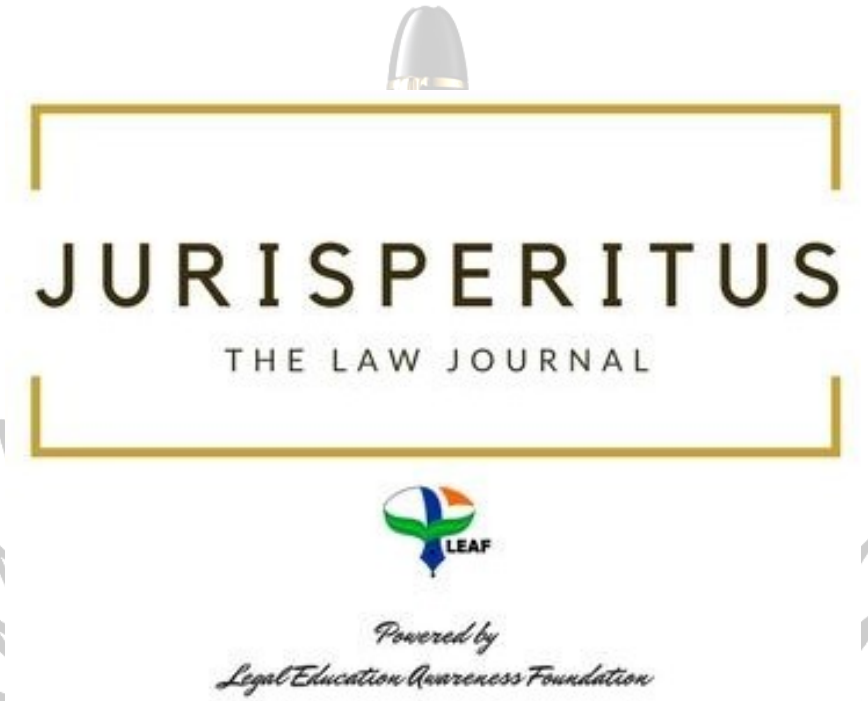

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Jurisperitus: The Law Journal.

INDEX

LEGALITY OF ANIMAL CRUELTY IN MAINSTREAM COSMETICS

- MANASA RENDUCHINTHALA

INTRODUCTION:

Regardless of your gender, go to your bathroom and look around towards your soap, shampoo and other toiletries. Or simply take a look at your daily deodorants and perfumes. Or even your clothes. Some of them may be branded as 'Cruelty Free' or 'Vegan', some may be leather, fake or genuine. My point is, how much do we actually know of the items we use regularly in terms of how they're sourced, and what their impact is on the larger ecosystem.

As we move forward, we as a society have become very conscious and aware of what we put inside our mouths. Water Purifiers have double even triple filters. We boil our fruits to get rid of the manufactured waxy layer. You will always find health freaks reading the ingredient lists of every food or beverage before they purchase or consume it. But why are we so unaware and unbothered with our other daily essentials?

This article will enunciate the various unethical animal sourcing of many well-known products we use and its impact on society and our health. It will majorly focus on the legal measures taken to prevent this and protect not only animals but also us as consumers. Although most companies are party to grotesque crimes like Child labour that are kept under wraps from the general public, to whom the sleek shiny marketing strategies are shown, this article will mostly focus on animal cruelty and the relating laws in place. At the end, this article will also suggest new reforms and policies that can better protect all creatures of the earth.

HOW DOES ANIMAL CRUELTY TAKE PLACE IN MAINSTREAM COSMETICS?

Animal cruelty in products takes place in two ways:

Testing[1]: Several invasive experiments on rabbits, mice, guinea pigs, and rats are carried out despite the fact that they are not allowed by law. Skin and eye discomfort experiments, in which chemicals are rubbed onto shaved skin or dripped into the eyes of restrained rabbits without providing pain relief, are examples.

[1] Humane Society of the US- Cosmetic Testing FAQ

Experiments in which mice are force-fed chemical doses over and over again. Researchers use these tests to check for symptoms of general illness or serious health risks like cancer or birth defects. They can last weeks or months.

"Lethal dose" experiments, in which rats are required to drink vast quantities of chemicals in order to assess the dose that causes death, have been widely criticized.

The animals are usually killed by asphyxiation, neck-breaking, or decapitation at the end of certain experiments. There is no provision for pain relief. A significant percentage of the animals used in such testing (such as laboratory-bred rats and mice) are not counted in official statistics and are not protected under the Animal Welfare Act in the United States.

Thousands of products are now on the market that are made from ingredients that have a long history of being healthy and do not need further testing. Companies can ensure food protection by using certain ingredients in their products. Companies may also use non-animal tests that are already available or invest in and create non-animal tests for new ingredients. There are nearly 50 non-animal experiments available now, with several more in the works. These modern alternatives will more closely replicate how humans respond to cosmetic ingredients and products than animal experiments, and they are also more reliable and cost-effective.

Actively using animals/insects in production[2]: If you take a look a look at any makeup or skincare product you are most likely to find Carmine in it. Cochineal is a natural pigment extracted from the dried female insect Coccus cacti. Carmine is the aluminum lake of cochineal (cochineal). It's used in cosmetics and personal care items, among other things. Carmine is a food coloring that can be used in a variety of products such as juice, yogurt, and sweets. Her exoskeleton is crushed to produce a bright crimson red dye extract known as Carmine. Carmine was first used as a red dye by the Aztecs. Carmine is now used in a wide range of products, including strawberry milk, colored beverages, perfume, and vitamins, in addition to cosmetics. Carmine is often used to add color vibrancy, long-wear, and shade strength to a variety of products. Why will any cosmetics company use Carmine in their products? The short answer is that makeup companies use this ingredient because they believe it is the only way to achieve the brilliant cool pinks and reds that their consumers demand while remaining true to their natural makeup statements.

As an alternative, to achieve red, pink, and purple hues, companies may use a variety of natural Iron Oxide pigments and Micas specially treated with Iron Oxides and heat.

[2] Makeup Enthusiasts: Stop Smearing Dead Bugs on Your Face – Published June 6, 2017 by PETA

Why do we buy these products? Because we're unaware or unbothered because we believe it doesn't directly impact our health. To appeal to one's humanity to protect animals may not work but to let people know of how these products can harm them will definitely make them more cautious. A topical reaction to Carmine may be as mild as minor scratching and watering eyes or as extreme as swollen shut eyelids, anaphylaxis, or a total swelling of the throat necessitating a trip to the emergency room.

LEGISLATIONS THAT CURB THIS CRIME

Every country has some legislations to curb Animal Cruelty, unfortunately many are not rigid enough. Companies take advantage of these loose regulations and source their products from there. One of the many reasons are that testing on animals are much cheaper and quicker than the recent advanced alternatives.

Previously, the Chinese government mandated that all cosmetics be tested on animals. Fortunately, some of these standards have been removed from Chinese cosmetics legislation. China permitted companies manufacturing so-called "ordinary" cosmetics (such as shampoo or mascara) to escape animal testing for their products in 2014, while requiring animal testing for imported goods. In 2021, China changed its rules once more, allowing certain firms to import ordinary cosmetics without having to test them on animals.

In 2013, the European Union enacted legislation prohibiting the testing and sale of cosmetics that have been tested on animals, opening the way for attempts to find alternatives to animal testing in cosmetics. Similar legislation has been passed in India, Israel, Norway, Iceland, and Switzerland. Animal testing cosmetic firms in the US and abroad will be unable to market their products in these countries unless they reform their practices. Cosmetic animal research is prohibited or restricted in California, Illinois, and Nevada, as well as Australia, Colombia, Guatemala, New Zealand, South Korea, Taiwan, Turkey, and several Brazilian nations.:

In *Alternative Research & Dev. Found. v. Veneman 262 F.3d 406 (D.C. Cir. 2001)*[3]

An animal rights organization lobbied to get the concept of "animal" changed to include birds, mice, and rats used in science. USDA decided to take into account the animal rights foundation's petition to change the term, and to do so in a fair period of time. The National Association for Biomedical Research (NABR), a biomedical research organization that used birds, mice, and rats in its studies, tried to interfere and prohibit the petition from being

[3] Animal Welfare Act: Related Cases – Michigan State University

considered by USDA. NABR, on the other hand, was barred from doing so because there was no evidence that intervening would not jeopardize its interests.

Precedents like this tighten the definition of animals which adds a variety of animals that are now protected under this law. No change is permanent without a law overseeing it and punishing the offenders. Companies, unlike individuals are huge organizations. And although according to various Company Laws, the Board of Director is vicariously liable, most companies still escape liability and part of the reason is loose legislations and lack of public support/awareness on the issue.

CURRENT SCENARIO

Since the Second World War, people have been researching cosmetics on animals. Science has progressed since then, and public opinion has shifted. Nonetheless, the testing continues. Many people are surprised to learn that animal testing is still used in cosmetics, and when they learn that it is – and that an estimated half a million animals perish and die each year for the sake of beauty – they want to act, and they want the rest of the world to act as well.

Today's customers seek brands and products with clear ethical profiles, which include a dedication to non-animal testing. 'Veganism' and 'Ethical Consumerism' is a trend. 'Cruelty Free' and 'Vegan' are terms that brands use as marketing strategies because it sells. A company must show the protection of a cosmetics product before it can be marketed, but this can now be achieved easily and accurately using a combination of existing ingredients and superior non-animal methods that are scientifically more reliable and applicable to humans. People are demanding cruelty-free cosmetics because they recognize that it is impossible to look or feel good if animals suffer as a result. It's past time for the cosmetics industry, its regulators, and governments to recognize that animal testing is unethical, ineffective, and obsolete.

CONCLUSION AND SUGGESTIONS

One of the various reasons this topic needs to be talked about is the fact that the items in question here are absolutely not necessities for us as human beings. Most of these products can either be avoided or sourced ethically. And no animal deserves to be trapped and subjected to any violence over something us human beings don't essentially need.

Legal Suggestions

Out of the many ways that this inhumane act can be policed, one is that in order to open a company, they must be mandated to provide all information with regards to their sourcing and production, as public record. They must go through a board/organization that conducts

thorough checks and investigations to ensure everything is ethical and then it must be approved. There must be a unified central authority that regulates this, regardless of local national laws, so companies can't find loopholes around it.

An Aware Consumer

Now how can you, as an average consumer can help? Truth is, this is a situation where the consumer has the most power. If there is anyone who can stop companies that engage in animal cruelty. We must be mindful of where we put our money. We as consumers must only trust and purchase from full disclosure companies. Cosmetic firms are not required to reveal any ingredients used in a formula in quantities less than 1%, according to the FDA. Carmine can be used in cosmetic formulas that do not expressly state that they report 100% of their ingredients on the label, but it will not be included in the ingredient list if it is present in quantities of less than 1% of the total product. There are a number of loopholes in cosmetic labeling that could allow a cosmetic company to use Carmine in their formulations while hiding it from the label and the customer. If the cosmetics you're using use the terms "natural dyes," "natural pigments," or "fragrance," there's a chance they contain Carmine.

These 'catch-all' ingredient lists enable the company to alter or add ingredients at any time without having to notify customers or customer service representatives. In general, customer service agents at cosmetic companies are unaware of secret changes in formulations.

A quick google search can ensure that your shopping cart is cruelty free and you can become a more conscious consumer. Apart from the extreme animal cruelty, another reason to boycott brands that still engage in animal cruelty is its environmental impact. Every thing we take from the earth has its impact on the ecosystem. When we take more than we need, we disrupt the natural balance of the ecosystem.

MARITAL RAPE EXEMPTION: THROUGH THE CRITICAL LENS OF PUBLIC-PRIVATE DICHOTOMY

- YAZHINI C K

INTRODUCTION:

The definition of "Rape" is codified under section 375 of the Indian Penal Code (IPC) that includes various forms of sexual assaults. It criminalizes specific variants of non-consensual intercourse that lies outside the realm of a marital union and consensual intercourse with children and child brides under the age of 15.[4] It is quite inquisitive to note that exception 2 to the said section exempts rape inside the realm of marriage. Thus, India remains one of the 36 countries in the world that has not criminalized marital rape yet.[5] The Indian state with liberal democracy has outrightly chosen to maintain a dichotomy between public and private lives of the diverse society, and claims that it is pertinent to uphold and maintain peace among different cultural norms. This makes the State to consider the concept of consent in marital sexual relationship as a dicey area for it to comment on. Thus, it asserts that marital rape is not rape, even if it is, marital rape will be exempted.

The public-private dichotomy is looked upon critically by various schools of feminist jurisprudence. The Radical feminist jurisprudence pierces the dichotomy to declare that this dichotomy serves to secure the power dynamics that patriarchal system entrenches to take control over women's sexuality and privacy.[6] This paper discusses how the liberal concept of public-private dichotomy upheld by the state rationalizes marital rape and immunizes men in the name of marriage. It also discusses how the dichotomy allows the state to protect the patriarchal power dynamics within the institution of family and marginalizes women's individuality in marital sexual relationships.

MARRIAGE - A 'PRIVATE' INSTITUTION:

Various personal laws, along with ancient common law, perceived marriage as a sacred union of a man and a woman who have vowed to be exclusively for each other till death. Marital

[4] The Indian Penal Code, 1860, Section 375.
[5] Marital Rape in India: 36 Countries where Marital Rape is Not a Crime, India Today, Mar 12, 2016 < https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>
[6] Catharine MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8(4) The University of Chicago Press, 635-658 (1983) < https://www.jstor.org/stable/3173687>

relationship creates dependency that brought about specific obligations on both. It is quite evident that the obligations that the husband bore were 'public' in nature that involved economics, business, politics, trade, etc. On the other hand, the wife bore obligations such as emotional labour, sex, care, nurture and reproduction. It mostly remained inside home, and thus considered 'private' in nature, involving only the husband and the wife. This dichotomy allowed the husband to take control of the finance, because the former's obligations are quantifiable and monetised, while the non-quantified latter's labour are considered non-significant. This division of labour crowned the husband as the provider and the head of the home, that granted him control over the 'private' sphere. This presence of power dynamics in the so-called sacred union let him access the emotional and sexual obligations as much as he wants at his demand.[7]

Various legal fictions were built around the perception of sacred marital union by the English Jurists, and it took footing on the fact that woman's individual status and capacity is consolidated with that of man's upon marriage. Firstly, women were considered as chattels, that she was the property of her father, and was transferred to the husband upon marriage. She was never considered as a person of individuality and individual legal rights. Sexual assault or rape by the husband on the wife's body is merely considered as him using his property which she had no claim at all.[8] Secondly, according to the theory of unities, husband and wife became one entity, upon marriage. Also, it must be noted that the rights enjoyed by this 'one entity' was with the husband. Thus, it proposed the idea of husband being the master of the house.[9] This theory provided grounding to one of the famous statements made in 17th Century by Sir Mathew Hale, which is referred as "implied consent theory"[10], served as a legal footing for the modern day marital exemption, even though the said statement has been revised by many following jurists. He said,

"A husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto husband which cannot retract."[11]

[7] Srimati Basu, Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory, 37(1) Feminist Studies, Inc., 185 (2011) < https://www.jstor.org/stable/23069892?seq=1>

[8] Melisa J. Anderson, Lawful Wife, Unlawful Sex- examining the Effect of the Criminalisation of Marital Rape in England and the Republic of Ireland, 27(139) GA. J. INT'L & COMP. L., 139, 147 (1998) < https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1315&context=gjicl>

[9] Id.

[10] *State v. Smith*, 426 A.2d 38, 41 (N.J. 1981)

[11] Katherine M. Schelong, Domestic violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape and Stalking, 78 MARQ. L. REV. 79, 87 (1994).

It could be confidently asserted that there has been very little change of perception by the state on married woman's individuality in their 'private' space, over time. Though Verma Committee report recommended on criminalizing marital rape in India, the same never came into effect as law.[12] Marital rape exemption that reiterates the husband's unlimited access to sex in marriage, with the power dynamics in the backdrop and legal fictions that legitimizes 'implied consent' by the wife, a married woman's individuality is crushed under the whims of patriarchy. The laws that provides a ground for divorce for the husband upon wife denying sex, grabs away the wife's right or even the chance to be non-consensual by any other means.[13] By portraying marriage as a 'private' institution that must be off-limits to the state to intervene, the state rationalizes its sidestepping from revolutionizing laws that subjugated women in their domestic lives.

THE VOID CONCEPT OF 'PURITY':

In line with the liberal concept of public-private dichotomy, the overall 'private' sphere that the state refuses to touch is where the women are relegated to in the name of family. It is perceived that whatever happens inside a family is out of question by the state, as the state's intrusion would dilapidate the 'purity' that the institution of family holds within.[14] It is as simple as it is considered as family matters and are ignored to be intervened into. Mackinnon says,

"The exemption for rape in marriage is consistent with the assumption underlying most adjudications of forcible rape, it is personal."[15]

With respect to "Rape" being defined under section 375 IPC, presence of violence is very much stressed upon (which itself is a problematic but this paper restricts from not delving into it). But it is quite appalling that despite how much ever violence that the husband has exerted upon the wife, the marital status that exist between them, immunizes the husband from being prosecuted. Even if the wife is in the hospital bed, the state ignores to intervene to protect the life of that woman, by calling the violence actions as family problems that must be settled within by the husband and the wife.[16]

[12] Ridhi Sharma & Susan Bazilli, A Reflection on Gang Rape in India: What is law got to do with it?, 3(3) IJCJ & SD 4, 6 (2014) < www.crimejusticejournal.com>
[13] The Hindu Marriage Act, 1955, Section 13.
[14] Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88(1373) CAL. L. REV. 1375 (2000) < https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11686&context=journal_articles>
[15] Catharine MacKinnon, supra, 648.
[16] Melisa J. Anderson, supra, 142-143.

The dreadful nature of rape that the woman experiences is negated with respect to the mere relationship that she has with the rapist.[17] The state not only exempts marital rape to be criminal, sometimes, it goes another step by claiming how any intercourse between the husband and wife be considered rape at all.[18] The state also claims that even acknowledging the act of marital rape, forget criminalising marital rape, would destruct the marriage and shatter the family. Thus, the state rationalizes its behaviour of non-intrusion into the 'private' realm, and hence preserving the marriage, at the expense of a women's right to dignified life and choice.

Though the state is very much cautious from entering the realm of marriage and family, it quite easily intrudes the 'private' space if it is outside the realm of the same. Despite the consensual, non-coercive and non-violent nature of the intercourse, which does not amount to any sexual violation or offences on that women at all, the state criminalizes such behaviour of women.[19] It is quite evident that the state makes sure that in 'private' realms such as in family, women's actions and individuality with respect to sexual choices and consent are kept at place by the patriarchal head such as the husband, and the state does not question the latter of his abusive behaviour. Meanwhile, it is with absolute ease, the state steps up to criminalize when the chastity of wife is in question, or in cases of adultery[20] by the wife, to relegate her back into the untouched 'private' space. The state reasons that it would step up to protect the 'private' sphere of family or marriage from falling apart, on account of any individual sexual choices that women would exercise. By idealizing the 'purity' that family as an institution holds, the state demands the women to be dutiful to keep up their 'purity' by protecting their chastity and 'morality' to uphold the honour of the family.[21]

Though the state outrightly exempts marital rape, which is on every way not in line with the constitutional principles, it merely attempts to respond with domestic and personal laws. Personal laws provide cruelty as a ground for divorce.[22] But it must be noted that divorce can be claimed by the husband upon the wife denying sex too.[23] Thus, if both the provisions are read together, it seems that the wife, without denying the access of sex has to put up with the violence exerted upon her, in order to demand divorce as a remedy to save her life. On the other hand, the husband is not only not prosecuted or punished for raping her, but also is free to

[17] Jill Elaine Hasday, supra, 1394.
[18] Marriage, Sexuality and The Law- Criminalisation and Sexuality, 16 (Apr 28, 2015) <https://pldindia.org/wp-content/uploads/2015/11/1-Marriage-sexuality-and-the-law.pdf>
[19] Melisa J. Anderson, supra, 142.
[20] Adultery was recently decriminalised in September 2018 in the case, *Joseph Shine v. Union of India*, SCC 1676 (SC: 2018)
[21] Supra 15.
[22] The Hindu Marriage Act, 1955, Section 13.
[23] Id.

marry other women and demand sex or rape her under the immunity of marriage, which the state does not intervene to stop.[24]

THE STATE – THE PATRIARCH OF THE PARTIARCH:

Despite the public-private dichotomy, that considers 'private' to be untouched by anything that happens in the 'public', both these spaces function parallelly with similar kind of dynamics. The power dynamics is quite inherent to the 'private' space.[25] The age-old patriarchy that governs the 'private' realms of homes and families still serves as the most significant factor for the existing power play. Mackinnon compares the power dynamics that is employed by the government on the governed to that of the power exerted by men on women in the 'private' spheres.[26] As how the state expects implied obedience from the citizens, the man expects similar obedience from the wife, at all means, including access/ demand for sexual intercourse, which is immunized by the state itself.

Further, she asserts that State itself is a patriarchal male that perceives and treats women, the way men perceive and treat.[27] Thus, the state claiming to not intrude the 'private' sphere is only because the dynamics that exists in the sphere is benefiting the state, where it does not want to alter the status quo. In a way, it can be perceived that, with the explicit exemption of marital rape, the state authorizes the husbands to actively control wife's sexuality within marriage.[28] This claim paints a picture that the state does not want to avoid intruding the 'private' sphere, but it does not want to intrude or change the patriarchal setup of the 'private' sphere.

Though the 'private' realm is inhabited by women, it is dominated and governed by men.[29] Hence, the 'private' realm is not a personal space for women alone, it includes men, and is nothing less dynamic than the 'public' realm, but only of different nature. This dichotomy while acknowledging non-interference by the state of the 'private' (home/marriage/family) sphere, does not at any means acknowledge privacy of women within the 'private' realm.[30] In other words, women are not given any personal space or privacy for themselves that is not

[24] Morrison Torrey, Feminist Legal Scholarship on Rape: A Maturing Look at one form of Violence Against Women, 2(1) Wm. & Mary J. Women & L. 35 (1995) <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1283&context=wmjowl>
[25] Catharine MacKinnon, supra, 657.
[26] Id.
[27] Catharine MacKinnon, supra, 644.
[28] Melisa J. Anderson, supra, 144.
[29] Catharine MacKinnon, supra, 651.
[30] Id.

intruded by men or patriarchy. The state that wants to avoid intrusion into the privacy of homes, does not hamper the other actors who are inside the said sphere from intruding into the privacy of women in homes. Further, the dichotomy that upholds to leave alone the 'private' sphere merely protects man's privacy to subordinate women without any intrusion from the state.[31] The act of married women saying "no" to sex or to claim criminal action for the violence exerted upon them, thus demanding to acknowledge their right to honour their privacy , is completely ignored by the state in the name of non-interference into the 'private' realm, thus justifying male supremacy and allowing men to act as they please without accountability Mackinnon says,

"Privacy is everything women as women have never been allowed to be or to have; at the same time the private is everything women have been equated with and defined in terms of men's ability to have."[32]

CONCLUSION:

On a shallow level, some of the contentions that are posited against the criminalization of marital rape are as follows. On one hand, it is the fear of misuse of the provision by a revengeful wife against the husband.[33] On the other hand, owing to the level of illiteracy and poverty in the country, it is quite difficult to believe that the actors would understand the concept of consent in marital sexual relationships. But on a very deep level, it could be perceived that the state itself is a patriarchal institution. The husband of the house, who the law presumes to govern the 'private' sphere, is the miniature model of the state itself.

The state inherently wants the 'private' realms to keep up with the patriarchal values not only through personal laws, customs and tradition, but also through legitimate authorization of violence upon women in the martial relationship by the men of the family. Instead of outrightly legalizing many ill actions, that cannot be constitutionally upheld, that exert power upon women's bodies and individuality, it has successfully built a vault called 'private' sphere to safeguard the patriarchal norms, without any intrusion by the state. In case of marital rape exemption, the state, disregarding the women's norms and rights, actively immunizes the husband's act of coercion and violence in the name of marriage, by claiming to have marriage off the limits for the state to intervene.

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[31] Catharine MacKinnon, supra, 657.
[32] Catharine MacKinnon, supra, 656.
[33] Krina Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change, 42(5) Fordham INT'L. L. J. 1520, 1527 (2019) < https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2760&context=ilj>

To conclude, the liberal concept of the dichotomy of public-private sphere itself is an instrument employed by the state to uphold patriarchal subjugation on women's sexuality and privacy at large, among which marital rape serves as one of the best examples. One of the best ways to shatter the reasons for non-criminalizing marital rape in this ingrained structure is by acknowledging personal to be political. The so-called 'private' sphere has to be politicised, in order to legally advocate the problems faced by women under the roof of family, marriage and home. As Mackinnon says, "the paradigm of framework as a whole need to be altered"[34] and women's life and experiences must be brought from 'private' spheres to 'public' spheres, that allows for the state to take in consideration of the same and acknowledge the political nature of the issues at stake.

[34] Catharine MacKinnon, supra, 658.

PROGRESSION IN INTERPRETATION OF ARTICLE 21 WITH SPECIAL EMPHASIS ON RIGHT TO PRIVACY: THE JOURNEY SO FAR

- RATUL DHIMAN

ABSTRACT

Article 21 is perhaps the celebrity provision of the Indian Constitution, as it guarantees the right to life and personal liberty. Since the inception of Constitution, Article 21 has been interpreted in context with the changing times. With constant interpretation, the ambit of the Article 21 has been widened manifold. This paper looks into the evolution of the interpretation of Article 21, with specific emphasis on Right to privacy.

1. INTRODUCTION

Right to life and personal liberty is perhaps the most precious, sacrosanct, inalienable and fundamental of all the fundamental rights. Right to life and liberty enshrined under Article 21 of the Constitution is certainly the pre-requisite for enjoying other fundamental rights. Insofar fundamental rights are concerned, they aim to establish rule of law, hence negate any scope of tyranny. In words of Justice P.N. Bhagwati, "These Fundamental rights represent the basic values cherished by the people of the country since *vedic* times and they are calculated to protect the dignity of the individuals and create every conditions in which every human being can develop his personality to the fullest extent."[35] The inclusion of the chapter on Fundamental rights in the Constitution is in accordance with the trend of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.[36] The question as to the extent of enjoyment of these fundamental rights have always been a central point in the course of development of constitutional jurisprudence. Now, in modern times it is being accepted that no right can be unrestricted otherwise it becomes a license and jeopardizes the liberty of the other. The Constitution makers aware of this fact, and were wise enough to place reasonable restrictions on these rights. Also, the Constitutional courts of our country have made a significant contribution to interpret these rights, expand their ambit with

[35] Justice P.N Bhagwati in Maneka Gandhi v. Union of India & ors., AIR 1978 SC 564.
[36] Siddharam Satlingappa Mhetre v. State of Mahrashtra, (2011) 1 SCC 694.

changing times and most importantly to protect them. By and large, barring few exceptions the supreme court has on whole interpreted fundamental rights in quite liberal manner.[37] In this regard, rights enumerated under Article 21 has been most frequently dealt by the supreme court. It wouldn't be wrong to attribute Article 21 as the heart of the Constitution. It's only the result of interpretation of Article 21, that many other rights have emerged under the umbrella of right to life and liberty. Therefore, Article 21 can also be rightly regarded as '*Gangotri'* of numerous second and third generational rights owing to its expanded view. Article 21 declares "No person shall be deprived of his life or personal liberty except according to the procedure established by law." The interpretation phrase 'procedure established by law' has also been done by Supreme court in much significant manner. The interpretation in post-emergency era has ushered a new epoch of expanding horizon of the right to life and personal liberty. The scope of this right is still expanding with the advancement of time, and in recent past certain landmark decisions of the Supreme court have had added certain news dimensions to the right enumerated under Article 21. Therefore, doctrinal study of the expanding horizons of Article 21 assumes a great amount of significance. It is often said that Part of a country's civilization can be measured by the prevailing state of freedom, the study of expanding horizons of Article 21 will also bring us forth that how socio-political factors pave way for judicial experiments. In all of the major interpretations made by the Supreme court, one thing is very common to all, that dignity is regarded as essential constitutional guarantee and has also been considered as essential element associated with the right guaranteed under Article 21. This idea of dignity also finds its place in the preamble which is 'the window to the Constitution'.

Former Chief justice of India, *J. S. Verma* expressed his views about right to life with human dignity, as

"the right to life is a recognised as a fundamental right under Article 21 of the Constitution of India. It is a basic human right inherent in human existence with is not gift of any law. The law merely recognised an inherent right and is not its source. Human rights are those rights has derived from the natural law which have evolved out of natural rights, rights inherent to people by virtue of their being human and being a moral and rational nature and having a common capacity of reason. This comprises a core base of basic guarantees, including the right to life, freedom form torture or inhuman or degrading treatment or punishment, freedom from slavery, servitude and forced labour, the right to free movement and the right to food and shelter".

[37] M.P Jain, Indian Constitution Law 881 (8th ed., 2018).

A.K Goplan v. State of Madras[38] was the first case before the Supreme court in which interpretation of Article 21 was dealt with, later with the decision in *Maneka Gandhi v. Union of India*[39]a new phase of expanding view of Article 21 emerged. In 2017, the decision in *Justice (Retd.) K.S Puttaswamy v. Union of India*[40]has made the way for the right to privacy under Article 21 which will of a great and assuredly multidimensional impact. The evolution of interpretations of Article 21 has been broadly discussed in proceeding sections of this paper.

2. A.K GOPALAN VIEW: NARROW APPROACH

For the first time, the Supreme court got the opportunity to interpret Article 21 in *A.K Goplan v. Union of India*[41]. This case came at the time when Constitution was in very nascent form, and the court opted for the literal interpretation or it could be said that 'positivist' approach was followed by the supreme court. In the instant case, a *habeas corpus* petition was filed by a communist leader under Article 32(1) seeking his release for detention under the Preventive Detention Act, 1950. The petitioner claimed that the said act was in contravention with Articles 13, 19, 21 and 22 of the Constitution. It was contended by the petitioner that the law under the ambit of Article 21 does not only mean enacted law but also comprises the principal of natural justice. It was also contended that reasonable of preventive detention is to be judged under the Article 19. It was also argued by petitioner that the expression 'procedure established by law' in the lines of American 'due process' paves the way for judicial review in regard as to the reasonability of the procedure. The Supreme court by majority in this case held that the safeguards under Article 22 has been satisfied therefore, thus the petitioner cannot challenge his detention under any other fundamental right. The majority view upheld that rules of natural justice being vague and indefinite could not be read under the word 'law' in Article 21. However, Justice Fazl Ali dissented and held that the principle of 'no one shall be condemned unheard' was a part of the general law of land. Also, the court refused to acknowledge the that 'procedure established by law' was akin to 'due process' under American Constitution. Justice Fazl Ali disagreed from majority opinion on this point also. In *Goplan*, it was attempted to weave guarantees under Articles 19, 21 and 22 in a common thread, however the same was not accepted the majority opinion. Justice Fazl Ali making most significant dissent in matter opined

[38] A.K Goplan v. State of Madras, AIR 1950 SC 27.
[39] Supra note 1.
[40] Justice K.S Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[41] Supra note 5.

that fundamental rights are not isolated but make a common thread of liberty and freedom. The dissent made by Justice Fazl later came to regarded as one of the three great dissents.[42] Later, his dissent was taken in regard to overrule this case.

In *Gopalan* case, the majority opinion was that the protection against Article 21 was only against arbitrary executive action and not against any kind of arbitrary legislative action. In 1976, the infamous *ADM Jabalpur v. Shivkant Shukla,*[43]also known as habeas *corpus case* was decided by 4:1 majority. In the given case, it was held by the supreme court that a detenu under MISA act couldn't enforce his right under Article 21 when the enforcement for the same has been suspended by the presidential order under Article 359. The ratio of this case was also based on the decision in *Goplan* case. However, Justice HR Khanna in the *ADM Jabalpur* case made a dissent which even cost him to his elevation. Justice Khanna opined that state cannot deprive a person of his life and person liberty without the authority of law. Justice Khanna's dissent in this case is also the one of the three great dissents as mentioned earlier. The dissent embarked as a guiding light for the future interpretations. The rigidity as to the exclusivity of the fundamental rights got somewhat lessened with the decision in *R.C Cooper v. Union of India*[44], famously known as Bank Nationalization case wherein Article 19(1)(f) was linked with Article 31(2). This was a baby step towards ending the fallacy of exclusivity of fundamental rights from each other.

3. MANEKA GANDHI CASE AND 'WIDEST POSSIBLE' INTERPRETATION APPROACH

The liberal interpretation in *Maneka Gandhi* case gave a new to the Right to life and personal liberty. The decision in this case was a major turning, as Supreme court gave up the traditionalist literal interpretation and opted for much liberal interpretation. The socio-political developments during the emergency period was the one of major reason that supreme court assumed a much active role in protecting and promoting the fundamental rights. Through this decision an attempt was made to restore people's faith in judiciary.[45]

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[42] PTI, 'Three great dissents' find place in Supreme Court's privacy verdict, Hindustan Times (Aug 24, 2017 22:58 IST), https://www.hindustantimes.com/india-news/three-great-dissents-find-place-in-supreme-court-s-privacyverdict/story6b6IhLKpl4J8FOguvoHHWN.html#:~:text=The%20Supreme%20Court%20on%20Thursday,privacy%20as%20a%20fundamental%20right. (Last retrieved on 29-7-2020 at 4:50 PM).

[43] A.D.M Jabalpur v. S. Shukla, (1976) 2 SCC 521.

[44] R.C Cooper v. Union of India, AIR 1970 SC 564.

[45] Zia Mody, 10 Judgments that Changed India 40 (2013).

In this case, the petitioner's passport was impounded under Section 10(3)(c) of the Passport act, 1967. The petitioner was daughter in law of the former Prime Minister Indira Gandhi, who was ousted by Janta Party led by Morarji Desai. Maneka was founder editor of a magazine which was used by her to restore the lost image of congress party and to discredit the new Janta party government. Her passport was declined *'in the interests of the general public*'. The petitioner challenged the said order being was violative of Article 21 as to the 'procedure' and violative of Article 19(1)(a) and Article 19(1)(g). The majority judgment was delivered by Justice P.N Bhagwati. The dissent made in *A.K Goplan* by Justice Fazl Ali was followed, and the *Goplan* case was overruled. The court held that Articles 14, 19 and 21 are not mutually exclusive and with this the doctrine of 'golden triangle' of fundamental rights emerged. Justice Krishna Iyer expressed this in way that "no fundamental right is an island in itself". It was emphasized that the expression 'personal liberty' was to be given 'widest possible' interpretation. The court stated:

"Articles dealing with different fundamental rights contain in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in Constitution. Their waters must mix to constitute the grand flow of unimpeded and impartial justice…The isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial."[46]

The court interpreted that the 'procedure established by law' could not by any procedure, but it should be just, reasonable and fair and not arbitrary, unreasonable and fanciful. Thus, with this interpretation the expression 'procedure established by law' became akin to the American 'due process'. Justice Bhagwati opined "The principle of reasonable which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence." With this, right to travel abroad came up as an implied right under Article 21 and the same ratio was adopted by court in other cases which ultimately made roads for various new rights under the umbrella of Article 21. *Maneka* case, also made one thing very clear that the protection under Article 21 also extends against the legislative action.

4. EXPANDING AMBIT OF ARTICLE 21 AFTER MAENKA GANDHI CASE: ROLE OF PILS AND JUDICIAL ACTIVISM

[46] Maneka Gandhi v. Union of India & ors., AIR 1978 SC 564, ¶ 3.

After the new interpretation of the expression 'procedure established by law' akin to 'due process' Supreme court itself assumed the power of substantive review under Article 21, the court transformed itself from being merely a supervisor, to being a watchdog of the Constitution.[47] The court looked beyond the literal interpretation and made numerous creative interpretations.

In 1976, through the judgment in *Mumbai Kamgar Sabha*[48] Justice Krishna Iyer sowed the seeds of Public Interest Litigation (PIL). Later, with the efforts of Justice P.N Bhagwati, the whole concept of PILs was taken to great extent. This is the reason that Justice P.N Bhagwati has had been attributed as 'the champion of PILs'. With the coming up of PILs, the rule of *locus standi* was diluted and consequently, judicial activism greatly contributed in the expanding dimensions of Article 21 in Post-*Maneka* period.

In *Francis Coralie v. Union Territory of Delhi*[49], the view that right to live with dignity was inseparable tenet of Article 21 was elaborated as:

"The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to basic necessities the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self."

Another broad formulation of the theme of life to dignity is to be found in *Bandhua Mukti Morcha v. Union of India*[50]. Characterizing Art. 21 as the heart of fundamental rights, the Court gave it an expanded interpretation. Bhagwati J. observed:

"It is the fundamental right of everyone in this country… to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.

[47] Zia Mody, 10 Judgments that Changed India 43 (2013).
[48] Mumbai Kamgar Sabha v. Abdulbhai, (1976) 3 SCC 832.
[49] Francis Coralie v. Union Territory of Delhi, (1981) 1 SCC 608.
[50] Bandhua Mukti Morcha v. Union of India, (1997) 10 SCC 161.

"These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

Hussainara Khatoon v. State of Bihar[51], is said to be the first reported case of PIL, in this case, the inhuman conditions of the prisons and under trial prisoners led to the release of more than 40,000 under trial prisoners. With this and subsequent decisions, Right to speedy trial emerged as a fundamental right under the ambit of Article 21.

In *R.P. Ltd. v. Proprietors Indian Express Newspapers, Bombay Pvt. Ltd.*[52], observed that if democracy had to function effectively, people must have the right to know and to obtain the conduct of affairs of the State.

Environmental issues were given dur importance and Right to Clean environment was brought under Article 21.[53] The guidelines issued in *Visakha*[54] case and *DK Basu*[55] cases were also the result of court assuming active role in promotion of human rights and towards fulfilling the obligations under Public International law.

The following are some of the rights which were held to be part of guarantee under Article 21:

1. Right against solitary confinement[56]
2. Right against bar fetters[57]
3. Right to legal aid[58]
4. Right against Handcuffing[59]
5. Right against custodial violence[60]
6. Right to healthcare[61]
7. Right to shelter[62]
8. Right to compensation[63] (et al.)

[51] Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81.
[52] R.P. Ltd. v. Proprietors Indian Express Newspapers, Bombay Pvt. Ltd., 1988 SCR Supl. (3) 212.
[53] M.C Mehta v. Kamal Nath, AIR 2000 SC 1997.
[54] Vishaka & Ors vs State Of Rajasthan & Ors., (1997) 6 SCC 241.
[55] D.K Basu v. State of West Bengal, (1997), 1 SCC 416.
[56] Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.
[57] C.G Sobhraj v. Delhi Administration, 1978 AIR 1514.
[58] M.H Hoskot v. State of Mahrastra, (1978) 3 SCC 554.
[59] P.S Shukla v. Delhi Administration, (1980) 3 SCC 526.
[60] Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96.
[61] Parmanand Katara v. Union of India, AIR 1989 SC 2089.
[62] M/S Shnatisar Builders v. Narayan Khimalal Totame, AIR 1990 SC 630.
[63] Rudul Shah v. State of Bihar, (1983) 4 SCC 141.

The period after *Maneka* case is also considered as golden period for recognition of several new civil, political and human rights through creative interpretation.

5. PUTTASWAMY JUDGMENT & THE RIGHT TO PRIVACY: A NEW MILESTONE

The debate around Privacy as a fundamental right date back to the time when the Constitution was being framed, the debate went through several cases but got settled only in 2017.

For the first time in *M.P Sharma v. Satish Chandra*[64]the question came before the supreme court whether searches and seizure were valid keeping right to privacy in light. It was held that there was no right to privacy in Indian Constitution. Later, in *Kharak Singh v. State of U.P*[65], the validity of domiciliary visits was challenged. The court citing importance peace & order in the society held that such visits under various police regulations was held valid as there was no right to privacy. It is important to note, that these cases were decided before the *Maneka Gandhi* case, thus they followed the limited approach under *Goplan* case.

Justice Subba Rao dissented with the majority opinion in Kharak Singh and held that:

""No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping."

The fallacy of exclusivity of fundamental rights was discarded in *R.C Cooper*[66], which overruled *Goplan*. The eleven-judge bench decision in Cooper was visited in Maneka which was a turning point. *In Gobind v. State of Madhya Pradesh*[67], a three-judge bench, mindful of its inability to overturn a judgement of a larger bench, skirted around the inconsistency by 'assuming' that the right to privacy was protected under the constitution - relying on the first part of the *Kharak Singh* judgement without specifically calling out it's inconsistency with the second. Many smaller benches followed suit building on these principles to articulate a fundamental right of privacy in the context of medical privacy, matrimonial privacy,

[64] M. P. Sharma And Others vs Satish Chandra, 1954 AIR 300.
[65] Kharak Singh v. State of U.P, AIR 1963 SC 1295.
[66] Supra note 10.
[67] Gobind v. State of Madhya Pradesh, (1975) 2 SCC 521.

reputational privacy, privacy of sexual orientation and many more. However, given that this jurisprudence had been on uncertain foundations, it was always susceptible to challenge.[68] Justice B.P Reddy in *R. Rajgopal v. State of Tamil Nadu*[69], noted that intrusion in one's family, procreation, motherhood, education etc. would amount violation of right to privacy as implicit in right to life and personal liberty. In *PUCL v. Union of India*[70], telephone tapping was held violative to Right to life and personal liberty.

In *Selvi and others v. State of Karnataka and others*[71] . The Supreme Court acknowledged the distinction between bodily/physical privacy and mental privacy. The scheme of criminal and evidence law mandates interference with the right to physical and bodily privacy in certain circumstances, but the same cannot be used to compel a person "to impart personal knowledge about a relevant fact". Subjecting a person to techniques such as narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test without his or her consent violates the subject's mental privacy. This case also establishes the intersection of right to privacy and Article 20(3).[72]

The Right to Privacy was upheld as a fundamental right in *Puttaswamy* case. The particular issue was brought before the court when the validity of collecting demographic and biographic data under Aadhar act was challenged. The Attorney General contended that in view of *M.P Sharma* and *Kharak Singh* cases, there was no right to privacy under the Indian Constitution. This question was referred to a nine-judge bunch which unanimously held that Right to privacy was a fundamental right and it could be derived from Articles 15, 19 and 21 thus there was no need to articulate it out separately. It was after 10 years of judgment in IR Coelho, when nine judge benches delivered a unanimous decision. The views in *M.P Sharma* and *Kharak Singh* were overruled to the extent till where they didn't accept privacy as fundamental right. The court also significantly overturned the decision in infamous A.*D.M Jabalpur*. It is again matter

[68] Trilegal, Supreme Court Declares Right To Privacy A Fundamental Right, Mondaq (August 31, 2017), https://www.mondaq.com/india/privacy-protection/625192/supreme-court-declares-right-to-privacy-a-fundamental-right (Last retrieved on 28-7-2020 at 5:50 PM).

[69] R. Rajgopal v. State of Tamil Nadu, AIR 1995 SC 264.

[70] PUCL V. Union of India, AIR 1997 SC 568.

[71] Selvi and others v. State of Karnataka and others, (2010) 7 SCC 263.

[72] State of Privacy in India, Privacy International (January 26, 2019), https://privacyinternational.org/state-privacy/1002/state-privacy-india (Last retrieved on 28-7-2020 at 5:55 pm)

of concern that this case overruled by Justice DY Chandrachud, whose father Justice Y.V Chandrachud gave majority view in *A.D.M Jabalpur*.

The major conclusions of this case are discussed as follows:

1. The dignity of the individual, equality between human beings and the quest for liberty are the foundation pillars of the Indian Constitution.
2. Life and liberty are not the creations of the Constitution but are recognized as inseparable part of human beings.
3. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise forms other facets of freedoms and dignity recognized and guaranteed under Part III.
4. Privacy is the constitutional core of human dignity. Privacy has but normative and descriptive function.
5. Privacy at its core preserves personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his life.
6. Privacy attaches to the person since it is an essential facet of the dignity of the human beings.
7. The court didn't embark upon an exhaustible enumeration or a catalogue of entitlements or interests comprised in the right to privacy. As the interpretation is supposed to be flexible to allow future generations to adapt its content bearing in mind its basic or essential feature.
8. Like any other right, privacy too is not an absolute right. The state can impose restrictions on the right to privacy to protect legitimate state interest but it can only do by in accordance with the given test-
    i. Existence of a law that justifies an encroachment on privacy;
    ii. A legitimate state aim that ensures that the nature or the content of this law falls within the zone of reasonableness and operates to guard against arbitrary state action; and
    iii. The means adopted by the state are in proportionality to the objects and needs sought to be fulfilled by law.

9. Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measure to protect the privacy of the individual.
10. Informational privacy has been upheld as a facet of right to privacy. In this regard the court has commanded the union to frame legislation.

Justice (Dr.) D.Y Chandrachud in opening lines of his judgment opined:
"If privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection."[73]
Justice Bobde held that "Privacy has the nature of being both a common law right as well as fundamental right."[74]

As to inalienability, Justice Chandrachud noted that:
"Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights."[75]

It was observed that *Rajgopal*[76], *Gobind*[77] and *Mr. X v. Hospital Z*[78] outlined the law of privacy in India. Cursory reference and observations were also made in regard with *Selvi*[79], *Jethmalani*[80] and *NALSA*[81] cases. The dignity jurisprudence was carefully taken note of. Also, a significant emphasis was made on the evolving dimensions of privacy. As early cases dealt with police regulations authorising intrusions on liberty. With the evolution of time, the assertion of the right to privacy has to be considered in context of varying contexts. The court

[73] D.Y Chandrachud, J. in Justice K.S Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, ¶ 1.
[74] S.A Bobde, J. in Justice K.S Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, ¶ 18.
[75] Supra note 39, ¶ 40.
[76] Supra note 35.
[77] Supra note 33.
[78] Mr. X v Hospital Z, (1999) 1 SCC 57.
[79] Supra note 37.
[80] Ram Jethmalani v. Union of India, (2011) SCC 1.
[81] NALSA V. Union of India, (2014) 5 SCC 438.

pressed that "They had to weave a jurisprudence of privacy as new challenges emerged from a variety of sources: wiretapping, narco-analysis, gender-based identity, medical information, informational autonomy and other manifestations of privacy"[82]

The dignity jurisprudence was beautifully weaved along with the privacy jurisprudence:

"Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life…..The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life….Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."[83]

The court noted that interpreting the existing Constitutional guarantees, numerous rights have emerged from Article 21 without any Constitutional amendment nor does it create a new set of rights. It was stressed that Today's problems have to be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society. The view that privacy was an elitist construct was discarded and conversely the notion of essential nature of privacy in today's world driven by digital economy & knowledge-based economy was followed. Justice Chandrachud declared that "Privacy is the ultimate expression of the sanctity of the individual. Privacy is the ultimate expression of the sanctity of the individual"

A special stress was laid on informational privacy. Justice Sanjay Kishan Kaul noted that:

[82] Supra note 39, ¶ 90.
[83] Id., ¶ ¶ 106-107.

"We are in an information age. With the growth and development of technology, more information is now easily available. The information explosion has manifold advantages but also some disadvantages. The access to information, which an individual may not want to give, needs the protection of privacy."[84]

Justice Chandrachud in this regard observed:

"Ours is an age of information. Information is knowledge. The old adage that "knowledge is power" has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence…..To put it mildly, privacy concerns are seriously an issue in the age of information."

Since, the information has resulted in complex issues related to informational privacy. Data surveillance is a new threat and big data is the new order of the day, a large amount of data is stored and processed which gives reasonably apprehensions of violation of privacy in various instances. In this regard, various international conventions were referred and also the suggestions made by AP Shah Committee were taken in light. The court has commanded the union to legislate a comprehensive data protection law, which has become a major requirement in the context of present times. Justice Kaul specifically took in account the privacy concerns against the state and non-state actors. He observed:

"These digital footprints and extensive data can be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour and interactions and hence, is valuable information. This is the age of 'big data'."

The reasonable restrictions on the right to privacy were also dealt with and the test of reasonable proportionality and legitimacy was laid out. These were carved out to maintain a delicate balance. Justice Chelameswar noted:

"Like all fundamental rights, privacy too has its limitations. There must be identified depending upon the nature of privacy interest claimed. Courts must be guided by the standard of just, fair

[84] S.K Kaul, J. in Justice K.S Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, ¶ 12.

and reasonable legislation as applicable to Article 21. The strictest scrutiny standard of compelling State interest must be used."[85]

The decisive *Puttawamy* judgment has settled the unsettled law related to privacy in India. It has also impacted on numerous judicial decisions and legislative actions. The Draft data privacy bill has been tabled which is on the recommendations made by Justice B.N Srikrishna committee. In *Navtej Singh Johar*[86], he Supreme Court of India unanimously held that Section 377 of the Indian Penal Code, 1860, which criminalized 'carnal intercourse against the order of nature', was unconstitutional in so far as it criminalized consensual sexual conduct between adults of the same sex. he Court relied upon the judgement in the case of *K.S. Puttaswamy*, which held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights, and that sexual orientation forms an inherent part of self-identity and denying the same would be violative of the right to life.

The Court in *Joseph Shine*[87] held that in criminalizing adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse – in doing that, the statutory provision fails to meet the touchstone of Article 21.

The Supreme Court in *Central Public Information Officer, Supreme Court of India vs. Subhash Chandra Agarwal*[88] held that the Office of the Chief Justice of India is a 'public authority' under the Right to Information Act, 2005 thus enables the disclosure of information such as the Judges personal assets. In this case, the Court discussed the privacy impact of such disclosure extensively, including in the context of *Puttaswamy*. The Court found that the right to information and right to privacy are at an equal footing, and that there was no requirement to take a view that one right trump the other.

As, the *AD.M Jabalpur* has been overruled, it is expected that the law on death penalty shall also be revisited in near future as the present concept relies on the ration in *A.D.M Jabalpur*.

[85] Justice Chelameswar in Justice K.S Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, ¶ 42.
[86] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
[87] Joseph Shine v. Union of India, AIR 2018 SC 1676.
[88] **Central Public Information Officer, Supreme Court of India vs. Subhash Chandra Agarwal, Civil appeal no. 10044 of 2010.**

6. CRITICAL APPRAISAL OF THE RECENT TRENDS AND CONCLUSION THEREOF

The *Puttaswamy* judgment has set up a new benchmark by recognising privacy as fundamental right. It has also strengthened the dignity jurisprudence in the Indian Constitutional law. The recent trends imply that the doctrine of liberal interpretation will keep guiding the Constitutional courts. Keeping privacy and dignity jurisprudence in light, it can be very well expected that constitutionality Martial rape, restitution of conjugal rights, media trial shall be challenged in near future. Also, as indicated by the supreme court in various instances the human rights will go on expanding and adapting with evolution of society to cater the needs of the time. One such aspect can be that of Access to internet as a right in 'Digital era'. In *Anuradha Bhasin v. Union of India*[89], freedom to speech and expression and freedom to practice any profession, or to carry any trade or business on internet has been upheld as fundamental right under Article 19. However, still Right to access to Internet is not a part of Right to life, but one can reasonably expect it to be in coming future. The Data Protection bill, 2019 has been tabled but is yet to be passed. It is being put forth by some domain experts that the bill treats privacy as an end as the proposed framework is highly regulated, thus a more pragmatic and modest approach is still required.[90]

In early 2020, the liberal interpretation of Article 21 has been relied upon while dealing various cases taking pandemic in the view. The court has reiterated the view that 'prisoners to have right to life' while listening to petition putting light on spread of COVID-19 amongst prisoners. Matter of custodial torture and encounter killing again came in common discourse with the infamous *Bennix* and *Vikas Dubey* incident. The new Environment Impact assessment notification made available for public discussion has also been condemned for its diluting effect as regard to environment effects of the industries and other projects. Several high courts during this pandemic have reiterated that non payment of subsistence wages does amount to violation of Article 21. Murmurs were also heard related to the 'information stored' by *Aarogya setu* app, however, it is clear this comes in exception to right to privacy as laid down in *Puttaswamy* and also that the app stores the data with anonymity.

[89] Anuradha Bhasin v. Union of India, Writ Petition (civil) 1031 of 2019.
[90] Anirudh Burman, Will India's Proposed Data Protection Law Protect Privacy and Promote Growth?, 23-28(2020) , www.jstor.org/stable/resrep24293.7. (Last retrieved on 28 July 2020 at 9:30 PM).

One thing which is clear from the above discussion, that the present interpretation of Article 21 has come after a long journey and has evolved in stages, also that this shall keep going on to meet the needs of changing time.

EXAMINING THE CRIMINAL JUSTICE SYSTEM IN THE PERSPECTIVE OF BEST INTEREST OF A CHILD

-ANDRYUSHA A. D'COSTA e PINHO

ABSTRACT

A phrase often quoted by criminologists is that of Winston Churchill, which states that 'one measures the civilization of society by the way in which it treats the prisoners.' This quote indicates that in the prevailing trend in criminology and other sciences generally, the focus is on the criminals. In fact, what would be a more appropriate measure is also how well the victim is treated within the system. There is a need to reverse this offender oriented trend. It is assumed that the victim has the support, though in reality crime leaves a profound impact on the people affected by it. Victims and the family suffer from physical, mental and emotional harm and for some, their lives are forever altered.

Victim support and protection should become compulsory in the criminal justice system. Victims of crime need support to access the justice system and experience justice being done. A victim of crime experiences negative emotions and other consequences immediately following an incident, hence it is of utmost importance that a victim support mechanism is made available as a matter of right and priority.

The present paper focusses on vulnerability of children as victims of crime and critically analyzes the existing support mechanism, set-up by the Goa Government and recommends measures for improving support system for children.

Goa is the only state in 2003 to have identified different types of abuses and penalized abuse against children, until 2012 when the central legislation Protection of Children from Sexual Offences Act 2012[91] came into force. The Goa Children's Act 2003[92] does spell out various parameters for victim support within the police station and court processes but has failed to provide other support systems for them.

The absence of a support system impedes the victim's access to the justice system or discourages them from coming forward thus defeating the objective of the intent of the legislators to have special and specific laws.

Meeting the needs of the children who are victims of crime is the need of the hour.

[91] Act 32 of 2012
[92] Act 18 of 2003

Key Words: child victim, child friendly justice, best interest of child, Goa Children's Act 2003, criminal justice system

INTRODUCTION

"The justice system cannot be blind to the fact that children have specific needs and rights. When children are involved in judicial proceedings, the scales of justice can only be balanced if the child's best interest is preserved and if they are given a proper chance to understand what is at stake and participate in the decisions concerning them,"

- General Maud de Boer-Buquicchio
Deputy Secretary Council of Europe

In recent years there has been a variety of developments designed to improve the ways in which victims of crime are treated in the criminal justice system[93].

When the victim is a child, the child not only has to cope with the emotional as well as physical consequences of the criminal acts but also has to deal with the trauma of the legal involvement, as reporting the crime brings the child in contact with the criminal justice system. The criminal justice process becomes stressful for the child victim because of various reasons: limited knowledge and lack of experience in the proceedings, children's understanding of the process, its importance and the rationales behind various procedural rules is very limited[94]. Secondly they are taken away from their natural environment and have to communicate with a lot unfamiliar adults. Many of the persons assigned for the job of interacting with victims are barely trained on how to deal or speak to young children. These are some of the reasons a child victim could feel intimidated and therefore, the need of the hour is to focus on the concern on how to prosecute without causing additional trauma to the child victim.

It is very important that when children come in contact with the criminal justice system they are met with a system that will understand, respect and protect their best interest during all the stages of the process of justice.

[93] The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 recognizes four major components of the rights of victim of crime -[93] Access to justice and fair treatment, restitution, compensation and assistance

[94]https://digitalcollections.anu.edu.au/bitstream/1885/47077/25/05chapter4.pdf

Making the system more child-friendly will not only improve protection of children, but, will also enhance meaningful participation and improve the quality of justice.

THE TERM CHILD FRIENDLY JUSTICE

The term child friendly justice is not a new concept and it has taken various forms and number of different names[95] throughout development. The Council of Europe with an aim to improve the justice system and adapt to the needs of children has given the most extensive set of standards on child friendly justice[96] in its Guidelines of the Committee of Ministers of the Council of Europe. It defines child friendly justice as creation of the justice system which will guarantee the respect and effective implementation of all children's rights, giving due regard to the child's level of maturity and understanding based on the circumstances of the case.

The definition basically sets out that child friendly justice is based on the image of a child as a human being in development, who is entitled to all rights under the International human rights law, including the right to participate in judicial proceedings that concern him. Child friendly justice system should not only treat children with dignity, it should also actively contribute to raising a child's welfare in the broader society[97].

The term child- sensitive is defined under The United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.[98]

The United Nations Convention on the Rights of the Child 1989[99] is a universal endorsement which clearly confirms that presently a child is not a passive and vulnerable individual but is a right holder and a subject of rights. The legal status of the child under international human rights is built on four key provisions and the same were recognized by the UN Committee on the Rights of the Child as the four general principles of the United Nations Convention on the Rights of the Child 1989.[100]

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[95] Other terms are "child sensitive justice", "justice for children", "children in contact with law".

[96] child friendly justice is justice that is: Accessible, Age appropriate, Speedy, Diligent, adapted to and focused on the needs of the child, Respecting the right to due process, Respecting the right to participate in and to understand the proceedings, Respect the right to private and family life, Respecting the right to integrity and dignity

[97] Reflections on child friendly justice.

[98] child-sensitive is defined as "an approach that balances the child's right to protection and that takes into account the child's individual needs and views".

[99] Resolution 44/25 of 20th November 1989 entry into force 2nd September 1990, in accordance with Article 49

[100] The four key provisions are 1) nondiscrimination, 2) the best interest of the child as a "primary consideration" in all matters affecting the child, 3) the right to life, survival and development and 4) the right to be heard.

BEST INTEREST PRINCIPLE

The treatment and handling of children during judicial proceeding is an important fundamental right concern, addressed by the United Nations in its Convention on the Rights of the Child (CRC), The European Union further showed its commitment to this issue, by promoting the Council of Europe (CoE) 2010 guidelines on child friendly justice and helping Member States improve the protection of child right in their judicial systems[101]. The rule of best interest of the child as laid down in the Convention on the Rights of the Child states that the best interest of the child must be a primary consideration in all actions concerning children. This principle was a rule accepted in many countries much before the United Nations Convention on the Rights of the Child in the year 1989[102].

POSITION IN GOA

Goa was the first state in the entire country which adapted to the needs of children as well as child friendly justice system by enacting the Goa Children's Act 2003[103]. This Act has given a holistic approach to the victims in cases of child abuse wherein the act mandates a support person to the victim during his/her initial contact with police.

It is a unique piece of legislation which was enacted keeping in mind the principles of the United Nations Convention on the Rights of the Child, the same is reflected in the objective of the Act which states "To protect, promote and preserve the best interest of children in Goa and to create a society that is proud to be child friendly". The Act contains provisions and procedures concerning the treatment of children and their participation in the justice process keeping in mind their particular rights and needs.

It gives special attention to ensure that there are effective child friendly procedures which includes advice, advocacy etc. It deals with both substantive and procedural law.

Under the Act there is the establishment of a Special Court "Children's Court'. The Goa Children's Act 2003 covers all types of abuse against children which are defined under section 2 (m) [1] and further the punishment has been provided under section 7, 8 and 9. This act also

[101] The rights promoted by the guidelines are 1) right to be heard 2) to be protected 3) non- discrimination

[102] The principle was first seen in the 1959 Declaration of the Rights of the Child. Principle 2 state" The child shall enjoy special protection, and shall be given opportunities and facilities by law and by other means to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interest of the child shall be the paramount consideration.

[103] The Act has been amended in the year 2004 and 2005.

enshrines the principal of "Best interest of the Child" and empowers the officers for any action under this principal.

CHILD VICTIMS IN GOA – A BRIEF OVERVIEW

Presently there are over three hundred and eighty-five cases pending adjudication before the Hon'ble Children's Court for the State of Goa.

If we see the data submitted by the Victim Assistance Unit for the State of Goa[104] to the State Government for the year 2014 – 2021 the number of children that have come in contact with the criminal justice system are one thousand seven hundred and eleven. Out of these one thousand seven hundred and eleven the six major abuses are cases of sexual abuse, Kidnapping, children as witnesses to crimes such as murder of either of parents, assault or sexual offences and cases of assault. This points out two things, one greater awareness has been carried out on the issue of child abuse, and there has been increase in number of cases being reported before the police.

Types of Cases	Record Count from 2014 to 2021
Sexual	400
Kidnapping	212
Child witnesses	210
Assault	195
Physical	66
Verbal	49

*** Source: Victim Assistance Unit**

It's pertinent to note here that cases of Kidnapping are not per se Kidnapping for the purpose of ransom. These cases are that of elopement due to love affairs. The same are registered as kidnapping because of the directions issued by the Supreme Court[105].

BEST PRACTICES

In all matters of child sexual abuse, in order to protect the victim from the alleged offender the proceedings are conducted in camera. The atmosphere in the court is informal and the same is reflected through the settings of the court. The Presiding officer does not sit on a raised platform thus enabling a one to one interaction between the Presiding officer and the victim. The police, the Presiding officer as well as the advocates appear in civil dress.

[104] Victim Assistance Unit for the State of Goa is an autonomous body mandated under the Goa Children's Act 2003 empowered to provide assistance to victims of abuse who come under the purview of Goa Children's Act 2003 and POCSO Act 2012

[105] *Bachpan Bachao Andolan v/s Union of India (WP (Civil) 75 of 2012) 10th May 2013.*

The procedure followed in the court are child friendly as the child victim is not familiar with the procedural aspects of the same. Keeping this aspect in mind the Goa Children's Act 2003 lays down procedures which mandate that at all stages no harm should be caused to the sensitivity of the child which shall include the principles of best interest, principle of non-waiver of rights, principle of equality, principle of right to privacy and confidentiality, principle of fresh start, and principle of last resort. It has to be seen that at no stage the child should be exposed to the accused. At the time of cross examination, the tender age and psychological state of the child should be considered, it also lays down various other guidelines[106].

The Presiding Officer as well as most of the staff in the children's Court are females. With the efforts of the Victim Assistance Unit various procedural aspects have been streamlined: 1) Appointment of full time President for the children's Court after ten years of enactment of the legislation, 2) In cases of child sexual abuse medical examination needed to be conducted and the same was conducted by the Forensic Department which consisted of all male doctors. After several meetings and deliberations, the department handling examinations was changed to the Gynecology department where female doctors conduct medical examination of a rape victim, 3) launching of the 'Going to Court programme' where law students assist the child victim/witnesses who come before the Court.

The State has also established various authorities to protect the rights of the children. It was the first state to establish The Commission for Protection of Child Rights prior to the National Commission for Children Act 2005. Similarly, it also established a holistic support system for

[106] Section 32 (2) a)Child victims/witnesses are informed of their role in regard to court proceedings; (b) Their views are allowed to be heard and respected; (c) Inconvenience to them is minimized and their privacy is respected; (d) Delays in the proceedings are reduced; (e) Aggressive questioning or cross examination of child victims is avoided and the same, if necessary, is done through the judge; (f) Provisions are made for trials in camera; (g) The identity of the child victim is protected; (h) Child victims are prepared for the judicial process and prosecution of alleged abusers is not rushed if a child is not ready to go to court; (i) The investigator ascertains the need for medical examination of the child victim and when examination is undertaken, ensures that multiple re-examination is avoided; (j) The medical examination should be conducted in the presence of the parent/guardian and social worker/counsel or as far as possible; (k) Child's [testimony or statement] should be recorded in the presence of a social worker/counsellor as early as possible after the abusive incident with other witnesses at hand; (l) Adequate translation/interpretations and translators/interpreters who are sensitive to the children's needs should be provided wherever needed. (m) In case of a mentally challenged child, the competent service provider should depose on behalf of the child; (n) The special needs of the child victims/witnesses should be catered for. These should include the following:- (i) Enable children to familiarize themselves with the court surroundings; (ii) Inform children of the different roles of the key persons at court, such as the judge, the defense lawyer and the prosecutor; (iii) Inform the court of the special needs of children in general and of individual children in specific cases; (iv) Help children to be comfortable in the proceedings; (v) Encourage questionings to be short and clear so as not confuse child witnesses; (vi) Permit children below eight years of age to respond to leading questions facilitated by a social worker.

the victims of abuse i.e. The Victims Assistance Unit was set up prior to the Nirbhaya centers being set up in the country. This points out the proactive stance that the state has taken to protect children.

CONCLUSION

Child witnesses and victims of abuse have not been a prime focus in the Criminal Justice system. The Goa Children's Act 2003 and the newly enacted Protection of children from Sexual Offences Act 2012 have tried to somehow tilt the focus and bridge the gap to reach out to victims and witnesses.

But mere enactment of new legislations will not help as there is a need to change the mindset of all stake holders including the Judiciary so as to make the passage of criminal justice system child friendly for all children. This can be addressed to some extent by having constant trainings of stake holders in the field of child development, handling of child abuse cases and trauma associated with it.

Therefore, the justice system needs to be reviewed the way in which it interacts with children. Respecting the principles of child- friendly justice system will not only eliminate the trauma which a child faces in each step of the legal proceeding but will foster greater respect for the rights of the child by providing full access to the justice system.

A WAY FORWARD TO THE BEST INTEREST OF THE CHILD

Due to the enhanced reporting, there is an increase in the number of children which come in contact with the law as both victims and witnesses. The need of the hour demands intervention which should not be a sole responsibility of a single agency or professional group but it must be a shared community concern. It also calls for greater convergence between various Government Departments and strengthening of partnership between the government and NGOs.

We need to create awareness among children about their rights and duties as making them aware of the same will be weapon in their hands to protect them from being abused. In order to reduce pendency of cases before the sole children's court for both the districts of Goa there is a need to set up full-fledged Children's Court for both the districts. The urgent need of the hour is 1) to amend the Goa Children's Act 2003 so as to synchronize with other central legislations, 2) Child victim/witness Code which should spell out the following a) The right to be treated with dignity and compassion, b) the right to be protected from discrimination, 3) the Right to be informed, 4) the right to be heard and to express views and concerns 5) the right to

effective assistance 6) the right to be heard and to express views and concerns, 7) the right to effective assistance, 8) the right to privacy 9) the right to be protected from hardship during justice process and the 10) right to safety.

Witness protection is another area which needs to be looked into as reporting of offence or associating with criminal justice system could be a life threatening process. In the recent past there have been various instances where victims are murdered or they turn hostile due to threats. Such witness protection could include constant follow-up by the police or NGO associated with the case.

UNDERSTANDING THE CONCEPT OF LEGAL MEDICAL TERMINATION OF PREGNANCY IN INDIA

- YUKTI YADAV

INTRODUCTION

The emphasis of Medical Termination of Pregnancy Act is not on the right to abortion but on the right to privacy and reproductive control of a women limiting it by circumstances that can lead to abortion. Prior to 1971 there was no separate Act dealing in abortion and nor was it legal in India. Before 1971 abortion was criminalized under section 312 of the Indian Penal Code, 1860 i.e. causing miscarriage. Section 312 of Indian Penal Code, lays down two situations where causing miscarriage was/is punishable which are:

1. Where whoever voluntarily causes a woman with child to miscarry not in good faith to save the life of the woman. In this case the act of causing miscarriage should be voluntarily done and should not be done in good faith, then if both the conditions are fulfilled the person who acts according to the section shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.
2. Where whoever voluntarily causes a woman with child to miscarry, shall, if the woman is quick with child, be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

The explanation to section 312 of Indian penal code increases the ambit of the section by including a woman who causes herself to miscarry. In India there are number of religious groups with their own beliefs and disbeliefs but limiting ideologies of all groups Medical Termination of Pregnancy Act came in force to protect a woman who is expecting.

Access to safe abortion has been established as a human right and many countries have adopted legal frameworks to protect woman. The World Health Organisation (WHO) first recognised unsafe abortion as a public health problem in 1967, by 2003 it developed technical and policy guidelines that included a recommendation that states pass abortion laws to protect women's health.

In 1970's the United States of America became the first country to liberalize its abortion laws along with several western European nations whereas in 1935 Iceland became the first western country to legalize therapeutic abortion under limited circumstances. Abortion rounds various streams of thought and multiple discipline. It has always been a big fuss in medico-legal circles.

This article is divided into five sections/parts that will cover at large national aspect of medical termination of pregnancy. Part one will cover comparative study of medical termination of pregnancy Act, 1971 and Amendment Bill, 2020. Part two will throw light on the concept of abortion granted under various circumstances. Part three will disclose right of abortion as human right. Part four will cover the role of medical board, courts and the State in termination of pregnancy.

PART ONE:
COMPARATIVE STUDY OF MEDICAL TERMINATION OF PREGANANCY ACT, 1971 AND AMENDMENT BILL,2020

The preamble of Medical termination of pregnancy Act, 1971 states that this Act is to provide for termination of certain pregnancies by registered medical practitioners. This Act was enacted by the Parliament of India in 22nd year of republic of India. Prior to this Act abortion was dealt under Indian Penal code but section 3 of Medical termination of pregnancy Act, 1971 states that whatever contained in Indian penal code, a registered medical practitioner shall not be guilty of any offence under that code or under any other law for the time being in force if any pregnancy is terminated by him in accordance with the provisions of this Act.

Section 3 sub-clause 2 lays down two situations subject to sub clause 4 under which a termination can be done:

1. Where the length of the pregnancy does not exceed 12 weeks (if only one registered practitioner) or
2. Where the length of the pregnancy exceeds 12 weeks but does not exceeds 20 weeks (if not less than two registered medical practitioners)

In both the cases the opinion formed should be in good faith by the practitioner that,

1. Continuance of pregnancy would involve risk to the life of the pregnant woman

2. Might have grave injury (physical or mental health)
3. Substantial risk that if the child were born, it would have suffer physical or mental abnormalities
4. That the child might be handicapped
5. Result of rape/ rape victim
6. Unwanted pregnancy/ failure of any device or method

Section 3(4)(b) states that no pregnancy can be done without consent of a woman but section 3(4)(a) states that no pregnancy of a woman who has not attained the age of 18 years and is a lunatic will not be terminated except with the consent in writing of her guardian.

Currently abortion requires the opinion of one doctor if it is done within 12 weeks of conception and two doctors if it is done between 12-20 weeks. The bill allows abortion to be done on the advice of one doctor in the case of certain categories of woman between 20-24 weeks. The bill set up state level medical boards to decide if a pregnancy may be terminated after 24 weeks in cases of substantial foetal abnormalities. Several writ petitions have been filed by women seeking permission to abort pregnancies beyond 20 weeks due to foetal abnormalities or rape. The bill allows abortion after 24 weeks only in cases where a medical board diagnoses substantial foetal abnormalities. This implies that for a case requiring abortion due to rape that exceeds 24 weeks the only recourse remain through a writ petition.

There are different opinions with regard to allowing abortions. One opinion is that termination is choice of the pregnant woman, and a part of her reproductive rights. The other is that the state has an obligation to protect life and hence should provide for the protection of the foetus. The bill does not specify the categories of woman who may terminate pregnancies between 20-24 weeks and leaves it to be prescribed through rules and the bill requires abortion to be performed only by doctors with specialisation in gynaecology.

Medical board consist of:

1. A gynaecologist
2. Paediatrician
3. Radiologist
4. Sonologist
5. Other notified by the state government

In Surendra Chauhan versus State of MP[107], the Supreme Court of India upheld the conviction of a doctor who had a degree in medicine, but not the experience and training in the relevant discipline of medicine for undertaking abortions. In particular the doctor in question did not possess the experience and training as prescribed in rule 4 of the MTP Rules. The court observed that conducting of abortions without proper facility and not keeping clinic registered, was itself a punishable crime. The abortion "Pill" is actually two pills, taken on two different days. The first tablet, RU-486 or Mifepristone, acts by blocking progesterone, a hormone essential in pregnancy, and hence kills the fetus. The Second pill, Misoprostol, is taken three days later. This causes uterine contraction that expel the fetus. Accordingly since the clinic in question was not an 'approved place' in terms of section 4 of MTP Act, the doctor was liable for conviction under section 314 of the IPC.

The difference between the medical termination of pregnancy Act, 1971 and the Amendment bill,2020 is as follow-

The medical termination of pregnancy Act,1971	Amendment bill, 2020
Up till 12 week – advice 1 doctor	Up till 12 week – advice 1 doctor
12-20 weeks – advice 2 doctors	12-20 weeks – advice 1 doctor
20-24 weeks – not allowed to terminate	20-24 weeks – 2 doctors, allowed in some categories
More that 24 weeks – not allowed	More than 24 weeks – medical board will permit only in cases of substantial foetal abnormalities
Anytime if necessary to safe the life	Anytime if necessary to safe the life
If a minor wants to terminate her pregnancy - written consent from the guardian is required.	Not required
Did not allow termination of unmarried women who cite contraceptive failure as a reason for seeking an abortion	Applies to unmarried women

[107] AIR 2020 SC 1436

Medical termination of pregnancy Act was criticised as it failed to keep pace with advances in medical technology that allows for the removal of a foetus at a relatively advanced state of pregnancy. While amendment bill, 2020 is the right step towards protection of women but with time there might be more amendments to be looked into.

