number of crimes, exclusively against women which is very much evident to each one of us. The Parliament has ordered different laws for the assurance of women from such violations however they have not been fruitful in controlling these wrongdoings. In this research paper, we shall understand various crimes that occur against women in India and the provisions for their protection under the Indian Penal Code and various other Special Laws. Then we shall understand the various provisions present in the Indian Penal Code that aim to protect women. The Indian Penal Code contains various provisions which are meant for the protection of women. We shall then understand as to why these provisions have failed and suggestions as to their implementations.[699]

Keywords: Indian Penal Code, Laws, Protection, women.

INTRODUCTION:

Swami Vivekananda once said, "There is no chance for welfare of the world unless the condition of women is improved. It is not possible for a bird to fly on only one wing". by the turn of the current century. He was causing to notice the way that around one-portion of humanity is experiencing bias, separation, and mistreatment in a male-dominated society. There are many kind of crimes which are against the women in India. For example, Infancy which means physical and emotional abuse to the women or female infanticide and girlhood including child marriage, medical care and education, sexual abuse, genital mutilation by strangers also by family members and so on.

The sections of the IPC are far reaching and incorporate both reinforced work and sex laborers and the legislations do just adding administration to the all around long arraignment. There isn't anything in this legislation to save the casualties from being attempted under other correctional arrangements for wrongdoings which were beyond their ability to do anything about like going without a visa. These are the only sections discussed in this article which are gender-neutral but most of the victims of prostitution in India are women and sections 370,

[699] Second year Law Student from National Law University, Nagpur.

372 and 373 are the only sections in the IPC which safeguard women and underage girls who are trafficked for the purpose of prostitution. The CLAA and the new corrections in the assault laws, aggressive behavior at home arrangements, the share demise arrangements, corrosive assault arrangements and the infidelity arrangements show that the public authority and the legal executive are attempting to change the law to address concerns raised by women's activist associations. In any case, the part reformist methodology towards the change is reflected in the different incongruities that continue in criminal law.

The research questions:

i. Which are the sections or provisions which are used to protect the women in India?
ii. What is the meaning of those provisions?
iii. Which are other provisions' rather than IPC to protect women in India?
iv. What is the critical view towards provision of IPC?

Here some important legal provisions for the protection of India.

"Section 304 B" : "Where the death of a woman is caused by bodily injury or by any burns or happens in any case than under typical conditions inside seven years of her marriage and it is shown that soon before her passing she was exposed to savagery or badgering by her significant other or any relative of her better half for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such relative or husband will be considered to have caused her demise. Whoever submits endowment passing will be rebuffed with detainment for a term which will not be under seven years yet which may reach out to detainment forever." [700]

The 1986 amendment created a separate type of offence called dowry death to withstand the increasing incidence of dowry deaths.

Essentials of Sec 304B are

1. "Death of women has been brought about by consumes or bodily injury or happens in any case than under typical conditions".

2. "Such demise probably happened inside 7 years of marriage".

3. "Before long before her demise the women probably been exposed to pitilessness or badgering by her significant other or any family members of her better half"

[700] The Constitution of India, as modified up to the 1st Dec,2007.

4. "The victim was exposed to mercilessness or provocation by her significant other or any relative of husband of her."

5. "Such harassment or cruelty must be for, or regarding interest for dowry".

'Soon before her death' means stretch among brutality and passing ought not be a lot. There should be presence of general and live connections between the impact of savagery dependent on settlement interest and the concerned demise. On the off chance that the supposed occurrence of pitilessness is far off on schedule and has become state enough not to upset the psychological balance of the lady concerned, it would be of no result. In the case of dowry death there shall be presumption against the husband and the relatives.

Section 326A – "Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine; Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim; Provided further that any fine imposed under this section shall be paid to the victim."[701]

Section 326B provides for punishment up to 5 years for attempting of acid attack.

With the increase in no of crimes in our society, we come across to one of the heinous crimes faced mostly by the women who lead to lifetime impact inside and outside both of a victim is Acid Attack.

"Sec 357(A)" came to be inserted in Crpc, 1973 which provides with the end goal of pay to the people in question or their wards who has endured misfortune or injury because of the wrongdoing and who require restoration. There has been many guidelines issued by the Hon'ble Supreme Court in order to curb the growing menace of acid attacks by imposing duties on the state to regularize the sale and restrict the availability of the acid and also the provide the compensation and rehabilitation to the acid attack victims.[702]

[701] The Constitution of India, as modified upto the 1st Dec,2007.

[702] https://www.worldcat.org/title/ratanlal-dhirajlals-the-indian-penal-code-act-xlv-of-1860/oclc/141860683

However, it must be recognized that having tough laws and authorization organizations may not be adequate except if profound established sexual orientation predisposition is eliminated from the general public.

In Laxmi v. Union of India, the landmark case in this context, the apex court issued certain guidelines to be followed by the Sate.

1. Regulation of the acid by the state and UT. No acid shall be given to an individual without his identification card and other details.

2. The corrosive assaults casualty will be paid pay of in any event Rs. 3 lakhs by the concerned State Government/UT as the after care and recovery cost.

3. State must ensure that free treatment is provided to victims of acid attack and a certificate can be issued by the concerned hospital which may be utilized by the victim for treatment and reconstructive surgeries.

Section 354 - "Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."[703]

Section 354 of IPC clearly states that if any person with a clear intention tries to outrage the modesty of a woman shall be punished with imprisonment for respective term according to the nature and gravity of the offence, but even after implementing such laws there seems to be no fear in minds of men of this country.

Elements for Section 354 of IPC –

i. There should be a very clear intention from the side of defendant or he has the basic intelligence to know that his act can likely cause harm.
ii. The defendant causes an act to outrage the modesty of a woman by using criminal force or tries to assault a woman.[704]

The Section has been enacted to protect women from unwanted assaults and other demeaning act which may outrage the modesty of a woman. Modesty simply means an attribute which

[703] https://books.google.co.in/books/about/Constitution_Of_India_10_e.html?id=rA39_9XtbBkC

[704] https://www.advocatekhoj.com/library/bareacts/indianpenalcode/index.php?Title=Indian%20Penal%20Code,%201860#:~:text=Indian%20Penal%20Code%2C%201860%20%7C%20Bare%20Acts%20%7C%20Law%20Library%20%7C%20AdvocateKhoj&text=Right%20of%20private%20defense%20against,person%20of%20unsound%20mind%2C%20etc.&text=Assaulting%20or%20obstructing%20public%20servant%20when%20suppressing%20riot%2C%20etc.

comes up with sex of females. Section 354A punishes Sexual Harassment which may include, demand for sexual advances, physical contact, making sexually colored remarks, showing pornography etc. up to a period of 3 years. Section 354B punishes using of criminal force to disrobe a woman, with a maximum punishment up to 7 years. Section 354C punishes Voyeurism up to a period of 7 years and Stalking is punished under Section 354D for up to a period of 3 years.[705]

'Section 372' – 'Whoever sells, lets to hire, or otherwise disposes of any 2 [individual younger than eighteen years with plan that such individual will at whatever stage in life be utilized or utilized with the end goal of prostitution or illegal intercourse with any individual or for any unlawful and unethical reason, or realizing that it generally will be likely that such individual will at whatever stage in life be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'[706].

These provisions are for safeguarding minors against the acts of selling for prostitution. This includes selling, letting to hire or disposal of any person under the age of eighteen i.e., a minor for the purpose of prostitution or illicit intercourse or for any unlawful and immoral purpose at the same time or in future. The punishment for such act would be term that may extended up to 10 years and shall be liable for fine too. If a female is sold to someone who manages or runs a brothel, then the act of selling would come under this section unless proved contrary. 'Illicit Intercourse' includes intercourse between people not joined by marriage or by any association or tie which, however not adding up to a marriage, is perceived by the individual law or custom of the local area. Similarly, Section 373 punishes the buying of minors for the purposes of prostitution and is punishable up to 10 years.

Section 375 of the Indian Penal Code defines rape and Section 376 makes it a punishable offence which will not be under seven years however which might be forever or for a term which may stretch out to detainment forever, the way things are changed by the 2013 Criminal Amendment Act. The discipline has been additionally reached out by the Amendment Act and it recommends broad discipline for assault guilty parties like police authorities, local officials, military work force, family members, instructors, prison staff and in collective brutality, pregnancy of casualty, minor young lady, inability of lady to give

[705] https://www.worldcat.org/title/ratanlal-dhirajlals-the-indian-penal-code-act-xlv-of-1860/oclc/141860683
[706] https://books.google.co.in/books/about/Constitution_Of_India_10_e.html?id=rA39_9XtbBkC

assent, mental of actual incapacity overwhelming position or while assault causes appalling substantial damage which is for at least 10 years and stretches out to life detainment which implies detainment for the convict's excess characteristic life. The legal laws for the insurance and avoidance of assault in India do give a knowledge of a severe overall set of laws and cruel discipline to the guilty parties. Notwithstanding such severe arrangements India observes 106 assaults each day which is sheer embarrassment of our Constitutional and Moral qualities.[707]

Section 376 – "This Section provides definition of Rape which includes penetration of penis in mouth, urethra, anus or vagina of a woman or penetration of any object in vagina, urethra or anus, or manipulation of any part of woman's body to cause such dissemination or claim of mouth to urethra or vagina or anus or making her do so to him or someone else. This act should be done under seven circumstances to be called a rape."[708]

i. Without her Consent.
ii. Against her Will.
iii. Her consent obtained under fear of death or of hurt.

When the man knows that she isn't his wife also female gives her consent considering him to be her husband.

i. Consent given under intoxication or administration or unsoundness of mind of such substances causing her not to understand the consequences and nature of what she is giving consent about.
ii. Consent given by a minor girl.
iii. When the female is not able to communicate consent.

'Section 498A' – "Whoever, being the spouse or the relative of the husband of a lady, subjects such lady to mercilessness will be rebuffed with detainment for a term which may stretch out to three years and will likewise be responsible to fine."[709]

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707 https://www.advocatekhoj.com/library/bareacts/indianpenalcode/index.php?Title=Indian%20Penal%20Code,%201860#:~:text=Indian%20Penal%20Code%2C%201860%20%7C%20Bare%20Acts%20%7C%20Law%20Library%20%7C%20AdvocateKhoj&text=Right%20of%20private%20defense%20against,person%20of%20unsound%20mind%2C%20etc.&text=Assaulting%20or%20obstructing%20public%20servant%20when%20suppressing%20riot%2C%20etc

708 https://books.google.co.in/books/about/Constitution_Of_India_10_e.html?id=rA39_9XtbBkC

709 https://www.advocatekhoj.com/library/bareacts/indianpenalcode/index.php?Title=Indian%20Penal%20Code,%201860#:~:text=Indian%20Penal%20Code%2C%201860%20%7C%20Bare%20Acts%20%7C%20Law%20Librar

Section 498A of the IPC, sees Matrimonial Cruelty as a Cognizable, Non Compoundable and Non Bailable Offense and gives a discipline of detainment as long as three years, or potentially a fine. [710]

Safety of woman from cruelty of her husband and his relatives is safeguarded under this section. The act of cruelty could be such that

i. Is prone to drives lady to end it all or to make grave injury or peril life, appendage or wellbeing of that lady.
ii. Harassment of lady to satisfy the unlawful need of giving some property or significant security. This segment gives discipline to a term that may reach out as long as 3 years and will be responsible for fine as well. The act of causing harassment of woman to give up dowry is punishable under this section. Woman should be safe inside the house of husband throughout her life; this is the concept and view behind this section.

Section 509 – "Whoever, planning to affront the unobtrusiveness of any lady, articulates any words, makes any strong or signal, or displays any article, proposing that such word or sound will be heard, or that such motion or item will be seen, by such lady, or barges in on the protection of such lady, will be rebuffed with straightforward detainment for a term which may reach out to three years, and also with fine".‟ Sexual Harassment of a woman which includes uttering of words, gesture or exhibits any object or making of any sound, with an intention of insulting the modesty of woman is punishable under this section for a term which may extend up to 1 year and also shall be liable for fine. This section is about the safety of Woman in the day to day society. They have a right to live with dignity and anyone who tries to attack that dignity should be punished".

To draw out the sacred order, the state has sanctioned different administrative measures proposed to guarantee equivalent rights, to counter friendly segregate on and different types of viciousness and monstrosities and to offer help benefits particularly to working women. In spite of the fact that women might be casualties in any violations, it can be 'Murder', 'Theft', 'cheating', or some other wrongdoings, the wrongdoings which are coordinated explicitly

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y%20%7C%20AdvocateKhoj&text=Right%20of%20private%20defense%20against,person%20of%20unsound%20mind%2C%20etc.&text=Assaulting%20or%20obstructing%20public%20servant%20when%20suppressing%20riot%2C%20etc

[710] https://books.google.co.in/books/about/Constitution_Of_India_10_e.html?id=rA39_9XtbBkC

against women are portrayed as 'Wrongdoing against women'[711]. Which are extensively ordered below two categories? one it is albeit a women can be casualty of any wrongdoing in the public arena and indeed all violations can't be delegated a wrongdoing against women aside from few violations which influences a women to a great extent. Anyway significant advances have been taken by the enactment which has demonstrated as weapons for women and assisted them with remaining in male overwhelming country. Presently we will examine significant violations against women alongside the legitimate arrangement which punish the criminal.[712]

The Crime identified under the Indian penal code (IPC)

i. "Rape (sec.376 IPC)
ii. Kidnapping & Abduction for different purposes (sec. 363-373 IPC)
iii. Homicide for Dowry, Dowry Deaths or their attempts (sec.302/304-B IPC)
iv. Torture, both mental and physical (sec.498-A IPC)
v. Molestation (sec.509 IPC)
vi. Sexual Harassment (sec.509 IPC)
vii. Importation of girls (up to 21 years of age) (sec. 366-B IPC)[713]"

The Crimes identified under the Special Laws (SLL)

Even though all laws are not sexual orientation explicit, the arrangements of law influencing women fundamentally have assessed intermittently and revisions completed to stay up with arising requests. The exceptional social authorizations to shield women and their inclinations explicitly are:

i. "The Employment state Insurance Act, 1948"
ii. "The Plantation Labour Act, 1951"
iii. "The Criminal Law (Amendment) Act, 1986"
iv. "The factories (Amendment) Act, 1986"
v. "Indecent representation of women (prohibition) Act, 1986"
vi. "Commission of sati (prevention) Act"
vii. "The Family Courts Act, 1954"

[711] "Status of Women in India" by Shobana Nelasco, p.11
[712] Crime in India 2012 Statistics, National Crime Records Bureau (NCRB), Ministry of Home Affairs, Govt of India, Table 5.1, page 385.
[713] https://www.worldcat.org/title/ratanlal-dhirajlals-the-indian-penal-code-act-xlv-of-1860/oclc/141860683

viii. "The Special Marriage Act, 1954"
ix. "Bonded Labour System (Abolition) Act (1976)"
x. "Legal Practitioners (Women) Act (1923)"
xi. "Indian Succession Act (1925)"
xii. "Indian Divorce Act (1869)"
xiii. "Paris Marriage and Divorce Act (1936)"
xiv. "Special Marriage Act (1954)"
xv. "The Maternity Benefit Act, 1961(Amended in 1995)"
xvi. "Dowry Prohibition Act, 1961"
xvii. "The Medical Termination of Pregnancy Act, 1971"
xviii. "Foreign Marriage Act (1969)"
xix. "The Hindu Marriage Act, 1953"
xx. "The Hindu Succession Act, 1956"
xxi. "Immoral Traffic (Prevention Act, 1956"
xxii. "The Contract Labour (Regulation and Abolition) Act, 1976"
xxiii. "The Equal Remuneration Act, 1976"
xxiv. "The child Marriage Restraint (Amendment) Act, 1979[714]"

LEGISLATIVE PROVISIONS:

i. "The Dowry prohibition Act, 1961;
ii. "The commission of sati (prevention Act), 1987,
iii. The immoral Traffic (prevention) Act, 1986;
iv. The indecent representation of women (prohibition) Act,1986,
v. The maternity Benefit Act, 1961;
vi. The Medical Termination of pregnancy Act, 1971;[715]"

A CRITICAL VIEW TOWARDS PROVISIONS OF IPC

The Indian Penal Code (IPC) has various provisions which safeguard women; most of these provisions are part of chapter 16 which includes the offences affecting the human body. This article highlights these provisions in five parts. The first part includes the gravest yet one of

[714] http://mospi.nic.in/sites/default/files/Statistical_year_book_india_chapters/CRIME%20STATISTICS-WRITEUP.pdf
[715] https://www.scconline.com

the most used provisions of the IPC: section 375. Sections 375 and 376 define and set out the punishment for rapes. According to the National Crime Reports Bureau (NCRB), a woman is raped every 15 minutes in this country. This is an alarming number and the more concerning statistic is that in an alarming 94 % of these rapes, the accused is known to the victim. [716]The provisions relating to rape have recently amended with the help of the Criminal Law Amendment Act (CLAA), 2013 which was conceptualized in the wake of the protests against the Nirbhaya case. These amendments were in accordance with the 123rd Law Commission Report (LCR). The LCR suggested widening the ambit of rape to include other forms of penetration and penetration by objects and not just the male sexual organ. [717]

This Amendment Act was commendable and helped in acknowledgement of a lot of offences which did not amount to rape under the previous laws. But the Amendment fails to criminalize marital rape which is reflective of how the legislature has not changed its patriarchal perspective. The IPC and hence the provisions for rape were passed in the mid-19th century and had a patriarchal perspective on violence against women[718]. Failure to acknowledge marital rape reflects the idea that a woman is a man's property and hence, a husband cannot violate his wife.[719]

RESEARCH METHODOLOGY

Primarily I would like to thank 'The Amicus Quire' who gave me the opportunity to be a part of this learning process and who gave me this golden chance to do this research paper on the topic – "legal provisions for protection of women." In this project I got to know many aspects which were unknown to me and helped me to enhancing my learning skills. I started with the collecting the provisions that are for protection of women in Indian Constitution, and come to know about various provisions in IPC, SLL and legislative provisions also which works towards protection of women in India.

