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

This journal is an initiative by Legal Education and Awareness Foundation, a registered Non-Governmental Organization, which aims at providing legal education and awareness to all parts of the country beyond any social and economic barriers.

We, at Jurisperitus believe in the principles of justice, morality and equity for all.

We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

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ECONOMIC GLOBALIZATION AT THE STAKE OF ENVIRONMENT

- **SHASHANK SINGH & SAHIL GUPTA**

The world has been progressing at a much faster pace than even thought of decades before. Globalization is at its peak and is expected to only boom in the coming future. The business inter and intra trade are flourishing at an exorbitant rate. International trade is becoming an important driver of economic development, as a rising number of developing countries look to trade and investment as a vital part of their strategies for development.

However it's not just trade that's flourishing but also a major increase in environmental concerns, both at society level and amongst the policy makers. One aspect of such concerns is the depleting interrelationship between international trade and environment. It has been observed that expansion in trading practices though resulting in increased wealth, often have both positive and negative impacts on the environment.

Therefore, this paper intends to examine the impact of globalization on environment by throwing light upon the nature and extent of protection given to the environment under the trade regime at both national and international level. The current international as well regional legal framework with regard to balancing of trade and environment, needs a better enforcement mechanism at both the levels, so that trade is carried out in such a manner, that is efficient for both the environment and economy..

Keywords –Globalization, Trade, Environment, Development, Economic

PRELIMINARY DETAILS

A. AIMS & OBJECTIVES OF STUDY:

The main aim of the study is to analyse the extent to which the economic *Globalization* has been impacting the environment. The detailed aims are:

- To discuss the term "GLOBALIZATION" and how it has been affecting the environment due to current legal framework.
- To discuss the provisions pertaining to environment under international trade regulatory bodies so as to keep a check upon environmental depletion by the trade practices.
- To learn about various multilateral agreements that have been entered into by nations so as to prohibit and prevent such trade practices that are causing injury to environmental units.
- To understand via certain case studies the disputes arising between nations due to economic globalization.

B. RESEARCH PROBLEM

Economic Globalization is the need of the hour. If intra and inter nation trade is stopped even for a short span the economy would cease leading to such downfall of the countries that they would take years to overcome. However, when economy starts interfering with mother nature it becomes more dangerous because it's very difficult to choose from either one of them. The need is to harmoniously construe them both as neglecting of one would surely lead to

consequences unbearable. But in recent times the conflicts between human and environment are growing with a fair enough pace. Therefore the paper intends to lay down the conflicts arising and the measures to balance the interests of nations along with the environment.

C. RESEARCH QUESTIONS

a. What is "Globalization" and how it's affecting the environment?
b. What are the existing provision under international framework that tends to harmonise environmental concerns?
c. Which multilateral agreements have been entered into by nations in order to protect the injury to environment from trade practices?

D. HYPOTHESIS

Despite of the fact that economic development is the need of the hour, it cannot be presumed to be only essential activity that a human must live, stand and abide by. If there is unhealthy sorroundings then there is no point of economy. It can be seen evidently that today's trade practices are at no point concerned about our mother nature. Despite of inclusions of legal framework at national and international level hardly the positive impact can be observed. We lack severe check upon the practices that we follow internationally be giving more weightage to not so fair trading customs upon the environment. Thus, more stringency is required and

more assessment of the trading practices is to be carried on in order to assess the impact upon environment.

E. RESEARCH METHODOLOGY

The research methodology followed in the study is doctrinal *i.e.* descriptive and analytical, with many of the researchers views interspersed throughout the project. Primary sources such as statues, case laws and international norms have been used. Secondary sources such as books, articles, news reports and websites have been relied upon.

INTRODUCTION

According to some people globalization began about 60,000 years back at the beginning of the human history. Since the ancient times, many civilizations have expanded commercial trade exchange. Also migratory phenomenon has contributed to these exchanges. By time passing, globalization i.e. exchanging trade has been growing. This phenomenon has continued in history, particularly by military annexation and researches undertaken. But actually it was not till technology advanced in communication and shipping or transportation that globalisation has fastened up. Notably after the latter half of the 20th century that world trades speeded up in such a dimension that the word 'GLOBALIZATION' started to be used frequently.

We often think that globalization is just a financial and economic phenomenon but contrary to our thinking, globalization includes a wider field than just trade and exchange of goods, services, finances and much more. Some examples which tell us this are:

CULTURAL GLOBALISATION: It means that different customs, beliefs and habits of local communities have interpenetrated and are shared by communities which used to have their specific beliefs and procedures. It reflects standardization of cultural expressions around the world.

POLITICAL GLOBALISATION: It refers to the development and growth of the political system worldwide, in complexity i.e. governmental action takes place at an international level, one of the important key characteristic of this political globalization is the brushing aside the importance of the nation-state political scene. This system consist of national governments, their governmental and intergovernmental organizations and social movement organisations.

SOCIOLOGICAL GLOBALISATION: Sociological globalization refers to the ongoing process in which information almost moves in real time. It involves interdependence in the cultural and social spheres of society. People move all the time too, mixing and amalgamating different societies.

TECHNOLOGICAL GLOBALISATION: By this millions of people are interconnected to the word of technology and digitally powered platforms. At present, internet and social media platforms like instagram, facebook, skype, etc are at the heart of this.

ECOLOGICAL GLOBALISATION: It means the internationally coordinated practices concerning environmental protection. It accounts for the idea of considering Earth as a single global entity which all should protect as it affects all of us.

World Health Organisation defined GLOBALISATION as the increased interconnectedness and interdependence of peoples and countries. This is understood by including two related things: the modifications in the policies at national and even international levels; the opening of international borders to increase the trade of goods, finances, services and much more. What

one actually means by globalization is speeding up of trade of goods, human beings, services etc, throughout the world.

Globalization contributes to the relationship between societies and individuals worldwide. It is rising day by day at the cost of environment loss. Countries for their self - interest in the name of globalization are harming environment in some or the other way. Every person is not benefitted from technological change and globalization.

The subsidiary body of the UN, the ***Committee for Development Policy*** has defined globalization as "the increasing interdependence of world economies as a result of the growing scale of cross border trade of commodities and services, the flow of international capital and the wide and rapid spread of technologies."

International trade is becoming an important driver of economic development, as a rising number of developing countries look to trade and investment as a vital part of their strategies for development. At the same time, however, most of the world's environmental indicators have been steadily deteriorating.

Origin of the Trade and Environment Conflict

Initially there was no major concern towards environment with respect to trade, the evidence of which can be traced to the fact that General Agreement on Trade and Tariffs, 1947 does not provide even for a single word about the environment. The same is the status of United Nations Charter and Treaty of Rome that established the European Economic Community.

However, the debates pertaining to trade and environment have not evolved recently. They have been into existence since 1970's. Broadly the debates were related to two major facets that are impact of trade on environment versus the impact of environmental policies that

hamper trade. Today, environmental protection had become an agenda as trade and environmental policies regularly bypass each other frequently.

In 1972 the growing environmental concerns led to the Stockholm Conference on Human Environment which led to a Stockholm Declaration whereby member nations agreed to decrease the persistent organic pollutants in the environment.

Between 1971 and 1991, both environmental policies and trade began to have a growing impact on each other, and the effect of trade on the environment started becoming much more evident. Also during the Tokyo Round of Trade negotiations from 1973-1979 there was keen discussion as to what extent the measures pertaining to environment can have affect upon the trade. A similar discussion was also taken up in the Uruguay round of negotiations which took place from 196-1993.

After such discussions various modifications were made out in the international legal frameworks pertaining to environment like those in General Agreement on Trade in Services (GATS), Trade- Related Aspects of Intellectual Property Rights (TRIPS), the Agreements on Agriculture, Sanitary and Phytosanitary Measures (SPS), and Subsidies and Countervailing Measures (SCM).

Before 1991 there were discussions linked to trade environment concerns but the discussions gained huge significance after the 1992 TUNA DOLPHIN I case of US where tuna imports were banned by US from Mexico on the ground of environmental concerns as the method adopted by Mexico for catching the Tuna fish involved killing of large numbers of dolphins. Mexico alleged that the embargo was not in agreement with GATT rules. The report of the panel was not adopted, although it was in favour of Mexico but was deeply criticized by environmental groups who felt that trade rules were like an obstruction to environmental protection.

Environmentalism in GATT/WTO

In order to understand the complexity between trade and environment the path that needs to be traced down is by the analysis of General Agreement on Tariffs and Trade (GATT) since the roots of international trade lies in GATT as it was the sole multilateral agreement regulating international trade back then. However GATT was replaced by WTO which came into existence with the Marrakech Agreement on January 1, 1995. Now the body responsible for the trade agreements, removal of trade barriers and managing of conflicts is WTO.

PRINCIPLES RELATING TO ENVIRONMENT IN WTO

- **Preamble**

The Marrakech Agreement made certain additions in draft of WTO and provided a guideline for GATT and other WTO agreements to be interpreted in the light of environmental management and protection with special reference to sustainable development. This amendment resulted in having a significant impact on the decisions in the dispute settlement mechanism of WTO.

- **The Principle of Non-Discrimination: Article I and III**

Article I and III are the most basic principles of GATT/WTO on which the rules of multilateral trading system are based.

Article I contains the '**Most-Favoured Nation (MFN)'** clause, which requires that if special treatment is given to the goods and services of one country, it must be given to all WTO member countries. No one country should receive favours as that distort trade. All members are on an equal footing, and all share the same benefits.

Article III contains the 'National Treatment Principle (NTP)' clause, which provides that the goods and services of other countries be treated in the same way as those of your own country.

The **principle of Non-discrimination** prevents the misuse of environmental rules and of their usage as hidden restrictions on international trade. With respect to trade-related environmental issues, the principle ensures that there is no discrimination between domestically produced like products and products imported from different trading partners.

- **Article XX on General Exceptions**

Article XX of GATT permits certain unilateral trade measures in order to implement environmental protection. GATT puts no restrictions on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported products i.e. a country can by its own laws formulate principles pertaining to imports or exports that it does to its own products if it considers necessary in light of its environmental policies.

Moreover, Article XX(b) and (g) are the exceptions which focuses on the protection of human, animal or plant life or health and conservation of natural resources. Basically, these provisions allow WTO Members to justify GATT-inconsistent policy measures if these are either "necessary" to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources.