PART TWO:

ABORTION UNDER VARIOUS CIRCUMSTANCES

Before even talking about the right to abortion an understanding on the grounds on which an abortion can be made is to be seen. Internationally there are six grounds on which an abortion can be made which are:

1. Risk to life
2. Risk to health
3. Victim of rape
4. Foetal impairment
5. Economic or social
6. On request

There are countries that permit abortion on all six grounds like India, Argentina, Armenia, Austria and the list goes on. On the other side there are countries that might permit abortion on five grounds or on four grounds or not at all. Iceland in 1935 became the first western country to legalize abortion under limited circumstances. In 1970s the United States became first country to loosen restriction for its abortion laws. In case of Roe versus Wade the United States Supreme court held that the constitutional right to privacy is board enough to encompass a women's decision whether or not to terminate her pregnancy. The supreme court of United States looked into decades of cases before passing any judgement in Roe case. By that time Roe's case was a reflection of time. By the late 1960's a nationwide effort was underway to reform the criminal abortion laws in effect in nearly every state.[108]

Roe versus Wade was a ray of hopes as many females at times have argued that illegality led many women to seek black market abortion by unlicensed physicians or to perform the procedure on themselves. As a result the number of deaths increased. The 1960s and 70s saw

[108] Plannedparenthood.org

liberalisation of abortion laws across Europe and the Americans which continued in many other parts of the world through the 1980s.[109],[110] By 1964 India began liberalisation of abortion in the context of high maternal mortality due to unsafe abortion. Doctors frequently came across ill or dying women who had taken recourse to unsafe abortions carried out by unskilled practitioners which made them realise that the majority of women seeking abortions were married and under no socio-cultural pressure to conceal their pregnancies and that decriminalising abortion would encourage women to seek abortion services in legal and safe settings.[111]

The Government of India, appointed Shah Committee to carry out comprehensive review of Socio-Cultural, legal and medical aspects of abortion, and in 1966 the committee recommended legalising abortion to prevent wastage of women's health and lives on both compassionate and medical grounds.[112]

ABORTION POLICY EVENTS IN INDIA
1964 – MINISTRY OF HEALTH AND FAMILY PLANNING CONSTITUTES SHAH COMMITTEE
1966 – SHAH COMMITTEE REPORT
1971 – MTP ACT PASSED
1972 - MTP ACT ENFORCED IN ALL OF INDIA EXCEPT JAMMU AND KASHMIR
1975 – MTP RULES AND REGULATIONS FRAMED
2002 – MTP (AMENDMENT) ACT - MIFEPRISTONE APPROVED FOR MEDICAL ABORTION BY DRUG CONTROLLER GENERAL OF INDIA
2003 – MTP RULES AND REGULATIONS AMENDED
2004 – NATIONAL CONSENSUS GUIDELINES FOR MEDICAL ABORTION (UNDER DEVELOPMENT)

[109] M Berer. Making abortion safe: matter of good public health policy and practice Bulletin of World Health Organization.
[110] A Rahman, L Katzive, S Henshaw. A global review of laws on induced abortion, 1985-1997 International Family Planning Perspectives.
[111] R Chhabra, SC Nuna. Abortion in India: An overview. 1994
[112] Government of India. Report of the Shah Committee to study the question of legalization of abortion. 1966; Ministry of Health and Family Planning: New Delhi

2019 – ENTRY NO. 60 SCHDULE 5 OMITTED SUB-SECTION (2) OF SECTION 1, WORDS "EXCEPT THE STATE OF JAMMU AND KASHMIR" - MADE APPLICABLE BY THE JAMMU AND KASHMIR REORGANISATION ACT, 2019
2020 – AMENDMENT BILL

FACTORS THAT ALLOW TERMINATION OF PREGNANCIES: AN UNDERSTANDING THROUGH CASE LAWS:

1. **Risk to life:** In X and ors. Versus Union of India[113], the Supreme court was concerned with a pregnancy which had advanced into 24th week. The medical board which was constituted, had opined that the condition of foetus was incompatible with extra uterine life, i.e. outside the womb because prolonged absence of amniotic fluid insufficiency at birth. Supreme Court after referring to dictum in Suchitra Srivastava versus Chandigarh Administration[114], that a woman's right to make reproductive choice is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution, permitted the pregnant mother to undertake the termination of pregnancy. The court also observed that though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, it considers appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of MTP Act, 1971.

2. **Risk to health:** there are cases where the courts of India have valued the health of a women pregnant such as in case of Sonali Kiran Gaiwad versus Union of India[115], the medical board, which was constituted, examined the mother and indicated serious abnormalities of the foetus, a substantial risk of serious physical handicap and high chance of morbidity and mortality in the new born, although the mother's life was not at risk still the court granted permission of termination. The supreme court held that "continuing pregnancy will cause more mental anguish to the petitioner i.e the mother".

[113] (2017) 3 SCC 458
[114] 2009 (9) SCC 1
[115] Case no. 928 of 2017 decided on 9th October 2017

3. **Victim of rape:** In Suchitra Srivastava and Anr versus Chandigarh Administration[116], the victim had became pregnant as a result of an alleged rape that took place while she was an inmate at a government run welfare institute located in Chandigarh. The Chandigarh Administration, after discovery of her pregnancy approached the High Court seeking approval for the termination of pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her on her prospective child. Court ordered constitution of an expert body in this case which stated in its report that the victim has expressed her willingness to bear a child, court ordered otherwise for the termination of pregnancies. This case was in light as the Advocate of the pregnant mentally ill woman moved for second appeal. The result of which was that the court granted a stay on the High court's orders thereby ruling against the termination of the pregnancy. However, the Supreme Court held that there is no doubt that a woman's right to make reproductive choice is also a dimension of 'personal liberty' as understood in Article 21 of Constitution of India. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. Hence the court did not permit the termination of pregnancy because the petitioner was not held to be mentally ill and the petitioner did not consent for termination.

In the above case the only reason why a court did not permit termination was because of the concept of 'consent'. But in case of Z versus State of Bihar[117], the petitioner has sought for permission to terminate her pregnancy which had advanced to 23rd or 24th week on grounds of that she was a victim of rape and also found to be HIV +ve. The High Court relying upon the doctrines of "pares patriae" had declined permission for medical termination of pregnancy

[116] 28th August, 2009
[117] 2018 (11) SCC 572

which had by then advanced into 24th week. However the Supreme Court emphatically reversed the High court by styling the approach of the High Court as "completely erroneous".

4. **Foetal impairment:** In Tapasya Umesh Pisal versus Union of India[118], the Supreme Court in interests of justice, permitted the petitioner to undergo MTP, which was in its 24th week noting that "but for the time period, it appears that the case falls under section 3(2)(b) of the MTP Act". The medical board, in the said case, had opined that the bay if delivered alive, would have to undergo several surgeries after the birth which is associated with a high morbidity and mortality. The Supreme Court on basis of material present that time held that it would be difficult to refuse the permission to medically terminate pregnancy, as it was certain that the foetus if allowed to born, would have a limited life span with serious handicaps which could not be avoided.

PART THREE:
RIGHT OF ABORTION AS HUMAN RIGHT

So far as discussed above a large picture can be drawn on questions such as:

1. What is abortion?
2. Is abortion legal in India?
3. Circumstances under which abortion can be permitted?
4. Constitutionality of medical board?
5. Difference between MTP Act and Amendment Bill 2020?
6. Role of medical practitioner and place of abortion.

The question that arises here at this moment is what are human rights? And why is right of abortion expanded as human rights? So to begin with human rights are those rights, which are available to every individual without discrimination of any kind. Again the question that arises is that whether human rights are those rights that are accepted by a State and by society at large?

The United Nation has defined human rights as – "Human Rights as those rights which are inherent in our state of nature and without which we cannot live as human beings. Human rights

[118] (2018) 12 SCC 57

belong to every person and do not depend on the specifics of the individual or the relationship between the right holder and the right guarantor".[119]

In simple words, Human Rights are the rights that everyone has equally by virtue of their humanity. In the context of the present study human rights can be defined as those rights without which human beings cannot live with dignity, freedom – political, economic, social and cultural, and justice in any Nation or State regardless of colour, place of birth, ethnicity, race, religion or sex or any other such consideration. The first document to lay down human rights is the Universal declaration of human rights (herein after UDHR). Article 1 of UDHR states that all human beings are born free and equal in dignity and rights whereas Article 5 states that no one should be subject to torture or to cruel, inhuman or degrading treatment or punishment. When we talk about right to abortion as human rights is not both of the Articles an violation of human rights? Similarly Article 6(1) of the International Covenant on Civil and Political Rights states that every human being has the inherent right to life and shall not be arbitrarily deprived of his life but there are some controversial issues related to this supreme right. One such right is right to abortion. On one part we are talking about abortion as a right and on the other we are talking about abortion as inhuman behaviour contradicting to the very documents that is talking about human rights. It is believed that every mother has a right to abortion but the right of a mother is to be balanced with the rights of unborn.

Our world is a mix of cultural with number of religions based on their beliefs and customs. Right to abortion was not permitted and was strongly opposed by the society. Getting pregnant or being blessed with a child was considered as being blessed by the Almighty God i.e. The Universal Creator. With time and change/advancement in technology, right to abortion has been legally sanctioned by most of the Nations after the famous decision of Roe versus Wade[120]. With time there might be a change in technology but oppositions are still present and people do believe that it should be legally prohibited.

Indian law allows abortion in certain circumstances. Abortion was in practise even before it was legalized. Women were opting for abortion by illegal methods. It is severely condemned in ancient literature. With time growth in the judgements given by judiciary system was seen.

[119] Un.org
[120] Decision by United States Supreme Court

People started giving importance to the other sex i.e. the mother who is carrying a baby. Human rights value everyone's rights and liabilities. An unborn child also have a right to life but judiciary made strong analysis as to the suffering that the child might have to face after his/her birth.

A woman's right is respected and she is given a chance to prove grounds for termination of pregnancy. The two major grounds that a woman has to prove for permission to get her abortion terminated is:

1. Risk to life either of baby or to herself
2. Serious grave injury to her physical or mental health

A court has to carefully analysis and value both the lives. In the case of D. Rajeswari versus State of Tamil Nadu and others[121], the court granted the permission to terminate the pregnancy of a 18 years unmarried girl and who was also a victim of rape after she prayed that the child in her womb who is 3 months old should be permitted to be terminated as it is causing her mental illness and if the pregnancy continued it would cause great anguish in her mind which would result in a grave injury to her mental health.

The consent given by pregnant mother who can be a major or minor or may be mentally ill is important. The court closely observed the prayer of that unmarried 18 years old as it was in the interest of the justice and society. The Supreme court in Sudha Sandeep Devgirkr versus Union of India[122], laid down that narrow construction to the expression "life" under section 5 of the MTP Act would then mean that the exception in section 5 will not operate even to contingencies where registered medical practitioners opine that the continuance of pregnancy involves grave injury to the physical health or to the mental health of the mother. The exception will then not apply to cases:

1. Where pregnancy is alleged to have been caused by rape
2. Where medical opinion establishes that there is substantial risk that if the child were born, it would suffer from physical and mental abnormalities as to be seriously handicapped.

[121] 2014
[122] 3rd April 2019

If section 5 is read narrowly then the whole purpose of justice will go in squander. When we talk about human rights at large we need to respect everyone's boundaries. A court before delivering its judgement should analysis and closely examine all the factors upon which termination of pregnancy can be allowed to sever proper justice and societal interest. Right to abortion might not have been our human rights from beginning but with advancement in time and technology it is now essential for balancing both the lives.

PART FOUR

ROLE OF MEDICAL BOARD, COURTS AND STATES IN TERMINATION OF ABORTION

Before examining what is the role of medical board in termination, brief analysis as to the rules in the Act is explained. The preamble of MTP Act, 1971 refers to termination done by registered medical practitioners only. The term "registered medical practitioner" is further defined under section 2(d) of the Act as – a medical practitioner who possesses any recognized medical qualification who has such experience or training in gynaecology. The Act at large makes it clear that any termination that is to be performed legally is to be done by a registered medical practitioner only. Section 3 states that when pregnancies are terminated by registered medical practitioners notwithstanding anything contained in India Penal Code that registered medical practitioner will not be guilty of any offence if termination is in accordance of the provisions of Act.

The question that arises here is whether this registered medical practitioner forms a part of medical board? The answer is YES, a medical board consist of:

1. A gynaecologist (mentioned in the preamble and section 3 of the Act)
2. Paediatrician
3. Radiologist
4. Sonologist
5. Others notified by State Government

Section 3(2) of the MTP Act states the role of gynaecologist as – a pregnancy may be terminated by a registered medical practitioner only in case of:

1. Where the length of the pregnancy does not exceed 12 weeks if such medical practitioner is,

2. Or where the length of the pregnancy exceeds 12 weeks but does not exceed 20 weeks, if not less than two registered medical practitioners are,

Of opinion formed in good faith that the pregnancy will lead to factors that are laid down for permission of termination then in that case he will permit and submit his report to the court responsible for justice and societal interest.

The constitution of medical board is in hands of the court and state government. Section 7 of the Act states that a state government may be regulations:

1. Require opinion of such registered medical practitioner concerned to either preserve or dispose the certificate made under section 3(2)
2. Requires any registered medical practitioner to give intimation of such termination and such other information relating to the termination as maybe specified in such regulations
3. May prohibit the disclosure except to such persons and for such purpose as may be specified in such regulations of intimations given or information furnished in pursuance of such regulations.

Sub clause (2) of section 7 states that any information furnished in pursuance of regulations made by virtue of clause (b) of sub-clause (1) shall be given or furnished as the case may be is to be informed to the Chief Medical officer of the State. With new Amendment Bill,2020 role of medical board was enhanced and few changes were made which are as follows:

1. Prior Act required advice of two doctors when the pregnancy was for 12 to 20 weeks but after Amendment Bill 2020 only advice from one doctor was required.
2. Prior Act did not allowed termination of pregnancy if the pregnancy was in 20 to 24 weeks but after Amendment bill 2020 it was allowed with advice from two doctors for some categories only.
3. For more than 24 weeks it was absolutely prohibited but after Amendment Bill it was felt that chance and advancement in technology termination of pregnancy can be permit to women in case of substantial foetal abnormality.

All State and Union Territory governments will constitute a Medical Board. The Board will decide if a pregnancy may be terminated after 24 weeks due to substantial foetal abnormalities. as each board will consist a registered medical practitioner he is bound to only reveal details

of a woman whose pregnancy has been terminated to a person authorised by law. Violation of such law will be punishable with imprisonment up to a year, a fine, or both.

In case of Mamta Verma versus Union of India and others[123], the Supreme Court of India was concerned with a pregnancy which had advanced into the 25th week. A medical board was constituted to submit it's finding in the case which opined that the "patient wants the pregnancy to be terminated as the foetus is not likely to survive. It is causing immense mental agony to her and after going through the ultrasonography reports, Committee is of opinion that there is no point to continue the pregnancy as foetus has anencephaly which is non-compatible with life and continuation of pregnancy shall pose severe mental injury to her". On the findings of medical board the Supreme court permitted medical termination of pregnancy by observing that:

1. "We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive. It is also submitted that the petitioner understands that her foetus is abnormal and the risk of foetal mortality is high. She also has the support of her husband in her decision making.

2. Upon evaluation of the petitioner, the aforesaid Medical Board has concluded that her current pregnancy is of 25 weeks and 1 day. The condition of the foetus is non compatible with life. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull.

3. Importantly, it is reported that the continuation of pregnancy can pose severe mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy."[124]

In the above case there was no danger to the life of the pregnant mother yet, termination of pregnancy was permitted primarily on the ground that the foetus was not likely to survive and this was causing severe mental injury to the pregnant mother. The judgement was based on the

[123] (2018) 14 SCC 289
[124] Mamta Verma versus Union of India

report submitted by the medical board. The main and important vital role of medical board is the examination of foetus and the pregnant mother.

Role of medical board is examination and role of court is to do justice in societal interest. In the above case medical board examined the pregnant mother and informed the court about her case where the baby/ foetus would not have survived as was without skull. Analysing the whole situation in context of law is the role of courts. The medical board is expected to address all medical issues which normally arise in such matters, including, but not restricted to the following:

1. Whether the continuance of the pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical or mental health or
2. Whether there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped
3. Whether, having regard to the advanced stage of pregnancy, there is any danger if the pregnant mother is permitted to terminate her pregnancy
4. If the pregnant mother is a minor or mentally ill person, then the medical board to ascertain, to the extent possible, the wishes of the pregnant mother on the continuance of pregnancy or otherwise
5. The medical process best suited to terminate the pregnancy and the possibility of child being born alive, in the process.
6. Any other issues, which the medical board regards as relevant, in such matters.

The Supreme court in case of Parmanand Katara versus Union of India[125], observed that a Doctor at the government hospital positioned to meet this state obligation of examination and termination is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way. Is the child despite attempts at medical termination of pregnancy, is born alive then the parents as well as the Doctor owe a duty of care to such a child. The best

[125] (1989) 4 SCC 286

interest of the child must be the central consideration in determining how to treat the child. The extreme vulnerability of such child is itself reason enough to ensure that everything which is reasonably possible and feasible in the circumstances, will have to be offered to such child, so that it develops into a healthy child.

In such matters the instinct of the parents will no doubt take over when it comes to the love and care to be offered to such child. However in cases where parents are not keen to look after such a child then the doctrine of "parens patriae" will oblige the State to assume parental responsibilities in relation to such child. The best interest of the child must be the primary consideration in all such matters.

CONCLUSION

The place of a mother is irreplaceable in a child's life and her contributions are immeasurable. Without any doubt a mother is the solider who stands to protect her family. Medical termination of pregnancy has always been in light as it holds different opinions. The journey of medical termination of pregnancy Act, 1971 to Amendment Bill, 2020 was a long way with a difficult path. The growth not only supports the child but also a pregnant mother. There are times when we have to make hard choices so it is the case with a mother who has to approach a court to permit her for termination on grounds that would make the life of the child if born hard. The courts and the legislature have made amendments in the Act which are constitutional in nature and provides justice in societal interest. Enactment of termination Act was to protect a child and a pregnant mother from mental agony. It is easy to comment on someone's life but it is hard to stand in their shoes. The statements of objects and reasons of the Bill states that several writ petitions have been filed before the Supreme Court and various High Courts seeking permission to abort pregnancies beyond 20 weeks in the case of foetal abnormalities or pregnancies due to rape faced by women. The Bill allows for termination of pregnancies after 24 weeks only in certain cases. Increasing the ambit of "pregnant women" the Bill is unclear about the categories of women who can terminate pregnancy between 20-24 weeks. The major set back is that no time frame for medical board's decision is specified. At large the Act and the Bill are supportive to both a child and pregnant women.

TRIBAL AND LAND ALIENATION

- PROMIT ACHARYA & TIYASHA BANERJEE

ABSTRACT

Countless regions predominantly occupied by Adivasis had been announced to be Excluded and Partially Excluded Areas during the British time frame. These territories went under the domain of the Scheduled Districts Act of 1874 and the Government of India (Excluded and Partially Excluded Areas) Order 1936. Following the Independence of the country, these territories were brought under the Fifth and Sixth Schedules severally, and alluded to as Scheduled Areas. Some other overwhelmingly Adivasi territories were announced to be Scheduled Areas by the President therefore. But still, there are discriminations and corruptions that are being faces by the tribal regarding their land and property. This paper deals with such an issue and elaborates the different measures that have been taken by the government and judicial decisions to cope up with this issue.

INTRODUCTION

Article 244, in Part X of the Constitution entitled "The Scheduled and Tribal Areas", states in the first clause that the provisions contained in the Fifth Schedule will apply to the administration and control of any states of the Scheduled Area and Scheduled Tribes other than the States of Assam, Meghalaya, Tripura and Mizoram.

The reason for Scheduled Areas, as likewise perceived in a few decisions, is to safeguard the ancestral self-governance, their way of life and monetary strengthening, to guarantee social, financial and political equity, and conservation of harmony and great governance.[126] It is considering this article that the Constitution made the Fifth Schedule which has broadly been classified "A Constitution within a Constitution" by late Dr. B.D. Sharma, previous Commissioner for Scheduled Castes and Scheduled Tribes.

THE FIFTH SCHEDULE IN THE CONSTITUTION

The constitution of India in its Preamble highlights and commits to it being a 'Justice, social, economic, and political' country. The right to life under[127] of the Constitution has been

[126] Samatha vs. State of Andhra Pradesh (1997) 8 SCC 191
[127] Article 21 of the Constitution of India.

deciphered in a catena of decisions to incorporate the right to life with dignity, which incorporates subsequently a large group of different rights which are fundamental and critical to guarantee that this life is all encompassing and complete. Therefore the right to livelihood,[128] the right to shelter[129], the right to a clean environment[130], the right to water[131], and numerous other rights which are of a socio-economic nature, have been held by judicial precedent to be part of the fundamental right under Article 21. At its center, the Constitution bears a promise to the idea of equality of all citizens under the steady gaze of the law, as expressed at the beginning of the Preamble when it focuses on the vision of 'equality of status and opportunity' as a center piece of the goal of a recently free state. The principal right to equality has been held to be essential for the 'fundamental construction' of the Constitution and in this way unchanged even by constitutional amendment.[132]

As anyone might expect, the Fundamental Rights Chapter of the Constitution (Part III) subtleties the idea of equality at many point. Article 14 perceives the privilege to balance under the watchful eye of law and equivalent insurance of the law and makes the very accessible to all people, that is, citizens just as non-citizens. The Constitutional arrangements just as various legal points of reference solidly build up that a simple 'formal' uniformity approach has been dismissed. All things being equal, the Constitution unmistakably perceives that to be totally significant, a 'meaningful' way to deal with correspondence must be embraced, and consequently the chronicled separation of specific gatherings and classes should not exclusively be recanted by the state, however solid advances should be taken to invert the current results of such verifiable segregation. It is just with a particularly meaningful or agreed methodology can fairness and equality from a genuine perspective being accomplished.

With regards to this way to deal with Equality, the Constitution perceives the right against discrimination in Article 15 which restricts discrimination by the condition of any citizen on grounds of religion, race, rank, caste, sex, place of birth, or any of them. The Article demands governmental policy regarding minorities in society, as extraordinary arrangements for 'socially and instructively in backward classes of residents or for Scheduled Tribes', as a piece of this right.[133] Article 16 (preclusion of discrimination in public employment incorporates reservations for 'backward class of citizens' and reservations in advancements for Scheduled

[128]Olga Tellis vs. Bombay Municipal Corporation (1985) 3 SCC 545, Narendra Kumar vs. State of Haryana (1994) 4 SCC 460, State of Himachal Pradesh v. Raja Mahendra Pal (1999) 4 SCC 43.
[129]Shantistar Builders v. Narayan Khimlal Toame (1990) 1 SCC 520.
[130]N.D. Jayal v. Union of India (2004) 9 SCC 362, 382.
[131]B.L. Wadhera vs. Union of India (1996) 2 SCC 594.
[132] Keshavananda Bharati v. St of Kerala (1973)4 SCC 225, Minerva Mills Ltd vs.UOI (1980) 3 SCC 625.
[133]Article 15(4) of the Constitution.

Tribes), and Article 17 (denial of untouchability in any form) are cases of explicit territories where the Constitution requires the state to take a positive and favorable to dynamic methodology.[134]

Essentially, the "Directive Principles of State Policy" (Part IV of the Constitution) additionally contain a few arrangements which straightforwardly and in a roundabout way confer the privilege to equality as perceived in the Constitution. The Supreme Court in various decisions has held that these standards provide the right to life and dignity under Article 21. Key among these are two arrangements which are perceived to have verbalize the idea of 'distributive justice':

Article 38 poses an obligation on the state to "secure a social request in which equity, social, monetary and political, will advise every one of the organizations regarding the national life" and specifically to limit imbalances in income and kill disparities in status among people and among gatherings of individuals;

Article 39 contains basic commitments on the state to coordinate its approach towards what is known as 'distributive justice', as for satisfactory methods for work, possession and control of material assets, minimisation of grouping of abundance in the monetary framework, etc.

Moreover, **Article 46** contains a commitment on the state to advance the training and financial interests of more fragile segments, specifically the Scheduled Tribes, and furthermore to shield them from social unfairness and all types of misuse.

This way to deal with correspondence, which perceives the need to address authentic wrongs to accomplish meaningful fairness, in the present and the future, with a center obligation to distributive equity and the decrease of monetary imbalances, has educated the whole protected administration as to minimized people groups when all is said in done, and Scheduled Tribes specifically. Subsequently, the established arrangements identifying with Scheduled Tribes under Article 244 and the Fifth Schedule should consistently be set inside this bigger protected point of view, prior to undertaking any printed examination concerning a particular reality circumstance or issue. At the point when perused together, these established arrangements make an unmistakable agreement for tribal homelands which have been perceived as such through the way toward planning of such territories, in light of the acknowledgment that ancestral or native people groups have truly endured on account of individuals from the 'terrain', including the colonizers, and require exceptional securities at a protected level to guarantee that these chronicled wrongs are not rehashed, and are turned around.

[134]Safai Karamchari Andolan & Ors. vs. Union of India & Ors. (2014) 11 SCC 224

This part of the law identifying with unique established constitutional protection to Scheduled Tribes and Scheduled Areas has additionally seen some significant turns of events. A main choice regarding the matter was passed by the Supreme Court in *Samatha vs. State of Andhra Pradesh*[135]The Court was approached to rule on whether the award of a mining lease, in a Scheduled Area to a non-tribal was disregarding laws forestalling alienation of Adivasi lands. The particular setting for the case was the Andhra Pradesh Scheduled Areas Land Transfer Regulation 1 of 1970, which unequivocally disallows any individual in a Scheduled Area from moving terrains to anybody other than to a Scheduled Tribe. The reason of the guideline is that all land in Scheduled Area is dared to have been Adivasi land; thus, not only should no land currently pass under the control of non-Adivasis, yet any land as of now possessed by non-ancestral ought to, if being moved, returned to the hands of Scheduled Tribes. The inquiry under the steady gaze of the Court was whether the award of a mining lease on government land to a non-tribal abused this guideline.

The Court didn't depend absolutely on the particular provisos of the Regulation and rather held that the Constitution necessitates that land in Scheduled Areas ought to stay with the Adivasis to save their self-rule, culture and society. The Regulation, thus, ought to be deciphered 'expansively' to satisfy this command.

WHAT ARE SCHEDULED AREAS?

It is notable that "scheduled Tribes" are those that are planned as such by a Presidential Order under Article 342 of the Constitution. It could be called attention to that the creation or end of Scheduled Areas, as given in section 6 of the fifth Schedule, is put at a significantly more elevated level than the statement of Scheduled Tribes and Scheduled Castes by Presidential Orders under Articles 341 and 342, where, ensuing to the underlying notices in 1950, the Constitution engages the Parliament to make changes now and again.

As per the Ministry of Tribal Affairs, '(t)hese measures are not spelt out in the Constitution of India but rather have gotten grounded. They encapsulate the standards continued in proclaiming the 'Excluded' and 'Partially - Excluded Areas' under the Government of India Act, 1935, just as those contained in Schedule 'B' of proposals of the Excluded and Partially Excluded Areas Sub Committee of Constituent Assembly and those illustrated by the Scheduled Areas and Scheduled Tribes Commission 1961.[136]

[135] Samatha vs. State of Andhra Pradesh (1997) 8 SCC 191

[136]Special Report: Good Governance for Tribal Development and Administration, National Commission for Scheduled Tribes May 2012.

CRITERIA FOR DECLARING AN AREA AS A SCHEDULED AREA

The First Scheduled Areas and Scheduled Tribes Commission, otherwise called the Dhebar Commission (1960-61) set out the accompanying rules for announcing any territory as a 'Scheduled Area' under the V Schedule:[137]

- Dominance of tribal populace, which ought not be under 50%;
- Compactness and sensible size of the territory;
- Underdeveloped nature of the territory; and
- Marked uniqueness in the monetary norm of individuals, when contrasted with the adjoining regions.

All the more as of late, a reasonable regulatory substance like a locale, block or taluk, has been likewise distinguished as a significant extra models.[138]

It has been stated by one of the High Courts that if any rules with respect to the territories to be included for the Fifth Schedule can be derived from the arrangements of the Constitution, it is that the zones ought to have a generous grouping of ancestral populace.[139]

LAND ALIENATION AND ACQUISITION

Loss of land stays the single greatest reason for hardship of the vocations, lives and countries of tribals across India. One would anticipate that the constitutional design, explicitly pointed toward shielding tribal lands from simply such misfortune, would have had an obvious effect. All things being equal, we find that confiscation proceeds with unabated, with just the systems for such seizure of land changing over various legal and established systems.

Scheduled Tribes have, all around, enjoyed the conventional and standard rights over huge wraps of land. Notwithstanding, the interaction of acknowledgment of customary privileges of Scheduled Tribes to land is altogether lopsided and inadequate. Over the long run, the state and non-tribals have denied them the entrance to their territories by appointment of these terrains. Of the recorded land rights, notwithstanding the established and administrative protections at the Central and State level, land distance has been broad. As expressed before, in consistence of Paragraph 5(2)(a) of the Fifth Schedule, most States have instituted enactments limiting/restricting the exchange of land from tribals to non-tribals in Scheduled Areas.

[137] As cited in the Fiftieth Report of the Standing Committee on Urban and Rural Development (2003) (Thirteenth Lok Sabha)
[138] Annual Report 2013-14, Ministry of Tribal Affairs, Government of India
[139] Amarendra Nath Dutta vs. State of Bihar AIR 1983 Patna.

Nonetheless, these enactments have not had the option to satisfy the established target of guaranteeing that tribals hold power over their countries. Despite the fact that most prosecutors which approach the Courts meet a positive outcome, it is still obvious that these laws depend vigorously upon their actuation by the influenced parties, and the quantity of cases which are really initiated in courts are a simple glimpse of something larger. As indicated by a Report of the Department of Land Resources, Ministry of Rural Development, Government of India,[140] in July 2013: 3.75 lakh instances of tribal land estrangement were enrolled covering 8.55 lakh sections of land; Out of the above mentioned, 1.62 lakh cases (43.2%) were discarded for tribals covering an all out territory of 4.47 lakh sections of land (58.28%); 1.55 lakh cases (41.1%) covering a region of 3.63 lakh sections of land were dismissed by the courts on different grounds.

The above information exhibits that 41.1% of cases recorded by tribals for rebuilding of distanced lands were dismissed by the Courts, a disturbing figure given that tribals will in general have helpless admittance to the legal frameworks and to lawful counsel and portrayal in any case. It is additionally significant that the aforementioned numbers have not changed at all since a past report arranged by a similar Department in 2005. Around then, 57,521 cases including 0.44 lakh sections of land of land were forthcoming in different courts of the country, however the current status of pendency of such cases isn't known.

There is no measurement of the numerous situations where, in any event, when legal choices were given for the tribal party, real rebuilding of the land was effectuated. From there on, accepting the prosecutors can withstand the significant expense of case and postponements to get a positive decision, the real reclamation of ownership stays a proceeding with issue. As has been archived by different essayists, this last connection stays the most fragile on the whole existing area alienation and reclamation laws.

Where the tribals do hold ownership and command over their customary grounds, in protection from market influences, it is the force of famous space of the Indian state which represents the best threat. The force of prominent area of the state has sadly been deciphered, both in law just as in arrangement, to mean the ability to persuasively obtain private property (and redirect basic property) to any utilization it sees as fitting. Usha Ramanathan[141] says that the nineties, with its plan to open up the economy, the accentuation on privatization and progression, and

[140] Draft National Land Reforms Policy, 24th July, 2013, Department of Land Resources, Ministry of Rural Development, Government of India.

[141] Ramanathan, Usha 'Eminent Domain, Protest and the Discourse on Rehabilitation' in M.M. Cernea and H.M. Mathur (eds.) Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-sharing. London-New Delhi: Oxford University Press (2008).

re-defining of chance of expenses, as additionally of the part of the express, that the interaction of disinvestment set up, has given rise to additional discontent. This is represented by the re-focusing on that has arisen where tribals, for example, who had been shielded inside the sacred regulation, subsided to zones in the obscuration of state concern even as the state privatized its inclinations in open area ventures for which it had taken ancestral land.

The ancestral populaces have been excessively focused on, dislodging them from their properties and jobs, as their assets have been seized and redirected for the 'bigger basic great'. The Constitution of India as initially embraced and accommodated a key right to property[142] which was gradually shaved away for the expressed reason for facilitating land change until it was at long last revoked in 1979. Tragically, today when the terrains of millions of tribals, some of which were the subject of these very land change measures, are under get, there is no such insurance.[143]

The Twelfth Five Year Plan report recognizes this reality as follows: "The excessively huge effect of removal of tribals is apparent from the way that in any event at 55% of all uprooted individuals are tribals and in States like Gujarat the extent is 76%. It has been a significant explanation behind their pauperisation, regularly driving them to a condition of shelterless and assetless dejection. The assumption that dislodging is an unavoidable result of all formative endeavors requires to be reevaluated in the light of the tremendous expense of human enduring in such tasks. The need to dodge such huge scope relocation, especially of tribals and in instances of unavoidable removal, their extensive resettlement and restoration (R&R) has gotten one of the focal issues of the formative interaction itself."[144]

The courts have likewise generally neglected to give any help in such manner. Amusingly, in a judgment identifying with dislodging of tribals in huge numbers in the State of Gujarat because of submergence in the Sardar Sarovar project, the Supreme Court has decided to depend upon an arrangement[145] in the ILO Convention No. 169 to show up at a finding that dislodging of tribals with the end goal of 'improvement' is unavoidable and consequently can't be held to be infringing upon the commitments of the Indian State under the said Convention.[146]

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[142]Article 19(1)(f) of the Constitution. Article 31(1), under the sub-heading "right to property". These provisions, among others,were repealed by the Constitution (Forty-Fourth Amendment) Act, 1978 which came into forcein 1979.

[143]The right to property is recognised as a constitutional right under Article 300-A of the Constitution of India.

[144]Social Inclusion (Chapter 24 @ para 24.85 page 237), Volume-III (Social Sectors), Twelfth Five YearPlan (2012–2017) Planning Commission, Government of India.

[145]Article 16 of ILO Convention.

[146] Narmada Bachao Andolan vs. Union of India (2000) 10 SCC and also State of Kerala vs. Peoples Unionfor Civil Liberties & Ors (2009) 8 SCC 46.

In the case of Narmada Bachao Andolan[147] while managing the genuine issues with the venture raised by associations viewing the ecological just as financial effect of the dam, the Supreme Court observed the definite explanation by the applicant of the privilege to life under Article 21 of the Constitution read with Article 12 of ILO Convention No. 107. While tolerating the legitimate recommendation that global arrangements and pledges can be added something extra to homegrown laws, the Court proceeded to excuse the conflict of the solicitors in regards to explicit infringement of Article 12 as follows: 'The said article obviously proposed that when the evacuation of the ancestral populace is fundamental as an outstanding measure, they will be furnished with place where there is quality in any event equivalent to that of the land recently involved by them and they will be completely made up for any subsequent loss of injury. The restoration bundle contained in the honor of the Tribunal as improved further by the State of Gujarat and different States at first sight shows that the land needed to be distributed to the tribals is probably going to be equivalent, if worse than what they had claimed'.[148]

All the more as of late, in a suit emerging out of the disappointment of the State of Kerala to execute its own responsibilities to reestablish grounds to the first ancestral proprietors which had been distanced through deal to non-tribals, the Supreme Court analyzed Article 21 of the Constitution, the ILO shows and the UNDRIP, and showed up at the accompanying finding.[149] 'It is presently acknowledged that the Panchsheel teaching which given that the clans could prosper just if the State meddled negligibly and worked primarily as an emotionally supportive network considering section of time is not, at this point substantial. Indeed, even the thought of self-sufficiency contained in the 1989 show has been dismissed by India.'[150]

The Court proceeded to take note of that there is apt proof that the tribals in Kerala are far superior off than their partners in different States, and thusly thought it is protected to reason that large numbers of them have been ingested into different establishments in the State of Kerala and in different pieces of the nation, despite the fact that there was no such proof put before it. The Court additionally closed: 'Undeniably, the subject of rebuilding of land ought to be considered having respect to their misuse and delivering them destitute from the standard of Article 46 of the Constitution of India. For the previously mentioned reason, in any case, it could be of some interest to consider that the demand of self-rule and the perspective on a segment of individuals that tribals ought to be permitted to stay inside their own living space

[147] *Ibid*
[148] *Ibid* at paragraph 58.
[149] State of Kerala vs. Peoples Union for Civil Liberties & ors (2009) 8 SCC 49.
[150] *Ibid* at paragraph 18.

and not be permitted to blend in with the rest of the world would rely on the sort of Scheduled Tribe classification being referred to.'[151]

These perceptions seem to acquiesce to the interaction of mainstreaming which the Fifth Schedule and other constitutional provisions identifying with Scheduled Tribes and tribals were intended to stand up to.

CONCLUSION

What we see today is an awful disintegration of the constitutional command giving uncommon status to Scheduled Areas, where the Fifth Schedule firewall, which was intended to secure tribal lands, is beginning to disintegrate. The Standing Committee on Social Justice and Empowerment of the fifteenth Lok Sabha, in its 2010-2011 report made a searing prosecution of the Ministry of Tribal Affairs, for its inability to assume a supportive of dynamic part in the usage of laws and plans in Scheduled Areas and for Scheduled Tribes. Specifically, the board of trustees noticed the appallingly sluggish execution of the Forest Rights Act 2006. After five years, the execution of the Forest Rights Act has seen surprising advances, both nearby individual timberland rights and nearby local area and local area backwoods asset rights. The execution proceeds, in any case, to stay lopsided across states.[152]

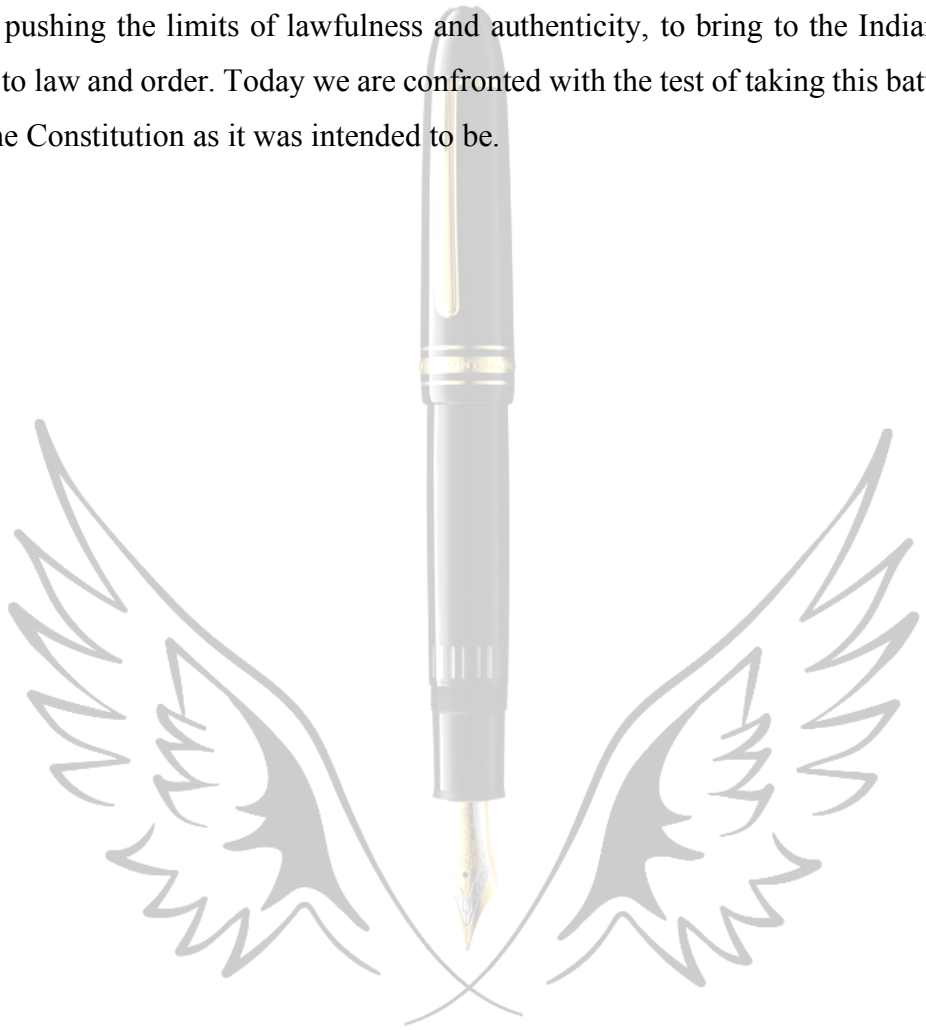
This is valid for all legal defensive enactments, as we have seen above, regardless of whether these be concerning land distance, neighborhood self administration, command over assets, or natural enactments. Unmistakably, the cycle of disintegration of the rights contained in the Constitution, and the different defensive enactments established by the state, has acquired force over the most recent couple of years. The time isn't far when the whole texture of the letter and actual purpose of the law identifying with Scheduled Areas could be rendered unimportant.

Simultaneously, we additionally see the rise of an undeniably aggressive protection from these cycles rising up out of inside the Scheduled Areas, and the ancestral networks which won't acknowledge the advancement of the mechanical behemoth. Declining to be discouraged by the restricted and legalistic translation of the restricted rights accessible to the ancestral people groups, these developments rather attest central, good, and established standards of another majority rule government. In his book K.G. Kannabiran[153] has depicted it subsequently: 'Authenticity doesn't concern itself such a great amount with whether legislative exercise of

[151]Ibid at paragraph 18.
[152]The Standing Committee on Social Justice and Empowerment (2010-2011), 15th Lok Sabha 2010-2011.
[153]Kannabiran, K.G., The Wages of Impunity: Power, Justice and Human Rights, Delhi, Orient Longman, Delhi, 2004

force is legitimate. Or maybe, what is at issue is the way and reason for the activity of established force and the avocation of such an activity

Kannabiran, a roused and motivating robust of the social liberties development in India, spent a lifetime pushing the limits of lawfulness and authenticity, to bring to the Indian country a guarantee to law and order. Today we are confronted with the test of taking this battle forward, towards the Constitution as it was intended to be.



PRINCIPLES AND THEORIES OF LABOUR WELFARE: RECOGNITION AND IMPORTANCE

- RAHUL SHARMA

ABSTRACT

Labour Welfare thus incorporates in its fold all initiatives aimed at improving the health, protection and wellbeing of employees and the general welfare of workers. It is limited to those operations which are carried out, by statute or otherwise, within or outside the industrial premises of any organisation, administration, "employers which do not fall under social security provisions and which contribute to changes in the health", productivity and welfare of "industrial workers and their families" e.g. recreational, healthcare, cultural, cooking, swimming, transport facilities, cafeterias and creches, etc. The Government should also therefore interfere and enact regulations from time to time to ensure continuity in the operation of such services. The involvement of the state, though, is only meant to widen the scope of its applicability. The paper analyes the conceptual framework of labour welfare and it also throws light on the objectives,principles and theories of labour welfare.

KEYWORDS: Employers, Labourer, Government, Industry.

INTRODUCTION

Labour welfare is a vital element of labour-management relations. Workers welfare is an expansion of the term welfare and its relation to workers. The term labour, labourer, workers, workman or employee are all used to refer to the wage-earning human agents in the industry. Welfare means faring and doing well. It is a descriptive concept that refers to an individual's physical , behavioural, and emotional well-being. The idea of labour welfare was influenced by the principles of democracy and the welfare state. A welfare State endeavours to provide living-shalter, standard of education, pensions, insurance of unemployment, sick-leave, health care, additional income in exceptional cases, equal wages through controlling price and wages. There are several types of labour such as Slave labour, Child labour, White-Collar labour, Blue-Collar labour, untrained labour, semi-trained and trained labour etc. Under labour welfare, the labour class is provided labour welfare facilities. "These facilities include all services, amenities and facilities which are provided by the employer in or in the vicinity of the

undertaking in order to enable the employees to perform their work in healthy and congenial surroundings and provide them with amenities conducive to good health and high morale".[154] There are several Directive Principles included in the Constitution of India for the welfare of the labour class such as right to work, right to participation in management, equal pay for equal work, right to adequate means of livelihood, right to shelter etc. There are several labour welfare theories made such as theory of Religion, Trusteeship, Philanthropy, Policy, Public Relations etc. for the welfare of the labour class. There are several advantages of labour welfare such as Improvement in labour-management relations, increase in the efficiency and income, high morale of workers, creation of permanent labour force, improvement in the mental and moral health etc.

The concept of a welfare state is to play a key role in the safety and the encouragement of the social well-being and economic conditions of her citizens. This principle of welfare state is based on equality in opportunities, equal distribution of public responsibilities, wealth for those who are unable to avail such opportunities themselves for a nominal provision of a good life. This term of welfare state may cover a different type of social organization and economic conditions.[155] T.H. Marshall, a sociologist, has identified that a welfare state has a distinctive combination of capitalism, democracy and welfare of the people.

This term of welfare state involves that the funds should be transferred from the state, to the service providers in the field of healthcare, education social amenities as well as to the individuals for their services (benefits). The state government is funded through redistribution in taxation and is often referred to as a type of "mixed economy".[156] The taxation generally includes income tax from higher group of society, this is called a progressive system of tax. This system reduces the income gap between the poor people and the rich people of the State.[157]

The idea of a welfare State includes two prime interpretations:

i. The duty of a welfare state is to create a social safety net for its population for least standards of changing kinds of welfare.[158]

ii. In a welfare State, the government assumes main responsibility for the well-being of its citizens. Since all the aspects of a welfare State are considered and applied on its citizens as a right, therefore, this responsibility ought to be a comprehensive one.

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[154] K.K. Ahuja, *Dynamics of Industrial Relations and Labour Legislations* 268(Kalyani Publishers,1st edi.,1997).
[155] "Welfare State: Encyclopaedia of Political Economy" 1245 (1999).
[156] ibid
[157] Pickett and Wilkinson, "The Spirit Level: Why More Equal Societies Almost Always Do Better" 112 (2011).
[158] For the impact of industrialization on the Indian Society see, R.C. Saxena, *Labour Problems and Social Welfare* 14 (p. K. Nath & Co., Meerut 1974).

A welfare government in the strictest sense shall provide all resources which are helpful for the welfare and well-being of the citizens at large. This type of government is involved in its population at every level and provide amenities for their social, physical and material level rather than to provide for their own. Hence the welfare State tries to create economic and social equality or try equal standard of living for its citizens.[159]

Such type of State, i.e., welfare State endeavours to provide living-shalter, standard of education, pensions, insurance of unemployment, sick-leave, health care, additional income in exceptional cases, equal wages through controlling price and wages. The welfare State government will provide public transportation, social facilities like parks, libraries, community centres, child cares and several other communities for its people. The resources for these facilities are collected either through insurance programmes or through taxes.

CONCEPT AND DEFINITION OF LABOUR WELFARE

The Oxford dictionary outlines labour welfare as "*efforts to make life worth living for Workmen*".[160] Labour welfare is an important dimension of labour-management relations. It is the method of exceeding minimum set requirements in order of worker health, protection, general well-being, and capability and effectiveness growth.[161]"Labour welfare includes general welfare facilities designed to take care of well-being of employee's and in order to increase their living standard. It can also be provided by government, non-government agencies and trade unions."

"Labour welfare' is defined by Committee on Labour Welfare as: *Such facilities and amenities as adequate canteens, rest and recreation facilities, sanitary and medical facilities arrangements for travel to and from and for accommodation of workers employed at a distance from their homes, and such other services, amenities and facilities including social security measures as contribute to conditions under which workers are employed*."[162]

The idea of labour welfare is dynamic and variable, and varies greatly from time , place, business, "social values and customs", the extent of industrialisation, the general socio-economic growth of individuals, and the political philosophies prevalent at a given moment. It is also based on the "age – group", gender, "socio-cultural history", marital and economic status and level of education of workers in different industries.

[159] "Encyclopaedia of Social Sciences" Vol. XV, 195 (1985).
[160] Oxford Dictionary (6th Edition).
[161] S C Bhatnagar, "Improving the Effectiveness of a Multipurpose Worker", Journal of Family Welfare,98 (1982).
[162] Committee on Labour Welfare (1969)

According to C.P John, the term labour welfare in its broad connotation refers to a state of living of an individual or a group in a desirable relationship with the total environment — ecological, economic, and social.[163]

The ideals of socialism and the welfare state have inspired the concept of worker rights. Democracy is more than just a political system; it is a way of life based on ideals like equality and democracy for all. In reality, the provision of welfare programmes brings to bear a variety of reflections that embody a wide range of cultural and social circumstances.[164]

OBJECTIVES OF LABOUR WELFARE

Apart from salaries and benefits, organisations engage in a variety of labour rights programmes, either willingly or as a result of legal requirements. Its aim is to improve workers' job lives and social standing.

THE OBJECTIVES OF LABOUR WELFARE ARE AS FOLLOWS:

1. To improve the labour force's working conditions, personal and social lives, and welfare.
2. To keep employees comfortable and pleased with their workplace.
3. Employee dissatisfaction with their job life leads to industrial strife and confrontation. The aim of labour welfare is to reduce trade disputes and violence.
4. To boost productivity by improving reliability.
5. To provide a more conducive physical working environment.
6. To raise the workers' quality of life.
7. The labour welfare package seeks to assist workers in overcoming issues such as absenteeism, high turnover, indebtedness, alcoholism, and other issues that make workers physically and mentally vulnerable.[165]

NEED FOR LABOUR WELFARE

The need for labour welfare arises from the existence of the manufacturing sector, which is marked by two fundamental factors: first, the working conditions are not conducive to good health; and second, when a worker enters an enterprise, he is forced to live in an entirely unfamiliar environment, posing adjustment issues.

[163] CP John," Impact of Labour harmony on the society" 652 (ed. 2010) .
[164] http://shodhganga.inflibnet.ac.in/bitstream/10603/12615/7/07_chapter%202.pdf,last accessed on 04 April 2021.
[165] http://www.jiwaji.edu/pdf/ecourse/political_science/MBAII_HRD_204.pdf, last accessed on 04 April 2021.

The Constitution of India, which established the following Articles in this regard, emphasised it in the free India.

"Article 39 - *The state shall, in particular, direct its policy towards securing;*

a) That the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources are so distributed as to subserve the common good;

(c) that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women; and

(e) that the health and strength of workers, men and women; and the tender age of children are not abused and that citizens are not forced by economic necessity to enter a vocation unsuited for their age or strength." [166]

The Directive Principles of state policy play a major role in the making of new labour laws in India.DPSP falls under Part IV of the Indian Constitution.

"Article 41 - *The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and other cases of under-served wants.*[167]

Article 42 - *The state shall make provision for securing just and humane conditions of work and for maternity relief." [168]*

In a PIL, filed by an NGO in *Bandhua Mukti Morcha v. Union of India* [169] , focused on the piteous conditions of bonded labourers in Haryana during a quarry. During the hearing, a number of labour welfare oriented and protective legislations and Bonded Labour Act and Minimum Wages Act were also observed by the bench. The Apex Court gave several directions to the State Government to discharge the Constitution obligation towards the bonded labourers and further said: 'The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions

[166] The Constitution of India,1950,Art. 39.
[167] The Constitution of India,1950,Art.41.
[168] The Constitution of India,1950,Art. 42.
[169] (1984) 3 SCC 161

of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.' In the case of *Olga Tellis v. Bombay Municipal Corporation*[170], the hon'ble court upheld that 'the right to life included the right to livelihood and no one has the right to make use of a public property for a private purpose without requisite authorization.'

The benches of the hon'ble Supreme Court later on followed and approved the Olga Tellis dictum. In the case of *Municipal Corporation of Delhi v. Gurnam Kaur*[171] , the hon'ble court established that 'the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation as the squatters had no legal enforceable right.' In the case of *Sodan Singh v. New Delhi Municipal Committee*[172]established that 'the question whether there can at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative. Hence, all such cases were dismissed to account for socio-economic compulsions which gave rise to pavement shelter and refused the examination of such problem from a statutory point of view instead of in the context of human rights.'

"Article 43 - *The state shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise work, a living wage condition of work ensuring a decent standard of life and full employment of leisure and social and cultural opportunities and, in particular, the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."*[173]

"Article 43 -A- *The state shall take steps, by suitable legislation on in any other way, to secure participation of workers in the development of undertakings, establishments or other organizations engaged in any industry*." [174]

The hon'ble court, hearing a PIL,in the case of Consumer Education and Research Centre v. Union of India[175]noticed that the long years of working in a harmful chemical climate could result in debilitating asbestosis. Hence, the court ordered for a compulsory health insurance for each and every worker who was working in a chemical factory and enforced it as a fundamental right to health to worker.

[170] (1985) 3 SCC 545
[171] (1989) 1 SCC 101
[172] (1989) 4 SCC 155
[173] The Constitution of India,1950,Art. 43.
[174] The Constitution of India,1950,Art. 43-A.
[175] (1995) 3 SCC 42.

Everything capital is derived from labour. It is located near nature, which provides it with the raw materials that it transforms into wealth. Yet it is unquestionably greater than this." As a result, labour welfare is a fundamental requirement for all organisations.

THE KEY FEATURES OF LABOUR WELFARE

1. *Addition to wages and salaries* – "In addition to normal pay and other economic incentives" given to workers under contractual laws and collective bargaining, welfare steps are taken.

2. *Functions* – – Labour welfare provides a range of programmes, amenities and equipment offered to employees to increase their health, productivity, economic development and employee social standing.

3. *Dynamic* – Labour welfare, in nature, is diverse. It varies by country, from area to area and from organisation. Labour welfare performance depends on the workers' needs, their social standing, social class.[176]

4. *Flexible* – Labour welfare is stable and everstyle and ever-changing idea when new health programmes are rolled on to the current measures from time to time. With time and the evolving society climate the demands of the labour force change.

5. *Voluntary and/or mandatory* – Such labour welfare programmes are provided by legislation and are obligatory, and others are provided willingly by the employee improvement agency. Employers, government, workers, or any social or charitable organisation can enact welfare programmes.

6. *Purpose* – The main aim of labour welfare is to enhance the workforce 's social life and work life.

THEORIES OF LABOUR WELFARE

We find a great difference from region to region, "time to time", "country to country" and industry to industry etc. a great flexibility in the form of labour activities. It also depends on the social customs of the region, educational level, degree of industrialization, socioeconomic development of the country.

For the conceptual framework for the welfare of the labourers, the following seven theories have been constituted:

[176] Labour Welfare: Meaning, Evolution, Scope, Concept ,https://www.economicsdiscussion.net/labour/labour-welfare/31839, last accessed on 04 April 2021.

I. The Theory of Religion: The religion theory is based upon the concept that most of the persons believe in one religion or the other. Therefore, he is essentially a religious animal as he is a social animal. We see that most of the actions by men are related to their religious beliefs and sentiments. Hence, the religious sentiments and the feelings of persons motivate and such sentiments are concerned with an employer to involve in various welfare activities so that he can get emancipation in future in this life or in the life of afterwards.[177]

II. The Theory of Trusteeship: This theory is also known as the Paternalistic theory for the "welfare of the labour class". According to the theory of trusteeship, the industrialist or the owner of an establishment who holds the total estate has its profits and properties in the form of a trust.It means the employer holds all the industrial assets for himself but he shows that all the benefits are for the welfare of the workers and also for the society. Therefore, this theory of trusteeship emphasizes that it would provide funds for the welfare of their workers and society at large on an ongoing basis.[178]

III. The Theory of Bringing Peace (Placating): The theory of bringing peace is based on the idea that the groups of labour are more aware of their rights as well as privileges, hence, the awareness of their privileges and rights has made them more demanding and militants than ever before. The labour class demands for better standards of living and higher wages may not be ignored now by the owner of an industry. According to the theory of bringing peace, the periodical acts for the welfare of the workers in an industry can be introduced. These acts may be called as a kind of pacifiers and friendly gesture in an industry. Hence, it is essential to take up timely efforts for the welfare of the labour class to appease the workers.[179]

IV. The Theory of Philanthropy: The theory of Philanthropy relates to love of men for the welfare of mankind. Philanthropy stands for "Loving mankind." It is built on the belief that man has natural instinctive urge to strive for the removal of the suffering of other and their well-being. With the support of Philanthropists, "in the early years of the Industrial revolution", the labour welfare movement started. Therefore, in the industrial area, the employer has to promote his policies towards the well-being and welfare of his workers.

V. The Theory of Policy: The theory of Policy is based upon the notion that for the welfare and well-being of the labours, a minimum standard is essential. Here, the presumption is that in the absence of a policy and without any compulsion, the employers will never make

[177] V.V. Giri, *Labour Problems in Indian Industry* 457 (Asia Publishing House, Bombay,1972).
[178] Ibid at 462
[179] John M Ivancevich, *Human Resource Management* 698 (Tata McGraw Hill Education Private Limited, New Delhi,2010).

provisions for the workers even for minimum facilities. Obviously, in this theory, assumption is made that man is a self-centred and selfish being. Hence, he will always try to achieve his own aims at the cost of his workers and other people of the society. In case, a proper policy is planned than the managers and the owners of an industrial unit shall have minimum opportunities to exploit the labourers and other working class engaged in that industry.[180]That is why, it is obligatory on the part of the State to intervene and maintain minimum standard for the working class and for the welfare of its employees.

VI. The Theory of Function: The theory of function is also known as the theory of efficiency of labour class. Here, the welfare work acts as a means to preserve, develop and secure the productivity and efficiency of the working class. It is clear that the workers will become more efficient and skilful if the employer takes care of his worker.

VII. The Theory of Public Relation: "In this theory, such a provision is made to create an atmosphere of goodwill between the management of the industry and the labour class and also between the public and the management." The programmes would act as a kind of advertisement in support of an organization that would help in the projection of the good image of the industry which will help to promote healthy and good public relations.[181]

PRINCIPLES OF LABOUR WELFARE

The philosophy of labour welfare is based on a few basic principles. The following are the most important aspects of the lot:

- **Principle of Social Responsibility-** Industries have a common duty to contribute to the betterment of society. Social accountability primarily refers to an industry's obligation to follow strategies, make decisions, and behave in ways that are beneficial and necessary given the society's current circumstances. This theory is founded on the public's view of industry and its role in society, i.e. the government's social duty by industry. Labor health activities are expected to be a representation of an industry's responsibility to its employees. By fulfilling its social responsibility to workers and society, it hoped to gain workers' confidence and cooperation, as well as provide them with job stability, a decent salary, and equitable opportunities for growth and development.[182]

[180] ibid
[181] A.M. Sarma, *Aspects of Labour Welfare and Social Security* 247 (Himalaya Publishing House, Bombay,1985)
[182] R. K Bharadwaj, "Labor Welfare in India: An Overview", 2 IJEEFUS 79-92(2012).

- **Principle of Democratic Values-** The theory of democratic principles for labour welfare recognises that workers will have unmet needs, that industry has a duty to meet those needs with welfare services, and that workers have a right to the form and manner in which these services are given. Participation of workers in the administration in the formulation of welfare programmes to be given. The worker is logical and capable of making mature choices, which is the fundamental premise of this theory and method.
- **Principle of Adequacy of Wages**- The theory of labour welfare is adequacy of pay; it acknowledges that labour welfare programmes are not intended to replace wages, but rather to inspire employers and improve their working and social lives. It would be incorrect to pay poor wages on the grounds that employers are compensated with different labour welfare benefits. The right to a decent income is crucial, and it should be a key component of worker welfare.[183]
- **Principle of Efficiency** - The fourth theory of labour welfare, which focuses on welfare, emphasises the importance of increasing production and competitiveness. Also employers who do not practise corporate justice agree that a company must implement all labour safety policies that maximise productivity. Workers' schooling and preparation for job development, accommodation, health-related services, and safety programmes have long been recognised as the most important facets of labour security for greater worker productivity.
- **Principle of Co- responsibility-** The Principle of Co-Responsibility for Labor Welfare states that employers and employees share responsibility for labour welfare, not just employers. Labor welfare policies would fail to accomplish their goal if the parties' interests and obligations are not shared and accepted at the operational level.
- **Principle of Totality of Welfare-** The premise behind labour welfare policies is that the philosophy of labour welfare must pervade an organization's pyramid and be adopted by all layers of decision-makers.
- **Principle of Re-personalization-** Human production is regarded as the primary goal of labour welfare, which, according to the theory, should mitigate the negative consequences of the industrial mechanism. As a result, it's critical to put in place labour protection programmes both within and outside the factory; businesses must have both intramural and extramural labour welfare services.

[183] M. Vasudeva Moorthy, *Principles of Labour Welfare* 86(Gupta Bros. (Books),1968) .

- **Principle of Co-ordination or Integration**- This is one of the most critical principles for effective welfare programme delivery. To encourage the healthy growth of the industrial grounds, workers, and society, welfare activities require a coordinated approach. It is essential for the growth of industrial relations harmony.[184]

IMPORTANCE OF LABOUR WELFARE SERVICES

1. Improving the health of the worker – Labor welfare offers incentives including preventive insurance, protection from job risks. The numerous medical services provide the staff with improved physical and mental fitness.

2. "Increase in efficiency" – Various welfare programmes build a better working environment and enhance the workers' physical and mental health so that they can enhance their efficiency and performance.

3. "Reduction in labour turnover" – Labour welfare service offers satisfaction to the employees. Satisfied employee have a greater enthusiasm at work. This decreases the instability and absenteeism of labour.

4. "Improving employee's morale" – Labour welfare programme lets the employee feel that they are, and are being needed to look after, an essential part of the organisation. This increases staff morale.

5. Promotion of industrial peace – Welfare programmes aim to sustain harmony in industry. It prevents clashes with labour unions over problems such as unsafe job climate, occupational incidents, dangerous working conditions etc.

6. Providing satisfaction to workers – Welfare services such as accommodation, insurance care, school programmes and leisure amenities for the worker and their family help create contented workers. Health and safety initiatives, better working standards and injury prevention build trust among the staff.

7. Reducing social evils – Improvement of working life 's financial, intellectual, social and cultural conditions saves workers from social evils such as alcohol , gambling, and so on.

8. "Relieve from personal worries" – Labour welfare policy protects the workers' professional and social lives. Welfare services support the working poor and their families alike. Staff are therefore released from their immediate and family problems.[185]

[184] https://www.economicsdiscussion.net/labour/labour-welfare/31839, last accessed on 05 April 2021.

[185] https://www.preservearticles.com/human-resource-management/labour-welfare/31213, last accessed on 05 April 2021.

CLASSIFICATION OF WELFARE FACILITIES:

"The welfare facilities provided to the workers can be classified into different categories. These categories are (i) Statutory measures (ii) Voluntary measures and (iii) Mutual measures."

(i) Statutory Measures: The government's coercive authority results in statutory welfare measures. Employers are required by law to administer the welfare programme. The government enacts laws governing healthcare measures in order to ensure that jobs have a guaranteed level of health and safety. Employers must adhere to basic welfare standards in areas such as hygiene, healthcare, lighting, drinking water, accommodation, sanitation, and so on. For welfare services, the government has enacted stringent regulations.

(ii) Voluntary Measures: Voluntary health measures refer to the practises that employers engage in with their employees on a voluntary basis. Some organisations offer social services that are not mandated by statute, but are provided solely for the purpose of raising the living standards of their employees.

(iii) Mutual Measures: Mutual actions are those taken by employers with the help of labour unions. Some labour unions are also responsible for the well-being of their members.

VARIOUS STATUTORY WELFARE FACILITIES ARE LISTED BELOW:

The Indian government has passed a number of actions to ensure the health of workers employed in various establishments. The welfare measures in different industries are controlled by these acts. Statutory welfare measures are those that are offered as a result of federal legislation. The below are examples of federal health programmes.

"**The Factories Act, 1948**: The welfare amenities provided under this Act are given below:

1. Washing facilities
2. Facilities for storing and dry clothing
3 Sitting facilities for periodic break for employees required to work in a standing place
4. First aid box or cupboards – one for every 150 employees and ambulance services, where more than 500 people are working
5. Canteens if employing more than 250 workers
6. Provides shelter, rest rooms, and lunch quarters, where more than 150 employees are working
7. Crèche, if hires over 30 women."

"The Mines Act, 1952: The mine owners have to fulfil the following obligations regarding health and welfare of their workers: Labour Welfare: An Overview

1. Crèches service, where 50 female employees are working
2. Provision of facilities to take food and relax when employed 150 or more people.
3. Provisions of a canteen in mines employing 250 or more workers.
4. Maintenance of first – aid boxes, first – aid rooms in mines employing more than 150 workers
5. Coal mines provision for (i) pit head baths complete with steam baths; (ii) sanitary latrines; as well as (iii) separate lockers for men and women staff."

"The Plantation Labour Act, 1951: This act requires the following welfare measures to be given to the workers of plantation" :

1. Canteens with 150 or more employees in plantations
2. Crèches employing 150 or more female employees in plantations
3. Leisure activities for the staff and their offspring
4. Educational programmes for young children are provided in the estate, which has 25 youth staff aged 6 to 12.
5. "Housing facilities" for each worker living at the plantation and his / her kin. The requirements and conditions of the housing, the distribution processes and the rent paid by employees shall be specified by the State Governments in the rules.
6. The State Government may establish regulations requiring each planting employer to have such numbers and types of umbrellas, blankets, raincoats or other such facilities as may be required to protect employees from rain or cold.

CONCLUSION

The concept of welfare for labour has been inspired by the concepts of democratic system and welfare state. Labor and its welfare are very valid complaints for any govt in any nation, whether it is developing,underdeveloped, undeveloped or developed. No country's economic growth or preserving the status quo in every country's economic development can be thought of without worrying about the country's workers.

Labour welfare and work satisfaction are various aspects that are vital for guaranteeing the nation's industrial stability, outstanding industrial relations and development. Employers have occupational health services focused on diverse methods and linked to multiple hypotheses. The productivity of workers depends on different variables that dictate how satisfied employees are. Satisfaction with employment is also focused on many hypotheses and is informed by

several think-tanks. When the features of the task correlate with the individual's desires, the work is satisfactory. Employment welfare facilities can achieve the needs of workers and thereby encourage workplace satisfaction.

SUGGESTIONS

The following suggestions are made for the betterment of labour welfare:

1.”Female workers are less aware of the statutory welfare facilities so steps should be taken too aware them on the same.”

2.Modifications are needed in canteen amenities; in order for staff to be able to access hygienic and high-quality food.

3.Improvement is expected in the job of the welfare officer, since most workers are of the view that they do not pay heed to their complaints or concerns.

4. Labour Health Check-up Camp must be held annually in the corporation.

5. Adaptable work plans to be developed by managers and accepted by management to fulfil company responsibilities and at the same time meeting staff's personal life requirements.

INTERNET ERA DOMAIN NAME AND TRADEMARK DISPUTES WITH SPECIAL REFERENCE TO INDIA

- ANJALI NAIR

ABSTRACT

Internet has unfolded its potential and its users are now quite convinced that it is a cost effective, flexible, efficient and viable option to carry out different business activities disregard of any physical or geographical boundaries. But along with the benefits the internet brings into table it is also responsible of various disputes like the issue of conflicts between trademarks and domain names. The conflict between trademarks and domain names is a topic of intensive discussion throughout the world. In light of the benefits the internet has also stormed its share of conflicts with law, especially intellectual property jurisprudence. In this article the author highlights in detail the conflict of trademark and domain name, it discusses in detail the causes and kinds of the disputes and what the legal system has to offer to this condition. Author through this article tries to highlight the issue of dispute between trademark and domain name and also how the laws are inadequate to deal with the issue. Also examines as to how the courts of law have attempted to resolve domain name disputes. The article an attempt to do a broad picture analysis of the current domain name resolution framework and what this means for domain names in general. The article concludes with the same remark and suggestions that might help in settling these disputes.

I. INTRODUCTION

Internet is often described as a "network of networks" because it constitutes of hundreds of thousands of interconnected networks linking billions of devices around the world. The phenomenal growth of the Internet as a commercial medium has brought about a new set of concerns in the realm of intellectual property As the Internet grows in prominence as a venue for business, the Courts will be called upon to apply traditional legal principles to new avenues of commerce. Domain name disputes present such cases.[186] The spread of the Internet has led to an increase in the number of registered domain names - those fashionable '.com' web addresses that have all but transformed modern business. However, it is interesting to note that

[186] Sourabh Ghosh, "Domain Name Disputes and Evaluation of The ICANN's Uniform Domain Name Dispute Resolution Policy" 9 Journal of Intellectual Property Rights 424 (2004)

Internet accessible computer systems actually includes a series of Internet Protocol (IP) numbers rather than domain names.

The Indian Trademark law, as embodied in the Trademarks Act, 1999, allows parallel use of the same trademark by multiple parties, provided such use does not create a likelihood of consumer confusion. On the internet, however, parallel use of the same name is precluded. This restriction has led to a spate of disputes between domain name holders, trademark owners, and private individuals.

It is common practice amongst traders to have their website address and use the same in respect of their goods/services as trade name. In other words the domain name is being used as a trade name or trademark, and the Registrar will, subject to the usual criteria of the Act, permit domain names to be registered as trademarks if otherwise registerable. Elements of the domain name such as ".com" or "co.in" are considered to be totally non-distinctive, much in the same way as "Ltd" and "Plc". As a general rule, the examiner should consider whether the remainder of the mark is descriptive or non-distinctive; if so, there will be an objection under Section 9.[187]

The applicant of a new domain name is required to verify if the given name is already taken. By registration and use of a domain name, entitlement to a trademark may be violated, because the trademark owner holds exclusive right to use it in relation to products or services, for which it was recorded, and exclude from using it all who use identical or similar designations, if similarity could lead to mistaken identity. Though it is not possible to identify a domain name with a commercial name, the trade name can be used as a second-level domain within the framework of the domain name.

II. UNDERSTANDING DOMAIN NAMES & TRADEMARKS

- **Domain Names**

A domain name is a set of Roman characters assigned to an IP address (Internet Protocol address) composed of a series of number, in order to make it easier to remember. Domain names are the unique addresses assigned to particular computers that are connected to the Internet. Without such unique addresses, computers would not be able to send packets of information to the correct location. An important function of domain names is to provide easily recognizable and memorisable names to numerically addressed Internet resources. This abstraction allows any resource to be moved to a different physical location in the address

[187] The draft Manual of Trade Marks Practice and Procedure file:///C:/Users/anjal/OneDrive/Desktop/TM%20Domain%20Name/1_32_1_tmr-draft-manual.pdf (last visited on 14/03/2020).

topology of the network, globally or locally in an intranet. Such a move usually requires changing the IP address of a resource and the corresponding translation of this IP address to and from its domain name. Very simply put, a domain name is the linguistic counterpart of what we call an Internet Protocol (IP) address. Every computer has an address, which is akin to a telephone number.[188]

Domain names are the human-friendly forms of Internet addresses, and are commonly used to find web sites. For example, the domain name wipo.int is used to locate the WIPO web site at https://www.wipo.int or the WIPO Arbitration and Mediation Centre site at https://www.wipo.int/amc/. A domain name also forms the basis of other methods or applications on the Internet, such as file transfer (ftp) or email addresses - for example the email address arbiter.mail@wipo.int is also based on the domain name wipo.int.[189] The top-level domains are divided into two categories: the generic top-level domains (gTLDs) and the country code top-level domains (ccTLDs). The gTLDs .com, .net, .org and the subsequently introduced domains .aero, .biz, .coop, .info, .museum, .name, and .pro are managed by registry operators acting under the authority of the Internet Corporation for Assigned Names and Numbers (ICANN; http://www.icann.org).[190] The ccTLDs are administered by the competent national registration authorities. There are some 243 ccTLDs, each bearing a two-letter country code, for example .fr for France, .jp for Japan or .mx for Mexico.[191]

A domain name is a written representation of a website address, e.g. www.ipindia.nic.in, it is common practice amongst traders to have their website address and use the same in respect of their goods/services as trade name. In other words the domain name is being used as a trade name or trademark, and the Registrar will, subject to the usual criteria of the Act, permit domain names to be registered as trademarks if otherwise registerable. Elements of the domain name such as ".com" or "co.in" are considered to be totally non-distinctive, much in the same way as "Ltd" and "Plc". As a general rule, the examiner should consider whether the remainder of the mark is descriptive or non-distinctive; if so, there will be an objection under Section 9.[192]

The Bombay High Court in *People Interactive (India) Pvt. Ltd. vs. Vivek Pahwa & Ors*[193] held, "*it* [domain name] is *the Internet equivalent of a physical or terrestrial address. It directs a*

[188] Shamnad Basheer, *Information Technology Law in India* 153 (Indian Law Institute, New Delhi, 2004)
[189] https://www.wipo.int/amc/en/center/faq/domains.html#1 (last visited on 14/03/2020).
[190] https://www.wipo.int/export/sites/www/amc/en/docs/guide-en-web.pdf (last visited on 14/03/2020).
[191] *Ibid.*
[192] The draft Manual of Trade Marks Practice and Procedure file:///C:/Users/anjal/OneDrive/Desktop/TM%20Domain%20Name/1_32_1_tmr-draft-manual.pdf (last visited on 14/03/2020).
[193] Notice of Motion No. 1687 of 2015 in Suit No. 846 of 2015, Decided On, 14 September 2016

user to a particular part of the Web where a domain name registrant stores and displays his information, and offers his services."

- **Current Status and Valuation of Domain Names**

Domain names are the gateway to websites. A website is a collection of related web pages typically identified with a common domain name and published on at least one web server. All publicly available websites collectively form the World Wide Web. The valuation of domain names can take place autonomously or jointly. Websites cannot exist without access domains, whereas domain names can be an empty shell, with little if any contents.[194]

The valuation of domain names is complex and is based on several parameters (internal or publicly available from the Web) that derive from the key value drivers described in the following sub-paragraphs. It should be remembered that the value of a web domain depends on its capacity to attract traffic, i.e. visitors, and to transform them into cash generating customers.[195]

Domain names represent the virtual "shop window" of selling agents that want to promote their products or services. Internet population is estimated at about total 130 million throughout the world. About 25.6 percent of the population holds domain name registration.

The value of domain names cannot be under-estimated. Stories of how business.com sold for 7.5 million dollars during the dot-com boom continue to do the rounds. A widespread valuation method for domain name evaluation is the use of earnings multiples (see for instance flippa.com), such as P/E multiples as well as EV/EBITDA and EV/Sales (revenues). Enterprise-Value-to-Sales is a valuation measure that compares the enterprise value of a company to its sales, giving investors an idea of how much it costs to buy the company's sales.[196]

As opposed to the physical world where two or more trademarks are capable of co-existence, the medium of the Internet does not allow for more than one domain name registration. This coupled with the fact that most registrars do not have a system to review a domain name application for the bona fides of an applicant wishing to register a domain name, but rather grant such registration on a first come first served basis, leads many a time to what are commonly referred to as "abusive registrations" i.e. registration by a person of a domain name containing a trademark, in which such person/ entity has no legitimate right or interest.

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[194] Roberto Moro Visconti, "Domain Name Valuation: Internet Traffic Monetization and IT Portfolio Bundling" 2 *SSRN* (2017). available at https://dx.doi.org/10.2139/ssrn.3028534 (last visited on 12/03/2020).
[195] *Id.* at 3.
[196] Shamnad Basheer, *Information Technology Law in India* 154 (Indian Law Institute, New Delhi, 2004).

The domain name serves the same purpose which a trade mark serves and cannot be said to be merely an internet address to identify a particular website.[197]

- **Trademarks**

According to Section 2(zb) of the trademark act,1999: "Trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and—

(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and

(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark;[198]

A trademark (popularly known as brand name) in layman's language is a visual symbol which may be a word signature, name, device, label, numerals or combination of colours used by one undertaking on goods or services or other articles of commerce to distinguish it from other similar goods or services originating from a different undertaking. The legal requirements to register a trademark under the Act are:

- The selected mark should be capable of being represented graphically (that is in the paper form).
- It should be capable of distinguishing the goods or services of one undertaking from those of others.
- It should be used or proposed to be used mark in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services and some person have the right to use the mark with or without identity of that person.[199]

[197] Elizabeth Verkey, *Intellectual Property* 275 (Eastern Book Company,Lucknow,1st Edition,2015)
[198] Section 2(zb) of the Trademarks Act,1999.
[199] http://www.ipindia.nic.in/faq-tm.htm (last visited on 10/03/2020).