REVIEW OF LITERATURE

A. The Constitution of India.

[716] "Women in History". National Resource Center for Women. Archived from the original on 2009-06-19. Retrieved 24 December 2006.
[717] https://www.lawctopus.com/academike/women-security-legal-safeguards-india
[718] "National Policy For The Empowerment Of Women (2001)". Retrieved 24 December 2006.
[719]Scc.com articles, on 6th of july.

B. Indian Penal Code, 1860.
C. Women rights in India under Legal Provisions.
D. Ratanlal & Dhirajlal's the Indian Penal Code (Act XLV of 1860)

METHOD

In this research paper I used Doctrinal system which alludes to a method of directing research which is generally considered as "normal legitimate exploration". Which deal with case laws, provisions and also other legal source. It fluctuates from various techniques in that it looks at the law inside itself, this doctrinal strategy makes no undertaking to look at the effect of the law or how it is applied, yet rather assesses law as a gathering out of guidelines which can be perceived and separated using legitimate sources.

SUGGESTIONS

I would like to suggest that we should follow the all provisions given by the Constitution of India which awards justice to women just as empowers the State to accept proportions of positive isolation for women for executing the all out monetary, preparing and political disadvantages looked by them. Principal Rights, among others, ensure consistency under the watchful eye of the law what's more, identical affirmation of law; prohibits exploitation any inhabitant on grounds of religion, race, station, sex or spot of birth, and confirmation correspondence of opportunity to all occupants in issue relating to work.

CONCLUSION:

The approval of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1993 is the key of; the rule of sexual orientation correspondence is revered in the Indian Constitution in its Preamble, Fundamental Duties, Directive Principles. and Fundamental Rights. The Constitution awards uniformity to women, yet in addition enables the State to embrace proportions of positive separation for women. Inside the system of popularity based country, our laws, improvement strategies, Plans and projects have focused on women' headway in various circles. India has likewise sanctioned different worldwide shows and common freedoms instruments resolving to get equivalent privileges of women.

Inside the state of a greater part rule, province, and our legitimate rules are in various circles. From the Fifth Five Year Plan this is 1974 to 78 onwards has been a checked extrade withinside the way to adapt to women' inconveniences from specialists help to progression. Lately, the reinforcing of women has been seen in light of the fact that the central issue in discovering the situation with women. The National Commission for Women became establishment through method of methods for International Journal of Humanities and Management Sciences (IJHMS) Volume 3, Issue 5 (2015) ISSN 2320–4044 (Online) an Act of Parliament in 1990 to monitor the rights and legitimate advantages of women. The 73rd and 74th Amendments (1993) to the Constitution of India have given to reservation of seats within side the local area varieties of Panchayats and Municipalities for women[720], setting up a steady system for their collaboration in powerful on the nearby levels

The women' improvement and a broad unfurl association of non-Government Organizations that have stable grassroots presence and significant ability into women' interests have contributed in propelling drives for the fortifying of women. Regardless, there in any case exists a broad empty among the objectives enunciated within side the Constitution, institution, procedures, plans, programs, and related added substances from one angle and the situational truth of the situation with women in India, at the other.

[720] "Women in History". National Resource Center for Women. Archived from the original on 2009-06-19. Retrieved 24 December 2006.

CASTEISM AND HEGEMONY

- DEEPANSHI LODHI & DHRUV JAIN

INTRODUCTION -

Caste discrimination affects approximate 260 million people globally. The extensive people live majorly in India, Bangladesh, Pakistan, Nepal, Sri Lanka, Afghanistan, Bhutan. It involves colossal violation of social, cultural, economic, civil, and political rights. Those who are at the bottom are considered sinful, immoral human beings and were treated as they were polluting the other caste groups. The discord of society into castes is a global phenomenon practiced with any particular region or belief system.

CASTE SYSTEM PRACTICED IN INDIA-

Caste as a social organization deeply rooted in socio-cultural and spiritual life of Indians for thousands of years. It experienced constructional and functional changes across Ancient, Medieval and Modern India. A cursory review of the origin and ideological roots of caste reveals at a massive level is known as Varna and at meso level it is known as jati. Caste system in India divided people into unequal and multiple social groups. The caste system is the evanishment for the Indian society. It divides the Indian society into different sectarian groups and classes. The term "Scheduled Castes" and "Scheduled Tribes" are used in Government documents just to identify the former untouchables and tribes. However, the National Commission on 2008 asked the State Government to end the use of the word 'Dalit' instead of 'Scheduled Castes' in official documents by calling the term unconstitutional. Caste system is customary embedded in the Hindu Caste system, there are different theories regarding the origin of caste system in India. According to the religious theory claims that

The Varna's were created from the body of Brahma, the creator of the world. At the top of it's the Brahmin who were mainly teacher and intellectual and are believed to have come from Brahma's head, then the Kshatriyas, the Warrior and the Rulers supposedly from his arms. The third notch went to the Vishay's, the Traders who were created from his thighs. At the bottom of the slit were the Shudras who came from Brahma's feet and did all the menial or low status jobs. However, outside the Hindu caste system were the achhoots, The Dalits or the Untouchables, traditionally, the groups characterized as untouchable were those whose

occupations and the way of living involved polluting activities, which the most important were-

- Taking life for a living, a category that included, for example, fishermen.
- Killing or disposing of dead cattle or working with their hides for a living.
- A category that includes occupational groups as sweepers and laundry workers.
- Eating the flesh of cattle or pig or chicken and also a category into which the most of the aboriginal tribes of India fell.

THE MISCHIEF OF THE SYSTEM-

UNTOUCHABILITY –Untouchability is a practice in which the lower caste people suffer from some disabilities, Untouchability is an age-old practice in India, many villages are separated by caste and they were not allowed to cross the line dividing them from the higher castes, even they are not allowed to use the same wells or drink in the same tea stalls as higher castes. Mahatma Gandhi spoke about untouchability in term of disabilities imposed by the Hindus on the Harijans, also the untouchables were called by different names in different times like in the Vedic period they were called “Chandalas" by higher castes, in the Medieval period they were called and “Achhutas”, in the British period they were called as “Depressed Caste” and in the contemporary period they were called as “Scheduled Caste”. However, practicing of Untouchability leads to social discrimination in the society, damages social harmony, brought down the image of Indians in the eyes of the other countries and developed a sense of inferiority among the Scheduled Castes.

DISCRIMINATION- Because of caste system, there is a Discrimination. The Untouchables, Scheduled Caste peoples do not have the facilities like electricity facility, sanitation facilities or water pumps also they do not have the proper education facilities, medical and housing facilities as compared to Higher Castes peoples.

Caste system is primarily in the Hindu Caste system to which Dalit are considered outcast human begins due to this refusal practiced; they have restricted approach to resource services and development. The system confers many privileges on the upper castes while sanctioning repression of the lower castes by privileged groups.

According to Historical Theory, Caste system has been around since the 1840's but we have been using caste around 1500 BC, when Aryans arrived in India. Indian Society seized a vast range of protest movements across the ideological spectrum in different historical speculation. Some of the Indian Nationalist tried to avoid this racial discrimination of the caste system and assert equal status with colonial ruler. However, these claims were argued by Dr. B.R Ambedkar, Ambedkar argued for social equality for all the citizens of Indians and acknowledged the concept of modern citizenship. They approached the caste system from the view of the untouchables and argued that most of the castes were victims of caste cruelty. In his writing the social power of the caste system and favor the abolition of Caste is the only substitute to overcome the disgraceful practice. The Scholarship on the sociology of caste broadly said by AM SHAH argues that Caste has undergone a rapid change in 21 century India. He claimed that Caste as a system lost its significance over a period especially in Urban India whereas in rural surroundings it lost its practice leisurely. Caste is one of the major fount of conflict in Indian Society. The source of conflict is a sense of supremacy shared by the dominant Castes over the marginal castes. Villages across the states in India witness multiple forms of violence, humiliation and, physical violence is a very common occurrence.

However, Constitution of India prohibit discrimination on the basis of caste and in order to correct historical injustice and also provide a measure to the traditional disadvantage. The authorities declare quotas in government jobs and in educational institutions for the lower caste peoples. Caste as a system is losing its arouse burden, with the spread of secular education and increasing urbanization, the influence of caste has brushed aside, especially in cities where multiple castes live side by side and inter caste marriages.

Article 15 of the Constitution of India forbid the nation from discriminating any citizen on the basis of one or many of the aspects such as caste, religion, race, sex, place of birth and others.

Article 14 of Indian constitution states that Equality before law, State shall not deny any person equality before the law or the equal protection of law within the territory of India.

Article 17 of Indian Constitution said Abolition of Untouchability, the enforcement of any disability arising out of "Untouchability" shall be an offence punishable according to law.

CIVIL AND RELIGION DISABILITIES AND PRIVILEGES-

Caste imposed discrimination refers to the socially constructed hierarchies through old age norms. Customs and practices aimed to protect the social, political and economic interests of the privileges. This has given some moral power to some social groups. These groups are successful in imposing their worldview, norms, beliefs and cultural practices on other approved social groups. It hardly provides scope for the deepening of social democracy which is a preconditioning for political democracy in India.

CASTE AND HUMAN RIGHTS-

Article1 of the Universal Declaration of Human Rights states -All human beings are free and equal in dignity and Rights.

Article 7 of the Universal Declaration of Human Rights- All are equal before law and are entitled without any discrimination to equal protection of the law.

Article 18 of the Universal Declaration of Human Rights -Everyone has the Right to freedom of thought, conscience and religion. This Right includes Freedom to change his religious belief and freedom either alone or in community with others and in public or private to manifest his religion or belief in teaching practice, worship and observance.

Caste Biases include enormous violations of civil, political, economic, social and cultural Rights. Caste pompous communities are denied a life in dignity and equality, so these were the laws established by authorities to safeguard the ones from discrimination on the basis of "CASTE".

GOVERNMENT INITIATIVES TO REMOVE THIS PRACTICE-

The Indian Government took various initiatives to remove untouchability from the society and has brought many reforms to improve the quality of life for the weaker section of the society some of them are considered as:

- The Government provides them an ACT, Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
- The Government provides them a provision in the Constitution which talks about a reservation in places like educational institutions, for employment opportunities etc.
- The Government established social welfare departments and national commissions for the weaker section of the society.

- The Government abolished the use of the word 'untouchability' in 1950.
- Also, the Government provides them a constitutionally guaranteed fundamental human rights.

These measures adopted by the government to remove caste discrimination from the Indian society have brought some extent of relief to the weaker section of the society. However, the peoples reside in rural areas still facing extreme discrimination on the basis of caste and creed.

LEGISLATIVE FRAMEWORK ON CASTE SYSTEM IN INDIA-

The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent atrocities against the Scheduled Castes and Scheduled Tribes. The Act prescribes the penalties that are more stringent than the Indian Penal Code and other Laws. This Act provides security to STs and SCs. In India the lower castes groups being the victims of untouchability and have faced socio-economic discrimination and exclusion from others as well as violence. The Indian Constitution designated the untouchable as Scheduled Caste and Article 17 of Indian Constitution banned this practice in any form. But to protect the lower castes from atrocities and violence various legislative measures were made such as, The Untouchability (Offences) Act, 1955 which was the first step to protect the lower castes peoples. Afterwards it was amended and rechristened as the Protection of Civil Rights Act, 1976, but it was not much effective. As a result, a strong legislation was enacted named as Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The provisions of this act is divided into three parts, the first one establishes a criminal liability on the SCs and STs, the second one prescribes the reliefs and compensation for victims of atrocities and the last one consists of provisions relating to implementation and monitoring of this act such as special courts. There was a case ***Subhash Kashinath Mahajan Vs. State of Maharashtra,*** in this case Bhaskar karbhari an SC employee of the technical education department of the government of Maharashtra, filed a complaint under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 against his two superior officers. They had made adverse comments on his performance in his annual confidential report, according to the complaint the superiors made adverse comments because of his lower caste identity and not because of his performance. The investigating officer requested for a prosecution sanction against the two accused in December 2010, but it was denied by the Director of technical

education, Subhash Kashinath Mahajan in January 2011. Gaikwad then filed a First Information Report (FIR) under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act against Mahajan in March 2016 for denying sanction. The Director approached the High Court in May 2017 for anticipatory bail, but his plea was quashed by the High Court. He then approached the Supreme Court in 2017, and in March 2018, the apex court delivered an order, quashing criminal proceedings against Mahajan. The main points of the Supreme Court order are as follows:

- For lodging an FIR under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act preliminary enquiry is to be conducted by a deputy superintendent of police.
- Provision of immediate arrests in complaints filed under the Act no longer stands. If the accused is a government employee, the police have to seek the permission of the appointing authority to arrest the accused. In cases where the accused is not a government servant, permission of the Senior Superintendent of Police is necessary for making an arrest.
- The Supreme Court also lifted the provision of a blanket ban on anticipatory bail in cases registered under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. It ruled that if the court hearing the matter finds prima facie that there is no case or finds that the complaint could be mala fide in nature, anticipatory bail may be granted to the accused. However, according to section 18 of the original Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, anticipatory bail cannot be granted in cases lodged under the Act.

This order by the Supreme Court led to a huge outburst of public anger and protests by *Dalit* groups. To protest against what they saw as a dilution of the Act, the agitators took to the streets and organized an all-India shut down (Bharat Bandh). It also provides that no preliminary inquiry will be required for registering a criminal case, and an arrest under this law would not be subject to any approval. This overturning of the Supreme Court order while satisfying the *Dalit* demands has angered the upper castes. Upper caste groups in poll-bound Madhya Pradesh have started to protest against the government action to overturn the Supreme Court judgment in *Subhash Kashinath Mahajan v. State of Maharashtra* case. Thus, this case has brought to the fore contrasting arguments about the Scheduled Castes and

Scheduled Tribes (Prevention of Atrocities) Act which need to be deliberated in a dispassionate and reasonable manner.

CONCLUSION

The curator of this Caste system in India is the subject matter of crucial importance even today, despite the Indian Constitution providing a legal framework to ensure equality of opportunities over the caste, religion, region and race. The Constitution of India put an end to the practice of Untouchability and declared caste base abuse, violence is a crime. However, 74 years of independent rule have failed to terminate the forms and practices of the caste system in India.

GENDER INEQUALITY

- SHIKHAR SRIVASTAVA

After the World War II, in the post modernization era, one of the issues which had attracted the attention of the policy makers and social scientists was gender issues and concerns. Gender issues mean the discussion on both men and women, though women who suffer from gender inequality. From all gender issues, gender inequality is the most prevalent in India. Consideration of gender inequality is now common in Government, Non-Government organizations, and in the politics in India. The policy makers are strongly believed that a positive commitment to gender equality and equity will strengthen every area of action to reduce poverty because women can bring new energy and new sights. A lot of debates are going on women and their development since last few decades. Thus, several national and international organizations are trying to promote the advancement of women & their full participation in developmental process & trying to eliminate all forms of inequality against women. The importance of feminism has been steadily growing and gaining intellectual legitimacy. The intensity of gender inequality 'indicates the status of women in that particular community. The possibility of women being prone to gender inequality is limited when she enjoys a high status in the society and vice-versa. Therefore, knowledge pertaining to status of women's necessary to get clear interpretation of gender inequality.

HISTORY OF GENDER INEQUALITY

If we highlight ancient India, an Indian woman was in the position of high esteem and was pronounced by the word of maata (mother) or Devi (goddess) in the Vedas and Upanishads. Same as Manu Smriti, woman was considered as a precious being and in the early Vedic age, girls were looked after with care. Then practice of polygamy deteriorated the position of woman and in the medieval period, the practices of purdha system, dowry system, and sati system came into being. But with the passage of time, the status of woman was lowered.

After the development of science and technology, female feticides is being practiced by large number of people .This has also led to a drop in the female ratio. The Indian census 2011 state wise shows that Kerala represent the highest sex ratio with 1084 females per 1000 males while Haryana represents the lowest sex ratio with just 877 women per 1000 males. Then the

dowry became popular and it was the starting period of female infanticide practices in few areas.

In India, a sex-selection phenomenon has been in place since the 1980s, with men born during this period now at marriageable age. Then the urbanization since the 1990s where a lot of families and men have moved to cities to look for work. People are much wealthier but at the same time there's pressure to produce sons as an heir, so educated, wealthy families are now more likely to have sex selection. These entire factors are coming to play and creating this toxic mixture, which has turned violence against women into a bigger issue today.

The origin of the gender inequality has been always the male dominance. At least in India, a woman still needs the anchor of a husband and a family. Their dominating nature has led women to walk with their head down. It was all practiced from the beginning and is followed till date. In the case of a woman's reservation in parliament, the opposing parties believe that women are born to do household tasks and manage children and family. In many parts of India, women are viewed as an economic and financial liability despite contribution in several was to our society, economy and by their families.

The crime against women is increasing day by day. Domestic Violence, Rape, Sexual harassment, molestation, eve teasing, forced prostitution, sexual-exploitation, at work places are a common affair today. So, it's an alarming issue for our country. The major reasons for the gender inequality are identified as the need of a male heir for the family, huge dowry, continuous physical and financial support to girl child, poverty, domestic – violence, farming as major job for poor and the caste system.