MULTILATERAL ENVIRONMENTAL AGREEMENT

The principal techniques available under international law for states to work together on global environmental issues is the multilateral environmental agreement (MEA). MEAs are agreements between three or more states which may include obligations varying from more general principles about a particular environmental issue, through to complete actions to be taken to accomplish an environmental objective.

Committee on Trade and Environment

The most important body of WTO in terms of environment is 'Committee on Trade and Environment'(CTE), which was formed to address the issues relating to growing interaction between international trade and environmental protection and to maintain harmonious relationship between both of them.

CTE addresses twofold problems firstly the trade concerns that arise out of the environmental protection policies and secondly the problem of 'how to deal with trade provisions in MEAs which differ from WTO obligations'.

AGENDA OF CTE:

1. The relationship between trade rules and trade measures used for environmental purposes, including those in MEAs.
2. The relationship between trade rules and environmental policies with trade impacts.
3. Trade rules on the transparency (that is, full and timely disclosure) of trade measures used for environmental purposes, and of environmental policies with trade impacts.
4. The relationship between the dispute settlement mechanisms of the WTO and those of MEAs.

5. The relationship between the environment and the TRIPS Agreement.
6. The relationship between the environment and trade in services.

KEY DISPUTES

Tuna Dolphin case

One of the earliest and most questionable trade- environmental issue concerned a US restriction on certain fish import as a piece of more extensive exertion to ensure dolphins. The 1972 Marine Mammal Protection Act(MMPA) required US fishermen to use Dolphin safe fishing strategies to forestall the undesirable catching of dolphins in handbag seine nets utilized by fish fishing armadas. In 1984 the US Congress added a Direct Embargo Provision to the MMPA that permitted the US to improve import prohibition on fish from nations that didn't employe Dolphin safe fishing techniques.

Regardless the tuna dolphin case significantly upheld in the discussion over the connection between international Trade and the Environment seen it came by to two significant arrangement of exchange dealings were in high stuff those to make the North American free trade area (NAFTA) and to complete the Uruguay round in the GATT and make the WTO. The tuna-Dolphin case accordingly become ammunition for both the to environmentalist and American sovereignty.

The shrimp-turtle Case

Like the tuna- Dolphin case, another complaint was brought against the US simply following three years. Indeed an imported item this time shrimp was the issue for natural damage. In 1987 the US acting as per the US Endangered Spices Act, 1973 gave a guideline requiring all US banner shrimp fishing boats in the Gulf of Mexico and in the Atlantic Ocean of the South

Eastern Coast of the United States to utilize the turtle excluder gadgets affirmed as per standard set by the US government offices.

In 1989 the US Congress received a correction approaching the secretary of state to arrange concurrence with different Nations for the security and discussion of ocean Turtles. The alteration accommodated the disallowance of shrimp reaped with innovation that didn't satisfy us guideline. NINE states embraced administrative estimates fulfilling US guidelines and work ensured declaration allowing them ideal for send out. Import of shrimp from vessels enrolled in other state subject to import.

The US- Gasoline case

In 1999, United State revised the Clean Air Act(CAA) with an end goal to improve air quality by diminishing unfavorable emanations from gasoline use. The law commanded the offer of reformulated (that is cleaner) gasoline in intensely populated metropolitan regions yet allowed the proceeded with offer of regular gasoline in more provincial regions.

To forestall a move in cheap however profoundly dirtying fuel fixings from metropolitan to rustic region the law additionally specified that authority over ordinary gas should stay as clear as it was in 1990. Overall, homegrown purifiers were permitted to utilize singular benchmark that were really being used in 1990 while unfamiliar makers needed to follow and average standard set by the Environmental Protection Agency. This, Venezuela an and Brazil contended, was in clash with Article III of the GATT as it oppressed imported items.

IN 1996 WTO investigative body concluded that the standard foundation technique were expected conflicting with article III and couldn't supported by article XX, as the United States had guaranteed. In any case, the litigant body found that the US measures were focused on the protection of common assets and that WTO individuals were allowed to set their own current circumstance target furnished they do so conformity with WTO rules,in specific concerning

the treatment idealistic and unfamiliar items. The disput settlement body, presently working under the fortified principles of the WTO understanding, hence took a more extensive perspective on ecological reason for exchange measure and didn't zero in exclusively on oppressive nature of the measure.

CONFLICT BETWEEN WTO and MEAs

It was the Doha round of negotiation in the WTO that for the first time where environmental concerns were directly discussed. In the Doha Declaration it was mentioned "*that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive*".

At present there are more than 250 MEAs in force that are regulating environmental issues and out of them may affect trade. A possible source of conflict between the trade measures contained in MEAs and WTO rules are the violation by MEAs of the WTO's non-discrimination principle. Such a violation could take place when an MEA authorizes trade between its parties in a specific product, but bans trade in that very same product with non-parties. Similarly, MEAs often conflict with fundamental principles of the WTO system.

Conflicts arises pertaining to jurisdictional issues and the manner of dispute settlement as well as which mechanism of dispute resolution is to be adopted Several disputes concerning environmental issues have been brought before the WTO dispute-settling mechanism, which over time has opened up to demands relating to environmental protection.

CONCLUSION

The broad aim behind international trade and environmental is to provide for social welfare. Both of them improves the quality of human life. However, at present there are huge conflicts between the two subjects that is being tried to harmoniously settled by various MEA's and WTO.

Even though existing GATT/WTO rules accommodate many environmental goals such as maintenance of high environmental standards and technical regulations and etc but more compatibility should be brought between provisions of GATT and MEAs which contains trade measures. WTO should tend to incorporate more stringent, formal and transparent mechanism to resolve disputes pertaining to trade environment issues.

Though CET has been established for a very pious purpose and it is even working quite efficiently but at times it is felt that due to jurisdictional overlapping between CET and WTO the former is not able to deliver the outcome that is expected from it. Thus, the jurisdiction of CET should be made exclusive and recommendations given by CET should have a firm say while WTO deals with any dispute.

It can also be observed that there is also a jurisdictional overlapping between WTO and MEA's which is not fruitful rather the confusions persists and defaulting party often tends to incline towards the loopholes. Thus, it becomes difficult to prevent and prohibit practices despite of them being against environmental concerns. WTO being the most powerful and only dispute settlement body, which can impose sanctions sometimes can't cope up with complicated environmental issues. Consequently, the objectives of multilateral environmental agreements are neglected.

Thus, there needs to most emphasis on settlement of such disputes amicably because both the subjects are way too essential for human existence and nations can never survive without harmonious existence of both

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DOMESTIC VIOLENCE- THE SHADOW PANDEMIC

- HIMANI MISHRA & SHUBHANGI AGGARWAL

Analysing the utility of Domestic Violence Act in light of contemporary pandemic.

Women and Men together constitute the human civilization. They are both equals, who haven't been treated equally since time immemorial. Women have always been considered the weaker sex throughout the world. Their rights, their aspirations and their needs have always been neglected. We live and thrive in an extremely patriarchal society where both men and women are expected to behave in a certain manner, where women are expected to endure every hardship that comes their way and where men are given all the power and authority over them as they are considered the head of the family.

Women have been subjected to various crimes throughout the history of mankind, and domestic violence is one such horrendous act committed against women.

Domestic refers to the realms of home. The violence inflicted on women within the realms of their home is referred to as domestic violence in layman language.

The COVID-19 outbreak has spared no country, and almost the entire world has come to a standstill at the same time as many countries were forced to announce a nation-wide lockdown to combat this pandemic. People were given strict orders to stay at home. This led to an overall decrease in the crime rates as there were fewer robberies and murders.

But this pandemic lead to the rise of another SHADOW PANDEMIC- rise in the domestic violence incidents throughout the world.

The National Commission for Women has recorded a two-fold increase in gender-based violence across India. A woman is 17 times more likely to be assaulted by her husband. A total

of 315 complaints were received by the National Commission of Women in April 2020, which is the highest number since August last year.[1]

Various factors have led to an overall upsurge in the number of incidents of domestic violence during this pandemic, which mainly include stress, potential job or economic losses, disruption of social and protective networks, and social distancing measures. The increase in cases of domestic violence against women and children highlights the inability of the state to tackle the problem of domestic violence. Domestic violence is a grave violation of the fundamental right to life guaranteed under Article 21 of our constitution. In *Francis Coralie Mullin vs. union territory administration*,[2] the Hon'ble Supreme Court held that Article 21 also includes the right to be free from physical violence.

The Prevention of women from Domestic Violence Act (PWDVA) 2005 was enacted after the ratification of the CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) by the Indian Parliament. The origin of the act lies in Article 15(2) of the Indian Constitution, which empowers the state to make special provisions for women and children. The PWDVA is a civil law and is meant to recognize the rights of the aggrieved woman and to provide protection rather than to punish the offender, unlike Section 498A of the Indian Penal Code.

The definition of domestic violence has been given a very broad scope under Section 3 of PWDVA. Apart from physical and sexual abuse, the definition has been worded to include verbal and emotional abuse as well.

[1] [1] https://www.thehindu.com/news/national/lockdown-ncw-receives-315-domestic-violence-complaints-in-april/article31497599.ece

[2] 1981 AIR 746, 1981 SCR (2) 516

Moreover, the proviso to Section 2(q) of the PWDVA, which defines the term respondent, has been given a broadened scope by giving the aggrieved wife or female living in a relationship in the nature of a marriage to file a complaint not only against her husband or male partner but also against a relative of the husband or the male partner.

Section 8 of the act provides for the appointment of Protection officers for each and every district, who shall, as far as possible, be women. The role of the protection officers becomes even more important during this pandemic as women are finding it difficult to lodge a police complaint due to immobility. The protection officer prepares the domestic incident report to be submitted before the magistrate. They also ensure that the aggrieved person is made aware of their rights, that they can avail free legal aid, and also ensure the availability of safe shelter homes to the victims.

But the number of shelter homes available in our country is clearly inadequate. Due to the surge in the number of domestic violence complaints, there is an increased need for these shelter homes. The NCW and the police have taken several steps to shift the victims from their homes to these shelter homes during the lockdown as well, but there is an increased threat to safety and health in these shelter homes during the COVID-19 pandemic.

The state governments appoint these protection officers. But it has been observed that the state governments do not appoint an adequate number of protection officers, and they usually follow the practice of giving additional charge to the existing police officers as protection officers. In this time of the pandemic, when the police are already overburdened with COVID-19 duty, protection officers do not pay any heed to domestic violence cases. Protection officers play the role of fulcrum in this act, and thus their unavailability has left the victims at the mercy of their abusers.