A registered trade mark is also infringed when a mark is used in the course of trade but because of: a) Its identity with the registered trade mark and the similarity of the goods or services covered by such registered trademarks; or b) Its similarity to the registered trade mark and the identity and 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; or d) Its likely to cause confusion on the part of public or which is likely to have an association with the registered trade mark. Similarly, a registered trade mark is infringed by a person if he uses such registered trade mark as his trade name or uses such registered trade mark as a part of his trade 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.[200]

III. JUXTAPOSITION OF TRADEMARK AND DOMAIN NAME

The Internet is often called a borderless universe. Since trademarks are protected under the territoriality principle, domain names by their nature ideally should not create any conflict with it. However, domain names now have commercial effects and value as discussed in the previous section. The Internet, throughout the world, causes various disputes, infringement and other, where such unforeseen issues force authorities to deal with them. It has been reported that, in response, steps to settle matters under international treaties and conventions have been investigated.[201]

The dispute arises when the registrant uses the trade mark of somebody else as a domain name by another company or when the registrant is using a domain name confusingly similar to the trade mark of another company or when two or more companies, each with legitimate claims to the name, want to use the same name in their domain names.

The advantages cannot be fully reaped because of the technological constraints. Domain names are based on the principle of "first come first serve" basis and are not caps sensitive. There is no mechanism in place to establish identity of the person interested in registering any name and due to technological constraints, one name can be registered only once in a top level domain name e.g. there will be only one www.bata.com.

[200] M. Tariq Banday, Farooq A. Mir, "Techno-Legal Interplay of Domain Names: A Study with Reference to India"8 *World Academy of Science, Engineering and Technology International Journal of Computer and Information Engineering* 171 (2014).

[201] Sachiko Serita, "Trademark and Domain Name Protection" training material available at www.jpo.go.jp (last visited on 10/03/2020).

It is also important to note that there are fewer formalities with the domain registration system than most trade mark systems and thus less inquiry into the validity of the registration. It should also be noted that even if a company has not formally registered a trade mark they may have common law rights based on actual use and which can be protected by the common law tort of passing off at common law and unfair competition law in civil law systems. Many actions involved both action for breach of a registered trade mark and passing-off.

IV. Role of Courts to Resolve the Conflict

Use of a registered trademark as part of a domain name was considered by the courts as infringing the rights of the registered trademark holder. The domain name serves the same purpose which a trademark serves and cannot be said to be merely an internet address to identify

The question that arose in *Satyam Infoway Ltd. V. Siffynet Solutions (P) Ltd*[202] was whether internet domain names are subject to the legal norms applicable to other intellectual properties such as trademarks. It was held that domain name may have all the characteristics of a trademark and could find an action of passing off. Distinguishing between trademark and Domain Name it was held that the distinction lies in the manner in which the two operates.

The apex Court admitted that there is no legislation in India which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extra territorial and may not allow for adequate protection of domain names, this does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off.

One of the most significant cases in the Indian context has been the *Yahoo case*[203] where the Internet search engine Yahoo! Inc. sued an Internet pirate who had not only copied the domain name Yahooindia.com but had used Yahoo India as a trademark in a similar script on its Web site by offering directory services with information specific to India, and was passing itself off as an extension of Yahoo. The defendant had further copied the contents of the plaintiffs Web page and consequently the HTML code7 associated with the said page. The Delhi High Court granted an injunction restraining him from using Yahoo either as a part of his domain name or as a trade mark or from copying any of the contents of the plaintiffs Web site and thereby infringing Yahoo's copyrights. Specifically, the court held that trade mark law applies with equal force on the Internet as it does in the physical world. Moreover, on account of the ease

[202] *Satyam Infoway Ltd. V. Siffynet Solutions (P) Ltd* (2004)6 SCC145; AIR (2004) SC 340.
[203] Yahoo!Inc. v. Akasb Arora & Anr.[l999 PTC]

of copying, anonymity, ease of access from any corner of the world, the Internet was a medium in which the courts should take a strict view of copying. The potentiality of the harm was far greater because a wrong could be easily propagated to every corner of the world.

In a similar case before the Bombay High Court, in the matter of *Rediff Case*[204], the plaintiff had filed a case of passing off against the defendant, who had adopted the domain name radiff.com as part of their trading style, which was alleged to be deceptively similar to the domain name of the plaintiff, rediff.com. The Court findings in favour of the plaintiff held that since both, the plaintiff and the defendant had a common field of activity, both operated on the net, and both provided information of a similar nature, and both offered a chat line therefore, there is every possibility of an Internet user getting confused and deceived in believing that both domain names belong to one common source and connection although the two belong to two different persons. The Court was satisfied that the defendants have adopted the domain name radiff.com with the intention to trade on the plaintiff's reputation and accordingly the defendant was prohibited from using the said domain name.

In another case[205], before the WIPO Arbitration and Mediation Centre, the dispute was relating to the domain name iffco.com. The defendants had registered the domain name iffco.com and had been using it with good faith. The complainant had domain names related to iffco.com and had a legitimate interest in the domain name. The complainant had alleged the defendant of diverting the net surfers to its own website. However, the Arbitration Centre dismissed the case, as both the parties had legitimate interest in the domain name and the complainant had failed to prove "bad faith" on the part of the defendant. In a similar matter, which came up before the Delhi High Court, in the case[206], the plaintiffs had filed a case of passing off against the defendant, who had adopted the domain name mutualfundindia.com, which was alleged to be deceptively similar to the plaintiffs' domain name, mutualfundsindia.com. However, the Court, dismissed the plaintiffs' contentions, as the plaintiffs had failed to prove that their domain name had acquired a secondary meaning, which is a prima facie requirement to grant a protection to a descriptive name.

A well-known website naukri.com was litigated [207], wherein the plaintiff had registered its domain name naukri.com in 1997 and defendant registered naukari.com and jobsourceIndia.com in 1999 which was objected by the plaintiff on the ground that it is identical

[204] *Rediff Communication Limited* v. *Cyberbooth, A.I.R. 2000 Bom. 27*
[205] *Indian Farmers Fertiliser Cooperation Ltd* v. *International Foodstuffs Co22*
[206] *Online India Capital Co Pvt Ltd & Anr* v. *Dimensions Corporate 2000 PTC 396*
[207] *Info Edge (India) Pvt. Ltd*. v. *Shailesh Gupta*

to or deceptively similar to his (plaintiff's) domain name/ trademark. The dishonesty on the part of defendant is writ large as confusion is sought to be created by the defendant by diverting the Internet traffic from the website of the plaintiff to the website of the defendant. The defendant contended that word "naukri" is a generic word which cannot be protected by trademark law. It was further contended that adjectives are normally descriptive words and nouns are generic words. This contention of the defendant was rejected by the court by concurring with the opinion of Mac Carthy, who said, "parts of speech test does not accurately describe the case law result". Therefore, such a criteria cannot be accepted as a safe and sound basis to ascertain as to whether a particular name is generic or descriptive. The court opined that even generic word is entitled to protection where it has attained distinctiveness and is associated with the plaintiff for considerable time.

In *Zee Case*[208], the defendant registered domain name identical to the trademark "Zee" of the plaintiff. The plaintiff's claimed that the word "Zee" is arbitrary and fanciful word which has been adopted by the plaintiff's in the year 1992 for all its business activities in India and abroad and thus it is not open for the defendants to have got the same name registered as their domain name. The court not only accepted this contention but suggested that a mechanism should be globally put in place wherein the registered trademark holders should be asked to registered the mark with the ICANN accredited registrars with a stipulation that in case any person seeks to register a domain name consisting of the registered mark, no objection would be required to be obtained from the owner of the registered mark.

V. CONCLUSION

A domain name is an identity or name which distinguishes a registrant from another. Internet allows universal access cutting across boundaries. Domain name therefore gives universal exclusivity. No two domain names can be exactly similar. The original role of a domain name was no doubt to provide an address for computers on the internet, but the internet has developed from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for internet communication but also identifies the specific internet site. In the commercial field, each domain name owner provides information/services which are associated with such domain name. Thus, a domain name may pertain to provision of services within the meaning of section

[208] *Zee Telefilms Ltd. & Ors* v. *Zee Kathmandu &Ors* 2006 (32) PTC 470

2(1)(z) of the 1999 Act. A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise not only because it facilitates the ability of consumers to navigate the Internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify its corresponding Internet location.

In India it is now well settled that domain names are to be protected on the same lines as trademarks. The cases had started happening early enough in about 1996, when Tanishq' complained of an unconnected and unauthorized person who had registered 'tanishq.com' who was consequently restrained by an injunction. From that time onwards, a line of cases spanning in various high courts, similar judgments were pronounced. In May, 2004 the Supreme Court in the case of *Satyam Infoway* has laid down that Indian courts shall protect domain names on the legal principles applicable of trademarks and trade names.[209]

The Supreme Court in the case[210] gave mandate to the subordinate courts to follow UDRP which was reasoned as; a domain name is potentially accessible irrespective of the geographical location of the consumers. The outcome of this potential for universal connectivity is not only that a domain name would require worldwide exclusivity but also that national laws might be inadequate to effectively protect a domain name. The lacuna necessitated international regulation of the domain name system. This international regulation was effected through WIPO and ICANN. India is one of the 171 states of the world, which are members of WIPO. This has established a system of registration, while this registration may not have the same consequences as registration under the Trade Marks Act, 1999; nevertheless it at least evidences recognized users of a mark. Besides, the UDRP is instructive as to kind of rights which a domain name owner may have upon registration with ICANN accredited registrars.

[209] *Rajat Agarwal and Ors.* v. *Spartan Online Pvt. Ltd. and Ors. (12.05.2017 - CALHC) : MANU/WB/0340/2017*
[210] *StyamInfowayLtd.* v. *Sifynet Solutions Pvt. Ltd. (2004 (28) PTC 566 (SC).*

CHARTING OUT THE AFFLICTION TO THE FEDERAL STRUCTURE OF INDIA

- SIMRAN KAUR

ABSTRACT

The Constitution of India is the final yardstick to assess the scale of digression of a nation and from the ethos which are imprinted in and echo from it. Federalism is a formidable feature of the political system, a mode of governance that has sustained India. It is responsible for running a democratic order and polity on fair lines. To achieve the progress of a nation while saving it from fragmentation and erosion of the Constitutional values requires both the states and centre to propel the mandate of Federalism which is not in denigration of the powers which the Constitution bestows them with. Proportionality and Peace is enmeshed in the whole labyrinth of our Constitution hence a sound communication among institutions, Centre, States is a necessity to retain the supremacy of the Rule of Law ordained by the Law of the Land.

This paper shall give an insight into the recent trends which have created deep seated fissure lines running between Centre and States. It shall delineate structural working within the ambit of twin elements of Decentralization and Centralization and whether it has hampered the right to development and governance of states and reflecting the efficacy of Federalism in totality?

I. INTRODUCTION

To understand the magnitude of riddles in the current discourse, it is significantly crucial to give a meaning and inspire confidence in the spirit of the Constitution. The disparate gaps in governance which more often than not arises out of an apparent lack of constitutional coordination long overhauling the progress of institutions which are either the direct creation of the Constitution or are institutions whose working depends on Constitutional Institutions, can be colossal.

While a slight lack of Constitutional Coordination can go ignored for it doesn't pose a grave threat as much as altogether subverting the essence of values that the Constitution implores and stands tall on, does in the long term. There are a host of constitutionally assigned duties which every actor in the entire political ecosystem of the country is bound to adhere to and advance in the best interests of the nation. Around this, our Constitution does the task of ensuring and attaining a state of equilibrium in the country which encompasses all forms of political activity, decision making and policy churns. This paper shall investigate as to how the Constitution over

the course of time has prodded and has been instrumental in definitively defining the power dynamics into the paradigm of Federalism. It is pertinent to expound the principles beneath the spectrum which lays down a robust modus operandi for operation of Federalism and seep into an investigation of the recent past which has witnessed tremendous changes in these frontiers on which Federalism has to command its position to work as a lubricant between the Centre and States.

The Doctrine of basic structure came into formal existence with the penning down of the landmark judgment, Keshavananda Bharati v. State of Kerala[211] wherein Justice S.M Sikri held that the Federal character of the Constitution was one of the basic principles and was declared to be immune from Parliament's power to amend the Constitution under Article 368. The Basic structure doctrine is a conclusive determination based on constitutional findings which has figuratively defined the limits on the powers of the government to enact laws that are not in derogation to the essence that comprises the pith of the Constitution. Ever since that, the doctrine of basic structure has been subject to varied interpretation bringing into purview, its importance and dimensions time and again[212]. Further in State of Karnataka v. Union of India[213] it was held that the Constitution contains a carefully conceived demarcation of powers between the Central Government and State Governments, and one must read into the Constitutional distribution of powers as well as the provisions which are not to be found therein but may seemingly flow logically from what the Constitution provides for in express terms. Our Constitution barrels towards retaining the basis of the rule of law and balances the scales of democratic power[214]. It closely keeps a wind of order of the symmetry between the three separate branches of the Government. It envisions a healthy and fair relation between several units to avert political disintegration and threat to its integral sovereignty. For this harmony, it works on principles such as Federalism which are not explicitly named in any of the Articles dealing with relations between the Centre and States but whose working shall reek of the inverted forms of preaching federalism.

Examining the vast extent of Federalism and the landscape where its foreplay with factors like political climate comes into effect is essential to draw an analogy of the ever changing frontiers at an accelerated pace. The contours of Legal and Political Sovereignty around which administrative Units shall function are abundantly dealt by the Constitution. Federalism does

[211] *Keshavnanda Bharti v Union of India*, (1973) 4 S.C.C. 225.
[212] *Supreme Court Advocates-on-Record Assn. v. Union of India,* (2016) 5 SCC 1.
[213] *State of Karnataka v Union of India*, (1977) 4 S.C.C. 608.
[214] Zia Mody, *10 Judgments that Changed India*, 8-9 (Penguin Random House India, Shoba De Books, 2013)

not trample upon fundamental political integrity of the states however all the member states have to act in unison with the Central Policy[215]. The preamble to the constitution strongly implies that the legal and political sovereignty which primarily vests with the people of India is neatly distributed between the centre and the state[216]. After comparison of India's federal structure with that of the United States, India comes across as not a truly federal country. Our constitution however makes it clear that there is whatsoever, no inherent sovereign or autonomous form of power enjoyed by the states that cannot be encroached upon by the centre[217]. Perhaps this constitutional position has lent credence to several of the central decisions on policy making and law making taking place which is applicable across India.

In the constitutional vocabulary the federal structure has more appropriately been described as a quasi-federal structure which is a mixture of both federal and unitary elements. It means that states are sovereign in the well defined fields of governance assigned to them which thereby means that neither they are satellites of the Centre nor they are the agents of the centre[218]. The practical implication of variedly complicated constitutional interpretations holds more value than the design of language laid down in several articles of the constitution which detail about federalism directly or indirectly.

Federalism serves out of a plethora of mandates, a dual purpose and that is of self reliance under the aegis of the ultimate interests of the nation. This inadvertently means that the Centre has been given core areas and domains of governance. It functions like a lubricant to generate the mammoth of strength to regulate the affairs of the Country as diverse as India. Federalism is not a mere matter of political bargaining but a consistent sound political and economic culture that needs to be inculcated throughout. It is a form of institutional arrangement which ensures self rule in consonance with the motto of advancing the subject hood of the constitution. It is the key component of the political system that exhibits elements of democratic governance and equal accountability. No doubt there are complex political constraints on the vast political territory but what matters is that the outline of federalism shall be rooted in the constitutional framework. Taking a cue from it hereby means that federalism as a functional instrument shall derive its authority and legitimacy from the constitution and not practiced on political whim.

[215] Sujit Choudhry, Madhav Khosla*,et.al.*(eds.), *The Oxford Handbook of the Indian Constitution,*485 (Oxford University Press, Delhi, 2016)
[216] *S.R Bommai v Union of India*, (1994) 3 S.C.C. 1.
[217] ibid
[218] ibid

The same has been recognized and imprinted by way of a spectrum of case laws by the Apex Court. Foremost being in the case[219] it was noted that Indian Union is diversely federal. The extent of federalism is justifiably watered down by the obvious needs of progress and development of a country and crucial for national integration of the country as well. What it implies is that states perhaps cannot stand in the way of a legitimate and comprehensive planned development of the Country which is regulated and defined by the Central Government.

The outward appearance of the provisions within our Constitution can imply multiple meanings but what is crucial is that the operations are ultimately judged by twin standards. First being the contents of power which a number of provisions entail and in ordinary practice their use being regarded as more Unitary than Federal. The breakthrough observation of the whole case was its remark that the desire to unite is indispensable for federalism but cannot be stretched to the limit that it creates an integrated whole which churns out governance on all substantial matters of the Government. It is then embracing a unitary form of Constitution. The judgment relied on the words of the Father of our Constitution Dr. Ambedkar who stated that our Constitution is federal "*in as much as it establishes what may be called a Dual Polity." He further went on to say in the Constituent Assembly explaining the rationale of the Constitution makers who deliberately avoided a" tight module of federalism"* unlike the American Constitution which formally encapsulated the strict and tight form of federalism[220]. All in all for him, the principle architect of the Constitution he strongly held that the Constitution to be unitary as well as federal as per the peculiar circumstances and demand of the time. The biggest take away from this case law is the multifaceted view it sheds on Federalism and the way it shall pan out.

In his last speech made to the Constituent Assembly, he went on to say that the Constitution assuredly accords too large a field to Centre for the operation of its legislative and executive authority unlike in any federal constitution of the world. It is however not to be mistaken that states have been placed under the domination of Centre[221]. From the notes touched upon by the founding father, it is to be kept in mind that the Centre has not been allowed to enjoy an absolute degree of having an overriding factor in matters of governance over issues in which states also had their stake, for the whole purpose of Federalism would become futile if it has to oscillate

[219] *State of Rajasthan v Union of India,* (1978) 1 S.C.R. 1.
[220] ibid (https://indiankanoon.org/doc/174974/)
[221] The Wire Staff, Lessons For Today in Ambedkar's Last Address to the Constituent Assembly, The Wire, available at:https://thewire.in/government/ambedkar-constitution-assembly-democracy (last visited on May 25, 2020).

completely in favor of the side responsible for executing formidable matters of national importance. Our Constitution offers a relatively balanced model for both the Centre and State to work.

Delineation on Constitutional Amendments which have a bearing on the federal structure of the country becomes necessary. Amendments are the giving of the flexible nature of our Constitution, and are instrumental in forging a renewed culture of Constitutionalism which reinvents the standpoints from which errors in Constitutional obedience were detected. It implores strong values of cooperation which forges fraternity and a strong spirit of nationhood. It lays down a roadmap for fair government functioning and sound democratic governance. The beauty of the Constitution is personified through several of the constitutional amendments which are made under Article 368. Amendments have constantly strived to be an embodiment of change, a change which doesn't lose out or perhaps compromises on the essential tenets of the Constitution. Constitutional Amendments have in their own capacities, sculpted the outlook of constitution towards socio political discourse with every passing time. Having far long term political ramifications, they are nevertheless a holistic attempt of addressing a web that is entangled or perhaps entrenched in an ambiguous understanding of proportionality. Now, they can be as significant or immaterial as merely tweaking some parts or provisions or as monumental as giving it an altogether meaning itself. But above all they are instrumental in igniting a deep sense of judicial thinking which further reflects itself in the manner in which judges choose to interpret the law at large. The same amount of nuance and promise however is difficult to be found in a statutory amendment per se, it however does not have the luxury to run away from the Constitutional substance that it has to carry in its skeleton.

II. Mapping the Dented Changes

A very recent Amendment that has been introduced in the public domain is the Citizenship Amendment Act which radically and in an unabated form, seeks to change the demographic landscape of the country. What was however surprising was the lack of consultation with the states in taking such a huge step which impacts the minutest level of social life of a citizen up till the affecting India's global standing particularly on the Humanitarian Front. It lists out the Countries from which minorities shall be given citizenship and which countries whose minorities will not be accorded Indian Citizenship[222].

[222] Citizenship Amendment Act 2019: All You Need to Know, Live Mint, *available at*: https://www.livemint.com/news/india/citizenship-amendment-act-2019-all-you-need-to-know-11576401546515.html (last visited on Jan 20, 2020)

Citizenship Amendment Act also unpredictably and inexplicably brought about an unprecedented tussle between the states and the Centre to the fore not just in terms of a legal dispute which was brought before the Apex Court but a deeply decisive and arbitrary confrontation. Eventually, several states passed motions in state assemblies opposing the CAA-NRC on the basis that it grades citizens[223]. Ever since the opposition against the Citizenship Amendment Act and its likely alignment with the National Register of Citizens has gained rhythm there is a completely different wavelength that has had a deep impact on the pattern of federalism. On the Federalism Front, it raises several questions about the role states get to play in the implementation of the Act as well as the executive execution. The opposing states have cited differences with the centre on several issues in the operation of CAA and National Population Register which is a pre documentation of citizens residing in India for the purpose of carrying out a disfranchisement procedure thus culminating into a dispute. As for ambiguity over jurisdictional matters, the 2014 bench comprising Justices Chelameswar and SA Bobdey came to the conclusion that a state can challenge a central law under Article 131. The Supreme Court adjudicates upon a matter of legal right that is the main bone of contention between the Centre and the State. Awaiting the decision which shall be binding on the state and the centre it is a matter of great seriousness that states go on to thwart the implementation of CAA within their states. Looking outside the purview of Article 131 which is primarily a result of constitutional visualization of the likely disputes to arise between the centre and the states, the states are given the liberty to oppose the onslaught of a central law[224]. Introducing a Law on Citizenship entails revisiting the Articles in the Constitution detailing it. It thereby means that organically the law cannot be in contradiction to the Constitutional mandate and to make law on a subject over whom the Constitution has already delved into, a Constitutional amendment is inadvertent.

India is so richly diverse with countless ethnic identities, languages, that a decision which carries the potential to change the demographic landscape in parts shall have social consequences for states which houses minority communities in particular. It is stepping beyond the constitutionally prescribed limit of overlapping matters of governance that fall in the respective spheres of centre and the state, because it overwhelmingly a divisive policy of the

[223]Samyak Pandey, 11 state governments, representing 56% of India, have now taken a 'no-NRC' stance, The Print, *available at*: https://theprint.in/india/11-state-govts-representing-56-of-india-have-now-taken-a-no-nrc-stance/340213/ (last visited on May 24, 2020).

[224] KunwarBir Singh, The Jurisdiction of the Supreme Court regarding refusal by states to implement the Citizenship Amendment Act, 2019, Legum Vox, *available at*: https://www.legumvox.in/2020/02/the-jurisdiction-of-supreme-court.html?m=1 (last visited on May 26, 2020).

Centre which tacitly encompasses the will of the State to carry it out even when States have gone against it before its implementation. The Central Government forbears the pervasiveness of "Cooperative Federalism", which is dampened down by its own political creed to centralize and amass power in its hand[225].

III. Disturbing Narrative of Fiscal Federalism

Fiscal Federalism is another fulcrum on which federalism is tested very regularly for it has to tread to retain economic stability of the nation. The whole basis of fiscal federalism underwent a monumental change with the onset of the 101st Constitutional Amendment, giving birth to a new taxation system which established the Goods and Services Tax regime**.** It is important to note that the powers of taxation which are vested with the Union are mostly based on considerations of convenience of imposition rather than sole domination to be procured by the Union in lieu of these powers. The Constitutional makers did not intend the spending of all taxes by the Centre for its own purposes but the same to be also constructively directed for subsidizing state activities. It was their vision in realizing that the sources of revenue which fall within the purview of the states in all probability cannot prove to be sufficient in the wake of ever growing welfare and developmental activities. This formulation of thought points towards a certain flexibility flowing from the working of the Constitution in respect of the distribution of financial resources among different layers of the body of Government. The norm is that all revenue that accrues to the States from the taxes is used by them, but all taxes levied by the Centre are not meant for its exclusive use. The Centre is obligated to share some of its taxes with the States. The very objective is to maintain a balance and remove the disparity of economic resources between the States thus stabilizing the financial relations between the Union and the states.

With regard to the comparative analysis, on lines of the balance to be attained in the gamut of Fiscal Federalism, The Royal Commission of Taxation, Canada in its report commented that "Unless the allocation of the burden is generally accepted as fair, the social and political fabric of a country is weakened and can be destroyed. We are convinced that scrupulous fairness in taxation must override all other objectives"[226]. Since India borrows a strong semblance from Canada as far its federal structure is concerned, the take on allocation and sharing of burden

[225] Ambar Kumar Ghosh, The Paradox of 'Centralised Federalism' : An Analysis of the Challenges to India's Federal Design, *available at*: https://www-orfonline-org.cdn.ampproject.org/c/s/www.orfonline.org/research/the-paradox-of-centralised-federalism/?amp (last visited on September 20, 2020).

[226] R.W. Houghton, *Public Finance* 143 (2d ed. 1973)

becomes imperative to inculcate in practice. The states' revenue mainly accrues from four main sources which are the income generated by powers to tax derived from the 7th Schedule, transfers allocated by the finance commission under Article 275, the transfer that occur from the planning commission and lastly from central Ministry budget to the States taking the form of grants and loans[227]. And with this States are supposed to write their own development trajectory. But the current discourse has made an alteration as states have crippled out on their revenue collection despite having a provision in GST Law which mentions about the states being compensated by the Centre for losses[228]. The all over narrative however is that states have loosen out on their financial autonomy and a bulk of their revenue depends on a host of economic and political contingencies in control of the Centre, to say the least which whittles down fairness as being a prerequisite for tax related matters[229].

Transcending to another essential attribute of fiscal federalism is the current situation in which states are placed with respect to sharing of resources in the lockdown period brought by the deadly pandemic of COVID-19. It has been touted as a susceptible misuse of the current situation by the Centre to extend its domain of powers which were in the share of states and thus compromising the principle of Federalism. The notion of fair play in as far as sharing of resources is concerned has seen a sharp decline specifically during the pandemic period. Two reasons are attributable to this predicament. The first being centre not releasing the shares of GST dues and the second being the sources of revenue for state's earning which is excise on alcohol sales has been damaged owing to the lockdown. All hopes were therefore set on the mechanism of fiscal responsibility and budget management act whose borrowing limits had been relaxed from 3 to 5% by the centre. It has resulted in a tight position wherein to avail this fiscal borrowing which is upto 5% states have to fulfill rather unrealistic conditions given the precarious economic condition which is to promote one nation and one ration card, performing well on ease of doing business, developing state owned power companies to be more profitable by bringing in reforms and increasing revenues of urban local bodies[230]. This poses a deeply critical question about the state's ability to meet up these demands in order to revamp their financial capacities and paints a deplorable picture of the states battling for finances from the

[227] Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), *The Oxford Companion to Politics in India*, 52, (Oxford University Press, 2011).

[228] GST Comppensation to States, Tax Guru, *available at:*https://taxguru.in/goods-and-service-tax/gst-compensation-states.html (last visited on May 25, 2020).

[229] Pratap Bhanu Mehta, GST: A Constitutional Adventure, India Express *available at*: https://indianexpress.com/article/opinion/columns/indian-eonomic-reforms-institutionalisation-of-the-gst-regime-a-constitutional-adventure-2956335/ (last visited on May 23, 2020).

[230] Saba Naqvi, Centre has shown scant regards for the states, May 21, 2020, The Tribune at 09.

Centre. In the backdrop of centre deciding the rules and procedures which determine what commodities are not to be sold and what economic activities are to be shut amidst this lockdown period most of which comes in the domain of the state, comes across as redefining federalism in contravention to what the constitution defines. Even the dismantling of MPLADS scheme for two years and deciding to put the money into consolidated funds of India strikes at the spirit of cooperative federalism and is tantamount to centre handing out containing disaster management to states after somehow being a part of creation of crisis. The pandemic has tilted the scales of balance on which hinged the core of federalism and federal Arrangements on multiple counts[231].

After the passing of the GST Constitutional Amendment, the Centre and the States have lost the legislative power to independently levy indirect taxes. Both levy the GST jointly, as a common indirect tax however, states have lost the power to independently frame their indirect tax policy, and are bound by the decisions of the GST Council as the decision making of body works as per the Centre's assent[232]. The Centre devised a legal commitment to compensate the states by way of enacting an act which sets a minimum level in case of dearth of revenue, but continues to dilute its mandate. On the other hand, tax buoyancy which is the ratio of change in centre's gross total revenue and change in GDP has fallen sharply between 2017-18 and 2019-20,it was 0.16 in 2016-17, 0.12 in 2017-18, 0.09 in 2018-19 and -0.05 in 2019-20. Hence negative tax buoyancy in a period of positive GDP growth implies that taxes actually fell even though GDP was rising, reducing the Centre's ability to raise revenue and impact the states' share which have been most deprived[233].

With regard to federal division of power, India subscribed to the "*regulatory and interventionist model*", which outlines that the Union and States operate in their own exclusive legislative domains and any interference from the Union government is prohibited, unless expressly provided in the Constitution. The dispersed power of operations as opposed to

[231]Anirudh Burman, How COVID-19 is Changing Indian Federalism, *available at*: https://carnegieindia.org/2020/07/28/how-covid-19-is-changing-indian-federalism-pub-82382 (last visited on October 1, 2020).

[232]The Imbalance of Power, Breaking down the GST Compensation Dispute, *available at:* https://theimbalanceofpower.blogspot.com/2020/10/breaking-down-gst-compensation-dispute.html (last visited on October 15, 2020).

[233] Roshon Kishore, India's fiscal federalism crisis is not the Pandemic's creation, *available at:* https://www.hindustantimes.com/india-news/india-s-fiscal-federalism-crisis-is-not-the-pandemic-s-creation/story-xGx0OgajpML1r80O4kvKdK.html?utm_source=browser_notifications&utm_medium=Browser&utm_campaign=notification (last visited on October 16, 2020)

relative chipping away at functional autonomy to execute power has struck really hard at the heart of federalism. In the domain of Labor Law Amendments that spurred across several states, the Central government made alterations by allowing states to override existing labor legislations to arbitrarily undermine the remedies and rights pertaining to the population engaged in labor[234].

IV. Usurpation of Power shrouding Federalism

To hark back at the remodeling of edges of federalism, it is pertinent to note that the Union is not 'sovereign' and its power to ensure compliance with central laws is sourced and limited by the Constitution, hence the requirement of Policy implementation of Centre by the states does not give a reason to it to assume unaccounted for paramountcy[235]. Federalism undoubtedly creates a unique power paradigm in which two differently placed entities interact. It cannot obviously follow a blind folded path of equality and equal claim over resources lest it goes against a fundamental control that vests with the Centre.

It has been further accentuated by the recent proposal of Amendment which will be the Electricity Bill 2019. The Central Government is proposing to amend the Electricity Act 2003 listing out fundamental changes to the system which operates the Electricity Act along with its established institutions. Electricity falls under the Concurrent List which is the Third List in the Seventh Schedule of the Constitution. The state electricity regulatory bodies are the Constitutional Authorities to regulate the matters related to Electricity in the respective states. As per the present provisions in the Act, the Chairperson and members of the State Regulatory Commissions are appointed through a Committee constituted by the state governments. With the changes sought to be introduced by the Bill, these powerful appointments shall be made by a National Level Committee having maximum Central Representation. The State Regulatory Commissions also stand to lose powers to adjudicate upon matters between generators of electricity and the licensees which now shall rest with a new National Level Body named as Electricity Contract Agreement Authority. The state load dispatch centers have been debarred from scheduling energy unless there is a payment security mechanism of the Generators Bills'

[234]Pratap Bhanu Mehta, Ordinances by states to Change labour laws are a travesty, *available at*:https://indianexpress.com/article/opinion/columns/industrial-relations-code-india-labour-law-amendment-pratap-bhanu-mehta-6405265/ (last visited on October 20, 2020).

[235] Anubhav Khamroi, Federalism and COVID-19: Analyzing the "National Importance" Justification of Centre, *available at*:https://lawschoolpolicyreview.com/2020/08/08/federalism-and-covid-19-analysing-the-national-importance-justification-of-the-centre/ (last visited on October 21, 2020).

in place[236]. Matters in Concurrent List have always given a chance to the Centre to extend its domain of exercising residuary power[237].The Bill clearly disrupts the power of the states by taking away the powers of the states and assigning those roles to itself leaving states with virtually no say in matters of appointment and takes the autonomy of Centre in Concurrent List to another level. It is tantamount to puncturing the interface of federalism on which self rule interacts with shared rule.

The scheme of Liberalization advocated by the Centre that the three Farm Bills propel also is a prime example of an attempt to redefine Federalism. Agriculture being a state subject, in all probability Centre cannot amass power to legislate on domains covered by states except for constitutionally prescribed reasons. Decentralization and Centralization are two concomitants and facets that embody federalism. What the current times behold perhaps is the bold unfettered centralization whilst the crumbling down of decentralization which was responsible for bringing states on a pedestal wherein they could advance their demands and enforce the same against the Centre. India's major substantive and procedural internal security laws had undergone a sort of complete Amendment also pointing out towards a new isolated front of federalism which Centre is carving out for itself. While UAPA has traditionally always been the hallmark for sole Union Control, it is the change made in the method of investigation adopted by NIA which shall go down to affect the fabric of federalism. The Amendment expands the powers of investigative machinery under NIA to investigate matters mentioned in the Schedule of the Act. It is empowered to investigate on crimes emanated from drug and human trafficking across India[238]. With an already miniscule role of states that they have in working with the Central Investigating Agency, including crimes like drug and human trafficking which is no doubt a huge and dark facet of Organized Crime is further undermining the control of states over their machinery for dealing with crimes within their territory lowering chances of timely effective deliverance of justice[239]

[236] Anupam Chatterjee, Draft Electricity (Amendment) Bill 2020 :Proposals brighten outlook for sector, Financial Express, *available at:* https://www.financialexpress.com/industry/draft-electricity-amendment-bill-2020-proposals-brighten-outlook-for-sector/1947156/ (last visited on May 26, 2020).

[237] Acharya Dr Durga Das Basu, *Introduction to the Constitution of India*, 363 (Lexis Nexis Publication, 22nd Edition, 2015)

[238] Ministry of Home Affairs, The National Investigation Agency (Amendment) Bill, 2019, PRS Legislative Research, *available at*: https://www.prsindia.org/billtrack/national-investigation-agency-amendment-bill-2019 (last visited on May 28, 2020).

[239] Aakar Patel, UAPA (Amendment) Bill 2019 violates the very International laws it quotes, defies principles of natural justice, *available at*: https://www.firstpost.com/india/uapa-amendment-bill-2019-violates-the-

The deep seated ramifications for the Rule of Law are alarmingly grave, in the hour of weakening of the fabric of federalism. Federalism has been incorporated as an instrument of social adjustment for the resolution of deeply diverse conflicts and barriers. However now, its dented structure constitutes to be one of the many manifold crises that India currently faces. The invocation of the Disaster Management Act which considerably denuded the power of states to act in a way that was best for local contexts while giving overwhelming powers to the Centre to lay down an unequivocal policy framework for a completely unpredictable set of situations[240].

To maintain the Constitutional Tenor it is important for federalism to not function in a diabolic or patent ambiguous manner. It is the axis around which the full circle of rule of law revolves and any rupturing effect to it can have grave consequences for the democratic rubric as a whole. To draw conclusively that the current frontiers of federalism have been shelling out a narrative which is in contradiction to the Constitutional spirit and in subversion to liberal democracy, is not an exaggeration. In the backdrop of redrawing Frontiers of Federalism, India cannot afford to scramble its core federal structure. The institutional construct of Federalism has been designed to function on a collaborative and cooperative basis which has suffered a great deal of harm.

By rapidly moving towards centralizing pieces of legislation in socio economic realm and leveraging the domination of executive machinery to proceed with, is not only altering the valves and contours of federalism that are constitutionally marked but arbitrarily excluding inclusivity from the whole process of development that takes shape within the sphere of Federalism.

very-international-laws-it-quotes-defies-principles-of-natural-justice-7104391.html (last visited on May 29, 2020).

[240] Ramachandra Guha, The Darkest Hours, The Telegraph Online Edition, *available at:*, https://www.telegraphindia.com/opinion/coronavirus-a-six-fold-crisis-confronts-india/cid/1775032?ref=opinion_opinion-page&fbclid=IwAR2xtDMemUuJlQBml5uRpMDIMWT7n7bSx9h5ySjpET2Ij6lD65yHe5Wc1-I. (last visited on May 20, 2020).

MARITAL RAPE- A CRIME UNDEFINED

- SHALMOLI GHOSH

ABSTRACT

Humankind remains on two pillars, men and women, they ought to have equivalent significance and part in its turn of events and development, however women have consistently been exposed to a great deal of mortification by men, sexual offence is a well-suited case of the monstrosities submitted against the poise of ladies. The offense of Rape is one of the most frightful and boorish wrongdoings executed against ladies. Marital Rape, however not characterized as a crime, in India it is one of the most disputable and unique issues. Women have been treated as an object of joy since days of yore. They have been survivors of wrongdoings like sexual harassment, acid attack, kidnapping and abduction, cruelty by husband, dowry death, female child murder, rape, sodomy and so on. As of late, where the overall population is battling for equivalent rights for men and women, the pace of wrongdoing against women is multiplying. Rape is a crime because of which women everywhere all over the world are languishing. Different nations have made an honest effort in making laws for the security of women. India is putting emphasis on protection of women against various crimes, however neglects to shield a wedded lady from her attacker who evidently in such cases is her significant other, by not having any legal provisions that recognizes marital rape as a crime. The research paper submits that there is requirement for immediate criminalization of marital rape and elucidate the failure of the legal system in India by not defining marital rape as a punishable offence that scars the victim for the rest of her life.

MEANING OF MARITAL RAPE

The word ‘rape’ has been derived from a Latin word ‘raptus’ which refers to the act by one man of wrecking the property of another man. Here, property means wife or daughter of another man.[241] In other words, rape is an illegal sexual activity carried out under threat or coercion. Rape and marital rape are altogether two different concepts and cannot be used interchangeably.

Marital rape is the act of sexual intercourse between a man and a woman, who in the eyes of the law are husband and wife where the women does not give assent for such act. Marriage is a formal social and legal union between two individuals in which both of them pledge to live

[241] https://legal-dictionary.thefreedictionary.com/Marital+rape

together in both happiness and torment. Marriage also gives a right to the couple to legalize the consummation of their marriage. But marriage is not just a physical union, it is an unbreakable spiritual and emotional bond between a husband and a wife. As per old Hindu sacred scriptures wives are called 'Ardhangini' because no religious rites and rituals carried out by a man are considered to be complete without his wife. Women are supposed to be given equal importance but with reference to recent times, offences against women are proliferating. According to National Crime Records Bureau of India, a crime against a woman is committed every three minutes.[242] The different criminal monstrosities against women are sexual harassment, forced prostitution, trafficking, rape. Marital rape is another heinous offence against women hidden in the veil of marriage. Marital rape is also known as conjugal rape or wife rape. The absence of assent is the basic component and need not include physical brutality. Marriage is considered to be an implied consent from the wife and is compelled to have sexual intercourse with her spouse. This roots back to that age of the historical backdrop of humanity when women were contemplated as property of their significant other. A legal principle of coverture also alludes a woman as a property of her husband and denies her substantial uprightness subsequently striking a blow at her rights. Conjugal assault is viewed as a type of aggressive behaviour at home and sexual maltreatment. Even today, Indian judiciary does not recognize marital rape as a crime. Marriage does not provide a husband an ultimate right to forcefully have sex with his wife just because of a mere wedlock. The right to involve in any kind of sexual activity must be consensual and not an obligation on the party of the wife. The wife ought to have freedom to decline to have intercourse and cannot be constrained by her husband.

EFFECTS OF MARITAL RAPE

Rape is itself an abominable offence violating her nobility and dignity and when it happens within the four walls of a marital home, it reduces the status of a woman to a bare object for sexual delight. Marital rape anguishes a woman as she has to silently endure the unbearable pain all by herself. This quietness has as impeding impact on the woman's mental and physical wellbeing. There has always been a false notion that marital or wife rape is less distressing but it is actually a myth. Marital rape shows the perversity of the husband and the ramification of marital rape is frivolous due to the basic certainty that the rapist is none other than her husband whom she had expected to be there beside her always.

[242] https://www.who.int/

The aftermath of marital rape is lethal. The victims can experience post-traumatic stress disorder, depression, flashbacks- memories of rape as if it was taking place again, personality problems, suicide attempts and intentional self-harm (ISH), sleep disorder, eating disorder, anger and guilt. Ann Wolbert Burgess and Lynda Lytle Holmstrom identified a syndrome known as Rape Trauma Syndrome (RTS) which has two phases – a) acute or initial phase that lasts for few days or few weeks and b) reorganization phase that lasts for months or even several years. The effect of marital rape can be categorised into physical effects and psychological Effects. Physical effects include injuries in private parts, bleeding around vaginal and anal areas, bruises on breasts and inner thighs, fatigue, painful intercourse, urinary tract infection, unwanted pregnancy and different sexually transmitted diseases like HIV, Genital warts, Syphilis, Gonorrhoea, Chlamydia. Psychological effects include shock, fear, anxiety and suicidal tendencies, sexual dysfunction and depression.[243]

Women are victim of subordination from time immemorial yet in recent times they have achieved new heights in different spheres of life overcoming all the hurdles. But this does not change the fact that women are oppressed in many ways in the male dominated society. Patriarchy which literally means 'rule of the father' is the main hindrance in a woman's advancement and the sole reason behind discrimination against women. This oppression destroys the self-confidence and self-esteem of every women and puts a bar on her dreams and aspirations. As a matter of fact, women are expected to act regardless of her choice and conscious. They are often regarded as belonging to others with no identity of her own. According to many religious and social beliefs wives are expected to be in the role of 'pavitra stri' having no opinion of their own. All these social practices and customs gives male ego a boon and they start believing that they can do whatever they want with their legally wedded wives. It is in their conscious that marriage is the implied consent and if after marriage the wife refuses to have intercourse, it is no wrong to force her for having sexual intercourse. Men do not realise that having sex with someone without consent is called rape which means ravishing or violating that woman. When one thinks of the word rape, it is a common tendency to associate it with a stranger or some other malevolent individual. Even a woman herself cannot imagine that she can be raped by her husband with whom she expected to live a lifetime of happiness. Typically, one does not consider rape with regards to marriage but this does not change the reality that forcefully having intercourse with his own wife against her will is also rape because marriage is not an implied consent for sex and even after marriage both the

[243] https://www.ncbi.nlm.nih.gov/

husband and the wife are two different individuals with different preferences and opinions. The Delhi High Court while hearing petitions on making marital rape a punishable offence stated that "Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party".[244] On the other hand, the other bench with Acting Chief Justice Gita Mittal and C Hari Shankar stated that marriage gives the right to both man and woman to say no to physical relations. This is a highly debatable topic and conclusions are yet to be reached on this matter which denounces the shortcomings of the Indian Judiciary. Having no legislation for marital rape is the foremost reason that men do not think twice before raping their own wife and outraging their modesty.

MARITAL RAPE AND PRESENT LAWS IN INDIA

Marital rape is one of the highly under-reported violent crime. Millions of women from different corners of the world are victims of marital rape for centuries yet this problem has received very little attention in the rape and domestic violence domain. Marital rape is a serious problem which is neglected by legal practitioners, social activists and the society as a whole from time immemorial. There has been a lot of legislations and enactments passed in order to protect women from different atrocities and violence against them. Some of the notable shameful offences against women for which the Indian judiciary has enacted laws are dowry, cruelty, female infanticide and domestic violence. However, the most disgraceful wrong hidden in the curtains of marriage, where the husband forcefully engages his wife in a sexual intercourse assuming that it is his matrimonial right, 'marital rape', has not been recognized as a crime by the law makers. The fact that marital rape is not a crime is totally unacceptable in a civilised nation like India which celebrates 73 years of Independence.

The word 'rape' has been codified in Section 375 of Indian Penal Code, 1860 but the word 'marital rape' has not been defined under the ambit of Indian law which is very disheartening. This section includes all forms of sexual assault including non-consensual sexual intercourse with a woman but exception 2 to this section does not criminalize marital rape as it states - "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."[245] This section echoes masochist sentiments because it specifically states that a husband cannot be prosecuted for forcing his wife to have sexual intercourse thinking that it is his

[244] https://economictimes.indiatimes.com/
[245] The Indian Penal Code, 1860

nuptial rights. Section 376 of the IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.[246] This section too, does not mention any punishment for marital rape. However, under section 376B of IPC sexual intercourse with one's own wife without her consent under a decree of judicial separation is punishable by 2 to 7 years' imprisonment. This is a little improvement towards protecting the women of the country from any sort of coercion to have sexual intercourse. The Indian judiciary considers rape within marriage impractical and therefore it is not considered as a crime despite of the fact that the Supreme Court of India and various High courts of India is flooded with writ petitions challenging the constitutionality of Exception 2 to Section 375 of IPC. After a landmark judgement[247] that criminalized forceful sexual intercourse with a wife aged between fifteen years and eighteen years, there has been an unprecedented increase in filing petitions challenging the validity of Exception 2 as a whole. But in spite of being aware about the adversities faced by women all over India, marital rape is still not recognized as a crime. Also, in 2005, the Protection of Women from Domestic Violence Act, 2005 was passed yet did not consider marital rape as a crime but considered it as a form of violence. The act mentioned above at least mentions about rape within marriage as it prohibits sexual violence within a live in or marriage relationship. This is of not much help because the act provides only civil remedies.

WHY MARITAL RAPE IS NOT RECOGNIZED AS A CRIME IN INDIA

The country is celebrating some landmark judgements of 'Aadhar Card Case' and 'Triple Talaq Case' and achieving new cornerstone but despite of several amendments and legislations one of the most humiliating and disgraceful act is still not a crime in India. It is a matter of great concern; the Central Government has expressed its views against making marital rape a crime by saying it would 'destabilize the institution of marriage'.[248] It roots back to the statement made by Sir Mathew Hale, Chief Justice in 17th Century England that 'the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and

[246] The Indian Penal Code,1860
[247] Independent Thought v Union of India, (2017) 10 S.C.C. 800 (India)
[248] RTI Foundation v. Union of Indi, W.P. (C) No.284/2015 (India)

contract, the wife hath given up herself this kind unto her husband which she cannot retract'.[249] Another justification for not criminalizing marital rape comes from William Blackstone in 1753 by stating "[B]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage".[250] The concept of marital rape has evolved in the recent period with the growing awareness of protecting women against various crimes. According to Coverture, a legal doctrine, it is believed that after successful completion of marriage, a woman's legal rights and obligations are taken over by her husband and gives consent to every act done by him which cannot be revoked at any point of time. The term 'implied consent' was derived from this doctrine. This puts an obligation upon a woman to give all the things that her husband asks for, even if it is against her will. The precepts of the marital rape exclusion are based on this notion of 'irrevocable implied consent'. One of the major reason for not making marital rape a crime is because of its near impossibility of proving it. It is of the opinion that marital rapes are difficult to prove and it will only create burden to the already over-burdened legal system. It is also believed that discontented and angry wives might put false allegation of marital rape on their innocent husbands and women could misuse the laws against marital rape. The union government said a law criminalizing marital rape can become an "easy tool to harass the husbands," arguing "if all sexual acts between a husband and his own wife qualify to be marital rape then the judgment whether it is marital rape or not will singularly rest with the wife." Another common argument against the idea of criminalizing marital rape is that laws against marital rape would destroy many marriages because a couple cannot have possible conjugal reconciliation. These are evidently very lame excuses in the male dominated society that lack both legal and moral force. Marriage in which the wife is raped by her own husband is already destroyed. Laws should not protect a rapist husband and encourage forced cohabitation because preserving the integrity of any human being is of paramount importance.

After the brutal gang rape popularly known as "Nirbhaya case", the Verma Committee, a three-member panel was appointed to strengthen the rape laws of India. One of the suggestions of the Justice Verma Committee was criminalizing marital rape. It was also a pivotal demand of women's right activists. The Justice Committee proposed that the Indian Penal Code (IPC) should make a clear demarcation between rape within marriage and rape outside marriage. The Committee also suggested that the exception to marital rape should be removed. The most

[249] https://www.galgotiasuniversity.edu.in/
[250] https://theswaddle.com/

difficult snag in the way of India criminalizing marital rape is the Union Government itself. The Government continued to protect men who rape their own wives. The then Government, led by the Congress Party rejected all the recommendations made by the Justice Verma Committee contending "the potential of destroying the institution of marriage, if marital rape is brought under the law, the entire family system will be under great stress." The current Government led by Bharatiya Janta Party headed by Prime Minister Narendra Modi is also of the same opinion with regard to criminalization of marital rape. The Government today does not have any plans relating to imposition of punishments for marital rape. Haribhai Parathibhai Chaudhary, a minister in India's Ministry of Home Affairs said in a written statement "It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context." Again, former Chief Justice of India Dipak Misra expressed his views against criminalizing marital rape stating "because it will create absolute anarchy in families and our country is sustaining itself because of the family platform which upholds family values."[251] The various factors that attributes to non-criminalization of marital rape in India are religious beliefs, social customs, illiteracy, poverty, the mind-set of the Indian society and lack of financial empowerment of the majority of females. The Government today suggested the law makers to consider all the factors before criminalizing marital rape.

Opposing to such articulations, the contention that Indian society is too traditional to even consider criminalizing marital rape is irrational and unjustifiable. Custom and traditions cannot be utilized to shield the weak. The Government on one hand bluster on about gender equality and women empowerment, while on the other hand they do not give women the basic rights they deserve. The Government ought to be sure about the plans they need to advance in the future and should not promote baseless propaganda. The largest democracy failed to protect the women from getting raped by their own husbands but that same democracy is legalizing same-sex marriage. Women are not only expected to remain silent on this matter but also are suggested to learn to live with it. There is an ardent need to change the laws on sexual offences and that the Indian judicial system must criminalize marital rape to preserve the dignity of the women.

CONSTITUTIONAL VALIDITY

Violation of Article 14 of the Indian Constitution

[251] https://economictimes.indiatimes.com/

Article 14 of the Indian Constitution states that the "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[252]The Constitution of India guarantees equality to all but Indian criminal law discriminates against female victims who have been raped by their own husbands. Article 14 of the Constitution ensures 'Equality before Law' and prevents state from discriminating amongst the citizens on any ground, but when it comes to defining marital rape as a crime, the State discriminates against women. According to Section 375 of Indian Penal Code, a married woman who is under the age of fifteen years has the right to charge her husband on the allegation of marital rape if her husband forces for sexual intercourse but once she attainted the age of fifteen years, that rights gets curtailed automatically. Moreover, the section is in itself contradictory because the rightful age to marriage is eighteen years according to Section 5 (c) (iii) of the Hindu Marriage Act, 1955. The exception 2 to the Section 375 classifies woman based on her marital status and immunizes actions perpetrated by the husbands against their wives. The exception fails to protect the married women for no reason other than the marital status while protecting unmarried woman from the same heinous acts. In fact, married woman find it more difficult as they are legally, financially and emotionally tied to their husbands and the violence happens at her own home. In the case of Budhan Chowdhury v State of Bihar[253] as well as in State of West Bengal V Anwar Ali Sarkar[254], the Supreme Court held that:

"a. The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and

b. The differentia must have a rational relation to the object sought to be achieved by the legislation."[255]

The classification created by Exception 2 has no rational nexus with that of the underlying objective of the Act. Thus, Section 375 does not satisfy the test of reasonableness and violated the protection guaranteed under Article 14 of the Indian Constitution.

Violation of Article 21

Article 21 of the Constitution of India states that "no person shall be denied of his life and personal liberty except according to the procedure established by law."[256] The Supreme Court of India has interpreted this clause in plethora of cases to extend the literal meaning of "life and liberty". Thus, judicial interpretation has expanded the ambit of Article 21 by leaps and

[252] The Constitution of India,1950
[253] AIR (1955) SC 191 (India)
[254] AIR (1952) SC 75 (India)
[255] https://indiankanoon.org/
[256] The Constitution of India,1950

bounds and held that the rights guaranteed under Article 21 includes not only right to life and liberty but also rights to health, privacy, dignity, safe environment and safe living conditions. Exception 2 to Section 375 of IPC violates Article 21 of the Indian Constitution on so many grounds. Recently, courts have started acknowledging a right to abstain from sexual activities are within the scope of Article 21. In the case of State of Karnataka v. Krishnappa[257], the Supreme Court held that "sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female." In another case of Justice K.S. Puttuswamy (Retd.) v. Union of India[258], the Supreme Court explicitly held that right to privacy is a fundamental right and therefore forced cohabitation is a violation of fundamental right. In the case of State of Maharashtra v. Madhkar Narayan[259], the court contented that every woman is entitled to her sexual privacy and anyone and everyone cannot violate her privacy.

Additionally, Exception 2 also violates the right to live with dignity because when a husband forces his own wife for sexual intercourse against her wish, it adversely affects the physical and mental health and undermine to live with human dignity. Moreover, in many cases Supreme Court held that the offence of rape infringes the right to life as well as right to live with human dignity of the victim of the crime of rape. In the landmark case of Bodhisattwa Gautam v. Subhra Chakraborty[260], the court held that rape is a crime against the basic human right and provided guidelines for compensating the rape victim. Again in the case of The Chairman, Railway Board v. Chandrima Das[261], the court held that rape is not only a violation of an ordinary right of a person but also violation of the Fundamental Rights enshrined in Part III of the Constitution of India. Rape is a crime not only against the person of a woman, it is a crime against the entire society. Most recently, the Supreme Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right guaranteed by Article 21 of the Constitution. Therefore, marital rape clearly violates the rights to live with dignity, privacy and personal liberty and to that effect, exception 2 provided under Section 375 of the Indian Penal Code, 1860 is violative of Article 21 of the Constitution. Also, Article 51A (e) of the Constitution states "to renounce practices derogatory to the dignity of women", and it is the fundamental duty of every citizen of India.

MARITAL RAPE AND GROUND FOR DIVORCE

[257] (2000) 4 SCC 75 (India)
[258] (2017) AIR 2017 SC 4161 (India)
[259] AIR 1991 SC 207
[260] AIR 1996 SC 922
[261] MANU/SC/0046/2000

In order to break this legal deadlock, however, marital rape can be brought under cruelty and hence can act as a ground for divorce. In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence. Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. However, the same does not entirely protect the women from the crime which has undergone. Cruelty refers to an intentional infliction of harm, either mental or physical on a living being, especially a human. Also, the Indian Penal Code, 1860 explains cruelty as any act by the husband that drives the victim woman to commit suicide or cause to her grave and serious injury, both mental and physical. The landmark case of Shobha Rani v. Madhukar Reddy[262] observed that cruelty must be studied in light of the conduct of one spouse towards another in a marriage and in the respect of marital obligations. It is herein important to note that all personal laws follow the fault theory of divorce. This theory is generally opted by a spouse who desires to be absolved by way of proving the fault of the other spouse. The Hindu Marriage Act, 1955 provides cruelty as a fault ground for divorce. So also, the personal laws provide cruelty as a ground for divorce including the Special Marriage Act, 1954, the Dissolution of Muslim Marriage Act, the Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936. Thus, in order to constitute marital rape as a ground for divorce one has to resort to the ground of cruelty due to the absence of a separate ground of marital rape.

CASE STUDY

In the case of Bishnudayal v. State of Bihar[263], Jagarnath, the appellant had two daughters named Saraswati and Sumitra. Saraswati, the elder daughter was married to Debnandan who was a resident of the Bahera village. Jagarnath invited Debnandan and his family members for a puja in their house. Saraswati could not attend the occasion on account of her illness. After the puja when all the guests were leaving, there was a request made from Debnandan's family to take Sumitra along with them for a week to look after her sister. Jagarnath allowed Sumitra to go to the village Bahera. He waited for more than a week for his daughter but she was not sent back. Later, he learned that Sumitra had been married to Bishnudayal, one of the relative of Debnandan who forcer her for illicit intercourse. Bishnudayal, the accused was held liable for rape under Section 376 of Indian Penal Code.

[262] 1988 SCC (1) 105 JT 1987 (4) 433
[263] A.I.R. 1981 S.C. 39 (India)

In RTI Foundation v. Union of India[264], the Central Government was of the opinion that criminalization of marital rape may destabilize institution of marriage. Further they submitted that abolishing Exception 2 to Section 375 would be of no use as nature of rape within marriage and outside marriage are not same. If all the sexual activities between a husband and a wife qualify to be rape, then the judgement as to whether it is actually a marital rape or not would solely depend on the wife.

CONCLUSION

The researcher has attempted to give a detailed understanding of the nature of marital rape. The paper throws light upon the meaning of marital rape, its effect on the victim and the present legal scenario relating to rape within marriage. The researcher has also tried to point out the loopholes existing in the current legal system that indirectly promotes patriarchy in the society. In the era of legal reforms and revolutions, criminalizing marital rape is very crucial. Although, it is imperative to know that Criminal Law is in the Concurrent List and therefore implemented by the States. The vast cultural diversity in different states and conflict between personal and religious laws with that of the new amendments in the statutory criminal law makes it difficult for the lawmakers to bridge the gap between rape and marital rape. There is a dire need to criminalize marital rape but mere declaration of it is not sufficient Something more is needed to be accomplished for sharpening the legal executive and the police. There is additionally a need to teach the common mass about this wrongdoing, as the genuine objective of condemning marital rape can only be accomplished if the general public acknowledges it to be a crime.

[264] W.P. (C) No.284/2015 (India)

USE OF E-SOURCES AND LEGAL RESEARCH

- HIMANSHU RENIYA

ABSTRACT

The use of e-resources in research is increasing day by day. The focus of research is gradually moving from other secondary resources to e-resources. These resources not only are easily accessible but also the qualitative. The importance of it can be seen from the fact that due to the current pandemic only the e-resources are accessible. Hence, it is most important to know and understand how to utilise the available resources. The e-resources though widely used and highly appreciated have a lot of limitation in terms of usage, approach and others. Firstly, a general fallacy is that everything is available in form of e-resource, either free or paid based. But still majority of the world's printed material is in the physical form only; many of the ancient and archaic records are not available on the internet. Despite highly technological advancements, the relevance of books is still there. E-resources in many could not out-law the value of physical and printed material and is still highly relevant in today's time. Also we have seen that some scholars are also very much acquainted with use of E resources so institute should provide proper training to those scholars and provide free access to E resources like SCC, Jstore, Manupatra etc

INTRODUCTION

Law is a field that subsists on books and derives its life from the facility of the word. From time out of mind, the library and also the legal community are mutually interdependent to every other, become very indispensable, complement, the sooner being an acknowledged workroom for the latter.

Electronic legal information resources are legal documents, concerned with law which needs computer and its accessories to be accessed. Examples are CD-ROMs on law, electronic databases on the web. Electronic resources provide easy and fast access to information in law and other disciplines and profession and also are very cost effective compare to the value of print material. Electronic databases can easily be re-searched using new clues, the user has easy accessibility to a very big selection of indexes and databases, many of which cannot be available locally. Even the electronic version of the text or the print material is obtainable now a day or is easily made one. Several electronic legal information products are available today;

some examples are Westlaw, I-Law, Lexis Nexis Professional, SCC Online, Manupatra, Heinonline etc.

From academicians, scholars, and big selection of its user community. Most of those resources are free, available in electronic format, and really little restrictions to use. It allows any users to review, share, refer, index, cite, and use it exclusively without social, economic, and technical barriers. other than this, many publishers and institutions also are providing open access to their repositories and databases where works and articles stored would give them a good publicity to contribute to the learned society during a greater way. The those who wish to get rid of barriers to access these resources are contributing to research, education, and knowledge of the society. Many of the organisations are working in providing free access to any or all reasonably research databases to general public in no cost. However the employment of those resources is probably going to be influenced by availability of the resources. this suggests that electronic resources must be made available in several brands to the users in their institutions. Their contents must even be publicized by the library so as to prompt their use. Some constraints can also affect the employment of electronic resources. Consequently, this study investigated the provision, level of use and constraints to the employment of electronic resources.

AWARENESS ABOUT THE E-RESOURCES.

Academic libraries are centre of knowledge and hence are considered as integral parts of academic life. The advent of Information and Communication Technology has led to the use of electronic resources in libraries. The availability and accessibility of legal information is also seen as the key facet of a democratic form of government. A democratic set up is also heavily dependent effective and efficient judicial system[265].

Now-a-days the dissemination of information has improved drastically because of the help of Technology. Over the last few decades, electronic resources have become increasingly substantial component of academic library. This is due to the emergent advancement of information technology and its effect on collection development policies in Libraries. Hence, the use of physical access to the library has reduced to a larger extent because it can be easily accessed through electronic form via internet. It is also changing the world approach towards

[265] Dr. Padma et.al, Use of Legal Information sources and services by the undergraduate students of government law college, Coimbatore, Tamilnadu State, India: A study, University of Nebraska – Lincoln (e-journal) available at https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=5084&context=libphilprac accessed on 5 December, 2020

the use e-resource from printed material[266]. Electronic resources are therefore available extensively in many institutions worldwide, and can be accessed anywhere by the help of internet and by many people or users at the same time, which makes it very convenient to use. To cater this information needs of the many universities' community and to provide appropriate and accurate information to its users, huge amounts of monies are spent by Library management to subscribe to these e-resources to satisfy users' information needs as well as satisfy the teaching, learning and research needs of the university.[267] In spite of the value of e-resources and ensuring that it is available for use by Library users, studies have shown that usage is not up to the expected level.[268] Various researches have shown that there is lack of awareness about the resources in the student about the e-resources. Many a time the issue is about the knowledge of accessing information on those portals.

Electronic sources are becoming very important to the academic community. Hence, it is necessary for awareness of these information resources to be made paramount to library development in the 21st century[269].

Majority of research has shown that search engine has been one of the prominent portal of research. Some of the research has also found out that the major reason that contributed to low utilization of electronic resources was limited searching skills. Lack of accessibility to computers connected to internet, low internet bandwidth and unreliable power supply has also been found one of the major reasons for this[270].

[266] L. Santhi and N. Radhakrishnan, Awareness of Electronic Resources among the Research Scholars of Anna University of Technology, Coimbatore and its Affiliated Colleges, Indian Journal of Library and Information Science Volume 6 Number 3(Supl), Sept - Dec 2012 at page 19

[267] Franklina Adjoa Yebowaah MS, Awareness and Use of Electronic Resources in University Libraries: A Case Study of University for Development Studies Library, University of Nebraska – Lincoln (e-journal) available at https://core.ac.uk/download/pdf/188115998.pdf accessed on 5 December, 2020.

[268] Ibid

[269] Olajide Oluwakemi and Adedokum Folasade, Awareness And Use Of Electronic Information Resources By The Faculty Members Of Afe Babalola University, Ado Ekiti (Abuad): A Survey, University of Nebraska – Lincoln (e-journal) available at

https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=5430&context=libphilprac accessed on 5 December, 2020.

[270] Available at:
http://shodh.inflibnet.ac.in:8080/jspui/bitstream/123456789/5278/1/electronic%20information....pdf accessed on 5 December 2020

Tawfeeq Nazir in his study in University of Kashmir has also found that lack of awareness about different type of e-resources and lack of library assistance are the major cause behind the low usage of e-resources[271].

USE OF E-RESOURCES.

Law is a highly knowledge dependent area and having accurate and up-to-date legal information is must which can create difference like between winning or losing cases. The information task carried out by lawyers can be difficult, often involving finding and working with different type of information i.e. different types of document, law reports, cases, legislations, commentary, articles etc. involving a wide range of legal topics[272].

The amount of information available over internet grows very exponentially each year. One estimate of current production comes from a 2003 Berkeley study, noting that five exabytes of information was generated in 2002 alone, 92% of which was stored electronically.[273] The use of such a huge amount of information cannot be ignored by the researcher of any field. The literature also shows that a number of relevant studies have been carried out on the use of e-resources by lecturers, research scholars and students worldwide[274].

Usage of an online material has a lot of advantage over the printed material and is therefore widely preferred over other sources. Due of many of these reasons the online material is highly preferred over the printed materials.

Using the e-resources instead of the printed material saves both time and effort of the researcher; the print version often requires consulting three or more different books or supplements and is still felt incomplete if not updated. The online content are updated daily, and all the resources are incorporated into a single display.

Printed material being a tangible object, can be limited to only a single user at any given point of time but contrast to it the digital material can be copied innumerable times and simultaneously disseminated to various persons across the globe. Thus e-resources avoid the

[271] Tawfeeq Nazir, Use And Adequacy Of E-Resources By The Research Scholars And Students Of The University Of Kashmir In Science & Social Science Faculties: A Case Study, available at https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=5430&context=libphilprac accessed on 5 december, 2020

[272] S. Thanuskodi, Effective use of e-resource materials among practicing lawyers of Madras high court, International Journal of Library and Information Science Vol. 2(4), p. 72, May 2010 available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.948.1943&rep=rep1&type=pdf accessed on 5 December, 2020.

[273] Michelle M. Wu, Why Print and Electronic Resources Are Essential to the Academic Law Library, available at https://core.ac.uk/download/pdf/70374532.pdf accessed on 5 December, 2020.

[274] Supra 6

issue of limited use. It is also a cost-effective method. Printed resources obviously require a heavy amount for its paper, printing, binding and other cost to make it into a proper booked form and further the transportation. In that way electronic databases are less expensive than books, and require less space. A book or any other printed material needs space and lot of efforts to carry from one place to another especially when they are more in number. Similarly a physical library also cannot go from one place to other. Apart from that publishing houses need machinery and space for resourcing the material which is significantly larger and add to cost.

For one or many of these reasons, people have adapted to technology and are fond of using e-resources. Those who do research are accustomed to find it over multiple databases with single tap which is not so easy on printed resources. Any person out of natural course have tendency to choose the easy way out hence they tend to lie upon the use of these e-resources and databases.

Due to the higher advent of technology, the digital document already outnumbers print ones. Even in the scholarly world, the number of resources published exclusively online is increasing. This growth was prompted by the rapid increase in publisher print pricing, and propelled further by lower distribution costs, technology's evolution, and user demand. For legal researchers, numerous reviews and journals are already available online at no charge to the library, and a significant amount of unique or free information is available only in digital format[275]

LIMITATION OF E-RESOURCES.

The e-resources though widely used and highly appreciated have a lot of limitation in terms of usage, approach and others. Firstly, a general fallacy is that everything is available in form of e-resource, either free or paid based. But still majority of the world's printed material is in the physical form only; many of the ancient and archaic records are not available on the internet. Despite highly technological advancements, the relevance of books are still there. E-resources in many could not out-law the value of physical and printed material and is still highly relevant in today's time.

Secondly, not every time the material available in electronic form is freely accessible. Many of it is available through various databases like SCC Online, Manupatra, Jstor, Heinonline,

[275] Michelle M. Wu, Why Print and Electronic Resources Are Essential to the Academic Law Library, available at https://core.ac.uk/download/pdf/70374532.pdf accessed on 5 December, 2020.

scribd etc. which are not free and cost too much. These databases can be proved economical in terms of institution, but when an independent individual is engaged in research, he might have a budget constraint and might not be able to get access through all these databases. An Institution or a library can easily arrange these resources.

Thirdly all the material available out there on the internet might not always true or authenticated. For an academic library, though, in which patrons require authoritative data to support arguments, instruction, or scholarship, the greatest strength of the Internet also becomes one of its dominant liabilities. Internet has become one such platform where everyone with a computer connected with internet can post anything on a web server without any accuracy or authenticity neither backed by any valid source. There is no guarantee of the poster's authority or of the authenticity of a document. This is why in current time it is also becoming source of fake news and fake propaganda for personal or political gains. Some authenticity can be derived from some reputed sites or designated domain. For ex. a .gov or .nic.in domain are government domain and can be considered to provide authentic information. In lot of instance even in courts the validity of the document from other non-reliable websites are denied admissibility for the want of reliability only. Similarly in academic and legal discourse also these information are not acceptable[276].

The evolution of use of e-resources is very new and a lot of people are not very friendly to use by lot of people for longer time. It is generally seen that the younger generation are more adaptable to it and can use it for longer time, but the elder generation in the field also struggle regarding this interaction with technology and find it difficult to use. Although a lot of people are accepting it but still a major chunk of people are there who are not very adaptive to it. Many a time there is also issue of a proper reader which can replace the printed material in totality. Very long digital documents are unfamiliar and difficult to use. Screen glare and eyestrain are a serious concern for many potential users of e-resource technology. A major worry of reading from an e-resource reader could hurt the eyes. The display resolution of computer screens and electronic devices is considerably less than the print quality produced by a printing press[277].

[276] Wendy Duff et al., Historians' Use of Archival Sources: Promises and Pitfalls of the Digital Age, PUB. HISTORIAN, Spring 2004, at 7.20

[277] Advantages & Disadvantages of Electronic Resource available at http://www.lisbdnet.com/advantages-disadvantages-electronic-resource-e-resource/ accessed on 5 December 2020

Apart from that there is not always possible for the researcher to find the appropriate material from the ocean of resources. There are a larger number of document available on the internet, but sometimes the herculean task is to find out the relevant material required for the research.[278] Instead of high technological advancement there are still a lot of places which are not connected to a proper internet connection to access all the e-resources. Only the offline e-resource available through CD, Pendrive etc. are accessible. These people cannot access all the online material.

There are also several issues related to ownership, copyright and licensing over internet material. There is often issue related to copyright of these materials. Many a times the original owner of the copyright is not available or is disputed. On the contrast the many electronic material or products are licensed. Once the license is expired all the material or the subscription is ended the user is no more able to access that information. Contrast to this when a person buys a printed book, it is always available to him for unlimited period.

Many electronic resources are transient and temporary. They can disappear wholly or suffer from the lesser defect of link corruption. They may be removed from databases by the publisher for reasons ranging from desire to keep the database current, to disinterest in maintaining a low-use resource, to fear of litigation over database copyright issues, to objections of a political nature. Alternatively, electronic publications may cease to be updated or may move without notice.

Many e-resources are typically fashioned to be compatible with some software which sometimes may be not easily available. Since e-resources are reliant on on other equipment, some hardware or software glitches may affect it. Unless the hardware, Internet connection or battery power that is required by an e-resource reader is readily available, then its electronic document is useless. In addition, e-resources depending on hardware and software and are more easily damaged than a printed book[279].

Electronic resources have led to a new age of communications and information sharing. Electronic journals have helped publishers and scholars to disseminate information much more quickly than was previously possible. Initially, electronic journals were seen by many as a passing fad. Many in the library profession considered them problematic and inappropriate for

[278] Mukul Bharadwaj and Swadesh Sharma, Electronic resources for University and Library and Its Advantages, International Journal of Research in Library Science ISSN: 2455-104X Volume1,Issue 2 (July-December), 2015

[279] Advantages & Disadvantages of Electronic Resource available at http://www.lisbdnet.com/advantages-disadvantages-electronic-resource-e-resource/ accessed on 5 December 2020

library collections since they presented problems in terms of acquisitions, subscriptions, cataloguing, and archiving[280].

SUGGESTIONS

- User training is important for the higher use of electronic resources within the library since a good range of users are looking out electronic literature on their own.
- Electronic resources users ought to be schooled regarding advanced search ways and also the use of controlled vocabulary to create electronic search method a lot of easier.
- The library ought to conjointly establish the nonusers of electronic resources and correct steps ought to be taken to convert them into potential users the resources.
- The university management ought to offer funds for subscription to additional electronic primary and secondary sources.
- Moreover, since users are experiencing issues in gathering in gathering info, the foremost appropriate measures ought to be taken to beat this, like increasing the quality of terminals and printers.
- There are some legal information sources the law students are aware of but they don't use. Such users should be known and they should be familiarized to the goodness of the unutilized resources.

CONCLUSION

The mere existence of information does not guarantee its actual use; the format of its presentation has a material bearing on making content either easy or difficult to use… Though Mann's intent was to bolster the use of print materials, his sentiment applies equally to digital data and, indeed, to any newly introduced format[281]. Certainly, developments in technology will carry on opening new opportunity for researchers, but the more suitable focus may be the value of any opportunity to information, and not just novel ones.

Print material have independent value and contain age old information which may not yet be available in other formats. Additionally, the advent of technology arrive with a lot of counter questions about preservation, long-term research needs, content quality, document control and

[280] Manikya Rao, Impact of E-resources and Services in Academic Law Libraries in India, Indian Journal of Library and Information Science Volume 6 Number 3, Sept - Dec 2012

[281] Michelle M. Wu, Why Print and Electronic Resources Are Essential to the Academic Law Library, available at https://core.ac.uk/download/pdf/70374532.pdf accessed on 5 December, 2020.

authenticity. Nature of technology makes it exposed to attack, modification, and disappearance, and its evolution has not yet reached a point where it rivals print in stability, longevity, and ease and comfort of use.

Hence, although the electronic resources are very abundant and easily available the use of print material cannot be forgone.

COMMON LAW ASPECTS OF ENVIRONMENTAL LAW IN INDIA

- INDULEKHA K.

The word *Common Law* has its origin from *Latin* term *Lex Communis*. The common law is the oldest source of Environmental law. It is also called as *judge made law.* Common Law means the embodiment of customary laws and judicial decisions of England. Article 372 of the Constitution of India gives force to the Common law in India. The remedies those were available under the Common law are now given a new scope under various Indian Laws, mostly Law of Torts and Indian Penal Code, they are:

1. Negligence
2. Nuisance
3. Strict and Absolute liabilities
4. Trespass

1.1 NEGLIGENCE

Negligence under Tort law:

The tort of Negligence is used when where others like that of tort of nuisance and tort of trespass cannot be used. The term 'negligence' means infliction of injury or damage as a result of failure to take reasonable care. According to Winfield and Jolowicz[282], "*Negligence is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff."* J. Baron Alderson in *Blyth v. Birmingham Water Works Co* [283]defined, "Negligence is the omission to do something, which a reasonable man guided upon those consideration, which ordinarily regulate human affairs, would do or doing something, which a prudent or reasonable man would do."

There are two essential ingredients of Negligence, they are;

a. Defendant's duty to take care of plaintiff.
b. Breach of duty by defendant.
c. Proximate damage.

[282] Winfield and Jolowicz on Tort, Ninth Edition, 1971, p. 45

[283] (1856) LR 11 Exch. 781

Negligence under Indian Penal Code, 1860:

a. *Section. 269 – Negligent act likely to spread infection of disease dangerous to life.*

Whoever, negligently by an act spreads infection of any disease dangerous to life shall be punished with imprisonment of either description which may extend to 6 months with fine or both.

b. *Section. 270 – Malignant act likely to spread infection of disease dangerous to life.*

Whoever maliciously does an act to spread the infection of any disease, dangerous to life, shall be punished with imprisonment of either for a term which may extend up to 2years with fine or both.

c. *Section. 284 – Negligent conduct with respect to poisonous substance.*

Whoever is in the possession of poisonous substance in rash and negligent manner does some act which endangers the human life or is likely to endanger or causes injury to any person negligently shall be punished with imprisonment of either for a term which may extend up to 2years with fine or both.

1.2 NUISANCE

The term 'nuisance' is derived from French word *'Nuire',* which means *'to annoy or to hurt'*. Nuisance is an act or omission, interfering with the right of another to enjoy property causing physical damage or discomfort. Nuisance maybe described as, "*unlawful interference with a person's use or enjoyment of land or some right over it, or in connection with it.*"[284] "*The wrong of nuisance consists in causing or allowing without lawful justification, the escape of any deleterious thing from his land or from elsewhere into land in possession of plaintiff.*"

There are two types of Nuisance:

a. Public Nuisance
b. Private Nuisance

Public Nuisance – An act or omission which causes injury or damage to the public at large. Public nuisance is both a tort and a crime. The public nuisances which are environmental damage/offences include intolerable noises, dust vibrations, waste dumps, etc.