FACTORS BEHIND GROWING GENDER INEQUALITY

There are so many factors which are fully responsible for gender inequality in India. These factors are as follows:-

ECONOMIC FACTORS

¬ **Labor participation:** - There is wage inequality between man and woman in India. A substantial number of women enter the labor market after thirties, generally after completion of their reproductive roles of child bearing and rearing.

¬ **Access to credit:** - There are large disparities between men and women in terms of access to banking services. Women often lack collateral for bank loans due to low levels of property

ownership and micro-credit schemes have come under scrutiny for coercive lending practices.

¬ **Occupational inequality:** - Women are not allowed to have combat roles in military services. Permanent commission could not be granted to female officers because they have neither been trained for command nor have been given the responsibility in India.

¬ **Property Rights:** - Although women have equal rights under the law to own property and receive equal inheritance rights, yet in practice, women are at a disadvantage. The Hindu Succession Act of 2005 provides equal inheritance rights to ancestral and jointly owned property, the law is weakly enforced.

¬ **Women's inequality in proper inheritance:-**Women are insignificantly deprived of their proper inheritance culturally and religiously as well. The religious constitution doesn‟t give women equal inheritance; there is a segregation of giving the property to women as they will not be given the property as men can have. Though Islamic constitution permits women having at least half of the property as man, society is reluctant to give the desired property to women let alone giving the equal share.

¬ **Employment inequality**: - Some common inequalities that take place in the workplace are the gender-based imbalances of individuals in power and command over the management of the organization. Women are not able to move up into higher paid positions quickly as compared to men. Some organizations have more inequality than others, and the extent to which it occurs can differ greatly. In the workplace the men usually hold the higher positions and the women often hold lower paid positions such as secretaries.

SOCIAL FACTORS

¬ **Education:** - The female literacy rate in India is lower than the male literacy rate. According to census of India 2011, literacy rate of female is 65.46% compared to males which are 82.14%.

¬ **Health:-** On health issue, the gender inequality between women's and men's life expectancy and women live compared to men in good health because of lots of violence, disease, or other relevant factors.

¬ **Patriarchal Society:** - Most of India has strong patriarchal custom, where men hold authority over female family members and inherit property & title. It is the custom where

inheritance passes from father to son, women move in with the husband & his family upon marriage & marriages include a bride price or dowry.

¬ **Dowry:** - The dowry system in India contributes to gender inequalities by influencing the perception that girls are a burden on families. Such belief limits the resources invested by parents in their girls and limit her bargaining power within the family.

¬ **Gender-based violence:** - Gender-based violence such as rape, sexual assault, insult to modesty, kidnapping, abduction, cruelty by intimate partner or relatives, importation or trafficking of girls, persecution for dowry, indecency and all other crimes are practiced on women. These crimes show the high degree of inequality in India.

¬ **Women's inequality in decision making:** In India, Women have less authority than men to legal recognition and protection, as well as lower access to public knowledge and information, and less decision-making power both within and outside the home. This is also one of the reasons for inequality in gender.

CULTURAL FACTORS

¬ **Old age support from sons:** - A key factor driving gender inequality is the preference for sons, as they are deemed more useful than girls. They are supposed to support the old age security of their parents.

¬ **Patrilineality system:** - It is a common kinship system in which an individual's family membership derives from and is traced through his or her father's lineage It generally involves the inheritance of property, names, or titles by persons related through one's male kin.

¬ **Role of sons in religious rituals:** - Another factor is that of religious practices, which can only be performed by males for their parents' afterlife. Sons are often the only person entitled to performing funeral rights for their parents.

¬ **Son Preference:** - Boys are given the exclusive rights to inherit the family name and properties and they are viewed as additional status for their family. Moreover, the prospect of parents, losing daughters to the husband's family and expensive dowry of daughters further discourages parents from having daughters. There is a strong belief that daughter is a liability.

LEGAL & POLITICAL FACTORS

According to the Constitution of India, both men and women are equal in the eyes of the laws and hence they have equal rights. But, unfortunately, legal & political bias has prevented the law to attain the success of equality in gender. This is another reason for inequality in gender.

CONVERSION THERAPY: A VICIOUS WEB

- ABDUL NOOR BIN ABDUL NASIR, M.NIKETH VINOD & NOURIN. S. FATHIMA

INTRODUCTION

Despite the decriminalization of homosexuality in India and worldwide, conversion therapy remains a stain on mankind. The brutality of the therapy, as well as its sheer existence, reveal outdated concepts of ‘normalcy.' In the name of ‘religion' and ‘medical practice,' these ideas brutalize the LGBTQIA+ community, suffocating one's choice of gender and sexuality by referring to it as an illness.

The so-called "conversion therapy," a blanket term for a varied set of hazardous and unproven pseudo-scientific "treatments" intended at changing a person's sexual orientation or gender identity, is common but generally unrecorded. Counseling, medicine, institutionalization, and hormone injections are among of the options, as are rare but extreme procedures like electro-convulsive therapy and hormonal castration. Outside of the professional setting, a variety of spiritual godmen and gurus claim to be able to cure homosexuality with prayer, physical assault, and mental conditioning. All of these practices are based on the idea that you can alter your sexuality.

Surprisingly, it appears that the disproved concept of conversion therapy is still in use. It can include everything from shock treatment to exorcism and hormones to psychiatric medicines and instilling a sense of shame, all in the name of curing queerness. It causes irreversible mental health damage to victims, according to medical specialists. Though homosexuality is no longer classified as a "mental disorder" in India, conversion therapy has persisted in religion, morality, and farcical "medical" techniques that purport to heal the abnormal.

WHAT IS CONVERSION THERAPY?

Conversion therapy, often known as reparative therapy or gay cure therapy, tries to cure someone of their sexual orientation. It aims to repress a person's natural impulses and sexual identity using a variety of ways ranging from prayers to 'corrective' rapes and physical violence.

These therapies might be carried out by faith organizations or healthcare experts. The goal of these treatments is to alter a person's sexual orientation. Counseling, medication, hormone injections, aversion therapy, and institutionalization are among options for treating hormonal castration or electrocution. All of these when combined with family abuse and pressure from society can lead to serious image physically and causes trauma.

Conversion therapy is said to be practiced discreetly. Falsified files are used to transport the 'patients' to psychiatric wards in hospitals or de-addiction centers. This so-called "treatment" is given out by preachers, naturopaths, shamans, and religious institutions, as well as unethical health practitioners. And surprisingly, some medical practitioners genuinely believe they are providing a service.

HISTORY

Curing homosexuality has a long history, dating back to the beginnings of psychiatry. The roots of this illegal behavior can be traced back to the nineteenth century, when aberrant sexual preferences were regarded as shameful or criminal. The accounts of Albert von Schrenck-Notzing, a German physician who allegedly used hypnosis to 'cure' homosexuality in the 1890s, are one of the first known cases.

By the early 1900s, hypnosis, electroconvulsive therapy, and surgical methods like lobotomy were all being used by practitioners all over the world. People were tortured, castrated, and subjected to horrific punishment. Stanley Kubrick's 1971 film A Clockwork Orange depicted aversion therapy.

Contemporaries of Sigmund Freud engaged in techniques for gay cures in the early twentieth century. In 1952, Alan Turing, a mathematician and computer scientist, was forced to undergo chemical castration in the United Kingdom for "gross indecency." ", which is to say, a homosexual connection. During World War II, a man who was instrumental in deciphering Nazi Germany's codes died two years later, reportedly by suicide. Following the Stonewall riots of 1969, which were protests against police brutality that catalyzed the gay liberation movement, the American Psychiatric Association (APA) was obliged to remove homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973. Multiple mental health institutes also disclaimed conversion therapy after a few years.

Between 1977 and 1982, the Department of Psychiatry at AIIMS, New Delhi, in India, conducted a study to reverse sexual orientation. Six homosexuals were given electric shocks

to suppress their homoerotic thoughts using an aversion therapy equipment set at 50 volts. According to the study, it claimed that four people were effectively reoriented.

In 2001, the Milap Project, a Delhi-based Naz Foundation India Trust organization, filed a complaint against an AIIMS doctor who had psychologically mistreated a patient in order to 'treat' homosexuality. This treatment plan included electroshock therapy.

The Indian Psychiatric Society issued its first "position statement on Homosexuality" in 2014, declaring that same-sex sexuality was not a psychiatric disorder and that there was no evidence that sexual orientation could be changed through treatment. This statement was issued in response to former Indian Psychiatric Society president Indira Sharma's controversial remarks about homosexuality, describing it as "unnatural" to media. After the Supreme Court struck down section 377 of the Indian Penal Code, decriminalizing homosexuality, the IPS restated their position in 2018.

Homosexuality is not a mental condition, according to the Indian Psychiatry Association, and there is no evidence that one's sexual orientation can be changed. Conversion therapy is still used by some mental health practitioners and institutions. Due to the widespread use of conversion therapy to 'cure' homosexuality by changing a person's sexual orientation, India continues to experience resentment from the LGBTQIA+ community. This technique is based on the social stereotype that homosexuality is a sort of perversion that need medical intervention.

AFTER-EFFECTS OF CONVERSION THERAPY

After receiving conversion treatment, 98 percent of the victims had significant psychological and bodily consequences. The primary issue is that the claim that conversion therapy may change a person's sexual identity are either untrue or discredited. These techniques can teach a person to avoid being attracted to a particular sex, but they cannot change a person's basic nature. Several religious groups argue that through changing one's sexual identity, these reparative activities might help people live a "normal" life. However, research has shown that such approaches are ineffective and have detrimental consequences. Furthermore, minors are particularly vulnerable to being lured into conversion therapy. Depression, anxiety, drug usage, homelessness, and even suicide are all possible outcomes of such activities. Furthermore, the therapist's agreement with the societal bias may exacerbate the self-hatred already present in the patient

Conversion therapy, in which victims are subjected to various sorts of physical and emotional torture, is without a doubt extremely destructive. According to a research by the UN's independent expert on gender violence and discrimination, 98 percent of individuals who receive such therapy suffer long-term consequences, such as sadness, anxiety, permanent bodily harm, and loss of faith. Conversion therapy has been documented in different states in India, indicating that a lot of Indians have been victims.

Conversion therapy is unethical and a violation of human rights at its most fundamental level. In recent years, laws and views around homosexuality have changed. Non-heterosexuality is not a mental disorder, according to the Indian Psychiatric Society, and it cannot be modified through external means.

Even after the Supreme Court struck down Section 377, decriminalizing consensual same-sex relationships and issuing the landmark NALSA verdict to protect transgender rights, Indian society is far from queer-friendly: LGBTQIA+ people still endure violence, hatred, and shame. And it poses a serious threat to their emotional and physical well-being.

As a result of the presence of homophobia, biphobia, or transphobia in society, attempts to change a person's sexual orientation through conversion therapy are made. This, however, has severe consequences for the individual's mental health.

LEGAL POSITION IN INDIA

Conversion therapy is a method of changing a person's sexual orientation from homosexual to heterosexual. The medical profession has condemned this treatment as unethical because it is based on the assumption that homosexuality is a mental illness, despite the lack of scientific evidence. Under medical negligence, the use of such therapy by doctors might result in civil liability - a type of legal liability in which compensation is paid in the form of money for damages caused – as doctors have a duty to decide whether or not to take up the case. This was held by the Supreme Court of India in the case, *Laxman Balkrishna Joshi vs Trimbak Bapu Godbole and Anr.*[721]

Conversion therapy cases should not be taken up by Indian doctors. If they fail to do so, they may be held liable for legal damages as a result of medical negligence. Civil liability, on the other hand, only recognizes monetary compensation. As a result, assigning civil liability to

[721] Laxman Balkrishna Joshi vs Trimbak Bapu Godbole And Anr (1969) AIR 128, 1969 SCR (1) 206

doctors who blatantly disregard medical research is insufficient to totally abolish this practice. As a result, there is a requirement to assign criminal liability.

The majority of criminal law is written from the perspective of a cisgender heterosexual man, according to feminist legal scholarship. Deep-seated ideas that favor the gender binary can lead to laws that are gendered. Statements from the Centre, arguing that same-sex marriages "would cause havoc in society" and should be considered "impermissible," indicate that numerous biases may enter into legislation affecting the LGBTQIA+ community's rights. As California's ban on conversion treatment demonstrates, such prohibitions frequently necessitate the state defining "sexual orientation." Given the current regime's heteronormative and stereotyped ideas, it seems questionable that this task can be performed adequately. A transgender person is defined in the Transgender Persons (Protection of Rights) Act of 2019 in a way that ignores the concept of gender fluidity. This cannot happen again, and the inclusion of LGBTQIA+ community members' voices should be seen as essential in a topic so intricately linked to their right to dignity and life under Article 21 of the Constitution.

To begin with, Section 319 of the Indian Penal Code (IPC) defines the crime of "Hurt" as inflicting infirmity. Furthermore, it was decided in *Jashanmal Jhamatmal v. Brahmanand Sarupananda*[722] that mental infirmity falls under the category of "Hurt." As a result, due to substantial evidence of mental illnesses such as depression, anxiety, and trauma produced by conversion therapy, it may be inferred that it falls under the category of "Hurt." Furthermore, Section 304-A of the IPC establishes criminal liability for medical malpractice. The bar for establishing the same, however, is quite high. As stated in *Jacob Mathew vs State of Punjab & Anr*[723], in order to demonstrate criminal carelessness or recklessness, the act must be of such a high degree that it is considered "gross." As a result of the ambiguity and broad scope of the terms "high degree" and "gross," medical practitioners can get away with it without facing any consequences.

Today, no Indian legislation clearly forbids conversion therapy. The Mental Health Act of 2017 does, however, expressly ban treatment for an adult's mental health without their informed consent. Furthermore, Section 2(i) states that consent for a specific intervention must be granted freely and without coercion, and that adequate information, including risks, benefits, and alternatives, must be disclosed prior to such consent. As a result, conversion

[722] Jashanmal Jhamatmal Vs. Brahmanand Sarupanand, AIR 1944 Sind 19
[723] Jacob Mathew vs. State of Punjab & Anr. (2005) 6 SCC 1

therapy and its associated procedures are in direct violation of the Act. The Mental Healthcare Act of 2017, states that no discrimination against patients based on gender or sexual orientation is permitted. According to the Act medical providers must also obtain "informed consent" before treating LGBTQIA+ patients. In *Navtej Singh Johar vs Union of India*[724], the Supreme Court of India decriminalized homosexuality in 2018. It used worldwide norms and acknowledged medical standards to exclude homosexuality from the definition of mental disorder under Section 2(s) of the Mental Health Act, 2017, and relied on international norms and accepted medical standards to do so. The Court ordered the government to publicize the decision widely in order to eliminate the societal stigma associated with homosexuality. It also required the government and police to be made aware of the crimes committed against the LGBT people. There occur three problems because of placing LGBTQIA+ members generally under this Act.

- To begin, a member of this community cannot be classified as a "mental health" patient solely based on their sexual orientation.
- Moreover, the Act's definition of informed consent is limited because it does not protect individuals who are either uneducated or have been misled into believing that their sexuality is a "disease." The court ruled in *Common Cause v. Union of India (2018)* that everyone has the right to self-determination, which includes the right to choose. This right includes the willingness of patients to submit to medical treatments as well as the ability to select between alternative medical treatments. To conform to cultural views, LGBTQIA+ patients are coerced into consenting to and undergoing such a brutal practise. Furthermore, the culture of humiliation, cruelty, and abuse that surrounds alternative sexual identities has a substantial impact on the victims' mental health, and an individual may submit to fraudulent treatment in order to meet "society's expectations."
- Finally, the Act solely holds the state and mental health experts accountable, but not other perpetrators like parents. Parents, according to a recent study, play a critical role in attempting to "change" one's sexual orientation.

[724] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

Religious therapists or babas who provide this therapy on their own or at the request of parents are likewise exempt from liability.

In addition, the court in the Navtej Singh Johar case stressed the right to privacy given by Article 21 of the Indian Constitution, which includes the right to make personal decisions. Along with decisional autonomy, the judgment recognizes the right to health as a fundamental component of the right to life (Article 21), with health encompassing both physical and mental well-being. On the basis of the grounds of this decision, it is clear that "forced conversion treatment" breaches a fundamental right, namely Article 21 of the Indian Constitution. The current legal framework does not provide any express protection from the heinous practice of conversion therapy.

The prohibition against conversion therapy must encompass all of the forms in which this heinous activity manifests itself. Corrective rape and electroshock therapy are examples of conversion therapy practices that are more "apparent" and hence should be prohibited. However, there is a less obvious technique to practice conversion therapy that the law may miss. Official organizations such as the International Federation for Therapeutic and Counselling Choice are promoting conversion therapy as Reparative Theory or Sexual Attraction Fluidity Exploration in Therapy (SAFE-T). They try to explain homosexuality as something that is "unwanted," for which LGBTQIA+ people need "sympathy," and hence strive to "assist" them in their barbaric practices. While the names of these activities and organizations may appear innocent, they are essentially the same old wine in a new bottle. Furthermore, criminalizing conversion therapy is merely one tool in the arsenal for eradicating it. Conversion therapy that is based on human rights cannot be entirely punitive. Instead, efforts should be made to utterly delegitimize this behavior. Professionals in the medical field should be aware of the presence of various sexual orientations and gender identities. Individuals should be made aware of their legal rights, and this process and its outcomes should be reviewed and evaluated on a regular basis to ensure accountability.