Another important safeguard provided under this act is the right to reside in a shared household provided u/s 17. It provides that every woman in a domestic relationship shall have a right to shared household and cannot be evicted by the respondent, irrespective of whether or not she has any right or title in the same. This provision is essential as it provides a sense of security to the aggrieved women, especially during this lockdown, who are ensured that they will not be left homeless if they take action against their abusers.

Moreover, many migrant workers –who are believed to be around 120 million or more –are trying to go to their home villages, hundreds or thousands of miles away from the urban areas where they had migrated for work. [3] It has become difficult for most of them to go to their home towns or villages and thus they are living with their friends or relatives in these difficult times. Due to these hard situations, it has been noticed that the men in the family have become more frustrated, leading to increased violence. They beat their wives and children in frustration. Section 17 does not provide any relief in this pandemic to the migrant female workers who cannot seek the right to residence in these cases as the scope of this section is very narrow, as it is limited to the house owned by the husband or taken on rent by husband either solely or jointly by the husband's family.[4] It does not include the residence of relatives or friends where the husband is residing. Thus, we can see that the women, in this case, cannot ask for the right to reside and thus have no other option but to tolerate the abuser.

[3] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj65qKCt7HpAhWmyDgGHaVXAi0QFjAAegQIBhAB&url=https%3A%2F%2Fwww.theguardian.com%2Fglobal-development%2Fcommentisfree%2F2020%2Fmay%2F05%2Fwhere-indias-government-has-failed-in-the-pandemic-its-people-have-stepped-in-coronavirus&usg=AOvVaw2cECLR2taLJhjhCmhbPty7

[4] S.R. Batra & Another vs. Smt. Taruna Batra (2007) I DMC 1 (SC).

According to many studies, about 57 %of the women in India do not have access to mobile phones or internet facilities. [5] Thus, though many state governments have taken the initiative and started the facility of WhatsApp helpline number or facility of reporting the incident with miss call or call or complaining via emails, still due to lack of access to technology and telephone these initiatives are of no value. Therefore, many cases go unreported.

This lockdown has been very harsh on all forms of labour, but the main victims are undoubtedly, the unorganized labour which comprises more than 50% of the workforce, as most of them have lost their jobs. This adds to the economic hardships of the entire family, especially the poor households. It is usually advised to the women to stay away from their abuser or to avoid them as much as possible. But this advice is of no use in poor households who live in a one-room house. Moreover, when big sized families are forced to stay together in a room for a continuous period, the number of clashes increase, and it is the women of the family who have to face the brunt of all this frustration.

Usually, women used to go to their natal homes and seek help from their own parents and relatives whenever such incidents of domestic violence occurred. But due to COVID -19 lockdown, interstate borders are sealed, people are not allowed to leave their homes, and thus they cannot go to their natal home or meet their friends. The act remains silent on tackling such emergency situations and fails to become a deterrent for domestic violence abusers in such pandemic.

Another factor leading to an increase in domestic violence is the increased financial dependence of women as they are more vulnerable to pay cuts and job losses during this pandemic. Moreover, the women are often concerned about their child's future and security,

[5] http://www.livelaw.in/emerging-shadow-pandemic-duing-covid-19-dmestic-violence-156075

which makes it harder for them to report such crimes and to leave the house of their abuser. During this lockdown, it is not just the women, but also the children in the family who have become more vulnerable to physical violence. Also, a violent environment, even if the children are not themselves, the victim, has a very harsh impact on the mental balance and sanity of a child. Every child deserves a healthy environment to grow in.

National Commission for women has launched a special WhatsApp helpline number and has started to accept complaints via email.

Several countries around the globe have adopted innovative approaches like the French government has announced that it will be paying for victims to stay in hotels, and "pop-up counselling centres" will be setup in shops so that women can approach them easily, even while grocery shopping; Canada has allocated $200 million funds for women and gender equality; United Nations has urged governments to designate shelter as essential services and provide online legal support and psychosocial services for women and girls.

There are several other steps that can be adopted by the Indian government to tackle this shadow pandemic which include -

- Recognizing work done by protection officers as essential services along with others like health services
- Organizing awareness drives by using digital, social, and print media for raising awareness regarding domestic violence, the government helpline numbers, and various provisions of the domestic violence act. It should be printed and circulated in both regional as well as the English newspaper.
- Caller tune messages can be used for raising awareness and launching slogans like - suppress corona, not your voice (launched in Uttar Pradesh).

- Popularizing in India, the "mask -19" codeword used in France and Spain with which women could indicate to pharmacies that they require support.
- Establishing a silent call or helpline number or code word to report domestic violence complaint when the abuser is near them(Like in the United Kingdom, the police are asking victims to call emergency number 999 and then to dial 55, so that they can know that is a call for help against violence).
- Free online and tele-counselling.
- Relaxation to any person who breaks the norm of lockdown as result of trying to report abuses.
- Online health appointments through phone calls for victims.

The need of the hour is not only to have a law in place to tackle the increasing incidents of domestic violence, but what is even more important is for the law to be well implemented, well regulated, dynamic, and for it to have a wider scope to cater to the needs of all sections of the society, so that it can provide a safe place to all women from "INTIMATE TERRORISM."

INSANITY DEFENSES : LOOPHOLES IN THE SYSTEM

- NAMITA JAIN

MEANING

Insanity Defense is basically defensing by pleading not guilty due to unstable mind or mental disorder or incapability to understand the questions and putting rational answers to them. The law which deals with such cases is known as "Law of Insanity". The law assumes that when the person is incapable of understanding the nature of the act done by him, he cannot be made liable for such criminal act. The defense of insanity is taken in criminal cases where the insane person commits an offense punishable under The Indian Penal Code. Determination of insanity is a task undertaken by court by means of medical examination. Different countries have different laws on Insanity. Party pleading insanity must furnish clear, convincing and sufficient evidences in order to prove the mental disorder and unintentional nature of act. Insanity is actually a legal term. In such offenses criminal makes an admission that he has committed the crime but he was not sane at that time to understand the nature and consequence of committing such offense.

According to a report, the defense of insanity is claimed in less than 1 percent of the criminal cases and the success rate of such pleading is only 25 percent. An insane person cannot be given punishment in unstable mental state. As a common practice, the period of punishment begins when the guilty person comes into healthy state of mind. The provisions has been given under section 84 of The Indian Penal Code. The section protect an unsound mind person from any liability and criminal proceedings against him. Whether it has become a loophole in the present judicial system or not is a question of fact.

Section 84 of The Indian Penal Code: Act of person of unsound mind

The section states that *"nothing is an offence if it is done by a person who, at the time of commission, because of unsoundness of mind, was incapable of understanding the nature and consequences of the act he/she is doing and also was unaware that the same is prohibited by law"*.

The fundamental principles based on the rule mention in section 84 IPC are mentioned below:

(a) *Actus nonfacit reum nisi mens sit rea* which means that nothing is wrong unless done with a guilty intention and;

(b) *Furiosi nulla voluntas est* which means that a person with mental illness has no free will and therefore he/she can do no wrong. This way Section 84 discharges a person with mental illness from his liabilities because of absence of mens rea or an intent.

ORIGIN

The concept of insanity law is not new. It has been in force since centuries and was first formed part of laws made by romans. The first case came in the year 1581 where the defense questioned the accountability on the insane person. In the early 18th century, "wild beast" test gained attention which has the view that a person with understanding of an infant or mind of a wild beast cannot be convicted for the offense committed by him. Followingly, many other tests were deduced such as insane delusion tests, good and evil tests. None of the test successfully worked with the object of insanity law before the landmark test of Mc Naughton's came. In R v. Mc Naughton became the base of section 84 of The Indian Penal Code. In this case, Mc Naughton mistakenly killed Edward Drummond assuming him to be some other person. The court ordered his acquittal on suffering from such mental disorder. The jury gave the order to admit him in the mental asylum.

In the judgement of Mc Naughton, five rules were framed by the court:

1. That until contrary is proved, it will be presumed that convict is sane;
2. If at the time of commission of crime if the offender knows the nature and consequences of the offense then he is liable to be punished;
3. That to establish a defense on insanity, accused must not be in position to know the nature and consequences of his/her act;
4. That the delusions and or the belief on which the accused person acted should be true;
5. In English law, the responsibility of determination that a particular person is insane or not rest with the jury.

These five propositions became a benchmark to determine whether the accused was actually insane at the time of commission of the crime or claiming on false grounds to deter punishment.

JUDGEMENTS

- Honourable Supreme court in the judgement of Bapu @Gajraj Singh v. State of Rajasthan held that if a person pleas or seeking relief on the grounds of delusion of partial nature, abnormity of mind, irresistible impulse or compulsive behaviour then no relief will be granted on mere such grounds under section 84 of The Indian Penal Code.
- In another judgement of Surendra Mishra v. State of Jharkhand, Supreme Court referred section 84 and held that medical insanity is different from legal insanity and on proving the first, the latter will not be assumed to be proved. Therefore, a person cannot avoid punishment on the grounds of mental insanity

Gist of section 84 IPC: Only presence of mental incapacity or illness is not sufficient. The fact must be proved with evidences.

Insanity Law is helpful in genuine cases where:

- the accused is actually suffering from such mental illness;
- The insanity law saves an insane person from simple and rigorous punishments as he was incapable to understand the gravity of crime committed by him;

Why Insanity Pleas are unsuccessful in most cases?