Section.268 of Indian Penal Code, 1860 defines public nuisance as "an act or omission , which causes any common injury, danger or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

[284] Prof. Winfield on Nuisance

Section.290 of Indian Penal Code, 1860 provides for Punishment for public nuisance in cases not otherwise provided for. "Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees." Criminal Procedure Code, 1973 provides for provisions for preventing and controlling public nuisance causing air pollution, water pollution and noise pollution.

Case law for public nuisance

Municipal Council, Ratlam v. Vardhichand[285], was a Public Interest Litigation on public nuisance where, the residents of Ratlam Municipality in Madhya Pradesh were facing problems due to effluents from an alcohol plant, open drains and public excretion by nearby slum dwellers. Aggrieved by this Mr. Vardhichand and other residents filed a complaint with the Sub – divisional Magistrate of Ratlam under *Section.133 of Criminal Procedure Code* to direct the Municipal Council of Ratlam(MCR) to take necessary actions for the removal of aforesaid public nuisance.

The Magistrate directed the MCR to draft a plan for the removal of public nuisance within 6 months. An appeal was preferred where the Sessions court reversed the order of Magistrate. On an appeal to the High Court, the order of Sessions court was set-aside and the order of Magistrate was upheld. MCR preferred an appeal in the Supreme Court, where it took plea of 'financial instability' to comply with the order. The Supreme Court rejected the MCR's plea and directed MCR to provide a drainage system within a year and approved Rs. 6 lakhs for the same. Further the Magistrate of Ratlam was directed to inspect the progress of the work every 3 months.

1.3 STRICT AND ABSOLUTE LIABILITIES

Strict Liability

The rule of Strict Liability is a form of private law action in respect of cases of environmental pollution. The circumstances where an individual is made liable with no fault or intention or negligence on his part. This liability arises out of breach of duty and is termed as 'Strict Liability'.

This doctrine of *strict liability* was propounded by *Justice Blackburn,* in 1868 for the first in the case of *Rylands v. Fletcher*[286]. The liability in the case of *Rylands v. Fletcher* is strict in the sense; the defendant is liable irrespective of negligence is proved on his part. In most of the

[285] AIR 1980 SC 1622
[286] (1868) L.R 3 H.L 330

tortious liability, the defendant is liable only if the negligence is proved on him, whereas in strict liability, the defendant is liable even if there is no negligence by him which has to be proved. Certain defences can be taken by the defendant in case of strict liability.

Essential ingredients the plaintiff needs to prove:

a. Dangerous thing
b. Escape
c. Non – Natural use

Defences which can be taken by the defendant:

a. Act of God (Vis Major)
b. Plaintiff's own fault
c. Malicious act of third party
d. Common benefit
e. Statutory authority

"The natural use of the land by the defendant is also a defence."[287] This defence was established in the case of *State of Punjab v. M/s Modern Cultivators*[288], where *Chief Justice Hidayatullah* of Supreme Court held – "in the interest of the public that is natural use. If it is regarded as non – natural use it attracts strict liability and no government would come forward to construct the irrigation dams."

Absolute Liability

The rule of 'Absolute Liability' gains its source from the rule of 'Strict Liability'. In case of absolute liability, the liability of the defendant is more compared to strict liability. Unlike strict liability, under absolute liability no defence can be taken. There is no chance of escape by the defendant.

The doctrine of *Absolute liability* was propounded by *Chief Justice P.N. Bhagawathi* in the year 1987 in the case of *M. C Mehta v. Union of India*[289]. The major outcomes by Supreme Court in this case; apart from absolute liability:

a. The larger and prosperous the enterprise is, greater must be the compensation payable.
b. To minimize the hazards of chemical industries, they should be located away from densely populated areas.
c. Green belt of 1 – 5 kms of width around the industries shall be provided.

[287] P. S Jaswal and Nishtha Jaswal "Environment Protection, Sustainable Development and Law", 1st Edition 1999 at Pg. 11
[288] AIR 1965 SC 17
[289] 1987 SCR (1) 819, AIR 1987 965

d. The environmental pollution must be assessed by Ecological Sciences Research Group.
e. A special environmental tribunal must be set up.

1.4 TRESPASS

Trespass means unauthorised interference with possession or enjoyment of other's land. Trespass in environmental sense means, 'any transgression or offence against the law of nature.' Nuisance and Trespass may coincide, some kinds of nuisance being also continuing trespass[290]. Trespass includes dumping of wastes, discharge of filthy water on other's land. The act of Trespass to land is an offence under Section. 441 of Indian Penal Code, 1860.

According to James E. Krier[291], "there is an advantage of trespass action over an action of nuisance. But the actions under trespass in environmental cases are rarely invoked. It may be noted that trespass remedy, despite its wide scope, is inadequate to control air pollution."

Case law for trespass under environmental law

Martin v. Reynolds Metal Corp.[292], there were deposits of microscopic fluoride compounds on Martin's property that were emitted in the form of vapour form from Reynolds' plant it was held to be an invasion of this property and subsequently trespass.

[290] Pollock on Torts, 15th Edition at Pg. 302
[291] In Environmental Law and Policy (1971) by James E. Krier at Pg. 211
[292] 297 F.2d 49 (9th Cir. 1961)

RISE OF RETAIL INVESTORS DURING 2020 LOCKDOWN: D - STREET HAIL ADMIST CRISIS

- **SUMIT SINGH SHEKHAWAT, GAURAV SINGH & SANKALP SHARMA**

"When there are no sports or other entertainment, people simply play the market."[293]

- *RONNIE SADKA, Professor of Finance at Carroll School of Management.*

"In the midst of every crisis, lies great opportunity." – Thousands of retail investors of India seemed to have taken this quote by Albert Einstein quite a bit seriously, as they have embraced the D-Street or equities for the first time during the COVID-19 global pandemic.

Just before the onset of Financial Year 2020-21, India, along with Nations around the world, had to adopt stringent measures to stop the wrath of Coronavirus. Countries enforced back-to-back lockdowns which forced people to stay home. India's benchmark Indices, SENSEX and NIFTY, fell more than 40% in just a few days. With people being free from their 9 to 5 jobs, which is roughly the time our stock market works, people shifted to a less hectic 'work from home' culture. These new investors found time to read and research about the market and tried their hand at 'Bottom Fishing'. It refers to the situation when the market had nearly reached its lowest and most blue-chip, fundamentally strong stocks are available at a discounted price. While many invested because the interest rates were falling and real-estate was already struggling, some people had extra savings to spend and make a quick buck. Betting is still not legal in India, so the stock market was their escape. They could've chosen to invest in Mutual Funds or Managed Funds, but owing to the ample time they had, they tried their hand at direct investment in stocks.

1 CRORE FRESH INVESTORS!

Because of the lucrative offers and discounts, many leading Brokerages like Zerodha, 5 Paisa have reported a significant rise in the opening of new Demat accounts in the covid era.

[293] https://www.bc.edu/bc-web/bcnews/campus-community/faculty/lockdown-investors.html

According to the Securities and Exchange Board of India (SEBI), the number of Demat accounts opened in 2020 was the most in at least a decade at 10 million, a 250% jump from the 4 million accounts opened in 2019.[294]

These figures are relieving to read, as roughly only 2% people out of our total population invest in stocks as compared to about 50% people of the USA or any other developed economy. Slowly and steadily, India is recognizing the potential in this sector.

B-TOWN JOINS THE PARTY

The Entertainment Industry has also chipped in to the cause by creating stock market-related content, be it movies like Baazaar, The Wolf of Wall Street, and the top-rated TV series 'SCAM 1992: The Harshad Mehta Story'. The TV series portrayed the rise and fall of the publicly acclaimed 'Big Bull', Harshad Mehta. The lavish lifestyle he lived fascinated thousands of people. On one hand, these movies and shows were leaving a strong impression on their viewers, but on the other, their creators got their pockets filled. Content like this spread awareness about how the stock market works and the bottomed-out market was a cherry on the cake for the young minds. They wanted to try their hand at trading and were looking for a perfect entry. While many being smart investors choose to get proper education before investing, many enthusiastic newbie traders, believing in the rags to riches stories, often make mistakes. They tend to invest in penny stocks or in stocks that are not fundamentally strong, eventually losing money, and are forced to leave the market with an unpleasant experience.

DERIVATIVES GETTING THE LIMELIGHT

But where are these newbie investors putting their stakes, is a point to ponder over. The answer to this is 'Derivatives Segment'. Most long-term investors put their money into 'Cash Segment' which is buying and selling stocks at full payment. Most 'top guns' or successful traders who have a huge capital usually invest in this. Whereas the derivatives segment, which consists of Futures and Options, is aimed at short-term benefits, these assets come with an expiry date and are riskier.

But all leading brokerages nowadays provides the freedom to do F&O trading at very low margin requirement on hedged positions, luring hordes of investors to explore this segment. One more reason for Options being so popular among traders these days is that they offer very

[294] https://www.livemint.com/market/stock-market-news/sip-trend-shows-more-investors-seek-to-make-direct-bets-in-stocks-11594604815684.html

high returns but are ideal for those who have a big risk appetite. Options, being very sensitive to market volatility, should always be hedged, i.e. taking up another safety trade if things go south. The risk should also be a calculated one to offset any unexpected price movement. F&O trading is also contrary to the perception that most people have, that to earn good returns, you need to invest a large capital into the market.

GOLD AND SENSEX GOING HAND-IN-HAND? A BUBBLE ABOUT TO BURST

In August 2020, gold was the only profitable investment. So in a nutshell, no investment provided handsome returns except gold.

Since gold is considered a 'safe haven', most safe players tend to shift their investment from the market to safe havens like gold, government bonds, US dollar, etc. at the time of crisis. This was the reason for gold reaching an all-time high despite the market struggling to get back on its feet.

When gold was breaking its all-time highs, Robinhood investors kept on buying at the top of a bull market. Moreover, Foreign Institutional Investors (FIIs) coming back to the Indian market not only helped NIFTY and SENSEX with faster recovery but also helped them reach new highs - SENSEX touching the mark of 50,000 for the first time. These investors kept on buying in the hopes of a vaccine and a faster-than-expected economic growth.

RBI predicts a disastrous GDP fall of 7.5%, yet the stock market is soaring high. So investors should be cautious before creating new long positions, as the market may experience profit booking and take some correction.

HAS TRADING BECOME AN ISSUE IN INDIA?

The current scenario looks just like a rotten watermelon, good and fresh on the outside, bad on the inside. However good the recovery looks, which is urging people to take benefit of the bull rally, it might be short-lived. It is safe to assume that a good percentage of people jumped into the market instigated by their 'FOMO feeling' without any solid knowledge or guidance.

In a survey conducted by Statista Research Department in 2020, 36% of people lost about 45% of their investment during the corona period.[295] Apart from the survey, there must be thousands of people who lost their entire equity leaving a huge hole in their savings and taking them several years back. Most people lose even more of their capital trying to recover their losses

[295] https://www.statista.com/statistics/1109923/india-share-of-investors-who-have-lost-equity-during-the-covid-19-outbreak/

and end up burdened under debt. Suicides due to heavy losses in the share market aren't a new phenomenon. But due to the pandemic, people already being tight on money, added losses from the market resulted in a rise in the number of suicides.

Proper education is always requisite, but greed and indiscipline have been the major reason for a trader's losses since time immemorial. With most brokerages giving you the liberty and leverage to trade 20 times the amount of your investment, people have been taking Intraday trades like never before. Intraday trading means squaring off your position by the end of the day, whether or not the trade has gone in your favor. Professional traders rely on their skill and experience while trading intraday, whereas amateur traders rely upon their luck and speculation, which makes it a kind of gambling. And as the rule of gambling says – 'The house always wins'. No matter how lucky you are in life, you will come back to zero and most will incur losses too. The gist of the matter is that you cannot make a constant living out of it, unless you are a disciplined and experienced trader, because let's face it, making money in the stock market is not as easy as it looks.

The greed to earn exponential returns from intraday and F&O often makes trading addictive. An average trader who has had a streak of successful trades tends to overtrade, not knowing when to stop, eventually ends up in red or at times, taking desperate trades to recover the recent loss, this strategy takes you to your final destination of trading, i.e. wiped out capital.

CONCLUSION: TRADING THE RIGHT WAY

Believe it or not, from the experience of millions of people around the world, 'Market demands money from you' – means you either invest in a proper education first or lose in the market doing silly mistakes. You should always invest in proper education, there is a reason why people invest in law schools, engineering colleges, etc. to get a degree. If not this, one should at least join a good online course on the stock market or rather can take help from YouTube and social media. Most channels and content creators from the finance space have seen a massive boom in viewership and subscriptions during the lockdown. So, that's one option you can try.

As a beginner, never deploy a huge capital at first, do paper trading, or take small trades to get a feel of the market. A smart trader would be the one who never puts all his eggs in one basket, try to have a diversified portfolio. Experts say you should divide your capital into at least 5 parts and invest smartly.

For Intraday and F&O players, a strict stop loss should be followed as these trades are very risky. Proper money management should also be followed, meaning only 10% of the capital

should be deployed per trade. Do not forget to maintain a good risk to reward ratio and remember, the path to becoming a successful trader is by cutting losses. The secret to lasting longer in the market is by cutting losses and making stop loss your friend, and this is one of the biggest differences between an average trader and a professional trader.

BEWARE of the tipsters that claim to give you trading calls by SMS or social media. Blindly following their tips and not trading according to your risk appetite is generally the recipe for disaster. These tipsters often have ulterior motives, always better to be safe than sorry.

"None can destroy iron but its own rust can. Likewise, none can destroy a person but one's own mindset can." – Ratan Tata

In the end, it all comes down to discipline and patience. The market tests your psychology, demands you to be on your toes, to be confident and not over-confident, and being wise and not greedy. If your trades are driven by your emotions of greed, hope, anger, regret, or fear, the market will soon show you the exit. One should have realistic expectations of how much money he's going to make and be content enough to book profits from time to time. Rely upon analysis rather than speculation.

May all the bulls and bears be in your favor, Happy Trading!

VISHAKA VS. STATE OF RAJASTHAN

- SWATHI R

INTRODUCTION:

Sexual harassment is any form of unwelcomed sexual behaviour that is offensive, humiliating or intimidating in nature. Most importantly, it is against the law. Being sexually harassed affects people in different ways. Sexual harassment can be written, verbal or physical, and can happen in person or online. Sexual harassment can also be termed as a "eve teasing" in India, and it can be determined from the following acts like passing an indicative or typical uninvited comments or jokes, uninvited touching, making appeals for sex with sexually blunt pictures or text messages or emails and discredit a person because of sex. This case is a landmark judgement case, which implemented special provision relating to sexual harassment of women in a workplace. This case created a great impact on women welfare organization and played a great role in preventing sexual harassment of women in workplaces. Even though there has been no provision for sexual harassment at workplace under Indian Constitution, Sexual Harassment violates the fundamental right of the women of gender equality which is codified under Article 14 of the Indian Constitution and also the fundamental right to life and personal liberty and to live a dignified life is violated under Article 21 of the Indianconstitution.

FACTS OF THE CASE:

- Bhanwari devi is a social worker. She works in the social development program in the rural areas in one of the Rajasthan villages which was runned by the Rajasthan government (WPD).
- She was very keen in the rural development programs and was very much interested in developing the rural areas.
- As a part of her job, she took a turn on attempted rape of women from a hailed nearby village in which she gained the entire support of village people.
- And then as part of promoting and developing the rural, she took a hand on abolition of child marriage. This campaign was subjected to disapproval and ignorance by all the members of the village, even though they were aware of the fact that child marriage is illegal.

- In the meantime, the family of Ram Karan Gurjar, one of the family in the village had made arrangements to perform a child marriage, for his infant daughter.
- Bhanwari, abiding by the work assigned to her, tried to incline the family to not perform the child marriage but, all her attempts resulted in being vain or pointless. The family decided to go ahead with the child marriage.
- On 5th May 1992, the sub-divisional officer (SDO) along with the Deputy Superintendent of Police (DSP) went and stopped the said child marriage. However, the marriage was performed the next day irrespective of prior actions and no police action was taken against it. Later, it was established by the villagers that the police visits were a result of Bhanwari Devi's actions. This led to boycotting Bhanwari Devi and her family. Bhanwari also lost her job amid this boycott.
- In 1992, to seek vengeance upon her, Ramakant Gujjar along with his 5 men gang raped her in front of her husband. The police department at first tried to deter them from filing the case on one pretext or other, but to her determination, finally she lodged a complaint against the accused.
- The trial court acquitted the accused. But in support of the women welfare organization, They all filed a writ petition in Supreme Court of India under the name 'Vishakha'. The apex court was called upon to frame guidelines for preventing Sexual Harassment at Workplace. The hon'ble court did come up with such guidelines as Vishakha Guidelines which formed the basis of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

ISSUE:

How does the sexual harassment leads to gender inequality?

How far is it important to protect women to work freely in their workplace?

JUDGEMENT:

Gender Equality always finds a place in Fundamental Rights enshrined under Article 14, 19 & 21. Sexual Harassment at Workplace is a clear violation of gender Equality which in turn violates these essential rights of the female class. Such harassment also results in the freedom provided under Article 19(1)(g). The protection of females has become a basic minimum in nations across the world. In the absence of domestic law to curb these evil acts, assistance could be rendered from International Conventions and Statues to the extent that it does not contravene with any domestic law or does not violate the spirit of the Indian Constitution. The Judiciary

derived this authority from Article 51(c) and 253 read with Entry 14 of the Union List of Seventh schedule of the Constitution. The court held that such violation therefore attracts the remedy under article 32. The Indian Judiciary has time and again reiterated upon the fact that Right to life under Art. 21 also comprise Right to live with dignity and respect. Such aforesaid dignity could and should be protected with suitable guidelines. It is of utmost importance to frame some guidelines to fill the legislative vacuum and curb these evil acts. The apex court found authority in filling the legislative gap by making law so as to maintain the Independence of Judiciary and its role envisaged under Beijing Statement of Principles and Independence of Judiciary in LAWASIA region which was signed by the Chief Justice of the Asia Pacific in 1995 as those representing the minimum standards necessary to be observed in maintaining an independent and effective Judiciary. The judiciary found the following as the source of the guidelines which would act as law of the land. They are,

- Convention on the Elimination of all forms of Discrimination against Women (Article 11 & 24)
- General recommendations of CEDAW in this context (Article 11,22,23,24)
- At the 4th World Conference on Women in Beijing, Govt. of India made an official commitment to set up a National Commission at every level and in every sector that will look after Women's Rights. The Supreme Court inter alia, clearly mentioned that the guidelines were to be treated as law declared u/a 141.

VISHAKA GUIDELINES, 1997:

- In its judgment, the Court provided a set of guidelines for employers as well as other responsible persons or institutions to immediately ensure the prevention of sexual harassment. In accordance with Article 141 of Constitution, these guidelines were to be considered law until appropriate legislation was created.

- Sexual Harassment consists of unwelcomed sexually determined behavior as physical sexual contact, sexual favor, sexual remarks, pornographic content and also verbal, Non-verbal conduct of sexual nature.

- Sexual Harassment at workplace should be always informed, produced and circulated.

- Whenever a sexual harassment takes place which amounts to a specific offence under law, the employer should take action by complaining about the same to the appropriate authority to that place.

- An appropriate mechanism of prevention should be created for redressal of the complaint.

SEXUAL HARASSMENT AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013:

It took the government seventeen years to pass a law against sexual harassment within the geographical point earlier this year, within the wake of the Delhi gang rape in last December which shook the country, the Supreme Court in 1997, set down the Vishaka Guidelines on that matter. The Act includes several provisions of the Vishakha Guidelines, in that category the first requirement formulation is of "a code of conduct for the workplace". Building on the Vishakha Guidelines, the Act implies the formation of an interior complaints committee and an area complaints committee at the district level. The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 seeks to guard women from sexual harassment at their place of work in an exceedingly abundant wider sense. The Bill was first introduced by Women and Child Development Minister Krishna Tirath in 2007 and approved by the Cabinet Union in January 2010. It was tabled within the Lok Sabha in December 2010 and observed by the Parliamentary commission on Human Resources Development. The committee's report was printed in November 2011. In 2012, the Cabinet Union approved a change to incorporate domestic employees. The amended Bill finally passed the Lok Sabha in September 2012. And then the Bill was passed in Rajya Sabha in February 2013. It received the assent of the President of India in April 2013 and finally came into force in December 2013.

IMPORTANT PROVISIONS OF THE ACT:

1. This Act defines sexual harassment at the workplace and provides a mechanism for redressal of complaints and also provides safeguards against the false charges.

2. The definition of "aggrieved woman", WHO can get protection beneath the Act is extraordinarily wide to hide all girls, no matter of her age or employment standing,

whether or not within the organized or unorganized sectors, public or personal and covers purchasers, customers and domestic employees similarly.

3. whereas the "workplace" within the Vishaka tips is confined to the normal workplace set-up wherever there's a transparent employer-employee relationship, the Act goes abundant additional to incorporate organisations, department, office, branch unit etc. within the public and personal sector, organized and unorganized, hospitals, nursing homes, academic establishments, sports institutes, stadiums, sports advanced and any place visited by the worker throughout the course of employment as well as the transportation.
4. Each leader is needed to represent an interior Complaints Committee at every workplace or a branch with ten or a lot of staff. The District Officer is needed to represent a neighborhood Complaints Committee at every district, and if it is needed at the block level.
5. The Committee is needed to complete the inquiry inside a fundamental quantity of ninety days. On completion of the inquiry, the reports are sent to the leader or the District Officer, because the case could also be mandated to require action on the report inside sixty days.
6. The Complaints Committees have the powers of civil courts for gathering proof in accordance with sexual harassment.
7. The Complaints Committees square measure needed to supply for conciliation before initiating a Associate in Nursing inquiry, if requested by the litigant.
8. Penalties are prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine of up to fifty thousand.

ANALYSIS:

The "Vishaka Guidelines" created by India's Supreme Court were said to be the first enforceable civil law guidelines on the rights of women, to be free from violence and sexual harassment in both public employment and private employment. This landmark victory led the Indian Government to introduce legislation prohibiting sexual harassment in the workplace and inspired other women reforms across South Asia, including action taken in Bangladesh and Pakistan. The Supreme Court of Bangladesh, for example, referred to the Vishaka Guidelines in a ruling that determined violence against women in the workplace were a result of the Government's failure to take action against it through law. Similarly, it also provided detailed guidelines to be implemented by employers until the Bangladeshi Government took action

through legislation. And this is the important case that took a turn in women's liberty in the workplace. In this sense this case holds a special place in every woman who has been working peacefully in the present century.

CONCLUSION:

The Sexual Harassment not only affects a women's life physically but it destroys them mentally and decides them to hold on in their homes. It should be abolished to prevent the dignity and the respect of the women. Various new approaches and skills shall be implemented by each and every institution, organisation to prevent their women employees from such an evil social act. The main objective behind the stabilization of this right is to promote gender equality at workplace without any kind of discrimination and discernment among the workers of an organisation and take the women's of the country to the next level as their wish. No such kind things should stop women of not achieving from what they want to. This guidelines and the Act plays an important role in protecting women from the sexual harassment right now and it ought to protect even more women in upcoming years.

PUTTASWAMY V. UNION OF INDIA

- PRAJWAL DWIVEDI

ABSTRACT

An Indian Supreme Court bench of nine unanimous in its opinion held that in India the right to private life is a fundamental right. The case, brought up by Judge Puttaswamy of the retired High Court, challenged the Government's proposed uniform biometric identification card scheme which was mandatory for access to public services and benefits. The government argued that in any context, for example when people are in public, the right to privacy does not apply to everyone. The Congressional Guards argued that privacy is an incident of fundamental rights or freedom guaranteed by Article 21 which states that "No one shall be denied his life and personal freedom except in accordance with the law." It is an exceptional case that may lead to a number of Indian laws becoming constitutional challenges, including legislation that criminalizes same-sex marriages and bans of beef and alcohol use in many Indian States. Moreover, in the Indian Union, the countries will also establish for every person a data protection system. Furthermore, because of the privacy issues that privacy advocates are facing and the world's discussion on private security, the matter will certainly become more important.

INTRODUCTION:

An Historical Judgment confirmed fundamental rights to privacy was issued by the Supreme Court of Justice K.S. Puttaswamy vs. Union of India on 24 August 2017. In the Council, the freedom of speech and freedom of movement are provided for in the Indian Constitution Section III (Article 19(1), Article 14 and Article 18) and for our basic rights (Article 19(1)(a) of the Act) (d). The law does not grant or deprive these human rights and must comply with any of the laws and executive orders. However, as other constitutional rights are, the Supreme Court has made it clear that the right to private protection is not a 'absolute right.' Such interests would be overestimated by concurrent States and private interest subject to certain checks and benchmarks. The tests set out by the Puttaswamy Supreme Court, which determine more privacy violations, will be examined in this article. The report argues that a plurality of judges hereby assume that the European proportionality principle applies to potential violations of data protection study. The therigor and technicity of this doctrine will rely, but on a case-by-case basis, on the essence of the conflicting interests concerned. Any action in question will

remain concentrated in Article 21 of the Constitution at least on the principle of "fair, equitable and rational." It is vital to consider why the Supreme Court is asked to determine if we have a constitutional right to privacy and how it has finally taken a decision before reaching court standards.

WHAT IS PUTTASWAMY CASE[296]?

The question before the Court was whether the right to privacy was explicitly given in the Constitution, and it was if privacy was found to be a fundamental right. It was one that because the Court had taken the position in the above-mentioned judge's view into account, the petitioner wanted the Court to make explicit whether or not the arguments put forward in the previous judges about the existence of a constitutional rights held true.[297]

JUDGEMENT OF CASE.

Every one of the nine Justices on the Supreme Court unanimously agreed that the constitution guaranteed an individual's right to privacy, and granted it as an essential part of that right, not only life but also the right to personal freedom. It was obvious that it did not understand the clear right to privacy in M.P.P. Sharma and Kharak Singh to make free choices in their own lives, so they were denied relief.

the law on privacy, which recognised their views of autonomy over their own food and the fact that it also protects their identities, and/impugns their reproductive rights, has additional weight because of that reflects the good sense of both, as well as their wellbeing (e.g. privacy of health records). In more fundamental terms, Chandrachud: it can be lost if an individual is made part of the public sphere (on behalf of himself, C. J. Kehar J. Agrawal and J. Nazeer). Other things the paper had discovered was found, however, is that it had asserted that as well: that there is a negative right to state protection as well as a positive right to personal freedom in the case of the illegality of homosexuality. As a result, the judges held that the rules and regulations pertaining to data protection had to be implemented in India..

In this regard Chandrachud (for his part, C.J. Kehar, J. Agrawal and J. Nazeer) argued that the privacy of an individual who is in the public domain is not completely abandoned. It also found that private privacy included the State's right to prevent the crime of homosexuality and the

[296] https://indiankanoon.org/doc/127517806/

[297] http://www.scconline.com/DocumentLink/uq68RLmX

State's right to protect it from discrimination. The Judges argued, therefore, that in India data protection policy was adequate.

J. Chelameswar said in his judgment that the judge declared that "the right to privacy meant the right to deny medical treatment, the right to escape forced feeding, the right to eat pork, and the right to display religious symbols in one's personal appearance."

This was echoed by Judge Bob Bobdoe, who noted that personal data must be used in the manner it was provided to be to in order for a contract to be valid..

J. Nariman: The Judge has classified the confidentiality aspects of this concomitant opinion as non-interference with the individual party, the protection of personal data and the right to make personal decisions.

J. Sapre: In order to preserve the fundamental aim of freedom and friendship which guarantees the dignity of the person, in addition to being a separately owned right, the right to privacy also encompassed the right of an individual to freedom of expression and of movements.

j- Kauljudge covered both the right to privacy and the right to maintain personal integrity when he said, "Privacy rights are integral to maintaining dignity and integrity." He went on to say that in his speech that while data protection and national security safeguards should be enshrined in legislation, he didn't advocate for any loopholes in those rules.

BENEFIT OF THIS CASE

- • Individual privacy is an integral dignity element. Privacy allows the individual to maintain body and mind autonomy. The individual's autonomy is the capacity to decide on life's key issues.
- One can move to Supreme Court or high court against tyranny of state.
- Provides for protection against the state's interference in the private matters including marriage family & sex.
- • It held the state responsible and sought justice in the event of any infringement in the private area without its permission.

CONCLUSION

Since the nature of the right to privacy has recently been discussed in the Supreme Court, a wide range of individual privacy claims have appeared on the court horizon. The exact boundaries of the right must be individuated on a case-by-by-case basis, however, it is widely accepted that privacy claims must generally be considered and mitigated with other important

interests. It would be based on each individual facts and understanding of rights that have been granted by Article III of the Constitution, but the hierarchy of rights will vary in each case. Such a case could be an instance of marital rape lawbreaker might put her personal freedom at risk by impeding her ability to resist her husband in order to keep "private" activities within the marriage, affecting her privacy? Those who fail to understand autonomy act in a way that benefits everybody, such as having a meta-knowledge databases, aren't doing their job, if they provide someone with that information? If a person's right to be forgotten is as considerable as the benefits that they expect from sharing information across the Internet, does it outweigh those, right? Also, last week the Delhi High Court instituted a legal proceedings asking for a ban on religious ceremonies to be dropped in order to conjugate privileges being infringed upon by the Hindu Marriage Act and Special Marriage Act restitutions violated. When the Puttas-Mc Cartansaleecases decide to apply the test, how it would they want to do so on these diverse topics is something of equal importance will be examined.

PSYCHOLOGICAL AND LEGAL REFLECTION ON HATE CRIME

- ALAN BAIJU

INTRODUCTION

"Hate crime is defined as an offense in which the victim is targeted because of the actual or perceived race, colour, religion, disability, sexual orientation, or national origin of that victim"[298]. Incidents of hate crimes usually manifest itself in the form of violence against a particular individual or group belonging to a targeted community mainly by hate mongers and mobs who with their biased and bigoted mindset resort to brute force and intimidating actions in order to instill a sense of fear and make a statement to that particular group of the society.

In the contemporary period, the ambit of hate crimes has moved beyond discrimination and lynching and now encompasses derogatory and offensive speech, all of which is seriously harmful to the harmony and sound functioning of society. Hate crimes have a drastic psychological and emotional dilapidation that extends well beyond the victim as such crimes not only undermine a targeted community or individual but undermines the very rights that a person has been granted by the virtue of being a citizen of that country. "Hate crimes have a tremendous impact on the individuals who are victimized. In addition to the psychological and emotional harm caused by hate crime and its repercussions on identity and feelings of self-worth of the victim, the degree of violence involved in hate-motivated offences is normally much more extreme than in non-hate crimes."[299]

HATE CRIMES: INDIAN CONTEXT

The lynching of a black teenager by the name of Jesse Washington in Waco, Texas in the year 1916 continues to be a black mark in American history as it serves as a constant reminder of the notorious and gruesome acts of violence which ensued back when the Jim Crow racial segregation laws were deep-rooted into the norms of the American culture. Jesse was falsely accused of raping and murdering his white employer's wife. Jesse's lynching was made a public spectacle with as many as 15,000 onlookers who were predominantly white, coming together

[298] Sullaway, M. Psychological perspective on hate crime laws. Psychology, Public Policy, and Law, 10, (2004). 250–292

[299] R. v. Bissonnette, [2019] Q.J. No. 758

in a celebratory mood as 17-year-old Jesse was castrated and hung over a bonfire after his body was saturated with coal oil. Pictures of his charred corpse were circulated in the form of postcards. Now in stark parallel to this, in December 2017 in the Rajsamand district of Rajasthan, a Bengali Muslim migrant by the name of Afrazul Khan is hacked to death using a pickaxe and later set on fire, the whole incident is videotaped and the circulated video shows the attacker proclaiming that Khan is guilty of "love jihad". Although decades apart in the timeline the two incidents bear many uncanny resemblances, both involved individuals belonging to a targeted and marginalised group, Afrazul a Muslim in a Hindu majority India and Jesse an African-American when the U.S was under the stronghold of white supremacists, both these incidents were motivated by discrimination and the crime is committed against the individuals because they belonged to a particular group or held a certain identity. Those who were responsible for the killings took the law into their own hands and placed themselves in the position of a judge and executioner.

Hate crimes in India are in no way a recent phenomenon, history books are littered with such incidents of sectarian violence primarily emerging as an aftermath of the tragic partition in 1947 that claimed the lives of over 2 million people. The Hindu-Muslim conflict has been at the heart of much of India's political and social unrest and such conflicts aren't just social but also historical. The disastrous partition was the result of the inability of both the communities to decide upon and settle the division of power and lead to what has been called the most massive mass migration in history, and the inter-community violence and clashes have persisted since then. Extremist activities such as the demolition of Babri Masjid on December 6th,1992 by Karsewaks of the Vishwa Hindu Parishad (V.H.P.) and allied organizations who are right-wing volunteers and the burning of the Sabarmati Express train on February 27th,2002 carried out by Muslim extremists only continues to deepen the divide between the respective communities and this percolates into the general society as well. “The biggest challenge to democracy is the threat to communal harmony by frustrated elements resorting to competitive communalism resulting to communal violence which leads to loss of lives and properties.”[300]

Hate crimes in India are mostly religiously or politically motivated. It is tragic to observe that the political ecosystem in India capitalises on the biases and notions of the layman for their own gains and continues to propagate political hate speeches which have paved the way to

[300] Sree Kochu Malayalapuzha Devi Kshethra Samrakshna Samithy and others versus the District collector, Civil station, Kodappanakunnu, and others LINID 2019 KER 33248

incidents of mass violence. The political and social discourse in India post-2015 has seen a meteoric rise in the number of hate violence especially in the form of mob lynching and in a majority of such incidents Muslims and Dalits have been on the receiving end. Lynching in India continues to be masked by different terms such as cow vigilantism, mob violence, etc but the fact remains that such crimes disproportionately affect marginalised groups. This is further evidenced by over 600 incidents that Amnesty India's Website "Halt the hate" has recorded, the same has also been found by several social organizations who continue to observe that Adivasis, Muslims, Christians, Dalits, and LQBTQ+ individuals are far more susceptible to such crimes. They make a case that it is imperative that criminal provisions and legislative amendments should identify instances of such lynching's as hate crimes. The National Crimes Record Bureau (NCRB) which is the central agency responsible for tracking, collating, and recording the various crimes occurring across the country surprisingly does not record hate crimes with the reasoning that there aren't laws to effectively deal with such crimes. The majority of such attacks have been associated with cow vigilante groups. One such incident which leads to the discourse on hate crimes to actually gain traction in India is the lynching of a 55-year-old farmworker Mohammed Akhlaq and his son Danish on September 28th, 2015 at Dadri in Uttar Pradesh. The duo was dragged out of their house at night and thrashed brutally by a mob after an announcement at a local temple alleging that the family consumed and stored beef. Although Danish survived, his father succumbed to injuries. The family tried to pursue arduous litigation and a plea to re-investigate the case but in vain, as on August 2019, the Alwar trial court acquitted all the seven accused. Hate in India is propagated in the form of narratives that cause collective bodies to attach certain tags to certain communities and identities.

POWER DYNAMICS ASSOCIATED WITH HATE CRIMES

India's social and political discourse is very much interlinked to the numerous hate crimes that occur across the country. Power is often measured in terms of the dominance and controls a certain social group or organisation holds over the actions and minds of another group, thereby effectively curbing their liberty to practice, follow and profess their religion, ideology, or beliefs. This abuse of Social power Primarily by the political and authoritative figure by means of both legitimate and illegitimate means has led to its institutionalisation and normalisation which allow them to constantly hold the reigns of control over the larger social sphere. This is quite evident from several examples, The RSS-led NDA government has not released any official data regarding hate crimes, causing the general public to rely solely on databases such as Hate Crime Watch whose statistics have been published by several international media

houses. It is also quite surprising that there been an effective curbing of websites such as Factchecker. in and Human rights watch as well as social organisations such as Amnesty International (whose operations in India have been wound up citing continuous reprisal from the current government in power) which publish data on and meticulously record hate crimes. "lynching is not the word from Indian culture, its origin is from a story in a different religious text. We Indians trust in brotherhood. Don't enforce such terms on Indians"[301] these words by the RSS chief Mohan Bhagwat reflect the attitude that most political parties resort to when questioned about the advent of hate crimes, the same is evidenced by the fact that 49 eminent intellectuals which included actor and film-maker Aparna Sen, author Ramachandra Guha, and Film-maker Shyam Benegal were charged with sedition for writing an open letter to the Prime Minister raising their concern over the increasing cases of hate crimes and mob lynching's in India, charges were later dropped as the investigative agency could not provide sufficient evidence. Therefore, it is evident that any active discussion or measure against hate crimes in India are blocked by an institutionalised power structure that emphasises hatred for their personal gains.

PSYCHOLOGY OF HATE CRIMES

It is evident that socio-political, historic, and economic issues and circumstances are a major contributing factor towards the consolidation of hatred within a society, the crux of the matter however lies in the mind of the perpetrator. Hate is based on perceptions of a stable, negative disposition of persons or groups. "We hate persons and groups more because of who they are, than because of what they do. Hate has the goal to eliminate its target. Hate is especially significant at the intergroup level, where it turns already devalued groups into victims of hate."[302]

- Frustration stemming from personal failures or underachievement:

People who indulge in extremely jingoistic or hyper-nationalistic behaviour are often seen indulging in these activities in order to tide over feelings of deep-rooted inferiority complex or frustration. They find objects to anoint their failure to and bear extreme resentment towards it in an effort to salvage feelings of self-worth. They often latch onto and become staunch followers of a political party or social organisation in the hopes that the prestige of the

301 "Lynching a foreign concept, says RSS chief Bhagwat", The Telegraph online, https://www.telegraphindia.com/india/lynching-a-foreign-concept-says-rss-chief-bhagwat/cid/1710307

302 Fischer, Agneta, et al. "Why We Hate." *Emotion Review*, vol. 10, no. 4, Oct. 2018, pp. 309–320

organisation they are affiliated to will in some way rub- off in them and thereby compensate for what they could not achieve personally. This psyche is easily observed in relation to Donald Trump's victory in the U.S presidential elections, based on analysis the New York times reported that the majority of Trump supporters were low-income white Americans without a college education. Trump vehemently attacked immigrants and Muslims thereby addressing the hidden fear of many Americans who wished to express the same but chose not to do so fearing a backlash. He portrayed immigrants and Muslims as a common enemy that was responsible for depriving lower-income Americans of jobs, this narrative although false managed to strike a chord with many whose votes were instrumental in his victory.

- Violence perpetrated by lowering moral consciousness:

Fanatism is often characterised by a lack of critical thinking and blind adherence which causes individuals to lack empathy for other's pain and feelings. The perpetrators of hate and violence have a lower moral consciousness which causes them to lack any guilt towards the object of hatred. This is often caused by the fact that these individuals tend to live and stay in the loop of niches that provide them with a positive feedback mechanism, i.e.; in a group where their pre-existing notions are further cemented and contradictory opinions and discussions are avoided. This is thereby a classic example of Selective exposure theory.

- Group behaviour and mob mentality:

People are more likely to sin as members of a group than as individuals[303], when perpetrators of hate participate as a group it fosters a certain sense of belonging and camaraderie amongst them which fill the void of their individual identities. The core psychology behind people hating more virulently and acting more violently when they are part of a group or organisation is essentially the same as people committing crimes such as rape and theft during mass riots. These perpetrators are emboldened by the anonymity or shield of protection offered by the group, this is also often referred to as herd immunity. It was in response to the rising cases of mob violence within the country that the apex court dictated that "No individual in 1 (2015) 3 SCC 467 his own capacity or as a part of a group, which within no time assumes the character of a mob, can take the law into his/their hands and deal with a person treating him as guilty. That is not only contrary to the paradigm of established legal principles in our legal system but

[303] Niebuhr, Reinhold. *Moral Man and Immoral Society: A Study in Ethics and Politics*. 1932

also inconceivable in a civilized society that respects the fundamental tenets of the rule of law."[304]

- Retaliatory, thrill-seeking, or defensive mechanism:

A study carried out by Social scientists Jack McDevitt and Jack Levin reveals that many hate crimes are in fact driven by an immature itch for drama and excitement or by the haters putting themselves in the position of some sort of "saviour/defender" of their neighbourhood, religion, etc. Others are "mission-offenders" who engage in mischievous activities as a retaliatory mechanism against the actions of the victim community.

- Resonance with a leader:

It has been observed that individuals who harbour hatred towards a certain community or identity only rarely give these thoughts public expression fearing social backlash however when such individual unite under a leader that blatantly espouses communal and racial statements and hold certain marginalised communities responsible for the shortfalls and failure of his target audience, he is able to immediately strike a chord with many of his supporters. Pledging allegiance to such a leader further hardens the individual convictions of people and also provided them a feeling of being guilt-free. Individuals who hold a disposition towards authoritarianism and an averment against minorities or certain identities tend to support politically Right-wing figures

- "Revenge" for wrongdoings of the past

With the advent of social media and increasingly privatised and capitalist media houses, it is evident that accounts of genocides, rape to even the so-called "love- jihad" has been greatly distorted. This causes "haters to believe that the enemy is irredeemably malevolent, and there is little room for constructive change. Thus, only radical options are left to act upon one's hate, making its down-regulation difficult."[305]

LEGAL DISCUSSION ON HATE CRIMES

Much alike other criminal offences, the perpetrator's criminal responsibility in a hate crime also requires the presence of mens rea as a key element. "The "because" statement in the legal

[304] Tehseen S. Poonawalla vs Union Of India on 17 July 2018
[305] Fischer, Agneta, et al. "Why We Hate." *Emotion Review*, vol. 10, no. 4, Oct. 2018, pp. 309–320

definition of hate crime about the distinctiveness of the victim(s) denotes the offender's mens rea and perceptions of differences in group membership"[306].

The essential element that distinguishes a hate crime from other crimes which can be tried under the existing criminal provision in India is the discriminatory motive behind the crime, it is therefore of tantamount importance that hate crimes are recorded and recognised. There is significant international precedence for such an approach, The European Court of Human Rights observed in the case of ***Abdu Vs Bulgaria***[307] that "Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights.". Investigation of any possible discriminatory motives especially when the victims belong to a marginalised community should be done stringently by the assigned law enforcement agencies and the proposed legislation must have provisions to check the same. The National Crimes record bureau must be engaged in collecting and reporting disaggregated data on alleged hate crimes so as to help create programmes and better policies for the police and prosecuting authorities to prevent future crimes of this nature. "According to the Organization for Security and Co-operation in Europe, Codifying the social condemnation of hate crimes into law is important to affected communities, can help build trust in the criminal justice system, and thus can repair social fissures"[308].

An ideal example of a legislature taking an active step towards the curbing of hate crime is the passage of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act by the U.S congress in 2009. This was the after-effect of the brutal murder of Matthew Shepard and James Byrd Jr, the first for his sexual orientation and the second for his race. Although the civil rights act of 1968 already provides for federal investigation and prosecution on crimes involving race, colour, religion, or national origin, the new act widened its scope. The act is consistent with the U.S supreme court's decision in *Wisconsin VS Mitchell* [309] and provided a longer maximum sentence for crimes where the accused has selected victims on the basis of "the victim's race, religion, colour, disability, sexual orientation, national origin or ancestry."[310]

[306] Key Sun," The legal definition of hate crimes and the hate offenders distorted cognitions", Issues in Mental Health Nursing, pg:599

[307] (Application No. 26827/08)

[308] Shivam, Anmolam, "India needs legislation to counter hate crime" https://www.thestatesman.com/opinion/india-needs-legislation-counter-hate-crime-1502883535.html

[309] Wisconsin v. Mitchell, 508 U.S. 476 (1993)

[310] Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (2009)

Adopting an Anti-Hate Approach:

There is an urgent need for an active dialogue between the civic society, the legislature and representatives of marginalised communities to work out the specifics of anti-hate crime measure which may include explicit provisions of law and broader policy changes which will help eradicate discrimination. The law must expand itself in order to accommodate all offences done with a discriminatory motive rather than just limit itself to crimes such as "lynching" which the law currently addresses using Section 223(a) of the Criminal Procedure Code, 1973 wherein a person can be charged for an act of group attack on some other person. Narrowing the scope of the law to this extent would also limit the scope of actions to counter hate crimes as killings and assault only a fraction of the alleged hate crimes. Therefore, the ambit of what the law perceives to be crimes of discriminatory motives should be expanded to incorporate base offences including harassment, sexual offences, property damage, etc. There should also be due consideration on how hate crimes are incorporated into the criminal codes, this may be done either by distinguishing hate crimes as a separate form of crime or by considering discriminatory motive as an aggravating factor in existing crimes. Dealing with hate crimes would also require competent and well-trained law enforcement personnel and judicial officers.

The number of hate crimes and atrocities against minorities are at an all-time high and our alarming figures have caught the attention of international human rights bodies as well. With a country as heterogeneous as India, it is of paramount importance that there is a proper legislation and a strict implementation mechanism in place to check discrimination and bigotry otherwise co-habitation becomes next to impossible for several marginalised communities. Violators of hate-crime laws should be met with strict action and laws such as "Manav Surakha Kanoon" need to be enforced and it is only through such solid strides that we will be able to collectively curb the cancer of hate crimes out of our society.

SAMPURNA BEHRUA V UNION OF INDIA, 2018

- RUKHMAN SINGH RATHORE

INTRODUCTION

India is a signatory to the United Nations Convention on the Rights of the Child, which is an international human rights treaty that sets out the civil, political, economic, social, health and cultural rights of children. In the Indian Constitution after the Forty-Second amendment the Article 39 (f) and Article 39A guarantee certain rights to children. Article 39 (f) says, "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." and Article 39A says, "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." Article 14 and 22 (1) also oblige the State to guarantee equality before the law and a legal system that promotes justice on the basis of equal opportunities for all. The main burden of the writ petition is the failure of the state governments to implement various provisions of the act of 2000 including, inter alia, the establishment of child welfare committees, Juvenile Justice boards, Special Juvenile Police Units, the establishment of appropriate homes for children in need of care and protection, improving the lives conditions of juveniles in conflict with the law, medical facilities for children in the custody of the state and several other human rights issues.

In this paper, we will focus on a landmark judgement of ***Sampurna Behrua v Union of India, 2018*** in which the Supreme Court gave certain directions which led to several developments in Juvenile Justice laws in India.

DIRECTIONS GIVEN BY SUPREME COURT:

i) Ministry of Women and Child Development in Government of India and State Governments should ensure that all positions in National Commission on Protection of Child Rights (NCPCR) and State Commission on Protection of Child Rights (SCPCR) are built up in time and adequate staff is provided to these statutory bodies.

ii) NCPCR and SCPCR should take care of their duties and functions with great earnestness since they have a very significant and pro-active role to play in improving the lives of children across the country.

iii) State Child Protection Societies and District Level Child Protection Units have an enormous responsibility in ensuring that Juvenile Justice Act is effectively implemented and child care institutions are managed and maintained in a manner conducive to the well being of children in all respects.

iv) State Governments must ensure that all positions in the Juvenile Justice Board and Child Welfare Committees are filled up exponentially in accordance with the rules of the State Government.

v) Juvenile Justice Board and Child Welfare Committee must appreciate that it is necessary to have sittings on a regular basis so that a minimal number of enquiries are pending which is a constitutional obligation.

vi) NCPCR and SCPCR must carry out time bound studies on various issues under Juvenile Justice Act, and state governments and union territories must take remedial steps.

vii) NCPCR and SCPCR must carry out a study for estimating the number of probation officers required and accordingly must appoint the necessary number of probation officers. It must be emphasised that the role of a probation officer is critical for the rehabilitation and social reintegration.

viii) Ministry of Women and Child Development (MWCD) must make creative use of information and communication technology not only for the purpose of collecting data but also for other issues connected with Juvenile Justice Act, for example having databases of missing children, trafficked children and follow-up of adoption cases, etc. Utilisation of technology will improve administrative efficiency and will have a positive impact on the lives of children.

ix) There is a need to set up a Special Juvenile Police Unit and to appoint child welfare police officers at the earliest as the police is the first responder on issues pertaining to offences allegedly committed by children.

x) The National Police Academy and State Police Academy must consider including child rights as a part of their curriculum on a regular basis.

xi) Management of child care institutions which is extremely important. State governments and union territories would be advised to ensure that those are registered so that children can live a dignified life in these institutions.

xii) State governments and union territories would be advised to appoint eminent persons from civil societies to monitor and supervise child care institutions in all the districts. For this, state legal service authorities and district leader service authorities would extend full assistance and cooperation to the government authorities in this venture. There is no effective response from the state governments and union territories with respect to Juvenile Justice funds.

xiii) It is requested to collect any information relating to Juvenile Justice Act and to prepare a report for the National Legal Services Authority which will help in decision making and to plan out their affairs.

xiv) All authorities i.e Juvenile Justice Board, Child Welfare Committee, probation officers, district child protection unit, child welfare police officers and managerial staff of child care institutions must be sensitized and given adequate training relating to their position.

xv) Chief Justice of every High Court to register proceedings on his own motion for effective implementation of Juvenile Justice act 2015 so that roadblocks if any are encountered by statutory authorities and Juvenile Justice committee of the High Court are meaningfully addressed after hearing the concerned governmental authorities.

xvi) Request Chief Justice of each High Court to consider child friendly courts and vulnerable witness courts in each district.

xvii) Enquiries under Juvenile Justice act and trials under POSCO (Protection of Children from Sexual Offences) should be conducted with high degree of sensitivity.

CONCLUSION

The Honourable Supreme Court gave the above mentioned directions which developed the legal framework of the juvenile justice laws in India and laws in accordance to the protection of children in India. This case is of immense value in taking a step forward in realising the rights of minors who may not be able to speak for themselves. For this, Sampurna Behrua should be applauded for her efforts to make the state aware of its responsibility. The state needs to ensure that the Juvenile Justice law is properly implemented. Juvenile delinquency can be stopped only if minors and are adequately cared for and children are provided with an environment in which they can develop a healthy thinking process.

KASHMIR: A BATTLEGROUND FOR ARCH-RIVALS

- MEHUL ANAND

ABSTRACT

We all know decently about Kashmir. It has been known as the paradise on earth and at the same time a battleground as well. How ironic it is that a beautiful place has witness multiple wars where two countries India and Pakistan claiming as their own land till todays date since both of them got independence in the year of 1947. In this paper, we will be knowing about a brief history of Kashmir, a Hindu ruled kingdom where majority of population is of followers of Islam religion. Moreover, this paper deals with timeline of Kashmir and aims at excavating and highlighting the justification behind wars which were held after regular intervals resulting in huge loss of precious life of human whether army men or civilians on both sides.

Key Words: Article 370, India, Pakistan, War, Kashmir, Conflict, Problem

1) INTRODUCTION:

1.1 History of the state of Jammu and Kashmir

Before 1947, Jammu and Kashmir (J&K) was considered as princely state. Who was having a ruler named Maharaja Hari Singh who did not want to merge with Pakistan and want to negotiate with both the countries which were India and Pakistan to have independent status for his state. Whereas, The Pakistani leaders thought the Kashmir region 'belonged' to Pakistan, since the majority of the population of the state were followers of Islam religion. But this is not how people saw themselves- they considered themselves as Kashmiri above all. The popular movement in the state which was quit Kashmir agitation, led by Sheikh Abdullah of the national conference wanted to get rid of Maharaja Hari Singh, but was against joining Pakistan. "Sheikh Abdullah opted for India as he believed Pakistan was determined to become a theocracy". [311]

In the year of 1947, months after both the countries gained Independence Pakistan sent tribunal infiltrators from its side to capture Kashmir. This forced Maharaja Hari Singh to seek help from the Indian Military. As a result, Indian military was looking forward to help and extended its

[311] https://www.telegraphindia.com/india/sheikh-abdullah-opted-for-india-as-he-believed-pakistan-was-determined-to-become-a-theocracy/cid/1695891

support and drove back the invaders from the Kashmir Valley but this could only be happening if Maharaja Hari Singh has signed an 'Instrument of Accession' with the Government of India. Pakistan always considered Kashmir as its own part as a consequence of which one part of the state come under Pakistani control. India claims that this area is under illegal occupation and describes it as 'Pakistani Occupied Kashmir' or 'POK'. In 1948 Sheikh Abdullah becomes the Prime Minister of the State of Jammu and Kashmir (the head of state was then called then Prime Minister and now is consider as chief minister). India agreed to maintain the then autonomy of Jammu and Kashmir and provide them with the then special status of Article- 370 of Constitution of India.

1.2 What was Article 370?

1. Notwithstanding anything in this constitution:

(a) The provisions of Article 238 shall not apply in relation to the State of Jammu & Kashmir.

(b) The power of Parliament to make laws for the said state shall be limited to

(i) those matters in the Union List and the Concurrent List which in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State and

(ii) Such other matters in the Said Lists as, with the concurrence of the government of the State, the President may, by order specify.

1. Explanation. For the purposes of this Article, the government of the State means the person for the time being recognized by the President as Maharaja of Jammu & Kashmir acting on the advice of the council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifty day of March 1948.

(c) The provisions of Article (1) and of this Article shall apply in relation to this State;

(d) Such of the other provisions of this Constitution shall apply in relation to that State Subject to such exceptions and modifications as the President may by order specify;

Provided that no such order which related to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (1) shall be issued except in consultation with the government of the State.
Provided further that no such order which relates to matters other than those referred to in the last proceeding proviso shall be issued except with the concurrence of the Government of the State.

(2) If the concurrence of the government of the State referred to in para (ii) of Sub Clause (b) of Clause (1) be given before the Constituent Assembly for the purpose of framing the Constitution of the State is concerned. It shall be placed before such Assembly for such decision as it may take thereon.
(3) Notwithstanding the anything in the foregoing provisions of the article, the President may, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may notify.

Provided that the recommendation of the Constituent Assembly of the State referred to in Clause (2) shall be necessary before the President issues such a notification.[312]

1.3 How was it different from rest of the India?

- Indian constitution deals with the special status given to the state of Jammu and Kashmir.
- Jammu and Kashmir citizen have dual citizenship.
- Indian parliament does not have any major rights over Kashmir it can only control issue of defence, international relation and communication.
- Jammu and Kashmir national flag is different.
- Outsider cannot own a land in Jammu and Kashmir because of section 370 RTI does not apply on Jammu and Kashmir, RTE is not implemented, CBI does not apply, Indian laws are not applicable and Sariah law is applicable to women in Kashmir.
- Jammu and Kashmir legislative assembly term is 6 years whereas its 5years for the states of India.

[312] Article 370 of Constitution of India (before amendment)

- The order of state of India is not valid in Jammu and Kashmir. Parliament of India can make laws in extremely limited areas in terms of Jammu and Kashmir.
- In Jammu and Kashmir if a woman marries a person of any other state of India, citizenship to the female ends.
- If a woman marries a man in other Indian states she loses her citizenship whereas if any women marry a Pakistani, she will be entitled to have a citizenship of Jammu and Kashmir.
- There are no rights to panchayat in Kashmir, minorities in Kashmir (Hindu, Sikh) does not get 16% reservation.[313]

2) STATEMENT OF PROBLEM:

2.1 Pakistan's problem

Since Pakistan gained Independence in 1947, they have always considered Kashmir as their integral part of Islamic Republic of Pakistan because of three reasons. Firstly, as mentioned above, the state of Jammu and Kashmir was having a Hindu ruler and a Hindu kingdom but majority of people living there where followers of Islam Religion this led Pakistan to Invade the territory of India's Jammu and Kashmir and took a big part of it which they considered as 'Azad Kashmir' and India call it 'Pakistan Occupied Kashmir' or 'POK'. Secondly, Pakistan considered that it is India who has illegally occupied the Kashmir in the year 1947 by influencing the then Maharaja to sign the 'Instrument of Accession' and thus could not be recognised.

Thirdly, Pakistan's allegation was that the Muslims living there were being terrorised and were tortured. They also claimed that they invaded in the north-west part of Kashmir in order to do self-defence while thinking at the same time that India will annexe some parts of Islamic Republic of Pakistan.

2.2 India's response and problems

India scrutinize that Pakistan is sponsoring terrorism in Indian Administered Kashmir since Independence and have tried to invade but failed subsequently. The Invasion which was made in the year of 1947 may be regarded as what is described in International law 'indirect aggression' or subversion intervention'. The subversive activities are prohibited by the International Law. Article 51 of United Nations charter clearly stipulates that in self-defence

[313]Kashmir: Problem: Its legal aspects book by H.O. Agarwal

forces can be used by a state in another state only when 'armed attack' occurs. In other cases, forces cannot be legitimately used in order to exercise the right of self-defence. Since Indian forces had not committed any such attacks in the territory of Pakistan, the government of Pakistan cannot be justified in using the force in the state of Jammu and Kashmir.

India on another hand also claimed that it signed the 'Instrument of Accession'. In fact, it is Islamic Republic of Pakistan who illegally invaded some part of Kashmir and claiming it as their own. In the year 1975 an agreement was also signed between the then chief minister of Jammu and Kashmir and the then Prime Minister of India which came to be known as Indra-Sheikh Accord.

3) REVIEW OF CASES:

The Prime Ministers Jawaharlal Nehru and Liaquat Ali Khan metin 1947-48, where Nehru acknowledged Khan of India's intention to refer the dispute to the United Nations under article 35 of the UN Charter, which will allow the member states to bring to the Security Council attention situations `likely to endanger the maintenance of international peace'.

India sought resolution of the issue at the UN Security Council on 1 January 1948. Following the set-up of the United Nations Commission for India and Pakistan (UNCIP), the UN Security Council passed Resolution 47 on 21 April 1948. The measure imposed an immediate cease-fire and called on the Government of Pakistan 'to secure the withdrawal from the state of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the state for the purpose of fighting.' It also asked Government of India to reduce its forces to minimum strength, after which the circumstances for holding a plebiscite should be put into effect 'on the question of Accession of the state to India or Pakistan.' However, it was not until 1 January 1949 that the ceasefire could be put into effect, signed by General Gracey on behalf of Pakistan and General Roy Bucher on behalf of India[314].

The UNCIP made three visits to the subcontinent between 1948 and 1949, trying to find a solution agreeable to both India and Pakistan. It reported to the Security Council in August 1948 that "the presence of troops of Pakistan" inside Kashmir represented a "material change" in the situation. A two-part process was proposed for the withdrawal of forces. In the first part, Pakistan was to withdraw its forces as well as other Pakistani nationals from the state. In the

[314] https://en.wikipedia.org/wiki/UN_mediation_of_the_Kashmir_dispute#cite_note-FOOTNOTESchofield200368-69-4

second part, "when the Commission shall have notified the Government of India" that Pakistani withdrawal has been completed, India was to withdraw the bulk of its forces. After both the withdrawals were completed, a plebiscite would be held. The resolution was accepted by India but effectively rejected by Pakistan.

The Indian government considered itself to be under legal possession of Jammu and Kashmir by virtue of the accession of the state. The assistance given by Pakistan to the rebel forces and the Pakhtoon tribes was held to be a hostile act and the further involvement of the Pakistan army was taken to be an invasion of Indian territory. From the Indian perspective, the plebiscite was meant to confirm the accession, which was in all respects already complete, and Pakistan could not aspire to an equal footing with India in the contest.

The Pakistan government held that the state of Jammu and Kashmir had executed a Standstill Agreement with Pakistan which precluded it from entering into agreements with other countries. It also held that the Maharaja had no authority left to execute accession because his people had revolted and he had to flee the capital. It believed that the Azad Kashmir movement as well as the tribal incursions were indigenous and spontaneous, and Pakistan's assistance to them was not open to criticism.

In short, India required an asymmetric treatment of the two countries in the withdrawal arrangements regarding Pakistan as an `aggressor', whereas Pakistan insisted on parity. The UN mediators tended towards parity, which was not to India's satisfaction. In the end, no withdrawal was ever carried out, India insisting that Pakistan had to withdraw first, and Pakistan contending that there was no guarantee that India would withdraw afterwards. No agreement could be reached between the two countries on the process of demilitarisation.

Scholars have commented that the failure of the Security Council efforts of mediation owed to the fact that the Council regarded the issue as a purely political dispute without investigating its legal underpinnings.

4) WARS BETWEEN INDIA AND PAKISTAN

India and Pakistan have been indulged into war 4 times. These wars result in destruction of communities and families and often disrupts the development of the social and economic fabric of nations. The effects of war include long-term physical and psychological harm to children and adults, as well as reduction in material and human capital.

4.1 Indo-Pak war 1947

The Indo-Pak war of 1947 was also called the First Kashmiri War which was started in 1947 when Pakistan feared that the Maharaja of the princely state of Kashmir and Jammu would accede to India. After partition, princely states were given to choose whether to join Republic of India or Islamic Republic of Pakistan or to remain independent. Jammu and Kashmir, the largest of the princely states, had a majority Islam religion population and significant fraction of Hindu population, all ruled by the Hindu Maharaja Hari Singh. Tribal Islamic forces with sponsored from the army of Pakistan attacked and annexed parts of the princely state forcing the Maharaja to sign the Instrument of Accession with Dominion of India to receive Indian military aid.[315] The UN Security Council passed Resolution in 1948. The fronts strengthen with time along what came to be known as the Line of Control. India gained control of about two-thirds of the state (Kashmir valley, Jammu and Ladakh) whereas Pakistan occupied roughly a third of Kashmir (Azad Kashmir, and Gilgit–Baltistan).

4.2 Indo-Pak war 1965

This war was started after Pakistan's Operation Gibraltar, which had mission to infiltrate forces into Jammu and Kashmir to precipitate an insurgency against India. India retaliated by launching a military attack on West Pakistan. The seventeen-day war caused thousands of casualties on both sides and witnessed the largest engagement of armoured vehicles and the largest tank battle since World War II. [316]The tension and hostilities between the both nations ended after a ceasefire was declared after diplomatic intervention by the Soviet Union and USA and the after-all issuance of the Tashkent Declaration.

4.3 Indo-Pak war 1971

This war was unique in the way that it did not involve the issue of Kashmir for the first time, but was rather precipitated by the crisis created by the political led battle brewing in erstwhile East Pakistan (now Bangladesh) between Sheikh Mujibur Rahman, Leader of East Pakistan, and Yahya Khan and Zulfikar Ali Bhutto, leaders of West Pakistan. This would culminate in the declaration of Independence of Bangladesh from the so-called state system of Pakistan. India intervened in the ongoing Bangladesh liberation movement. After a large scale pre-emptive strike by Pakistan, full-scale military attack between the two countries commenced.

[315] https://en.wikipedia.org/wiki/Kashmir_conflict
[316] https://olayinkashehu.medium.com/india-pakistan-two-neighbours-edging-closer-to-war-48f243662a97

Pakistan attacked at many places along India's western border with Pakistan, but the Indian Army successfully held their positions. The Indian Army quickly responded to the Pakistan Army's movements in the west and made some initial gains, including capturing Pakistan territory. Within two weeks of intense fighting, Pakistani forces in East Pakistan surrendered to the joint command of Indian and Bangladeshi forces after which the People's Republic of Bangladesh was created. This war noticed the highest number of casualties in any of the India-Pakistan conflicts, as well as the largest number of prisoners of war since the Second World War after the surrender of more than 90,000 Pakistani military and civilians. In the words of one Pakistani author, "Pakistan lost half its navy, a quarter of its air force and a third of its army".[317]

4.4 Indo-Pak war of 1999

Commonly and very well known as the Kargil War, this conflict between the two countries was mostly limited. During early 1999, Pakistani troops infiltrated across the Line of Control (LoC) and annexed Indian territory mostly in the Kargil district. India responded by launching a major military and diplomatic offensive to drive out the Pakistani infiltrators. Two months into the conflict, Indian troops had slowly retaken most of the ridges that were encroached by the infiltrators. According to official count, an estimated 75%–80% of the intruded area and nearly all high ground was back under Indian control. Fearing large-scale escalation in not so military conflict, the international community, led by the United States, increased diplomatic pressure on Pakistan to withdraw its military from remaining in Indian territory. Faced with the possibility of international isolation, the already fragile Pakistani economy was weakened further. The morale of Pakistani forces after the withdrawal declined as many units of the Northern Light Infantry suffered heavy casualties. By the end of July 1999, organized hostilities in the Kargil district had ceased. [318]

5 AGREEMENTS/DECLARATION BETWEEN INDIA AND PAKISTAN

5.1 Tashkent Declaration, 1966

This declaration was signed by prime minister of India, Lal Bahadur Shastri and Ayub Khan President Pakistan wherein it was agreed that relations between India and Pakistan shall be based on the principle of non-interference in the internal affairs. They will discourage any

[317] https://military.wikia.org/wiki/Indo-Pakistani_wars_and_conflicts
[318] https://www.cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/k/Kargil_War.htm

propaganda directed against them side by side encourage propaganda which promote the development of the friendly relations between the two countries. The minister of foreign affairs for India Sardar Swarn Singh stated in the UN general assembly in 1966 that I am going to repeat my previous year's statement in the assembly on Kashmir issue.[319] It is, therefore necessary for me to make my government's position clear beyond any doubt. Legally, constitutionally, morally and on the basis of the will of the people, the state of J & K is an integral part of the Indian union. The periodic participation in the election held there. He further stated that there is no better way of giving reality to the freedom to the people of state.

5.2 Shimla Agreement 1971

The agreement on bilateral relations between India and Pakistan was signed on 2-7-1971 wherein it was pledged by both countries that United Nations charter shall governs the relation between the countries and the basic issues and causes of the conflict which have weakened the relations between the two states for lost 25 years shall be resolved by peaceful means. There shall be no interference of any third party in the bilateral issues. That they will take steps within their power to prevent hostile propaganda directed against each other. The line of control resulted from cease-fire line of 1971 shall be respected without prejudice to the recognised position of either side and both shall refrain from the threat of the use of force in violation of this line.

5.3 Kashmir Accord 1974

Sheikh Mohd Abdulla explained in January, 1972 that he had given up the hope of obtaining support for independence as an alternative from Pak, and that he saw future of state as an autonomous region within the union of India and this change was due to India and Pakistan war of 1971. Prime Minister Indira Gandhi welcomed the decision and talk was initiated between Beg and diplomat G. Parthasarathy culminating into an agreement to be known as *Kashmir Accord* was signed between governments of India and state of J&K. The demand for fresh election in the state was rejected at all. It was agreed that state of J&K is constituent unit of India shall be in its relations with union which shall be continuously be governed by article 370 of the Indian constitution. The residuary power under article 248 of the Indian Constitution will remain with the state. It was also decided parliament will continue to have power to make laws relating to the prevention of activities directed towards disclaiming,

[319] https://www.academia.edu/44708025/A_Journal_of_CPJ_School_of_Law

questioning or disrupting the sovereignty, territorial integrity of India or bring about cession of a part of the territory of India or secession of a part of territory of India from union or causing insult to Indian national flag, Indian national anthem and constitution. Any provision of Indian Constitution applied to J&K with adaption or modification, such adaption or modification can be altered or repealed by an order of president under article 370. But all those provisions applied without adaption or modification are unalterable each provided each individual proposal in this behalf being considered on its merits.

5.4 Lahore Declaration

Prime Minister Atal Behari Vajpayee of India and his counter partner Prime Minister Muhammad Nawaz Sharif of Pakistan met after Kargil conflict in 1999 and it was agreed that sharing of a vision of peace and stability between their counties and progress and prosperity for their peoples. They again committed to principle and purposes of the charter of the UN and universally accepted principles of peacefully co-existence. They recalled the determination of both countries to implement the Shimla agreement in letter and spirit and resolution of all outstanding issues including Kashmir.[320]

6. PRESIDENTIAL ORDER

On 5 August 2019, The Constitution (Application to Jammu and Kashmir) Order, 2019 under Article 370 was issued by the President of India superseding the Constitution (Application to Jammu and Kashmir) Order, 1954. The same was announced in the Rajya Sabha by the Home Minister Amit Shah. The order stated that all the provisions of the Indian Constitution will be applied to Jammu and Kashmir from now on. This in effect meant that the separate Constitution of J & K stood abrogated. The President issued the order with the "*concurrence of the Government of State of Jammu and Kashmir*", which apparently meant the Governor appointed by the Union government.[321]

The Presidential Order of 2019 also added clause (4) with four sub-clauses to Article 367 under "*interpretations*". The phrase "*Sadar-i-Riyasat acting on the aid and advice of the Council of Ministers*" shall be construed as the "*Governor of Jammu and Kashmir*". The phrase "*State*

320 https://www.academia.edu/43751889/ANATOMY_OF_ARTICLE_370_and_35A_TRACING_THE_PAST_TO_THE_PRESENT

321 https://www.academia.edu/43751889/ANATOMY_OF_ARTICLE_370_and_35A_TRACING_THE_PAST_TO_THE_PRESENT

government" shall include the Governor. In proviso to clause (3) of Article 370, the expression "*Constituent Assembly of the State referred to in clause (2)*" shall read "*Legislative Assembly of the State*".*-regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise*."

According to Jill Cottrell, some of the Presidential orders under Article 370 have been issued since 1954 in similar circumstances when the state was under President's rule. The Union government interpreted the "*concurrence of the state government*" under these circumstances to mean the Governor.

Immediately after placing the Presidential Order 2019 before the Rajya Sabha, Home Minister Amit Shah moved a resolution recommending that the president issue an order under article 370(3) rendering all clauses of Article 370 inoperative. After the resolution was adopted by both houses of the parliament, the President issued Constitutional Order 273 on 6 August 2019 replacing the extant text of Article 370 with the following text:[322]

"*All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule,*[323]

7. CONCLUSION:

It is significant to note that Pakistan used its forces in Kashmir immediately after it become the member of the United Nations Organisation. Had it used its troops before becoming the member of world body then the scenario might be something else as their membership would have been denied. In the up-coming future what we can expect from both nuclear countries is that both of them should focus upon their development in terms of political, economic and socially rather than competing with others integral part. After India and Pakistan got indulged into wars till todays date they haven't find any conclusion yet. War has a catastrophic effects on the health of people and wellbeing of nations. Studies have shown that conflict situations cause more mortality and disability than any major disease. As a matter of fact, war only leads

[322] https://www.indiandefencetimes.com/president-orders-indian-constitution-to-apply-in-jammu-and-kashmir/

[323] Article 370 of Constitution of India

to destruction and none is declared as victorious over the other. After the world war 1 and 2, if European countries can unite and live peacefully then why can't India and Pakistan?

COSMOPOLITANISM AND GLOBAL JUSTICE

- KARAN KUMAR CHOUDHARY

INTRODUCTION

GLOBAL JUSTICE AND COSMOPOLITANISM

Most academic discussions of worldwide justice have targeting its normative significance. Political theorists, who have dominated discussion on global justice, have mostly considered it in terms of a project, that's a normative political project to be realized in the world. i might wish to comment briefly on this before I move to debate the opposite and more sociological dimensions, especially the cognitive dimension, and more specifically the method by which global justice emerges. A striking feature of normative conceptions of worldwide justice is that political theorists are divided with the aims of global justice, which we will increase the lexicon of essentially contested terms. Much of this disagreement arises when it involves the tricky problem of the way to create policies to realize normative aims, assuming that these are often agreed on, since unrealizable aims are useless. There's perhaps wider agreement on the presuppositions of worldwide justice as regards, as an example, the responsibilities of citizenship. Assuming that the aims of worldwide justice derive from the responsibilities of citizenship, which entail not just rights but also obligations, an honest place to start is with the condition of citizenship. There is general agreement that citizens have an obligation to others beyond those who are members of their community, generally taken to be a state, but disagreement on how far it should extend – to humanity at large, as an example, as Peter Singer (2004) has argued – and, moreover, there's disagreement on what the requirement entails and the way far into the longer term such obligations should extend (for instance, to future generations). Within the case of debt crisis Europe, there's the difficulty of whether obligations reach member states to help those states in financial trouble on the grounds that the EU as an entire will benefit. During this case it's evident that obligations are associated with interdependence. However, if we've an obligation to people with whom we aren't directly connected – to form that assumption – the question arises on what quite deeds should follow (donations, changes in consumption like fair trade, boycotting the products of exploitative companies, increased taxation to fund aid, etc.). This is often seen as an issue of solidarity, whether it's a 'thin' or a 'thick' solidarity. there's a second debate on whether responsibility falls on individuals or on states, for a few it's enough that states fulfill the requirement , as an

example through humanitarian aid financed through general taxation, but for others individuals as active citizens even have additional obligations of a pro-active nature. Also, there's a variety of pragmatic issues concerning efficiency, that is, who is best placed to realize the specified results – states, inter-governmental organizations or global institutions – and what sorts of action are required (e.g. military intervention, high-interest loans or aid, changes to migration policies, reduced carbon emissions, etc.). There is an extra layer of complexity, too, if we add responsibility. to possess an obligation to others is all the stronger if one features a responsibility to them, but not all obligations are based on responsibility; they will be inspired by solidarity, which successively rests on sources such as identity and is usually relational (in the sense of bonds that derive from having a direct reference to others). Indeed, i might argue that cosmopolitan solidarity doesn't necessarily derive from the obligations (or duties) of citizenship, which is essentially determined properly secured by a state. But this is often an issue that's essentially one among process or emergence instead of one among the project of worldwide justice, that is, it's a development that is determined by changing social realities and the way publics answer problems in the social world. With reference to global justice as a political project, there are essentially four positions, ranging from fairly weak to strong views, counting on where one stands on the question of the bounds of obligation and whether or not the norms that apply within a given state also should apply beyond the jurisdiction of the state. One position is that the aim of global justice is to alleviate poverty in order that basic needs are often fulfilled. This is often a reasonable weak objective therein it's achieved once the matter of absolute poverty has been solved and really basic problems of health are solved. This position generally corresponds to humanitarianism and development aid, and is inspired by a basic desire to provide assistance to vulnerable persons or societies that have experienced a serious catastrophe. However, the requirement to supply assistance to those in need doesn't challenge the obligations of citizenship and doesn't necessarily cause cosmopolitan consequences. A second position is to ascertain the matter of worldwide justice in terms of the pursuit of human rights. During this case the target is quite more focused on individuals than on societies as an entire and cares with securing basic liberty. These are two weak demands since the aim is to bring societies up to a particular level or to eliminate specific obstacles or to form possible certain basic capabilities, as Martha Nussbaum (2002, 2006) argues, like needs and freedoms. A 3rd position is to ascertain the aim of worldwide justice to be the pursuit of equality, this being a stronger position, as Gillian Brock (2009a, 2009b) has convincingly argued, therein to realize equality in many parts of the world it's necessary to vary power relations in those countries and put in situ new social structures. This is often quite the

satisfaction of basic needs, but extends into the domain of the politics of recognition. None of those three positions – assuming effective means are often established on the way to achieve them (which for positions one and two is rather simpler than for the third) – has any significant qualitative implications for the developed world or for planetary sustainability. They're compatible with liberal and statist as against globalist arguments.