In his judgement in *S. Sushma v. Commissioner of Police*[725] on June 7, 2021, Justice N Anand Venkatesh took a positive step in this regard by outlawing conversion therapy. As a result, Tamil Nadu has become India's first state to outlaw conversion therapy. This decision is noteworthy because Justice Venkatesh made a concerted effort to educate himself on the

[725] S. Sushma v. Commissioner of Police (2021) W.P. No. 7284

subject and comprehend the vulnerabilities of India's LGBTQIA+ population. “Ignorance is no excuse for normalizing any type of discrimination,” he said. He gave interim rules and recommendations to help the LGBTQIA+ community live better lives. As a result, a vital precedent will be set for judicial and legislative bodies to be more responsive and accountable in understanding and protecting the LGBTQIA+ community's concerns and rights. Conversion therapy is widely used in India, and it is practiced by both doctors and cosmic healers, demonstrating how science and religion interact. As a result, the legislature must take a lead role in declaring all types of conversion therapy to be unethical and dangerous.

AROUND THE WORLD

There are international accords and covenants that allow conversion therapy to be practiced. The UN's Special Rapporteur on Torture emphasizes the importance of gender-inclusive application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It claims that "conversion" therapy causes severe, life-long physical and mental anguish and suffering, and that it can lead to torment. Discrimination against members of the LGBTQ community also violates Principle 17 of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, which were recognized in the *NALSA v. Union of India* decision. The World Health Organization had declassified homosexuality as an illness a decade before, stating that because it is not a disease, it does not require treatment. The Pan American Health Organization issued a statement in 2012 urging governments around the world to expose such "therapies" and promote diversity, as well as making recommendations and proposals for governments, academic institutions, the media, and societies to address the problems raised by conversion therapy. Many governments have recognized the breach of human rights and ethics that conversion therapy causes and have outlawed it. In terms of one's right to mental health, the Human Rights Council defined mental health to be a human right in its Resolution 36/13. Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR – which India has ratified) states that "State Parties should ensure that everyone has the right to the highest quality of bodily and mental well-being."

According to the worldwide LGBTQ organization ILGA World, pseudoscientific practice has a "negative effect on people's life from a very early age." The World Health Organization

(WHO) and more than 60 health professional groups from over 20 nations have all condemned the practice.

Only four nations, according to ILGA World's 'Curbing Deception - A global review of legal constraints on so-called ‘conversion therapies,' have banned the practice: Brazil, Ecuador, Germany, and Malta. Another four countries, the United States, Canada, Australia, and Spain, have regional legislation prohibiting the practice in some areas. Argentina, Uruguay, Samoa, Fiji, and Nauru are among the five countries with indirect restrictions. In other words, just seven countries have direct legislation prohibiting the practice on either a national or regional level.

According to the ILGA report, "brutal and inhumane tactics" were used to change people's sexual orientation, gender identity, and gender expression throughout the twentieth century. Medical experimentation, lobotomy, castration, chemical, and electroshock aversion therapy are only a few examples. As the United Kingdom prepares to discuss the issue in Parliament, two years after the Government committed to abolish the practice, the ILGA has updated its toolkit to raise attention to the findings.

It only made it to the House of Commons because a large enough number of people signed an e-petition, which automatically qualified it for a parliamentary debate. This is despite Prime Minister Boris Johnson's commitment to outlaw the practice last summer, claiming that a study was needed to determine its prevalence in the UK before any legislation could be introduced.

The response to putting a stop to the practice varies around the world. Other nations, such as Brazil and Spain, limit or restrict the practice's advertising rather than outright prohibiting it, as they do in Malta, Ecuador, Germany, and sections of the United States.

While 2020 was supposed to be the year when the world made substantial headway toward banning the practice, the pandemic has slowed things down. More than 10 countries had policies in the works or even bills introduced when the report was released in February 2020. However, Germany is the only new country to establish national restrictions on the practice in the recent year, with the United States, Mexico, Australia, and Canada locally. Similarly, there have been some rollbacks in the pandemic, such as in the US state of Florida, where various county-level prohibitions were challenged on the grounds that they infringed on "free speech rights." Some have been overturned, while others are currently being challenged.

Even though a parliamentary debate is being held in the United Kingdom today, nearly 1000 days after the country committed to outlaw the practice, no proposals have emerged.

CONCLUSION

As a result, an emphasis on delegitimizing and prohibiting conversion therapies through legislation and policy becomes critical. India should take a page from the countries that have outlawed such therapies and penalized practitioners who perform them, therefore increasing their civil culpability. It is past time for India to ratify the UN Convention Against Torture, implement the ICESCR and the Yogyakarta Principles, and enact legislation that ensures compliance with international law.

The major issue is that homosexuality is treated as a disorder, thus sensitization and awareness are equally important. People who are different from them will always be met with prejudice, fear, and hatred. However, fraudulent claims to medical validity obscure this type of prejudice. The medical community's outspoken condemnation of conversion therapy is great, but it is insufficient to address the practice's irrational and damaging nature. It's high time for us to acknowledge that homosexuality, sometimes known as "queerness," is everything but aberrant. Choosing one's sexual orientation or gender is a personal decision. And anyone who tells us otherwise is simply ignorant and outdated. Prejudices flourish in an environment where these therapies are used. The most pressing need is for people to recognize that homosexuality is not a mental illness that requires treatment.

BANKS NATIONALISATION IN INDIA

- VANSH DEEP & SHREYA YADAV

ABSTRACT

Indian Banking history can be traced to 19th century. During the colonial era many Indian banks were founded either by the Presley States or by wealthy individuals. The primary aim of most of the banks was to cater financial needs of trade and industry in that locality. During this period the banking services became the privilege of big business firms and wealthy individuals. Masses were denied easy credit and banking services. Agriculture and rural small scale industries did not have access to credit facilities and banking services. They depended on village money lenders and other private financiers to fund their activities. These local financial prodders exploited the rural population by charging enormous interest rates and harsh repayment conditions.

Nationalization of banks in India by then Indian Prime Minister Indira Gandhi wrote a new chapter in Indian Banking history. The nationalized banks in India were compelled to focus on rural and agricultural sectors as a part of their social responsibility. Their resources were utilized to empower farmers and agricultural laborers in order to free them from the clutches of money lenders. Nationalization of banks in India was done in two phases. The first phase of nationalization started in 1955 when the erstwhile Imperial Bank of India became State Bank of India with an Act of parliament. During 1959, seven subsidiaries were nationalized and associated with State Bank of India one by one. This heralded a new beginning in Indian banking system. The State Bank group became the largest bank in India serving 90 million customers with a network of over 9000 branches in nook and corners of the country.

The second phase of nationalization started in 1969 with the nationalization of 14 major commercial banks in India. In 1980, 6 more commercial banks were nationalized and became public sector banks. After this period the Public Sector

Undertaking banks expanded their reach and grew in leaps and bounds. The nationalized banks in India expanded their branches and spread their activities across the country. The PSU banks introduced new schemes and programs to cater all sections of the society. Thus

the nationalization of Banks in India helped the masses to avail banking services at affordable cost.

KEYWORDS

PSU, Nationalization, Commercial, Economic, Fundamental Rights, Constitutional, Monopoly, Compensation.

INTRODUCTION

After independence the Government of India (GOI) adopted planned economic development for the country (India). Accordingly, five year plans came into existence since 1951. This economic planning basically aimed at social ownership of the means of production. However, commercial banks were in the private sector those days. In 1950-51 there were 430 commercial banks. The Government of India had some social objectives of planning. These commercial banks failed helping the government in attaining these objectives. Thus, the government decided to nationalize 14 major commercial banks on 19th July, 1969. All commercial banks with a deposit base over Rs.50 crores were nationalized. It was considered that banks were controlled by business houses and thus failed in catering to the credit needs of poor sections such as cottage industry, village industry, farmers, craft men, etc. The second dose of nationalisation came in April 1980 when banks were nationalized.

OBJECTIVES

The nationalisation of commercial banks took place with an aim to achieve following major objectives.

1. Social Welfare : It was the need of the hour to direct the funds for the needy and required sectors of the Indian economy. Sector such as agriculture, small and village industries were in need of funds for their expansion and further economic development.

2. Controlling Private Monopolies : Prior to nationalisation many banks were controlled by private business houses and corporate families. It was necessary to check these monopolies in order to ensure a smooth supply of credit to socially desirable sections.

3. Expansion of Banking : In a large country like India the numbers of banks existing those days were certainly inadequate. It was necessary to spread banking across the country. It could be done through expanding banking network (by opening new bank branches) in the un-banked areas.

4. Reducing Regional Imbalance : In a country like India where we have a urban-rural divide; it was necessary for banks to go in the rural areas where the banking facilities were not available. In order to reduce this regional imbalance nationalisation was justified:

5. Priority Sector Lending : In India, the agriculture sector and its allied activities were the largest contributor to the national income. Thus these were labelled as the priority sectors. But unfortunately they were deprived of their due share in the credit. Nationalisation was urgently needed for catering funds to them.

6. Developing Banking Habits : In India more than 70% population used to stay in rural areas. It was necessary to develop the banking habit among such a large population.

RUSTOM CAVASJEE COOPER V. UNION OF INDIA, AIR 1970 SC 564

Brief Facts and Procedural History:

(1) On 19.07.1969, then Vice- President of India V.V.Giri (acting as President) promulgated the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 8 of 1969 in exercise of the power conferred by Article 123(1) of the Constitution of India. This Ordinance had the effect of nationalizing 14 private sector banks having a deposit base of over INR 50 Crore and thereby vesting the ownership of the private banks with the government.

(2) The principal provision of this Ordinance was that every undertaking (i.e. the 14 banks) would stand transferred and would vest in the corresponding new bank which would be owned by the government. This included transfer of all assets, rights, powers, authorities and privileges and all movable and immovable properties of the old bank which would be vested in the corresponding new bank. For this purpose, the Central Government was supposed to pay compensation to the banks. The total amount of compensation could be determined by consensus between the bank and the government. However, if achieving consensus was not possible, the Central Government would refer the matter to a Tribunal to

determine the compensation payable in marketable government securities which would mature post 10 years.

(3) Thereafter, on 21.07.1969, petitions challenging the competence of the President to promulgate the Ordinance were filed in the Supreme Court. The lead petitioner was one Rustom Cavasjee Cooper, who was a director of the Central Bank of India which was one of the nationalised banks and he held shares in the Central Bank of India, Bank of Baroda and the Union Bank of India.

(4) However, before the petitions could be heard by the Supreme Court, a bill to enact provisions relating to acquisition and transfer of undertaking of the existing banks was introduced in Parliament and was enacted on 09.08.1969 as the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969. The long title of the Ordinance and the Act was identical and by Section 27(1) of the Act, Ordinance 8 of 1969 was repealed. This Act was to be retrospectively applicable from 19.07.1969 and the 14 private banks were to be nationalized as similar to the Ordinance.

Petitioners Contention:

The Petitioners challenged the Constitutional Validity of the Ordinance and consequently the Act on the following principal grounds: –

(1) That the Ordinance promulgated under Article 123(1) of the Constitution was invalid, because the condition precedent to the exercise of the Ordinance making power did not exist. Nani Palkhivala, while appearing for the petitioner submitted that the President was not the final arbiter of the existence of conditions on which the power to promulgate an ordinance may be exercised. Moreover, it was submitted that the necessity to take immediate action should be established by the Respondents Union of India considering the fact that the Ordinance was enacted on 19.07.1969 while the Parliament supposed to commence on 21.07.1969 i.e. just two days later.

(2) That the Parliament did not have any legislative competence to enact the ordinance and consequently the act and that the Parliament encroached upon the State List in the Seventh Schedule of the Constitution. Palkhivala argued that Act was devoid of any legislative competence and therefore was liable to be struck down.

(3) That by enactment of the Act, fundamental rights of the petitioners guaranteed under Articles 14, 19(1)(f), 19(1)(g) and 31(2) were impaired and therefore the act was invalid. As

far as the right to compensation under Article 31(2) was concerned, it was contended that compensation means a "just equivalent" in money of the property acquired and that the law providing for compulsory acquisition must aim at a just equivalent in terms of compensation. Further, it was submitted that the Act should be struck down for not satisfying the test of compensation under Art.31 (2) and for not providing relevant principles for determining such compensation.

(4) That the Act violated the guarantee of freedom of trade under Article 301.

(5) Lastly, it was contended that retrospective operation given to Act 22 of 1969 was ineffective, since there was no valid ordinance in existence and further that the provision in the act retrospectively validating infringement of the fundamental rights of citizens was not within the legislative competence of the Parliament.

Respondents Contention:

(1) The Learned Attorney General firstly contended that the petitions were not maintainable because no fundamental rights of the petitioners were directly impaired and the petitioner was only a director, shareholder and holder of deposit and current account with the banks but was not the owner of the property sought to be nationalised considering that a Company is a legal person, separate and distinct from its individual members and that the property of the company is not the property of the shareholders.

(2) Further, the Attorney General submitted that the condition of satisfaction of President was purely subjective and the Union of India was under no obligation to disclose the existence of circumstances of the necessity to take action.

(3) The Attorney General submitted that Parliament had the legislative competence within Entry 45 of List I of the Seventh Schedule i.e. "banking" and within Entry 42 of List III i.e. "acquisition and requisitioning of property".

(4) It was pleaded by the Attorney General that compensation under Article 31(2) does not mean a "just equivalent" and that the courts could not determine the adequacy or the reasonableness of the compensation. He also contended that there was no infringement of the fundamental rights as claimed by the petitioners and therefore the act was valid.

Decision of the Court:

A. Judgment of J.C.Shah, J. (He wrote the majority judgment for himself and 9 other judges)

(1) Firstly, the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1969 was struck down as the act failed to provide compensation to the banks according to relevant principles and therefore impaired the fundamental right under Article 31(2) of the Constitution. Due to this striking down of the Act, the Court did not delve into the issue as to whether the Act violated freedom of trade and commerce under Article 301.

(2) It was held that the petitions would not fail on the ground that the shareholders were not holders of the property and that jurisdiction would not be denied by the court when the individual right of the shareholders were impaired and therefore the preliminary objection raised by the Attorney General against the maintainability of the petitions failed.

(3) Shah, J. observed that the Ordinance had been repealed by the Act and therefore opined that the question of its validity was purely academic and not exactly relevant.

(4) Shah, J. held that Parliament had the legislative competence to enact the law under Entry 45 of List I of the Seventh Schedule and within Entry 42 of List III i.e. for acquiring the undertaking of the named banks.

(5) Further, it was held that the Act was not violative of Article 19(1)(g) of the Constitution of India, however, the act was held to contravene Article 14 of the Constitution since the guarantee of equality was impaired by virtually preventing the banks from carrying on the non-banking business.

B. Dissenting Judgment of A.N.Ray, J.

(1) Ray, J. held that there can be retrospective legislation affecting acquisition of property and therefore the Act was not invalid on the ground of retrospective operation.

(2) Further, Ray, J. held that the Act does not violate Article 31(2) because it referred to authority of a law but did not include any words of limitation or restriction as to law being in force at the time and therefore held that the act was valid and as a corollary the act need not be struck down.

(3) He agreed with the majority view that Parliament had legislative competence to effect nationalisation under Entry 45 of List I and Entry 42 of List III of the Seventh Schedule.

(4) Ray, J. opined that Article 19(6) conferred a power on the State to have a valid monopoly business and therefore Article 19 (1) (g) was not violated and also that the Act did not violate Article 14 of the Constitution.

(5) As far as the issue relating to the promulgation of the Ordinance was concerned, Ray, J. opined that the satisfaction of the President was subjective and therefore there was no necessity required to be established by the Union of India and the only way in which the Ordinance making power by the President could be challenged was by establishing bad faith or mala fide or corrupt motive by the Petitioners.

Aftermath: By a majority of 10:1, the Supreme Court of India struck down the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1969 mainly on the ground that the proposed compensation to be provided to the 14 banks failed the test of Article 31(2). Thereafter, the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 was enacted by the Parliament but with inclusion of a specific amount of compensation to be paid to each of the 14 banks. This amount was clearly specified in Schedule II of the 1970 Act unlike the impugned Act of 1969 which provided for Constitution of a tribunal by the Central Government in case compensation could not be arrived at through consensus. Therefore, notwithstanding the striking down of the Act of 1969, Nationalisation of Banks prevailed and subsequently in 1980, 6 additional banks were nationalized.

DEMERITS AND LIMITATION OF NATIONALISATION OF BANKS

Though the nationalisation of commercial banks was undertaken with tall objectives, in many senses it failed in attaining them. In fact it converted many of the banking institutions in the loss making entities. The reasons were obvious lethargic working, lack of accountability, lack of profit motive, political interference, etc. Under this backdrop it is necessary to have a critical look to the whole process of nationalisation in the period after bank nationalisation.

The major limitations of the bank nationalisation in India are:-

1. Inadequate banking facilities : Even though banks have spread across the country; still many parts of the country are unbanked. Especially in the backward states such as the Uttar Pradesh, Madhya Pradesh, Chhattisgarh and north-eastern states of India.
2. Limited resources mobilized and allocated : The resources mobilized after the nationalisation is not sufficient if we consider the needs of the Indian economy. Some times the deposits mobilized are enough but the resource allocation is not as per the expansions.
3. Lowered efficiency and profits : After nationalisation banks went in the government sector. Many times political forces pressurized them. Banking was not done on a professional and ethical grounds. It resulted into lower efficiency and poor profitability of banks.
4. Increased expenditure : Due to huge expansion in a branch network, large staff administrative expenditure, trade union struggle, etc. banks expenditure increased to a dangerous levels.
5. Political and Administrative Inference : Many public sector banks badly suffered due to the political interference. It was seen in arranging loan meals. It ultimately resulted in huge non-performing assets (NPA) of these banks and inefficiency.