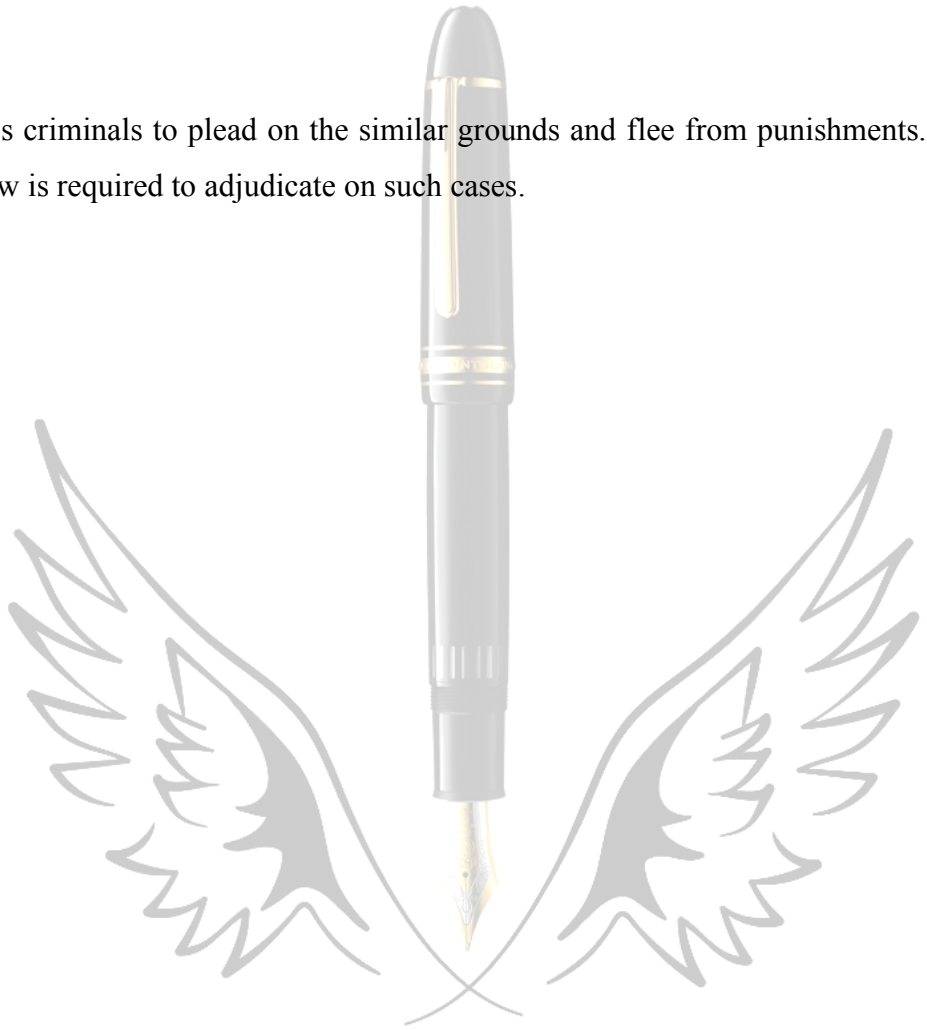
The reason behind this are mentioned below:

- Criminals try to hide behind using the curtain of the insanity defense.
- As stated above, Insanity is a legal concept and hence mere pleading is not sufficient to prove the mental disorder of the criminal.
- The burden of proof lies on the alleged person and on his failing to prove such mental incapacity the case automatically proves the points of the other party.
- Such defences act as an excuse to evade from punishments.
- It is seen that most of the times the insanity law has been misused and considering these instances, many countries like England, Argentina, and Thailand have abolished such law.
- Acquittal on the false ground of insanity encourages the crimes and the criminals.

CONCLUSION

Considering all the points of insanity law we have reached to the conclusion that the law is actually a loophole in the system of criminal law as it prevents the law from punishing the criminals who hides themselves behind the grounds of insanity and where it is sufficiently proved that they have committed such crimes. No clear and detailed provisions are present in the legislations and due to this criminals evades punishment. The defense of insanity also

encourages criminals to plead on the similar grounds and flee from punishments. A uniform code or law is required to adjudicate on such cases.



PROTECTION OF THE ACID ATTACK VICTIMS BY STATE: WHETHER MYTH OR REALITY?

- **BANHITA SARKAR**

INTRODUCTION

Ani DiFranco says, "Any tool is a weapon if you hold it right"[6]. Although, holding it right often causes the weapon to be held against the 'rights'. Acid is one such weapon which has tremendously affected the rights and lives of many in India. Acid attack is a heinous act constituting throwing of acid on the body of a human, which may severely cause irreparable damage to the skin and other body parts of the person. Acids like Hydrochloric and sulphuric acid are commonly used in India, which cause the skin tissue to MELT. Law Commissions report mentions, acid eats through two layers of the skin, i.e. the fat and muscle underneath, and sometimes not only eats through to the bone but it may even dissolve the bone.[7]

Between 2014 and 2018, 1,483 reported cases of acid attacks came up in India wherein Uttar Pradesh, West Bengal and Delhi alone constitute 42 per cent of the cases.[8] One can only speculate the statistics about the total cases and the consequent suicides. Undoubtedly, to

[6] Vicki Reynolds, *Collective Ethics as a Path to Resisting Burnout,* INSIGHTS, 6, (2017), https://vikkireynoldsdotca.files.wordpress.com/2017/12/reynolds2009collectiveethicsasapathtoresistingburnoutinsightsrccjournal.pdf.

[7] LAW COMMISSION OF INDIA, THE INCLUSION OF ACID ATTACKS AS SPEIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME, Report No 226, at 10 (July, 2008).

[8] Pulaha Roy, *India saw almost 1,500 acid attacks in five years*, INDIA TODAY, January 12, 2020.

secure deterrence and protection from such a heinous crime, the State has to assure its responsibility towards enforcement of effective redressal mechanisms.

To strengthen the rights of individuals is one of the chief functions to be performed by the State under the head of protection. The definition of protection also entails respect for the rights[9], life and dignity[10] of an individual. Additionally, states have the legal obligation to protect and promote human rights, including the right to social security, and ensure that people can realize their rights without discrimination.[11] In Joseph Shine`s case[12], the Court even stated,

"*It is the duty of this Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life-irrespective of whether these spheres may be regarded as 'public' or 'private'.*"

ACID ATTACKS: PREVALENT PROTECTION MECHANISMS

A. Judicial Developments

The role of the Judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic-polity thereunder shall not survive, the day Judiciary fails to

[9] Simon Bagshaw, United Nations Office for the Coordination of Humanitarian Affairs, OCHA on Message: Protection (Oct. 7, 2020, 10:09 AM), https://www.unocha.org/sites/dms/Documents/120405%20OOM%20Protection%20final%20draft.pdf.

[10] Kapila Hingorani v. State of Bihar, (2003) 6 SCC 1 (India).

[11] Social Protection Human Rights, Responsibility of the State (Oct. 7, 2020, 10:17 AM), https://socialprotection-humanrights.org/key-issues/governance-accountability-and-democracy/responsibility-of-the-state.

[12] Joseph Shine vs. Union of India, (2019) 3 SCC 39 (India).

justify the said trust. If the Judiciary fails, the Constitution fails and the people might opt for some other alternative.[13] With the rule making power in the hands of the judiciary, it forms an effective part of the State[14] and thus has an important role to play in the redressal of acid attack victims. Some relevant judicial decisions in connection with acid attacks include:

1. **Laxmi v. Union of India[15], 2014**

On refusal of a marriage proposal, Laxmi, a minor then, faced an acid attack by three men. In this landmark case, the petitioner sought specific laws to deal with acid attacks, regulation of supply of acid and rehabilitation and compensation for the victims. Various legislative changes, as discussed in the next section, were introduced due to this case. In addition to this, the concept of victim compensation scheme was delved into. The most significant aspect of the judgment allowed a minimum compensation of Rs. three lakhs to every acid attack victim. Acid, as it had turned out to be, was also titled as "poison". Also, it was laid down that no hospital or clinic could deny treatment to an acid attack victim.

2. **Parivartan Kendra v. Union of India and Ors.[16], 2015**

Four people attacked two Dalit sisters and even, allegedly, enjoyed the moment after pouring acid on the elder sister. Injury to the arm was also caused to the younger sister. A writ petition was filed under Article 32 to emphasise on the lack of adequate compensation for acid attack victims along with no legal guarantee to free medical care and rehabilitation provisions.

[13] Shanti Bhushan vs. Supreme Court of India and Ors, (2018) 8 SCC 396 (India).
[14] P.C. Garg v. Excise Commissioner, Allahabad, (1963) AIR 996.
[15] (2014) 4 SCC 427 (India).
[16] (2016) 3 SCC 571 (India).

Although the Bihar Government provided for Rs. 2,42,000, a claim for at least 10 lakhs was filed, wherein 5 lakhs had already been spent on the treatment of the elder sister. In concurrence with the Laxmi judgment, the Court held that no restriction was placed on grant of compensation more than Rs. 3 lakhs. Consequently, a sum of Rs. 13 lakhs was granted as compensation.

3. Ravada Sasikala v. State of Andhra Pradesh and Ors[17], 2017

The victim was attacked with acid on refusal of a marriage proposal. The Court held, "A crime of this nature did not deserve any kind of clemency. It was individually as well as collectively intolerable.". The reduced sentence by the High Court was set aside and an order for imprisonment for a year was restored, as stated by the Trial Court. The accused was also directed to pay a sum of Rs. 50,000 and the State was told to compensate the victim with Rs. 3 lakhs.

4. Yogendra v. The State of Madhya Pradesh[18], 2019

The Appellant was convicted for muder of a lady by pouring acid on her. Sessions Court awarded a death sentence under Section 302 of IPC. even the High Court enhanced the compensation. The dying declaration of the lady had rightly pointed to the appellant as the cause of death. The act was committed by the Appellant, when out on bail. However, a gap of 10 years existed between the two incidents

[17] (2017) 4 SCC 546 (India).
[18] (2019) 9 SCC 243 (India).

B. Legislative Developments

Unlike the countries of Afghanistan[19], Bangladesh[20] and Cambodia[21], no specific enactment or legislation exists for putting an end to this atrocious act of acid attacks in India. However, certain provisions in other laws have been provided to enforce their rights.

1. Position before 2013

Before 2013, the following were the relevant sections of Indian Penal Code (1860), used by the victim to enforce his or her rights:

- Section 320: Grievous hurt
- Section 322: Voluntarily causing grievous hurt
- Section 323: Punishment for voluntarily causing hurt
- Section 326: Voluntarily causing grievous hurt by dangerous weapons or means

Earlier, convictions have been done[22] under Section 302 (Punishment for murder) and Section 307 (Attempt to murder). Nonetheless, as contended in the Laxmi Case, the bails are granted easily under these sections. Most importantly, the mens rea, which is obvious in the cases of acid attacks, is extremely difficult to prove under the said sections.

[19] Law on Elimination of Violence against Women (EVAW), 989 (2009).
[20] Acid Crime Control Act (ACCA); Acid Control Act (ACA) (2002).
[21] Acid Control Law (2011).
[22] Gulab Sahiblal Shaikh v. The State of Maharashtra, (1998) Bom CR(Cri); Devanand v. The State (1987) 1 Crimes 314 (India).