Finally, there's the stronger position that the aim of worldwide justice is to realize equality between states, as against taking without any consideration existing relations, and to realize certain goals within states, like the removal of absolute poverty, the enforcement of human rights, greater equality. During this stronger position, which we will term globalist, the question of worldwide justice is inescapably one among redistributive justice and powerful demands as to what obligation to others entails. Within the case of migration, as an example, it may be necessary to make significant changes to membership of the polity. Strong conceptions of global justice also arise on redistribution, challenging liberal humanitarianism. Once the satisfaction of basic needs and freedoms has overcome absolute inequality, the challenge of overcoming relative inequality remains. This puts egalitarianism to the test, since if the whole world were to realize an equivalent standard of life because the developed world, the planet would self-destruct in terms of ecological sustainability. This, then, is where

global justice and global environmentalism are interlinked, and where the target of planetary sustainability could also be the last word aim of worldwide politics. Strong conceptions of global justice also are associated with the thought of worldwide democratization and call into question the statist and liberal assumptions of the opposite positions with the argument that global institutions got to be created instead of counting on existing states or the actions of individual citizens.[324] The first two positions have the merit of being achievable, while the second two, in particular the fourth, are less clear in terms of how forward. The pursuit of the normative objectives of worldwide justice can't be separated from the means to realize them and we have to entertain the likelihood that to ignore such problems because the enforcement of global justice are often counter-productive, if not destructive. The misuse of human rights, for instance, has brought the very notion of human rights into disrepute, though I strongly disagree with the view of critics like Costa Douzinas (2000) that this has altogether discredited human rights (see for a special view Moyn, 2012). It does mean that global justice may be a contested domain and historically variable. We only need to consider the atrocities committed within the name of regime change and liberal democracy. However, I reject the strong critique

[324] https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1058&context=e-Research

of worldwide justice that argues that, while it's going to be desirable, any attempt to create it's either impossible or oppressive thanks to the measures it might require. i feel these positions are as wrong because the conservative realist position (espoused by David Miller and Michael Walzer, for instance) that only cohesive national communities are real and that we haven't any obligations beyond the borders of nation-states. To pursue this further it's, in my view, best to put the thought of worldwide justice within the context of the broader framework of cosmopolitanism, since this has generally provided the terms of analysis for the transformation of political community within the context of worldwide challenges, for as I shall argue global justice is a component of a wider socio-cultural shift and thus tied to other processes of change. To know the prospects of cosmopolitanism is especially important within the context of an excellent number of worldwide challenges, starting from ethnic-national conflict to racism and therefore the exclusion and discrimination of minorities, ecological destruction, human trafficking, the exploitation of vulnerable workers, etc.

THE CONDITIONS OF THE POSSIBILITY OF COSMOPOLITANISM

What would be the evidence for such a process and the way can its assessed? My proposal is for a three-fold level of study. First, four levels of cosmopolitanism are often specified. Second, three main processes are often identified by which norms or normative systems emerge. Third, variety of key areas is often identified for empirical evidence. The first two are going to be outlined during this section, with the third, the main target of the ultimate section of the article. Cosmopolitanism is often understood in terms of 4 levels of relationships, as I have argued in my book The Cosmopolitan Imagination (Delanty, 2009). These range from low to high levels of intensity and may even be seen as constitutive of subject formation and thus elements within the making of a cosmopolitan subject. The first level of cosmopolitanism is often described as cultural and typically concerns curiosity about other cultural values. One among its most pervasive forms is in consumption, but it also can be seen in educational programs aimed toward understanding other cultures. In these instances cosmopolitanism entails a reference to the opposite that doesn't involve extensive self-scrutiny or reflexivity and is fully compatible with most expressions of liberal tolerance. it's going to also exhibit a general tolerance of diversity, recognition of interconnectedness and a disposition of openness to others. In sum, it's a soft quite cosmopolitanism and like the condition of 'cultural omnivorousness'. A second sort of cosmopolitanism concerns a stronger and more positive recognition of the opposite. Here cosmopolitanism are often associated with political than purely cultural relations of

alterity. During this case the question of the inclusion of the opposite is paramount, not just awareness or curiosity about difference. Such expressions of cosmopolitanism can be associated with what Honneth (1996) and Taylor (1994) ask as recognition, especially recognition supported rights. The enlargement of the boundaries of political community in both the national and international context is often seen in terms of the cosmopolitan ethnic of 'solidarity among strangers'. Expressions of solidarity as against tolerance illustrate this deeper level of the engagement with the opposite. While such sorts of cosmopolitanism are often found on the worldwide level, it's more characteristic of local contexts. While the second sort of cosmopolitanism demands of the political subject a change in their reference to alterity, it doesn't require far more than the inclusion of the opposite. A third expression of cosmopolitanism is to be found during a stronger reflexive and important attitude whereby both self and other undergo transformation. This concerns the mutual evaluation of cultures or identities, both one's own which of the opposite. to realize it a degree of cultural distance is required so as to make an area for critique and skepticism. This more critical quite cosmopolitanism makes it possible for people to mediate between cultures. Such sorts of cosmopolitanism are going to be expressed in dialogic encounters and in deliberative communication. This is often also what allows for the critique of cultures and cross-cultural communication. The fourth sort of cosmopolitanism builds on the previous one in its orientation towards a shared normative culture. The characteristic expression of such sorts of cosmopolitanism isn't simply mutual critique, but the formation of latest social relations and institutions. This is often where the results of the opposite levels become evident. In this case it's possible to talk of cosmopolitanism as a societal condition as against being a facet political community or characteristic of individuals. Unlike the previous types, it's also possible to relate this type of cosmopolitanism to an engagement with global problems or consciousness of the urgency for global justice and therefore the got to find solutions which will require giving primacy to the non-national interest and therefore the perspective of others. Thus when cosmopolitan sorts of consciousness penetrate beyond the extent of people to succeed in the societal level, creating not only new institutions but also wider social transformation beyond the national societies, we will speak of a worldwide cosmopolitanism. These four levels of cosmopolitanism aren't necessarily consecutive and may be coextensive. However, it is sensible to ascertain them as analytically separate and embodying degrees of strength, from 'soft' to 'hard' forms. This approach offers a rejoinder to the common critiques of cosmopolitanism that tend to ascertain it as a worldwide condition unconnected with local contexts or a view of cosmopolitanism as necessarily 'thin' in contrast to 'thicker' local

identities and solidarities. The differentiated conception of cosmopolitanism suggests here would on the contrary see it as engrained altogether social contexts. From a sociological perspective, the task is additionally to elucidate the emergence of cosmopolitanism, as an example to account for a way the various levels emerge and interact with each other. This will be seen in terms of three processes: generative, transformative and institutionalizing processes. Generative processes involve the creation of latest ideas, new perceptions of problems, new interpretations of meta-norms (liberty, freedom, autonomy, equality, etc.), resulting in new kinds and cycles of claim-making, which challenge the given order. Such processes, which cause a rise in variation, are related to social movements which are generally the initiators of social change. This is often the primary step within the emergence of norms. This may also involve the mixture of various meta-norms, as an example equality and autonomy. Transformative processes follow from the choice of the variability generated and occur typically when a dominant movement brings about major societal change through the mobilization of huge segments of the population and therefore the transformation of the form of government during a period of contestation. This is often where the question of solidarity and identity is relevant: changes in consciousness occur following from new ways of framing problems. Institutionalizing processes occur when a movement succeeds in institutionalizing its project during a new societal framework, as an example within the establishment of a replacement state or in new legislation and brings about the reorganization of state and society. Cosmopolitanism is produced altogether three processes; it's not then simply one level, such as an institutionalized policy, but the result of diverse movements and actions. In answering the question whether or not cosmopolitanism is real, one must consider the process by which it emerges. Norms are produced in such processes and not simply given. It follows that there'll vary interpretations of such norms in several contexts (including in several civilizational contexts). This approach would thus give centrality to agency within the shaping of cosmopolitanism, which ultimately derives from the capacity of social actors in specific places and at specific times to reinterpret their situation in light of latest ideas or new interpretations of ideas, as in, as an example , the reinterpretation of the meaning of solidarity or rights. It’s also a matter of how social actors interpret their situation in light of public interpretations of social issues. This might be a method during which there could be useful cross-fertilization between political philosophy and sociology, for an under-researched area is strictly this: how norms emerge and undergo change in light of latest interpretations. Political philosophers simply postulate norms and debate their feasibility and desirability, while social scientists have an interest in their empirical existence as something than are often measured.

However, before something are often measured it must first exist and, as I even have argued, There are degrees of emergence. At add such processes may be a mechanism which may be described as like the logic of translation. The key aspect is that the transformation in meaning that happens when an idea or idea is taken from one context and placed in another, for a translation always involves a change in meaning. During a similar way, the language of rights, for instance, undergoes a particular metamorphosis when the rights that apply normally in one context are applied to a different or when one group uses the rights claimed by another. The history of democracy has been characterized by the constant contestation and negotiation of its terms and really meaning. The language of rights, obligations, democracy, citizenship is never settled in its meanings, but is perpetually hospitable new interpretations. This cognitive condition is ultimately what makes possible the generation of latest norms; it makes possible the emergence of latest politics and claims, and enables the shaping of latest institutions. Viewed in such terms cosmopolitanism isn't to be defined only with reference to normative change but also involves socio-cognitive shifts, namely shifts in ways in seeing the planet (see Strydom, 2011, 2012). It's such changes in cognitive capacities that often change the articulation of latest normative principles or their application in domains where they previously didn't apply. During this sense, then, cosmopolitanism entails learning capacities: individuals, collective actors, and societies find solutions to problems that need the critical reflexive capacity to require the purpose of view of the opposite under consideration. The cognitive dimension of cosmopolitanism should be distinguished from its epistemic level, that's the shape of data that it's going to engender. Many accounts and discussions of cosmopolitanism are confined to its normative and symbolic levels of expression, that's the extent of norms and principles and therefore the level of meanings and values. the priority with the normative has been more a feature of the political philosophy of cosmopolitanism while interest within the symbolic has been a feature of the culturally orientated social sciences, such as anthropology and cultural studies. This has been to the neglect of its cognitive dimension, which may be seen as a more basic level and one that gives the condition of the possibility of the normative and symbolic forms, also as knowledge. However, a fuller picture will involve watching the interaction of all four forms. Specific examples of the cognitive order include reflexivity, self-problematization, critique, connectivity. of those a crucial one with reference to cosmopolitanism is that the latter: shifts in cognition occur when individuals see new connections between things that were previously seen as separate. The capacity to ascertain connections between phenomena is that the basis of the likelihood of worldwide justice.

THE DIFFUSION OF COSMOPOLITANISM IN DOMESTIC POLITICS

Undoubtedly the foremost extensive evidence of cosmopolitanism is often found within national societies. While it's not entirely possible to separate internal processes of change from people who are externally induced, it are often said with some confidence that social change over the past few decades has resulted in greater pluralization within national societies. The impact of globalization has not undermined cultural diversity and produced more homogenization, as has been demonstrated within the World Values Surveys (Norris and Inglehart, 2009). The overall trend has actually been towards a greater emphasis on significant value change within the direction of what are often broadly termed symbolic cosmopolitan values. Homogeneous national identities have increasingly come under scrutiny in societies that are more aware of their multi-ethnicity. There's considerable empirical evidence in many societies of increased multiple identities, especially among children. Viewing cosmopolitanism as a process of cultural opening and self-problematization, the state is one among the most sites of cultural contestation. Examples of this will be found in debates around memory and commemoration, heritage, representations of the state, the curriculum and academic policy and media, and popular culture.

CONCLUSION

In conclusion, the apparent rise of anti-cosmopolitan trends – xenophobic and recalcitrant nationalism, religious fundamentalism, new technologies of surveillance and population control – shouldn't detract from the potential of cosmopolitanism to cause alternatives. However, what's not present may be a significant cosmo-political project that might deliver greater global justice. The challenges for cosmopolitan science are very great, but if the proposals made during this article are accepted it follows that the main target of attention should be the capacities and learning potential in contemporary societies for social change within the direction of cosmopolitanism. While a worldwide cosmopolitan social actor intrinsically doesn't exist, there's a plurality of such actors within the world and thus some indication of the making of a cosmopolitan subject. Moreover, the existence of cosmopolitan orientations in critical public's world-wide offers some hope for the prospects of cosmopolitanism to possess a greater impact. This is often where the important hope for global justice ultimately resides. Global justice isn't simply a group of normative principles of justice that are applied in given situations, but a process that regulates and structures much of the

political and is constitutive of social spaces. The normative order of justice, with which cosmopolitan notions like global justice is usually associated, isn't permanent but hospitable contestation and to new interpretations, self-understanding and narratives. So what's occurring today may be a cognitive expansion within the nature of justice. During this sense then global justice has a generative impact in opening up new ways of seeing political community and in responding to injustice. In terms of the three mechanisms discussed within the foregoing, while cosmopolitanism is reflected altogether three, it's more strongly evidenced as a generative process that provokes new challenges to political community through enhanced consciousness of the interconnectivity of the planet Evidence of major change can never be easily found within the short term. Criticisms of cosmopolitanism that invoke the apparent presence of counter-cosmopolitan trends – which presumably presuppose cosmopolitan currents – are too short-sighted in that specialize in a brief time span or on reactive events. The Axial Age breakthrough itself took several centuries – 800 to 200 bc – to supply the primary universalistic visions, which laid the foundations for the emergence of cosmopolitanism, and therefore the tumultuous history of democracy is itself a reminder of the necessity to require a extended view on major social and political transformation. Thus the very fact that there's much evidence of worldwide injustice does not mean that global justice is absent from the self-understanding of up to date critical publics or that it's no consequences. The thesis of this text is that the most compelling evidence resides less in manifest institutional change – despite considerable gains, as discussed within the preceding section – than in socio-cognitive shifts in learning competences. Thus the structuring impact that global justice has had on the political imagination in recent times is actually more of a cognitive than a normative development in redefining the self-understanding of political community.

INTERNATIONAL TRADE & COMPETITION LAW

- SARTHAK AGGARWAL

1. International Trade

1.1 What is International Trade why it is needed?

Trading globally gives consumers and countries the opportunity to be exposed to goods and services not available in their own countries. Almost every kind of product can be found on the international market: food, clothes, spare parts, oil, jewellery, wine, stocks, currencies and water. Services are also traded: tourism, banking, consulting and transportation. A product that is sold to the global market is an export, and a product that is bought from the global market is an import. Imports and exports are accounted for in a country's current account in the balance of payments.[325]

Global trade allows wealthy countries to use their resources – whether labour, technology or capital – more efficiently. Because countries are endowed with different assets and natural resources (land, labour, capital and technology), some countries may produce the same good more efficiently and therefore sell it more cheaply than other countries. If a country cannot efficiently produce an item, it can obtain the item by trading with another country that can. This is known as specialization in international trade.

Let's take a simple example. Country A and Country B both produce cotton sweaters and wine. Country A produces 10 sweaters and six bottles of wine a year while Country B produces six sweaters and 10 bottles of wine a year. Both can produce a total of 16 units. Country A, however, takes three hours to produce the 10 sweaters and two hours to produce the six bottles of wine (total of five hours). Country B, on the other hand, takes one hour to produce 10 sweaters and three hours to produce six bottles of wine (total of four hours).

But these two countries realize that they could produce more by focusing on those products with which they have a comparative advantage. Country A then begins to produce only wine and Country B produces only cotton sweaters. Each country can now create a specialized output of 20 units per year and trade equal proportions of both products. As such, each country now has access to 20 units of both products.

We can see then that for both countries, the opportunity cost of producing both products is greater than the cost of specializing. More specifically, for each country, the opportunity cost

[325] http://www.investopedia.com/articles/03/112503.asp#ixzz28gQ4cOr6

of producing 16 units of both sweaters and wine is 20 units of both products (after trading). Specialization reduces their opportunity cost and therefore maximizes their efficiency in acquiring the goods they need. With the greater supply, the price of each product would decrease, thus giving an advantage to the end consumer as well.

Note that, in the example above, Country B could produce both wine and cotton more efficiently than Country A (less time). This is called an absolute advantage, and Country B may have it because of a higher level of technology. However, according to the international trade theory, even if a country has an absolute advantage over another, it can still benefit from specialization.[326]

1.2 Other Possible Benefits of Trading Globally[327]

a) FDI: International trade not only results in increased efficiency but also allows countries to participate in a global economy, encouraging the opportunity of foreign direct investment (FDI), which is the amount of money that individuals invest into foreign companies and other assets. In theory, economies can therefore grow more efficiently and can more easily become competitive economic participants. For the receiving government, FDI is a means by which foreign currency and expertise can enter the country. These raise employment levels, and, theoretically, lead to a growth in the gross domestic product. For the investor, FDI offers company expansion and growth, which means higher revenues.

b) Relative Profitability: The rate of profit to be earned from export business may be higher than the corresponding rate on the domestic sales.

c) Insufficiency of Domestic Demand: The level of domestic demand may be insufficient for utilizing the installed capacity in full. Export business offers a suitable mechanism for utilizing the unused capacity. This will reduce costs and improve the overall profitability of the firm. Recession in the domestic market often serves as a stimulus to export ventures.

d) Reducing Business Risks: When a firm is selling in a number of markets, the downward fluctuations in sales in one market, which may be the domestic market, may be fully or partly counter balanced by a rise in the sales in other markets. Secondly, geographic diversification also provides the momentum to growth in as much as a single or few markets will have only limited absorptive capacity.

e) Legal Restrictions: Governments may impose certain restrictions on further growth and capacity expansion of some firms within the domestic market in order to achieve certain social

[326] Paul R. Krugman and Maurice Obstfeld, ―International Economics: Theory and Policy‖ 8th Ed., pp.28-29

[327]

objectives. But there may not be any such restrictions, if the additional capacity is utilized for exports. Then the firm may be tempted to export.

f) Technological Improvement: Entry to export market may enable a firm to pick up new produce ideas and to add to product line, improve its product, reduce costs and discover new applications for its product.

1.3 Free Trade vs. Protectionism[328]

As with other theories, there are opposing views. International trade has two contrasting views regarding the level of control placed on trade: free trade and protectionism. Free trade is the simpler of the two theories: a laissez-faire approach, with no restrictions on trade. The main idea is that supply and demand factors, operating on a global scale, will ensure that production happens efficiently. Therefore, nothing needs to be done to protect or promote trade and growth, because market forces will do so automatically.

In contrast, protectionism holds that regulation of international trade is important to ensure that markets function properly. Advocates of this theory believe that market inefficiencies may hamper the benefits of international trade and they aim to guide the market accordingly.

Protectionism exists in many different forms, but the most common are tariffs, subsidies and quotas. These strategies attempt to correct any inefficiency in the international market.

1.4 Distortion in International Trade:

One of the main reasons behind distortion of international trade and fair competition is that though increasing returns in a monopolistic market promote international trade this situation ignores many of the detrimental effects that can arise due to imperfect competition, such as a disparity in the prices a firm charges for its goods that are exported and the ones that are sold in their respective domestic markets, constituting price discrimination. The most common form of price discrimination is dumping, defined as a situation where, "the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country."

The definition of dumping according to GATT is: "*The sale of products for export at a price less than the 'normal value' where normal value means roughly the price for which those same products are sold on the 'home' or exporting market.*" [329]

Raj Aggarwal, —International Trade‖, Latest Ed. 2007, pp.50-57. Page 10 of 35 certain social objectives

[328] Supra 3.

[329] Article by Shruti Ojha —The Economic and Legal Analysis of Dumping‖2008 sourced online from http://www.globalpolitician.com/print.asp?id=3989

1.5 International Trade- With respect to India[330]

For decades after independence in 1947, India embarked on a program of autarky (national economic self –sufficiency) which included import substitution policies. By 1991, however, a sluggish economy combined with the forces of globalization led to a more open Indian economy. There was simultaneously a gradual rise in exports, imports, foreign direct investment (FDI), and overall economic growth. In the 1990s, exports of goods and services rose from 6.2 percent to 8.2 percent of total output. By the end of the decade, however, growth in exports began to level off due to reduced international demand, especially with India's main economic partners, the United States and the European Union (EU). Indian exports were further hit by serious competition from East Asian countries, which had recently experienced depreciated domestic currencies, which led to a decline in global prices for their manufactured goods. As a result, exports of Indian textiles, chemicals, machinery, electronic goods, and automotive parts all began to decline.

As compared to a couple of decades earlier, however, the size of India's foreign trade has noticeably expanded, both in absolute terms and relative to the country's GDP. Exports have again picked up since 1999, when they showed a 13 percent growth. Imports have also ballooned, showing an average of 20 percent growth per year during 1992-2000. Total exports in 2001 are expected to be near US$46 billion and total imports at US$51 billion. Petroleum constitutes the largest import item at more than US$6 billion and accounts for 14 percent of total imports in 1999. Petroleum imports may be as high as US$17 billion in 2001. Gems and jewellery constitute single largest export item, accounting for 16 percent of exports and earning about US$4.5 billion in 1999. The top 3 export destinations of Indian goods were the United States, Britain, and Germany, which together constituted one-third of total Indian exports in 1999. In turn, the top 3 import sources were the United States, Britain, and Belgium, together constituting 21 percent of total imported items.

2. Dumping

2.1 Dumping- Evolution of the term[331]

It has long been customary to speak of one market as a 'dumping ground' for the "surplus" products of another market when the producers of the latter for any reason sell their commodities in the former at unusually low prices.

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[330]India International trade, Information about International trade in India http://www.nationsencyclopedia.com/economies/Asiaand-the-Pacific/India-INTERNATIONAL-TRADE.html#ixzz28nQlw0Sb

[331]http://ufh.netd.ac.za/bitstream/10353/100/5/Zvidza%20thesis%20ch3.pdf

From this usage it was a natural outcome to speak of selling in a distant market at reduced prices as "dumping", but the word used in this sense appeared not to have entered into the literature of economics until the first years of the twentieth century. In 1903 and 1904, the tariff question was the dominant political issue in Great Britain, and in a huge output of polemical literature which marked the tariff controversy. The term became well established and appeared with or without apologetic quotation marks in book after book.

The term "dumping" has since found its way into the economic terminology of the French, German, Italian and probably other languages. Initially, it had a vague and uncertain meaning, and is still used indiscriminately for such diverse price-practices such as severe competition, customs undervaluation, "bargain", "sacrifice" or "slaughter sales", local price-cutting and selling in one national market at a lower price than in another.

In recent years, however, the increased use of the term by academic economists with their creditable tendency towards the exact establishment of terminology and of the development of legislation dealing with dumping and allied price-practices, which made necessary some measure of precision in the differentiation between various price practices, have both contributed to the consistency of the usage. Extensive variations in the use of the term both as to gist and implication are nevertheless still present.

According to Dale, the origin of the word "dump" is uncertain. Its usage by the early nineteenth century had come to mean the act of throwing down in a lump or mass, as with a load from a cart, and it was then a natural extension to apply the word to the disposal of refuse and to describe as a dumping ground, a market for the disposal of surplus stock. During this time, "dumping" was used in English language trade literature to illustrate loosely a situation in which goods were sold cheaply in foreign markets. Today, however, the term is used intentionally to signify the practice of price discrimination in international trade. The term was applied persuasively to describe almost any situation in which goods were sold abroad at cheap prices, irrespective of the cause of the cheapness, the insinuation being that the goods were unwanted in their country of derivation and were exported only to get rid of them.

Economists have always defined dumping as transnational price discrimination where prices vary between national markets. Although economists still object in principle, they now accept that dumping may also be defined as transnational sale below costs. Deardoff admits this new "definition": "The definition has broadened over the years; some now consider dumping including 'sales below costs', at least presumptively….this alternative criteria for dumping have gradually acquired elevated status of an alternative definition".

However, there is no correlation between price discrimination and sales below cost. Sales below cost may occur with or without discrimination and yet, on the other hand discrimination may take place without selling below costs. The term dumping is employed most often, even in careless business language to signify selling the same commodities at different prices in different markets. Commercially, the term is often uncritically extended to cover various types of sales at prices lower than those generally current, even if the prices are uniform to all purchasers.

2.2 Types of Dumping[332]

1. Sporadic Dumping: Occasional sale of a commodity at below cost in order to unload an unforeseen and temporary surplus of the commodity such as cheese, milk, wheat etc. in the international market without reducing domestic prices.

2. Predatory Dumping: Temporary sale of a commodity at below its average cost or a lower price abroad in order to derive foreign producers out of business, after which prices are raised to take advantage of the monopoly power abroad.

3. Persistent Dumping: Continuous tendency of a domestic monopolist to maximize total profits by selling the commodity at a higher price in the domestic market than internationally (to meet the competition of foreign rivals).

2.3 Causes of Dumping[333]

Dumping usually occurs because of the following reasons:

(1) Producers in one country are trying to stay competitive with producers in another country,

(2) Producers in one country are trying to eliminate the producers in another country and gain a larger share of the world market,

(3) Producers are trying to get rid of excess stuff that they can't sell in their own country,

(4) Producers can make more profit by dividing sales into domestic and foreign markets, then charging each market whatever price the buyers are willing to pay.

2.4 Dumping: According to GATT and WTO Anti-Dumping Agreement[334]

Dumping occurs when the export price of goods imported into India is less than the Normal Value of 'like articles' sold in the domestic market of the exporter. Imports at cheap or low

[332]http://books.google.co.in/books?id=bgLXTW2oq2cC&pg=PA459&lpg=PA459&dq=types+of+dumping+in+international+trade&source=bl&ots=7ulTPCiui0&sig=jT_54ZXWlsElfKXxZJPEBHK5t8&hl=en&sa=X&ei=MDKFUPXGFImSrgf82oHwDw&ved=0CCwQ6AEwAg#v=onepage&q=types%20of%20dumping%20in%20international%20trade&f=false

[333]http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

[334] Anti-Dumping-guide, Ministry of Commerce, sourced from http://commerce.nic.in/traderemedies/Anti_Dum.pdf (visited on 5th October, 2012).

prices do not per se indicate dumping. The price at which like articles are sold in the domestic market of the exporter is referred to as the "Normal Value" of those articles.

The normal value is the comparable price at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country or territory. If the normal value cannot be determined by means of domestic sales, the Act provides for the following two alternative methods: • Comparable representative export price to an appropriate third country.

• Cost of production in the country of origin with reasonable addition for administrative, selling and general costs and for profits.

The export price of goods imported into India is the price paid or payable for the goods by the first independent buyer

3. Anti-Dumping Law

3.1 Meaning of Anti Dumping

Anti-dumping can be fined as a protective device available to the states against vicissitudes associated with the free trade. In the recent years a large number countries have become frequent users of anti-dumping. Many of the heaviest anti-dumping users are countries who did not even have an anti- dumping statute a decade ago.

The traditional users continue to make use of these measures with more vigour by targeting new users. Anti-Dumping duties were introduced by the developed countries to protect their industries against the low priced imports. Developing countries supported the inclusion of the provision relating to anti-dumping duties under GATT because they wanted to levy of antidumping duties to be under international regulation. Anti-dumping measures are not only legal but they are also flexible in usage. Further, anti-dumping duties can be presented not only as protection but also as an encounter against "unfair" competition.[335]

3.2 WTO and Anti-Dumping Agreement:

Though the WTO rules normally discourage protectionist policies, they do permit and accommodate anti-dumping measures to provide temporary relief to domestic industry against ―dumping‖ by foreign firms. Many trade economists view anti-dumping as the most pernicious WTO-sanctioned instrument of protection available to countries currently. The best

[335] T.P Bhat, "Globalisation of Anti-Dumping and its Impact", Foreign Trade Review, 2003, Vol.38, Issue No. 2, pp 54-90.

explanation for its existence is that developed countries have chosen not to give it up. Lately, however, developing countries have also become frequent users of this instrument.[336]

The WTO provisions on anti-dumping are contained in GATT Article VI and the Uruguay Round Agreement on Anti-dumping (formally, Agreement on Implementation of Article VI). The latter builds on the Tokyo Round Anti-dumping Agreement, which had been signed by developed countries only. The UR Agreement revises the Tokyo Agreement in some areas while adding precision in others.

The Agreement on Anti-dumping introduces specific provisions relating to the methodology of establishing the existence of dumping and injury. For example, the United States and European Community had for years compared the prices charged in individual export transactions with the average home market price to establish dumping. This practice biased the outcome in favour of a positive finding. The Agreement on Anti-dumping now requires that export prices be compared on either "average-to-average" or "transaction-to-transaction" basis. As a result, the US has adopted the average-to-average comparisons in majority of the cases.[337]

GATT Article VI requires an injury test for the "industry" but does not define industry. As a result, in practice, in the past, when individual firms or trade associations filed anti-dumping petitions, it was presumed that they were acting on behalf of an "industry." Under the Agreement, a determination must now be made though the test is relatively lax. The test requires that the petition must be "supported" by producers (a) accounting for 25% of total production of "like products" and (b) representing more than 50% of the production of those firms expressing a position, pro or con, on the petition.[338]

3.3 Anti-Dumping in India: Legal Framework[339]

1. The principle of imposition of anti-dumping duties was propounded by the Article VI of General Agreement on Tariffs & Trade (GATT) 1994 – Uruguay Round

2. Indian legislation in this regard is contained in Section 9A and 9B (as amended in 1995) of the Customs Tariff Act, 1975

3. Further regulations are contained in the Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]

[336] Article by Arvind Panagariya: Core WTO Agreements: Trade in Goods and Services and Intellectual Property p16.
[337] Ibid, p17.
[338] Ibid, p19.
[339] Anti-Dumping-guide, Ministry of Commerce sourced from http://commerce.nic.in/traderemedies/Anti_Dum.pdf.

4. The Designated Authority for conducting investigations pertaining to Anti-Dumping issues and on basis thereof, for forwarding its recommendations is the Ministry of Commerce, Government of India.

5. The responsibility for Imposition and Collection of duties as imposed /recommended by the Adjudicating authority is imposed upon the Ministry of Finance, Government of India.

Section 9A of the Customs Tariff Act, 1975 (hereinafter referred to as "the Act") as amended in 1995 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter referred to as "the Rules") framed there under form the legal basis for anti-dumping investigations and for the levy of anti-dumping duties. These are in consonance with the WTO Agreement on anti-dumping measures. These rules form the legislative framework for all matters relating to dumping of products, which include the substantive rules, rules relating to practice, procedure, regulatory mechanism and administration.

3.4 Anti-Dumping in India: Regulatory Framework[340]

Anti-dumping, anti-subsidies & countervailing measures in India are administered by the Directorate General of Anti-dumping and Allied Duties (―DGAD‖) functioning in the Department of Commerce in the Ministry of Commerce and Industry and the same is headed by the ―Designated Authority‖. The Central Government may, by notification in the Official Gazette, appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the Designated Authority. In India, there is a single authority — DGAD designated to initiate necessary action for investigations and subsequent imposition of anti-dumping duties.

The Designated Authority is a quasi-judicial authority notified under the Customs Act, 1962. A senior level Joint Secretary and Director, four investigating officers and four costing officers assist the DGAD. Besides, there is a section under the DGAD headed by the Section Officer to deal with the monitoring and coordination of die functioning of the DGAD.

The Designated Authority's function, however, is only to conduct die anti-dumping/anti subsidy & countervailing duty investigation and make recommendation to the Government for imposition of anti-dumping or anti subsidy measures. Such duty is finally imposed/ levied by a Notification of the Ministry of Finance. Thus, while the Department of Commerce recommends the Anti-dumping duty, it is the Ministry of Finance, which levies such duty.

[340] Section 3(1) of "The Custom Tariff Act, 1975".

The law provides that an order of determination of existence, degree and effect of dumping is appealable before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) — a judicial tribunal. It reviews final measures and is independent of administrative authorities.

This is consistent with the WTO provision of independent tribunals for appeal against final determination and reviews. No appeal will lie against the preliminary findings of the Authority and the provisional duty imposed on the basis thereof. The appeal to the CEGAT should be filed within 90 days.

4. Competition Act, 2002: Overview

Competition is now universally acknowledged as the best means of ensuring that consumers, even more so the "aam aadmi" or "common man", have access to the broadest range of services at the most competitive prices. Producers will have maximum incentive to innovate, reduce their costs and meet the consumers demand. Competition thus promotes allocative and productive efficiency. But all this requires healthy market conditions and governments across the globe are increasingly trying to remove market imperfections through appropriate regulations to promote competition.[341]

4.1 The Preamble of the Competition Act, 2002:

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

The Act provides a very wide mandate for the Competition Commission of India to enforce. Apart from it rather broad objective, the Act contains provisions which have rather become standard in the competition jurisdictions all across the globe. These are the provisions relating to anti-competitive agreements, abuse of dominant position and regulation of combinations. In the respect of anti-dumping law the provisions relating to abuse of dominant position and anti-competitive agreements assume importance. In respect of dominant position it is pertinent to note that whereas dominance is not frowned upon by the Competition Act, 2002 abuse of dominance is certainly frowned upon by the legislation. Another significant feature in the context of these provisions of the Act is that anti-competitive agreements and abuse of dominance are to be prohibited by the orders of the Commission whereas the mergers are to be

[341] The Competition Act, 2002: Overview December 2011 sourced from http://www.cci.gov.in/images/media/Advocacy/Overview2012.pdf

regulated by the orders of the e of Commission. This difference in law is of immense significance. Whereas the former two prevent enhancement of consumer welfare the latter drives economic growth. Hence, the distinction has been maintained.

4.2 Section 4 of Competition Act

In respect of abuse of dominant position, Section 4(2) enlists the circumstances when an enterprise shall be considered to be abusing its dominant position. It states:

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,-

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

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

(ii) price in purchase or sale (including predatory price) of goods or service; or

(b) limits or restricts-

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

4.3 Abuse of Dominant Position

One of the most vigorous users of the predominant international trade defence measure, i.e. antidumping duty, India has an unenviable and unfortunate reputation for extreme protectionism being afforded to its domestic industries through the use of anti-dumping investigations and duties. Anti-dumping as an international trade defence measure is by definition protectionist of the Indian market and is based on the following three touchstones:

(i) that there is a significant difference between the normal value of a commodity or product and the price at which it is exported to India;

(ii) that the difference between the normal value and the export price to India greater than certain tolerances is per se evidence of dumping;

(iii) if this dumping causes or is likely to cause injury to the domestic industry, antidumping duties would be levied.

The effect of anti-dumping duty usually renders the export of the product to India economically unviable. Now, the touchstone of competition law is to avoid an appreciable adverse effect on

a relevant market. Quite naturally, the availability of competing products, whatever their source provides wider and more economic options to consumers in the relevant market for a product. Let us consider a practical example. Two dominant Indian manufacturers of a product jointly have in excess of half of the domestic production of the product. Under the rules, a petition for imposition of antidumping duties can be filed by the two as being representative of the domestic industry in India. Let us assume that a few smaller domestic players and exports to India by foreign entities constitute the rest of the supply of the product to the market in India.

An overwhelming majority of the recommendations of the antidumping authority are to impose antidumping duties, and thus, knock exporters out of the Indian market. There is no substantive ideological divergence between anti-dumping law and competition law on the acceptability of the dominant nature of these petitioners. Nothing in competition law disapproves dominance itself.

But now to the anti-dumping investigation, this investigation will determine as to whether the users of the product manufactured by the two dominant companies in the market will be left with a reduced choice and constrain them to purchase willy-nilly from the two dominant companies.[342]

4.4 Section 18: Duties of the Commission

As stated in Section 18 of the Competition Act, 2002:

It shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

5. <u>Divergence between Competition and Anti-dumping Laws</u>

5.1 Price Discrimination with respect to domestic and foreign suppliers

It is clear that competition and antidumping laws determine the legitimacy of a given conduct using different standards. Under competition law, conduct is prohibited only if it lessens competition or otherwise leads to a loss of consumer welfare. Under antidumping law, conduct (specifically, dumping) is prohibited only if it injures domestic producers. The problem with having different standards for competition and antidumping law becomes apparent when one realizes that the conduct described as dumping is identical to the conduct reviewed by the

[342] Article by Farhad Sorabjee —Competition and Trade Defence: A case for dumping something?

competition authority known as "price discrimination". Specifically, price discrimination entails charging a higher price to customers who are willing and able to pay the higher price and a lower price to customers who are either unable or unwilling. Under some conditions, without price discrimination some customers would not otherwise have access to the product. Price discrimination is practiced in many industries such as the airline industry whereby passengers travelling in the first class section of the aircraft are required to pay a significantly higher fare than passengers travelling in the economy class section; further, the difference in fares does not reflect only the difference in the cost of providing the service to these groups of passengers. The effects doctrine is a guiding principle in competition law enforcement which dictates that conduct which have similar effect on the market should be treated similarly. Based on this principle, therefore, we can say that price discrimination on the part of domestic suppliers is regulated differently from price discrimination on the part of foreign suppliers. Dumping[343] is also a type of Price Discrimination under which the foreign supplier charges less in our market than his home country's market which is treated differently (anti-dumping duties) from domestic supplier's price discrimination.

5.2 Need and Reasons for Harmonization of the Legislation

Price discrimination on the part of domestic suppliers is regulated differently from price discrimination on the part of foreign suppliers derives a need to synchronize competition and antidumping law, at least to the extent that it relates to scrutinising price discrimination.

The pricing behaviour of a foreign supplier which technically meets the dumping definition is per se questionable if analyzed from a competition policy perspective. Therefore, so far as amending antidumping law to conform to competition law is concerned, it may be pertinent for the policy makers to bear in mind that government policy should serve the interests of the governed. Thereby implying that, harmonisation of antidumping law to confirm with competition law ought to promote the welfare of many consumers, rather than the welfare of the few domestic producers (who may be dominant players in the market) in order to be more consistent with serving the interests of the public.

5.3 Ways to Harmonize the Legislation

There are three alternative ways to harmonize the legislation: (i) amend antidumping law to conform to competition law; (ii) amend competition law to conform to antidumping laws; (iii) develop new standards and amend both competition and antidumping laws accordingly. A

[343] Dumping occurs when the export price of goods imported into India is less than the Normal Value of _like articles' sold in the domestic market of the exporter.

discussion on the merits of the third option is beyond the scope of this paper. We will restrict the discussion therefore, to the merits of the first two alternatives.[344]

Antidumping law has the effect of promoting the welfare of domestic producers whereas competition law has the effect of promoting the welfare of consumers. A decision of how to harmonize the treatment of price discrimination is essentially a determination of which legislation produces the more desirable effect. One useful means of making such a determination is to identify the overarching purpose of any government policy.

This is to say that government policy should serve the interests of the governed. To the extent that promoting the welfare of the many consumers, rather than the welfare of the few domestic producers, is more consistent with serving the interests of the public, harmonization should involve amending antidumping law to conform with competition law. Such harmonization will involve a redefinition of two key concepts in antidumping law: (i) market definition and (ii) dumping.

5.3(i) Redefining "Markets"

Antidumping legislation implicitly identifies the domestic market to comprise only of domestic producers- to the exclusion of current and future importers which are presumably seen to operate outside of the domestic market. This view is inconsistent with how markets are identified in competition law.

For the purpose of evaluating the competitive effects of any challenged conduct (including dumping), a market is defined to identify the set of products which could be affected by the conduct. Market definition is a fundamental concept in competition law because if the market is not correctly identified, one is unlikely to accurately identify the competitive effect of the challenged conduct. A formal definition of this concept was first advanced by the competition authorities in the United States of America (U.S. Department of Justice and the Federal Trade Commission 1997): "…A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and non transitory' increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test…" This definition and the test is used to identify the market, has been used by competition authorities in most, if not all, jurisdictions in which competition legislation is enforced. An

[344] Article by Kevin Harriott, —Anti-Dumping and Competition Law in Conflict‖ June 2010.

important observation arising from this definition is that both importers (existing and potential) and producers are equally legitimate participants in defining the market; and neither party is given prominence over the other. In this manner, the definition of the market is consumer-oriented in that it seeks to identify the set of products which consumers perceive to be substitutable in satisfying a specific desire or need. What matters to the consumer is that the product is capable of satisfying her need. All other things being equal, the technology used to make the product is of little significance. For example, consider someone deciding on whether to purchase mangoes grown by Farm K or by Farm L. It is of little value to the consumer that the operations on Farm K use mainly machinery; and that the operations on Farm L use mainly labourers. What matters to the consumer is the value for money (based on factors such as taste, price, etc.) offered by each farm? By similar reasoning, one should understand that the only difference between producers and importers is that they utilize different technologies. In this sense, importation should be viewed as an alternative method (i.e. technology) of making the product available to consumers rather than as a necessarily inferior method.

To convey to one group of suppliers, a greater right to participate in the market would be to distort the market incentives for suppliers to become efficient; which would ultimately deprive consumers of the potential surplus which could be realized.

If importation is more efficient than production, with respect to supplying the product to consumers, then the competitive market would favour importation; otherwise it would favour production. In so doing, each competitively organised market would meet the needs of consumers using fewer productive resources and thus allow more resources to be available for use in other markets.

5.3(ii) Redefining "Dumping"

In antidumping law, ―dumping‖ is said to occur whenever the export price of a product is less than the price of the product in the home market. Further, dumping is prohibited only if it injures the domestic market. This conduct, as described, is referred to in competition law as price discrimination and known to be beneficial to consumers under some conditions, and detrimental to consumers under other conditions. This means that it is appropriate to challenge the conduct as it has the potential to have adverse effects on the industry. Presumably, the test used to prohibit the conduct should be sufficient to identify the conditions under which the conduct would be beneficial; unfortunately, this is not the case under existing antidumping law. Specifically, the current application of antidumping law will successfully challenge conduct which is unlikely to harm the domestic market. This over-deterrence will ultimately discourage legitimate competitive conduct, to the detriment of consumers. To harmonise antidumping law

with the principles of competition law, one would have to improve the tool used by antidumping law to filter conduct which is potentially harmful from that which is unlikely to be harmful. To show that the existing tool is inadequate, we use competition law analysis to expose the fundamental flaw in the conceptual framework on which antidumping law is predicated. As mentioned earlier, dumping occurs when the foreign producer price discriminates between customers in the home market and customers in the export market. Based on received research into price discrimination, we know that the price will be lower for the customer group whose demand is more sensitive to price increases.

To determine which customers are likely to be more sensitive to price increases, we need only compare the characteristics of customers in the home market with the characteristics of customers in the export market. One important distinguishing characteristic between the two groups is the difference in transaction costs associated with the acquisition of the product. Specifically, the transaction cost for customers in the export market (i.e. the _importers') is considerably higher than the transportation cost for customers in the home market. The transaction cost for importers comprise shipping (insurance and freight) the product to, and clearing (tariff, duties and fees) the borders of, the importing country. Importers have what is said to be a derived demand for the product; that is, the product is desirable only to the extent which it could be profitably resold to consumers in the domestic market. If importers which face significant transaction costs compete with domestic producers which do not incur said cost, then in most circumstances foreign producers must offer discounts to stimulate the (derived) demand from importers.

Accordingly, importers are likely to be more sensitive to price increases, than domestic customers. It is reasonable, therefore, to expect that the price in the export market will be less than the price in the home market. This is the first of two important arguments used to support the convergence of competition and antidumping law: dumping is necessary, in most cases, to stimulate demand in the export market and consequently facilitates competition in the domestic market.[345]

6. Dumping and its impact on Competition

6.1 How unfair is dumping?

Dumping is actually fair. The thing is this question was put wrong at the beginning and the beginning was long time ago. Looking back through time, the first antidumping law was meant

[345] Article by Kevin Harriott, —Anti-Dumping and Competition Law in Conflict‖ June 2010, sourced from http://www.jftc.com/Libraries/Staff_Opinions/Antidumping_and_Competition_Law_in_Conflict.sflb.ashx visited on 19th October, 2012.

to remedy unfair trade, namely dumping, but it has become clearer over time that there is nothing wrong with dumping. It benefits people in poor countries by offering lower prices and new varieties of merchandises. Despite its evil name, dumping does a good job.[346]

"If the other fellow sells cheaper than you, it is called dumping. Course, if you sell cheaper than him, that's mass production." ....

William Roger

Antidumping duties work like import tariffs. But antidumping is a trickier issue because it is always discriminatory. This implies that the domestic industry can strategically use this instrument to target only foreign firms it views as competitive rivals. And, being selective, antidumping measures also generate more negative effects than tariffs do. Consumers are clearly worse off because they have to bear the cost of duty. Imports become more expensive. Furthermore, there is no guarantee that the domestic producers will keep their prices at the initial levels. Depending on price elasticity, they can obtain higher profits by setting a new price higher than before but lower than those of dumped products.

Things become worse when dumped imports are intermediate goods. One may think about steel for example. It is certain that consumers who purchase steel as a final good are worse off. Controlling for other factors, the downstream productions are deteriorated by the duties imposed on upstream products. This is due to higher prices of their intermediate inputs.

The imposition of antidumping measure seems to benefit no one but the domestic producers whose foreign rivals face an antidumping action. To evaluate if antidumping is an appropriate policy or not, we need to know whether the increase in profits of the domestic firms is large enough to offset the decrease in welfare of all others in the country. Both common sense and formal estimation say no.

The concept of dumping seems fair because it is recognized that producers may sell their goods in different markets at different prices and that prices of a goods are influenced by several market forces and may vary at different times. It may be a perfectly legitimised business activity like discounts offered by airlines to students or senior citizens etc. There may not seem anything intrinsically unethical or illegal about dumping.

6.2 Dumping and Economics

Adam Smith has famously quoted:

[346] Article by Sarut Wittayarungruangsri on the topic "Antidumping: A Villain in International Trade".

"If a foreign country can supply us with commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage."

Economists have emphasized that economic law and policy should only be about economic efficiency. They rebut any legal doctrine that entrenches any economic rights at all on grounds of fairness, rather than efficiency. According to them the whole purpose of competition is for consumer welfare. However, dumping is regarded as an "unfair" trade practice as it may cause or threaten to cause material injury to the importing markets and hence, anti-dumping measures are initiated.

These measures include imposition of anti-dumping duties that are imposed at the time of imports in addition to other custom duties that are intended to off-set the supposed injury and price undertaking, wherein the exporter himself undertakes to raise the price of the product and then sell it in the importing country to avoid the anti-dumping duties.

The credibility of these measures has been debated upon since on one side anti-dumping measures aim at providing speedy relief to the domestic industry against the trade-distorting phenomenon of dumping and on the other hand, it is argued that countries take advantage of antidumping laws because of their economic and political manipulability and prove to be a threat to the free market access that the GATT/WTO have strived to achieve in the past 50 years.

6.3 Dumping and Law

The agreement on Anti-dumping had been made in the Uruguay round Agreement on Antidumping, formally called the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, that allows GATT contracting parties to offset the margin of dumping of dumped goods if it can be shown that such dumping causes, or threatens to cause material injury to competing domestic industries.

Most lawyers defend anti-dumping as a trade remedy that is necessary for ensuring fair trade. According to them, international price discrimination is objectionable. If left uncontested and unchallenged, it confers a comparative advantage on exporters. Exporters exploit the market, with considerable negative effects on domestic industry.

The use of anti-dumping actions therefore enables the domestic producers to offset, quantitatively the artificial advantages received by the exporting country's producers so that they are able to compete on an equal footing with the exporting country's producers. Anti-dumping measures largely provide this level playing field.

Dumping has two differing effects in the importing country. The low prices of the imported products may harm the domestic industry which is producing like products. At the same time, consumers and other industrial users of the importing country may benefit from such low prices. However, these users and consumers are not well organized and their voice is not as strong as the producer industries which are normally backed by trade unions. Hence, pressure for acting against dumping is usually much stronger than that of dumping.[347]

7. Conclusion and Suggestion

The main objective of Anti-Dumping Law is to protect domestic industries. Does it mean that less efficient industries must be protected? In fact according to Competition Act, 2002 less efficient industries should shut-down and exit market if they cannot compete. Anti-Dumping Law has a protectionist flavour which Competition Law has not. These both contradict, they cannot exist together; they are oxymoron.

Over the past years it has been suggested that anti-dumping measures and competition measures are mirror images, complementary mechanisms, and that one should take place of the other. Anti-Dumping measures are, therefore not normally a means of restoring fair trade (although sometimes may be). Rather they are protective mechanism. It would be very optimistic to assume that the elimination of Anti-Dumping measures would easily follow from the widespread institutionalisation of competitive measures. Being a part of a developing nation if I would have to choose between elimination of anti-dumping measures in exchange of implementing competition rules it will be a wonderful bargain.

From the point of view of economics, there is no reason to support any anti-dumping law, since price differentiation across markets is a legitimate and a perfectly rational, sensible and legitimate profit-maximization action. Under this line of argument, there is no justification for condemning certain export prices simply because they happen to be lower than prices in other markets. Domestic price discrimination i.e., differences in pricing between one country‘s domestic regional markets, normally is not penalized. There arguably is no economic reason for treating ―international‖ price discrimination any more harshly by imposing dumping duties. Of the different categories of dumping, only predatory pricing dumping and most instances of strategic dumping raise overall welfare concerns. Yet, these two forms of dumping pertain largely to the theoretical realm, as most anti-dumping cases in the real world do not involve dumping as defined by these two categories and even Competition Act is there to look after such predatory pricing.

[347] http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

Above all, if antidumping were to be a tool against unfair trade as it was initially meant to be, it would be essential to reconsider the definition of dumping and think carefully what is fair and what is not. Is it fair enough to accuse and penalise someone just because prices are not equalised?

But before the things got worse reform is necessary. These rules and policies are needed to be amended and a lot can be done. More transparent process of investigation is desirable: one needs to know in details how a constructed price is calculated. Material injury requires more careful scrutiny: is injury caused by dumping or just by higher competition? Consumers' welfare also has to be taken into account, not only in text but also in practice.

One of the major proposals could be replacement of anti-dumping with competition principles. One of the major concerns of dumping is predatory dumping i.e. a type of anticompetitive event in which foreign companies or governments price their products below market values in an attempt to drive out domestic competition. This may lead to conditions where one company has a monopoly in a certain product or industry. The function of Competition Commission of India is to take necessary action to address such an issue instead of levying antidumping duties. There is a need to review Anti-Dumping Law. Also there is a need to bring this issue in competition policy because draft competition policy does not directly resolve this issue.

In order to give protection to domestic infant industries there is a need to make provision for such reform in Competition Act or there is a need to interpret or expand the phrase “ensure freedom of trade carried on by other participants” as stated in Section 18 of Competition Act, 2002. Ideally these duties should be abandoned but no country will do so till it is being implemented in other countries. Thus the problem is needed to be solved at multilateral level.

It is difficult to create a new framework altogether for this issue. Therefore it will be better to do some changes in existing framework so that it is beneficial for the whole economy. There should be working group meetings on matters of concern (dumping and competition). The change should maximize the welfare of Indian economy.

WHY ARE THERE ACID ATTACKS IN NEW INDIA?

- ASHU DHIMAN & PARAM BHAMRA

ABSTRACT

Acid attacks are not only a burning offence on the skin of a women, but also on the face of the society. It is 2019, India is a modern society on a pace to become a global superpower within a century with a promising future. But what good is that future, if 50% of the population has to live under the fear of getting attacked by the random people over petty issue or differences. It is shameful to acknowledge that despite being such a heinous crime, we as a society cannot accept *Acid Attack* as the most heinous offence against the women. It is considered as a crime against the soul of the women, not her body as here the perpetrator's main aim is not the kill the women but to leave the women in living hell and experience all the pain and agony for her entire life as she lives with the scarred face or body. It is a gender based terrorism directed against the women where the objective of the perpetrator is to deform the body of the female which leads them into psychological oppression of the society. In many cases, the women choose to end their life rather than living a scarred life which has been imposed upon them.

In this paper, author focuses on the root cause of the problem and what are the rehabilitee services which are helpful for guiding the women and various other methods such as surgery which helps with removal of deformity and lead the women to live a happy life.

KEYWORDS: Perpetrator, Offence, Gender, Disfigurement, Administered

INTRODUCTION

Acid attacks are the throwing of an acid or a corrosive substance on the body of victim, mostly on the face, with the intention to harm, injure, disfigure the face of the victim. It is basically a personal vendetta of a man against the women due to any reasons.

Acid attack has become a worldwide problem in which one gender lives in the fear of another gender being subjected to various kinds of offences except acid attacks, such as Sexual harassment, rape etc. Acid attack is one of the heinous form of gender based offence which leaves a mark on the women, this doesn't kill her but make her live insufferably and live with that mark, incurred upon her by the perpetrator. In cases of acid attack, the main aim and focus of the perpetrator is not to kill the victim as it might put her out of the pain, but rather ensure

her survival with horrible condition, destroying her facial structure and rendering her life socially unfavourable. Acid attacks don't only injure the victim physically but also psychologically as it alters the personality of the women in facing the world. Most women who are victim of acid attacks cannot find their way back to the society as they feel embarrassed to show their face in the world.

In many countries, there are also male victims of the acid attack but in countries like Bangladesh, United States, Taiwan, Cambodia most common gender which faced acid attacks were female[348]. Violence or crime against women are becoming a very critical problem in this modern era of humanity because as a society, we cannot talk of growth or development if roughly 50% of the population of world is living under terror of the other half. Even though in India we have strict laws and rules which expressly prohibit and gives strict punishment to the offends and rules which prohibit sale of acid over the counter, there is still no end to this horrifying offence. According to National Crime Rates Bureau of India, there were 45 reported cases of Acid attacks in India in 2014. In 2015, the number jumped from 45 to 249 cases of rape out of which 61 cases was from state of Uttar Pradesh alone[349].

If we compare to the outside world, women in India are more prone to the acid attack as there are many factors which increase likeability of women subjected to acid attacks as due to the large population in India and probability number of such attacks increases in the country, other possible reason being the high illiteracy rate of India which degrades the moral standards of the population.

There is no dedicated database in India which calculate the number of cases of acid attacks as according to National Crime Records Bureau, there are 350 to 500 incidents of acid attacks each year whereas according to research conducted by various Acid survivor's foundations, the official toll of reported acid attacks can be between 500 to 1000 attacks in India, excluding those cases which go unreported[350].

PROBLEMS OF ACID ATTACK

Incidents of Acid attacks happen all-over the world, including the United States of America. But countries such as Bangladesh, Cambodia, and India holds one of the most recorded offences of acid attacks. According to *Acid Survivors Foundation* (ASF), in Bangladesh since

[348] Mannan A, Ghani S, Clarke A, Butler PE. Cases of chemical assault worldwide: A literature review. Burns 2007;33:149-54.

[349] National Crime Records Bureau. Ministry of Home Affairs. Crime in India 2015 Statistics. Chapter(1):(22).

[350] Patel M. A desire to disfigure: Acid attack in India. Int J Criminal Social Theory 2014;7:1-11.

1999, there have been 3,000 reported cases of acid attack victims in this country whereas a thorough search of Indian newspapers or press reveals 153 reported acid attack cases from Jan 2002 to Oct 2010. In Cambodia, according to research and data collected and gathered by the Cambodian Acid Survivors Charity on people who were treated in hospitals or clinics for acid attacks, there have been 271 acid attack victims between 1985 to June 2010. Governments of these countries refrain themselves from keeping any official statistics or records of acid attacks, and there are probably more likely many times more cases of acid attacks than these figures state[351].

India has adopted no specific law containing strict provision for providing element of deterrence in the public to stop such horrifying acts, as opposed to Bangladesh which enacted specific laws to tackle with the problem which lead to drastic fall in the number of acid attacks reports whereas the number in India are still climbing[352].

One of the main problem which persists in tackling the problem is Availability of acid, as without it, there'd be no scope of such attacks. In India, a bottle of *Hydrochloric Acid* is available in market for a price of mere Rs. 16 to Rs. 24[353] whereas in Bangladesh, only licensed users can buy the acid from the market[354].

This problem further was mentioned by Laxmi Aggarwal[355], *"Acid is still sold openly in some parts of India, and it is easily available to the offenders. We have gathered videos of the acid being sold even after the restrictions, but it evoked no action,".*

CONSEQUENCES

The most noticeable effect or consequence of an acid attack are the lifetime disfigurement of body of the victim. The acid attack is a type of violent and heinous assault by throwing or administering the throwing of acid or any corrosive substance on the body of another person

[351] COMBATING ACID VIOLENCE IN BANGLADESH, INDIA, AND CAMBODIA - A Report by the Avon Global Centre for Women and Justice at Cornell Law School, the Committee on International Human Rights of the New York City Bar Association, the Cornell Law School International Human Rights Clinic, and the Virtue Foundation, Chapter(1) Page(1).

[352] COMBATING ACID VIOLENCE IN BANGLADESH, INDIA, AND CAMBODIA - A Report by the Avon Global Centre for Women and Justice at Cornell Law School, the Committee on International Human Rights of the New York City Bar Association, the Cornell Law School International Human Rights Clinic, and the Virtue Foundation, Chapter(1) Page(11).

[353] S. Bagashree & M.V. Chandrasekhar, *The 'Acid Test': Will Government Regulate Sale of Deadly Chemicals?*, HINDU, Feb. 5, 2007, *available at* http://www.hindu.com/2007/02/05/stories/2007020519590100.htm visited on 28/12/19

[354] Acid Control Act 2002 and Acid Crime Prevention Acts 2002

[355] Laxmi Aggarwal, Victim of Acid attack who is now one of the most recognizable people in India fighting the assaults

with the intention to harm, injure, disfigure the body. Mostly acid or such corrosive substance are thrown at or towards the face of victim which in consequence burn them and damage their skin tissue which often expose and sometimes dissolve the bones of the victim. The long term consequence of such form of violent attack is that it can lead to make the victim blind, as well as scarring of permanent nature or disfigurement of the face or body or sometimes both. The assault of acid attack worsens the life of the sufferer and it also changes and impacts other aspects of their life such social, economic and psychological.

The medical consequences of acid attacks are extensive as well as expensive. Acid attack are not one of those types which can easily be treated, as the most or majority of such acid attacks are focused or administered at the face of the victim so, it all depends upon the type or volume of the acid thrown and the amount of time before the acid is extensively and thoroughly washed off with water or neutralized with any type of neutralizing agent. The acid attack can also make our body paralyzed as it has tendency to rapidly degrade or in simpler terms eat our skin or the thick layer of fat which is present beneath the skin of the victim and in some cases acids reach even till the bones. Eyelids and lips hold the most probability to be completely damaged or disfigurement and the nose and ears holds the risk to be severely damaged by the attack.

PROVISIONS UNDER INDIAN LAW TO TACKLE THE PROBLEM

Before 2013, there were no specific law or any provision which focused on the problem of acid attacks and the cases of such attacks were dealt under provision of causing *grievous hurt by dangerous means*[356]. It dealt with cases which provide punishment for causing grievous hurt to anyone through dangerous means or weapons, but this provision did not directly target the perpetrators of the acid attacks.

The problem with provision of grievous hurt by dangerous means[357] is that this provision is very narrow and is not better equipped to deal with the issue of acid attack as:

- It is not exhaustive and does not cover the different types of injuries sustained or inflicted due to an acid attack
- This section is not equipped to deal with the act of administering or planning of acid attack.
- This section is also ambiguous on who should get the fine which will be imposed on the perpetrator.

[356] Section 326 of Indian Penal Code, 1860.
[357] Supra note 9

- The section refrains itself from punishing the intentional act of throwing of acid if the victim sustains no injuries.

18th *Law Commission of India* which was headed by Justice A.R. Lakshmanan, proposed three new sections in the existing laws to tackle the issue of acid attacks and such provisions were:

1) Provision of Voluntarily causing grievous hurt by use of acid was introduced in Indian Penal Code[358]. It states that whoever causes any type of damage or deformity whether permanent or partial shall be punished by imprisonment not less than 10 years which may can extended up to life and the fine should be paid to the victim and such fine should be just and reasonable and should cover the medical expenses of the victim.
2) Provision of throwing acid or attempt to throw acid on any person shall be made liable under this[359]. Here, mere intention of throwing or administering acid is sufficient to hold the perpetrator liable to safeguard the women upon which he was planning to administer the acid. This section provides precautionary protection to the victim.
3) Provision as to presume the fact that if any person causes or attempts to throw or administer the acid[360], the court shall presume that the person had an intention of causing damage or disfigurement of the face or body of the victim.

ROLE OF JUDICARY IN ACID ATTACK CASES

As the crime rates of the incidents of acid attack have increased from near past, so in order to put a stop in ever increasing number of such acid attacks the Supreme Court played a pro-active role and has put prohibition on selling of the acids which can cause such harm.

Laxmi who was 22 years old, is an acid attack survivor who was waiting for her bus in Delhi's famous market known as Khan Market back in 2005, there two perpetrators threw acid on her. The reason they threw acid on her is because she refused to marry one of perpetrators, so they threw acid on her and left her disfigured. The victim and her family were financially poor but they help by a benefactor who incurred the medical expenses for her treatment which were approximating to Rs. 2.5 Lakhs. Even after going through 4 plastic surgeries the victim's appearance remains hideous and no one know how many surgeries it would take to make her appearance a mirror of what it was supposed to be if acid wasn't administered to her.

[358] Section 326A of Indian Penal Code, 1860. Criminal law (Amendment) Act 2013.
[359] Section 326B of Indian Penal Code, 1860. Criminal law (Amendment) Act 2013.
[360] Section 114B of Indian Evidence Act, Criminal Law (Amendment) 2013.

After the leading case of *Laxmi v UOI*[361], the Supreme Court passed an order directing the state to put ban and prohibiting the sale of acid in shops. In order to prevent acid attacks in the country, the Supreme Court has totally banned the counter sale of the acid unless and until the seller of such acid, maintains a proper record of the details such as address and other details of the buyer, and the quantity of acid purchased. Dealers are authorized to sell the acid only after the buyer shows an identity card issued to him by the government and after clearly mentioning the purpose for which he is making such purchase. The seller is required to submit the details provided to him by the buyer along with the details of sale to the nearest local police station within three days of such sale. Acid should not be made available to be sold to minor and the stocks of such acid is required to be declared to the sub-divisional magistrate (SDM) within 15 days. Failing which, undeclared stocks is subjected to be confiscated and the defaulter can fined up to Rs.50, 000. Acid attack is now a non-bailable and cognizance offence under Indian Penal Code.

The Supreme Court gave directions to all the states to pay compensation to acid attack victim amounting to Rs. 3 lakhs which can be used towards medical treatment and rehabilitation of the victim and the sum of Rs. 1 lakh to be submitted within 15 days of when attack took place and the rest of the amount within two months of such attack. *Alok Dixit, Founder of Stop Acid Attack* says that the good thing that has come out of it is the compensation but that is for the girls who will be attacked in the future.

In *Devanand Vs. The State*[362] a man threw acid on his unfriendly wife because she denied to live with him or cohabit with him. The wife became victim as she suffered permanent disfigurement and lost her one eye due to this acid attack. The perpetrator got convicted under Attempt to murder[363] and was awarded imprisonment for 7 years.

CONCLUSION

There are no official figures available as stated above, but it is calculated that there are approximately 1,000 incidents of acid attacks which happen each year in India. The citizens or people residing India has grown hearts of stone that they didn't even consider the consequences before they throw acid on the face of innocent women. The heart of people of India, living in such historic and cultural society has become black, that they even didn't think about the family members of the victim of their crime as they are also the one who suffers along with the victims,

[361] Laxmi Vs Union of India & Ors on 10 April, 2015 Writ Petition (C)No.129 of 2006
[362] Devanand v. The State (1987) (1) Crimes 314.
[363] Section 307 of Indian Penal Code, 1860.

the perpetrators never think that what will they do if someone do the same with their family members or if their family was subjected to go through his horrific act.

Neighbouring countries such as Bangladesh and Pakistan too along with India have also reported cases of such acid attack over the decades. The reasons of such act has mostly remained same across the various borders such as availability of acid very easily and the mentality of a "lover" to 'teach a lesson' to the girl who dared to reject him. The incidents of acid attacks in Bangladesh have seen a drastic downward slop after the sale of acid was restricted and prohibited for general public back in 2002. In India, acids are still available in local provision stores at 16 or 24 rupees a litre.

A total prohibition on the sale of acid in the market without proper license is the most important criteria which needs to be implemented in order to stop acid attacks. Acid attacks are the crime of vengeance by one gender against the other gender. The change in the law which was brought forward in 2013, will work effectively only when it is implemented properly. There is also a dire need to create awareness among the sellers of chemical substances such as acid or corrosive substances. Formulating a legislation is no use until and unless the society as whole change their collective mind. Though implementing new laws are necessary in order to tackle the problem but the mind of people needs to be change too.

CRITICAL ANALYSIS OF MARXISM IN INDIAN SOCIETY

- ANSHU SINGH

"The philosophers have only interpreted the world in various ways. The point, however, is to change it."

- Karl Marx[364]

ABSTRACT

India is a burgeoning economy moving in the fast lane towards a global power in the arena of economic progress. Diplomats go out of their way dispensing olive branches to the high and mighty in their endeavour to sign pacts and treatises to bring in foreign currency and investments into the Indian soil. But under this veneer of sophistication, lies a hard, bitter truth that is often brushed under the carpet- the state of the real India which lies buried in the mire of caste, poverty, exploitation, and corruption. The underbelly of the society is in a state of putrid decay. Even after nearly seventy years of independence, the society has not been able to shake off the mantle of colonialism and India that the world sees is just a dolled up mannequin- the superstructure may be bright and elegant. Still, the foundation stands on flawed principles and conditions.

The constitution of India declares it to be a socialist society. Still, the sad reality is that the ideological concept of servitude and inferiority is deeply ingrained in the psyche of the masses and the political fraternity go out of their way to consolidate and cement the bias to perpetuate their own selfish and vested interests. The problem lies not in solutions but the imbibing of the results of the Marxist way of thought and life. The proletariat needs to be given the status of human entities and not just be treated as vote banks.

The paper is an attempt to analyse the presence and impact of a Marxist conduit of thought in society.

Keywords: Economy, Real India, Proletariat, Marxist Thought.

1. INTRODUCTION

[364] Karl Marx, Quotes, Good Reads, (13th Nov. 2020, 7:30 PM), https://www.goodreads.com/quotes/17310-the-philosophers-have-only-interpreted-the-world-in-various-ways

India is a country that is truly blessed with all-natural resources and has the potential to outdo the best in the world in terms of growth and prosperity. Lying within the Indomalaya Ecozone and containing three biodiversity zones, the economy is already the world's seventh-largest by nominal GDP and third-largest by purchasing power parity. Thus it makes it the fastest growing economic power.

According to the IMF, India's growth is expected to grow to 7.2% in 2017–18 fiscal and 7.7% in 2018–19. With 1.27 billion people and the world's third-largest economy in terms of purchasing power, recent growth and development in India has proved to be one of the most remarkable achievements of our times. The country has brought a landmark agricultural revolution in a span of more than six decades since India got independence, which has resulted in transformation of the nation into a global agricultural powerhouse that is a net exporter of food in today's time.[365]

India has been put on the roadmap of economic progress even though it is a relatively new industrialised country and not so long ago it was under the colonial shackles of the British rule for over 200 years during which the basic economic, cultural and societal fibre of the society was mutilated beyond recognition to suit the interests of the ruling class. Unlike the other rulers who had also ravaged the subcontinent, the British were venomous in their attack on the basic identity of the Indian class. They overturned the critical conceptual reality of the masses by making forays into their educational and cultural distinctiveness. In the historic words of Macaulay, the English had the onus to create a class of persons who are Indian in blood and colour, but English in taste, in opinions, in morals and intellect. They had scant regard for the rich cultural and scholastic heritage of the sub-continent, and in their own parlance a single shelf of a good European library was worth the whole native literature of India and Arabia. They looked on Indians as savages who have to be educated to bring them on par with the European Standards. Paradoxically, seventy years into the independence despite the grandiose numbers and statistics exhibited by the World Bank, the ground reality is that the majority of the Indians continue with the same broken psyche and having internalised this ideology continue existence with the same kind of regressive mentality and difficulties.

In her study of India's political economy in the thirty years after independence, Francine Frankel analyses the paradox of Jawaharlal Nehru's commitment to both accommodative politics and radical social change.[366] "The idealism was clear in the designated goals of

[365] World Bank: India Country Overview 2013.
[366] India's Political Economy, 1947-1977, Princeton University Press, 1978.

egalitarianism, secularism, and socialism; but, Frankel notes, the practical results fell far short. Nehru's "Third Way" between communist revolution and western capitalism had not solved fundamental production and distribution problems. The ranks of the impoverished continued to grow."[367]

2. KARL MARX AND MARXISM

It is an anomaly of history that Karl Marx, who is considered as one of the most noteworthy social thinkers of the 19th century, was "an impoverished exile for most of his life". He is considered as the designer of socialism and the champion of communism. He was a good organizer, an effective writer, a voracious reader and a committed revolutionary. Apart from being a German scholar, he was an economist, a historian, a great humanitarian, philosopher, political propagandist and a journalist. Above all, he was a socio-political prophet and a dreamer. He dedicated himself towards the interest of the exploited working class and proclaimed an intellectual battle against the exploiting rich or the capitalist class. As a fearless fighter, he was sincere enough to cling on to the views which he believed in, till his last. His views and thoughts were so powerful and influential that more than one-third of the world's population was under their grip until recently. Even today, despite the great set back of recent times to the Russian communism, his thoughts and the communist ideology are still alive. His ideology of communism which retained its supremacy in many countries of the world for decades, has virtually proved the platonic saying, " ideologies rule the world".[368]

He was undoubtedly a great social thinker, profound scholar and a prolific writer. He has almost no influence on the development of early sociology which was dominated by the evolutionists. The mid 20th century witnessed the rebirth of Marxist sociology. He has exerted a tremendous influence on many sociologists. He has made scholars consider the problems which he has raised, and has opened up vast new areas of investigation.

He has, to a great extent, contributed towards the development of modern social science. His ideas still constitute the gospel of revolution, and his 'Communist Manifesto' remains the handbook of the revolutionaries throughout the world. He has provided a comprehensive theory of social change. His 'Conflict Theory' is a good alternative to the Western 'Functional Theory', which stresses upon the significance of social harmony, social equilibrium and social stability but undermines the role of conflict elements which is present within the society that would lead to the changes in the structure of the society. He has greatly contributed to the realm

[367] Indian Communism: Opposition, Collaboration and Institutionalisation, Milton Israel.
[368] Josiah Heyman, Marxism, Research Gate, (Nov. 18th 2020, 4:45 PM), file:///C:/Users/Home/Downloads/9781118924396.wbiea1860.pdf

of 'sociology of knowledge'. It can be said that his ultimate purpose was to achieve the well-being of the working community. He tried to lay down the foundations of a classless, casteless society based on social harmony and justice. He believed that his purpose could be realized by a historical class struggle and by the destruction of the capitalist class. His works created a sort of awareness not only among the workers but also among the capitalists, who started taking his predictions as warnings and his analysis of the capitalist regime as highly suggestive of correcting themselves.[369]

Marx and his thoughts have been widely criticized, as well. His idea of 'Polarisation of Classes' and 'Self-destruction of the Capitalist Class' was considered to be very simplistic, and he has given too much emphasis on the role of 'Alienation'. It was pointed out that the relationship between Revolution and Class Struggle was not clearly brought forth in his works. It was realized that he has neglected or under-estimated the role of non-economic factors, like religious views and attitudes in social life. He has been criticized as an advocate of a revolution and has been branded as a political propagandist and prophet. His predictions about the downfall of capitalism have not come true. His theory of social classes is ambiguous and debatable.[370]

Despite all the criticisms, his contributions to the development of social thought can hardly be exaggerated. He was a genius and a profound scholar. Marx is considered as one among the pioneering sociologists because his views and thoughts have a great sociological significance. Abraham and Morgan have observed that it cannot be denied that he has profoundly influenced Western thought, sociological, economic and political. It is true that many of his predictions have not come true, but it cannot be denied that those who have read his works have changed the world. Even the worst critics agree that Marxian theory provides an excellent framework for the analysis of conflict and change in modern society. His influence on contemporary sociological theory is growing, and Marxist sociology has already become an established branch of the discipline".[371]

3. MARXISM AND THE INDIAN SOCIETY

[369] Tomasz Helemejko, The concept of Marxism, (Nov 18th 2020, 6:20 PM), http://www.repozytorium.uni.wroc.pl/Content/40318/002.pdf
[370] *Ibid.*
[371] Josiah Heyman, Marxism, Research Gate, (Nov. 18th 2020, 8:45 PM), file:///C:/Users/Home/Downloads/9781118924396.wbiea1860.pdf

Marxism is the system of political and economic thoughts which was developed by Karl Marx, along with –Friedrich Engels, especially the doctrine that the state throughout history has been a device for the dominant class to exploit the masses.

Today, as the society is moving towards an increasingly polarised entity both in terms of economic disparity and the power relationships, the class struggle and the increasing sense of alienation, is on a dangerously tipping scale which can be ominous for the future of the country as a whole. Any tree which is decayed from the inside can never stand the rage of storms-Marxism in every possible way is the panacea for the present state. However, this concept is not a new theory for the country. In fact, India was introduced to the tenets of the philosophy with the start of the Russian Revolution and Rama Krishna Pillai had translated the biography of Karl Marx into Malayalam in the year 1914. Even though such tenets were known to the Indian and we still have the communist manifesto alive in the society even today, the condition of the class-based Indian percept makes it difficult for socialist principles to be accepted and implemented in totality – the very multifaceted nature of the society poses challenges of various kinds. Besides, there is the problem of the unity of ideologies.[372]

The three communist parties in the country have their own codes of law which don't allow for a united front. The main conceptual hurdle is in the dogmatic hypothesis through which we view the whole idea of the political theories that are the norm in a burgeoning economy like ours-we tend to hold principles on a leash and most of the time did not look at the practical implications of such a stand-we tend to reach for revolutions of an extreme kind; either in the form of extremist outlooks like Maoist or Naxalite insurgency or hypocritical and phoney dharnas that only provide leverage to the political bigwigs to promote their nefarious activities and selfish ends.[373]

Ross Mallick's study of Indian communism argues an even greater paradox…" Rather than a third mediating path and rejection of extremes, communists in India, as in other parts of the world, had insisted on the case for revolution." But they too accommodated to a democratic system that rejected the legitimacy of revolution while failing to achieve radical goals through other means'.[374]

Marxism as a way of life and thought has to be the underlying agenda while drafting policies that affect economic development at large. Imperialist forces had unleashed an era of capitalist

[372] Irfan Habib, Karl Marx and India, cpim.org, (Nov 20th 2020, 4:30 PM), https://cpim.org/sites/default/files/marxist/201703-marxist-marx-india-irfan.pdf
[373] *Ibid.*
[374] Shyla Abraham, An overview of the Marrxist thoughts and the Indian society, Impact Jornal, (Nov. 20th 2020, 9:15 PM), http://marxism%20in%20indian%20society.pdf

society, and it continues to this day it is time to rethink the modalities of inheritance (Ashraf Ghani). Even though India is a democratic country and secular in its outlook, "the democratic dividends"(Nandan Nilekani) have not been uniformly distributed, and the society remains largely imperialistic in principle with money and power holding the society in a vice-like a grip.