Apart from this there are certain other limitations as well, such as weak infrastructure, poor competitiveness, etc. But after Economic Reform of 1991, the Indian banking industry has entered into the new horizons of competitiveness, efficiency and productivity. It has made Indian banks more vibrant and professional organizations, removing the bad days of bank nationalisation.

IMPACT AND CONCLUSION OF NATIONALISATION OF BANKS

The impact of nationalization was seen instantly. There were no longer any barriers, social, economic or political between the bankers and customers. This enabled in a massive quantitative expansion in customer base and also helped improve the services. Nationalization also enabled the bank to widen its growth. There was no more concern for profitability and there was expansion in the rural areas. With this the economy also expanded and employment opportunities were created.

Moreover, with nationalization there was substantial increase in the no. of branches opened in rural/semi-urban centres. According to bank economists, during the last 28 years of nationalisation, the branches of the public sector banks rose 800 per cent from 7,219 to 57,000, with deposits and advances taking a huge jump by 11,000 per cent and 9,000 per cent to Rs 5,035.96 billion and Rs 2,765.3 billion respectively. It is argued that even today the nation is reaping the benefits of nationalization. For instance the national banks are still serving over 90% of the country's population availing banking services and thus driving the force of the Indian economy. Moreover, recently, P Chidambaram, the finance minister stated that nationalized banks were the reason that India recovered from the 2007 financial crisis faster than other economies of the world.

However, there have been negative impacts as well. Some economists argue that the benefits of the nationalization haven't still been fully realized. Government has failed to implement most of the recommendations of the committees and study teams charged with reforming the banking sector. For instance, the Narasimhan Committee in its report in 1991 stated that "Management weaknesses and trade union pressures have seriously undermined the efficiency of banks and financial institutions". It referred to the "lack of sufficient delegation of authority, inadequate internal control in respect of balancing of books and reconciliation of inter-branch and inter-bank entries." The committee also suggested that for the banking sector to flourish it is imperative that the banks becomes competitive and innovative.. New sets of skills need to be developed and new areas of expertise need to be identified. Values have been sacrificed for expediency and as a result the banks suffered huge losses which can be only attributed to the poor management of these banks

However, even though one may say that there have been negative impacts on the economy by reason of nationalization one can safely say that the positive contribution overshadows this negative impact and nationalization brought about a complete reform of the banking sector at time when it was needed the most.

EXPLORING THE IMPACT OF PATENT WAIVERS ON THE PROVISION OF COVID-19 VACCINE ACCESS

- NIVEDITA M.

Intellectual property rights (IPR) are legal rights granted to an inventor or creator to protect his or her work. An IPR, given for a certain period of time, gives a legally enforceable right to prohibit others from duplicating the innovation.

A patent, a common type of IPR, is an exclusive right given to the creator or inventor of a product that usually includes a new method of doing something or provides a new technological solution to a problem. A person may patent the finished product, which prevents anybody else from producing it, even if they use a different method. Alternatively, a patent may be obtained for the method through which the invention was created. In such a case, by changing the current method, the product may be produced by anybody other than the patent holder.

The investment of a person's time, money, effort, and intellect into an invention is the most fundamental basis for granting them such rights, which prohibit other parties from stealing or claiming the former's work. And for the same reason, it is claimed to boost a country's GDP by fostering healthy competition, stimulating industrial growth and fair globalisation.[726]

The issue of patent protection continues to arise especially in the changing pharmaceutical business. According to biotech companies, the safeguards provided by patent rights, have given the impetus to develop and produce Covid-19 vaccines in record time. Amid the ongoing Covid-19 pandemic, in the last few months, an intense debate has arisen about a potential waiving of patent rights on Covid-19 vaccines. The big question the debate poses is to whether a patent waiver should be allowed in case of Covid-19 vaccines?

[726] Chandra Nath Saha and Sanjib Bhattacharya, "Intellectual property rights: An overview and implications in the pharmaceutical industry"

What is the TRIPS agreement?

TRIPS[727] is a multilateral agreement on intellectual property rights such as copyright, industrial design, patent protection, and the protection of undisclosed information or trade secrets. It is a legal acknowledgement of the importance of the links between intellectual property and commerce, as well as the necessity for a balanced intellectual property system. The agreement came into effect in January 1995 and it covers all World Trade Organisation (WTO) members. It is an effort to bridge the gap in how these rights are protected and enforced throughout the world, and to put them under the umbrella of common international rules. The agreement sets minimum standards of intellectual property protection and enforcement that each country must provide to nationals of other WTO members.

Background of the debate

Governments and stakeholders have been debating the development and distribution of the Covid-19 vaccination since the outbreak began. Several efforts have addressed the voluntary sharing and pooling of IPRs.[728] WTO members have access to a variety of policy options recognized under the TRIPS Agreement as instruments to address public health problems whenever they arise.[729]

In October 2020, India and South Africa, 'leaders' of low-and middle-income countries, presented a petition to the WTO to modify requirements in international agreements governing IPR for medications and vaccines needed for Covid-19 treatment and prevention. Both nations requested the WTO's Council to enable member countries to renounce patent rights linked to Covid vaccines and other Covid-related technology for a certain period of time.

This request sought that the waiver should be extended until most developed and developing nations have administered the Covid-19 vaccine to their population. Several reports have

[727] Agreement on Trade-Related Aspects of Intellectual Property Rights.

[728] Priyanka Rastogi, "India: Patent Pool" (July 7, 2014), Available at https://www.mondaq.com/india/patent/325602/patent-pool.

[729] TRIPS report e-pdf: "The TRIPS Agreement and Covid-19" (October 15, 2020)

emerged regarding IPRs possibly impeding patients' timely access to affordable medical supplies.[730]

However, some countries like the United States and Russia, have stated their support for the waiver of intellectual property restrictions. The European Union is against it and the United Kingdom, Canada, Japan, and Australia have not made a decision yet. Over 120 countries have endorsed the plan, although all 164 member countries of WTO are yet to begin the negotiations.

Need for an intellectual property (IP) waiver; Arguments by supporting countries

During a pandemic, every nation should be able to produce its own vaccines. The effort to temporarily waive IP protection on coronavirus vaccinations is based on this principle. More than 100 nations, as well as international organizations such as the World Health Organization and the United Nations AIDS charity, UNAIDS[731], have joined the campaign, which was started by India and South Africa. The aim is to minimize the obstacles to developing their own vaccines, especially for low-income countries.

Manufacturers in Bangladesh, Canada, Denmark, and India have said that they are capable of producing vaccines but are unable to do so owing to a lack of licenses. Biolyse, a company based in Canada, is one such example. The business makes cancer drugs and claims to be one of the few in the nation capable of producing COVID-19 vaccines, but patent restrictions have stopped it from going ahead.

The main issue is that vaccine production, research, and development are focused too heavily in a small group of high-income nations. These countries' companies, who also control the most of the patents, have sold the majority of vaccine doses to their own governments as well as governments of other high-income countries. Governments in high-income nations have pre-ordered 6 billion doses out of the 8.6 billion confirmed sales so far.

By the end of 2021, the pharmaceutical sector plans to produce about ten billion vaccine doses, according to pharmaceutical-industry data. According to experts at the International Monetary Fund in Washington, DC, this is unlikely to materialize based on present patterns.

[730] Decker, Susan, and Christopher Yasiejko, "World War II-Style Mobilization Order May Carry Risks.", Bloomberg, Available at. https://www.bloomberg.com/news/articles/2020-03-20/world-war-ii-style-production-may-carry-legal-risks-for-patriots

[731] The Joint United Nations Programme on HIV and AIDS.

They estimate that the business will have generated approximately six billion doses by the end of 2021, according to a study[732]. Because of this possible shortage, individuals in low-income nations may have to wait even longer for their initial doses.

The number of vaccinations administered in Africa amounted to little over one dosage per person, or around 2% of the continent's 1.2 billion inhabitants. This is due to a number of reasons, including the fact that the continent imports 99 percent of its vaccinations and the fact that African governments lack the pre-order purchasing power of wealthier nations. It is for this reason that the African Union has established a plan to produce 60% of Africa's vaccinations on the continent by 2040.

The countries supporting the IP waiver aren't asking for charity; they're asking for the freedom to research and manufacture their own vaccines without fear of being sued by patent holders. This fundamental concept is understood by those who support the Covid-19 IP waiver. Leaders of nations that are presently opposed to the patent waiver doesn't seem to acknowledge it. "They need to be on the right side when the history of the pandemic is written", says John Nkengasong, head of the Africa Centres for Disease Control and Prevention.

The public in wealthy countries with enough doses of Covid-19 vaccine, such as the United Kingdom and the United States, is hopeful that life will soon return to normal, just as it did in Israel, where 56 percent of the population is completely vaccinated. The World Health Organization's director general, Tedros Adhanom Ghebreyesus, refers to this as "vaccine euphoria," a belief among people in developed countries that vaccinations had stopped the pandemic.

However, a dose of reality would hit in if the vaccine euphoric countries turned their attention to the increase in cases and fatalities in Brazil, India, Iran, and Nepal. The number of weekly cases has been gradually increasing over the last few months and has even reached at its peak ever. The virus outbreak has gone out of hand.

It didn't have to be this way. To stop the pandemic, there are a number of safe, very effective vaccinations that could be deployed globally. Despite this, just 0.3 percent of total doses have

[732] Ruchir Agarwal, Gita Gopinath, "A Proposal to End the COVID-19 Pandemic" (May 19, 2021)

been sent to low-income nations, a cruel disparity that UNAIDS Executive Director Winnie Byanyima refers to as "vaccine apartheid."

The World Health Organisation (WHO), Global Alliance for Vaccines and Immunisation (GAVI), and the Coalition for Epidemic Preparedness Innovations (CEPI) created Covax, a worldwide pooled solidarity mechanism during last year. In 2021, Covax aimed to vaccinate all high-risk individuals and health professionals in every country, wealthy and poor alike—roughly one fifth of the world's population.

Unfortunately, about a third of the world's wealthy nations skipped this system and went it alone in a vaccine grab, leaving little vaccines for Covax, the only multilateral mechanism functioning to deliver vaccinations to poor countries. Rich countries are increasingly vaccinating their low-risk populations ahead of health workers and high-risk individuals in less affluent countries. At least one dosage has been given to 60%, 52%, and 46% of individuals in Israel, the United Kingdom, and the United States, respectively.

Even if Covax achieves its goals, just 20% of individuals in low and medium-income countries (LMICs) would be completely vaccinated by the year 2021. Covax established a target of obtaining 2 billion doses for LMICs by the end of 2021, enough to vaccinate one billion people, when it first started (assuming a two-dose regimen). While Covax believes it is on track to meet this objective, just 20% of individuals in these less developed countries will be completely vaccinated this year. The goals lacked ambition since they were predicated on a "scarcity mentality," which recognizes that total world dosages would be limited, and that wealthy countries will likely hoard the supply.

Rich countries have purchased much more dosages than they would ever need and are stockpiling them. Canada has enough vaccine doses to vaccinate all of its people ten times. Britain isn't far behind, with enough vaccine to vaccinate everyone in the country eight times. The pressing requirement, if we are to put an end to this pandemic, is to cease hoarding. Gavi's CEO, Seth Berkeley, believes that wealthy nations have received approximately 1.5 billion more doses. They should provide them to Covax at once so that they may be distributed to LMICs as soon as possible.

These contributions are the fastest method to get guns in the hands of those who need them right immediately. However, they are insufficient. Donations are a charity model, and once ‘‘given away," the vaccination supply problem persists. As a result, a sustainable method for

LMICs to manufacture their own vaccines is required to guarantee population-wide immunization by the end of 2021(or early 2022 at the latest).

The People's Vaccination Alliance, a worldwide coalition of organizations and activists headed by UNAIDS, Amnesty International, and Public Citizen, is leading the people's vaccine campaign. The campaign stresses that "Pharmaceutical companies must enable the Covid-19 vaccines to be manufactured as broadly as possible by sharing their expertise free of patents."

According to the campaign, the three critical stages before a vaccination for the general public are as follows. A waiver of IP rights for Covid-19 vaccines, including their components and raw ingredients, is the first step. It was surprising to see the US administration rally behind the waiver quite recently. Other nations quickly followed, with the noteworthy exceptions of Germany and Switzerland. Even the Bill and Melinda Gates Foundation changed direction, continuing the domino effect. Bill Gates was widely chastised for initially opposing a waiver, but on May 6, 2021, Mark Suzman, the Gates Foundation's Chief Executive, stated, "No barriers, including intellectual property, should stand in the way of equitable access to vaccines, which is why we are supportive of a narrow waiver during the pandemic."

Other manufacturers would be able to step in and create raw materials for all of the existing vaccines, industrial parts, and components with an IP waiver. It would also make it easier to reach arrangements for the manufacture of more dosages in the future.

This proposal should be carefully examined since a temporary IP waiver may help speed up the end of this pandemic. It would also send a strong statement from wealthy nations and pharmaceutical firms that they are prepared to sacrifice some profit for the greater benefit. The People's Vaccine campaign, which seeks a temporary IP waiver, is supported by non-governmental groups as well as UNAIDS, the UN's HIV/AIDS agency. Many businesses have already benefitted from billions of dollars in public financing, according to proponents, via both research and development and advance purchase agreements. IP safeguards could be reinstated after the pandemic has ended.

According to Graham Dutfield, who researches intellectual property in the biological sciences at the University of Leeds in the United Kingdom, there is precedence for this. During World War II, the US government urged businesses and colleges to work together to increase penicillin production, which was required to defend troops against infectious

illnesses. Companies might have argued that this would hurt earnings, but they recognized the need of putting money aside for the greater purpose of saving lives and ending the war. "For a long period, the United States manufactured almost all of the penicillin," adds Dutfield. "However, businesses did not sue each other for patent infringement, and no one wanted to extort money from the rest of the world."

It is significant that the current US government is exploring the benefits of an IP waiver, and other nations is yet to follow suit. It may not be the best or only method to increase vaccine supplies quickly, but it does reflect a key concept. There are times when rivalry is beneficial to research and invention, and other times when it is necessary to put competition aside for the greater good.

The most compelling case for a temporary waiver is that patents were never intended to be used in global crises like wars or a pandemic. A patent compensates innovators by providing a limited period of protection from unfair competition for their innovations. The term 'competition' is crucial here. A pandemic is a race between mankind and a virus, not a race between businesses. Instead of competing, nations and businesses must work together to put the pandemic to an end.

Opposition to the IP waiver

According to a spokesman for the European Union, there is no evidence or conclusive proof that IPRs constitute a real hindrance to Covid-19 vaccines' distribution and technologies. As a result, a patent waiver is not the sole option for resolving this problem.[733]

The pharmaceutical industry, as well as most high-income countries, are averse to the concept of patent waiver in case of Covid-19 vaccines. Instead, those governments have committed to sharing more of their own vaccines with low-income countries and to increase financing for charity vaccine distribution programs like Covax.

One of the most serious issues regarding IP waivers is that they provide rivals, a shortcut to costly technologies. Companies also claim that IP waiver would not speed up vaccine production since materials are in limited supply and manufacturing them from scratch may take many years.

Also, the governments who oppose the waiver, claim that existing WTO regulations already enable nations to seek for "compulsory licensing" to overrule IP during crisis. Bolivia, for

[733] Collis, "WTO Members Reject IP Rules Waiver."

example, is now requesting permission from the WTO to utilize this method to produce Johnson & Johnson's COVID vaccine.

European governments agreed to share additional vaccine doses with low- and middle-income countries during the Global Health Summit in Rome, ahead of the World Health Assembly in Geneva, Switzerland. Ursula von der Leyen, the head of the European Commission, also wants to "clarify and simplify" the current methods for nations to adopt compulsory licensing.

The pharmaceutical industry, wealthy countries, and some academics contend that removing patents for a limited time would not inevitably speed up production or supply. It is unclear if the world has any spare industrial capacity, according to them. Even if patents were not an issue, acquiring all vaccine components, establishing factories, training personnel, and passing appropriate legislation — all of which are necessary for vaccine distribution — might take more than a year.

They propose that businesses should obtain the license for their product ideas in return for payment as an alternative to lifting IP. Many more businesses would be able to produce vaccines as a result of this. In addition to this, the World Health Organization is establishing a centre for businesses to exchange vaccination technology, skills, and other expertise.

It was also argued by the opposing countries that since IP develops confidence in new innovators, the proposal goes against the idea of ensuring security of the future generation of inventors and investors.[734]

Companies and wealthy nations also point out that they are already supporting Covax, a vaccination program that has secured more than 1 billion doses toward a 2 billion goal for 2021 to vaccinate 20% of the most susceptible populations in developing countries.

An IP Waiver as a stand-alone policy is not sufficient

The Covid-19 vaccine access dilemma will not be solved by an intellectual property waiver alone; other measures will be required. To achieve complete vaccination for the general public, two further stages must be performed. The second step involves transferring technical expertise from vaccine producers in the global north to regional hubs or directly to

[734] Pharma delivers COVID-19 solutions, but calls for the dilution of intellectual property rights are counterproductively. *Available at* https://www.ifpma.org/resource-centre/pharma-innovation-delivers-Covid-19-solutions-beyond-expectations-but-calls-for-the-dilution-of-intellectual-property-rights-are-counteproductive/ December 8, 2020)

manufacturers in the global south. The third step is to heavily subsidize manufacturing in LMICs.