Additionally, the harm inflicted by acid attacks were placed on the same pedestal as a fracture or privation of sight. However, one cannot measure the pain of an individual but one cannot undermine the very less chances of recovery and the neglect by society, in the cases of acid attack. There was a need to create distinction between the weapons used in Section 326 and acid. Keeping the mental trauma aside, the gravity of injury and the extent of mala fide intention cannot be done away with a maximum of 10 years of imprisonment. Acid throwing is an extremely violent crime by which the perpetrator of the crime seeks to inflict severe physical and mental suffering on his victim.[23] Critical matters like these deserve special attention and therefore, certain reforms were introduced after 2013.

2. Position after 2013

After passing of the landmark Laxmi judgment, there was an increased awareness and pressure to entail specifications in the existing laws regarding the rising acid attacks in the country. Consequently, the following changes were made:

- **Section 357A** was introduced in the Code of Criminal Procedure (1973) to entail provisions for the Victim Compensation Scheme. Recently, even Delhi High Court directed the Delhi State Legal Services Authority to undertake an enquiry and disburse compensation in accordance with the said Section.[24]

[23] LAW COMMISSION OF INDIA, THE INCLUSION OF ACID ATTACKS AS SPEIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME, Report No 226, at 3 (July, 2008).

[24] Tirath Singh Yadav v. State, 2019 (2) JCC 1610 (India).

- **Section 357B** was added to the Code of Criminal Procedure (1973) to clarify that the payment under Section 357A was in addition the fine paid to the victim under Section 326A, Section 376AB, Section 376D, Section 376DA and Section 376DB of the Indian Penal Code (1860).
- **Section 357C** further made provision of first aid or medical treatment mandatory for offences covered under Section 326A of Indian Penal Code (1860) and other provisions. This provision included both, public and private hospitals along with other local bodies. Also, as per this provision, information of the incident must also be sent to the police.
- **Section 326A** was added to the Indian Penal Code (1860) to provide for a cognizable offence when grievous hurt is voluntarily caused by use of acid. The provision provides for an imprisonment of at least 10 years along with a payment of fine to the victim.
- **Section 326B**, Indian Penal Code (1860) was inserted, titled as, "Voluntarily throwing or attempting to throw Acid". This further provided for 5 to 7 years of imprisonment along with a payment of fine.

The 18th Law Commission of India, headed by Justice AR Lakshmanan, recommended a presumption to be incorporated in the Indian Evidence Act as Section 114B wherein the Court shall presume that a person who does the act had complete intention and knowledge to commit an offence under Section 326A of Indian Penal Code (1860).[25]

[25] LAW COMMISSION OF INDIA, THE INCLUSION OF ACID ATTACKS AS SPEIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME, Report No 226, at 44 (July, 2008).

Conclusively, specific provisions have been added to the existing laws to provide for stringent actions against perpetrators of such a crime.

C. The Scheme for Compensation

The chief features regarding compensation for acid attack survivors, according to the Scheme of Compensation by NALSA[26], as endorsed by the Ministry of Women and Child Development, include:

1. The Deciding Authority concerning the application or recommendation for compensation shall be Criminal Injury Compensation Board which includes Ld. District & Sessions Judge, DM, SP, Civil Surgeon/CMO of the district.
2. The Secretary, State Legal Services Authority (SLSA) or Secretary, District legal Services Authority (DLSA) may grant interim relief, suo moto or after preliminary verification of the facts.
3. An amount of Rs. one lakh shall be paid within 15 days of the matter being brought to the notice of DLSA. The order granting interim compensation shall be passed by DLSA within 7 days of the matter being brought to its notice. The SLSA shall pay the compensation within 8 days of passing of the order. Thereafter, an amount of Rs. 2 lakhs shall be paid to the victim 'expeditiously' and lastly, within two months of the first payment.

[26] NALSA, COMPENSATION SCHEME FOR WOMEN VICTIMS/ SURVIVORS OF SEXUAL ASSAULT/ OTHER CRIMES (2018).

4. An additional compensation of Rs. 1 lakh can also be received under Prime Minister's National Relief Fund. Additional special financial assistance up to Rs. 5 lakhs is also provided for those who need treatment expenses over and above the compensation paid by the respective State/UTs in terms of Central Victim Compensation Fund Guidelines-2016.
5. The limits for compensation specify:

- Disfigurement of Face: Rs. 7 Lakh to Rs. 8 Lakh.
- Injury more than 50%: Rs. 5 Lakh to Rs. 8 Lakh.
- Injury less than 50%: Rs. 3 Lakh to Rs. 5 Lakh.
- Injury less than 20%: Rs. 3 Lakh to Rs. 4 Lakh.

According to Business Standard[27], the government has introduced a Central Victim Compensation Fund (CVCF) scheme, with an initial corpus of Rs 200 crores, to enable support to victims of rape, acid attacks, human trafficking and women killed or injured in the cross border firing. Also, it states that currently 24 states and 7 UTs have formulated the Victim Compensation Scheme.

PREVALENT PROTECTION MECHANISM: A MYTH

To emphasise on the role of laws and the necessity of involvement of State in the maintenance of society, one must look at the following statement made by the Hon'ble Apex Court in Subramanian Swamy vs. Union of India (UOI) and Ors[28]

[27] Press Trust of India, *Central victim compensation fund set up with Rs 200 crore,* Business Standard, October 14, 2015.
[28] Subramanian Swamy vs. Union of India (UOI) and Ors, (2016)7 SCC 221 (India).

"*Protection of individual right is imperative for social stability in a body polity and that is why the State makes laws relating to crimes. A crime affects the society. It causes harm and creates a dent in social harmony. When we talk of society, it is not an abstract idea or a thought in abstraction. There is a link and connect between individual rights and the society; and this connection gives rise to community interest at large. It is a concrete and visible phenomenon. Therefore, when harm is caused to an individual, the society as a whole is affected and the danger is perceived.*"

1. Punishments and Deterrence

It was contended in the Laxmi case that the Indian law does not address the gravity of acid attacks. Consequently, the State has undoubtedly provided for provisions for stringent punishments in case of acid attacks. However, the National Institute of Justice notes, More severe punishments do not "chasten" individuals convicted of crimes, and prisons may exacerbate recidivism.[29] Several studies also suggest that imprisonment does not deter crime.[30] Thus, stricter punishments, even draconian punishments does little to deter crimes.

2. Legislation and Implementation

Taking into consideration that the State has complied with its responsibility by providing a law, one cannot not look at the implementation of such laws. In India, the conviction rate for acid attacks is too low, in comparison to other countries. The number of cases added up to 53 by

[29] National Institute of Justice, Five things about deterrence, (Oct. 7, 2020, 10:50 AM), https://nij.ojp.gov/topics/articles/five-things-about-deterrence.
[30] Bob Yirka, Phys Org, Study suggests imprisonment does not deter future crime, (Oct. 7, 2020, 10:52 AM), https://phys.org/news/2019-05-imprisonment-deter-future-crime.html.

2006 in Karnataka and, as reported by the CSAAAW, verdicts were given in only 9 of these 53 cases.[31] According to India Today, out of the 734 cases that went for trial in India in 2015, only 33 were completed. Law is undeniably necessary but what do you do with an expensive cloth that you will never wear? Ultimately, it all turns out to be a 'white elephant'.

3. Compensation and Timely Relief

For cases, which actually get completed, one cannot assume that even they got what they sought for. Justice, a crucial concept in Indian Jurisprudence, allows for compensatory relief to the victim. However, while the victim needs the financial assistance on immediate basis, ASTI research[32] reveals that the total time taken for litigation around a case to end is between 5 to 10 years on average. The disbursal of compensation, even if done immediately, is more of a reimbursement than a relief. Victims often succumb to their injuries and when their families are provided with compensation, all they are left to think about is WHAT IF? What if they got the money earlier?

In civil law, compensation aims to place the injured party back in a position as if the injury has not taken place by way of pecuniary relief for the caused injury. The reforms made after 2013 provide for effective compensation disbursal. Nevertheless, when compensation is given for cases of acid attack, the amount is utilised for surgeries and medical treatment. One cannot even expect a relief for the loss of livelihood and reputation of the individual. To restore the

[31] LAW COMMISSION OF INDIA, THE INCLUSION OF ACID ATTACKS AS SPEIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME, Report No 226, at 7 (July, 2008).

[32] Acid Survivors Trust International, (Oct. 7, 2020, 10:54 AM) https://www.asti.org.uk/a-worldwide-problem.html#:~:text=ASTI%20research%20reveals%20that%20the,is%20known%20to%20the%20victim.

position of the victim is the mirage, the ideal and the impossible for the Indian legal system currently.

The key factors affecting punishment for acid attacks include:

- **A Deliberate Crime**

Acid violence is a premeditated act of violence as the perpetrator of the crime carries out the attack by first obtaining the acid, carrying it on him and then stalking the victim before executing the act.[33] Therefore, the strength of intention is too strong. Although, acid attacks have been faced by both, men and women. But, in India, such attacks are mainly inflicted upon the women. One needs to analyse that such a behaviour is prevalent due to the pictures of masculinity presented in the society which prevents the man to handle rejection and hatred. The frustration causes the person to seek vengeance in the most inhuman way possible.

- **Long-Lasting Consequences**

The injury caused to the victim has short term as well as long term consequences, which may even stretch for decades. Grafting surgeries take years to present a semblance and new complications keep arising as and when the time passes. The Report[34] also states that the scars grow and change over one to two years and as the scars thicken and contract, they can cause permanent disability by stiffening joints and restricting movement

[33] LAW COMMISSION OF INDIA, THE INCLUSION OF ACID ATTACKS AS SPEIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME, Report No 226, at 4 (July, 2008).

[34] LAW COMMISSION OF INDIA, THE INCLUSION OF ACID ATTACKS AS SPEIFIC OFFENCES IN THE INDIAN PENAL CODE AND A LAW FOR COMPENSATION FOR VICTIMS OF CRIME, Report No 226, at 12 (July, 2008).

- **Loss of Livelihood**

Out of the several consequences, one of the most hurtful consequences include the loss of independence of the victim. The society looks upon them either with pity or with shame. Women lose marriage prospects and the stereotypes do not allow them to find work for their sustenance. The isolation and mental trauma adds to the existing financial difficulties and physical pain.

The judicial decisions have aimed to do justice by extending the compensation, according to the circumstances, as seen in the Parivartan Kendra case. As per the percentage of injury caused, relief is provided for. The Constitution also guarantees fundamental rights, which take a severe hit in such cases. Right to life and freedom of movement, speech and expression are highly affected. One indeed can approach the Supreme Court according to Article 32. This has made the approach to justice easy. No matter what, the achievement of justice is still a far-fetched dream for survivors and other family members.