4. GROUND REALITY

Marxism as a theory is quite revolutionary in character, and so the tendency to equate its extreme revolutions and drastic changes is a dominant stream of thought. The proletariat of the country who have always been under the yoke of repression have always looked up to a political party or an external outfit to alleviate their difficulties. But the reality is that Marxism is a humanistic philosophy which calls for a change in the ideological perception of empowerment of the "Base" or the workers. And to make things worse, the party or the external forces that purport to support them are constituted of the class of either the intelligentsia or the new bourgeoisie. So the movements remain ineffective in the long run leading to the statistics showing differential results. The few privileged people who make up the emancipated few and who are the lucky stakeholders of powdered Indian status quo have taken on themselves to perpetuate this myth to keep the wheels of their own fortune running and in the process prolong the social evils that have scarred the conscience of the society. Corruption rules the roost and exploitative customs like female foeticide, child marriage, caste politics, dowry deaths, farmer suicides, poverty etc. plague the society. The common man continues to agonize under the heavyweight of exploitation. Reports of farmer suicides, droughts and floods, dowry deaths, infringement of human rights etc. have now become the norm rather than an exception. According to Nandan Nilekani, the co-founder of Infosys and the author of Imagining India, 93% of the population of India are in the unorganized sector totally bereft of any labour rights that are enjoyed by the enfranchised labour workforce. This leaves them completely exposed to the machinations of the elite and the privileged classes who make up the polished visage of India's stupendous economic and global power. Thus even though India is a heavyweight in terms of capital-physical, Institutional, Financial, Human, Security etc., the road to uniform progress remains largely untrodden. The absolute need of the hour is to bring into practice the principles of Marxist philosophy to curb this kind of class and social exploitation.[375]

[375] *Ibid.*

5. BRIDGING GAPS

Capitalist ruling class holds power, through which imperialist influence percolates. To fight against imperialism or neo-colonialist influences in India, there will be a need to fight against the ruling Indian bourgeoisie, who are the reason behind operation and infiltration of these influences in the country. From the political and historical point of view, the idea of the formation of an anti-imperialist united front with the national bourgeoisie for fighting foreign imperialism is out of place. Imperialism holds the native capitalist class and not the ruling power in the country.[376]

Thus the onus of bridging the gap lies with focusing on the human capital and bringing in a change at the level of thought. Marxism as a concept never depended on changing the world but in only changing the nature of the world. Marx clearly defined that class conflicts are an inherent part of any capitalist society-given the unequal distribution of capital and the intrinsic desire of man to possess wealth and power-he is very deeply afraid of being treated as a commodity with a short shelf life. The materialist society treats every worker as a "use and throws" property-modern work alienates and at every level man tries to free himself and move higher in life and to consolidate power-the class struggle as we know it and this forms the basis of any growth in the society. Thus capitalism and imperialism are not the culprits, but the issue lies in the reaction of the masses to this phenomenon.[377] It is, thus, the need of the hour to channelize the collected strength of the masses into a broader perspective. Just like the British who used Education as a tool to break the self-concept of the Indians, similarly building up of the nation's psyche should also be on the principle of education. Education in the Indian context is free and compulsory only in principle. The urgent need is to strengthen primary education in the country and bridge the gap between the government and private education. The change in thought and the emancipation of the workers can only happen when there are more educated people who are aware of their rights and their value as human beings.

The spread of English as a language is another step towards bringing in an egalitarian society, however paradoxical it may seem. English is India's sure-fire means of stepping into prosperity and self-concept. If the language percolates faster into the bloodstream of the proletariat, the faster would be their rise to emancipation. Language as a tool is now wielded by political powers to keep the wind blowing in their favour and maintaining class divide to favour their

[376]Salil Sen, Some Notes on a Positive Programme for Indian Revolution, Marxist Internet Archive (2008), (Nov. 22nd 2020, 7:20 PM) https://www.marxists.org/subject/india/positive-programme/ch02.htm

[377] Shyla Abraham, An overview of the Marrxist thoughts and the Indian society, Impact Jornal, (Nov. 23rd 2020, 9:20 PM), http://marxism%20in%20indian%20society.pdf

own ends. Maintaining cultural identity is good, but in the era of globalization, getting holed up in a geographical and cultural isolate would amount to being the typical frog in the well.

India is a land of villages, and Marxist thought should originate there if there has to be an overhaul of the society. The urgent demand is to build up the infrastructure to help in the changing the very nature of the rural arena to make it more akin to the city to stem the exodus of the people into the cities and stop the proliferation of slums which are the breeding ground for exploitation of numerous kinds, Technology has to be made more available, and people have to be educated on the use of technical gadgets and its use in agriculture and other occupations which definitely would enhance the quality of life and which in turn helps cement the communist way of life in the society.

Sustainable development which is inclusive in nature and which takes into consideration the needs and identities of various classes that constitute the spirit of India can only hold the flag of Marxist thought aloft and break the hegemony of capitalist forces. However, a social change is the foundation of a classless society that is open to freedom of thought, the strength of humanity and openness of economy-all precepts of the Marxist way of life and the panacea for the issues of today.

6. CONCLUSION AND SUGGESTIONS

Like Mr Ashraf Ghani[378] said "Neither the state nor the polity is constituted based on inclusion nor this forms the basis for the capitalist economy to thrive. Just because a state projects a whopping growth rate, inequality and exploitation remain the norm, and a socialist state fails to reinvent it. Marxism calls for opening opportunities for inclusion and accountabilities. A.R. Desai finds that the dominant sociological approaches in India are basically non-Marxist. The Marxist approach has been rejected because it has been considered of being dogmatic, value-loaded and deterministic in its nature. According to him, he relevant approach, is the Marxist approach as it could help to study of government's policies, the class entrenched into state apparatus and political economy of India. We understand the social reality by the aid of the Marxist approach through various means which includes production, the techno-economic division of labour involved in operating the instruments of production and social relations of production or what was more precisely characterized as property relations".

Marxist thoughts are the way, the truth and the life of a better society that is egalitarian in every possible way.

[378] Chancellor of Kabul University.

BATTERY AND ASSAULT – AN ORDINARY TORT

- DEVANSHI BAVISI

BATTERY

INTRODUCTION:

The intentional infliction of a harmful or offensive contact on another person is called battery. Battery deals with the actual use of unlawful force against a person. In order to prove a tort of battery, one needs to show that there was use of force. The force does not have to be great. There need not even be any hurt caused due to the use of force. Even simply spitting or throwing water on a person or for instance tying someone up forcefully is enough to constitute a tort of battery. It is enough that there was some use of force. In order for the tort of battery to be proved, it is necessary that the use of force be intentional and without any kind of lawful justification. A battery can therefore be defined as "intentional and direct application of force to another person without any lawful justification". Even the least touching of another person in anger or with a malicious intention can be considered a battery[379]. A touching which is not harmful but which is offensive to a normal or reasonable person is a battery and it subjects the actor to liability if the touching is not consented to or privileged. In this type of battery, it is the insult or offensive nature of the touch that is important and not the damage in fact. If two or more people for an instance meet in a narrow passage and without any violence or design of harm, the one touches the other gently, it will be no battery. But if any of them use violence against the other, to force his way out in a rude or inappropriate manner, it will constitute a battery[380]. A battery may consist of a harmful touching of the plaintiff's person, caused by the defendant with an intent to inflict a harmful or an offensive touching either of the plaintiff's person or that of a third person[381]. The wrongdoer committing the tort of battery necessarily has an intention to cause reasonable or unreasonable hurt and harm or sometimes even to kill the plaintiff in order to fulfil his malicious intent. The elements of battery thus are as follows:

[379] AK Jain, Trespass to person and property, 281, Eighth Edition, Ascent Publications, 2016.
[380] WD Rollison, Torts: Assault, Battery (scholarship.law.nd.edu) < https://scholarship.law.nd.edu >, Accessed on 15 January, 2021
[381] *Id*

- Malicious Intention
- Inflict to another person
- Harmful and offensive contact

ANALYSIS:

ESSENTIALS OF BATTERY – The main essentials required to commit a tort of battery are as follows:

1. USE OF FORCE – For a tort of battery to be committed, there must be the use of physical force. The force need not necessarily be harmful or great in nature. The physical touch and physical force is enough to prove a tort of battery. It need not even be necessary that the plaintiff should receive considerable amount of injury to file for a tort of battery. Only the use of physical force is necessary for the plaintiff to prove a tort of battery.

2. WITHOUT LAWFUL JUSTIFICATION – The force applied should be without any lawful justification and should be unlawful in nature. This means, for instance if two people passing by the same route clash accidently, it is not battery as there was no malicious intention. However, if one pushes the other on purpose, it constitutes a battery[382].

DEFENSES FOR BATTERY – The defences for the tort of battery are as follows:

1. Consent

2. One of the major defences

3. The burden of proof lies on the defendant

4. Self defence

5. More rare, but a defence nonetheless.

[382] Sakshi Raje, Legal article on Battery, Battery – law of tort, < https://lawtimesjournal.in >, Accessed on 15 January, 2021.

CASE RELEVANCE FOR BATTERY:

BETTEL ET AL V. YIM:

In this case, the plaintiff was a group of boys including Bettel and the defendant was Yim, the owner of a store. The group of boys including Bettel had been playing with toys and games in Yim's store before being asked to leave. Half of the total number of boys including Bettel left the store. But they remained outside the door of the store and began to throw lit matches into the store. For the first time, the plaintiff retrieved the lit match. The second burnt itself out, the plaintiff then re-entered the store, proceeded towards the pin ball machine and tried to recognize the smell. At the beginning, the defendant was unable to smell anything but very soon after a few moments he observed flames releasing from a bag full of charcoal and hence immediately removed the bag releasing flames out of the store. On questioning, the plaintiffs denied the fact that they have set up the fire in the store. The defendant Yim, then grabbed the plaintiff and shook him more than twice or thrice before his head came down to the plaintiff's nose. The issue in this case was an intentional wrongdoer could be held liable only for reasonably foreseeable consequence of his intentional application of force or should he be bearing responsibility for all consequences which flow from his intentional act. The case was decided for the plaintiff with special damages awarded. The reasoning for the decision was that if only foreseeability and intentionality were considered, then the defendant would not be held liable for further and perhaps more grave consequences arising from the action. On application of these principles to the facts it was found out that the defendant Yim, had intentionally shaken the plaintiff, Bettel which constitutes a battery, subjectively he accidently head butted the plaintiff, but the unintentional nature of the action does not remit his responsibility for it[383].

ISSUES:

The issue in this case was an intentional wrongdoer could be held liable only for reasonably foreseeable consequence of his intentional application of force or should he be bearing responsibility for all consequences which flow from his intentional act. The main issue is whether an intentional wrongdoer be held liable for consequences which he did not intend or not and whether the doctrine of foreseeability as found in the law of negligence is applicable

[383] Bettel et al v. Yim, 1978 CanLII 1580 (ON SC), (Canliiconnects), < https://www.canliiconnects.org >, Accessed on 17 January, 2021.

to the law of intentional torts or not. The issue portrays a question of fact whether should an intentional wrongdoer be liable only for the reasonably foreseeable consequences of his intentional application of force or should he bear responsibility for all the consequences which flow from his intentional act or not.

ARGUMENTS ADVANCED:

The plaintiff has framed his action in assault. Properly speaking the action should have been framed in battery which is the intentional infliction upon the body of another of a harmful or offensive contact. On the defendant's evidence, his act in grabbing the plaintiff with both his hands and shaking him constituted the intentional tort of battery. It is obvious that he desired to bring about an offensive or harmful contact with the plaintiff for the purpose of extracting a confession from him. Viewed as such, the defendant's own evidence proves, rather than disproves, the element of intent in so far as this aspect of his physical contact with the plaintiff is concerned. Indeed, the defendant's admitted purpose in grabbing and shaking the plaintiff does not fit into any of the accepted defences to the tort of battery — consent, self-defence, defence of property, necessity and legal authority. In grabbing the plaintiff and shaking him firmly, it ought to have been apparent to the defendant that in doing so he created the risk of injury to the plaintiff resulting from some part of the plaintiff's body coming into contact with some part of the defendant's body while the plaintiff was being shaken. That there is no liability for accidental harm is central to the submission of defence counsel who argues that the shaking of the plaintiff by the defendant and the striking of the plaintiff by the defendant's head must be regarded as separate and distinct incidents. While he concedes that the defendant intentionally grabbed and shook the plaintiff, he submits that the contact with the head was unintentional. Counsel for the defendant submits that the grabbing of the plaintiff and the subsequent striking of his nose by the defendant's head should be viewed as separate acts and that liability should end after the plaintiff was grabbed because what followed was accidental. I do not agree. On the facts of this case it is artificial to attempt to separate the two events which were part of one transaction. The striking of the nose occurred while the defendant continued to hold the plaintiff and while the plaintiff was being shaken by the defendant.

OBSERVATIONS:

If physical contact was intended, then the fact that the magnitude of its consequences exceeded the expectation is irrelevant. The key observations of this case are that the plaintiff goofs up with the matches and the defendant thinks something is wrong and therefore, shakes and

inadvertently smashes the nose of the plaintiff with his head. The issue is whether the defendant is guilty of unintentional consequences of his intentional acts. Elements of battery include intentional infliction on body of another by offensive or harmful contact. Foreseeability of negligence is not relevant in this case as this case deals with an intentional tort, it would ignore the essential difference between intentional infliction of harm (battery) and unintentional infliction of harm. Therefore, the defendant Yim of the case Bettel et al V. Yim is undoubtedly found and turned out to be guilty of battery.

ASSAULT

INTRODUCTION:

Intentional creation in mind of reasonable apprehension of imminent harmful or offensive contact is termed as assault. The tort of assault occurs when the defendant does something that causes a reasonable apprehension of battery in the mind of the plaintiff. This means that assault occurs when the defendant does something that scares the plaintiff into thinking that he/she is going to be subjected to unjustified use of force that is battery. Law assumes that the plaintiff is a reasonable and not a sensitive man or a woman. For instance, if someone verbally abuses a person without a suggestion of violence, and the person thinks that he or she is going to get battered, then the action of that person is not reasonable and justified. A necessary requirement for assault is that the defendant should have the ability to do harm. For instance, if a man on a hospital bed with plaster all over his body shakily moves his broken hand and says to someone that he shall bash him up, it shall not be considered as an assault since it is a very obvious fact that the man being sick, does not have any actual ability to inflict or cause harm. Similarly, if a person X says to Y that he shall shoot him and Y is aware of the fact that X is not carrying a gun, then it shall not be considered an assault as there does not arise a question of committing assault. Appearing to someone with a clenched fist is considered to be an assault. Assault requires no contact because its essence is conduct which leads the claimant to apprehend the application of force[384]. Assault is an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of battery on him by the defendant, it is basically an attempt or a threat to do a corporeal hurt to another, coupled with an apparent present ability

[384] Winfield and Jolowicz, Assault, Nineteenth Edition, Thomson Reuters, 2014.

and intention to do the act[385]. Showing someone an action of aiming a shoe at him to indicate that he shall be beaten by a shoe, or for that matter even verbally threatening some person, or even showing a loaded pistol to someone to indicate that he may get shot by the pistol, is also considered an assault in law of tort. Therefore, it can be easily said and stated that assault is basically an attempted battery.

ANALYSIS:

ESSENTIALS OF AN ASSAULT – The essentials required to commit a tort of assault are mentioned as follows:

1. THE CLAIMANT SHOULD APPREHEND THE APPLICATION OF FORCE – The word 'apprehend' in the context is used in the sense of the word 'expect'. The plaintiff must have a valid and justifiable reason to claim that the defendant is in capacity to carry harm or threat to the plaintiff immediately.

2. THREATEN BY MEANS OF WORDS – Threatening words alone can be actionable. Threatening of words indicates that the defendant is almost about to commit a battery. Threatening to a person is a signal of assault prior to committing a battery against the plaintiff.

3. CONDITIONAL THREATS – While words alone may constitute an assault, they may also negate the threatening nature of a gesture which otherwise would be an assault[386].

DEFENCES FOR AN ASSAULT – The defences for a tort of assault are as follows:

1. A real and honest perceived fear of harm against a person.

2. No harm or provocation on their part.

[385] AK Jain, Trespass to person and property, 281, Eighth Edition, Ascent Publications, 2016.

[386] Winfield and Jolowicz, Assault, Nineteenth Edition, Thomson Reuters, 2014.

3. There was no reasonable chance of retreating or escaping the situation.

4. A threat of unlawful use of harm against them.

CASE RELEVANCE FOR ASSAULT:

STEPHENS V. MYERS:

In the mentioned case, Stephens V. Myers, the plaintiff of this case is Stephens and the defendant, Myers as mentioned. In this case, the plaintiff, Stephens was seated round a table where few people excluding him were present as well. The defendant of this case, Myers too was present at the same table where Stephens was. It happened so that the defendant, Myers had caused some sort of disruption during the meeting while a discussion was going on. Therefore Stephens, being the chairman had expelled him out of the room where the discussion was held, to avoid any kind of disturbance. This made the defendant aggressive. Myers could not take up the disrespect and hence became angry. Therefore, he said that he might as well pull off the chairman from the chair and then move out of the room. The defendant, Myers, was aiming and intending to hit the plaintiff, Stephens and even had advanced and bent his fist towards Stephens. But fortunately then, he was stopped and controlled by someone sitting right beside him. Thus, this matter was taken to court by Stephens as he believed that Myers had clearly committed the tort of assault against him. When the matter was taken up to the court, the defendant of this case, Myers mentioned that no assault had taken place because according to him it was very evident that he could not at any cost carry out his threat as he had no power and capacity to do so since there were also a few more people present between them. The plaintiff on the other hand also mentioned about the clenched fist of the defendant and stated that he had assaulted Stephens. The court then passed a judgement mentioning that it is not mandatory and necessary that all the threats are an assault. There has to be a proper means to carry out the threat into action, and must be a possible threat to conduct the said violence. It was mentioned in the court that the defendant lacked a main clement of assault that is intention. The defendant, Myers did not have any kind of intention to hit Stephens as he knew he could not reach out to the chairman to hit. It was nearly impossible to do so. Therefore, the court passed a judgement mentioning that in this particular case, no assault had taken place[387].

[387] Stephens v. Myers – Assault (lawteachers)

ISSUES:

The main issues raised was whether the clenched fist of the defendant Myers actually caused assault to the plaintiff Stephens or not. The issue is also that was Myers in a considerable condition so as to carry forward his assault to Stephens, the plaintiff or not.

ARGUMENTS ADVANCED:

In Stephen v Myers (1830), the Claimant was a chairman at a meeting sat at a table where the Defendant was sat. There were six or seven people between the Claimant and Defendant. The Defendant was disruptive and a motion was passed that he should leave the room. The Defendant said he would rather pull the chairman out of his chair and immediately advanced with his fist clenched towards the Claimant but was stopped by the man sat next to the chairman. It seemed that his intention was to hit the Claimant. The Defendant argued that there was no assault as he had no power to carry out his threat as there were people in between. The court said that not every threat is an assault. There needs to be a means of carrying that threat into effect: it must a realistic threat of personal violence. The judge directed the jury (as juries were still in use at the time) that if the Defendant could have reached the chairman and hit him there was an assault. But if the Defendant did not have the intention of hitting the Claimant, or it was not realistic that he could reach the Claimant, then there is no assault. The jury found for the Claimant.

OBSERVATIONS:

In this case, it was concluded by the Honourable Court that the defendant of the case Stephens v. Myers was not liable for assault. As very clearly evident from the facts of the case, it can be observed that the defendant in anger had already clenched his fist. But contrary to this, it is also very clearly evident that Myers was in no condition favouring him to commit his assault. Therefore, the clenching of his fist cannot be considered assault as anyway he would be stopped by people from his actions to take place. Hence, no assault had been committed.

< https://www.lawteachers.net >, Accessed on 15 January, 2021.

REASON FOR CHOOSING THE TOPIC BATTERY AND ASSAULT:

The law of tort plays an important role in day to day life. A tort law can be used to resolve a dispute between two or more citizens having a quarrel even over petty matters as citizens may end up committing a battery or assault which would possibly persuade the dispute to continue further. The laws for battery and assault have their own remedies and hence would create a powerful impact. If there were no laws on battery and assault, the use of it would be very common. This topic has an importance to be discussed which is mentioned in the research paper.

DIFFERENCE BETWEEN BATTERY AND ASSAULT:

Assault comes before battery. For instance, approaching someone with a clenched fist is assault, while punching him is battery. Assault is the threat to use force while battery is the actual use of force. There may be certain rare case scenarios where battery is not preceded by assault. For example, if A walks behind B and pulls out the chair B is sitting on, A will have committed battery but not assault as there could not be a reasonable apprehension of force in B's mind. Assault is basically an attempt to commit a battery. Battery can be said as aggravated assault. Assault can be referred to threat to commit battery.

CONCLUSION:

Assault is an attempted offense, the law is intended to prevent possible battery by punishing conduct that comes in a dangerous way to obtain battery. As with most attempted crimes, a clear line cannot be drawn between a criminal attack and conduct that is merely an attack preparation. There should be an intention to cause harm, but it is not enough if it creates the possibility of damage or the danger of battery in a distorted future. Instead, the intent must be taken out of imminent danger, some over act that endangers the battery. Thus words or intentions do not constitute mere attack. It can be concluded that battery and assault are two different and separate offences that often occur together. The remedies for assault and battery can be action for damages, self – help and habeas corpus. Threat of violence is enough for committing an assault while for battery, physical contact is mandatory. The objective of assault is to threaten a person while the objective for battery is to cause harm. The nature of an assault need not necessarily be physical but for battery it must be physical.

CAPITALIZATION OF POLITICAL PARTIES IN INDIA

- **CHHAVI JAIN**

ABSTRACT

Capitalization of Political Parties is an issue that is in limelight for a while now. Since it's an issue which is not being converse in every household. But keeping that in mind, we cannot pass over without giving due attention. It is an issue which inquires the nation's priority, choices and governance. It also interrogates the public choices on opting for a representative and ruling party which may sound capable and competent to the casual eye but can be corrupt, manipulative and misrepresentative otherwise. This Research paper has been focused on covering the vital aspects and process of finances a party receives, sources of funds namely legal and other sources. It has covered Common laws against corruption of political parties like Income Tax Act, 1861, Representative of People's Act, 1951, Companies Act, 2013, Companies Act, 1956 etc. It has also covered the substantial legalities that government imposes on political parties while receiving funds and amendment held in that legalities in all those years. The most dominant topic covered in this research paper is "Methods to make the financing process transparent and fair". There are various method mentioned some are already known and some that can be approved if required. The paper also encompasses case laws and reports which are relatable in every aspect that are being mentioned. The paper also covers the data and facts recovered of political parties regarding its funding of different years. Lastly, Research paper has also sought on covering the Evolution of political parties and its endowment all these years. Though some of the methods, rules and acts are persistent, but some have been substituted. The paper concludes with a thought on the mechanism on financing of political parties, the notion of making this method effective and fair. Though, the research paper can't provide an absolute rest to all your suspicions and questions, but it has envisaged on wrapping wholesome. There is still some astray data which is concealed under the files. Although, what is being attained are abundant to disclose the reality.

Keyword :- Representatives, Financing, political parties, Methods.

INTRODUCTION

*"**It is government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system"**.*

-Nelson Mandela

To simply put it defines that Democracy is a government "**of the people, by the people, for the people**". After acquiring independence in 1947, India has adopted democratic form of government. In which power is vested in the hands of people, they are freely acknowledged to opt and elect that who is capable of maintaining the equilibrium of social, cultural, economic and political influence in country.

For the purpose of making this procedure more tranquil and compress, Elections are held at regular intervals of 5 years in India. In elections, different representatives under the placard of different parties stand to be elected by the people to hold the honor.

Prior to elections, parties are given the opportunity of prevailing and convincing people to a extent of gaining maximum votes through **election campaign[388].** Parties endeavor their utmost to assure people about the betterment of the nation and individual person, and people plump out for the best and grant their votes wisely keeping every minute detail in mind. Party which are accorded with maximum votes are designated the crown and rest are specified as oppositions.

In the course of Election Campaign, parties are authorized to disburse a precise amount of money in order to seek votes, but here the concern is from where the parties get these funds- Any corporate institutions, banks, government or organizations. All these funds of parties come from which means. Sources of funds of parties must be analyzed. Parties, their funds and sources are definitely a point of discussion.

SOURCES OF FUNDS

There are definitely various Source of Funds to the political Parties. But taking it as a transparent way to clear all the suspicions, is definitely not the answer. There is a bigger picture behind which needs to be disclosed. Let's discuss different sources of Funds:-

A. LEGAL SOURCES OF FUNDS:-

Public Funding:- Public Funding or State Funding is a type of funding in which government provide funds to the political parties for election related activities. This type of funding is being exercised to avoid funding from corporate bodies, so that they cannot have influence over

[388] Henry E. Brady, Richard Johnston, and John Sides, *The Study of Political Campaigns,* RESEARCHGATE, (January 2006), https://www.researchgate.net/publication/251806712_The_Study_of_Political_Campaigns

political parties, also with the reason to avoid money getting wasted in the elections, and it also provides fair opportunities to political parties having limited sources funding them.

Funding can be of two types:-

-Direct Funding:- In this type of funding, state provide direct funds to the political parties like by transferring it into their bank accounts.

-Indirect Funding:- In this type of funding, state does not provide direct funds to political parties, instead it provides indirect benefits such as free access to media, free access to public places for rallies, free or subsidized transport facilities, etc.

However, Direct funding by state or government is prohibited in India. But states too show their support to the political parties by providing them Indirect Funding. Some examples of which are providing free access, for campaigning, of state owned television and radio network, free electoral rolls, income tax exemption **under Section 13A of the IT[389] Act, (herein after the IT ACT)**,etc.

Corporate Funding:- Corporate Funding is a type of funding is which corporate bodies provide funds to the political parties. It has been observed that major part of the funds of political parties come from corporate bodies. In the year 2013-2014 90% of the funds of political parties were donated by corporates and In year 2019-2020 92% of the total funds came from political parties. In which **Bharatiya Janta Party** bagged the most. "**In 2018-19 Donations made by Corporate bodies and Business Houses of Rs. 876.10 crores went to five national Parties. The biggest share of over Rs.698 crore went to BJP, according to the Association for Democratic Reforms. The BJP received Rs. 698.08 crore from 1,573 corporate donors, followed by the Congress worth Rs.122.5 crore from 122 donors while the NCP got Rs.11.34 crore from 17 donors. Voluntary contributions of the BJP and the Congress above Rs.20,000 from corporate and business houses were 94% and 82% respectively. Between 2012-13 and 2018-19 donations from corporate to national parties increased by 968%, with a drop in the percentage in 2015-16[390]."**

Corporate donations are governed under the **Companies Act, 2013. Section 182 of the Act** [391]provides that

[389] Income Tax Act, 1961 No. 43, Acts of Parliament, 1961, (India),

[390] Special Correspondent, *BJP bagged largest share of corporate donations in 2018-19: Association for Democratic Reforms*, THE HINDU, (October 2020). https://www.thehindu.com/news/national/five-national-parties-received-87610-crore-as-corporate-donations-in-2018-19/article32862096.ecea

[391] Companies Act, 2013 No. 18, Acts of Parliament, 2013, (India), § 182.

-A company needs to be at least three year old since the date of its existence to be able to donate to a political Party.

-Companies can donate a maximum of 7.5% of the average net profits they made during three immediately preceding financial years,

-Such contributions must be disclosed in Profit & Loss accounts of the companies.

-No Contributions shall be made without obtaining the approval of the board of directors by passing a resolution.

-If a company fails to comply with the provisions of this section, it may be held liable to a pay fine which may extend up to five times the amount contributed in default and every officer culpable of such infringement may be imprisoned for a term which may extend to six months and with fine which may extend up to five times the amount contributed in default.

Corporate bodies play a prominent role in providing funds to political parties, not with the interest of donating a part of their income in welfare of nation, but with the personal interest of having influence over the political parties in future. With this instance, corporate funding has been banned multiple times, because during election corporate bodies flourishes their money as a part of donation to avoid paying taxes under **Section 80ggb of the INCOME TAX ACT,1961**[392] , "Donations by an Indian Company and enterprise to political party and electoral trusts which are registered in India. Such company or an enterprise is accessible to avail the tax benefits under this act.". In order to avoid this happening government needs to build a proper scrutiny to check date of incorporation, registration, profit and loss accounts of the companies and transaction receipt of all the transaction in order to make this process transparent and legal.

Electoral Trusts:- Electoral Trusts is a non-profit company established to receive voluntary funds subject to **Section 20B of the RPA**[393] (hereinafter RPA) and donate the some to the political parties **(Rule 17CA of Income Tax Rules, 1962)**[394]. Electoral Trusts are not allowed to carry any other business on their part as it is prohibited. Also. one electoral trust is not permitted to donate to other trust. It is must for an electoral trust to be registered under its name. It is currently provided for by the **Companies Act 2013 and Electoral Trusts Scheme,2013** as notified by the Central Board of Direct Taxes on 31st January 2013.

[392] Income Tax Act, 1961 No. 43, Acts of Parliament, 1861, (India), § 80ggb.
[393] Representatives of People's Act, 1951 No. 43, Acts of Parliament, 1951, (India), § 20B.
[394] Income Tax Rules, 1962 No.S.O.969, Acts of Parliament, 1962, (India), § 17CA.

It is compulsory for an Electoral Trusts to made a donation of 95% to the pollical parties for campaigning. Failing to pay such donations, may not exempt electoral trusts from paying taxes. Which can be exempted under **Section 13B of the IT Act[395].**

Uplifting the concept of Electoral Trusts has been made because of its transparency and tax benefits provided to it. Further to this, some companies made their electoral trusts such as Reliance Group, Vedanta Group, Bharti Group etc.

Moving to the Statistical data of Electoral trusts over the years, **In the year 2018-19 BJP made Rs. 1450 crores almost 60% of its total fund from Electoral Bonds. While congress made Rs. 383 crores ,41% of its total funds. Mamta Banerjee Trinamool Congress (TMC) raised Rs. 97 crores, 50.5% of its total fund from Electoral Bonds. While the other parties such as BSP, CPI and many others have not disclosed their data.[396]**

OTHER SOURCES OF FUND:- While above are the known sources of funds which give us a glimpse about the funding of political parties and its working. Whereas there are some unknown sources of funds which provide money and donations to political parties confidently. The Unknown sources here can be transactions made under the name of fake companies, trusts and organizations. Funds secretly received from private or corporates without mentioning it in a record book. This point strikes in the mind usually when expenses made by political parties are bigger than funds received. **In year 2013-14 BSP (Bahujan Samaj Party) declared to election commission that it did not receive any funds above 20,000 and did not disclosed names of sources. In the year 2004-05 and 2011-12, a large amount of donations of Congress, BJP, BSP, CPI and CPI(M) came from "Unknown Sources" as mentioned by them in the report submitted to election commission.[397]** Such sources were not disclosed even if the amount of donations were above Rs. 20,000.

COMMON LAWS AGAINST CORRUPTION IN FINANCING OF POLITICAL PARTIES

1.Statutory provisions allowing Political Parties to accept funds:- The primary provisions are:-

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[395] Income Tax Act, 1961 No. 43, Acts of Parliament, 1861, (India), § 13B.

[396] Anubhuti Vishnoi, *At Rs 1,450 cr, BJP got 61% funding via Electoral Bonds before LS polls,* TIMES INTERNET LIMITED ,(January 2020). https://m.economictimes.com/news/politics-and-nation/at-rs-1450-cr-bjp-got-61-funding-via-electoral-bonds-before-ls-polls/amp_articleshow/73181670.cms.

[397] Devesh K. Pandey, *'69% of political funds was from unknown sources'*, THE HINDU, (January 2017). https://www.thehindu.com/news/national/69-of-political-funds-was-from-unknown-sources/article17089815.ece/amp/#aoh=16178708261741&csi=1&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s

-Section 29B of the RPA Act[398] allows political parties to accept donations made by private individual or any company not by any government company.

2.Statutory provisions checking and restricting donations:- The scenario of relation between political parties is very fierce in India. They can do anything to surpass each other. Be it gaining maximum funds, donations and what not. So, to maintain transparency, regularity and efficiency on the functioning's part or to avoid parties to gain funds and donations from any illegal means. These provisions are made:-

-Section 29C of the Representatives of the People's Act[399]**,** It has been made compulsory or mandatory to political party to disclose their donations received from any individual or a company. If an amount of donation exceeds Rs.20,000 Political parties had to submit their reports of such transactions and data to Election Commission. Failure on this part will not exempt party from paying taxes under Income Tax Act,1961.

Limits on expenditure of Political Parties, This law is governed under **Rule 90 of Conduct of Elections Rules, 1961**[400] Earlier the limit set was lower than required in conducting the elections, But in the amendment 2014 it was enhanced. The lower limit set earlier leads to dishonesty and lack of transparency by political parties as the parties does not show the reports of actual expenses incurred. The limits set under the new Rule are:-

70,00,000 for all the states except Arunachal Pradesh, Goa and Sikkim for which maximum limit is Rs. 54,00,000 and for the Union territories is Rs.54,00,000 except Delhi for which the maximum limit is Rs.70,00,000.

-The Maximum limit for assembly constituency varies from Rs.20,00,000/- to Rs.28,00,000/- in varies states and UTs wherever applicable.

Section 77 of the RPA (Representatives of the People Act)[401]**:-** Further clarifies as to what comes under the purview of the 'expenditures of the party'. The expenditures of the political party include all the expenditures incurred by candidate of such party or his authorized agent in connection with the election since the date of his nomination till the date the result's declared. An account shall be nominated of such expenditures by the candidate himself or his authorized agent.

[398] Representatives of People's Act, 1951 No.43, Acts of Parliament, 1951, (India), § 29B.
[399] Representatives of People's Act, 1951 No.43, Acts of Parliament, 1951, (India), § 29C.
[400] Conduct of Election Rules, 1961, Acts of Parliament, 1961, (India), §90.
[401] Representative of People's Act, 1951 No.43, Acts of Parliament, 1951, (India), §77.

METHODS TO MAKE THE FUNDING OF POLITICAL PARTIES FAIR AND TRANSPARENT

-Ban Corporate Funding:- Corporate funding has given room to an enormous quantum of corruption in political funding. Corporates make bulky donations to the political parties some known, some unknown and owes to dominate them in future. Bombay high court in the year 1957 in a case has warned India with the statement "***It is our duty to draw the attention of Parliament to the great danger inherent in permitting companies to form contributions to the funds of political parties. It is a danger which can grow apace and which can ultimately overwhelm and even throttle democracy during this country"***[402]. **Calcutta High Court case**[403] has also triggered for the same earlier. However, despite of all the warning made by courts and criticism from public the parliament after restricting the contribution by corporate bodies to political parties in 1969, amended **Section 293A of the Companies Act,1956**[404] again and corporate bodies were yet again allowed to make donations to political parties. Currently **Section 182 of the Companies Act,2013** [405]regulates Corporate funding.

-State Funding- After prohibiting Corporate Funding, parliament needs to introduce state funding. As state funding will help in controlling corruption and black marketing and will fill all the loopholes existing in the system. It will also avoid wastage of money and will limit expenditure made by political parties in a certain way. However, as per the Election Commission, it is not the right time to introduce direct state funding. According to the **20th Election Commissioner of India, Nasim Zaidi**, it shall only be appropriate to introduce state funding if it is followed by some reforms such as:-

1. de-criminalization of politics in a democracy in parties,
2. holistic electoral finance reforms,
3. robust transparency and audits,
4. a strict legal regime for enforcement of anti-corruption laws.

-Right To Information (RTI)[406]:- RTI is the most appropriate way to make the funding of political parties more transparent and fair. If all the political parties come under the roof of RTI for all the transactions made by them even if above 20,000 or below 20,000 and in case any loops found, then an RTI application should be filed to avoid it. RTI will help in bringing

[402] Jayantilal Ranchchoddas Koticha vs Tata Iron & Steel Co. Ltd, AIR 1958 Bom 155, (1957) 59 BOMLR 738, ILR 1958 Bom 149 (India).
[403] Ganashakti & Anr vs state of West Bengal & Ors, W.P. No. 714 of 2012 (India).
[404] The Companies Act, 1956 No.1, Acts of Parliament, 1956, (India), §293A.
[405] *Id*. at 4
[406] Right to Information Act, 2005 No.22, Acts of Parliament, 2005, (India).

transparency and will develop a fair working and funding mechanism. Although most of the political parties oppose this method as they do not want to disclose their funding. But keeping in mind the legal aspects and functioning it could be adopted in a certain way.

-**Appointing Officials to govern the funding of political parties**:- Election Commission should appoint officials for each political parties at the time of elections to govern the functioning and to provide report to the election commission without any omission in its part. This method will delegate the authority and will bring efficiency, effectiveness and transparency. This will also help in avoiding the political parties to hide any part of donations received by them. Officials appointed will help in decreasing delay of work and will keep check on the political parties at the time of elections.

LEGALITIES

Section 29B of Representation of People's Act[407]:- Consistent with this section, every party established in India can accept any amount of donation and contribution voluntarily offered by any private individual, any company except than any government company.

Section 29C of Representation of People's Act[408]:- According to this section, treasurer or any person appointed by election commission has to mandatorily submit the report of the transactions and donations received excess than 20,000 by political parties for each financial year.

If any political party failed to submit the report than the political party will not be entitled for any Tax Relief under Income Tax Act.

Section 293A of Companies Act[409]:- According to this Section, A company has to be incorporated under Companies Act. A Company can donate 5% of its net profit from financial year and shall disclose this amount in the Profit and loss Account. Donation from company can only be made by passing resolution seeking consent of board of directors of Companies.

In case of contravention of this provision, A company shall be punishable for the fine which may exceed up to three times of the amount donated and any officer involved default in this contravention can get imprisonment for a term which may extend up to three years and also liable to fine.

[407] *Id*. at 11
[408] *Id*. at 12
[409] *Id.* at 17

Section 293A(1)(a) of Companies Act[410]:- According to this Section, Political Parties are not allowed to receive funds from Government Company.

Section 293A(4) of Companies Act[411]:- According to this Section, A company shall mention even minute details of the donations made to political parties in Profit and Loss Account. Ministry of Corporate affairs should verify it and in case of any infringement necessary actions should be taken.

Section 13A of the Income Tax Act[412]:- According to this Section, An income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or any income by way of voluntary contributions received from an individual shall not be included within the entire income of the previous year of such political party:

(a) Political Party must maintain books of account and other documents to allow Assessing Officer to deduce it's income properly.

(b) A political party must maintain the record of the name and address of any person or company making any contribution above 20,000 rupees.

Section 80ggb of the Income Tax Act[413]:- According to this section, A contribution or donation made by any company to political party is entitled to tax relief under this section.

Section 80ggc of the Income Tax Act[414]:- According to this Section, A donation or contribution made by any individual to political party is entitled to tax relief under this section.

Section 3&4 of the Foreign Contributions and (Regulations) Act (FCRA),1976[415]:- Political Parties in India are not allowed to receive any contribution and donation made by any foreign company or company in India under foreign name.

AMENDMENTS IN LEGALITIES

Section 2,3&4 of the Foreign Rule Act[416]- Earlier in this act, Political Parties were not allowed to receive any donation or contribution from any Foreign Company or Investor. But, after the amendment in Finance Bill 2018 Political Parties were allowed to receive any donation or contribution from Foreign Companies or Investors.

[410] The Companies Act, 1956 No.1, Acts of Parliament, 1956, (India), §293A(1)(a).
[411] The Companies Act, 1956 No.1, Acts of Parliament, 1956, (India), §293A(4).
[412] *Id*. at 8
[413] *Id*. at 5
[414] Income Tax Act, 1961 No. 43, Acts of Parliament, 1861, (India), §80ggc
[415] The Foreign Contribution (Regulation) Rules, 1976 No.49, 1976, (India), §3&4.
[416] Foreign Contribution (Regulation) Act, 2010 No.42, 2010, (India), §2,3&4.

Foreign Contribution (Regulation) Act, 2010[417]- Under this Act, It has allowed donation from foreign Companies having major stake in Indian Companies provided that they follow the guidelines pertaining to foreign investment within the sector during which they operate.

Section 236 of Finance Act,2016- [418] Within the opening paragraph for the words, figures and letters "the 26th September, 2010" the words, figures and letter "the 5th August, 1976" shall be substituted.

Amendments through Finance Bill 2018-

Section 80g of the Income Tax Act[419]- It has lowered down the donation limit for cash donations to political parties from Rs. 20,000 to Rs.2,000.

Section 80ggb of the Income Tax Act[420]- It has insisted upon that corporations or donations should be paid through cheque or digital payment other than cash giving.

It has also said that these funds will flow through the banking system (rather than under the table), corporations are neither obliged to disclose their purchases nor are parties required to report their deposits.

The Section 29A of the Representation of the People's Act, 1951[421]- It has also introduced the concept of "Electoral Bonds" by which corporations can purchase time-limited bearer bonds from scheduled banks and can transfer them to registered bank accounts of parties.

Section 182 of the Companies Act, 2013[422]- It also eliminates the cap on corporate giving (which previously stood at 7.5% of a corporation's average net profits over the previous three years).

Section 182(3) of the Companies Act, 2013[423]- It also abolishes the provision that firms must declare their political contributions on their profit and loss statements.

EVOLUTION IN FINANCING OF POLITICAL PARTIES

India, as a democratic country is a roof to numerous political parties combating to triumph in election. Political Parties scuffle with each other unquestionably to conquest in elections. For contesting the election, they need adequate funds for all the activities that revolve around conducting elections. Precedingly, Political Parties have undergone a grant evolution in all these years.

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[417] Foreign Contribution (Regulation) Act, 2010 No.42, 2010, (India).
[418] The Finance Act, 2016 No.28, 2016, (India), §236.
[419] Income Tax Act, 1961 No. 43, Acts of Parliament, 1861, (India), § 80g.
[420] *Id*. at 5
[421] Representatives of People's Act, 1951 No.43, Acts of Parliament, 1951, (India), § 29A.
[422] *Id*. at 4
[423] Companies Act, 2013 No. 18, Acts of Parliament, 2013, (India), § 182(3).

Traditionally, Political Parties were financed through Private donations, membership dues and Corporate Contributions. Corporate contributions were allowed but with certain restrictions, and had to declare it into Company's accounts. The RPA Act, has also set the limit on the amount being spent on elections, those who exceeded the limit would be subjected to disqualifications and annulment from elections.

By the 1960s, there was an introduction of the term **Black money**[424] in the financing of the political parties. **Reports**[425] say, Black money evaded because of the high taxation policy and legal system from 1950s onwards, and some of the money was pumped back into system with a view of creating influence in politics. In 1968 then Prime Minister Indira Gandhi banned Corporate donation. The ostensible reason behind banning corporate donations was to prevent the influence of corporate bodies in politics. However, some speculations say that Indira Gandhi banned corporate donations because of the fear that right-wing opposition parties might get endowed by corporates. The ban on corporate funding does not substitute state funding instead of corporate funding. This forced political parties to depend on black money as they do not have any legal source of fund available. In 1974, Supreme Court ruled in a **case**[426], "If a party is spending in lieu of any of his candidate should mention and calculate candidate expenses it in the accounts book, further to verify if the limit has been violated or not". Further this judgement was amended by the Parliament. Parliament amended Explanation1 to Section 77(1) of the RPA, Act, such that" **Party and supporter expenditures not authorized by the candidate did not count toward the calculation of a Candidate's election expenses. This made the limit on election expenditures largely ineffective, because it was limited to a candidate's direct expenditures only, while the party and therefore the candidate's supporters could spend without any limit**[427]".

The foremost development in 1980s, was of the amendment in the Section 293A of the Companies Act, 1985. The amendment allows the corporate donations to political parties with certain conditions including, Corporate bodies can only donate a maximum average of 5% from their net profit prior to the approval by the Board of Directors and disclosure in Profit & Loss Account of the Audited Accounts of the Company.

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[424] T.C.A Sharad Raghavan, *What is black money, and why it is so difficult to quantify it?,* THE HINDU, (June 2009) https://www.thehindu.com/business/Economy/what-is-black-money-and-why-is-it-so-difficult-to-quantify-it/article28228853.ece

[425] Prevention of Corruption (1964) and Wanchoo Direct Taxes Enquiry Committee (1971): Reports from Santhanam Committee, (1960).

[426] Kanwar Lal Gupta vs Amar Nath Chawla, 1975 AIR 308, 1975 SCR (2) 269 (India).

[427] Electoral Reforms by Law Commission of India: Report No. 255 on ,2015

The main concern related to Political Funding arose in 1993. Indian government became really concerned about it. The (Confederation of Indian Industry) CII was set up, and it also made a task force which recommended that donations from Corporate bodies should be made tax-deductible. Corporate donations are allowed only after the approval from Board of Directors. CII also promoted state funding to raise funds either from cess on excise duty or by industry to donate funds in election pool managed by state. A formula was made to distribute money to political parties. Thus, this proposal proposed a tax on industry to finance election campaigns. In 1996, two major development took place, **Common Cause judgement**[428] (PIL filed by an NGO named Common Cause) In this Supreme Court asked political parties to file their returns by 20 February 1996 as required by Income Tax Act 1961. Previously, political parties failed to file returns after the notice issued by Income Tax Department. Supreme Court also interpreted Section 77(1) of the RPA so that expenditures of political party would not be included with that of a candidate for the purpose of determining compliance with the expenditure ceiling, so long ad party had submitted the audited accounts of its income and expenditures. To that point, None of the party had submitted audited accounts. Now parties were force to declare their annual incomes; this brought about a degree of transparency in finance of political parties.

Another major development took place in 1998 about the allocation of free time on state owned television and radio to all seven national parties and 34 state parties in the form of partial state subsidy. The commencement of this initiative was initiated in general elections. At that time, only 15 minutes were allotted to each party on one television and two radio broadcasts. Additional involvement of private channels and cable operators came in view in 1998 as per the **report.**[429]

In 1999, political parties have faced some major changes regarding candidate's legal, financial and educational background. **In November 2000, Association of Democratic Reforms filed an PIL in Delhi High Court in response to the PIL, Delhi High Court directed Election Commission to check the candidate's criminal records, educational qualifications, assets and liabilities (along with his/her spouse) details and dependent relations[430].** The judgement was reaffirmed on March 13, 2003 despite facing challenges and an order was issued by an Election Commission on March 27, 2003 making such declarations compulsory.

[428] Common Cause (A Regd. Society), vs Union of India & Others, W.P. (Civil) No.215 of 2005, (India).
[429] State Funding and elections: Indrajit Gupta Committee, 1998.
[430] Association for Democratic Reforms vs. Union of India (UOI) And Anr, AIR 2001 Delhi 126, 2000 (57) DRJ 82, (India).

Since 1999, The most significant development of campaign finance was **Election and Other Related Laws (Amendment) Act**[431] passed by **National Democratic Alliance** government in September 2003. Under the section 80ggb and 80ggc of the Income Tax Act, Donations from company and individual contributions are made 100% tax-deductible (not compromising on the restrictions on company donations under section 293-A). While Sections like 29-C and 77-C are still aforesaid. This made the company and individual corporations to donate openly by check. But, company and individual corporations are tax-deductible if only made to political parties. This may cause a negative effect on the size of donations and transparency in the working of political parties.

In 2003, **Section 77(1) of the RPA Act**[432] was amended, in which candidate must report the outside spending of party and individual supporters for the purpose of expenditure ceiling. There are still some drawbacks of 2003 law, which exempts the expenditure on travel and party program for the candidate and political party and remains unlimited.

A final exemplary development since 1999 was increase in the expenditure ceiling of the candidate. In October 2003, the ceiling increased to Rs. 2.5 million and Rs. 1 million for Lok Sabha election and assembly election respectively. In February 2011, it further increased to Rs. 4 million and Rs. 1.6 million respectively.

CONCLUSION

After doing research and analyzing about financing of political parties. It is de-facto that this activity evolves around various aspects, under which some of them are open and transparent while the others are hidden and manipulated. Evaluating this process step by step can help government and people a bit more to know about the background of parties. While, no one can say that the whole procedure is legalized and valid. There are obviously some mis-representation, manipulation and hidden data which is yet not seen by the eyes of people. The only way to make this method more transparent and open is to make strict protocols, instructions and laws. Election commission can also set rigid requirements for the parties and candidates for contesting elections. Election campaign can be seen as a tough as well as easy platform in order to acquire the relevant data. Expenditures done by parties during election campaign has not surpassed the eyes of audience. Everyone is well aware about the contingencies during election but there is no verification about the same. Authorization of the

[431] The Election Laws (Amendment) Act, 2003 No.24, Acts of Parliament, 2003, (India).
[432] Representatives of People's Act, 1951 No. 43, Acts of Parliament, 1951, (India), §77(1).

data can only be done by respective agencies. Whereas, elections are good way for public to choose their representatives. It would be just like the "cherry on the cake" if the procedure was more fair, reasonable, valid, legal and open.

EXTRA CONSTITUTIONAL BARRIERS TO CONSTITUTIONAL AMENDMENTS: COMPARATIVE STUDY BETWEEN INDIA AND USA

- TAMANNA BANDYOPADHYAY

ABSTRACT

Change is the most unchangeable concept, hence with each passing day any society changes its so does its ideologies, needs and wants. Hence, the Constitution framers of most nations incorporated the provision for amendment in its Constitution. The power of amendment in the hands of the people of the nation is most vital as if used carefully it is virtuous whereas if the same power is used with evil desires it can even destroy the very Constitution's spirit it is a part of. Sometimes the amendment powers are also used for dismemberment however, with the power of judicial review a check on the same is possible. However, not all the Constitution allows same nature, scope or procedure of amendment.

This research paper is device to understand the extra constitutional barriers on amendment to the Constitution. Background checks on the amendment provisions are done. To understand the need for introducing such provision the constituent assembly of India's debate is discussed in length. The original amendment procedure and subsequent judicial interpretation along with its evolution in the hands of the judiciary is discussed to understand the nature and effect of the amendment procedure. A practical angle is also taken to understand the limitation that stops popular will of the people from getting a formal amendment, for the same discussions and debate of the Right to bear arms is thoroughly analysed.

Keywords: *Amendment Procedure, Basic Structure, Flexibility, Gun-Control, Invisible force*

INTRODUCTION

The Constitution is the grundnorm of every democratic Nation. It is the supreme authority from where all other functionaries/ authorities of the Nation derive their power. Thus, it is important to protect its sanctity and true spirit. India has the lengthiest Constitution of the world, also known as the bag of borrow. The Constitution framers had a lot of existing literature from which they took provisions, polished to fit Indian context and gave it a place in the most esteemed book of the land, the Constitution. On the other hand, USA is the oldest democracy,

it made a Constitution for its federal State with no proper organised literature; unlike India it has very few provisions.

It is important to understand that no norm can be so farsighted that it can incorporate within itself all the aspects that a society may require with time. Hence, it must not be rigid with its black letters. Both the Constitutions has amendment provision; so, that the grundnorm does not remain a static rusty norm rather it is allowed to evolve in order to cater to the needs and desire of the people. However, when we try to dive into the sprit of the Constitution the interpretation ought to vary from person to person and also from time to time. Thus, it is equally essential that the provisions are not such that it changes the very root of the Constitutional principles. It is because Constitutional principles remark the base of the society. It is the crux of the societal origin of a Nation, it reflects the goals for which different people with different thoughts and belief came together to be a member of the one united society that is governed Constitution.

NATURE AND EFFECT OF THE AMENDMENT PROCEDURE

India and USA has different nature of amendment procedure. One is comparatively flexible than another. It is vital to look into, whether and if so, how the nature of the amendment procedure has an effect in the political will to amend the constitution. Also, whether being too rigid amounts to lose sight. For the same one unsuccessful amendment would be looked into and one amendment that called for a difficult change but managed to be a place in the Constitution would be discussed. The discussion herein includes the social, economic and political spectrum that any amendment has to undergo. Parliamentary debates would be majorly used for understanding the societal dilemmas.

Effect of the nature of amendment procedure in the political will to amend the constitution

Some countries wants the Constitution to preserve its original form and makes constitutional amendment rigid whereas other counties has a comparatively easier method of amendment. Both India and America are federal states however the former solely vest the power of initiating any constitutional amendment at the behest of the Union and the states has a mere power to ratify for amendment of certain provisions concerning the federal structure.[433] However, in USA Article V allows amendment either by the Federation or by convention.[434]

[433] Art. 368(2), THE CONSTITUTION OF INDIA, 1950.
[434] Art. 5, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1787.

Constitution of neither state expressly enumerates the subjects for amending the Constitution[435] thus a Constitution is amended only when societal need or want calls for the same. It is the judicial institution of both the countries that decided the scope of amenability of the constitution.[436]

It has been accepted by the US Courts that amendment are questions of political nature and thus the court is resistant in interfering with the process or ratification of amendment but does only review the content of amendment. With the introduction of the political question doctrine[437] the court has restricted its role of reviewing the "contemporaneousness" of a constitutional amendment and left it to the legislative to decide. However, it stated that for ratification it is vital that an amendment must be contemporaneous.[438] Again, in India the Judiciary introduced the doctrine of basis structure[439] for limiting the scope of amendment.

The amendment procedures in both the sample states are approximately at par when weighed at the level of difficulty. However, as state ratification for Constitutional amendment in India is not required for all amendment but is an essential under Article V of US Constitution thus, comparatively sustenance of an amendment in USA is difficult than that in India. However, the scope of preferring an amendment from different political and social philosophy in USA is more likely as the states can move conventions through application from two thrid states seeking amendments. USA nevertheless choice to seldom use the power of amendment through application for convention[440] whereas India's state politics has time and again became reason for amending the Constitution, individual state interest has got significant place in the Constitution, for instances change in state borders, inclusion of schedule languages, and special status to few states under Chapter XXI.

Hence, it could be found that the unwritten norms play a more vital role in amending than the actual procedure laid in the constitution.

Rigid does not amount to lose sight

As, the unwritten rules and components tends to change the Constitution the rigidity of it has very less effect on such amendment. One of the reason may be, in democratic Governments

[435] Richard Albert. *The Structure of Constitutional Amendment Rules,* 49 Wake Forest Law Review 913, 964 (2014).
[436] *Id*
[437] *Coleman v. Miller,* 307 U.S. 433, 454–55 (1939).
[438] *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).
[439] *supra* note 1.
[440] *Proposing Amendments To The United States Constitution By Convention*, 70 Harvard Law Review 1067, 2(1957).

are elected popular will of the people and to stay in power such will needs to be upheld by the Government. In the way of upholding the same the Government would like to do anything but Constitutional principles would keep a check on that. Therefore, the procedure of Constitutional amendment is not a more recognisable hindrance for amending the Constitutional than Constitutional principal. If the substance of the Constitution is not defected rigidity of the procedure of Constitutional amendment does not stop the elected to enforce popular will of the people.

Invisible force behind sustainability of Amendment

In USA the only Constitutional Amendment that was repealed by another Constitutional Amendment was the 18th Amendment. Interestingly, Senator Morris Sheppard (D-Tex) on the event of its being a part of the USA Constitution stated in his speech:

"there is as much chance of repealing the Eighteenth Amendment as there is for a hummingbird to fly to the planet Mars with the Washington Monument tied to its tail."

The amendment came after Temperance movement. It saw a prohibition on liquor will be good for the economy, character of the Country and certainly will reduce crime rate.[441] Neither of the dominant political party took any active role in the issue.[442] It was only during the election season that Republicans supported briefly the movement though not the formal constitutional amendment whereas Democratic Party was against such anti-sumptuary legislation.[443] It could be anticipated the silence was because major protestors were woman [Women's Christian Temperance Union] and until 19th Amendment women were not allowed to vote. However, the same was passed by the Congress and was also ratified by all the states. But later it was found later the amendment did worse than good. As a result, with 21st Amendment the 18th Amendment was repealed.

Hence, it could be found that more than popular will of the people the effect of the amendment gets a weight to answer the question of its sustainability. It could also be acknowledged that any law that tries to supress or regulate the moral of any citizen it cannot pass the test of time. Throughout the history mankind struggled for more and more liberty and any newly imposed prohibition on already existing liberty cannot bring much good in their life.[444]

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[441] 18th and 21st Amendments, HISTORY (SEP 8, 2020), https://www.history.com/topics/united-states-constitution/18th-and-21st-amendments (Last visited on Sep 8, 2020).

[442] Aaron J. Ley & Cornell W. Clayton, Constitutional Choices: Political Parties, Groups, and Prohibition Politics In The United States, 30 The Journal of Policy History 609, 611 (2018).

[443] *Id* at p. 612.

[444] Walter Carrington, *The Aftermath of the Eighteenth Amendment*, The Virginia Law Register (1922) https://www.jstor.org/stable/pdf/1106773.pdf.

Again, in India the very 1st constitutional amendment had an effect of curtailing the Fundamental Right to hold property. With its introduction a societal struggle and chaos was formed as through the 1st Constitutional Amendment the legislative intended to introduce land reform policy through collecting any area of land beyond the prescribed limit from the landholder and to further redistribute the same to the land less farm labourers. Huge protest and cry against the same were anticipated by the legislator and also it was known to them that such an amendment might suffer from the vice of illegality as the same was curtailing Fundamental Rights. It is interesting to note that the 1st amendment was introduced within one year of the enforcement of the Constitution and during that time due to various reasons including centuries of oppression Fundamental Rights were provided with the dice of sacred and untameable. Thus, as a protective shield Schedule 9 was introduced practically more or less the same men and women who drafted the Constitution. In other words, the same individual changed its position on the point of law while serving under different colour of office.

Shri. JL Nehru also knew about the possible outbust the amendment can cause, hence, he put forth the following words before introducing the 1st Constitutional Amendment Bill:

"We have brought it forward now after that care, in the best form that we could give it, because we thought 'what the amendments mentioned in this Bill are not only necessary, but desirable, and because we thought that if these changes are not made, perhaps not only would great difficulties arise, as they have arisen in the past few months, but perhaps some of the main purposes of the very Constitution may be defeated or delayed. In a sense this matter, of course, has been mentioned rather vaguely and has been before the public for some time"[445]

The opposite version was echoded in the Parliament by Dr. Syama Prasad Mookerjee, he opined that:

"It is he [Pt.Nehru] said, a simple one; but even through a simple process very serious consequences may often ensue when it affects the rights and liberties of individuals or of a nation… The changes are fundamental and they go to the very root of some of the vital provisions of the Constitution, not only the Constitution of this country, but the Constitution of any country in which people are anxious to retain freedom and liberty… This is the challenge which he has deliberately thrown up to the people of India.... But is he really trusting Parliament? Is he giving the Members of Parliament full liberty to decide questions? As we

[445] THE PARLIAMENTARY DEBATES, CONSTITUTION (FIRST AMENDMENT) BILL 5 (May,1951) http://library.bjp.org/jspui/bitstream/123456789/2499/1/The-Parliamentary-Debates.pdf.

understand it, it is something different. He is treating this matter as a purely party question. He ought to treat this question as something different, something which affects the lives and liberties of individuals and the people as a whole and not as a party question, however big and however well-organised that party might be. He issued a circular to all the members of his party that their physical presence for the Constitution (First Amendment) Bill was necessary, even though the temperature in Delhi might go up to 110 or 112 degrees, that their presence was an imperative necessity."

After lots of deliberation and debates the 1st Constitutional Amendment saw the light of the sun. However, this made the landholders offended; the same was followed by a series of cases. The 9 judges Bench of the Apex Court had upheld the validity of 9th Schedule subject to basic structure test.[446]

Here, despite of huge protest the 9th Schedule got a place in the Constitution via 1st Amendment while, the 99th Amendment could not survive the test of time though it was passed on 13th August 2014 in the Lok Sabha with a voice vote of 367 in favour and no one in against, on the very next day it was passed by the Rajya Sabha and on 15th August, 2014 it got the assent of the President.[447] The same was held to be unconstitutional by Supreme Court Advocates-on-Record Association and another v. UOI[448] on 16th October 2015 and again on 19th November, the Attorney General informed the Supreme Court the Parliament will not prepare any Bill related to judicial appointment until the same is directed through a judgement.[449]

Therefore, ultimately the popular will of the people had to take a backseat while a clear power struggle between Judiciary and Parliament was sparking. Thus, again it could be seen that regardless of the flexibility of the Constitution it is actually the invisible hands of unwritten norms and power that decide the eventual future of Public.

BARRIERS FOR NEW AMENDMENTS

To understand whether the form of government (parliamentary/presidential) has any role in the amendment procedure the discussion herein proceed. With the help of current scenarios this

[446] *I.R Coelho v. State of Tamil Nadu*, AIT 2007 SC 861 (The Supreme Court of India).
[447] S.K Ramachandran & Anita Joshua, *LS passes National Judicial Appointments Commission Bill,* THE HINDU (Aug 13, 2014) https://www.thehindu.com/news/national/lok-sabha- passes-bill-to-scrap-collegium-system-in-judges-appointment/article6312661.ece (Last visited on Nov 23, 2020).
[448] *Supreme Court Advocates-on-Record Association and another v. UOI,* AIR 1994 SC 268 (The Supreme Court of India).
[449] K. Rajagopal, *Attorney General pulls out of drafting procedure to appoint judges*, THE HINDU (Nov 19, 2015), https://www.thehindu.com/news/national/Attorney-General-pulls-out-of-drafting-procedure-to-appoint-judges/article10217486.ece?homepage=true (Last Visited on Nov 23, 2020).

part of the paper would take an example of a formal amendment that the society is calling for but is not getting its place in the Constitution.

Second Amendment- Repeal?

US has witness the evil consequence of providing its citizens with the right to bear arm under Second Amendment. Traditionally it was seen a requirement of self-defence as state is not always there to take care of their rights from getting violated. However, in reality this amendment took lives of several individuals including that of Robert F Kennedy and Martin luther King Jr.[450] With this incident the federal Law to control arms was enacted, namely The Gun Control Act of 1968 however subsequently, the same was overthrown by the Firearms Owners Protection Act, 1988. In 1986 US politics took a turn towards conservative politics as a result a pro-gun attitude could be found during that time.[451] In 1993 Brady Law imposed a waiting and check of criminal records period but the ban on assault weapon Act had to see a sunset on 2004, as the same couldn't get sufficient support to be renewed.[452] Till date even after the horrific attack of Sandy Hook Elementary School shooting the Congress failed to take any substantive action to curtail the gun arm.

The two landmark decision of Gun arms namely, District of Columbia v. Heller[453] and McDonald v. City of Chicago[454] significantly curtail the power of the legislative to curtail virtual ban of handgun. Both the judgement are result of a committed well funded/ financed effort to retain the fundamental right to carry arms.[455] As per a 2013 survey[456] the support for regulation to have a check on the arms has considerably increased after the unfortunate incident of Sandy Hook.

Hurdles in the Path of Reform

However, there are certain restriction that the long past struggle for retaining Second Amendment to its maximum scope has imposed.

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[450] William J. Vizzard, *Shots in the Dark: The Policy, Politics and Symbolism of Gun Control* 87, 93-105 (2000).
[451] *id* at p. 59-72.
[452] Sheryl Gay Stolberg, *Effort to Renew Weapons Ban Falters on Hill* , N.Y. Times, Sept. 9, 2004.
[453] *District of Columbia v. Heller,* 554 U.S. 570, 622, 635 (2008).
[454] *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).
[455] supra note 22 at 53&54.
[456] Rebecca Ballhaus, *Poll: Support for Tighter Gun Checks Ebbs* , Wall St. J. (Dec. 13, 2013, 10:35 AM), http://blogs.wsj.com/washwire/20 13/1 2/1 3/poll-support-for-tighter- gun-checks-softens/, archived at http://perma.cc.

Judicial: The primary limitation are the judicial precedents that restricts ban on arms. For instances, in Printz v. US[457], it was held that 10th Amendment bars any 'record check on the gun buyers.'

Political: the present structural advantages that the conservative party has due to the bicameral nature of the Congress and

Historical loops: lack of people's movement in support of gun control for a long time.[458]

Populace Will: The current gun owning population is considerably high.[459]

Therefore, at the present time the Second Amendment has become an evil spirit that could be completely repealed only by a Constitutional Amendment however, such an amendment has a long way to walk before getting its due place in the Constitution.

Similarly, in India an amendment for appointment of Judges is long awaited. It is accepted by all stakeholders that the appointment procedure must be more transparent and structured. However, after the unsuccessful attempt of 99th amendment (extensively discussed in the previous Chapter) the Parliament resisted itself to formulate another novo amendment. The same was majorly because of the power struggle between the legislature and the Judiciary that the Nation witness during the phase of the passing of the amendment and its being struck down by the Apex Court.

Analysis and Findings

Constitution of both the Countries has provision for amendment. While USA being come together federation requires amendments to be ratified by the states, India does not require such ratification for all Constitutional Amendments but only for few selective subjects under Art. 368(2).

It was long accepted by the US Courts that the procedure of amendment is a question of politics but the substance of the Law is subject to judicial review. Thus, it is undoubtable that politics has a significant role in initiating and passing an amendment Bill. While looking into the amount of influence politics has on amendment procedure it was interestingly identified by the

[457] *Printz v. United States*, 521 U.S. 898, 933-34 (1997).
[458] *Gun Control: Key Data Points from Pew Research* , Pew Research Ctr. (July 27, 2013) http://www.pewresearch.org/key-data-points/gun-control-key-data-points-from-pew-research/, archived at http://perma.cc/LJC8-4G6S.
[459] 4 WILLIAM J. VIZZARD, FIREARMS INDUSTRY , IN GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE AND LAW 290 (GREGG LEE CARTER ED., 2ND ED. 2013).

authors that at certain points in history the unwritten norms/rules of politics were more overwhelming in bringing changes that the written procedure of the Constitution. In Chapter III of this paper it is elaborately described that how state politics in India got a national recognition despite of no provision for the states to move any state interest amendment in the form of convention or like also given the proportionate seats available to the Rajya Sabha members[460] it is not feasible for small state's regional parties to move any amendment for its interest.

For instances Indian National Congress (A prominent political party of India) had in the year 2019 highlighted the issue of Art. 371J in its manifesto, whereas despite of the provision to move an amendment by any state through application for Convention, no amendment of US Constitution till date passed by virtue of such convention procedure enumerated in Art. V of US Constitution. It was also found that the concept of procedural law being handmaid of justice and not the mistress could have a string of analogy in constitutional amendments too.[461] Till the substance of the constitutional amendment is in line with the constitutional principle the mode of its passing stand any test.

Hence, the rigidity or flexibility of constitutional amendment procedure does not stop the constitution to become more in line with the needs of the people. It was also found during the work that the introduction and sustainability of the constitutional amendment are derived by various factors that are not always in the reach of plain sight of a naked eye. The notion of Second Amendment has significantly changed its position in the in the minds of the citizen of USA. The long standing refusal to have restrictive law to curtail the Fundamental Right of bearing arm needs time to form a strong opposite wave of thought. Presently, giving up upon any kind of liberty is not a dear concept to the humankind. Also, as the concerned amendment is generally available to financially advanced community the preserving of the widest scope of interpretation is also weighing more as this group is more able to have finniest minds of advocacy representing their cause, an example of the same is McDonald case.

CONCLUSION

Both US and India has came a long way via amendments. There are occasions that the amendment procedure was actually used for Constitutional dismemberment.[462] To put in other

[460] *Ind. Const.* art.. 4(1), & 80(2) r/w 4th Schedule.
[461] In re Coles and Ravenshear [1907] 1 K. B. 1, 4.
[462] Richard Albert, *Constitutional Amendment and Dismemberment*, 43 The Yale Journal of International Law 1, 82 (2018).

words, the legislative has sometimes changed the original structure, identity of the Constitution and altered the fundamentals of the original skeleton text of the constitution. Such dismemberment at times stands the test judicial review and doctrines that evolved like the Basic Structure Doctrine. For instances the 1st Amendment though curtailed the Fundamental Right to property and subsequently 44th Amendment removed the same both stood valid before the basic structure doctrine yet altered the original skeleton of the Constitution. The underlying force of sustainability of any change in the constitution, be it amendment or dismemberment is various invisible factors, like change in society's notion of justice, shift of power from one segment of population to another etc, and not the very nature of amendment procedure.

SEXUAL HARASSMEMT AMIDST THE PANDEMIC

-KHUSHI DADIA

INTRODUCTION

Sexual Harassment at Workplace is a form of gender discrimination which impacts a woman's life in more ways than one. It is a persistent issue which has severe negative repercussions on the efficiency and performance of women. It can hinder the professional growth of women as it creates a hostile atmosphere which is not conducive for women to thrive and evolve in.

The PoSH Act 2013 is the Sexual Harassment of Women at Workplace Act (Prevention, Prohibition and Redressal) and is enacted by the Ministry of Women and Child Development. It was India's first legislation which specifically addressed sexual harassment at workplace after the landmark case of Vishaka. The Vishaka case is known to be a monumental case as it made the Government and the people aware about the difficulties faced by a woman in this patriarchal world. The PoSH Act is based on the 'Vishaka guidelines' which the Hon'ble Supreme Court formulated after the case of Vishaka v. State of Rajasthan.[463] The objective of the enactment of PoSH Act is to protect the safety of women and address their complaints. The ultimate goal is to put an end to all kinds of harassment against women and provide a friendly and safe working atmosphere for them. Even after these many years of the PoSH Act been passed, many women in India are unaware about their rights. There is not enough clarity as to which acts can be constituted as sexual harassment. Gradually, women are getting acquainted with the PoSH Act and the advantages it brings.

In June 2019, the International Labour Organization which has 187 countries as its members, had a breakthrough when it issued its first ever convention which addresses violence and harassment, including sexual harassment in the workplace.

SEXUAL HARASSMENT CASES DURING THE PANDEMIC

The Covid-19 pandemic has exhaustively changed our lives. It has forced us to work from our homes in order to maintain social distancing and stop the spread. Initially, it was difficult for all of us to adapt to the "new normal" but now all companies as well as their employees have accustomed themselves to this current situation. In fact, companies like TCS have announced work from home for almost all their employees till the year 2025. One would be under the

[463] 1997 6 SCC 24I: AIR 1997 SC 3011

naïve impression that sexual harassment at workplace would be unusual in this virtual situation. It would seem like the only positive thing happening around but it is appalling to see the number of females sexually harassed even in these gruesome circumstances.

Our place of work is now the couch of our house. All the meetings and seminars are done from the comfort of our own homes. The question that comes to mind is how can sexual harassment persist here.

According to Forbes, Sexual Harassment continues to be a downside even in a virtual workplace. They have come across a few cases where the boss asks the employee to show her full body on a video conference. One horrifying case included a guy showing his private parts in front of the camera. These acts constitute for sexual harassment even though no physical contact is involved.[464]

InfoSec Girls is an organisation that educates women in cyber security. An expert working there commented that women are not aware about what constitutes as sexual harassment in the online world. Few alert women have reported cases where they were forced to attend video calls at odd hours because of an "urgent matter" which ultimately was not an emergency at all. There have also been complaints that the colleagues are inappropriately dressed which make the women uncomfortable. Never Okay Project and SafeNet conducted a joint study and they found out that 86 out of 315 participants have faced sexual harassment while working online.

According to The National Law Review, Victoria in Australia has reported an 8% increase in sexual harassment complaints during the pandemic. It has shared the results of a study which state the reasons of increase in sexual harassment during the pandemic. Working from home breaks the seriousness and dedication of an employee and brings in a homely and lazy feeling which in turn leads to people being at liberty and engaging in informal behaviour. Social isolation and filling in the void of human connection is another reason for people harassing online.[465]

Even an article in The Times of India highlights that there is always a feeling of informality when one is working from home. The odd hours also lead to a person indulging in a deeper or personal conversation with his employee. The same person would have most likely refrained from doing this in a physical office space.[466]

Putting forth a different point of view, the most common form of sexual harassment is hostile work environment based on the sex of a person. This conflicting and unfair work environment

[464] Forbes Magazine (December 21, 2020)
[465] The National Law Review (November 18, 2020)
[466] The Times of India (May 31, 2020)

does not need any physical touch, it can easily happen in a video conference. To give an instance, a person in a higher position can "accidently" mute the female employee or "forget" to include her in an important project. Though not sexual, this also constitutes for sexual harassment at workplace. In the case of Nisha Priya Bhatia v. Union of India & Ors., the Court said that the Vishaka Guidelines and Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) say that sexual harassment at workplace is not only confined to the actual commission of that act. A humiliating or discriminatory environment also constitutes as sexual harassment.[467] Margaret Thomson makes a very strong point when she says that sexualising sexual harassment will rule out various claims of workplace sexual harassment that do not have sexual connotations. Most times the harassment at workplace is not due to sexual desire but due to the hatred that men tend to have for women who are now excelling in an industry which was dominated by men for years.

Stalking and online bullying are other examples of sexual harassment in a virtual world, according to statistics issued by the United Nations.[468]

Ian Schaefer, an American Lawyer states that a virtual workplace becomes an isolated workplace which has proven to be a common place for sexual harassment in the past. This is because it is more likely to be risk free of any bystander intervention. In the same way, while working from home, personal chats, one on one video calls for work have no witnesses. Thus, it leads to sexually red flagged behaviour. But proving that the victim has been sexually harassed in this situation becomes much easier since these online messages or the video calls can be easily recorded and saved thus becoming solid evidence. It becomes comparatively difficult to prove the same when one is approached physically because that does not leave any trail except a bystander's observation as mentioned earlier.

APPLICATION OF THE POSH ACT

The biggest doubt remains whether the PoSH Act includes sexual harassment of women at their virtual place of work.

The Vishaka guidelines on which the PoSH Act is based clearly state that a demand for sexual favours, showing pornography, sexually coloured remarks and unwelcome verbal sexual conduct amount to sexual harassment. All the above acts can be done without the offender and the victim being physically present in front of each other.

[467] 2020 (3) SCT 455 (SC)
[468] The United Nations

The definition of sexual harassment provided in Sections 2 and 3 of the PoSH Act is considered to be very wide. Even in the case of Dr. Punita K Sodhi v Union of India & Ors., the Court highlighted that sexual harassment is of subjective nature.[469] Some forms of sexual harassment are considered to be harmless by most men but women object to it. Section 2 (n) and its subclauses (ii), (iii), (iv) and (v) deal with what defines sexual harassment and they include pornography, sexually coloured remarks, demands of sexual favours and any verbal or non-verbal sexual act. Section 3 includes a promise or threat regarding the treatment of the victim and unwanted interference in the work done by the victim.[470]

The Supreme Court, in the case of A.K.Chopra, stated that physical contact is not necessary for an act to be considered as an act of sexual harassment.[471] The Court further explains that sexual harassment is a form of gender discrimination which includes sexual favours, inappropriate comments as well as a conduct which will affect and interfere in the work performance of the female employees and create a hostile work environment for them.