When WHO announced that it was looking for LMIC producers to make mRNA Covid-19 vaccines, the organisation was flooded with applications. Right now, scientists and policymakers across the globe must work together to find out how to take the next steps. Technology will need to be transmitted to a group of prospective new producers, which will need the mobilization of specialists, many of whom will be employed by the original businesses themselves. New financial resources must be mobilized to support factory construction, as well as worldwide supply chain coordination and other operational activities. The sooner it begins, the sooner one will be able see an end to this pandemic.

Patent waiver under international law

The relevant legal basis for a WTO decision would be the TRIPS Agreement. In addition to the complete "waiver" of patent protection, i.e., the suspension of all intellectual property regulations as envisaged in the original Indian-South African joint proposal, the TRIPS Agreement itself contains provisions allowing the use of third-party patents in certain exceptional circumstances.[735]

Article 31 of the TRIPS Agreement enables member states to give third parties compulsory licensing for certain patents that may be used to manufacture patent-protected vaccines, subject to specific circumstances, such as in the case of a national emergency. The provision of Article 31b is, which was introduced in 2017, enhanced this option. If an individual member state orders the grant of a compulsory license, the licensee is given permission to utilize the patented innovation in exchange for a fee. Compulsory licenses may also be granted with restrictions on subject matter or duration as the case may be.

Despite the fact that the issue has gained momentum as a result of the US administration's statement, the required consensus for a WTO resolution on an international waiver or restriction of patent protection has yet to be achieved. This is unsurprising, given the member nations' diverse opinions, and it is unlikely that an agreement will be achieved very soon. As a result, many people are already seeing the US administration's statement as a symbolic move.

[735] TRIPS Agreement Part II, Sec. 1, 4, 5, and 7

Individual member states' transposition into national law, which is needed following a matching WTO ruling, is likely to take longer time.

Scenario in India

The Patents Act of 1970 governs the awarding of patents in India. To become a major manufacturer of generic medicines and guarantee its worldwide supply, India transitioned from product patenting to process patenting. However, after becoming a signatory to the TRIPS agreement, India was forced to modify and implement major modifications to the system. As a result, Patent Act 2005 came into force across the pharma, chemicals and biotechnology sectors.

With the second wave of the Covid-19 pandemic wreaking havoc on the lives of people all around the world, but particularly in India, along with the threat of a potential third wave, there is an increasing need to vaccinate the whole population as soon as possible. The current issue is a demand-supply imbalance, which is mostly caused by limitations on vaccine production capacity. A total of 1,878 million doses which includes two doses each for 939 million adults are required for India to attain universal vaccination.

There is a demand-supply mismatch that needs to be overcome on a war footing because there are only two manufacturers in the country namely Bharat Biotech and Serum Institute of India. Both of these have a present production capacity of 80-90 million doses per month, which is calculated to rise to 160 million doses by the end of July 2021.

To remedy this situation, there is rising demand to use the Patents Act's provision of "compulsory licencing." This provision of Patents Act, 1970 was invoked a decade ago for the treatment of cancer.

The compulsory licence provision permits the Indian government to provide manufacturing rights to other producers without the owner's approval in the case of patented products, especially during national emergencies. In 2017, the Indian Patent Office issued its first compulsory licence under the amended 2005 Act to the Hyderabad-based drug company Natco. It authorised the company to produce and commercialise a medicine that was identical to Bayer's Nexavar for the treatment of kidney cancer. The obligatory licence was granted since the life-saving medicine was not available at a reasonable price and Bayer had not manufactured the medicines in India to a reasonable extent.

In India, medical experts believe that vaccine technology can be transferred from Bharat Biotech to other manufacturers under an open licence technique as the vaccine was developed with the help of the Indian Council of Medical Research (ICMR).

This does not mean that the vaccine manufacturer's IPR can be taken away because Bharat Biotech is a separate entity. It is not a part of the government. Legal issues frequently arise even among different PSUs or government departments because they are entirely separate organisations.

However, given the current pandemic situation, a humanitarian approach is required, and if traditional rules are disregarded, whether at the WTO level or on the home front, there may be no protests or criticism. On the other hand, wouldn't it be preferable to have a balanced approach that considers not only immediate vaccination supply but also future requirements?

To start with, most of the measures adopted today to ensure universal vaccination is purely a temporary solution designed to provide people with a ten-month buffer. According to medical experts, a second or third injection of an upgraded form of the vaccine will be required in the future, followed by a vaccine for life. Moreover, a vaccine for children under the age of 18 is still being developed. In such a scenario, the entire world is looking towards scientists for their assistance and contributions. Thus, it may not seem right to discourage scientific talent whether at the WTO level or domestically. After all, medical discoveries need scientists' skill, time, and energy in addition to the promoters' money.

It is also critical to recognise and not dismiss the fact that intellectual property rights have been incorporated into the trade agenda. Prior to the WTO developing countries such as India permitted for the manufacture of patented products by other manufacturers by altering the manufacturing process. As a result, these businesses began to export low-cost pharmaceuticals in order to make money. The TRIPS Agreement thus became increasingly important in settling international trade disputes involving intellectual property rights. Nations such as the ones in the European Union, who have concerns about reducing IPRs, may be persuaded by WTO assurances that medications for cure and prevention of Covid-19 would be used exclusively for domestic use and not for exports. There is also a requirement for a provision for the original patent holder to get due acknowledgement.

It is high time for countries to act with a humanitarian approach at the WTO in relation to relaxing IPR provisions for Covid-19 vaccines, or for that matter all critical drugs, but it is equally crucial not to disincentivize research and development activities. Furthermore,

patented companies should be encouraged to learn technology transfer in order to simplify the production of vaccines and medications in a shorter time frame and with some kind of royalty paid to them.

On the domestic level, efforts should be undertaken to transfer technology from companies such as Bharat Biotech to manufacturers that have the capability and know-how. However, Bharat Biotech could retain brand equity through a franchising structure. An appropriate pricing policy could compensate the company's R&D expenditure.

Practical Approach

Given the exclusivity of patent rights to vaccines conferred upon the patent holder, it could be concluded that a patent protection limit would lead to an increase in the supply of Covid-19 vaccines. But this assumption does not recognize that authorization to manufacture is not the same as manufacturing capacity. Manufacturing capacity requires a high level of knowledge, experience and technological infrastructure if clean and safe vaccinations are to be produced.

In the mRNA technology on which the vaccines like BioNTech/Pfizer, Moderna and CureVac, are based, the importance of manufacturing knowledge applies even more. One thing is that the production process is far more expensive and complex than the established vector vaccines; another is that the vaccine is extremely susceptible to temperature changes, with the exception of the Cure Vac vaccine candidate CVnCoV, and requires mainly a constant temperature of up to -80° Celsius.

Given the unique challenges of manufacturing COVID-19 vaccines, it cannot be assumed that a patent release alone will lead to the sudden production of clean and safe vaccines by previously unaffected producers world-wide. Another risk of limiting patent protection initiated by the Government becomes apparent when one considers how complicated and expensive drug development is. Recent studies have shown that the average costs of development of a single drug range from USD 1.3 billion to 2.8 billion.

It should also be taken into account that success during the research and development of a drug is not guaranteed, so that the billions invested in a worst-case scenario are lost. For example, the rate of failure of new Alzheimer's drugs a few years ago was around 99.6%. Faced with these figures, patents provide an incentive for firms to embark on costly and time-consuming research and development into new, successful medicines.

Under German patent law, for example, the proprietor of the patent is granted an exclusive right for a period of 20 years, in which the patented invention alone is authorized to use and exploit. For certain medicines, the use of so-called supplementary protective certificates can be extended by a maximum of five years ("SPCs").

Following the end of the safeguard period, imitators and generic producers can often benefit from the fundamental research work of the original inventor. Because their own research and development expenditure for the former patent-protected drug are reduced, generic products can usually be offered at a much lower price. A government-based waiver or restriction of patent protection may deter pharmaceutical firms from embarking on expensive research and development effort to ensure that essential medications are delivered in the future since they must worry that their hazardous investments will not be recovered. Against this backdrop, the rejection of the United States proposal by German Chancellor Angela Merkel should be regarded as a significant signal.

After all, Germany has long been regarded one of Europe's most significant patent sites. In 2017, one out of three patent applications in Europe originated from Germany and in Europe Germany, owing to its specialist courts in Düsseldorf, Mannheim and Munich, was also highly popular as a site for patent infringement procedure.

Is there a possibility of alternatives?

WTO members are responsible for preventing the nationalism and monopolization of Covid vaccination. They are to enhance cooperation on new Covid vaccines, therapeutics and diagnostic techniques.[736] For making Covid-19 vaccines accessible to low-income countries, the WTO could undertake a middle path approach by enabling technology transfer according to international treaties. It may also be beneficial to enable compulsory licensing[737] of medical products.

It is also important to ensure that governments do not impose export restrictions on Covid vaccinations so that additional duties do not prevent supplies to less developed countries.[738]

[736] Statement of Director-General Elect Dr Ngozi Okonjo-Iweala at the Special Session of the WTO General Council (February 13, 2021).

[737] Article 31 of TRIPS Agreement

[738] Allie Nawrat, "Exploring the Covid-19 Covid vaccine IP waiver proposal at the WTO" (March 15, 2021)

Countering extra costs will allow nations to purchase Covid-19 vaccines without the suspension of patent rights. No country shall be abandoned if the world is willing to share the burden of the Covid vaccination.

Stephen Ezell and Nigel Cory of the Information Technology and Innovation Foundation also highlighted the necessity for a fair balance between exclusivity and availability.[739]

Article 8 provides the WTO members the power to amend or alter the provisions in case of any health emergency to protect public health within the provisions of the TRIPS Agreement. During public health emergencies, one can use the compulsory license to use the patented product without the authorisation of the patent holder, as it may be challenging to obtain a voluntary license during such a time.[740] However, the use of such patent-protected technology is partly supervised and controlled by the patent holder.

Conclusion

As evident from the previous discussions, a waiver or restriction of patent protection is not a practical way of increasing worldwide supply of vaccinations in the short term. Instead, removing the patents involves health risks from non-experimentally produced vaccines and political risks in the form of ambiguity, which may have a permanent detrimental effect on the pharmaceutical industry's creative strength.

Therefore, supporting existing businesses and expanding their skilfully planned manufacturing capabilities are more beneficial. Expansion of current manufacturing is indeed in the interest of the pharmaceutical firms concerned, therefore several of them have gone into partnerships themselves.

The export of vaccination doses currently in stock to needed areas would also have a direct effect. After 34 million doses of AstraZeneca were sold by the EU last month, the USA also revealed its plans to export 60 million doses of AstraZeneca which it presently does not require.

Also, an uneven distribution of the vaccine availability should be addressed by reinforcing the global COVAX campaign along with the global vaccination initiatives behind it.

[739] Ezell and Cory, "Intellectual Property Internationally," page. 18.

[740] Jennifer Hillman, "Drugs and Covid vaccines Are Coming—But to Whom?*" Foreign Affairs* (May 19, 2020)

Furthermore, the concept of compulsory licensing helps strike a balance between protecting IPRs and ensuring access to essential medicines in public health emergencies.

RECENT TRENDS IN INDIAN LEGAL JURISPRDNCE

-HEMANTH J

INTRODUCTION:

As per the words of Indian justice's, the present crisis of Indian legal system is due to the complete dependence on colonial jurisprudence. India has inherited, as a hangover of the colonial jurisprudence of British legal system which created conflict between old laws and modern notions of justice.[741]

Law is a social science which closely linked with society. When human beings associate themselves in various forms of activity, they constitute a society. A society cannot remain static but it keeps on changing with economic, scientific and technological developments. Therefore, according to the changing requirements, law has to adapt itself and keep on evolving. This intimate relationship between law and society gave inspiration to Ehrlich and he propounded his Sociological Theory for the study of law. According to him, law depends on popular acceptance which has a great creative force. He supported the dynamic nature of law which keeps pace with the advance of time and needs of the society. He firmly believed that law consists not of propositions alone, but of legal institutions which people cherish in the society.

The law must take cognizance of the changing society and march in consonance with developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into reality. The immediate needs are required to be addressed through the process of interpretation by the court unless the same totally fall outside the constitutional framework or the constitutional interpretation fails to recognize such dynamism.[742]

LAW AND LEGISLATION (THE INDIAN CONSTITUTION):

During the British rule in India, development of native law was very slow. In fact, the British rulers were more interested in the perpetuation of their rule than the development of law. But independence of the country heralded a new era. The Indian Constitution came into existence

[741] Justice VR. Krishna Iyer Law India: some contemporary changes in law, 1976, p 36.
[742] Common cause V. UOI, AIR 2018 SC 87: (2018)5 SCC 1: LNIND 2018 SC 87.

in 1950 which laid down the goals which India had to achieve. It had to bring about socio-economic changes in the country.

The new challenges before the nation because of the socio-economic and technological changes can be effectively met either by introducing new laws or amending the existing laws to meet the exigencies of time. At present there is a wide gap between the poor and the rich, the socially neglected and socially dominating class which makes it imperative for the State to provide adequate protection to weaker sections of the society, prevent exploitation, corruption, malpractices and ensure equitable distribution of wealth and material resources to sub-serve the common good, In pursuance of the declared objectives of the Constitution, legislative process started for bringing about socio-economic changes for all-round rural upliftment. Village Panchayats have been established, vigorous literary drives have been launched, village and cottage industries have been developed and numerous other similar programmes have been worked out and given effect to. For the improvement of agriculture, horticulture and animal husbandry, schemes, projects and programmes have been launched.

India's constitution itself is a great social book. Support for legal, social and economic goals. economic and political justice, national religion and democracy. Fundamental rights guaranteed for Indian citizens form the basis of a free and democratic society. Under Article 12, the definition of "other jurisdiction" has been expanded to consider more and more institutions and organizations within the term "State" and thus to prevent them from violating fundamental rights. After the case of Maneka Gandhi V UOI the court began to expand the boundaries of fundamental rights and environmental justice through various interpretations promoted by the judicial activist. In this process, the judges rewrote many parts of the Constitution. The physical integrity of life and liberty, which is the most important aspect of individual freedom, is well protected in the Constitution and has been freely interpreted by the courts.

DPSP of Indian constitution provides guidelines of for the state to ensure welfare of society. These principles have been given growing importance by court. It also held that there is no conflict between directive principles and fundamental rights and they aiming the same goal of social revolution and establishment of welfare state envisaged in the preamble of constitution. Courts have been given the responsibility to ensure the implementation of the Directive Principles and to harmonize the social objectives underlying the directives with the individual rights. On the basis of Directive Principles, workers participation in management has been

allowed by the courts. In National Textile Workers Union v PR Ramkrishna[743] the Supreme Court recognized the workers' right to be heard in a winding up petition and also to appeal against the order of the court to wind up the company though the existing law does not provide any such right to workers.

In People's Union for Democratic Rights v UOI,[744] the Supreme Court attempted to convert right to minimum wage given in a statute into a fundamental right. It was held that labour or service for remuneration which is less than minimum wage is "forced labour" and a person providing such labour or service would be entitled to come to the court and seek enforcement of his fundamental right under Article 23 of the Constitution. The court further held that whenever any fundamental right which is enforceable against a private individual such as enacted in Article 23 is being violated, it is the Constitutional obligation of the State to take the necessary steps for the purpose of ensuring observance of the fundamental right by the private individual who is transgressing the same.

JUDICIAL SYSTEM:

The purpose of having a judicial mechanism is to advance justice. Traditionally, justice delivery system is adversarial in nature. Of late, capabilities and method of this adversarial judicial system are questioned and a feeling of disillusionment and frustration is witnessed people.

Among the Social justice adjudication is the application of equality jurisprudence evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the socio-economic inequalities accentuating the disabilities of the unequal fight, the adversarial process itself operates to the disadvantage of the weaker such a situation, the court has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. The courts, in such situations, generally invoke the principle of fairness and equality which are essential for dispensing justice.[745]

[743] AIR 1983 SC75 :1983 SCR (3) 12.
[744] AIR 1982 SC 1473: 1983 SCR (1) 456: LNIND 1982 SC 135.
[745] Narendra v state of Uttara Pradesh, (2017) 9 SCC 426: 2017 (11) scale 337: LNIND 2017 SC 2957.

PUBLIC INTEREST LITIGATION:

Law-making has assumed new dimensions through judicial activism of law courts. Public Interest Litigation (PIL) or Social Action Litigation introduced by the Supreme Court of India in Constitutional jurisprudence is a major example of the Supreme Court's judicial activism, Hitherto, the rigidity of the locus standi rule deprived the poorer sections of the society from approaching the courts for enforcement of their fundamental rights against the rich and affluent class of society but now public interest litigation has liberalized the locus standi rule to such an extent that it has opened new vistas for the redressal of social problems,

About PIL the Supreme Court has written:

The question What PIL means and i2 has been deeply surveyed, explored and explained not only by various judicial pronouncements in many countries, but abo by eminent judge's jurists, activist lawyers, outstanding scholars, journalists and social scientists etc. with a vast erudition. Basically, the meaning of the word Public Interest' is defined in the Oxford English Dictionary," as he common wellbeing ... also public welfare,

The court permits public interest litigation at the instance of "public spirited citizens" for the enforcement of the Constitutional and legal rights of any person or groups of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief.[746]

The test which one has to apply to decide the maintainability of the PIL concerns sufficiency of the petitioner's interest. Under this test it is necessary to consider the subject matter to which the PIL relates. It is wrong in law for the court to judge the applicant's interest without looking at the subject matter of his complaint. If the petitioner shows failure of public duty, the court would be in error in dismissing his PIL. The question of sufficient interest of the petitioner cannot be considered in the abstract. It must be taken together with the legal and factual context.[747]

[746] Interlocutory application making scurrilous allegations against public spirited person advocating public cause which demonstrated brazen sense of insensibility and insensitivity to the process of adjudication and dignity of women was not allowed to be circulated in any manner to anyone, Animal Welfare Board of India v People for Elimination of Stray Troubles, (2017) 1 SCC 394.