Rehabilitation relief, although asked for in several cases, has been neglected. Schemes may have been formulated but in a few cases, where the survivor achieves success, the State has a very limited role to play. The journey is of the victim and his or her closed ones. Although, the lawmakers do come into "the picture" for their self-interest. Reliefs are granted before elections and meetings and conferences happen once they are successful. But the journey, the struggle and the suffering is borne by the victim alone.

Let's imagine a scenario where a legal guarantee has been provided for deterrence, for punishment and for compensation. However, can one approach the Court for societal

acceptance? One severe difficulty arises when even after the surgeries are done, society does not accept the person the way they are. The individuality of the person and the vigour to live dies. Societal acceptance, if provided, can turn many criminals into people with a kind soul. This is the same society which allows an individual to perpetuate thoughts to kill someone so ruthlessly. The principles of machismo in the society doesnt let the man accept the "defeat" and therefore most of the acid attack incidents happen due to rejection of a marriage proposal or in furtherance of harassment of women. The role of society thus becomes significant in two aspects. Firstly, to let an individual cultivate a healthy mind so as to prevent such incidents. Secondly, if such incidents still occur, the society must accept the person, not with sympathy but with empathy.

CONCLUSION

The State has been found to have the positive obligation, pursuant to Article 21, to necessarily undertake those steps that would enhance human dignity, and enable the individual to lead a life of at least some dignity.[35] Protection by State is of utmost necessity for the lives of individuals. However, the State has to look beyond making provisions for punishments and schemes for compensation. Implementation of the ideals should be the main objective of the State. The State must proactively take action against perpetrators of such a crime and to secure deterrence, awareness towards the laws must be paid keen attention to. The existence of laws becomes a mere formality and therefore, a hopeless myth for the victims.

[35] Nandini Sundar and Ors. vs. State of Chhattisgarh (2011) MANU 0724 (India).

Indisputably, the legal system has evolved and the State has taken action towards the issues but there exists a long way ahead. The circulation of supply of acid is still rampant and the formalities prescribed are still unimplemented. The State Protection must provide a wholesome security to individuals but in India, victims are under constant threat of being attacked again. The denial of rights is not a single event but a continuous series lasting years, even the years of survival.

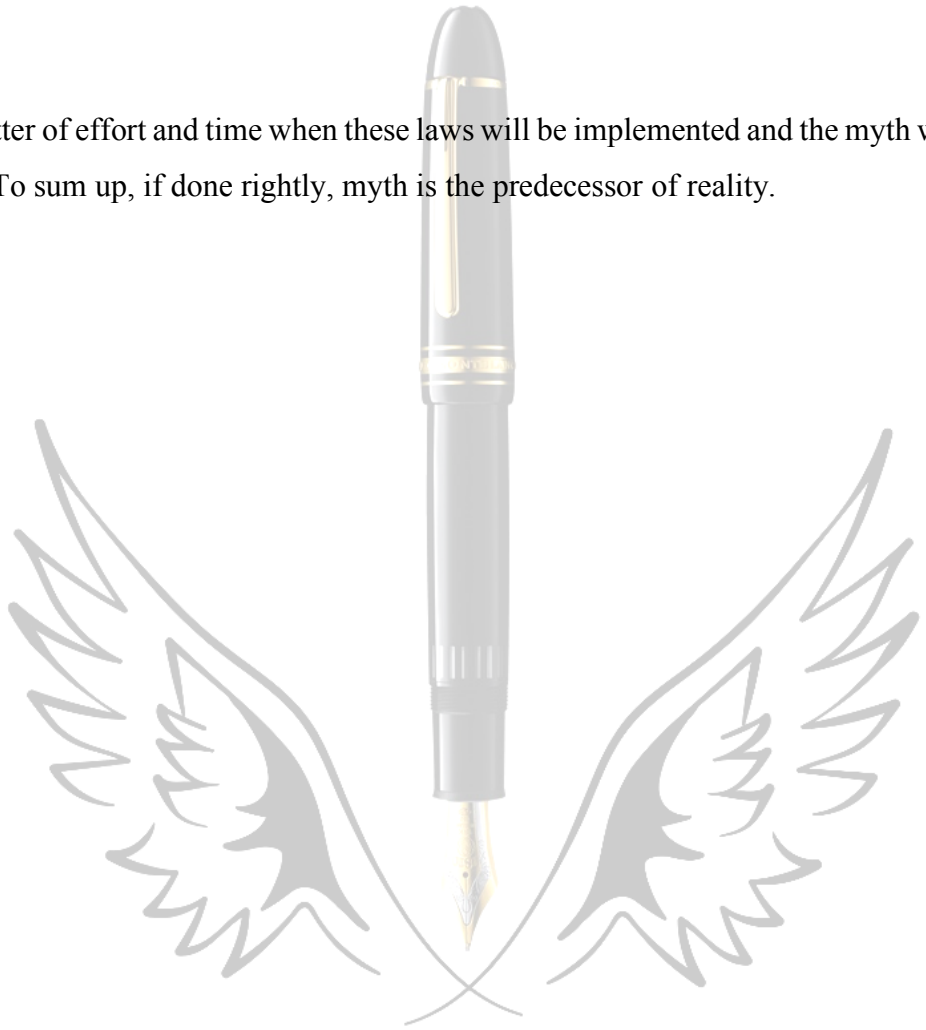
The role of the Legal Services Authority also need to be promoted and people should be apprised of the legal aid services they can get through these authorities. The lack of awareness of procedures has caused several cases to not be reported. People get scared of the financial burden of litigation and the fulfilling of different procedures to avail relief. Unnecessary formalities must be done away with and keeping the end in mind, the emans should be made easily available.

The Laxmi case affected the society, but only momentarily. The cinematic depiction in the movie "Chapaak" could have brought in a certain amount of awareness, if it had not been engulfed with controversies. Both, the victim or the criminal, needs the support of society because man is a social animal and every act of the society affects him or her tremendously.

Nikolai Berdayayev writes, "*Myth is no fiction, but a reality; it is, however, one of a different order from that of so-called empirical fact*."[36] The existence of the law is a true fact and it is

[36] JF BIERLEIN, PARALLEL MYTHS 17, (1994).

only a matter of effort and time when these laws will be implemented and the myth will become a reality. To sum up, if done rightly, myth is the predecessor of reality.



FEDERALISM: A COMPARITIVE ANALYSIS

- SANJANA SHRIVASTAVA

The republic of Germany, Austria and Switzerland are federal nations. The concept of federalism that is understood by the historical foundation of these three nations is much different to the other west European countries. These European countries are tilted towards centrally organised states to a great extent. The basic similarity that can be figured out is the common language as German is spoken by almost 3/4th of the swiss citizens. Apart from that the geographic proximity that these three nations hold again is something that would interest us as despite being similar on two grounds these nations stand at different aspects in terms of political and cultural unity.

Coming to the tendency of centralization and decentralization ,if depending on the statistical data during the 1970s, international comparison of the tax receipts collected by three national governments, Switzerland depicted the highest degree of decentralisation of all western federal states with 41% national government's share, federal republic with 51% and Austrian government with lowest degree of inclination towards the decentralisation with 70% shares closer to the centralised states of western Europe.

The involvements of interests in the federal system basically consists of two interrelated aspects that says; the formation of policies followed by the administrative implementation. In order to go in depth and check the work of political parties in the national and regional arenas are decided by the administrations of the central and regional governments who provide principal mechanisms for the same. These two different impacts or effects provide for the double legitimation and double identification of federal structure. Double legitimation because

they stand for elections in the national and central arenas and are valid in both and double identification because they act as interest enhancers in both the governments and are linked to both. The effect of these aggregators on the centralizing and decentralizing tendencies depends greatly on the vertical power distribution of the political parties. It's been acknowledged that the to be able to witness a relationship between a political authority and territorial community is very important. Its been defined as the as the predominant conjunction of the relationship to be based on the interdependent system of sovereign states. It can be well defined as that the territorial communication that has been talked here is about how the territorial interest group bind the individual groups with identification and hopes. What more has been focussed on here is the fact that sovereign nations have some bases, where ideology play a very vital role in regards to producing a territorial community, its structures and its definite functioning that have to be observed within the national authority. Also, three of the most important formulas that can be taken into consideration while trying to understand this concept of functioning of the national political authority are the unitary forms of governments, federal union (which is being primarily talked about here) and finally the confederations[37]. All of these have some ideological and structural bases. Talking about the one that closely witnesses the tendency of the centralisation and decentralisation, all the parties in the federations and the ones who effect the intermediation are important vehicles of centralization. The political dimension as far as the regulation of the same is concerned depends on the legitimation and the identification; hence bipolarity of the same in both the federal and regional areas however the administrative implementation is born out of the responsibilities of the cooperation and coordination obligatory on the federal and regional executives. Also, the relation between the cooperation

[37] The Territorial Dimension of Politics within, among and across Nations by Ivo D. Duchacek

and coordination could be understood by the term "*politikverflechtung"* that says "the fact that political decision making is a result of an amalgamation of decisions from many power centres." This federal relationship was developed in republic of Germany and after a lot of debates and discussion; it entered Switzerland and Austria. Talking about the similarities among all three of them again is in regard to their origin that is somewhat related to crisis. The swiss federal constitution emerged after the end of the civil war between liberal and catholic cantons was in order to determine the form of swiss federation. Similarly, Austrian and German federal system came into existence after the first and the second world war that completely destroyed the territorial unity of this country. Also, as we already know that the effects of double legitimation and double identification of political parties basically depends on the major mechanisms provided by the administrative implementation of the regional and national governments. So far as the legitimation is concerned, elections play a very important role in the national and regional parliaments and in this context distribution of powers between the two is very important and can be understood as the importance of voting systems.