Another case that proves the aforementioned point is Sapna Korde Nee Ketaki A. Ghodinde v. the State of Maharashtra and Ors., 2019.[472] The High Court of Bombay stated that creating a hostile and uncomfortable environment for a female which might affect her health and safety constitutes as sexual harassment under Section 3(2) of the PoSH Act.

For a woman to ask for protection under the PoSH Act, it is necessary that the sexual harassment act has taken place in her 'workplace'. Smita Paliwal writes that the PoSH Act has introduced the concept of "extended workplace" even though the Vishaka guidelines were about the traditional workplace setup. This was laid down after realising that sexual harassment is not only confined to the traditional place of employment.[473] In Saurashtra Salt Manufacturing Co. v. Bai Valu Raja & Ors., the Supreme Court clearly said that the employer's premises cannot be restricted to the perimeters of the traditional office space and can be extended beyond the physical territory.[474] Similarly, In Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University, the Bombay High Court opined that it is essential to interpret the scope of the workplace to be beyond the literal meaning of the word.[475]

The PoSH Act has widened the scope of definition of workplace in Section 2(o). It says that workplace includes more than just the office, it can be any place a woman visits arising out of

[469] WP (C) 367/2009 & CMS 828, 11426/2009
[470] Sections 2 and 3 of the PoSH Act
[471] (1999) 1 SCC 759
[472] 2019 (1) Bom CR (CRI) 415
[473] India: Notional Extension of Workplace, PoSH Act 2013
[474] AIR 1958 Sc 881
[475] 2014 SCC Bom 814

or during the course of employment. The PoSH Act also includes the words "a dwelling place or house". Even though the employees have no or less knowledge about this, they continue to be bound by the PoSH Act through this section. In Saurabh Kumar Mallick v. CAG, the Division Bench of the Delhi High Court stated that a narrow approach cannot be taken while defining a workplace. Its meaning cannot be restricted to the physical office setup.[476] Even in Ayesha Khatun v. State of West Bengal, the Single Bench of the Calcutta High Court opined that the word "workplace" should be given a logical meaning.[477]

The International Labour Organisation (ILO) also pointed out that the definition of workplace cannot be confined to the physical environment of a traditional setup. We need to consider the access that a harasser has because of a particular situation in a job. Specific consideration needs to be made to various work-related scenarios which do not include the primary place of employment in which a woman can be harassed. These scenarios include business trips, conferences, social work events, office parties, video calls and emails.[478] In Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors.[479], the accused had sexually harassed his female colleague during a work trip and the International Complaints Committee had recommended to terminate the employment of the accused. The Delhi High Court upheld this decision as it agreed that even though the victim was sexually harassed outside the office space, it still falls under the PoSH Act's extended workplace concept.

The provisions of the PoSH Act also include sexually harassing a third party online. To take an example for this, a company is having an online meeting with another company. An employee of company A sexually harasses an employee of company B, this will also come under the ambit of the PoSH Act and the offender will face consequences. Another example is, a company is having an online training session by an instructor who is not an employee of that company. If that instructor faces sexual harassment by any employee of the company, that employee will face charges under sexual harassment at workplace.

All the cases filed are usually about a male employee sexually harassing a female employee. But, in a significant verdict passed by the Calcutta High Court in the case of Dr. Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College, it has been held that same gender complaints are maintainable under the PoSH Act.[480] The Court has taken reference from Section 2(m) of the Act which uses the word 'respondent' to refer to the person against

[476] WP (C) No. 8649/ 2007
[477] WP 9985 (W) of 2018
[478] International Labour Organisation
[479] 2015 SCC Delhi 11026
[480] WP 32930 (W) of 2014

whom the woman has filed a complaint. The interpretation says that a female can also file a complaint against another female employee for sexual harassment.

The Justice JS Verma Committee has put forth few thoughts regarding the PoSH Act. It says that any 'unwelcome behaviour' from the perspective of the sufferer should come under the purview of the Act. This means sexual harassment is a subjective matter. It suggests that an employer should be held liable if he/she facilitated sexual harassment or tolerated an environment which lets sexual misconduct become widespread.[481]

THE INTERNAL COMPLAINTS COMMITTEE

Section 4 of the PoSH Act talks about the Internal Complaints Committee (ICC). Every company has to form an ICC which will be responsible to hear the grievances related to sexual harassment.[482]

The constitution of an ICC becomes important because those members are responsible for providing relief to the victim and penalizing the perpetrator. In the case of Global Health Private Limited & Mr. Arvinder Bagga v. Local Complaints Committee, District Indore & Ors., a fine was imposed under the PoSH Act for not constituting the ICC.[483] It is a compulsion that at least half number of members should be women. It is advisable to have odd number of members to arrive at a conclusion during voting. The presiding officer should be a woman who is a senior employee. In M. Rajendran v. M. Daisyrani & Ors., the Madras High Court was dealing with a case of sexual harassment against the Dean of a College.[484] The Internal Complaints Committee was constituted by the Dean himself and all the members except one were subordinate to him. The High Court had thus set up an Independent Committee to make sure the existing Committee makes an impartial decision. The Dean sought review of this judgement but it was dismissed by the High Court.

The victim must file a complaint within a period of three months from the incident. Once this period expires, she has no right to complain. An article in India Law Journal suggests that the limitation on the time period to complain should be extended. Three months is a very short time because such incidents have very serious emotional consequences and the sufferer should have enough time to gain the courage to talk about it publicly.[485] In the case of Tejinder Kaur v. Union of India, the Delhi High Court extended the three months period to three more months.

[481] Justice JS Verma Committee
[482] Section 4 of the PoSH Act
[483] WP No. 22314 and 22317 of 2017
[484] WMP No. 36640 of 2017
[485] India Law Journal

It was held that this extension can be provided only in unavoidable and extreme circumstances.[486]

The ICC is easily approachable during a normal situation but during these trying times, it is difficult for a victim to approach the ICC. Thus, it is important for companies to conduct PoSH e-trainings. This will make the employees aware of their rights and most importantly, it will give them a clear idea of what constitutes as sexual harassment in the virtual world and how they can address the ICC regarding the same.

When women are hesitant to complain, there are many things other employees can do to make them aware that they support them and what is happening to them is unacceptable. For example, if an employee notices a woman being sexually harassed on a video conference, he can record this act and encourage the woman to complain. One can also choose to be a witness or can himself complain to the ICC if the woman is reluctant. This is covered under Section 29 of the PoSH Act. It has listed a set of rules that everyone in the company should follow. Rule 6 allows a co-worker, relative or friend of the sufferer to file a complaint on her behalf if she is not in the mental or physical condition to do so.[487] When an employee prefers to remain silent even though he notices his colleague being sexually harassed, he in turn encourages such intolerable behaviour.

Section 19 of the PoSH Act emphasizes on the duties of the employer which is of prime importance because if the employer is successful in his duties, there are less chances of a woman being sexually harassed.[488] His duties comprise of organising various workshops and training programmes to aware the employees with the provisions of the Act, to make sure to provide a safe working environment and to render the necessary information to the Internal Complaints Committee regarding any case.

Another step taken by the Government towards helping women is the introduction of The She-Box (Sexual Harassment Electronic Box). It is an initiative by the Government to allow women to file complaints regarding sexual harassment at workplace through an online portal. An article in The New Indian Express states that women have started complaining through the SHe-Box after an unsatisfactory experience with the Internal Complaints Committee. The ICC has either let the offenders go even after evidence against them or the woman's life in her workplace has been compromised after she has complained to the ICC.[489] These are some of the reasons

[486] 2017 SCC Del 12221
[487] Section 29 of the PoSH Act
[488] Section 19 of the PoSH Act
[489] The New Indian Express (July 29 2019)

behind women relying more on the concept of SHe-Box. Since it is an online portal, women can easily access it from their homes and can still take its help if they are not receiving a serious reaction from the ICC.

PERSONAL VIEW

In these hyper- competitive times, women are not even one step behind and they hold equally important positions as their male counterparts. In my opinion, the Government should also include sexual harassment against men under the ambit of the PoSH Act or make a new Act pertaining to this issue. Along with the safety of women, it is also essential to not ignore the safety of men in a workplace.

CONCLUSION

The work from home concept is here to stay. Pertaining to this situation, many countries in the world are taking steps to avoid sexual harassment online. There are reports that many companies in India have framed new rules in order to prevent sexual harassment which includes inappropriate requests like video conferences after office hours, spreading sexually coloured jokes and remarks. [490]This study is done by Deeba Syed, senior legal officer at the UK Charity Rights of Women. They run a legal advice line for women and educate them about their rights against sexual harassment.

Sexual Harassment is a treacherous problem that poses a serious impediment to society. It hampers the longevity of a woman's career. We as a society need to work in the direction of making a workplace, be it physical or virtual, a comfortable environment for women and hence look forward to a day when an act like the PoSH Act will no longer be needed in our country.

[490] UK Charity Rights of Women

INFRINGEMENT OF HUMAN RIGHTS OF CHILDREN WITH INTELLECTUAL DISABILITIES- A CRIMINAL JUSTICE ISSUE

- RAJINI B. K. & ADVAITH M. VEDANTH

ABSTRACT

The social model of disability sector which includes children who are intellectually impaired acknowledges that obstacles to active and lively participation in society and its institutions reside in the environment rather than in the individual and that such barriers can and must be prevented, reduced or eliminated. Environmental obstacles come in many guises and are found at all levels of society. They are reflected in policies and regulations created by governments. Such obstacles may be physical – for example barriers in public buildings, transportation and recreational facilities. They may also be attitudinal – widespread underestimation of the abilities and potential of children with disabilities creates a vicious cycle of underexpectation, under-achievement and low priority in the allocation of resources. This paper delves deeper into the the national and international legislations relating to disability like intellectuality primarily focused on children and violation of human rights of such children.. We ensured to chart out all the challenges and recommendations for better treatment of such vulnerable group of children using secondary method of data collection. This paper also cities few relevant landmark case laws after conclusion part, relating to disability of children for comprehensive understanding.

KEYWORDS : Intellectual disabilities ,lively participation, vulnerable groups, social model

"What would happen, they conjectured, if they simply went on assuming their children would do everything. Perhaps not quickly. Perhaps not by the book. But what if they simply erased those growth and development charts, with their precise, constricting points and curves? What if they kept their expectations but erased the time line? What harm could it do? Why not try?"
— Kim Edwards[491]

491 https://www.goodreads.com/quotes/tag/intellectual-disability

INTRODUCTION :

1. Disability is part of being human. Almost everyone will temporarily or permanently experience disability at some point in their life. Over one billion people – about 15% of the global population – live with some form of disability and this number is increasing.
2. Disability results from the interaction between individuals with a health condition such as cerebral palsy, down syndrome and depression as well as personal and environmental factors including negative attitudes, inaccessible transportation and public buildings, and limited social support.[492] It is the result of pessimistic connections that take place connecting a person with impairment and his or her social behavior.
3. There are 600 million persons with disabilities in the world today. 80% of them live in emergent countries. A staggering 90 million people in India are disabled. That is almost one in every ten. These statistics in the very beginning of this article are not remarked to create any compassion for persons with disabilities. The aim of citing these figures here is to illustrate that still 600 million persons with disabilities are being prevented from contributing to the world society (whether socially or economically) because of the barricade called disability.[493]
4. People with disability are often considered to be weak, worthless and in some cases sub-human by their societies and because of this attitude they face a heightened risk of violence whether it is physical, mental or sexual in nature. Even in the context of religion, one can find evidence of the low regard that the various religions have always had for the disabled.[494] For Example, Hindu Law discriminated against the disabled on two grounds:
5. According to Baudhayana they are not capable of transacting legal business[495]

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[492] https://www.who.int/health-topics/disability#tab=tab_1

[493] http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=829

[494] Michael Moore, Religious Attitudes towards the Disabled, The Secular Web (Sep. 17, 2017, 08:12 AM), https://infidels.org/library/modern/michael_moore/disabled.html.

[495] P.V. Kane, History of Dharamshastra 297-298 (Government Oriental Press, 1958)

6. There was discrimination against the disabled because they were unable to perform the religious ceremonies. However, this discrimination was not on religious grounds as shudras who were not required to perform the Vedic rites were also excluded from inheritance on the grounds of disability[496]
7. Disability is not just a vigor problem rather it is a complex phenomenon which covers impairments, activity confinement and participation precincts. For a better clarity of the term 'disability', it would be imperative that we tend to focus on the various international and national instruments which talk about the rights of the disabled persons.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 establishes responsibility on the society to make adjustments for disabled people so that they overcome various practical, psychological and social hurdles created by their disability. The Act places disabled people at par with other citizens of India in respect of education, vocational training and employment.

The Act declares that the State shall progressively ensure that every child with disability has access to free education until the age of 18 years. Until now the provision of free education had been restricted to children below 14 years. The Act has several provisions to ensure equal opportunities, protection of rights and full participation of disabled people in mainstream activities of the society. The State has been entrusted with the responsibility to prevent disabilities, provision of medical care, education, training, employment and rehabilitation of persons with disabilities.

Section 2(s) of the Persons with Disabilities Act, 2016 also provides that a person with disability means a person with a long term physical, mental, intellectual or sensory impairment which in interaction with barriers hinders his full and effective participation in the society equally with the others.

Furthermore, it provides that implementation of the intentions and provisions of the Act shall be done through constituting of coordination committees at the Central and State levels with the Welfare Minister as the chairperson and officials of ministries and departments concerned, NGOs working with and for disabled people and eminent people with disabilities as members to coordinate disability-related activities of the Government, NGOs and others. The Indian disability law treats disability as civil rights rather than a health and welfare issue. The law

[496] Ramesh Chandra Dutt, A History of Civilization in Ancient India 59 (Vistar Publishers, Delhi, 1972).

recognizes the importance of consultation with disabled people on issues, which directly or indirectly affect them.[497]

In Javed Abidi v. Union of India, the petitioner's grievance was that there was lack of facilities like providing aisle chair and ambulift by Indian Airlines. The petitioner contended that it was a social obligation of the Airlines and the Airlines must provide these minimum facilities to permit easy access to the disabled persons, particularly those who are orthopedically impaired and suffer from locomotors disability. The major grievance of the petitioner was that Indian Airlines was not giving any concession to such disabled persons for their movement by air even though such concessions are being given to only blind persons, who are also disabled persons under the Act. The Court held that those suffering from locomotor disability to the extent of 80% and above would be entitled to the concession from Indian Airlines for travelling by air within the country at the same rate as has been given to those suffering from blindness on their furnishing the necessary certificate from the Chief District Medical Officer to the effect that the person concerned is suffering from the disability to the extent of 80%.[498]

In spite of the assortment of legislations, there is a ruthless scarcity of accessible and appropriate government services for women and children with intellectual disabilities. Children with disabilities and their families continually experience stumbling block to the gratification of their basic human rights and to their addition in society. Their capabilities are overlooked, their capacities are underrated and their needs are given low priority.

Yet, the barriers they face are more habitually as a result of the ecosystem in which they live than as a result of their impairment. While the state of affairs for these children is changing for the better, there are still severe gaps. On the positive side, there has been a gathering global momentum over the past two decades, originating with persons with disabilities and increasingly supported by civil society and governments. In many countries, small, local groups have joined forces to create regional or national organizations that have lobbied for reform and changes to legislation. as a result, one by one the barriers to the participation of persons with disabilities as full members of their communities are starting to fall[499]

The intent of this paper is to focus on the meaning of intellectual disability and the violence attributed towards the children who are suffering from the same. Apart from this, the

[497] http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=829

[498] http://disabilitylaw.org.in/disability-law/access/landmark-cases-in-access/

[499] Promoting the Rights of Children with Disabilities- Innocenti Digest No. 13 by UNICEF

international and the national legal frameworks shall also be discussed throwing light on the violation of the human rights of such children .

INTELLECTUAL DISABILITIES

8. Intellectual disability[1] involves problems with general mental abilities that affect functioning in two areas:
   - intellectual functioning (such as learning, problem solving, judgement)
   - adaptive functioning (activities of daily life such as communication and independent living)
9. Intellectual disability affects about one percent of the population, and of those about 85 percent have mild intellectual disability. Males are more likely than females to be diagnosed with intellectual disability. Intellectual disability is identified by problems in both intellectual and adaptive functioning.

Intellectual functioning is assessed with an exam by a doctor and through standardized testing. While a specific full-scale IQ test score is no longer required for diagnosis, standardized testing is used as part of diagnosing the condition. A full scale IQ score of around 70 to 75 indicates a significant limitation in intellectual functioning.[2] However; the IQ score must be interpreted in the context of the person's difficulties in general mental abilities. Moreover, scores on subtests can vary considerably so that the full scale IQ score may not accurately reflect overall intellectual functioning.

Three areas of adaptive functioning are considered:

1. **Conceptual** – language, reading, writing, math, reasoning, knowledge, memory
2. **Social** – empathy, social judgment, communication skills, the ability follow rules and the ability to make and keep friendships
3. **Practical** – independence in areas such as personal care, job responsibilities, managing money, recreation and organizing school and work tasks
4. Adaptive functioning is assessed through standardized measures with the individual and interviews with others, such as family members, teachers and caregivers.
5. Intellectual disability is identified as mild (most people with intellectual disability are in this category), moderate or severe. The symptoms of intellectual disability begin during childhood or adolescence. Delays in language or motor skills may be seen by

age two. However, mild levels of intellectual disability may not be identified until school age when a child may have difficulty with academics.[500]

10.

Intellectual disability was recognized in ancient Indian literature, but organized services have a history of just five decades. India shares many features of low- and middle-income (LAMI) countries regarding intellectual disability. There is a low level of awareness about its nature, causes and interventions.

One can come across many superstitions, myths and misconceptions about intellectual disability. In general, services are inadequate, being concentrated in big cities and urban areas. There is generally limited access to support services and few government benefits, and these, in any case, are often of little value (World Health Organization, 2007).

Locally and nationally, there are few relevant and reliable epidemiological data on the prevalence of intellectual disability. However, there have been some positive developments within the past three decades, and they are the focus of this paper. The limited epidemiological data in India on intellectual disability suggest a prevalence of around 2–2.5% in the general population. An excess prevalence in males, rural areas and low-income groups is reported. Acquired causes account for about 30% of cases. It is estimated that at least 25% of intellectual disability is preventable in India.

Article 1 of the Convention on the Rights of Persons with Disabilities also says that the persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The Persons with the Disabilities Act, 2016 under Section 2 of its Schedule clearly mentions that intellectual disability, is a condition which is characterized by significant limitation both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior which covers a range of every day, social and practical skills, including specific learning disabilities and autism spectrum disorder. Specific Learning Disability means the condition where there is a deficit in processing language, or difficult to comprehend, speak, read, write, spell or do mathematical calculations and also includes perceptual disabilities, while Autism Spectrum Disorder is a neuro-developmental condition that appears in the first three years of the life of a person. It affects a person's ability to communicate, understand relationships and

[500] https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability

relate to others. Therefore, in my opinion, intellectual disability may be defined as a significantly reduced ability to understand new or complex information, to learn new skills and a reduced ability to cope independently i.e. impaired social functioning. A person's mental capacity, the ability to make decisions can vary depending on the environmental or social factors; however, the legal capacity is "a universal attribute inherent in all persons by virtue of their humanity" and can therefore not be stripped of it."[501]

VIOLENCE AGAINST CHILDREN WITH INTELLECTUAL DISABILITIES- A HUMAN RIGHTS PERSPECTIVE

Children as a sum total are marginalized; however, some groups of children, such as children with disabilities like intellectuality, girl children, and children from cultural minorities face even greater prejudice.Children with intellectual disabilities are exceptionally at greater risk for discrimination due to the fact that

1) They have a disability and

2) They are children and therefore more susceptible to marginalization, exploitation, and abuse.

Unless these clusters of community are expressly mentioned in human rights treaties, they may be deprived of the protections and guarantees of the general children's human rights agenda, including the Convention on the Rights of Persons with Disabilities (CRPD).

For this reason children with disabilities are mentioned in a separate article in the CRPD. For them, as for all children, the assurance of their human rights, especially to health, survival, and an adequate standard of living, is critical.[502]

National research data also indicates that abuse against children with disabilities is more prevalent than against their non-disabled peers. A study in the UK shows that the increased risk of violence is related to a child's impairment. For example, children with intellectual disabilities are five times more likely to be victims of abuse, and those with moderate and severe speech and language issues are three times more likely to experience abuse[503]

A study commissioned by the Swedish government reveals that children with moderate or severe disabilities are three times more likely to become victims of bullying than their peers

[501] United Nations Committee on Rights of Persons with Disabilities, General Comment on Article 12: Equal Recognition before the Law (CRPD/C/4/2 (2014).

[502] UN Convention on the Rights of Persons with Disabilities

[503] Spencer, N., Devereux, E., Wallace, A., Sundrum, R., Shenoy, M., Bacchus, C. and Logan, S. (2005), Paediatrics

without disabilities. It is three times more common for children with physical or neuropsychiatric disabilities to be bullied than for children without disabilities.[504]

Few respondents contended that children with Down syndrome, autism spectrum disorders (ASD) and attention deficit hyperactivity disorder (ADHD) are particularly exposed to danger. The violence is commonly verbal in nature, ranging from subtle to public bullying, mocking, teasing, name calling and belittling, or can consist of social isolation. Children with autism are chiefly often excluded in schools and other settings.

This group of children is also more vulnerable because of problems with reporting and challenging abuse, and due to the perception that children with cognitive disabilities have limited forms of communication and cannot be trusted and used as reliable witnesses. Interviewees in several countries reported that children who communicate in non-traditional ways are especially vulnerable to abuse. This is because only professionals who work with the children and know them very well, or members of the children's immediate families, are in a position to learn about any incidents of violence. [505]

INTERNATIONAL LEGAL FRAMEWORK

If we have a look at international standards and mechanisms over four decades, the United Nations has made a strong commitment to the human rights of persons with disabilities. This commitment has been reflected in major human rights instruments as well as within specific measures and initiatives, which began with the 1971 Declaration on the Rights of Persons with Mental Retardation and now has culminated in the 2006 Convention on the Rights of Persons with Disabilities.

Other examples of disability-focused initiatives include the **International Decades of Disabled Persons, the 1993 Standard Rules on the Equalization of Opportunities for Persons with Disabilities and the 1994 Salamanca Statement and Framework for Action for Special Needs Education**.

The 1989 Convention on the Rights of the Child (CRC) is the first binding instrument in international law to deal comprehensively with the human rights of children, and is notable for the inclusion of an article specifically concerned with the rights of children with disabilities. The implementation of the CRC is monitored and promoted at the international level by the

[504] Sweden, The Swedish National Institute of Public Health (2012), pp. 39 and 50.
[505] Extent, causes and settings of violence against children with disabilities-EU REPORT

Committee on the Rights of the Child. The CRC identifies four general principles that provide the foundation for the realization of all other rights:

- non-discrimination;
- the best interests of the child;
- survival and development;
- respect for the views of the child

The principle of non-discrimination is reflected in article 2 of the CRC that expressly prohibits discrimination on the grounds of disability: States parties shall respect and ensure the rights set forth in the present Convention to each child ...without discrimination of any kind, irrespective of the child's disability or other status[506]

In 1971 Declaration on the Rights of Mentally Retarded Persons stipulates that a person with an intellectual impairment is accorded the same rights as any other person with Complemented the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child,

Article 23 of the CRC refers to the obligations of States parties and recognizes that a child with mental or physical disabilities is entitled to enjoy a full and decent life, in conditions that ensure dignity, promote self-reliance and facilitate the child's active participation in the community

i) States parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

ii) States parties recognize the right of the disabled children to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance that is appropriate to the child's condition. [507]

HUMAN RIGHTS LAW ON CHILDREN WITH INTELLECTUAL DISABILITY

Children's rights have foundations in provisions of international law. The Universal Declaration of Human Rights (UDHR)[508] Article 25, the Convention on the Rights of the Child

[506] Promoting the Rights of Children with Disabilities-UNICEF
[507] Convention on the Rights of the Child
[508] See http://www.unhchr.ch/udhr/lang/eng.htm

(CRC)[509] and the 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules)[510] address the rights of children with disabilities.

The 1948 Universal Declaration of Human Rights (UDHR) mentions children in Article 25 and 26. Article 26 states that motherhood and childhood are entitled to special care and assistance and that all children, regardless of whether they are born in or out of wedlock, shall enjoy the same social protection. Article 26 entitles everyone to equal access to education and allows parents the right to choose the kind of education given to their child. The 1989 CRC, the most universally ratified of all human rights treaties (only the USA and Somalia are not States Parties), lays the foundation for and defines the many rights that
the CRPD affirms. The CRC provides an over-arching framework for children's rights and makes special mention of children with disabilities in Articles 2 and 23.

It is important to remember, however, that every article in the CRC that refers to "the child" applies also to the child with disabilities. This inclusion marks an important shift in thinking towards a "rightsbased approach," holding governments legally accountable for failing to meet the needs of all children.

The CRC creates a new vision of children as bearers of rights and responsibilities appropriate to their age, rather than viewing them as the property of their parents or the helpless recipients of charity.

The CRC has special provisions for children with disabilities. Article 2.1 prohibits discrimination on various grounds, including disability, and Article 23 sets out the right to special care, education, and training. Children's rights cover four main aspects of a child's life that apply equally to children with disabilities: the right to survive, the right to develop, the right to be protected from harm, and the right to participate.

• Survival rights: the right to life and to have the most basic needs met (e.g., adequate standard of living, shelter, nutrition, medical treatment);

• Development rights: the rights enabling children to reach their fullest potential (e.g., education, play and leisure, cultural activities, access to information and freedom of thought, conscience and religion);

• Participation rights: rights that allow children and adolescents to take an active role in their communities (e.g., the freedom to express opinions, the freedom to have a say in matters

[509] See http://www.ohchr.org/english/law/crc.htm

[510] See http://www.ohchr.org/english/law/opportunities.htm

affecting their own lives, the freedom to join associations). Respecting a child's opinion (Article 12) is especially important as it gives children the right to a voice in all matters concerning them (e.g., kinds of treatment for disabled children);

• Protection rights: rights that are essential for safeguarding children and adolescents from all forms of abuse, neglect and exploitation (e.g., special care for refugee children and protection against involvement in armed conflict, child labor, sexual exploitation, torture, and drug abuse). The 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) address the rights of children and their families in Rule 2 (medical care), Rule 6 (education), which includes very young children with disabilities, and Rule 9 (family life and personal integrity). Rule 2 states that infants and children should especially have access to the same level of medical care that others have. Rule 9 states that persons with disabilities should be enabled to live with their families. States should encourage the inclusion in family counseling of appropriate modules regarding disability and its effects on family life. Respite-care and attendant-care services should be made available to families that include persons with disabilities. The Education Rule 6 states that general education authorities are responsible for the education of people with disabilities in integrated settings and encourages the active involvement of parent groups and organizations in the education process. Special attention is given to very young children with disabilities and populations at risk for double discrimination. It is important to remember that all international treaties apply, protect, and enable all, including infants, children, and youth with disabilities.[511]

UN Declaration on the Rights of Mentally Retarded Persons

This declaration on the rights of mentally retarded person's calls for national and international actions so as to ensure that it will be used as a common basis and frame of reference for the protection of their rights:

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as under human beings.
2. The mentally retarded person has a right to proper medical care, physical therapy and to such education, training, rehabilitation and guidance which will enable him to further develop his ability, and reach maximum potential in life.

[511] PART 2: the convention on the rights of persons with disabilities

3. The mentally retarded person has a right of economic security and of a decent standard of living. He/she has a right to perform productive work or to participate in any other meaningful occupation to the fullest possible extent of capabilities.
4. Whenever possible, the mentally retarded person should live with his own family or with his foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If an institutional care becomes necessary then it should be provided in surroundings and circumstances as much closer as possible to that of a normal lifestyle.
5. The mentally retarded person has a right to a qualified guardian when this is required in order to protect his personal well-being or interests.
6. The mentally retarded person has a right to get protection from exploitation, abuse and a degrading treatment. If prosecuted for any offence; he shall have right to the due process of law, with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable (because of the severity of their handicap) to exercise their rights in a meaningful way or it should become necessary to restrict or deny some or all of their rights then the procedure(s) used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure for the mentally retarded must be based on an evaluation of their social capability by qualified experts, and must be subject to periodic review and a right of appeal to the higher authorities.[512]

NATIONAL LEGISLATION AND POLICIES:

Let's have an overview relating to the Indian national laws and provisions related to disabilities:

A) The intellectually disabled children and the constitution

The Constitution of India applies uniformly to every legal citizen of India, whether they are healthy or disabled in any way (physically or mentally)

Under the Constitution the disabled children along with various communities in disability are also have been guaranteed the following fundamental rights:

[512] *A Handbook for Parents of Children with Disabilities*

1. The Constitution secures to the citizens including the disabled, a right of justice, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and for the promotion of fraternity.
2. Article 15(1) enjoins on the Government not to discriminate against any citizen of India (including disabled) on the ground of religion, race, caste, sex or place of birth.
3. Article 15 (2) States that no citizen (including the disabled) shall be subjected to any disability, liability, restriction or condition on any of the above grounds in the matter of their access to shops, public restaurants, hotels and places of public entertainment or in the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of government funds or dedicated to the use of the general public. Women and children and those belonging to any socially and educationally backward classes or the Scheduled Castes & Tribes can be given the benefit of special laws or special provisions made by the State.
4. There shall be equality of opportunity for all citizens (including the disabled) in matters relating to employment or appointment to any office under the State.
5. No person including the disabled irrespective of his belonging can be treated as an untouchable. It would be an offence punishable in accordance with law as provided by Article 17 of the Constitution.
6. Every person including the disabled has his life and liberty guaranteed under Article 21 of the Constitution.
7. There can be no traffic in human beings (including the disabled), and beggar and other forms of forced labour is prohibited and the same is made punishable in accordance with law (Article 23).
8. Article 24 prohibits employment of children (including the disabled) below the age of 14 years to work in any factory or mine or to be engaged in any other hazardous employment. Even a private contractor acting for the Government cannot engage children below 14 years of age in such employment.
9. Article 25 guarantees to every citizen (including the disabled) the right to freedom of religion. Every disabled person (like the non-disabled) has the freedom of conscience to practice and propagate his religion subject to proper order, morality and health.
10. No disabled person can be compelled to pay any taxes for the promotion and maintenance of any particular religion or religious group.
11. No Disabled person will be deprived of the right to the language, script or culture which he has or to which he belongs.

12. Every disabled person can move the Supreme Court of India to enforce his fundamental rights and the rights to move the Supreme Court is itself guaranteed by Article 32.
13. No disabled person owning property (like the non-disabled) can be deprived of his property except by authority of law though right to property is not a fundamental right. Any unauthorized deprivation of property can be challenged by suit and for relief by way of damages.
14. Every disabled person (like the non-disabled) on attainment of 18 years of age becomes eligible for inclusion of his name in the general electoral roll for the territorial constituency to which he belongs.

B) Education Law for the Disabled

- The right to education is available to all citizens including the disabled. Article 29(2) of the Constitution provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on the ground of religion, race, caste or language.
- Article 45 of the Constitution directs the State to provide free and compulsory education for all children (including the disabled) until they attain the age of 14 years. No child can be denied admission into any education institution maintained by the State or receiving aid out of State funds on the ground of religion, race, caste or language.
- Article 47 of the constitution imposes on the Government a primary duty to raise the level of nutrition and standard of living of its people and make improvements in public health - particularly to bring about prohibition of the consumption of intoxicating drinks and drugs which are injurious toone's health except for medicinal purposes.
- The health laws of India have many provisions for the disabled. Some of the Acts which make provision for health of the citizens including the disabled may be seen in the Mental Health Act, 1987

c)Family Laws

11. Various laws relating to the marriage enacted by the Government for DIFFERENT communities apply equally to the disabled. In most of these Acts it has been provided that the following circumstances will disable a person from undertaking a marriage. These are:

- Where either party is an idiot or lunatic,
- Where one party is unable to give a valid consent due to unsoundness of mind or is suffering from a mental disorder of such a kind and extent as to be unfit for 'marriage for procreation of children'

- Where the parties are within the degree of prohibited relationship or are sapindas of each other unless permitted by custom or usage.
- Where either party has a living spouse

12. The rights and duties of the parties to a marriage whether in respect of disabled or non-disabled persons are governed by the specific provisions contained in different marriage Acts, such as the Hindu Marriage Act, 1955, the Christian Marriage Act, 1872 and the Parsi Marriage and Divorce Act, 1935. Other marriage Acts which exist include; the Special Marriage Act, 1954 (for spouses of differing religions) and the Foreign Marriage Act, 1959 (for marriage outside India). The Child Marriage Restraint Act, 1929 as amended in 1978 to prevent the solemnization of child marriages also applies to the disabled. A Disabled person cannot act as a guardian of a minor under the Guardian and
13. Wards Act, 1890 if the disability is of such a degree that one cannot act as a guardian of the minor. A similar position is taken by the Hindu Minority and Guardianship Act, 1956, as also under the Muslim Law

d)Succession Laws for the Disabled

14. Under the Hindu Succession Act, 1956 which applies to Hindus it has been specifically provided that physical disability or physical deformity would not disentitle a person from inheriting ancestral property. Similarly, in the Indian Succession Act, 1925 which applies in the case of intestate and testamentary succession, there is no provision which deprives the disabled from inheriting an ancestral property. The position with regard to Parsis and the Muslims is the same. In fact a disabled person can also dispose his property by writing a 'will' provided he understands the import and consequence of writing a will at the time when a will is written. For example, a person of unsound mind can make a Will during periods of sanity. Even blind persons or those who are deaf and dumb can make their Wills if they understand the import and consequence of doing it.

e)Labour Laws for the Disabled

15. The rights of the disabled have not been spelt out so well in the labour legislations but provisions which cater to the disabled in their relationship with the employer are contained in delegated legislations such as rules, regulations and standing orders.

f) Judicial procedures for the disabled

16. Under the Designs Act, 1911 which deals with the law relating to the protection of designs any person having jurisdiction in respect of the property of a disabled person

(who is incapable of making any statement or doing anything required to be done under this Act) may be appointed by the Court under Section 74, to make such statement or do such thing in the name and on behalf of the person subject to the disability. The disability may be lunacy or other disability.

g)Income Tax Concessions

Relief for Handicapped

- **Section 80 DD:** Section 80 DD provides for a deduction in respect of the expenditure incurred by an individual or Hindu Undivided Family resident in India on the medical treatment (including nursing) training and rehabilitation etc. of handicapped dependants. For officiating the increased cost of such maintenance, the limit of the deduction has been raised from Rs.12000/- to Rs.20000/-.
- **Section 80 V:** A new section 80V has been introduced to ensure that the parent in whose hands income of a permanently disabled minor has been clubbed under Section 64, is allowed to claim a deduction upto Rs.20000/- in terms of Section 80 V.
- **Section 88B:** This section provides for an additional rebate from the net tax payable by a resident individual who has attained the age of 65 years. It has been amended to increase the rebate from 10% to 20% in the cases where the gross total income does not exceed Rs.75000/- (as against a limit of Rs.50000/- specified earlier).[513]

CHALLENGES AND RECOMMENDATIONS

From the profound discussion above, it is clear that children with intellectual disabilities suffer from high rates of violence, be it physical, sexual or psychological in nature. Human Rights law defines this as a violence accomplished by physical force, legal compulsion, economic coercion, intimidation, psychological manipulation, deception and misinformation and in which the absence of free and informed consent is a key analytical component.

There are various international and national instruments which lay down the law for the protection of children distressed from disabilities. On the other hand the state institutions are deteriorating in rendering these duties. There are many reasons for the same including:

1. The most significant cause is the prejudice associated with the disability. Persons with disabilities are still regarded as recipients of charity or objects of

[513] *A Handbook for Parents of Children with Disabilities*

others decisions, rather than people with the right and sovereignty to make their decisions.[514]

2. Seclusion and exclusion from the society poses another menace to the welfare of kids suffering from intellectual disabilities.
3. Mistreatment of the girls with mild intellectual disabilities by fellow residents or staff in the institutions is yet another challenge.
4. There is lack of admission to justice. In other words the justice system can be very demanding for people with disabilities, particularly people with psychological or intellectual disabilities.
5. Children labeled with intellectual disabilities are likely to be silenced and ignored when speaking out or attempting to defend themselves, particularly when the violence is authorized by law or committed in a context where the children is deprived of their legal capacity or freedom.

RECOMMENDATIONS

1. There should be requisite steps taken by the appropriate Government to improve the conditions of the institutions where the children suffering with disabilities are kept, so as to ensure that the Human Rights of such children are respected and protected. This can be done by issuing guidelines for sanitation, hygiene, and living conditions and involuntary electroconvulsive therapy.
2. An independent and confidential complaint mechanism must be created which can receive and investigate complaints on a confidential basis, about ill-treatment of children with intellectual disabilities in institutions.
3. There is a need to take measures to fight stigma, discrimination and all forms of violence against children with disabilities, for example through awareness campaigns and community discussions.
4. Education must be imparted to children with disabilities about their human rights. All the government and privately-run institutions need to provide accessible information to children with intellectual disabilities and inform them about their rights and complaint procedures.

[514] Id

5. The causes of all forms of violence against children with disabilities need to be investigated with regard to the isolation and victimization that can contribute to violence in such circumstances.
6. There should be proper allocation of funds by the appropriate governments and specific budgets should be created for community support programs and independent and supportive living arrangements for children with intellectual disabilities. Moreover, a body composed primarily of experts with disabilities must also be created in order to monitor and assess the effectiveness of community-based support services.
7. Ensure that the staff in general hospitals and at institutions are trained to accommodate children with disabilities and are sensitive to their needs

CONCLUSION

Numerous children with disabilities see themselves as fatalities of maltreatment and abuse, while society pays no attention to the problem. Nevertheless, some children with disabilities may not see themselves as victims of aggression because they consider their situations habitual and associated with disability. In some state of affairs society declines to distinguish that certain acts comprise violence, and the children who experience them may or may not consider themselves as victims. This is particularly true with respect to acts authorized under domestic law, such as forced psychiatric interventions with mind-altering drugs, electroshock or psychosurgery, institutionalization, restraints and isolation, which are practiced primarily on children with psychosocial disabilities and children with intellectual disabilities.

Case laws :

1) Pramod Arora vs Honble Lt. Governor Of Delhi and others

Facts :

Public Interest Litigation in order to seek the Court's powers in quashing or removing the amendment to the Right to Education Act in 2012, mandating the provision of free and compulsory education to children with disabilities in neighbourhood schools.

His contentions were:

(i) The Persons with Disabilities Act, in Section 26, speaks about free and compulsory education to children with disabilities till the age of 18. The Act also talks about 3% reservation in Institutions for Education of Persons with Disabilities.

Therefore, there must be such admission reservations for children with disabilities. Under the RTE, children with disabilities were clubbed along with children of 'disadvantaged group' and 'economically weaker sections' and because of their unique requirements, they would never get admission under the 25% of reserved seats. In a lottery system for admission of these children, children with disabilities may be severely underrepresented. Therefore, The Right to Education Act was hampering the wider rights under the Persons with Disabilities Act.
(ii) Secondly, under the Right to Education Act and the rules framed by the NCT of Delhi, admission criteria gave high weightage to the distance from the school to the home of the child. A child with disability may not stay close to a school providing the accessibility requirements that they need. If they would apply to a school that had these requirements but was far away, they would lose points on account of the distance factor. Therefore, the 'neighborhood' criteria was discriminatory to children with disabilities

Court rule:

(i) The right to free, compulsory education to children with disabilities guaranteed by Section 26 of the Persons with Disabilities Act is in no manner affected or diluted by the Right to Education Act. The State has to necessarily ensure the admission of all children with 'special needs' and to thereby give full and meaningful effect to the Persons with Disabilities Act. The provision regarding 3% reservation applies to higher education (because it uses the term 'persons' and not 'children')
(ii) To ensure adequate representation of all sections of society who fall under the category of disadvantaged groups and weaker sections, the State should ensure proportional representation of various groups
(iii) It would be violating the Persons with Disabilities Act if the 'neighborhood' criteria was used in relation to admission criteria of children with disabilities. Therefore, the State Government should look at the criteria in place and make sufficient amendments to ensure there was no discrimination against children with disabilities

The Court further directed that the Department of Education make special provisions for admission of children with disabilities as children with special needs:
(i) Create a zone-wise list of all public and private educational institutions that are able to accommodate children with disabilities. The list will also mention the impairments the institutions are able to cater to, the facilities available, whether residential or day-boarding, and the contact details for the concerned authority
(ii) Create a Nodal Agency, under the authority of the Department of Education (for the

processing of all applications pertaining to the admission of children with disabilities
(a) This Agency shall create a single form to be utilized by parents and guardians of children with disabilities for admission into public and private institutions, including all relevant details required for the purpose of admission
(b) Such forms shall be submitted to the Nodal Agency, which shall prescribe regulations for such process, and be forwarded to the concerned institutions
(c) Communication of decisions on admissions shall be done through the Nodal Agency. Schools could appoint liason officers to work with the Agency to smoothen the process

(d) The Nodal Agency shall keep a record of all applicants and institutions, and collate statistics at the end of every admissions cycle. This shall include figures as to the number of applicants, the nature of their disability, place of residence (zone-wise); and to the number of institutions, their location (zone-wise), the nature of disabilities they cater to and the number of available seats. Drop out statistics shall be collected and cases investigated by the Nodal agency and efforts made to seek readmission
(e) The Nodal Agency shall also prescribe a uniform mechanism and guidelines for the certification of children with disabilities by authorized persons
(f) The Nodal Agency shall also provide appropriate counseling facilities for parents and guardians, if requested by them
(g) Likewise, the Nodal Agency shall put in place a complaints mechanism and a mobile helpline to provide assistance
(iii) If, at any point during the admissions cycle, any child is unable to be placed in a school catering to his or her special needs, the Chief Commissioner of Persons with Disabilities and the Principal Secretary, Directorate of Education shall be informed in order to ensure that the mandate under Section 26 to place the child is fulfilled.[515]

2) LALIT AND OTHERS V GOVT. OF NCT AND ANOTHER

Facts

- This petition was filed by 12 inmates of the hostel attached to Andh Mahavidyalya, New Delhi, an institution for visually impaired students, seeking a direction that they may not be expelled or dispossessed from the hostel.

[515] http://www.irockit.in/pramod-arora-vs-honble-lt-governor-of-delhi-and-others/

- Out of these 12 inmates, expulsion orders were issued by the Respondents against 5 inmates on the ground that the hostel was meant for only students up to Class VIII and the petitioners had overstayed beyond this class.
- Many of them were between 25-35 years old and it was alleged that there was a shortage of space for deserving younger visually impaired students and that they were also intimidating the younger students.
- One of the main issues before the Court was whether the hostel was obligated to accommodate the petitioners because of their disabled status even if it resulted in a disadvantage to the other disabled students.

COURT HELD :

- "In the context of the inviolable human rights of the disabled, it is necessary to take note of the binding and mandatory provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (specifically Sections 26 and 30) (`PDR Act') and the Convention on the Rights of Persons with Disabilities (`CRPD') which has been ratified by India.
- In particular, Article 7 which set out the obligations of the States towards children with disabilities, Article 9 which obliges the States to take appropriate measures to ensure access to "schools, housing, medical facilities', and Article 24 which deals with the right to education are relevant."
- The court relied upon Article 24 of the CRPD which guaranteed the right to education and held that in the context of a disabled child housed in a state-run institution there are a cluster of laws all of which can be traced to the fundamental rights to liberty and a life with dignity.
- It held that in the context of a young person receiving education in a state-run institution as a resident scholar, the right to shelter and decent living is an inalienable facet of the right to education itself and when the State takes over the running of an educational institution that caters to the needs of the disabled, it has to account for the 'cascading effect' of multiple disadvantages that such children face.
- In the context of the present case however, the court held that due to the limitation of resources, all the visually impaired persons at the Andh Mahavidhyalala, irrespective of their age cannot possibly expect to be allowed to live there as the primary purpose should be to cater to the needs of young children studying up to class VIII. If this

primary object was not kept in view, then it may result in an unfair denial of the right to education of other deserving young students who are visually challenged.

- The court thus directed the Respondent authorities to take every possible effort to see if all the 5 inmates who were given expulsion orders could be accommodated in any of the other institutions in Delhi. Sufficient time of 6 months should be given to them to make alternative arrangements and assistance should be given to help them find alternative accommodation.
- The court also observed that this case should act as a wakeup call for the government to monitor the functioning generally of all institutions under its control, particularly for the disabled. This case illustrates the incorporation of the CRPD principles with regard to reasonable accommodation and right to education of children. The court was called upon to balance the two rights, which it ultimately did by taking into account the level of disabilities faced by each group demanding accommodation.[516]

[516] Legitquest

NATION VERSUS STATE

- RIA UKEY

INTRODUCTION

The terms Nation, state and the other terms related to them such as nationalism, statehood etc are wide enough to get confuse with their concept and understanding. But when we get into deeper and the political meanings of these terms we can easily differentiate and demarcate the differences and particular meanings and scope of these terms. This study shows the basic and fundamental differences between the concept of nation and a state. The term nation has a wider concept than a state. When we talk about a nation we talk about the unity and integrity among the humans who have common culture, roots, language etc. But when we talk about a state, we talk about the territory, population, government and the sovereignty. Building a nation requires emotions, sentiments, common thought process, similar agendas and a sense of unity amongst the people. A nation is neither controlled by any particular authority nor has any strict rules to abide by but it's a foundation on beliefs and sentiments of the masses. It has no set territory and thus it has a wider scope. Many elements take in account while a nation is formed though not all are absolute or necessary to form one. For instance, a nation can be built on the foundation of a few masses having common religion but having different language or having common language and different religion. Humans can get attached to any particular sentiment that they think is necessary for themselves and build a nation on that foundation.

But building a state does not require any sentiments or emotional attachment, it requires a physical territory and people residing in that particular territory which is governed by a particular body and has a authority beyond which there is no higher power. A state has narrower scope than a nation. People residing in a state need not to get attach to other in an emotional or sentimental sense neither they need to have common language or religion. To build a state these four elements are necessary and they are absolute and even if one element goes missing then a state cannot be formed because without a particular territory there cannot be justified division of the geographic area and its resources, people from other places might come and exploit the resources in the place where there are people already residing. Similarly, if the population is missing for whom the resources are being reserved, for whom the sovereignty is kept alive. And if the government is missing then how the people will be governed, who will make the laws and rules for the population, who will implement them and who will make sure that

everyone abides the same. Further, if sovereignty is not available then who would be the absolute authority to deal the problems the population faces. Thus all these elements are interconnected and are absolute without which a state cannot be formed.

Though the concept of modern nation and state is getting changed and people with different point of views and thinking have their different perspective on the formation of a nation and a state. For example, today states where there are various religions and cultures are expected to live peacefully, here not just territory, population, government and sovereignty matters but people are expected to keep away their differences and live with unity and integrity. The best example here is of India itself.

We can say that the concepts and meanings of these terms are changing but we cannot deny the fact that the foundation and the early meanings of these terms which our great philosophers and political thinkers gave have its own fundamental meaning and essence. So, here we have a detailed study on the meanings, concepts and the point of view of different philosophers about what a nation and a sate actually mean in a political sense.

AIMS

Here the aim is to study the concept of a nation and a state and analyse it's its important elements through the point of view of different political thinkers and philosophers. And also to make the difference between the concept of nation and state. Plus, how and till what extent these concepts of a nation and a state are relevant in today's political scenario.

OBJECTIVE

1. The impact and relevance of the views of different political thinkers and philosophers about the definition of a nation and a state in today's world.
2. The wider scope of the concept of a nation and a state in today's era.
3. How concept of nation and state imply on human beings in recent times.

NATION

When a group of people integrate on the basis of common culture, common religion, common race, common history, common language, common territory and common political aspiration it builds a sense of nation.[517] When we talk about a sense of nation it refers to a unity or integrity of people who unite on the basis of emotional, sensitive or spiritual consciousness. For

[517] Nation, Black's law dictionary, 2014 ed, pp 1183

instance, Kamala Harris became the first South Asian American women to get elected as a vice president of the United States. She has her roots connected to India as her mother is an Indian. And we feel a sense of connection with her as we all share common roots with her. Though we do not share direct common culture, religion or language with her but still there is a sense of nation. Here we integrate on the basis of emotional consciousness. Not only Indians but Africans too connect to her as her father was an African. And this does not stop here. The women all over the world connect to her as she is the first female vice president of the United States. And further we can say that nation is wider and more stable than a state. As nation does not have any set boundaries it can be extended beyond a state. For example, the Muslim brotherhood, Muslims are all over the world and they connect on the basis of common religion and that makes a nation. Recently when there were serious tensions going on between the French government and the Muslims, over the issue of displaying a cartoon of Prophet Muhammad, all the Muslims around the world connected on the basis of common religion and protested against it. Though, the cartoons were made in France, protests were carried out all over the world including India. Pakistan being a majority Muslim country went to the extent of stopping trade relations with France. This occurred due to religious, emotional and sensitive consciousness among all the Muslims around the world which unite them together. And by this we can say that a nation is built by the people and their emotional sentiments. A nation is built on the basis of shared belief that the people are connected to one another through some common beliefs and shared interests. Whether we live in Maharashtra, Karnataka or in Jammu and Kashmir we all share a sense of collective believe that we all are Indians and this builds a nation. If we take another example of recent times, the abrogation of article 370 from the constitution created havoc in the country. People were confused if it really helped the country in any way or not. Even before the abrogation situations were the same as they are now or maybe the situations have tensed now as according to some people it has divided the country and saturated the Hindu- Muslim ties in the country. Jammu and Kashmir had its own constitution and flag, but that does not separate a nation. People were connected by common historical, political, and emotional beliefs. The changes thus made are still controversial that if inside a state two different territories have different set of rules and laws, will it divide it as a nation? Different people have different perspective and after a few years we might know if the decision was apt or it wasn't. And thus a nation does not have set boundaries unlike a state.

A nation is bound by various aspects and different understandings. These various aspects are linguistic understandings, ethnic understandings, cultural understandings, political understandings, geographic understanding or spiritual understandings. There are various

examples which can be given on these aspects. A perfect example of linguistic understanding is the partition of Bangladesh from Pakistan. Though when Pakistan and Bangladesh were a single state, they all were Muslims but the Bengali Muslims felt a sense of unity and integrity when they were discriminated on the basis of language and thus they wanted to get separated as a nation and so did they. And by this we can say that a group of people or an organisation can be created on the basis of linguistic understanding. Secondly, on the basis of ethnic understanding. People unite on the basis of ethnic understanding. A recent example of this is the Rohingya Muslim genocide. Myanmar is a Buddhist dominated state where Rohingya Muslims are in the minority. The Myanmar security forces used military force on the Rohingya Muslims and this created a world-wide tension. This is a recent and perfect example of ethnic understandings where the Rohingya Muslims united on the basis of same ethnicity. So by these examples we can say that common interests and similar understandings is the basic foundation of a nation. A nation can influence or persuade people to follow what they try to promote. A nation thus has its own ideology and thought process. This basic thought or idea is then promoted to the masses and by this they try to persuade or influence people's idea about a particular ideology or a thought and a sense of ownership but clearly cannot be forced on the people. Here we can take an example of Nirbhaya case, where the victim was called the daughter of India and every household and every woman could share common sentiments with the victim. There the people stood by her as a nation.

Different political thinkers and philosophers have given different meanings and definitions of a nation. And they are as follows-

Guibernau has defined a nation as a group of people who are aware and purposive of forming a community and sharing common roots such as common language, religion and ethnicity and are connected through history and territory, and have a common purpose or agenda for their future and want to govern themselves according to their emotional or logical perspectives.

From a subjective point of view, Margaret Moore quoted the term 'nation' as a mass of people who want to get recognised themselves to a major and a particular group, who normally belong to same territory and have a sense of harmony among them to live with unity and integrity on the same territory. She also stated that it is not important to give or define the basic elements which define a group for getting together and forming a unity.

Karl Popper, the philosopher, after the Second World War, compares how the people of a particular race are united because they have a misconception about a few events which passed and have influenced them to the meaning or the concept of nation people in general have and how it has influenced the idea of a nation today.

Rabindranath Tagore defined a nation yet in a different way. According to him a nation is the people as a whole who have set powers with a definite point of view. He explains how an organization works and thrives for efficiency and how a person's energy is drained from realizing the purpose of higher morals. According to him a state always rewards for the economic efficiency and keeps one in the sense of fake moral superiority and this can become dangerous.

And by the above definitions and examples we can understand that according to different perspective of different political thinkers and scholars the important elements to form a nation changes. There is not any absolute or a fix element which is important of a nation to build. The ideology, thoughts and the elements keep on changing with the time. Today, when we talk about nation and the major elements to form it, the idea is totally different from the idea of the nation which people had centuries ago. And similarly, the idea of a nation that we have today could be different from the idea of a nation that the future generations might use. Therefore now we can say that the meaning and the major elements of a nation keeps on changing with time.

STATE

A state is a political organisation. There are a few important and essential components which build a state. These essential components of state is population, territory, government and sovereignty.[518] Population is one of the most important components of a state because without the people or its citizens a state cannot be a state. A state grows according to its population. The population or the people help the state establish and to grow. The more the population grows the more the state grows. Therefore, there cannot be any fixed number of citizens in a state. Though there are scholars who have given their opinions and views on the population which is fixed. According to Plato an ideal state should consist of 5040 people and on the other hand Aristotle was of the view that the population of a state should neither be too small or too large. It should be large enough to be self sufficient and small enough to be well- governed whereas if we talk about Rousseau, according to him 10,000 was an ideal number.[519]

Though today as modern states, preference is given to large or big population because the bigger the population is the lager is the man power. They can fight in wars for longer period.

[518] A. Appadorai, THE SUBSTANCE OF POLITICS, 1942, pp. 11

[519] Sevan G. Terzian, PLATO- THE IDEAL STATE, THE DIALECTICAL METHOD, EDUCATIONAL PROGRAMS, THE CULTIVATION OF MORALS, available at https://education.stateuniversity.com/pages/2326/Plato-427-347-B-C-E.html (visited on November 23, 2020)

They can be an asset to the state and make the sate a happier or a better place to live in. Though the population cannot be always be judged on the basis of the number of citizen but also the quality of the people who reside in the state. According to Aristotle, it depends on a person or the people living in the state how the state will be, good or bad. So thereby we can say that the size of the population cannot be fixed and it depends of the people and the state they form, that if the state is a good state or a bad state. The population of a state does not necessarily need to belong to same religion, speak same language, or belong to single race or culture. In fact the modern states promote the idea of reconciliation of the interests of various communities, culture and different group of citizens living together peacefully. The second most important element of a state is its territory. A modern state cannot exist without its territory. For example, the Nomadic tribes and the Gypsies. They are always wandering and do not have a fixed territory that's why they cannot form a state. Though when we refer to a territory of the state we just don't mean the land domain but also the lakes, rivers, the air space above it, economic zones where it is extended towards and so on. Though there are writers, scholars and philosophers who do not consider territory as an essential element for a state. Also, there is no clear demarcation of the size of a state. The size of a state can be too small or too big. For example India and China the two large states where as Vatican city and Monaco are examples of a few smallest states. Also, there are many pros and cons of having a small or a big state. A small state is well- governed as it is smaller in its size but it also has it's disadvantages such as, not having all the natural resources within its capacity. And as natural resources are one of the important aspects to make a state more powerful, the state might of small state which is self sufficient. And here can say that the size of the territory isn't always taken into consideration. Also the modern states are more into having larger territories. And therefore the territory is the symbol the sphere of the state. It provides resources for the sustainnance of a state. The third most important element of a state is its government. It is the political organisation without which a state cannot function. According to Garner, a government is an organizational agency which makes the laws for common people on common policies on common agendas and is regulated and common thoughts and interests are promoted. So the government makes the rules and the laws for its people, passes the laws and enforces them on the people. The government also provides common services to the people like defence services, police, foreign services, issuance of currency, transport, health, communication and to maintain the law and order in the state. Also according to Giddings- The government is the head of the progressive entity of a civilised society or state. State is in the necessity of the government. Though the functions of a government a less but we cannot refuse the necessity of the government that a state needs.

Although, there are different types of governments which rule the modern states. USA, Spain, and France are a few examples of countries with democratic governments and China is an example where there is a communist government. And by this we can say that that a government shapes a state and its identity. A government is responsible for structuring the state and making lives of the people residing in it simpler and effortless. The government of a state have its powers limited to its territory. Without a government which makes rules and laws for the people residing in the state, a state cannot be called a state. The government helps the state to function effortlessly and takes decisions on behalf of the people. It provides services to the people through which the people residing in it have a sense of security. The government tries to maintain the law and order. It looks after the people residing in the state and maintain the law and order of the state. The laws and the rules are definite or set for a state. And it cannot be extended beyond the definite territory of the state. For example, India and Pakistan share a border but Indian government cannot extend its powers to Pakistan and vice versa. The government runs the state and its people within its territory. The citizens knowingly or un-knowingly are controlled by the government in some or the other way. It has different institutions and the ranking of the institutions and their works are assigned to them. No institution can go beyond their limit to exercise their power. In a democratic state, judiciary plays an important role. Though there are exceptions like the United Kingdom where democracy exists with monarchy. A state can have various set and types of government. These different types of governments or the different types of governing system reflect a state. It reflects how it works, its ideology and thoughts and by this the modern philosopher and political thinkers predict the future of these states. The last and the most important element of a state is its sovereignty. A sovereign state is where there is no authority over one final or legal authority. A sovereign state functions without a control of any external power.Though most of the countries in the world are sovereign there are a few countries which are not yet sovereign but they are controlled by external sovereignty. The recent Hong Kong protests are the examples where the people have protested for a sovereign state for themselves. As we go back in the history when China lost a series of wars to Britain and ended up ceding Hong Kong for a period of 99 years. And later after the completion of 99 years Britain gave it back to China under a special agreement. Which was called ‘one country two nations’ which made Hong Kong a part of China but it also said that Hong Kong would retain a high degree of autonomy which made Hong Kong a democratic country and gave it freedom like right to vote and freedom of speech and expression. Though this agreement won’t last forever and in 2047 the agreement would terminate and Hong Kong will fully become a part of China. Without

sovereignty there is a possibility of anarchy and chaos in a state. And thus we can say that sovereignty is an important component to build a state and if it is absent a state would not be called a state. State is also a multinational foundation. It has people of different nationalities, different religion, different language and people with no common roots. They all reside together in same territory and are governed by same laws and rules by the same government and yet they might share different beliefs and no common roots. Indian state is an example of multinational state. Here people with different religion, language and nationalities live together. People here can have two nationalities. A person can be a Spanish as well as Indian national. And on the contrary, a nation cannot be multinational. Common roots, common language or common religion are some of the basic foundation of a nation that is the sole reason why a nation cannot be multinational. A state commands its people to follow the rules set by them. Amid the COVID-19 pandemic we all were not allowed to leave our houses due to the lockdown which was implemented on us and we had to adhere to it because it was a state's command.

And as mentioned in the above example of the tensions between the French government and the Muslims all over the world, the Muslims could only appeal most of them around the world to protest against the problems they faced they cannot compel or force the other Muslims to protest for them.

Different philosophers and scholars have their own definition of state. Different political thinkers have defined state from different perspective from time to time, to understand the concept of state from different perspective we need to understand some of the definitions given by different political thinkers which are as follow:

According to Bondi, state is an association of families and organisation people. He tries to explain how a particular group or organisation of people come together for a reason and they are governed by a supreme power and how there is no other power beyond the supreme power to control the citizens or the people of the state.

DR. Garner explained a state as a community of people residing in a definite and a self sufficient territory with an internal or external organised government to which the citizen have to obey habitually. According to his view a territory could be controlled by an internal or an external organisation or the government.

Whereas Woodrow Wilson defines a state as a definite or fixed territory where people are organised for law. And this means the people follow a set of rules and regulations by living in a fixed and a definite territory.

According to Later H. J. Laski a sate is a territory in which there is a society which is divided into government which claims its physical area and which is the highest authority of all the other institutions and believes in the welfare of the society.

On the other hand Aristotle explained a state as a union of families and small groups of people where people have a fulfilling and a self sufficient life, where they are happy, contended and they lead honourable life.

Here these scholars and philosophers try to explain the definition of a state through their perspective. But the major elements of a state are same in almost every definition given by different scholar or political thinker. To build a state the four major elements mentioned above which is the population, territory, government and sovereignty are the most important. And that's how we can imply that if we miss even one element out the four, the formation of a state is not possible. The meaning and the definition of a state was same for our past generation and will be the same for our future generations. A state is the foundation where its people have to abide by the law, share the territory with others, and rely upon the government for having a set of rules and regulations. The concept of a state is a very wide concept. State is a fix entity. Even if it is badly governed, with bad people and with no unity among the people, the state will be fix. What cannot be fix here is the government and the population. A government keeps on changing, the population keeps on increasing or decreasing but a sate will always be a state if the four major elements are available and the change in them does not affect that formation or the basic foundation of a state.

CONCLUSION

So by this we can conclude that a state is multinational foundation in which territory, population, government and sovereignty are the most important elements to form it. A state is a powerful entity which makes sure that it's population live in harmony and with respect. Whereas a nation is formed on the basis of a common feeling and physiological consciousness among the people to unite and integrate for a common cause. And the concept of nation is not a watertight compartment which includes territory, population, government and sovereignty and similarly the concept of a state is not a wide concept which includes commonality of various groups. We can also conclude that different philosophers with their own view point have different understanding towards what a nation is. They have different political views on different essential elements that are required to form a nation but when we talk about a state we can say that the political thinkers and philosophers have those four elements in common. By this we can conclude the how important these elements are while we think of a state and the basic foundation to form a state. Now when we talk about a state we can conclude that a

state is enforceable entity with sovereignty as its soul. Whereas if we talk about a nation, its soul is the commonality and the emotional attachment of human beings on the basis of religion, language, culture, ideology, race, ethnicity, etc. Though in my opinion, the concept of a state in the modern era should be looked in a wider sense. The major four elements that are require to form a state are not necessarily the only important elements. Today, these elements are seen with a wider scope and these elements have a wider meaning than their exact dictionary meaning. And when we talk about a nation and its concept the scope of it is beyond mere commonality of religion, culture or language but today it has become an important aspect to become a global citizen which the world want to become.

UNEMPLOYMENT CRISIS IN INDIA

- **B. SWATHI LAKSHMI**

India has a mixed economy with a more uniform society, religion, caste, and languages. Countless citizens fly between states to import and export goods and services, propelling the nation forward. From last year to now (2020-2021), the employee-employer conflict has been a difficult and unpredictable scenario. There has been a significant loss of business strategies, and the country is suffering as a result of this sudden pandemic. In these cases, the government and administration have also been powerless. Not only has India been affected by this crisis, but so has the rest of the world; the number of unemployed people has begun to rise. . It was said by ***Martin Luther King, that "A genuine leader is not a searcher for consensus, but a moulder of consensus".*** Similarly, no one could predict the outcome of this pandemic in the present situation. For more than a year, people continued to migrate from one state to another in search of work and hospitals. Workers in higher positions, such as in the management sector, have also been fired, and students preparing for board exams and competitive exams have had a history of problems.

Scale of Migration of Workers:

According to the CMIE survey, the majority of people would move to farming as a result of the unemployment crisis. When people began to lose their current jobs, they chose to return to their hometown, and when things did not go as planned, they went with the flow. The movement of jobs from urban to rural areas has increased in number as well. Catering and manufacturing are two examples of industries. Home service are facing tremendous downfall in their work.

Workplace Inequality:

According to article 14, the right to equality has been enshrined in our Indian Constitution since the time our country's freedom fighters fought for it. In addition, if 2021 comes and goes, the applicability of fair law for women and men in the workplace will continue to be a difficult issue to resolve.

Particularly in this second-wave pandemic, most women and men in the workplace are constantly challenged to reach an agreement. During the second wave of the pandemic, the

majority of women employees are fired or evicted from their jobs, while men with more work experience at retirement age are easily evicted and their salary is not paid on time.[520]

Sometimes most of the private companies need the work to be made on time from working from home and unable to pay the salary to the newly joined employees. All these were against the law as well.

Fall in Wages:

The deterioration of wages in 2021 will be increasing even more when the third wave hits the country. Daily wage workers gets affected and casual workers are being enjoying work from home. The lockdown analysis reported on 33 crore people in (2020-2021) been affected. There were 6.5% of people were unemployed during the year 2021. Usually, the scale of employment kept increasing as per the monthly analysis but, in the year 2021 due to the lockdown days, the daily wage people was under stress and kept migrating to their hometown and gets affected wholly comparing to monthly wage employees. Most of the people suffer without food and in crucial stage to pay their monthly rent especially in the cities so they decided to move to their native places to look on farming and remaining people who are in small scale shops totally shut down the job suffers every day. This pandemic is being one history to all the people of India to save the money for lifetime and educating themselves doing some certification courses helps them to evolve in working from home. The question is on the mode of continuing when will this pandemic ends. Nevertheless, the fact is nobody could analyse the variance of the virus and conclusion for it. Only solution for all the employees who is under stress with less salary or having the thought process of relieving from work or at any time they get evicted from job can do more courses on the work that is similar to it and explore on other sectors also.

Mahatma Gandhi National Rural Employment Guarantee Act, 2005.

The scheme has announced several government job portals through monthly newspaper and websites for the unemployed people to consume exams and get through government jobs permanently, also the agriculture sector is open to work aside. Ministry of labour and employment also announced platform for applying jobs regarded with agriculture, not only vacancies related to private organization and contractual jobs can also be available to update on it.

[520] https://indianexpress.com/article/opinion/columns/india-unemployment-crisis-economic-growth-covid-pandemic-7249627/

https://www.theleaflet.in/india-on-the-brink-of-unprecedented-unemployment-crisis-cmie-report/

National Rural Employment Programme:

The National Rural Employment Guarantee Act, 2005 aims to help the unemployed people especially for the daily wage employees under "Right to Work", When any bread winner of the family needs to be employed the act was been followed from 2005 under the UPA government of P.M. Dr.Manmohan Singh. This act particularly, helps the livelihood in rural areas at least 100 wages employment facility to the unskilled manual work to be done.

Corporate Sector Implementation

During this conditions prevailing in this pandemic era, companies have announced work from home availability to all the employees under their sector working for the benefits of the company. However, the suffering was also been facing wholly due to this affect globally. These unemployment crisis are in staggering numbers, while the pandemic stages are being contributed to the aggravating of the job situation, certainly in urban areas, the economy was facing severe distress as the jobs are not permanent and it is always in the catastrophic. The truth is that the economy been unable to focus on creating jobs at this lockdown stages which predates the standard of shocks on demonetisation and the add on of GST. In the current corporate sector, the companies wants to implement social distancing among the employees and they followed the work from home conditions but still, most of the employees started to face challenges in this prevailing situations. It was one tragic loss for the entire country due to fall in market and the consolidated salary not been able to contribute to the employees on time due to this crisis. Therefore, numerous employees been terminated with the compensation amount line by line on their experience levels.

In the case of ***Chairman Managing Director, Mahanadi Coalfields Ltd Vs, Sri Rabindranath Choubey, AIR 2013 SCW 6456.***

The appellant coal corporation is represented by the Chief General Manager, and the respondent is a company employee. It was discovered that there were shortages of coal worth Rs.21.65 crores due to severe corruption, resulting in a huge loss for the employer. Since reaching 60 years of age, the employee was suspended from work duty pending an investigation, and later superannuated. Later the employer held his payment of gratuity and the case came before the Delhi Supreme Court.[521]

[521] Chairman Managing Director, Mahanadi Coalfields Ltd Vs, Sri Rabindranath Choubey, AIR 2013 SCW 6456.

And the court notes that the gratuity of withdrawing payment during the pendency of an employee's disciplinary proceedings, as well as directing the recovery from gratuity of the whole amount to be charged to an employee or the recovery of gratuity to the extent of any pecuniary damage incurred to the corporation, if he has been found with wrongdoing or guilty as stated in subsection (6) of the Act. of Section 4 of the Payment of Gratuity Act 1972, or to have caused pecuniary loss to the company by misconduct or negligence, during his service".

Recent legal acts in labour law

Even though there is many legal provisions and acts has been enacted here the central government formulated latest developments regarded with the employment and labour law related codes to be discussed.

Industrial Disputes Act, 1947.

The employer is not allowed to discriminate from one employee to another in the case of any relevant country disputes, religion, or caste or there should not be any partiality for the work allotted as well in the company or industries. The provisions given in the Industrial Disputes Act, 1947 implements that (citizens of India) any employee who gets any work given to do, the need and necessities to be fulfilled.

The Factories Act 1948:

Employees employed in industries/factories are entitled to annual leave or holiday under the Factories Act of 1948. Staff in a factory are entitled to annual leave under the state-specific Small Scale Company and Establishments Act.

Conclusion:

In this pandemic circumstances, globally the crisis is being hit for two years completely. The market line also not stable and it kept laying downwards mostly. All over the economic standard is certainly low but in India, the people are suffering from extreme jobless situation and the government also trying to help the unemployment conditions. The stages of pandemic kept continuously decreasing the population of the people and most on the North India. There are few facilities available working from home and the technology has been improved and implemented everywhere for online classes for students and college institutions gaining new accomplishment through technology assessment criteria. [522]

[522] https://www.legitquest.com/case/chairman-cum-managing-director-mahanadi-coalfields-limited-v-sri-rabindranath-choubey/80FA0
https://scroll.in/article/985442/indias-economic-crisis-took-their-jobs-and-careers-and-the-recovery-hasnt-brought-them-back

Pregnant women having affected by covid struggles and the vaccination is not enough though. As it is mentioned above in the article the struggle is always there in India when it comes to unemployment. India having different classes of people all are not affordable in enjoying the sofa and washing machine at home 50% of the rural people suffer without fan at home and child abuse and harassment. All this comes to end when the men gets proper employment opportunity or in other sense he gets use of the chance. Now a days everything is available in the internet and the sources are heavy to get in but the guidelines need to be taken from some one who is literate or on job portal. It is beautifull said by our former ***president Dr.Abdul Kalam on his true words , "Love your job but don't love your company, because you may not know when your company starts loving you".***

Only the rural people has seen a steady rise during the lockdown period as farming became the last resort for those who lost their urban jobs. Most daily wage labourers who were forced to return to their places were the main reason behind a 14 million rise in farm employment. Farming is one developing stable growth in this pandemic stage and the more deforestation was happened for the past 5 years and agriculturist enjoys this time. The change will always be there for India but it takes time to clear all the dues in the growth of the economy standards.

The loss in the country is huge when compared to other country employees .India has lost tremendous daily wage employees about 2.1 crore and the monthly wage people receives half the salary and the managing level people enjoys the profit but which is only 30% of the population are in that category.

CONCERN OF DATA PROTECTION BY E-GOVERNMENT

- **OSHIN SURYAWANSHI**

The crucial matter of concern is that whether Government has taken adequate measures to protect the data collected for the Aadhaar purpose or not. Whether the Government is responsible and liable for data leakage or any other authority, is very important to determine. Chapters VI and VII of Aadhaar Act, 2016 deal with securing important data and also with the offences and penalties in case of breach of secured data. The UIDAI does implement appropriate organizational and technical security measures in case to ensure that personal information is in proper control and possession of authority and is absolutely secured against any type of use, access, or disclosure which is not permitted under Act or regulations thereunder, and against any accidental or data intentional destruction, or loss or damage.

Under Sec. 38 of the Aadhaar Act, provisions for the penalty for unauthorized access of its database like, downloading, hacking, copying, introducing any virus, extracting, or other type of computer contamination, damaging, etc. have been duly provided. The Government in Sec. 28 obliges all authorities and the private agencies appointed to have technical and organizational security measures for protection of information. Furthermore, the Government in same section prevents the authorities to revel any information collected by them.

It is also specified in Sec. 29, that none of the Biometric information that is collected under the Act, shall be subjected to sharing irrespective of any reason, or is to be utilized for any purposes other than the purpose prescribed under the Act. Many other provisions state that the Act shall assist the Government in creating enough provisions to assure the safety of data collected. But sources on the other hand blame the authorities for not maintaining the data collected for purpose it was meant to be used. Although, the Aadhaar Act, 2016 had laid down several penal provisions for some offences relating to the leakage of data, but the Act fails to deliver adequate security to information it collects which directly violates the Right to Privacy.

The Biometric copies collected by Government may construct several other problems like not matching fingerprints or non-recognition of iris scans. Such failure of technology will certainly give citizens the reasons to blame the authority because the authority is one relying completely upon it. There would always be a possibility of a false match of biometrics or no match at all. Even scientists and expects agree on this.

Over the last years, there have been multi fold instances of data leaking online even from the governmental websites. One of the case which was when an RTI application pushed the UIDAI to disclose the fact for about 210 government websites made personal details of people reveal publically on the internet with their Aadhaar. This report revealed that personal information was removed from all websites, but it also did not inform about the timings of the data leak. The issue was so excessive that even a simple google search revealed many databases along with their demographic data including their Aadhaar card numbers, their names, names of parents, mobile number, PAN number, religion, body marks, the status of rejection of applications, IFSC codes, bank account numbers, and many other sensitive information.[523]

Also, a report has been claimed by Centre for an Internet where the data of as much as 13 Crore citizens and 10 crore bank account numbers have been leaked from Aadhaar database and were openly accessible upon four portals built specifically for management of welfare schemes. The portals made it quite easy for any person to get the personal information including the bank account numbers. Such information now is within the hands of some of the private companies which is being used for purpose of telemarketing.

The reports suggested that Aadhaar details that were leaked could reach numbers to 23 crores. If other portals would be in direct connection to direct benefit transfers, the other portals used for data storing purposes. Hence, it shows how UIDAI, which is the sole authority for carrying out activities related to Aadhaar can become so irresponsible and casual with data that it goes viral easily through government portals.[524] It could be said that the data collected by Government is not safe and it can be leaked to private entities very easily and ultimately threatening the life and liberty of the citizens.

It was held by Mathew, J. that, *"the right to privacy was not absolute"* and all the makers of Constitution wanted to ensure that all the conditions that are favourable to pursuit of happiness. He spoke for himself, Krishna Iyer and Goswami, JJ, and said that the Right to Privacy to be denied only in a situation when in an event where the countervailing interest is supposed to be superior to this Right or where a compelling State interest was respectively proved. Hence, it can be referred from the above argument that *"The Government can impose the reasonable restrictions"* and where the situation arises for the interest of community.

[523] https://www.firstpost.com/tech/news-analysis/aadhaar-security-breaches-here-are-the-major-untoward-incidents-that-have-happened-with-aadhaar-and-what-was-actually-affected-4300349.html
[524] https://scroll.in/latest/836271/around-13-crore-aadhaar-numbers-easily-available-on-government-portals-says-report

The Hon'ble Supreme Court also in case ***Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi,*** mentioned that it important for Government to impose reasonable restrictions on the exercise of Right to privacy on the citizens, in view of the larger public interest. It was also stated by same court in ***MR. X v. HOSPITAL Z***, case that the Right to Privacy shall not be treated as an absolute right. In paragraph No. 26, the court provided some important guidelines mentioned below

"As one of basic Human Rights, the right to privacy is not treated as absolute and is subject to such an action as may be lawfully taken for prevention of a crime or a disorder or protection of morals or health or protection of the rights and freedom of others."