[747] Ranjan Singh 'Lalan' (VIII) v UOI, (2006) 6 SCC 613: 2006 (8) Scale 161.

In ABSK Sangh (Rly) v UOI,[748] it was held that the Akhil Bhartiya Soshit Karamchari Sangh (Rly) though an unregistered association could maintain a writ petition under Article 32 for the redressal of a common grievance. Krishna Iyer J, declared that access to justice through "class actions", "public interest litigation" and "representative proceedings" is the present Constitutional jurisprudence.

In that grounds of PIL have a lot of impact have made like protection of weaker section of society, securing human rights and dignity, protection of ecology and environmental pollution, matters of public interest. These mentioned grounds have a key in evolution of Indian judicial system which turned the PIL has a voice of public, even public got a good impression on our judicial system

LEGAL AID:

Legal aid means giving to persons of limited means gratis, or for nominal fees, legal advice and legal assistance in courts in civil and criminal matters. Its primary object is to make it impossible for any man, woman or child to be denied equal protection of the law simply because he or she is poor. The Preamble to the Constitution declares to secure to all citizens- Justice, social, economic and political, Liberty of thought expression, belief, faith and worship, equality of status and of opportunity; and to promote among them all: Fraternity assuring the dignity of the individual and the unity of the Nation. Articles 14 and 38 of the Constitution provide for equality of justice to all citizens. Article 14 states- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 38 states- The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. Thus, in order to ensure equality of justice as conceived by our Constitution, legal aid to the poor is necessary.

The Constitution of India is the last law book in our country. It contains articles and sections for all worldly work. Article 39 A of the Constitution of India states that the State shall ensure that the legal system promotes justice on an equal and regular basis, and shall provide free legal aid, in any form, by ensuring that all persons are given justice regardless of economic or social status. Sections 14 and 22 (1) also make it mandatory for the State to

[748] ABSK Sangh (Rly) v UOI, AIR 1981 SC 298: 1981 SCR (2) 185.

ensure equality before the law and a legal system that provides justice for all its subjects. Legal aid aims to ensure that the promise of the constitution is fulfilled in a book and spirit and equal justice is made available to the poor, oppressed and vulnerable in society.

The emergence of the concept of legal aid appeared in France in 1851 when the local government introduced the act of providing legal aid to the needy. In India, the concept of legal aid began in 1952 when the Government sought legal aid for the poor at various Law meetings. In 1980, a Committee was established to oversee legal aid programs throughout the country under the chairmanship of His Excellency. Mr. Justice P.N. Bhagwati, then Judge of the Supreme Court of India. It is known as the CILAS -Committee on Implementing Legal Aid Schemes and began working to provide legal aid to those in need across the country. The introduction of Lok ads has been another success in the field of legal aid for Indian citizens. These courts accelerated the trial process in our country and therefore justice was served expeditiously.

In 1987, the Legal Services Authority Act was enacted so that the concept of legal aid cells could have a legal basis and uniformity. Since it is not perfect, this action was eventually enforced in 1995 by the Honorable. Mr. Justice R.N. Mishra in particular also began to be used. The National Legal Services Authority was established in 1995 and Hon. Dr. Justice A.S. Anand, Judge, Supreme Court of India took over as Executive Chairman. A national network was established and the executive was the National Legal Services Authority. They strongly encouraged everyone to get justice and, as a result, set goals and policies so that according to the Constitution, legal aid was available to all.

Steps have been taken to achieve the primary motivation for legal aid cells. The following are some of the measures taken by the Central Authority:

- The dismissal of cases by Lok Adalats
- Publication of schemes and awareness programs for legal aid center
- Legal aid centers in prisons
- To empower NGOs and organizations by disseminating legal awareness

So, we see how the concept of legal aid cells began to be born and how it began to gain more and more importance in each phase

Legal Aid Programmes In of the directives from the Central Government, many States enacted their own pursuance legal aid legislations. The State of Madhya Pradesh introduced a

comprehensive legal aid scheme under the Legal Aid and Assistance Act, 1976. Initially, the scheme was introduced only in a few districts which were predominantly inhabited by Adivasis or aboriginal tribes. It was subsequently extended to all over the State. Constitutional Provisions for Legal Aid Article 39-A of the Constitution expressly provides for legal aid. It is one of the Directive Principles of State Policy and, therefore, the State is under obligation to adopt suitable measures for providing free legal aid to the poor.

STATUTORY PROVISIONS:

Criminal law: Section 304 of the Criminal Procedure Code, 1973 provides legal aid to the defendant at the expense of the State in certain circumstances. The Kingdom is often persecuted. The Office of the Public Prosecutor is a reminder to the common man that a criminal case is a public error and that the State will prosecute the offender.

Section 304 states-

(1) Where, in a case heard by a session court, the defendant is not represented by the defendant and where it appears in court that the defendant does not have sufficient means to file an objection, the court shall assign and plead his defense against State harassment.

(2) The High Court, with the prior approval of the State Government, may make rules providing for-

(a) the procedure for selecting defense representatives under subsection (1);

(b) premises to be approved by appellants;

(c) fees payable by petitioners to the government and, generally, for the purposes of subsection (1).

(3) The State Government may, by notice, direct that from the date not specified in the notice, the provisions of subsections (1) and (2) apply in respect of any other tribunal in the case before the courts. Defendant is presumed innocent unless proven guilty, therefore, he must be given every opportunity to prove his innocence.

Civil law: Civil Procedure Code, 1908 as amended by the Amendment Act, 1976 provides for suits by indigent persons. An "indigent person" has been defined as a person who is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in a suit, or where no such fee is prescribed, if he is not entitled to property of the value of

Rs.1,000 other than the property exempt from attachment in execution of a decree and the subject-matter of the suit. If the application to sue as an indigent person is granted, the plaintiff shall not be liable to pay any court fee or fees payable for the service of the process in respect of any petition, appointment of a pleader or other proceedings concerned with the suit. Where a person who Is permitted to sue as an indigent person is not represented by a pleader, the occur may if the Circumstances of the case so require, assign a pleader to him. Rule 17, which has been inserted by the Amendment Act, 1976 provides this benefit to the defendant also. It says that any defendant, who desires to plead a set-off or counter claim, may be allowed to set up such claim as an indigent person and the rules contained in this order shall so far as may be, apply to him as if he were a plaintiff and his written statements were a plaint Rule 18 of the same Order also inserted by the Amendment Act, 1976 provides that subject to the provisions of O XXXIII, the Central or any State Government may make such supplementary provisions as it thinks fit for providing free legal services to those who have been permitted to sue as indigent persons.

Civil Procedure Code deals with appeals by indigent persons Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appellate as an indigent person, subject, in all matters, including the presentation of such application, to the provisions relating to suits by indigent persons, in so far as those provisions are applicable. Where the applicant is alleged to have become an indigent person since the date of the decree appealed from, the inquiry into the question whether or not he is an indigent person shall be made by an officer of the appellant court unless the appellate court considers it necessary in the circumstances of the case that the inquiry should be held by the court from whose decision that appeal is preferred.

LOK ADALATS:

The Lok Adalats Center is a landmark in the history of the administration of justice that has removed justice at the door of the common man, especially those living in rural and remote areas. What is most annoying at the Lok Adalats center is the peaceful settlement of disputes between parties in agreement and to ensure the immediate removal of cases with less procedural procedures.

Section 19 of the Legal Services Authorities Act, 1987 provides for the arrangement of Lok Adalats. According to that section, all State officials or Regional Authorities or the Supreme Court Legal Services Committee or any High Court Legal Services Committee or, as the case may be, the Taluk Legal Services Committee may arrange for Lok Adalats at such times and places as such. and the formation of Lok Adalat. Section 20 describes the procedure that Lok Adalat will take to recognize the case.

Currently, the Lok Adalats operate in the Maharashtra Province. Gujarat, Kerala, Andhra Pradesh, Madhya Pradesh, and Delhi. All Lok Adalat awards will be considered as a decision of a civil court or, as the case may be, an order of any other court. Therefore, the proper execution of this award will ensure that All awards made by Lok Adalat will be final and binding on all parties to the dispute, and no appeal will be lodged with any court against this award.

The Supreme Court had the opportunity to distinguish between Permanent Lok Adalats and Lok Adalats in the case of InterGlobe Aviation Lid v N Satchidanand.[749] found that Permanent Lok Adalats should only refer to Permanent Lok Adalats under section 22 B (1) and Lok Adalats under section 19. Lok Adalats listed under section 19 regularly or permanently should be called Continuous Lok Adalats to avoid any confusion between the two types of Adalats.[750] "Permanent Lok Adalat is established under section 22 B (2) of Legal Services Authorities Act, 1987 It is composed of one judicial officer and two administrative officers, namely, non-juristic members with sufficient experience in public service activities, therefore, the Lok Adalats awards are based on the decisions of many non-judicial members The reason for such formation is explained by the Supreme Court in **Bar Council of India v UOI**[751] Arrested u and the whole idea of having non-legal members in a court such as Permanent Lok Adalat should ensure that legal expertise is not too important in reconciliation or judicial proceedings of this court. Such composition does not constitute an abomination to the rule of law and does not constitute a violation of the principles of justice and justice and does not conflict with Article 14 or 21. The disagreement of non-judicial officers with a member of the judiciary does not mean that the decision is unfair or lack of justice. while deciding on disputes made by Permanent Lok Adalats does not endanger the

[749] InterGlobe Aviation Led v N Satchidanand, (2011)7 SCC 463 |2011] 7 Mad LJ 619
[750] Ibid
[751] Bar Council of India v UOL 2012 AIR SCW 4430 (2012) 8 SCC 243 P141 SL

quality of dispute resolution. It was ruled by the Supreme Court that the concept of justice and equality continues to guide Permanent Lok Adalat during the reconciliation process or when the reconciliation process fails, in deciding the dispute accordingly. "Public Interest Litigation, the legal aid program and the Lok Adalats, all three of them, have brought about a radical change in the Indian legal system. The concept of social justice has been transformed into a reality in Indian society by these institutions.

CONCLUSION:

As I conclude about the above-mentioned points how modern trends is better than the ancient jurisprudence. And that's why our Indian legal system is believed widely among peoples only because of these new recent trends also A common belief among students about law is that they are the kind of strict rules that cannot be applied. In reality, legal law is the most important legal promise in society. Each public opinion will be reflected in the legal opinion. A legal expert can easily explain the various policy options submitted by the government. The recommendations of the jurists should be carefully analyzed and tested where the government will be able to start great progress in society. After that the legislatures can achieve their ultimate goal for the people. Legal analysis can only solve difficult questions on the social legal problems that exist in society. Now is the time to encourage emerging community law enforcement. Its time to urge it.

NANDLAL WASUDEO BADWAIK V. LATA NANDLAL BADWAIK AND ANR. (2014) 2 SCC 576

- **RITU BASU**

Court

Supreme Court of India

Citation

(2014) 2 SCC 576

Bench

Chandramauli Kr. Prasad J., Jagdish Singh Khehar J.

Petitioner/ Appellant

Nandlal Wasudeo Badwaik

Respondent

Lata Nandlal Badwaik and Anr.

Introduction

"Paternity is a presumption whereas maternity is a truth." This has been regarded as a very popular saying for years. In spite of being just a presumption, it has more weight in the society than the truth. Probably, that is the reason why it is fought more in the court rooms than the 'truth'.

Generally, law presumes that a child born to a woman during the continuation of a valid marriage is fathered by the husband of that woman. This presumption has ruled the court rooms for years in the cases of paternity disputes, until very recently when the Hon'ble Supreme Court of India, in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwik & Anr.*[752], assented to the fact that *"where there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the whole community to be correct, the latter must prevail over the former."*

Facts

The petitioner, Nandlal and the respondent, Lata got married in 1990. Very soon, the marriage proved to hit rough weather. The respondent filed an application for maintenance

[752] (2014) 2 SCC 576

under Section 125[753] of Criminal Procedure Code, 1973, which was dismissed by the trial court.

Subsequently, the wife, that is, the respondent, resorted to a fresh proceeding under Section 125[754] of Criminal Procedure Code, 1973, claiming maintenance for herself and for her daughter. The basic contention of the wife was that she had started living with her husband from 20th June 1996 and stayed together about two years during which time she became pregnant. She eventually gave birth to a girl child, when she went to her paternal home. However, the petitioner husband was reluctant to accept that the child (who is the Respondent No. 2 in the case) was his daughter. He alleged that the assertion of his wife that she had stayed with him since 20th June 1996 is false and asserted that after 1991, he had no physical relation with his wife. The trial Court, accepting the plea of the wife, granted the maintenance at the rate of Rs. 900/- per month for the wife and Rs. 500/- per month to the child.

Against these orders, the petitioner husband preferred a Special Leave Petition in the Supreme Court of India challenging the paternity of the child. The Supreme Court allowed the petitioner's prayer for conducting DNA test to be conducted at the Regional Forensic laboratory of Nagpur, the report of which conspicuously stated that Nandlal Badwik was debarred to be the biological father of the child, Respondent No. 2. The respondents requested for a re-test, being dissatisfied with the result to which the Court gave its consent and a retest was conducted at Central Forensic Laboratories, Hyderabad. This test also furnished the same report as the previous one.

Consequently, at this juncture, the counsel for the respondents submitted that since the appellant had failed to establish that he had no access to his wife at any time when she could have conceived the child, the direction by the Court for the DNA test ought not to have been given and hence the test result should be ignored. The Supreme Court discarded this contention, observing that the coordinating bench considered the circumstances of the case and it was precise in ordering the DNA test. Moreover, there were no objections from the side of the respondents to the prayer for DNA test and it was only after the reports of the test appeared adverse to them that they challenged it on the ground that such a test should not have been directed by the Court.

[753] Section 125 in The Code Of Criminal Procedure, 1973 (indiankanoon.org)
[754] ibid

Issue raised

Whether the accurate report of DNA test can be used as a contradiction to the presumption of paternity and legitimacy made under Section 112[755] of the Indian Evidence Act, 1872 and whether such presumption may be rebutted by proving non- access of the husband to the wife while the child could have been begotten?

Decision

The Apex Court, in the decision, observed that a plain reading of Section 112[756] of the Indian Evidence Act, it can be concluded that a child born during the persistence of a valid marriage shall be a conclusive proof of the fact that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof in cases where the conditions mentioned are satisfied, but it can be denied only if it is shown that the parties to the marriage could have no access to each other at the time in question, that is, when the child could have been begotten. In the instant case, the wife had pleaded that the husband had access to her and, in fact, the child was born out of the wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and hence, he had no access to her.

The court opined herein that the DNA test is a precise test and on the basis of the result of the test, it has been clarified that the appellant was not the biological father of the girl- child. However, the plea of the husband regarding the fact that he had no access to his wife during the relevant time had not been proved. It opined that Section 112[757] of the Evidence Act was enacted when the Legislature could not contemplate the modern scientific advancement and the application of DNA test. Although Section 112[758] raises a presumption of conclusive proof on satisfaction of the mentioned conditions therein, the same is rebuttable and the presumption may seek to afford justifiable means of arriving at an confirmatory legal inference. The Court stated that while the truth or fact is known, there is no need or room for

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

[756] Ibid.

[757] ibid

[758] ibid

any presumption. In case of a conflict between proof under law and proof based on scientific evidence, the latter would prevail.

Hence, the appeal was allowed and the judgment directing payment of maintenance to the child, that is, Respondent no. 2 was set aside.

Analysis

Section 112[759] of the Indian Evidence Act, read with Section 4[760] of the Indian Evidence Act makes it clear that a child born during the subsistence of a valid marriage is the conclusive proof of the fact that the child was fathered by the husband of the woman. It is settled that when the law says that existence of a fact is a conclusive evidence of another, it shall not be proved that in spite of existence of the former, the latter is non-existent. However, Section 112[761] of the Evidence Act itself provides an escape from the rigidity of that conclusiveness. If it could be shown that the parties had no access to each other at the time when the child could have been begotten, the presumption under the Section could be defeated. In the case of *Karapvya Sevarai v. Mayandi*[762], the Privy Council held that the connotation offered by the term "access" is restricted to only the existence of an opportunity for marital intercourse. This principle was accepted by the Supreme Court in the case of *Chilkuri Venkateswaralu v. Chilkuri Venkatanarayana*[763] as a correct law. Hence, "access" does not mean actual sexual intercourse between the spouses, but the mere existence of an opportunity for the same.

The controversy lies in the fact despite various Courts of India resorting to the result DNA fingerprinting in rendering decisions; it has not yet been included in the Indian Evidence Act. Hence, the judges have the discretion to accept DNA test under Section 45[764] of Indian Evidence Act or not.

The first paternity dispute in India solved by means of DNA fingerprinting was the case No. M.C. 17 of 1988 in the court of The Chief Judicial Magistrate of Tellichery, wherein the Chief Judicial Magistrate held that since the opinions of an expert is admissible under Section

[759] Ibid
[760] "Conclusive proof".—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.
[761] Supra note 4
[762] AIR 1934 PC 49
[763] 1954 SCR 424.
[764] Section 45 in The Indian Evidence Act, 1872 (indiankanoon.org)

45[765] of the Indian Evidence Act, the opinions of an expert in the matter of molecular biology was made also admissible.