On this basis, one can observe a contrast to both west Germany and Austria against Switzerland. Switzerland portrays a multidimensional segmentation. This segmentation includes linguistic, confessional, social and regional aspects and have equal weightages in terms of importance to the Swiss society. Substantiating it with statistical data one can extract that the German language group in Switzerland is 73.9% of the population in Switzerland which is contrary to the French population that estimates about 20.1% of the population. Following the same with 4.5% of Italian population and the Rhaeto-Romanic population to be 0.9%. protestants being a majority with 50.4% and the Catholics prevailing with 43.9%. it can be figured out with the above-mentioned facts and the statistical data provided that the linguistic aspect cancels the party aspects almost completely however the religious aspect

coincides. Taking into consideration the various types of conditions that are needed to explain the consociationalism of elite relationship; here the interest groups, factors such as the size of the country in terms of the population is of a great importance[38].The territorial distribution of the linguistic approach and the confessional aspects in Switzerland is not in accordance to the customs of cancelling the rather these follow the social aspect. More than the nation itself, the federal units show a kind of homogeneity along these two aspects. For example, the cantons have their own subculture, which has distinguished themselves from the constituent states of west Germany and Austria in regard to their identity.

On the other hand, all the three states have made this a political agenda to be working from bottom up. The Green alternative parties have tried to use regional arenas as a helping hand to enter the national parliament. A little similarity can again be observed as the situation in Switzerland urban cantons and the land of Hessen in Germany, new parties have tried to acquire shares in the national government, the chances of which is expectedly high in regional arenas however in Austria this similar thing has worked on the contrary that shows a very little chance of the same. Most importantly, this ideological concept of working from the bottom towards up is important for these new parties and can bring about a new angle to the concept of federalism.

Talking about the federal interaction and the assisting similarities and dissimilarities, these three nations are observed to be a little conscious and hence they might take pause in order to check the institutional frameworks. For example, the second federal chamber of the national legislature in Switzerland is having powers in the same amount as that of the first chamber.it has relatively a strong power in the federal republic but only a suspensive veto in Austria.

[38] Democracy in Plural Societies: A Comparative Exploration by Arend Lijphart

Moreover, the concept of federalism is more of a process rather than structure. In regard to this it's very interesting how the parties are trying to get involved within and among the processes. A great similarity that can be extracted here is the fact that in all the three countries that are being talked about here, the political parties present are represented in both the chambers of the national and regional parliaments and form governments in both.

The concept of federalism can be decided either by the party functioning as the opposition or the ruling in the federal or national governments. The opposition parties always tend to push the federal policies however ruling parties are more likely to push the centralized policies. The contrary can be seen in the regional arenas as the opposition being pushing the centralized policies and the ruling favouring the federative policies.

b) model of vertical differentiation

The national parties of Switzerland, except for the centrally organized SPS party, have been described as a "umbrella organizations" of cantonal parties where unity should win every time. An important result of the vertical differentiation

Of federal system that has its base in regional units is the swiss party system.one can figure it out from the fact that the opposition raised by the cantonal party against the efforts of unification by the national party. However cantonal parties have denied to use the name of the national party. This denial has two important factors, first the voter's loyalty within the cantons and secondly the ideological differences. The two important swiss parties have been making efforts since 1971 to achieve cohesiveness in the national organizations by the way of creating the central institutions that creates a homogeneity in the cantonal organizations and have however not been able to overcome the swiss party system. As a result of the federal intraparty effects, the peculiarity has both internal and external effects. The swiss model that shows conflict regulation, with its double concordance portrays the possibility of occasional

opposition. In comparison to west Germany and Austria, the federal role of members in Switzerland national parliament can be assessed clearly. The low party discipline in the swiss is not a result of consociational democracy rather it's also an impact of the groups and parties on the parliament. To be able to understand the very basis of consociationalism a great study on its patterns has been done. In an attempt to understand this very concept several generalizations have to be derived as its very important to connect and link it with the theories of politics that have different norms and regulations. It's been acknowledged that the key to consociational democracy is based on the people of different segments of the plural society's leaders and their choices that say that it should be governed with cooperation rather than competition[39]. Also, there are a lot of conditions that favour the consociationalism when it's in regard to the plural societies. It's also discussed that the consociational strategies of accommodation and adjustments in the plural societies should basically be taken into consideration on the basis of the ethnic division rather than the ideological conflicts. Linking this with the condition in Switzerland, this basically depicts a very loose relationship between the national and cantonal party organizations. There is another possibility in which these parties take the intraparty disharmony within the public which is of a great importance in Switzerland. And analysis of the election symbols of the cantonal parties shows deviation of views.

The independence of cantonal party is an evidence of internal relations within the parties. For example, candidates recruited is still a function of the cantonal organization and nomination process is under the monopoly of the cantonal party. To be able to summarise it, the swiss party has been seen to get shaped by the federalism and also contributed towards the strengthening the federalism.

[39] Lijphart's formulation in - Democracy in Plural Societies: A Comparative Exploration by Arend Lijphart

c) Model of vertical integration

Now, as we already know the party both in Germany and Austria shifted from a vertical conflict to a horizontal through a partisan competition. How these two federal systems are going to fulfil the needs depends on the vertical intraparty structures and processes. The internal reforms from the bottom up is in direct contact with the national parties structured from top bottom.

Germany and Austria have strong central party organs. Intraparty structures and their processes run mainly from channels that form hierarchy from top to bottom. The regional parties should work on the principles laid down in the policies of national party. Another example can be taken as when the national party has some influence in the selection process of the candidate who belongs to a regional party. In order to elect important politicians for national party, these parties encourage the regional parties for the same.

Coming to a different aspect, the ruling regional party gets more votes in the regional election than a national party gets in the national election. This kind of difference can be noticed in the Austria than in federal republic. The impact of regional party leaders in the national party is directly related to the electoral victories. The important decisions by them greatly influences the federal government especially when its associated with the personnel. The participation of land party in the vital processes within the national party is institutionalise through the membership of regional party elites in the higher federal party council. Now, what these elites have to do is to create a unity in the party policies of the respective regional and national parties.

In Germany, the rotation of top politicians between the regional and national parties is very common. However, in Austria its not the same as one can easily see the regional leaders replacing the members of the interest groups in the top organs of the Austrian people's party.

REVIEW OF LITERATURE

Democracy in Plural Societies: A Comparative Exploration by Arend Lijphart

It's a comparative exploration of an article that in 1956 was written by Gabriel almond in order to compare different political systems namely Anglo-American, continental European, pre-industrial and totalitarian. Unfortunately, when he got to face these small democracies especially small European democracies, that fit none of his above-mentioned categories. These somewhere contained a fragmented kind of political cultures that were prevalent in the European continental countries but however they had an achievement of stable democracy that too along the line of Anglo-American model. In response to this, Arend Lijphart, a scholar from Netherlands, developed the concept of consociational democracy, both by way of categorisation and as an explanation of the process by which the countries possessing fragmented political cultures would be able to achieve stable democracy.

The Territorial Dimension of Politics within, among and across Nations by Ivo D. Duchacek

The central focus of this book is to establish a relationship between the political authorities and territorial communication. Duchacek has also talked about the challenges that the nations are facing these days such as globalism and regionalism, ingressive and egressive flows and how they give the concept of ideology and movement with unity one hand(globalism) and the regional associations. The book also lets us know about the emerging trends of diplomacy between non-central units of political authority, taking in to account all the intensities and velocities of international processes.

CONCLUSION

If institutional framework and a long tradition are taken into consideration then there is just on name that pops up after the profound study of the above three country that is Switzerland whose federalism defines the above two aspects, and are further strengthened by the heterogeneity and regional solidarity of the respective political authorities prevalent over there. Something in addition to the above stated facts that strengthens the federalism is that this country has retained its importance of the minorities against majority principles which is often disregarded. Talking on the contrary the Republic of Germany and Austria have pure party federalism, in which the minorities interest is not paid any heed however possibility of participation of elite processes in the political party. The majority principle in any democracy is diminished by the federalism that proves beneficial of party elites, and hence has become an instrument of party state.

THE RTI ACT: EVALUATING THE SUNSHINE LAW OF INDIA

- ROHIT RANJAN

INTRODUCTION

"Secrecy, being an instrument of conspiracy, ought never to be the system of a regular government"

These words of the 18th century British Philosopher Jeremy Bentham succinctly present to us the importance of transparency in the functioning of a government. However, it will be a mistake on our part if we believe that these words talk about the government as we understand it today i.e. a group of people elected by the citizens to run the country by taking the policy decisions. In fact, what Jeremy Bentham would have intended (or what we should believe he should have intended, in order to make the most of this statement) is that the bodies that are responsible for the administration of a country should never have secrecy as their normal i.e. they should strive for openness and transparency, as far as practicable. This is because secrecy makes way for conspiracy, corruption and ineffectiveness of the administration, thus leading to a failure in achieving the objectives for which the various administrative bodies of a country are established.

India has been suffering from the problem of corruption since the pre-independence era. The achieving of independence hasn't changed the scenario much and we have continued to struggle with this evil even after independence. Decades after decades it was hoped that the situation would improve but only disappointment was received. The main reason of this

corruption was the secrecy which Bentham had warned against. The common people of the country had limited access to information regarding the various activities and decisions of the administrative bodies. Due to lack of information, people remained unaware about the misdeeds of the bodies governing them and were silent spectators to the corruption which had caught hold of the Indian administration.

What was required was that the people of India should have knowledge about how their government is functioning, how different policies are executed, how different transactions done by the government have played out, they needed to know if there is any discrepancy in the affairs of the government, or the administrative bodies of government. In short, what they needed was "accountability" on the part of the government. This requirement was also recognized by the Judiciary of our country. In ***Bennett Coleman v. Union of India***[40], for the first time, the right to know was realised as a fundamental right and the Supreme Court ruled that the right to freedom of speech and expression guaranteed under Art. 19(1) (a) included the right to information. ***In Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal***[41], it was held by the Supreme Court that the right to freedom of speech and expression includes the "right to receive and impart information". The court made it clear that the right to information is an inalienable component of Article 19 of our Constitution. In ***People's Union for Civil Liberties v Union of India***[42], the right to information was given the status of a human right, necessary for making governance transparent and accountable.

[40] 1973 SCR (2) 757
[41] 1995 SCC (2) 161
[42] AIR 1997 SC 568

All these judicial pronouncements established the importance of the Right to Information and in 2005, this right was established as a full-fledged statute entitled "The Right to Information Act, 2005". This act became the most important tool in the hands of the citizens of India for enforcing their right to know.