It was also mentioned by the Apex Court that statutory provisions which deal with primary aspects of the privacy would continue to be tested on grounds whether they violate an individual's fundamental right to privacy, and would not be struck down, if such thing is to be found on balancing test that public or social interest and the reasonableness of such restrictions might outweigh a particular aspect of privacy that had already been claimed. If this is so, then those statutes that enable the State to contractually obtain any information about the citizens would pass muster in its given circumstances, provided that they safeguard the citizen's privacy as well.

The Government cannot collect all data of whole nation on its own so it had delegated the right to some private entities and such collection increases the opportunity of data misuse, data loss, leakage of information of individuals which threats the Fundamental Rights of all the citizens. Also, data collected by such private entities does not allow them to share it with any third party unless allowed by the authority.

In the Case of ***M.P. Sharma & Others v. Satish Chandra & Others,*** a question had been raised that whether the state holds certain power for search seizure or not. The Apex Court stated that Rights of the citizens including the Right to Privacy must be secured in their house, persons, documents and other respective effect against any unnecessary search and seizure under the Indian Constitution and briefly concluded that in such kind of situations *"the Right to Privacy should not be compromised"*.

The Hon'ble Court in ***Justice K. S. Puttaswamy (Retd.), and Anr. v. U.O.I. and Ors,*** had stated that:

Paragraph 181: *"Data mining with an objective of assuring that all the resources are being properly provided to the eligible beneficiaries is a genuine ground for this state to enforce on collection of the authentic and genuine data. But, data that the state collects has to be used for*

those legitimate purposes of state and shall not to be utilized in an unauthorized way for illegitimate purposes".

There have been many real incidents where the data had been leaked from the Aadhaar authorities one of which was an incident that took place in Jharkhand. In April 2017, more than one million Aadhaar card numbers were leaked by Jharkhand Government Website. The officials that were involved were similarly unaware how the data collected made its way to the public domain and the glitch that took place revealed the names, addresses, Aadhaar numbers and bank account details of beneficiaries of Jharkhand's old age pension scheme. The UIDAI moved very quickly to shut down the website but still many days after Jharkhand leaks, at least five other data breaches of a similar kind had been reported.[525]

Such kinds of leakages affected citizens' trust in the safety of their personal information submitted to the authorities, and continuing leakages certainly violate citizens' fundamental rights and raise questions on the functioning of the E-government project.

[525] HT Correspondent, Right to Privacy a Fundamental Right: 7 Aadhaar controversies that raised concern, HINDUSTAN TIMES (Aug. 24, 2017, 14:58 IST), https://www.hindustantimes.com/india-news/right-to-privacy-a-fundamental-right-7-aadhaar-controversies-that-raised-concerns/story-UGTtXhgJDtaWrmyuli2LwO.html

WOMEN SAFETY - HOW CAN IT BE EFFICIENTLY ENACTED?

- **PRINCE KUMAR**

WHY WOMEN'S SAFETY?

"A girl should be two things: who and what she wants." – Coco Chanel.

In the old days, women were restricted to the four corners of the house and only did the household work and childbearing. But after globalisation, this changed dramatically. Now we see women working in every section of society from dealing with cases in top corporate businesses to driving public buses. Although their work had significant improvement in these past years, the public perception regarding them hasn't changed much, to be honest. They are still being objectified and humiliated in every sphere of work, which is such a shame considering the centuries that have passed since globalisation began. So, in order to mitigate the problems that are specific to women, we need to understand the core issues behind them and the reason as to why they occur in the first place.

CHALLENGES/HURDLES IN THE PATH

In the early days, women used to face problems pertaining to child marriage, the devadasi system, sati pratha, etc. Although I am delighted to inform you that these kinds of norms are mostly eradicated from our country, there still exist many different sorts of problems in the modern-day which women are used to facing and which need immediate recognition. Let's take a look at some of these problems.

Gender discrimination: The first and foremost problem being discrimination on the basis of the gender of a person. It is quite prevalent in our country it mostly concerns the women of the country as they are the ones who are being discriminated against in many fields of life on the basis of their gender. For example, due to the patriarchy in the mindsets of the people of our country, women are considered to be inferior when compared to men. This has led to many women quitting their jobs and letting go of many opportunities in life that could have been fruitful for them.

Violence against women: Women of our country are facing several kinds of violence every day and it has become a sort of a norm to hear such news on a daily basis. According to the crime record bureau of the Central home Ministry, a woman is getting kidnapped every 44 minutes and raped every 47 minutes[526]. We have to ask ourselves why most of the victims of these kinds of balances are women. What kind of education are we providing our country that there is such a vast difference between the treatment of men and women? Why is there a certain mentality prevalent in the country regarding how women should behave? These are questions that need deep contemplation and serious awareness in order to be able to mitigate the same. Even in this uncertain time like the COVID-19 pandemic, the domestic violence against women is all the more growing. The reporting of cases of domestic violence increased significantly during the lockdown period. This means apart from the violence and brutality is that are faced by them outside the home, even inside the homes they aren't safe.

Female Education: The percentage of women who are educated in India is still very low compared to other countries and it is extremely low in the rural areas in which the more aggravated forms of the abovementioned problems take place.

Unemployment: as mentioned earlier, women are facing brutality is in humiliation in all spheres of work and this is the reason why most of them quit and the unemployment rate of women goes very high. Even for the women who stay in their job, the path isn't very easy. The bosses in the organisations intentionally give more work to the women employees and constantly make them look inferior to their male counterparts. Again, the main factor behind the same can be linked to the perception and mentality about women in the society which inter-relates the two aspects.

Dowry System: When we are talking about the problems associated with women, we cannot forget an ancient practice still holding up its place in the modern era of the 21st century. The dowry system. It is mind-boggling to imagine that practice of that sort is still prevalent in our country after seeing such a vast development in the overall condition of the country.

[526] The International Journal of Indian Psychology, Volume 4, Issue 2, No. 89

SOLUTION

'Police' and 'Public Order' are State subjects under the Seventh Schedule to the Constitution of India. State Governments are thus responsible for safety and security of the citizens including women and girls.2 – Govt. of India[527].

The government says that the security and safety of women and children is the utmost priority for them, and the Ministry of women and child development has even initiated many of the fruitful enactments that have helped mitigate some of the problems. The fact is that there are enough laws in the country right now which, if implemented well, could possibly eradicate most of the problems that women are facing right now.

Let's have a look at some of them:

- The Equal Remuneration Act, 1976.
- The Dowry Prohibition Act, 1961.
- The Immoral Traffic (Prevention) Act, 1956.
- The Maternity Benefit Act, 1961.
- The Medical termination of Pregnancy Act, 1971.
- The Commission of Sati (Prevention) Act, 1987.
- The Prohibition of Child Marriage Act, 2006.
- The Pre-Conception & Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.
- The Sexual Harassment of Women at Work Place (Prevention, Protection and) Act, 2013.

- Contract Labour (Regulation and Abolition
- Contract Labour (Regulation and Abolition) Act, 1976
- Employees State Insurance Act, 1948
- Equal Remuneration Act, 1976
- Factories (Amendment) Act, 1948
- Maternity Benefit Act, 1961 (Amended in 1995)
- Plantation Labour Act, 19513[528]

[527] Press Information Bureau, https://pib.gov.in/Pressreleaseshare.aspx?PRID=1575574
[528] Acts, National Portal of India https://www.india.gov.in/my-government/acts

As you can see from the abovementioned points, there are several laws that cater to the specific legal rights of women and provide them a remedy against many kinds of problems while making them aware of their empowerment and security. So, the question here isn't about the enactment of a new law regarding the problems of women rather it is the proper implementation of the existing laws which would make a huge difference in the quality of life for women in our country. So, how can it be done?

ROLE OF THE GOVERNMENT

The government should specifically target these areas and ensure that the concerned legislation is implemented properly and its effect is enforced throughout the country. There is no point in having a law that is excellent on paper but never sees the light of day. There must be a significant improvement in the infrastructure related to the legislations be it physical or intellectual, in order to protect the rights of women. The government fund should be utilised in a way that provides the required funds to the fast-track courts which could, in turn, provide a one-stop crisis Centre for all the issues pertaining to women. Similarly, shelter homes must be provided with adequate infrastructure and funding in order to be able to ensure that the places are welcoming for women and cater to their needs. Police stations also have to be welcoming to women so that more and more of them register their cases and complaints. The statistics clearly show that crimes against women are under-reported severely in our country. For a democracy like India, it doesn't help us at the international platform when it comes to relationships with other developed countries. Suppressing the grievances of women only embolden is the perpetrators roaming around in the country and tarnishes the system's efficiency in the eyes of people.

India was named as the most dangerous country for women after coming fourth in the same survey seven years ago. The world's second most populous nation, with 1.3 billion people, ranked as the most dangerous on three of the topic questions – the risk of sexual violence and harassment against women, the danger women face from cultural, tribal and traditional practices, and the country where women are most in danger of human trafficking including forced labour, sex slavery and domestic servitude.[529]

Clearly, something is lacking on the part of govt. also.

[529] The World's 10 most Dangerous Countries for Women, Thomson Reuters, https://poll2018.trust.org/

EFFECTIVE POLICIES AT WORK

Corporate companies also have to play their part in making effective policies that deal with sexual harassment at the workplace. They have to formulate policies in such a manner that respects the dignity of women and allows them to register their complaint in a very easy manner without having to go through N number of personnel so that they don't walk away from many kinds of problems at the workplace. Although the new amendments to the sexual have made at workplace act has mandated most companies to establish a complaint Centre at each of their branches with women officers there, they have to ensure that those measures are actually being followed in each and every branch and check on that every few months so that over time they don't lose their effectiveness. Also, they should invest in things that encourage cultural organisational behaviour in their corporate offices where men and women can work freely without any kind of fear of harassment or pressure. The workplace should be a place where everyone is able to work comfortably and anything besides work should be done by taking prior consent of all the people involved in it. There are many cases of suicides by employees which would easily be avoided if proper mechanisms are in place and more importantly, are implemented properly. Lastly, there shouldn't be any kind of discrimination between men and women in the workplace as these kinds of things encourage the perpetrators to commit violence on women and it promotes the mentality of objectifying women in the corporate society and further degrades their integrity.

THE POSITIVES

Although there are many cases in which the government could be blamed for the lack of better than be mentation regarding the policies concerning women, there are a host of instances that the government in fact had acted according to the situation and amended various kind of laws in light of the changing circumstances of women:

The Criminal Law (Amendments), Act 2013 was enacted for effective legal deterrence against sexual offences. Further, the Criminal Law (Amendment) Act, 2018 was enacted to prescribe even more stringent penal provisions including death penalty for rape of a girl below the age

of 12 years. The Act also inter-alia mandates completion of investigation and trials within 2 months each.[530]

Our government has also taken many initiatives that pertain to the security and safety of women. Some of these are listed below:

- Nirbhaya fund- For projects relating to their security and safety of women in India. The concerned authority for the same is the Ministry of women and child development.

- ITSSO: a special online tool for the analysis and monitoring of real-time investigation in sexual assault cases. Relates to the criminal amendment law act of 2018.

- 112: emergency response support system, for computer-based aid to detect the location of distress. Started In 2018-19.

- Cybercrime portal: launched by Ministry of home affairs on 20 September 2018. Facilitates the report of obscene content by the citizens of the country. Along with this, cybercrime forensics labs have also been established in many states, and training of a large number of officers for the said purpose has also been initiated.

WAY FORWARD

Though there are many loopholes in the administration of justice in India(which in turn hinder the process on multiple occasions), I think the most important of them is govt. accountability. The govt. has to take active participation in the dealing of matters in cases pertaining to women. They can't just watch from the back and have to act also. The first and foremost step in that will be increasing the access to remedial facilities in the rural and semi urban areas.

Secondly, there has to be a dedicated institution that monitors the implementation of the various laws concerning women. Lastly, we as the aware citizens of our country, have to stand for women's rights and create a healthy environment in which the women do not hesitate to register any kind of complaint against anyone. I leave you on an open-ended note to contemplate on this matter and acquire an opinion on the same.

[530] Press Information Bureau, Govt. of India, Ministry of Home Affairs https://pib.gov.in/Pressreleaseshare.aspx?PRID=1575574

PROTECTION OF ARTISTIC FREEDOM: A LEGAL ANALYSIS

- **RUDRA CHANDRAN L**

As Oscar Wilde said , " Art is the most intense form of individualism that the world has known." Art is an expression of our thoughts, emotions, intuitions, and desires, but it is even more personal than that: it's about sharing the way we experience the world, which for many is an extension of personality. It is the communication of intimate concepts that cannot be faithfully portrayed by words alone. And because words alone are not enough.

There is a huge connect between art and freedom where art has an abiding connect with society, "Art has a social purpose and art belongs to the people. It's not something that is hanging out there that has no connection with the needs of man. And art is unashamedly, unembarrassingly, if there is such a word, social. It is political; it is economic. The total life of man is reflected in his art."[531] Albert Camus in his essays titled "Resistance, Rebellion and Death" makes a profound statement of the connection between art and freedom: "Art, by virtue of that free essence I have tried to define, unites whereas tyranny separates. It is not surprising, therefore, that art should be the enemy marked out by every form of oppression. It is not surprising that artists and intellectuals should have been the first victims of modern tyrannies… Tyrants know there is in the work of art an emancipatory force, which is mysterious only to those who do not revere it. Every great work makes the human face more admirable and richer, and this is its whole secret. And thousands of concentration camps and barred cells are not enough to hide this staggering testimony of dignity. This is why it is not true that culture can be, even temporarily, suspended in order to make way for a new culture… There is no culture without legacy… Whatever the works of the future may be, they will bear the same secret, made up of courage and freedom, nourished by the daring of thousands of artists of all times and all nations."[532]. In order to understand Artistic freedom first we have to understand that man among men who finds the exigencies which is common to all men who had willed freedom within himself and universally and he who tried to conquer it who is the Artist.

531. FRED L. STANDLEY & LOUIS H. PRATT ,CONVERSATIONS WITH JAMES BALDWIN,(University Press of Mississippi ed. 1989)
532. ALBERT CAMUS & O'BRIEN, RESISTANCE, REBELLION, AND DEATH,(1960).
533. SIMONE DE BEAUVOIR, THE ETHICS OF AMBIGUITY (Bernard Frechtman Trans., 1947)

ARTIST

While dealing with who is an artist. Mere dictionary meaning of the word 'artist' mean someone who makes art. Merriam-Webster dictionary defines artist as someone skilled or versed in fine arts or one who practises or profess an imaginative art or one who skilled in one of the fine arts or a skilled performer[533]. But the legal definition of artist appears. differently according to different fields of law. The definition of artist is different according to difference of scope of different fields of law. Even though artist has not be defined in many conventions and laws, rights and legal protections given to them are mentioned in them.

The Berne Convention for the protection of Literary and Artistic Works points out the eligibility for Protection of artists, not only their literary rights are protected by this Convention but also their moral rights. It defines what all are included in protected works, "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science"[534]. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work[535]. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.[536]The Convention says that the author is the beneficiary and he has the exclusive right with respect to the abovementioned works[537]. In the above mentioned cases, the author can be rightly termed as the artist. In this Convention it provides protection to authors who are nationals of the one of the countries of the union for

534.https://www.merriam-webster.com/dictionary/artist, accessed on 08/04/2019
535.Article 2(1) of Berne Convention for the Protection of Literary and Artistic Works, 1971,
536.Article 2(3) of Berne Convention for the Protection of Literary and Artistic Works,1971
537.Article 2(5) of Berne Convention for the Protection of Literary and Artistic Works,1971

their works or in case their works are first published in one of the countries of the union. On the above mentioned articles in becomes clear that through the protection of the literary and artistic works they are giving protection to artists. So an artist can be defined as the author or publisher of any of literary or artistic work as mentioned in Article 2(1) of Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979.

In India The Copyright Act, 1957 says about the rights of an artist. It also defines who is an artist with respect to a copyright that is to be protected

. Section 2(d) of the Copyright act says "author" in this Act means, — (i) in relation to a literary or dramatic work, the author of the work; (ii) in relation to a musical work, the composer; (iii) in relation to an artistic work other than a photograph, the artist; (iv) in relation to a photograph, the person taking the photograph; (v) in relation to a cinematograph film or sound recording, the producer; and (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created. In this case an artist can be defined as that defined in Section 2(d).

Simone De Beauvoir tells us how every artist, situated in the present uses her connect with reality to transcend social existence: "In order for the artist to have a world to express he must first be situated in this world, oppressed or oppressing, resigned or rebellious, a man among men. But at the heart of his existence he finds the exigencies which is common to all men; he must first will freedom within himself and universally; he must try to conquer it: in the light of this project situations are graded and reasons for acting are made manifest."[538]

ARTISTIC FREEDOM

In India artistic freedom is read into right to freedom of speech and expression which is guaranteed to every citizen under Article 19 (1)(a) of the Indian Constitution subject to reasonable restrictions under Article 19(2). The right to freedom of expression is recognised under Article 19 of the Universal declaration of Human Rights and is recognised under international human rights law in the International Covenant on Civil and Political Rights. Article 19 of this states that 'everyone shall have the right to hold opinions without interference and everyone shall have the right to freedom of expression, this right shall include freedom to

538. SIMONE DE BEAUVOIR, THE ETHICS OF AMBIGUITY (Bernard Frechtman Trans., 1947)

seek, receive and impart information and ideas of all kinds regardless o frontiers either orally, in writing or in print, in the form of art or through any other media of choice.'[539]

Commitment to free speech involves protecting speech that is palatable as well as speech that we do not want to hear. A declaration which is said to have been given by Voltaire: "I despise what you say but will defend to the death your right to say it" encapsulates the essence of the protection of free speech. Protection of the freedom of speech is founded on the belief that speech is worth defending even when certain individuals may not agree with or even despise what is being spoken[540]

John Stuart Mill in his classical book 'On Liberty' argued that The transformation of society from aristocratic to increasingly democratic forms of organization brought with it opportunities, then. But it also presented dangers. It meant rule by a social mass which was more powerful, uniform, and omnipresent than the sovereigns of previous eras. The dominance of the majority, Mill held, presented new threats of tyranny over the individual freedom was no less at risk from a newly empowered many, than from an absolute monarch. The restrictions over freedom that concerned Mill included, to be sure, legislatively enacted restrictions of liberty but they also took in broader "compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion"[541]Moreover he believed that informal mechanisms on social pressure and expectation could, in mass democratic societies be all controlling. Mill worried that the exercise of such powers would lead to stifling conformism in thought, character and action[542].

"Mill defends the view that extensive freedom of speech is a precondition not just for individual happiness, but for a flourishing society. Without free expression, humankind may be robbed of ideas that would otherwise have contributed to its development. Preserving freedom of speech maximizes the chance of truth emerging from its collision with error and half truth. It also reinvigorates the beliefs of those who would otherwise be at risk of holding views as dead dogma."[543]

539. Article 19 of the Universal Declaration of Human Rights,1948.
540. NIGEL WARBURTON, FREE SPEECH: A VERY SHORT INTRODUCTION 2 (Oxford University Press ed. 2009)
541. JOHN STUART MILL, First published in August, 2016 accessed at https://plato.stanford.edu/entries/mill/ on 15/04/2019
542. Ibid.
543. FREEDOM OF SPEECH, Stanford Encyclopaedia of Philosophy, available at https://plato.stanford.edu/entries/freedomspeech/#HarPriFreSpe

INTERNATIONAL SAFEGUARDS FOR FREEDOM OF EXPRESSION AND ARTISTIC FREEDOM

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

It was Rousseau who first said there should be an association where man will be uniting with all and he may still obey himself alone and remain as free as before. Later after the Second World War, the international community decided to draw a charter addressing human rights. The drafting of such a charter was entrusted to a committee chaired by Eleanor Roosevelt and composed of members from 18 countries. The Charter was drafted by Canadian John Peters Humphrey, and then revised by Frenchman René Cassin. The Universal Declaration of Human Rights was adopted by the third General Assembly of the United Nations on 10 December 1948 in Paris. Moreover it gave a voice to the human rights which can be defined as the basic rights inalienable to the dignity of human beings.

Article 19 of the Universal Declaration of Human rights, 1948 protects freedom of opinion and expression. It says

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"[544]

According to this ,since every human being has a right to freedom of expression, artistic freedom is implicit in UDHR. Therefore right of an artist to express oneself is a basic human right which cannot be alienated from him.

The International Bill of Human Rights—comprised of a resolution adopted by the United Nations General Assembly, and two international covenants: the UDHR; the International Covenant on Civil and Political Rights; and the International Covenant of Economic, Social and Cultural Rights

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR was adopted and opened for signature in 1966, then entered into force on March 23, 1976. State parties to ICCPR recognises the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[545]. The Preamble recognises that "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions

544. Article 19, Universal Declaration of Human Rights, 1948.
545. Preamble, International Covenant on Civil and Political Rights, 1966

are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights"[546]

Article 19 of the ICCPR deals with freedom of expression. It says that

"1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals"[547]

Here we can see that Article 19 of ICCPR is similar to Article 19 of the UDHR except for the restrictions that can be placed by the state. Here it was said that right to freedom of expression subject to certain restrictions.

INTERNATIONAL COVENANAT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS, 1966(ICESCR)

The Preamble of the Covenant recognises, inter alia, that economic, social and cultural rights derive from the "inherent dignity of the human person" and that "the ideal of free human beings enjoying freedom of fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights."[548] Furthermore, the overarching principles of the Covenant are: (1) equality and non-discrimination in regard to the enjoyment of all the rights set forth in the treaty; and (2) States parties have an obligation to respect, protect and fulfil economic, social and cultural rights. Article 15 of the Covenant recognises the right of everyone ,

"(a) To take part in cultural life;(b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"[549].

546. Ibid.
547. Article 19. International Covenant on Civil and Political Rights, 1966
548. Preamble, International Covenant on Economic, Social and Cultural Rights, 1966
549. Article 15, International Covenant on Economic, Social and Cultural Rights, 1966

Therefore it recognises the right of an authors to benefit from their interest resulting from any of their scientific, literary or artistic production. This covenant provides for the rights of an artist with respect to their artistic production. Moreover this Article says, "The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."[550] This Article places an obligation on the state parties to respect a freedom granted to authors to make use of their creative activity

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, 1965 (ICERD)

The ICERD is a treaty, adopted in 1965 by the United Nations General Assembly. The Preamble says about the objectives of this conventions. Parties to the ICERD 'condemn racial discrimination' and commit 'to the elimination of racial discrimination in all its forms.' It affirms to remove speedily all forms of racial discrimination throughout the world in all its forms and manifestations. It proclaim that parties to the ICERD believe theories of superiority based on racial difference are 'scientifically false, morally condemnable, socially unjust and dangerous.'[551]

Under Article 5 of the ICERD, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, in enjoyment of the right to freedom of opinion and expression.[552]As per this convention everyone without distinction of race, colour, nation etc.. are entitled to a freedom of opinion and expression , moreover state parties has an obligation to provide freedom to their citizens. This convention provides that no matter who the artist is he is entitled to get protection and freedom of thought and expression.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979 (CEDAW)

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly which is described as an international bill of rights for women.

550. Ibid
551. Preamble, International Convention on the Elimination of Racial Discrimination, 1965
552. Article 5 (d)(viii) , International Convention on the Elimination of Racial Discrimination, 1965

In its preamble, the Convention explicitly acknowledges that "extensive discrimination against women continues to exist", and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity". The Convention gives positive affirmation to the principle of equality by requiring States parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"[553] This convention calls for providing fundamental freedoms to women which involve freedom of opinion and expression. It provides that all women artists are entitled to their fundamental freedoms

ICCPR GENERAL COMMENT NO. 10: FREEDOM OF EXPRESSION—1983

General Comment No. 10 is a note from the OHCHR regarding the implementation of the rights recognized by Article 19 (Freedom of Expression) of the ICCPR[554]. Under ICCPR, it call for reports from State parties on the basis of the report, high commissioner identified that *"Many State reports confine themselves to mentioning that freedom of expression guaranteed under the Constitution or the law. However, in order to know the precise regime of freedom of expression in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right*."[555]

It says that right to restrictions of freedom of expression should not be in jeopardy of the right itself.

REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION—2

In 1999, the United Nations Commission on Human Rights issued resolution 1999/36, directing the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, to present a report on the Promotion and Protection of the

553. Aricle 3, The Convention on the Elimination of all Forms of Discrimination Against Women, 1979
554. U.N. Office of the High Comm'r for Human Rights, General Comment No. 10: Freedom of Expression (art. 19), U.N. Doc. 29/06/1983 (1983) [hereinafter General Comment No. 10].
555. Para 3 , ICCPR GENERAL COMMENT NO. 10: FREEDOM OF EXPRESSION—1983

Right to Freedom of Opinion and Expression.The report presented information on the Special Rapporteur's activities in assessing the promotion and protection of, among other things, the freedom of expression. The Special Rapporteur visited numerous countries (while requesting to visit several more) in collecting these findings.

In the executive summary, the Special Rapporteur noted "the right to freedom of opinion and expression is violated regularly in States with widely different political and institutional frameworks," and encouraged Governments to ratify the ICCPR, and amend laws that "may be used to infringe article 19 of the Universal Declaration of Human Rights." Mr. Husain also noted issues related to States' suppression or infringement of the freedom of expression on the internet and based upon gender. While these generalities may be sobering enough, the Special Rapporteur reported five concerning categorical trends of governments infringing upon freedom of expression: negatively characterizing expression as treasonous, legal action or prosecution, repressive measures against the press, harm to media personnel, and actions against academic freedom.In this report, the Special Rapporteur also included a catchall section that discussed other additional concerns. The Special Rapporteur added that part of the right to freedom of expression consists of the right for the people obtain "information that is rightly theirs" and "decisions of Governments, and the implementation of policies by public institutions, have a direct and often immediate impact on their lives and may not be undertaken without their informed consent."[556]

BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 1971

It points out the eligibility for Protection of artists, not only their literary rights are protected by this Convention but also their moral rights too. It defines what all are included in protected works. It defines literary and artistic works.

"The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing,

556. Alan Wehbé, *Increasing International Legal Protections for Freedom of Expression*, Article 5 accessible at Notre Dame Journal of International & Comparative Law:https://scholarship.law.nd.edu/ndjicl/vol8/iss2/ 5

painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science"[557].

Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work [558]. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections[559]. The Convention says that the author is the beneficiary and he has the exclusive right with respect to the on those works. Though Berne Convention speaks more about the rights of an artist like publishing rights, it also acknowledges the freedom of artists.

NATIONAL SAFEGUARDS

THE CONSTITUTION OF INDIA, 1950

Artistic freedom is protected under Article 19(1(a)) of the Indian Constitution. Article 19(1)(a) of the Constitution of India guarantees to all its citizens the right to freedom of speech and expression[560]. The law states that, "all citizens shall have the right to freedom of speech and expression". Under Article 19(2) "reasonable restrictions can be imposed on the exercise of this right for certain purposes. It is a fundamental right guaranteed to every citizen[561].

Freedom of speech and expression includes right to propagate or publicise views about events or oneself and it includes within its ambit , freedom of artistic expression, freedom of press even through electronic media. Thus right to communicate is the essence of freedom of speech and expression where right to communication is built out of specific rights like right to be

557. Article 2(1) of Berne Convention for the Protection of Literary and Artistic Works, 1971

558. Article 2(3) of Berne Convention for the Protection of Literary and Artistic Works, 1971

559. Article 2(5) of Berne Convention for the Protection of Literary and Artistic Works, 1971

560. Article 19, Constitution of India, 1950 "Protection of certain rights regarding freedom of speech etc (1) All citizens shall have the right(a) to freedom of speech and expression

561. Article 19(2), The Constitution of India, 1950 "Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence"

informed, right to inform, right to privacy and right to participate in in public communicative system[562].

Freedom of speech and expression has been accepted as a basic natural right which a human being acquires on birth[563]. In the case of Devidas Ramachandra Tuljapurkar v. State of Maharashtra[564], court said that there should not be a narrow or condensed interpretation of freedom of speech and expression and Article 19(1)(a) has to be interpreted in a manner by which the fundamental right to freedom of speech and expression is nourished. The words 'freedom of speech and expression has to be interpreted in association with "liberty of thought, expression, belief , faith and worship" which is a part of Preamble of the Constitution. This case explains how all Expression be defined, it can either be a work of Art, a drama, a poem, a writer or any works where thoughts are feely expressed,

"poetic license means the poet is free to depart from reality, fly away from grammar and walk in glory by not following the systematic metres, coin words at his own will, use archaic words to convey thoughts or attribute meanings , hide ideas beyond myths which can be absolutely unrealistic, totally pave a path where neither rhyme nor rhythm prevail, can put serious ideas in satires, ifferisms, notorious repartees, take aid of analogies, metaphors, similes… and one can do nothing except writing a critical appreciation in his own manner and according to his own understanding".

Similarly in the recent case of 'Meesha', Court held that a writer possess a freedom to express his views and imagination as well as readers has the right to enjoy, perceive and imagine from their viewpoint[565].

Court has repeatedly interpreted that Freedom of speech and expression include the right of artistic freedom. Here Constitution of India acts a s a safeguard for artistic freedom.

THE COPYRIGHT ACT, 1957

It is a form of intellectual form of law which gives protection to expression of ideas which includes artistic works. . Section 2(d) of the Copyright act says "author" in this Act means, — *in relation to a literary or dramatic work, the author of the work; (ii) in relation to a musical work, the composer; (iii) in relation to an artistic work other than a photograph, the artist; (iv) in relation to a photograph, the person taking the photograph; (v) in relation to a*

562. Indian Express Newspapers v. Union of India, AIR 1986 SC 515.
563. Anand Patwardhan v. Union of India (1997) 1 Bom CR 90
564. (2015) 6 SCC 1.
565. (2018) 9 SCC 725.

cinematograph film or sound recording, the producer; and (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created[566]

It is a bundle of exclusive rights which is available with respect to a dramatic work, literary, dramatic work or musical work etc[567]. Copyright means the exclusive right available to those persons who has the right which includes the right to reproduction, right to publish, etc..[568]. the copyright provides that who shall be the owner of the work[569] and how rights are available to him

CONCLUSION

These are main national and international safeguards with respect to artistic freedom . Since artistic freedom is a manifestation of freedom of expression, the above safeguards are available to it.

Freedom of expression is one of the most cherished values of a society. As we have discussed above through various theories and conventions, we are expanding our knowledge and understanding of the concept of liberty. What Mill has said is that freedom of expression acts as a protection against prevailing opinions. He called out for opening of these opinions and he made a statement that if the true opinion is not debated , there is no meaning for the opinion itself. But according to Scanlon, freedom of speech and expression has an intrinsic value and for a person to be autonomous, there must be ability to express oneself. He is his theories point out when the restrictions can be placed on the freedom of expression. While Raz says that freedom of expression is essential as it is needed for public good. He says that through freedom of expression, person is not only expressing oneself but acts as a mirror to life of others. Moreover he considers censorship as an insult of authorities to their people. Whereas Sorabjee says that there should be a rightful balance between freedom of expression and the restrictions placed upon it. And as we analysed various national and international safeguards, it shows the importance of this freedom which exists as a natural right inalienable to man The Constitution of India expressly sates about freedom of expression and the restrictions placed upon it.

566. Section 2(d), the Copyright Act, 1950
567. Section 13, Copyright act, 1950 "(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-(a). original literary; dramatic, musical and artistic works;(b) cinematograph films; and(c) records
568. Section 14, Copyright Act, 1950 "
569. Section 17, The Copyright Act, 1950

Moreover the freedom of expression is a fundamental right which can only restricted on reasonable ground

FAST TRACK PROCEDURE IN ARBITRAL PROCEEDINGS: A NEW TREND

- SHUBHAM MAHESHWARI & NAVNIDHI SHARMA

ABSTRACT

By 1980s expediting arbitration methods was began to use and become quite common for resolving international commercial disputes as speed and cost effectiveness of old practices of arbitration began to questioned and due to this initially it leads to mostly increased in mimicry of court procedure and finally fastback commercial arbitration is said to be a good and more efficient replacement for litigation. Fast track arbitration or Expedited Arbitration is done in very professional manner and hence this sort of arbitration is very well accepted, promoted and supported by both the parties, tribunals which provides necessary framework for the proceedings. And due to its increasing popularity day by day UNCIRTAL Rules for Arbitration was revised in the year 2006 with various other national laws related to arbitration. This paper main aim is to highlight the history and evolution of FastTrack arbitration, its Global scenario. It deeply discusses various Indian laws related to FastTrack Arbitration. It also discusses various issues and disadvantages regarding this sort of procedure and lastly this paper discusses some recommendations and suggestions to carry out FastTrack arbitration more smoothly and effectively.

KEYWORDS: Arbitration and Conciliation (Amendment) Act, 2015, Fast track arbitration, 246th Law Commission Report

INTRODUCTION

Arbitration is envisioned to be dynamic method for dispute resolution to cope up with the demands of globe. India has also taken various measures for being able to cope up the demands of both domestic as well as international level by changing its mode of dispute resolution and Arbitration and Conciliation Act, 1996 (hereinafter "the Act"). The arbitration becomes the popular choice for commercial disputes. However, due to high cost and lack of trained arbitrators this become adversarial effects in the growth of arbitration. To curb these problems there are two failed attempts which were unsuccessful, in 2001 and 2010. The authorities then further amended the Act to curb the above said problems and also to bring the Act with international standards another amendment which was introduced in 2015.

The evolution in the arbitration to a great extent makes one very cautious in sudden changes. This reduces the difficulty in the long time and increases the efficiency ion resolving the disputes which were earlier taking a long time.[570] Numerous ideas before the fast track arbitration has been suggested but there is no effective solution.[571] However, with the fast track evolution in last few decades which in nature can be consider as revolution and drastic changes has been occurring since then in the field of arbitration law.[572]

The Law Commission Report in 2001 and 2010 tries to amend the Act but it was failed and later on, the Arbitration and Conciliation (Amendment) 2015 was passed. This was amended due to the 246th Law Commission Report[573] and Fast Track Proceedings (FTP) in arbitration was introduced. The earlier 2 attempts was not able to pass but with modification in the arbitral award, curtailing the power of Court and new concept of FTP, it was accepted. This is consider as a robust step for regaining the lost confidence in both investor and firms. This will accelerate the arbitration process to great extent which is not possible before the amendment. This is the idea of International Chamber of Commerce and inserted in the Article 30. The concept of fast track proceeding in arbitration refers to the finish the proceeding within 6 months with the only concept of written pleadings in the matter.

The arbitration proceeding is time consuming due to various reasons such as, party deliberately with mala fide intention delaying the procedure or refusing to pay regular fees to arbitrator. With these type of situation, the arbitration is not able to fully show its potential. Expedited Arbitration or Fast Track Arbitration (FTA) is an efficient and effective method with time bound result, thus the delay in arbitration is not possible for any reason. It is a system in which Sole Arbitrator Tribunal is established by consent of parties and with time bound procedures to accelerate the proceeding of dispute resolution.

FTA combines many of these methods in order to achieve advanced speed and economy. Speed and economy are expected to arise from the parties' elimination and limitation of some of the procedural steps, by comparison to regular arbitration where all procedural steps are normally permitted.[574] In FTA parties insert time limits or procedural limitations for the

[570] Paul Friedland and Stavros Brekoulakis, *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process London,* U. O. L. S. O. I. A. & WHITE & CASE LLP 4, 1-50 (2012)

[571] Michael Davison and Lucja Nowak, *How Can it Deliver on its Promise? in Arbitration*, 75 INT'L ARB. 163, 163-168 (2009)

[572] Arthur W. Rovine, 1995, *Fast-track arbitration - an ICC breakthrough, Arbitration*, 61 INT'L ARB. REP. 3, 3-5 (1992)

[573] Sarosh Zaiwalla, *Putting arbitration on fast track,* BUSINESS STANDARD (Mar. 11, 2021, 20:00 AM), https://www.business-standard.com/article/opinion/putting-arbitration-on-fast-track-115110100753_1.html

[574]Nicolas Ulmer, *The cost conundrum*, 26 ARB. INT'L 223, 221-250 (2010)

conduct of arbitration, for example limited document production, a one-day hearing rather than a full hearing, and short deadlines between procedural steps.

With the recent trend of fast track arbitration with aim of reducing the cost and timely result, which was considered difficult in the regular arbitration. Fast track proceeding in arbitration is much stricter as compare to the regular arbitration as it does not allow any scope in extension of time which is more cost effective as it reduces the time, and with strict rules in procedure. The time limit is stricter in fast track arbitration which is 6 months, than in regular arbitration which is usually 12 months but can be increased.[575]

This paper highlights the evolutionary aspect of arbitration and also the fast track arbitration. This paper also talks the brief history which made the fast track arbitration possible both at the global as well as in the Indian level. This paper also outline the comparison between fast track arbitration and ordinary arbitration process with the pros and cons of the fast track arbitration. This also include the scope and characteristics of the fast track arbitration. Finally, this paper will talk about the advantages of fast track proceeding over ordinary arbitral proceeding and potential downsides including legal limitations in the application of fast track proceeding in arbitration.

HISTORY OF FTA

The term FTA was coined in late-half of 20th century, when the arbitration proceeding was criticised due to duration to solve international transactions. While facing such criticism, major institution searched for solution and a new concept arise namely Fast Track Arbitration. The International Court of Arbitration successfully solved various cases in beginning of 1990s within the time frame.

In India, the Arbitration is created from the Bengal Regulations in 1772, and thus the Arbitration Act, 1940 was formed. In case of "**M/S. Guru Nanak Foundation v. M/S. Rattan Singh & Sons"**[576] Supreme Court observed that "*Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940.*" But the unexpected situation arose such as the proceeding are conducted and challenge in the Courts making it a legal trap at every stage.

[575] EMMANUEL GAILLARD AND JOHN SAUVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 681 (Kluwer Law International 1999)

[576] M/S. Guru Nanak Foundation v. M/S. Rattan Singh & Sons, A.I.R. 1981 SC 2075 at 2076.

The Government in late 1980s realized the reforms are necessary for Arbitration law in India. The Supreme Court in **Food Corporation of India v. Joginderpal Mohinderpal**[577] observed that **"***We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence not only by doing justice between the parties, but by creating sense that justice appears to have been done.***"** Thus amending the earlier Arbitration Act, 1940 to The Arbitration and Conciliation Act, 1996.

The latest amendment was made in 2015 for adding new features in the Act such as curtailing the power of Court for giving more autonomy and flexibility to the Arbitration Tribunal, new concept such as Fats Track Arbitration to solve the case within a fixed time limit and time limit for arbitral awards.

GLOBAL SCENARIO

The rules for FTA procedure was added by the International Chamber of Commerce ("ICC") under Article 30. It was also included under the Appendix VI of the 2017 ICC Rules. According to the rules, if the amount of dispute is USD 2 Million or less than automatically the FTA will apply and if the amount is higher with the mutual consent of parties, parties can opt for FTA.

Important Expedited Procedure Rules are as follows:

1. A sole arbitrator has to be appointed {Article 2(1)}
2. The parties cannot make new claims consultation with Arbitral Tribunal {Article 3(2)}
3. Sole Arbitrator has the highest authority in determining written submission and witness evidence {Article 3(4)}
4. Sole arbitrator can make decision only on the basis of document without witnesses evidence or expert consultation {Article 3(5)}
5. Sole arbitrator within the six months has to make an award from date of referral to arbitration {Article 4(1)}

The other Arbitration Institution has their codified rules for FTA and parties are free to choose any institution as per their favorability for resolution of disputes as they deem fit.

FEATURES OF FTA

[577] Food Corporation of India v. Joginderpal Mohinderpal, AIR 1989 SC 1263 at p.1267.

1. Both arbitrator and parties has to abide by the strict time limits for accelerating the proceeding to resolving the disputes in shortest time possible.
2. As per Section 15 of the Act, the Court can reduce the fees of Arbitrator upto 5% as punishment for not able to resolve the dispute within the time limit without any substantial cause for such delay cause.
3. The court has power to extend the time period of dispute resolution with substantial reasons given by the arbitrator.
4. The arbitrator can follow any procedure and is not bound by the procedures to be followed in ordinary arbitral proceeding or by any other courts.
5. There is no requirement of oral proceeding and only relied on written submissions.
6. There is only a sole arbitrator to which parties submit their written submissions
7. This method help in reduce the cost, save the time by increasing speed without having any infringement of law.

DIFFERENCE BETWEEN FTA AND NORMAL ARBITRATION PROCEEDING

1. In FTA only one arbitrator for Arbitration Tribunal is required under Section 29B of the Act. where as in an ordinary arbitral proceeding there is need for 3 member Arbitral Tribunal under Section 11(3) of the Act
2. "In FTA the arbitral award has to be made within 6 months from date the arbitral tribunal enters upon the reference under Section 29B(4) of the Act where as in an ordinary arbitral proceeding, the arbitral award has to be made within 12 months from date the arbitral tribunal enters upon the reference under Section 29A(1) of the Act"
3. In FTA, the manner and amount of fees payable to the arbitrator is to be agreed by both arbitrator and parties under Section 29B(6)of the Act where as in ordinary arbitral proceeding, the manner and amount of fees payable to the arbitrator is determined by the High Court as per 4th Schedule of the Act.
4. In FTA, only written submission is relied upon without any oral proceeding under Section 29B of the Act where as in ordinary arbitral proceeding, the oral proceeding is relied upon as well as the written submissions and documents.[578]

[578] Anubhav Pandey, *All you need to know about Fast Track Arbitration Proceedings*, IPLEADERS (Mar. 12, 2021, 11:00 AM), https://blog.ipleaders.in/fast-track-arbitrtaion/#:~:text=In%20India%2C%20the%20concept%20of,written%20pleadings%20suffice%20the%20matter.

INDIAN LAWS ON FTA

1. 246th Law Commission Report

The Law Commission in 2010 is made for proposing the required amendment for the Act after conducting a proper study. After the careful study, the expert committee is to be established and made suggestion accordingly. The major focus of the study is to create the balance in the judicial intervention in arbitration proceeding, a new cost effective method for disputes with user friendly method.

Another major issues highlighted in the report is in relation with arbitral award as the procedures for arbitral award is the imitation of the Court proceedings. The new method was suggested in the report is introduce as Fast Track Arbitration which would enable the arbitrator to pass an award within a limited period of time. Furthermore, it would reduce the unnecessary procedures for providing arbitral award by following court procedures.

2. Arbitration and Conciliation (Amendment) Act, 2015

The introduction of expedited process of arbitration or FTA is recommended by the 246th Law Commission Report which was enacted through Arbitration & Conciliation (Amendment) Act, 2015 ("Amendment Act, 2015"). The newly inserted Section 29A and 29B which specifies the time limit of arbitral reward and procedure for FTA respectively.

Fast Track Procedure under Section 29B[579]

The application for FTA was made through an "opt-in approach", where parties by mutual consent in writing apply for FTA for dispute resolution before the appointment of Arbitration Tribunal. The parties can only adopt FTA by mutual consent and even the court cannot impose the FTA upon parties. The sole arbitrator is appointed by parties for their dispute resolution. The manner and amount payable is agreed by both the arbitrator and parties.

Procedure to be followed in FTA

The dispute is decided from the written submission and documents filed by the parties. The call is made if further clarification is required from the parties. The oral hearing can be

[579] Arbitration and Conciliation (Amendment) Act, 2015, § 29B, No. 3, Acts of Parliament, 2016 (India)

requested by the parties for further clarification on specific issues. Oral hearing can only be held when an Arbitration Tribunal deems it necessary or party himself request it. The Arbitration Tribunal may adopt any procedure as it deem fit for the expeditious disposal of the matter. The arbitral award is to be made within 6 months from date of reference. The time limit is provided under Section 29A (3) to (9) for passing of Arbitral Award. The parties can consent for the period to extend upto 6 months but not more than that for arbitral award. The approval from the Court is required for any additional time is required. If the Court does not find any reasonable explanation for the delay, then it can reduce upto 5% as a punishment for delay. The Court has also to substitute the arbitrator for delay and the arbitration will continue from the stage already reached earlier.[580]

3. Judicial Pronouncements

There are not many cases challenged before the Court due to the new concept of FTA. Few major cases are as follows:

In "**Hamara Pump Mithoura HPCL Petrol Pump v. Chairman-Cum-Managing Director Hindustan Petroleum and Ors."**[581] an application is made by the party for the arbitrator to adopt direction of FTA. The High Court disposed of the prayer for FTA and said that

"*…since there is neither an agreement between the parties for fast tracking the arbitral proceedings nor has the Court reached the stage of constituting an Arbitral Tribunal. As would be evident from a bare perusal of Section 29-B, the prayer to fast track has to be made by parties at any stage either before or at the time of constitution of the Arbitral Tribunal. This application has to be made in writing and is principally consensual. Before this Court, there is no consensus to fast track the proceedings before the Arbitral Tribunal. In view thereof, the prayer to fast track cannot be granted by the Court in the absence of any consent having been expressed in this respect by the contesting parties*."

The decision given by the Allahabad High Court is on the basis that there must consensus between both the parties for FTA. If there is absence of mutual consent for FTA, court cannot direct the arbitrator to opt for FTA.

[580] Chambers, *Fast Track Arbitration In India*, AMLEGALS (Mar. 12, 01:00 AM), https://amlegals.com/fast-track-arbitration-in-india/

[581] Hamara Pump Mithoura HPCL Petrol Pump v. Chairman-Cum-Managing Director Hindustan Petroleum and Ors., 2018 (1) ADJ 363

In another case of "**Crayons Advertising Private Limited v. Bharat Sanchar Nigam Limited",**[582] the parties adopt for FTA with mutual consent under Section 29B. But the Arbitration Tribunal failed to give an arbitral award within 6 months. The extension of time is not consented by the Petitioner for Arbitral Award. The High court said that

"Thus, I may only say since the period for pronouncing the award has expired lately on 30.11.2017 and not being extended with the consent of both the parties, the mandate of Mr. Rakesh Kumar stood terminated. The plea raised by the respondent viz the invocation being under the old Act- Section 29 (A) would not be applicable is frivolous in view of clause 12.2 of the Agreement…"

The decision given by High Court is on the basis that without the consent of both parties the extension period for Arbitral award cannot be made.

ISSUES

The first issues is in regarding with payment of fees as the High Court decide the payment of cost as per 4th Schedule under Section 11(14) of the Act and in FTA both parties and arbitrator determine the amount payable and manner of fees under Section 29B (6) of the Act. Thus, it can lead to the discrepancy between payments of fees payable as the Act has not provided maximum amount payable as fees.

The second issue is in regard to the consent of parties for FTA as without the consensus of both parties the FTA is not allowed and sole arbitrator cannot be appointed. As the uncooperative party would try to extend and delay the process for arbitral award.

The third issue is appointment of sole arbitrator as by appointing the sole arbitrator he will single handedly provide the arbitral award, thus can be disadvantageous for either parties. If the arbitrator lacks the expertise in that particular field or required an assistance for resolving the disputes

ANALYSIS

The concept of FTA as per above discussion leads to resolving disputes in international commercial contracts is a poor substitute for ordinary arbitration. Fast-track arbitration suffers several drawbacks in relation to the enforcement of arbitral awards.

[582] Crayons Advertising Private Limited v. Bharat Sanchar Nigam Limited, 2018 (2) ArbLR 252 (Delhi)

In dispute resolution procedure, the party can overcome the drawbacks by drafting FTA clause or through the institutional FTA. The disputes has been referred through FTA rules via institutional FTA which allow to choose the Arbitral Institution thus acting as an alternative to ordinary arbitral proceeding. FTA can resolve single as well as complicated disputes in less time and minimize the cost.

This option is more efficient which saves the parties cost and time which gives more time for the complex disputes to Arbitral Tribunal. The involvement of court is only at the request of the parties which can only decide the particular matter not the whole arbitral [proceeding and thus save cost and time and also give legal side of view to the parties without affecting the speed of FTA. FTA plays an important role in recognizing the autonomy which is required in arbitration to determine the witness, whole process to be followed or to decide for hearing.[583]

In recent years, the international arbitration is being costly and time consuming.[584] While some has suggested that this reputation is unfounded, which is responsible for the rapid growth in FTA. FTA is recommended due to cost effectiveness and speedy justice which is important for the dispute resolution. The arbitral institution used mainly FTA for parties so that they can get arbitral award at earliest without any form of delay.

FTA has other features except cost and time saving which is its simplicity. FTA can be regarded as the simple form of dispute resolution without any intervention from the court. In this there is need for consensus from the parties for hearing which is not required to be formal, no cross-examination or oral submissions to be given to the arbitrator and have same power as ordinary arbitration. Parties now-a-days prefer FTA over ordinary arbitration as there are dissatisfaction with formal procedures of arbitration.[585] And the parties can simply preserve the relationships through fast track arbitration that with ordinary arbitration. The parties usually agree considering the shorter time limits and all shortcuts available in procedures. Further they can be able to get settlement easily rather than legal settlement. It is suggested that the ordinary arbitration is more like an arbitration which involves costs and time on higher side by parties since they have to attend the proceedings but fast-track arbitration provides parties with a mechanism to avoid or discourage disputes.[586]

[583] Joshua D. H. Karton*, Party autonomy and choice of law: is international arbitration leading the way or marching to the beat of its own drummer?*, 60 U. N. BWK L. J. 38, 32-59 (2010)

[584] McIlwrath, *Faster, Cheaper: global initiatives to promote efficiency in international arbitration*, 76 INT'L J. ARB. 535, 532-537 (2010)

[585] Benjamin G. Davis, *Fast-Track Arbitration and Fast-Tracking your Arbitration*, 9 J. INT'L ARB. 46, 43-50 (1992)

[586] CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF AND GABRIELE SCHERER, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 156 (Kluwer Law International 2006)

SUGGESTION

1. The law governing FTA is needed to regulate the involvement of Court in the arbitral proceeding. There is need for more curtailing of power for Court. The example is English Arbitration Act, 1996 which uses principle for court to not intervene in the arbitration unless provided by law.
2. There must be proper allocation of power between FTA and Court for arbitral proceedings. There is increasing in the FTA institutions to delegate some power form the Court to the institutions in relation with the appointment and removal of the arbitrator in lieu of court.
3. The standard time limit of FTA for giving arbitral reward must change itself, so it can be applied on various stages as the situation arises. The time limit makes proceedings inflexible but consistency for parties. This will further help the Courts as the less assistance will be needed from the court for time extension.
4. The time has come for arbitrators and arbitral institutions to take on a more enhanced active role in FTA proceedings. This would replicate the role of judges in many jurisdictions who in recent years have had to accept more responsibilities in pre-trial, discovery and document production, and become more involved in dealing with expert witnesses. The over-riding goals of FTA demand that arbitrators and arbitral institutions adapt to the complex challenges that are now present in ICA. To increase the scope of FTA the roles of arbitrators and arbitral institutions have to become more pro-active in nature.

The institution should provide training for arbitrator so that they can reduce the cost and increase speed and manage FTA fairly. Arbitrator must complete training in expedited arbitration management before being included on a given providers list, and to update their knowledge and skills annually. Arbitrators should endeavor to improve their conduct of FTA proceedings

5. An economic and speedy FTA is one without dilatory tactics. The dilatory tactics can be employed at every stage. This can be reduced if arbitrators and arbitral institutions are empowered to confront delay in FTA proceedings due to parties by delaying in submitting documents or by arbitrators in making procedural constraints, observing time-limits and rendering FTA arbitral awards. Arbitration institutions and arbitrators

should accept these responsibilities in fast-tracking international arbitration proceedings.

6. The specific sets of FTA Rules created by arbitration institutions which expressly lay down fast-track procedures. The institutional court or board plays an important role in expeditiously reviewing challenges to arbitrators and a monitoring of arbitrator's performance without affecting their ultimate independence and decision making power. Institutional supervision has eliminated many procedural defects in FTA and increased the likelihood of enforceable FTA awards.
7. Lastly, publishing FTA awards as well as the outcome of proceeding to increase the understanding of participants on the practical implementation of FTA. So that others could avoid making same mistakes and spending unnecessary cost and time. With so many lessons, more and more apparent that making FTA awards available for increasing awareness in FTA procedures and practice which will remove the potential pitfalls of arbitrators due to lack of practical assessments of FTA proceedings, encouraging inefficient proceedings to be changed and to promote more widely those proceedings which are most efficient.

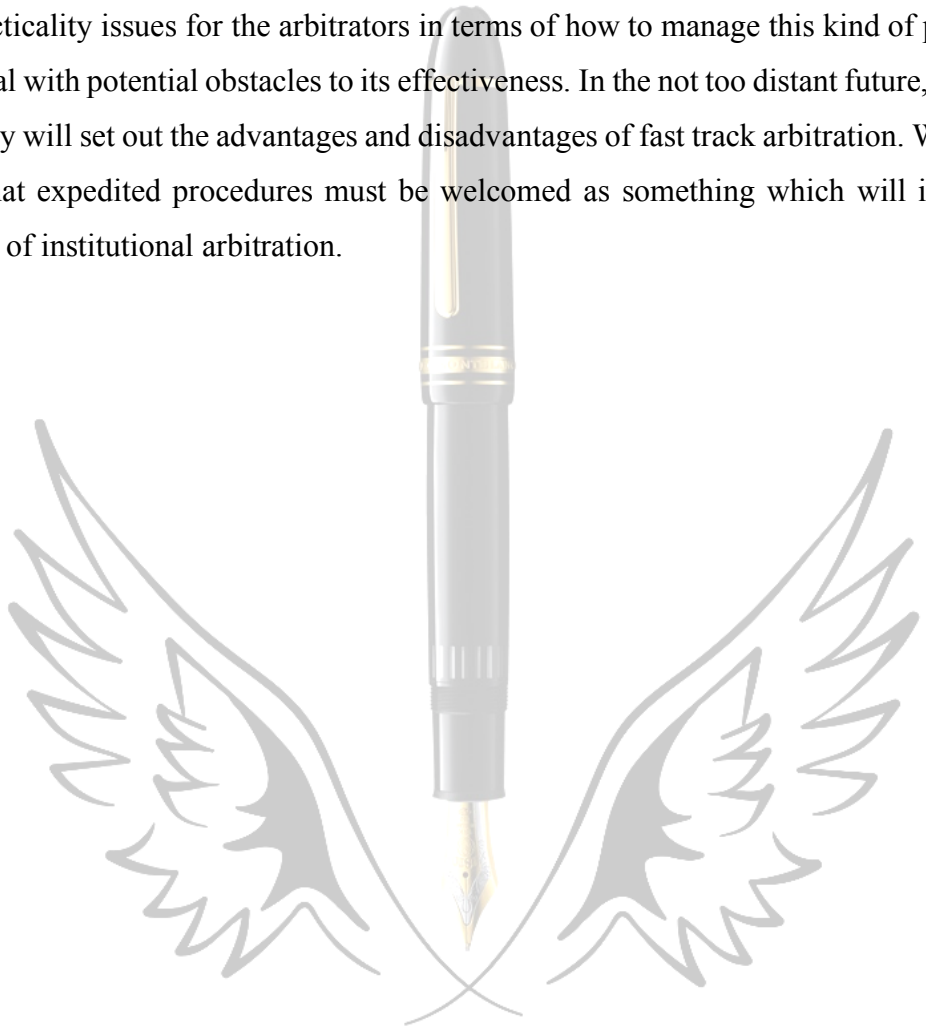
CONCLUSION

It is clear that fast track arbitration can be a valuable tool in meeting the current demand for more cost-efficient and quicker arbitral proceedings. However, expedited procedures are not suitable for every sort of dispute. For example, multi-party procedures or complex cases, such as those arising from the delivery of a complex industrial plant, which often require detailed technical evidence, are not really suitable for this form of arbitration.

By contrast, a dispute relating to price determination or involving trading partners who do not wish to have outstanding disputes for long periods of time are good examples of cases suited to a fast track procedure. It should be noted that the value of a dispute does not necessarily correlate with its complexity. Thus, the threshold set out by institutions may sometimes refer an unsuitable case to fast track arbitration. As pointed out in this article, the use of expedited procedures for unsuitable disputes may have some serious consequences. For example, there is an obvious risk that institutions and arbitrators may be found in breach of due process if they do not exercise their powers under expedited rules cautiously. The parties should have enough time to prepare their cases and equality between them should be ensured.

Other problems may also arise from the lack of reasoning of expedited awards insofar as they could be considered an issue of public policy in several countries. Other problems may arise

even when the dispute is suited to fast track arbitration. There certainly seems to be user demand for expedited procedures, but once the parties are taking part in this kind of arbitration, their counsel may try to run the case as if it were under the standard rules. This conduct may cause practicality issues for the arbitrators in terms of how to manage this kind of process and how to deal with potential obstacles to its effectiveness. In the not too distant future, the arbitral community will set out the advantages and disadvantages of fast track arbitration. What is very clear is that expedited procedures must be welcomed as something which will increase the versatility of institutional arbitration.



SOCIO-LEGAL PERSPECTIVES ON GENDER, SEXUALITY AND LAW: EDITORIAL

- SAMEER AFZAL ANSARI

Introduction

This special edition of Liverpool Law Review offers four articles that consider contemporary issues in Gender, Sexuality and Law. They are united by the socio-legal approach that they take to a range of global social phenomena and were each originally presented as part of the Gender, Sexuality and Law stream at the Socio-Legal Studies Association (SLSA) Annual Conference in Leicester. Each piece highlights the importance of socio-legal approaches to the examination of gender and sexuality in both domestic and international legal discourses and this editorial sets forth some of the issues in developing the 'field' of gender, sexuality within a socio-legal context.

Defining Socio-Legal

Drawing a collection of work under the banner 'socio-legal' is, despite the modern commonality of the term, not without problems. Philip Thomas has described the difficulties in defining Socio-Legal Studieswhilst Nelkin has noted the very term 'socio-legal' can be contentious amongst those who prefer the term 'Sociology of Lawand who seek to draw a distinction between the two.Footnote This distinction, or boundary, Banakar and Travers argue, is 'an obstacle which hinders the development of the social-scientific study of law'.Footnote They rightly note the increased sophistication which legal scholars show in their awareness of sociology and related fields.Footnote For example, in researching issues of gender, sexuality and law, it would not be unusual to consult with literature in sociology, psychology, history, media, politics, cultural studies, geography, anthropology, criminology and of course sexology. The strength of the Socio-Legal Studies Association Annual Conference, and similar conferences such as the Law and Society Association in the United States is that they seek to bring these scholars together under the heading socio-legal. Yet, that heading can still mean different things for different people.

An excellent and enduring definition of the term is that of BradshawFootnote who indicated that: 'in both topic and locus of study, socio-legal research moves beyond legal text to investigate law-in-society. Consequently, traditional legal reasoning and the focus on codes and cases of law are not the primary concerns of socio-legal study.'

This does give rise for debate as to how much those codes and cases should feature, if indeed at all. In the continuum of scholarship, where we place ourselves and how we are labelled defines career routes, and the work and language that might be acceptable in our scholarly field. Alan McKeeFootnote recently highlighted one example whereby the term 'titwank' could be used in humanities but not in the social sciences. McKee adds: 'there are many 'fucks' in queer theory'. Law's ability to navigate around the traditional boundaries of humanities and social sciences can give socio-legal scholars something of an advantage in exploring these issues. Definition of field therefore, appears to be important not only for what we say, but how we say it.

ThomasFootnote notes the division between the USA experience where the Law and Society Association is dominated numerically by non-lawyers from non-ivy league universities whilst the SLSA in the UK is 'dominated by academic lawyers from 'old' law schools'. Thirteen years later, Thomas' observation seems a little less straight forward.

Based on anecdotal experience, it remains the case that the US Law and Society Association offers a greater mix of scholars from a range of disciplines including sociology, anthropology, psychology and law, whilst the UK conference remains more focussed on legal scholars. A number of years ago, I was returning from the Law and Society Annual Meeting and found myself sitting at the departure gate next to another UK scholar. She was a sociology Professor but for her the SLSA was "too full of lawyers" and so her only socio-legal conference remained one that necessitated travelling across the Atlantic Ocean.

This remains a challenge for the SLSA and organisations like it. Nonetheless, the tilt towards a law focus appears to remain reflected in the membership of the society and in the recent Research Assessment Exercise (RAE) panel memberships for sociology, social policy, politics and psychology.Footnote

Literature around socio-legal studies has been peppered with fears about the future of the 'discipline' or 'field' with concerns expressed about empirical socio-legal research,Footnote the impact of the RAE,Footnote a lack of socio-legal training in Law Schools,Footnote and the impact of government's policy proposals and initiatives.Footnote Despite these concerns, there have also been positive developments. Cownie has noted that socio-legal research may be more widely spread within UK law schools than previously thought, noting that 'the socio-legal approach may actually be more influential than the doctrinal'.Footnote Of course, much depends upon our variant conceptions of socio-legal.

The most recent RAE did not comment explicitly on socio-legal studies in its overview, describing legal scholarship more generally as being 'in a healthy state'. There has been extensive comment upon the ESRC review of socio-legal research.Footnote The review came just years after the founding of the SLSA in the UK and came in the wake of a decision to end core funding of the Oxford Socio-Legal Centre. It acted as a means to both explore the then situation of socio-legal studies and also as a voice of concern about the ESRC's findings which concluded in its report that: 'there is a shortage of staff within law departments to provide training in socio-legal research, and social science departments do not have legally trained academics who can assist in developing an interest in, and knowledge about, law as a focus for research activity'.Footnote Despite these concerns, expressed over years ago, socio-legal studies has continued its inexorable rise.

By , Twining noted that socio-legal conference programmes were reflecting themes of 'diversity, increased sophistication and confidence'.Footnote Yet, with this increased sophistication, questions about the extent to which socio-legal studies is more about 'law' or the 'social'Footnote remain. The bringing together of a grand coalition of disciplines noted above invariably means different languages, methodologies and theories are poured into the melting pot that can be socio-legal studies. Gender, Sexuality and Law, with its similarly diverse constituency of scholarship, can therefore be both analogous to, and a constituent part of, socio-legal study.

More recently Cotterrell has sought to 'tilt' socio-legal study towards a focus on power and reassert links between law and morality. Of power Cotterrell writes 'Most socio-legal work explores the power of the law: how it is structured and organized, its consequences and sources, and the way people and organizations seek to harness it, have differential access to it or find themselves differentially affected by it.'Footnote

The similar focus of so much gender, sexuality and law scholarship on themes of power and morality—notably the influence of Foucault—renders socio-legal studies a logical home for this scholarship.Footnote

As has already been noted, the SLSA was established in in the UK with an aim to provide an annual forum for socio-legal scholars to disseminate their work.Footnote Nineteen years later, the Association restated its principles, and included a definition of socio-legal study:

'Socio-legal studies embraces disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions.'

The SLSA statement also recognizes the diverse nature of socio-legal scholarship, adding: 'Socio-legal research is diverse, covering a range of theoretical perspectives and a wide variety of empirical research and methodologies.'Footnote

Socio-legal can therefore provide a 'safe home' for Gender, Sexuality and Law scholars beyond their ordinary disciplinary boundaries. This notion of a 'home'Footnote has been stated as important by academics in this field and that resonates with traditional activism that sees LGBTQ rooms and spaces provided in universities and colleges and in more visible forms such as annual Pride events. We know the notion of 'safe space' is important in the construction of commercial social spaces for LGBTQ audiencesFootnote and so we should not be surprised that there is a need for a similar space of scholarship. The fluidity of socio-legal–and the inclusivity that stems from it is its great strength.

The SLSA, and its annual conference should perhaps therefore be seen as fertile ground for those scholars engaged in work within the broadly conceived 'field' of gender, sexuality and law, bringing together a set of players well suited to engage in what might be considered a multi-disciplinary field, albeit, as we will see, a 'field' which is itself rife with difficulties of definition.

- **Gender, Sexuality and Law**

In June , the Arts and Humanities Research Council funded Centre for Law, Gender and Sexuality was formed and funded for years.Footnote Although that funding has now ended, projects continue and the Centre–spread across the universities of Keele, Kent and Westminster–has helped to create three substantial clusters of scholarship in the area of gender, sexuality and law. This 'pump-priming' of research has ensured not only that academics have been brought together, but also that new generations of younger academics are brought through. As these PhD students move into full-time academic posts across the sector, we can expect Gender, Sexuality and Law scholarship to become more established beyond these clusters and will likely look back at the Centre as crucial in the continued development of this area. These groupings join those small teams of scholars or lone scholars at other institutions working in this field–such as those at Birkbeck, Durham, the University of the West of England and Sunderland.

Despite this recent high profile imitative, this area of research has long historical roots with MoranFootnote noting Sir Edward Coke's exploration of 'buggery or sodomy' in the early Seventeenth Century as part of his larger four volume exposition of English law. Yet, it is perhaps precisely because of the law that this remains a relatively new area of scholarship in much the same way that women's study owed much to the liberation movement.

Gender, Sexuality and Law (or other permutations of the same three 'subjects') is perhaps less of a discipline and more of a territory. Thomas noted that territories 'are capable of being created, negotiated, conquered, exploited, developed and lost'.Footnote The fluid boundaries of this and other subjects means that papers that address technology and sexuality might be found in the Information Law Stream as much as in Gender, Sexuality and Law. Papers exploring the Civil Partnership Act could be reasonably located in the Family LawFootnote stream as much as in GSL; so what is the function of a separate stream and why does it thrive amidst what Thomas called 'territorial uncertainty'?

Perhaps the answer lies in the move towards defining Gender, Sexuality and Law as a 'field'.Footnote FletcherFootnote has argued that 'the making of the field happens through practice in a larger sense; through the embodied intellectual struggles that researchers have with logics and critiques, with their own energy and time, with each other'. In this sense, the GSL SLSA stream, in a significant way, contributes to producing a 'field'.

These struggles have, in recent years, been dominated by the Socio-Political developments of the last decade, particularly in the Anglo-American context which has placed issues of gender and sexuality high on the political and media agendas. Gay Marriage, Civil partnerships, adoption rights, good and services rights, equality legislation, hate crime legislation and gender 'recognition' legislation has all contributed to stimulating a focus upon research into gender, sexuality and law. As Lee has noted,Footnote this relationship between social phenomena and legal response is one long established and engrained in the socio-legal tradition. The focus of the last decade upon equality in particular largely extinguished queer legal theory and the brief promise it had shown in the s. The last few years have seen a resurgence in queer and the growth in texts and articles that engage with queer theory discourse in the last eighteen months suggests a growing theoretical response to the last decade's equality driveFootnote and the resulting construction of new hierarchies.Footnote Here, violence, not necessarily physical but perhaps moral or social, can take the form of the good/bad sex divide defined by Rubin,Footnote Robson'sFootnote good/bad lesbian and Stychin's good gay/bad queer.Footnote These ideas can be seen as playing out in issues such as public sexFootnote and the barebacking phenomenon.Footnote

Such was the focus upon equality, that recent legal developments have largely been placed within a rights discourse and as such draw upon a legal scholarship that emphasises the link between law and politics within the wider context of socio-legal studies.Footnote

It is this wider political debate that has done much to inform the field of gender, sexuality and law. Many of those involved in the field have personal stories that have informed their

scholarship. For those in the UK who are recently retired, they grew up in a world in which homosexuality was illegal until whilst those still working within the Academy might have been of the 's, fighting for gay liberation or alternatively those who grew up in the s and who were educated whilst Sect. was in-force. This young group of academics voted for the first time during the late s, at a time when the UK government was equalising the age of consent, repealing Sect. , introducing Civil partnerships and working towards equality.

DiduckFootnote has noted that 'any field of study or inquiry, and [particularly gender, sexuality and law], is only comprised of the studies or inquiries of people, whether as individuals or groups, and that those studies cannot help but be informed by people's experiences, actions and interaction with others'. The radical change to law in England and Wales over the last decade is therefore likely to manifest itself in a shift in the experiences of those academics engaging in GSL scholarship in the next – years and their contribution will continue to re-shape and re-make this 'field'.

Gender, Sexuality and Law might therefore be said to naturally lend itself more to socio-legal study than black letter or doctrinal study and yet the historical location of gender in particular, and more recently sexuality, within the field of 'discrimination law' can lead to an approach more rooted in statute and case analysis than policy, society and theory. These differences of approach invariably lead to a range of views and different styles of teaching this area.

- **Gender, Sexuality and Law Pedagogy**

Law Schools increasingly appear to be teaching these subjects. The most recent survey of UK Law schools found that % offered Gender and the Law as a subject/module.Footnote It is not clear from this survey whether that encompasses sexuality but anecdotal evidence would suggest some courses do. A separate subject/module on sexuality was not listed at all in the Harris survey but it is known, again anecdotally, that such modules do exist today.

In the previous Harris survey, . % of UK Law Schools offered Gender and the Law suggesting, together with anecdotal evidence, an upward trend in this subject. Interestingly, the survey also identified four Law Schools (. %) offering Feminism and Law.Footnote This is another module that may in fact have been examining issues of sexuality and gender. The survey prior to this, produced by Wilson,Footnote did not identify specific modules in gender, feminism or sexuality.

In addition to the traditional academic forums, gender, sexuality and law has also taken advantage of the new technological developments of recent years. A number of blogs—particularly in the United States—have emerged that act as forums for sharing developments, offering rapid analysis and/or informal comment.Footnote These can further support not only

the student experience, but also act as a catalyst for the 'intellectual struggles' that will help to further develop a 'field' of gender, sexuality and law.

Pedagogy perhaps also brings into sharp focus the question of methodologies—particularly in the context of students' assignments and research supervision. Specific 'subjects', such as law and history have argued for their own methodological approaches to 'socio-legal'.Footnote For other subjects such as gender, sexuality and law, one has a plethora of methodological options from the social sciences and the humanities. Any attempt to assert a 'true' approach to the methodology for this subject or indeed any attempt to define the perimeters of this territory will surely fail. It is perhaps appropriate that is so given the queer tradition, which sees queer defined as 'the open mesh of possibilities. Gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone's gender, of anyone's sexuality aren't made (or can't be made) to signify monolithically'.Footnote

Pedagogy also acts as a driver to bring forth questions of the personal. Robson noted in the s that these courses can raise questions about personal revelation, self-censorship and boundaries of professional relations. She commented that: 'it seems like every pedagogical problem I have previously identified coalesces in the "finger fucking" class'.Footnote The class in question was examining the implications and interpretations of one case which also raised questions for her law students about lesbian sexuality. Robson went to conclude of the class that: 'it is the kind of class that makes me feel that, despite the problems, combining pedagogy, jurisprudence, and lesbian sex is worthwhile. It is the type of day that makes me think somehow of SapphoFootnote ; maybe she should go to law school'.Footnote

The divergent origins of gender, sexuality and law courses–whether they grew out of women's studies, feminist legal theory, human rights courses or are entirely new–together with the divergent backgrounds of course designers and tutors has resulted, perhaps unsurprisingly, in a range of different approaches,Footnote yet forums such as the SLSA offer an important space in which debates about these futures and approaches can take place.

- **Socio-Legal Future(s) for Gender, Sexuality and Law**

In addition to providing a space for these academic debates, the GSL stream of the SLSA is also adapting to encompass a wider range of scholarship and ideas with films and poetry featuring alongside traditional academic papers. In doing so, Gender Sexuality and Law can be become even more rich, and ever more encompassing.

Perhaps one clue to the future(s) for gender, sexuality and law lies in the point made earlier, and discussed by DiduckFootnote ; that the field is informed by our 'experiences, actions and interactions'. Today's LGBTQ activists are increasingly internationally focussed–whether it be battles between sexuality and religion in Europe and Africa, a cultural awakening on gender and sexuality in China and the wider Asian region through globalisation or even 'rights' based debates around same-sex marriage and other equality measures in the United States. As activists, we petition, protest and debate, and so too as scholars we write and as teachers we share these stories.

Theory has been a key component of gender and sexuality with postmodernism, feminism and queer being at the forefront in recent years. Whilst theory has been an important driver for change, it is also a product of that change. As we have seen greater doctrinal legal developments, so inevitably, do scholars turn to the theoretical to advance the field.

Debates within and from Feminism will no doubt continue to make an important contribution,Footnote but as we have recently begun to see, queer theory and queer legal theory is also once again making an important contribution,Footnote not least, because of the equality agenda of New Labour.Footnote Having equality as a norm will surely fuel speculation about the nature and value of equality–and questions about what next for the 'field'. It is possible that the goals of the last years may be seen as a false dawn, an objective falsely pursued as a product of hetero-normative and patriarchal hegemony. It's going to be interesting.

- **Introducing this collection**

The articles in this short edited collection draw upon the work of new and emergent socio-legal scholars and well as experienced scholars. Some are in what LeeFootnote has described as 'the advocacy tradition' of socio-legal research, arguing for policy review and/or reform and together they offer a domestic and international approach to gender, sexuality and law.

Sue Farran, in her article, 'Pacific Perspectives: Fa'afafine and Fakaleiti in Samoa and Tonga: people between worlds' offers a fascinating insight into the labels used in Somoa and Tonga for gender and sexuality. In a fascinating piece, Farran argues that the legal environment, shaped by Colonialism, renders island inhabitants trapped between 'two worlds', what she terms 'gender-enlightened' and the 'gender repressed'. It is a reminder that our own western constructions are precisely that–narrowly constructed in our Occidental legal cultures but due to colonialism, continue to have an international reach creating situations that demand socio-legal analysis and a questioning of international legal norms.

Julia Shaw turns to literature in her historical examination of gender roles. In, 'Against Myths and Traditions that Emasculate Women: Language, Literature, Law and Female

Empowerment', Shaw passionately examines the historically rooted 'patriarchal moral ordering', concluding that although in , legal doctrine ensures it remains largely a 'mans world', women can and must 'celebrate their distinct identity as a neglected core moral value'. Shaw reminds us of the importance of socio-legal analysis both historically and in contemporary law making.

Perhaps one of the most prominent sources for legal debate in Gender and Sexuality is the clash between liberal norms and religious doctrine–whether it is in the same-sex marriage debate or regarding expression rights. Maria Moscati, in her article, 'Trajectory of Reform: Catholicism, the State and Civil Society in the Development of LGBT Rights' examines two legal cultures, linked by a culture rooted in the Catholic faith. Moscati examines the different approaches to LGBT rights in Spain and Italy and puts forward an argument for legal reform in Italy through a consideration of moral norms, constructs of the family and an examination of socio-legal discourse.

In the final article, Sean Hennelly examines the role of the media in socio-legal discourse relating to law and sexuality. His paper, 'Public Space, Public Morality: The Media Construction of Sex in Public Places' considers the media reporting in UK newspapers of public sex environments. Hennelly offers a detailed examination of reports and concludes that newspapers have been 'irresponsible' in their reporting of public sex environments, particularly location details. Hennelly's piece acts to re-awaken us to the importance of the media in the production and construction of law and how it continues to inform and define gender, sexuality and law.