In the case of *Goutam Kundu v. State of West Bengal*[766], the Supreme Court a number of observations relating to DNA fingerprinting and its admissibility. Such observations are as follows:

1. Courts in India cannot order blood test as a matter of course
2. Wherever an application is made in order to have itinerant inquiry, the prayer for blood test cannot be entertained
3. There has to be a strong prima facie case in that the husband must establish non-access in order to dismiss the presumption arising under Section 112[767] of the Evidence Act
4. The court has to examine carefully as to what would be the outcome of ordering the blood test
5. One cannot be compelled to give blood sample for analysis.

In the case of *Shard v. Dharmpal*[768], the issue was whether a party to a divorce proceeding can be compelled for a medical examination. The DNA test was opposed by the respondent on the ground that such an order would violate his right to privacy. The three Judge bench of the Supreme Court held that, if the Court passes an appropriate order for arriving at the satisfaction of the Court and to protect the right of a party who may otherwise be found to be incapable of protecting his own interest, the question of such action being an infringement of Article 21 of the Constitution would not arise.

Comparison with other decisions

A prominent dissimilarity between the other cases and the instant case is that, in the *Nandlal*[769] case, the propriety of courts ordering DNA test was not examined. The issue before the Court was, whether to accept the result when there is a scientific proof reached by the DNA test or to adhere to the provision under Section 112[770] of the Indian Evidence Act.

[765] ibid
[766] 1993(3) SCC 418
[767] Supra note 4
[768] AIR 2003 SC 3450
[769] Supra note 1
[770] Supra Note 4

The Court, in the case of *Kanti Devi & Anr v. Poshi Ram*[771], had observed that the results of a genuine DNA test is said to be scientifically accurate but is not enough to escape from the conclusiveness of Section 112[772] of the Evidence Act. In this case, the Court held that on the strength of evidence, the Court was satisfied that the plaintiff husband had no opportunity whatsoever to have liaison with the defendant mother. So, there was no prima facie case to order a DNA test, where the evidences adduced were enough to reach a conclusion.

There may be a contradiction that the *Nandlal*[773] decision is not lawfully correct. However, under the circumstances of the case, the decision of the Court could not be otherwise, and could not have been more correct. Had the respondents objected to the DNA test in the first instance, it would have been a different circumstance. But when both of the DNA tests had excluded the petitioner husband as the father of the child, that is, Respondent No.2, the Court cannot ignore it and merely resort to the presumption under Section 112[774] of Evidence Act.

However, this decision of the Court cannot be considered as to have laid down a new law, owing to the fact that Section 112[775] of the Evidence Act continues to remain as an irrefutable presumption.

Inference

The law in India provides a special protection to the status of legitimacy. The type of evidence which can be used to rebut the presumption is also very specifically provided for. In certain European countries, DNA test has been adopted as the evidence to be used in paternity disputes. However, Indian courts cannot resort to this technique due to the stigma attached to illegitimacy and the absence of protective law for illegitimate children. Hence, it might lead to a husband to maintain an illegitimate child. However, allowing DNA test in every paternity dispute would be dangerous. A doubting husband would be most likely to produce his wife and child in court and subject them to ignominy. Even if the test proves that he is a real father, the loss of reputation and trauma suffered by the wife and the child until can never be compensated by way of damages.

[771] Appeal (civil) 3680 of 2001
[772] Supra Note 4
[773] Supra note 1
[774] Supra note 4
[775] Ibid

The Law Commission in its 185th report had recommended a refurbishment of Section 112[776] of the Indian Evidence Act. The recommendations have not yet been put to the mandate of the legislature. It, of course, is not true that the legislature is not yet aware of the advancement of science and technology. However, before making the proposed amendments, the pros and cons of every part of such amendment have to be widely debated.

The values of the country still continue to favor long standing family relations over genetics. It is widely agreed that scientific research and advancement should be employed in every aspect of life and most importantly, in law and justice. However, there remains a great difference between utilizing such technologies in fact finding of crimes, and civil disputes of such delicate nature like parentage.

[776] Supra Note 4

FINGERPRINTING IN LAW ENFORCEMENT AND LEGAL PROSECUTION

- MOHAMMED ZAMAN & AKSHAY PRAMOD

In the brief history of mankind's civilized existence in the face of the earth, very few things have transcended functionality without changing its original purpose. And one of those things is the unique intricate expression of a human finger or to simply put it, a human fingerprint. Fingerprints have been accepted as a universal method of identification. It is common knowledge that no two fingerprints are alike and various studies have disapproved any arguments which says otherwise. In 1914, a study by Dr. Edmond Locard using statistical analysis cemented the reliability of fingerprint identification by presenting a three part rule that assured the distinction in prints[777]. Though the universal acceptance that fingerprints are in fact articles of identity came much later in modern history, mankind did make notes and observations regarding it in separate occasions in different parts of the world. The earliest known usage of fingerprints for the purpose of commerce was found in Ancient Babylon where impressions of fingerprints on clay were used to enter into business transactions[778]. Clay seals with ridge impressions were used in both Qin and Han dynasties of China (221 BC – 220 AD) and the Persians in the 14th century have recorded notes and comments regarding the practice of identifying persons based on their fingerprints[779].

Though different cultures utilized fingerprints for a variety of reasons, the use of fingerprinting in law enforcement and criminal prosecution was little to none. The only known instance of print impressions being used to solve a crime before Anno Domini was in the Qin Dynasty (221-206 BC) where records prove that handprints were used as evidence in criminal investigations[780]. Until the 20th century, law enforcement agencies around the world considered fingerprints only as a secondary means of identification. The Bertillon system which was pioneered by Alphonse Bertillon in 1882 in Paris, France was still used as the

[777] Edmond Locard - Numerical Standards & "Probable" Identifications, Journal of Forensic Identification, 45(2) 1995, pp136-155
[778] Harold Cummins- Ancient Fingerprints in Clay, Journal of Criminal Law and Criminology, Volume 32, Issue 4
[779] "Jaamehol-Tawarikh" (Universal Book) by Kajeh Rashiduddin Fazlollah Hamadani (1247-1318)
[780] Mark Edwards Lewis- Early Chinese Empires

primary method for the identification and classification of individuals. Bertillon used the measurements of the parts of the body and photographs (which would later pave the wave for the use of mugshots in law enforcement) to identify individuals[781]. This system was however disapproved in 1903 in the United States where two individuals where found with near identical Bertillon measurements. The US Penitentiary in Leavenworth, Kansas was surprised to find that the Bertillon measurements of a man named Will West was nearly identical to another inmate named William West who was serving time in a correctional facility in New York. This discrepancy in the system prompted the New York Prison System and the Leavenworth Penitentiary to examine both the inmates in the penitentiary in Kansas. The measurements were indeed identical. Their fingerprints, true to its nature, were not. Subsequently, the New York Civil Service Commission, the New York Prison System and the Leavenworth Penitentiary proceeded to use fingerprints as the primary source of identification.

The very first case where fingerprints were used as evidence to solve a murder was the Francisca Rojas case in Argentina in 1892[782]. Francisca Rojas is believed to be the first person to be convicted guilty of a crime through fingerprint evidence. On 19th June, 1892, 27 year old Francisca Rojas from Necochea, Buenos Aires brutally murdered her two children, six-year old Ponciano Carballo Rojas and four-year old Teresa Carballo Rojas. Francisca then tried to stage an attack by slicing her own throat and blamed her neighbor Pedro Ramon Velazquez for the murders. The report of the murder only reached the provincial capital (La Plata) on July 9, 1892. The local police were stumped and had no leads and Police Inspector Alvarez of the Central Police was dispatched to take over the investigation. Upon arrival he realized that Pedro Velazquez had a solid alibi and that he was with his friends during the time of the murders. Francisca Rojas also denied that she was not involved in the murder of her children.

After reexamining the scene of the crime and talking to witnesses, Inspector Alvarez collected two items of interest which would later prove to be crucial evidence. One was a

[781] Henry T.F. Rhodes- Alphonse Bertillon: Father of Scientific Detection
[782] Mr. S.P. Singh – Landmark cases in the History of Fingerprint Science, XVIII All India Conference of Directors at Fingerprint Bureau

bloody impression of a thumb found on the door jamb and the other was a witness statement claiming that Rojas's boyfriend had been overheard saying that he would've married her if it weren't for her two children. On his return back to La Plata, Alvarez presented the fingerprint evidence to Croatian-born Argentine Juan Vucetich who was in charge of criminal identification at the headquarters. Vucetich quickly established that the fingerprint was of the murderer and ordered Francisca's fingerprints to be examined. The case was cracked wide open and Francisca was convicted for the murder of her children.

The outcome of that case completely changed the procedure of criminal identification in Argentina. The Argentine government scrapped the Bertillon system and proceeded to use fingerprints as the primary source of identification in criminal records. The government adopted Vucetich's improved system of fingerprinting which he termed as "comparative dactyloscopy". It was later adopted by a number of Spanish speaking nations.

The Kangali Charan case of India in 1898 played a key role in the adoption of fingerprinting as a means for criminal identification in the United Kingdom and its erstwhile colonies[783]. Kangali Charan was a thief who was charged with the murder of a manager of a tea garden in the Julpaiguri district on the Bhutan Frontier. The facts of the case are as follows. The victim who was a manager of the tea garden was found lying on the bed with his throat slashed. The dispatch box and the safe had been broken into and several hundred rupees had been stolen. Upon questioning the people in and around the tea garden, the police came to the following conclusions. The crime was either committed by the relatives of a woman who was the victim's paramour or by a gang of Kabulis who were camping in the neighborhood or by a disgruntled ex-servant who had been imprisoned for theft. Upon inquiry, the police ascertained that the crime wasn't committed by the woman's relatives or the gang of Kabulis. Further questioning of the servants also proved that they were above suspicion and that the closest item of interest which was a bloodstained apron of the cook was indeed the blood of a pigeon that he slaughtered for his master's dinner. They also came to know that the ex-servant had been released from prison a while ago.

[783] Mr. S.P. Singh – Landmark cases in the History of Fingerprint Science, XVIII All India Conference of Directors at Fingerprint Bureau

On examining the crime scene, the investigators found two brown smudges on the cover of a book calendar that was inside the dispatch box. Under a magnifying glass the smudge was deciphered to be a partial fingerprint. It was perhaps fate that Sir Edward Richard Henry[784], the founder of the Henry system of Fingerprint Classification, was posted near the scene of the murder. The investigators with Henry's assistance managed to examine the prints of the former servant which had been stored in a database in the Central Office of the Bengal Police. The Central Office classifies and registers the fingerprints of all individuals who had been convicted of certain offences. The partial print that was found at the crime scene matched Kangali Charan's right thumb. He was arrested and tried for theft and the murder of the manager of the tea garden.

Even though the fingerprint evidence tied him to both the offences, Indian courts only found Kangali Charan guilty of the offence of theft as they were apprehensive of accepting new technology as evidence in a trial for murder. Nevertheless, Sir Edward Henry's efforts didn't go unnoticed. In December 1900, the Belper Committee in England recommended the use of fingerprints for the classification of criminal identification records. And soon enough, the Henry System of Fingerprint Classification was adopted by the government after the United Kingdom Home Secretary Office conducted an inquiry into the studies published by Henry[785].

Even though the Henry system was adopted in 1900, the first conviction where fingerprints where used as evidence in a trial didn't occur till 1902. The Harry Jackson case of England in 1902 set the precedent as the first case to successfully try a person based on fingerprint evidence[786]. Harry Jackson was a thief who broke into the home of Mr. Charles Driscoll Tustin at Denmark Hill, South London in 27th June, 1902. He broke into the house through the freshly painted window sill and left the impressions of his fingerprints on the wet paint. On the following day the local police found these prints on the crime scene and contacted Detective Sergeant Charles Stockley Collins of the Metropolitan Police Fingerprint Bureau. Collins made his way down to the scene of the crime and took photographs of the prints.

[784] "1900 SIR EDWARD HENRY"- Authority, Scottish Police Services
[785] Edward Richard Henry- "Identification of Criminals by Measurements and Fingerprints"
[786] (to be added later)

After examining the prints he determined that the fingerprint of the left thumb was clearest. On the 13th of September Harry Jackson was arrested and tried for burglary. He pleaded not guilty. In order to prove to the conservative jury that Jackson was indeed guilty, the prosecutor, Mr. Richard Muir who was a well know lawyer of that time, compared the left thumb impression of Jackson and the fingerprint evidence which collected at the scene of the crime. It was a perfect match. Harry Jackson was found guilty of the crime and was sentenced to 7 years in prison.

The first case in the England where fingerprint evidence was used to try a murder was the Stratton Brother case[787] in 1902. On 27th March 1905, 16 year old Williams Jones went to the paint shop owned by the Farrows. He found it unusual that the shop was closed at that time of the day and he found it odd that there was no response even after knocking on the front door multiple times. He indulged his curiosity and peered into the shop through a window. He was shocked to find multiple chairs turned over and it appeared that the shop had been ransacked. He quickly sought the assistance of a local resident, Mr. Louise Kidman and forced their way in through the back door of the building. Inside the paint shop lay the blood soaked dead body of Mr. Thomas Farrow and his wife Ann who was lying unconscious. Mrs. Farrow was immediately taken to the hospital for urgent medical attention. But despite the best efforts of the doctors she was pronounced dead a couple of days later.

On examination of the crime scene, the investigators noticed that there was no signs of forced entry. They assumed that the perp entered through the front door after Mr. Farrow let them in. As they swept the crime scene, they found two face masks made out of stocking lying on the floor and perhaps the most important piece of evidence, a greasy fingerprint inside the cashbox which had been emptied. The investigating officers contacted Detective Inspector Charles Collins of the Scotland Yard's Fingerprinting Bureau. Detective Inspector Collins, of the famed Harry Jackson case, examined the fingerprint and came to the conclusion that it was the print of a thumb. After making sure that the fingerprint didn't belong to the victims or the officers in the crime scene, he cross referenced the fingerprint with the 80,000+ sets of prints that was stored in the database at the Bureau. Unfortunately there weren't any matches.

[787] Alfred and Albert Stratton (1905)

Inspector Collins then proceeded to interview numerous individuals hoping that they could provide any leads. Multiple people claimed that they say two men leave the Farrow residence on the morning of the murder and one those men were identified as Alfred Stratton. Alfred and Albert did not have criminal records but they were known for their criminal acquaintances. The description given by the witnesses matched that of the brothers. Moreover, Alfred's girlfriend confirmed to the police that he had given her a set of worn clothes that matched the description given by the witnesses. She also informed them that he had asked for a pair of stockings. One questioning Albert's girlfriend she confessed that he had returned home with a bundle of cash that was unaccounted for. The Stratton brothers were subsequently arrested and the fingerprint evidence proved to be the right thumb impression of Alfred Stratton. They were tried for their crimes and was given the death penalty.

In the due course of the development of fingerprint science, there have been various practices that were developed in the quest to obtain perfection in the identification of individuals. One of those practices was the study of Forensic Poroscopy. Poroscopy is the study of the pores one's palms and fingers. It essentially involves studying the shape, size and position of the pores by comparing the prints of the palms and fingers. Poroscopy was developed by the French criminalist Dr. Edmond Locard. His research in forensic science and its application in criminology has proved to be invaluable in criminal prosecution[788]. The first instance where poroscopy was used as evidence was the Boudet and Simonin case of France in 1912. On June 19th, 1912 Boudet and Simonin broke into the apartment of M. Chardonnet at No.6 Rue Centrale. They stole several pieces of jewelry and 400 Francs were taken from the money box. The French police were left stumped as they had no witnesses or clues regarding the identity of the culprits. However, on examining the rosewood money box they realized that it was covered in fingerprints. A sample of a complete print was developed using carbonate of lead and its photograph was cross referenced with the database of fingerprints that was maintained at the headquarters. The print was a perfect match with that of Boudet who has been arrested in the past for theft. The investigators arrested Boudet and his known accomplice Simonin. The police then obtained the impressions of their palms and fingers and compared them with the prints that were found on the money box. The impression of the

[788] Dr. Edmond Locard- "Legal Medicine under the Great King".

middle phalange of the left finger of Boudet and a small area on the palm of Simonin were identical with the prints on the box. Even while comparing the ridges on the impressions of the fingerprints, which was the standard procedure followed in fingerprinting, there were 78 points of identity for Boudet and 94 for Simonin. Despite the overwhelming evidence against them, Boudet and Simon refused to confess.

In the trial, the prosecution compared the palm and fingerprint impressions of Boudet and Simonin with the fingerprint evidence that was collected from the scene of the crime. As poroscopy was a science that laid emphasis on the size, position and number of pores on the ridges of the fingers, the prosecution enlarged the photographs of the impressions and proved to the jury the correspondence in pores. There were 901 separate points of correspondence in Boudets finger and more than 2000 points of correspondence in the palm of Simonin[789]. The jury found them guilty and they were convicted for theft. Unfortunately, the practice of poroscopy was later abandoned as the study of the correspondence of the pores proved to be too tedious and time consuming. The comparison of ridges on a fingerprint which was the standard procedure was preferred over poroscopy as it was just as accurate as the latter and less complicated than the other.

The science of fingerprinting in criminal prosecution and law enforcement has come a long way from the primitive examinations to the advanced field of study it was developed into. Fingerprints are still accepted as concrete evidence in a criminal trial and the vast field of research it has developed into has only made the process more authentic and reliable. Fingerprinting has benefitted the legal fraternity in ways that weren't even imaginable and one can find assurance in the fact that it will continue to do so.

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Jurisperitus: The Law Journal
ISSN: 2581-6349