IMPORTANT FEATURES OF THE RIGHT TO INFORMATION ACT, 2005

The following are some of the important features of the Right to Information Act, 2005 (RTI Act):

- Every Citizen possesses the Right to Information. (Section 3)
- The term "information" means any material in any form, and includes Records, documents, emails, opinions, press releases etc. (Section 2(f))
- Any information in a normal case can be obtained within 30 days of the request. (Section 7(1))
- If the matter related to the life and liberty of a person, the information can be obtained within 48 hours of the filing of the request. (Section 7(1))
- Every public authority is obligated to provide information on written request or request by electronic means. (Section 6)
- It provides of the constitution of Central Information Commission (Section 12) and State Information Commission (Section 15) and defines their powers (Section 18)
- It also provides for penalties in case of refusal to receive an application or not furnishing information without any reasonable cause (Section 20)

IMPACT OF THE RTI ACT ON TRANSPARENCY

The implementation of the RTI Act has made the administrative processes public, thereby bringing the desired openness and transparency in the working of public organisations. It mandatory for the public authorities to furnish 17 kinds[43] of information in a manner which can facilitate the provision of information under the Act. The information has to be updated regularly and the public authorities are required to ensure that these records are accessible to people across the country. The performance of the authorities as far as the disclosure of information is concerned is mixed as many cases of non-compliance to this provision are highlighted by studies conducted by various agencies.[44]

The provisions of the Act instil the element of accountability in the functioning of the public authorities. The appointment of officials responsible for the disclosure of information, defining their roles and responsibilities have provided strong mechanisms to ensure the accountability of public organisations. The provisions for the levying of penalty from officials in case of non-compliance with the provisions of the act also keeps a check on the administrative officials.[45] The kind of information which has been sought through applications filed under the RTI Act also promote the culture of transparency and accountability in the functioning of the public authorities. A study entitled *RTI in Practice: Mapping its Effectiveness in Urban Slums of Delhi*[46] has revealed that the applicants through the use of RTI have asked for information regarding the reasons for not making available the information relating to the admissions of

[43] Section 4(1) (b), the Right to Information Act, 2005

[44] Pricewaterhouse Coopers, Report*: Understanding the "Key Issues and Constraints" in implementing the RTI Act* (June 2009)

[45] C. Rodrigues, "Promoting public accountability in overseas development assistance: Harnessing the right to information" *CHRI* (2006)

[46] Department of Personnel and Training, Government of India, Report: *RTI in practice: Mapping its effectiveness in urban slums of Delhi* (2012)

students in schools under Economically Weaker Section (EWS) category. It suggests non-compliance with the order of the CIC on the providing of information with reference to the admissions under EWS category and its mandatory disclosure under Section 4 of the RTI Act. The applicants have also sought information regarding the reasons for non-fulfilling of certain obligations by the Fair Price Shops (FPSs) under the PDS (Public Distribution System) Control Order 2001. It is clearly evident from these examples that RTI has emerged as a tool used by the citizens to ensure accountability and transparency. The success of RTI as a tool to ensure accountability is evident through high percentage of people (78 per cent) confirming that they were able to extract the desired information through RTI.

It has been found that since the inception of the Act, the Right to Information has been used mostly in the areas where citizens find it difficult to get what they are entitled to. Most of the RTI applications were filed to correct the mistakes which had been existing due to high levels of corruption in the process of the delivery of service of the social sector programmes, especially the development programme[47]. A pertinent example of this is the Mahatma Gandhi National Rural Employment Guarantee Act. Before the enactment of the RTI Act, the information relating to muster rolls was not available in the public domain, due to which corruption was done on a large scale by the middlemen. By making muster rolls available online, the RTI has helped in reducing corruption[48].

By filing applications under RTI, disclosure of information regarding decision-making processes relating to file noting, cabinet papers, records of recruitment and promotion of staff,

[47] Centre for Good Governance, Report: *Best practices in implementation of the right to information act* (*National & International*) (2009)
[48] Editorial, "Learning from NREGA" *The Hindu,* Aug. 23, 2014

documents pertaining to tender processes and procurement procedure etc. have been obtained. The disclosure of this information has highlighted the incidents of corruption in their respective bodies.[49] Thus, by the use of the RTI Act, the citizens have access to a substantial amount of the information relating to the administrative bodies of the country, thus helping to mitigate corruption and introducing transparency in the functioning of the administrative bodies.

MAJOR ACHIEVEMENTS OF THE RTI ACT

In the 19 years of its existence, the RTI Act has helped unearth many corrupt acts of the public bodies. Some of the major scams which were busted by the Act are:

1. 2G Scam: The telecom sector scandal (popularly known as the 2G scam) which took place during the UPA involved the Telecom Ministry, with A. Raja, the Minister of Communications & IT being the primary official accused. The government of that time was accused of undercharging mobile telephone companies for frequency allocation licenses, which they used to create 2G spectrum subscriptions for cell phones[50]. It was alleged that the government did the said allocation for bribes, which resulted in costing the Indian government Rs. 1,76,645 crores. As the scam was revealed, the Right to Information helped to unearth how the scam spread in the UPA government. For instance, an RTI filed by the RTI activist Subhash Chandra Agrawal revealed that Raja had a 15-minute-long meeting with the then Solicitor-General Goolam E. Vahanvati in

[49] T.B. Simi, M.S. Sharma & G. Cheriyan, "Analysing the Right to Information act in India *CUTS International* (2010)

[50] 2G Scam Explained *available at:* https://www.news18.com/news/immersive/2g-scam-explained (Visited on October 16, 2019)

December 2007 following which a "brief note was prepared and handed over to the Minister", but no minutes were recorded[51].

2. Commonwealth Games Scam: The Commonwealth Games scam (CWG Scam) was another scam committed in the regime of the UPA-II. It was alleged that Suresh Kalmadi, an MP from Pune, handed out an inflated contract of Rs. 141-crore to Swiss Timing for its timing and scoring equipment, which caused a loss of Rs. 95 crores to the Indian government[52]. An RTI application filed by the Housing and Land Rights Network, a non-profit organisation, revealed that the Delhi government had diverted Rs744 crore from social welfare projects for the Dalits to the Commonwealth Games from 2005-2006 to 2010-2011.

Other scams[53] unearthed by the use of RTI Act are Indian Red Cross Society Scam, Adarsh Society scam, University scam in Odisha etc. These scams indicate the level of corruption prevalent in our country and disturb the conscious of every citizen. But the positive news in these revelations is that the citizens now have a powerful tool in their hand, called the RTI Act, using which even an ordinary citizen of the country can bring to the fore scams and corrupt acts worth thousands of crores of rupees. The RTI Act has ensured that no activity of the

[51] 5 Scams that the RTI Act helped bust in Its first 10 years *available at* https://www.huffingtonpost.in/2015/10/12/5-most-critical-scams-exp_n_8263302 (Last modified July 15, 2016)

[52] Commonwealth Games Scam *available at*: https://timesofindia.indiatimes.com/miscellaneous/commonwealth-games-scam/articleshow/56032112 (Last modified December 17, 2016)

[53] RTI success stories: 7 times the Act helped uncover scams, anomalies *available at* https://www.moneycontrol.com/news/trends/rti-success-stories-7-times-the-act-helped-uncover-scams-anomalies-4266141 (Last modified July 30, 2019)

government goes unchecked (unless it is exempted from the RTI Act) and thus has brought transparency in the functioning of the public bodies.

CHALLENGES FACED BY THE RTI ACT

Even though the RTI Act has achieved a fair amount of success in bringing transparency in the functioning of the administrative bodies, the success has not been satisfactory. The leading national daily *The Hindu*[54] reported in 2014 that as many as 9,62,630 requests were pending for disposal at the end of the reporting year 2013-14. An October 2014 report brought by RTI Assessment and Analysis Group (RAAG) showed a waiting period of up to 60 years in Madhya Pradesh and up to 18 years in West Bengal, calculated on the basis of the then rates of pendency in Information Commissions. In less than 3 percent of cases, penalties were imposed on government departments denying the information sought. The reasons cited by experts for such inefficiency are poor record-keeping practices within the bureaucracy, lack of infrastructure and staff for running Information Commissions, and dilution of supplementary laws.

The unsatisfactory performance of the RTI Act can be attributed to many reasons. The gap between the bureaucracy and the people is still largely unbridgeable. The bureaucrats look down on the people when they submit an application to seek information. It is very difficult to get the information sought, and getting that in time is also a challenge. Another important reason is that the members of the state and central information commissions are retired bureaucrats, who generally refrain from using the penal provisions of the RTI Act against the bureaucrats (because they are their former colleagues), even if the offense of not providing the

[54] 10 years after RTI, transparency under cloud *available at*: https://www.thehindu.com/news/cities/Delhi/10-years-after-rti-transparency-under-cloud/article7213480 (Last modified May 16, 2015)

information is proved beyond reasonable doubt[55]. This "we" feeling among the bureaucrats serves as a detriment to the RTI. Also, many a times the bureaucrats do not respond to the ordinary letters, applications etc. of the people, even though there are penal provisions for not doing so, as they have found out ways of evading the law.

THE RECENT AMENDMENT IN RTI ACT: AN ATTEMPT TO DIMINISH CITIZENS' POWER

In July 2019, an amendment to the RTI Act was brought by the present government in which the fixed tenure of 5 years for the Chief Information Commissioner and the Information Commissioners has been done away with. Their salaries also have been altered. Both will now be determined by the central government. It means that all the Information Commissioners as well as the Chief Information Commissioner have now been exposed to the whims and fancies of the ruling party. Their job security has been diluted and the amendment has made way for the ruling party to remove any IC or CIC who pose a threat to their government. In effect, this amendment has axed the sunshine law of the country and will lead to letting corruption go unnoticed. This amendment has received harsh criticism[56] from opposition parties, lawyers, judges of the Supreme Court and RTI activists, with the leader of the opposition in Lok Sabha calling it dangerous, and former Judge of the Supreme Court, Justice Madan Lokur[57] saying that the amendments are regressive and will have an impact on the functioning of the law.

[55] Prem Singh Dahiya, "Efficacy of the RTI Act" *Economic & Political Weekly*, June 13, 2009

[56] What makes RTI Amendment Bill so controversial? *available at* https://www.indiatoday.in/news-analysis/story/what-makes-rti-amendment-bill-so-controversial-1572596-2019-07-23 (Last modified July 23, 2019)

[57] RTI Amendments are regressive, will impact functioning of law: Justice Lokur *available at* https://www.livelaw.in/top-stories/rti-amendments-are-regressive-will-impact-functioning-of-law-justice-lokur-149007 (Last modified October 17, 2019)

THE WAY OUT

The following reforms are suggested by the researcher to overcome the above-mentioned problems:

- The parliament should make laws which provide for speedy replies of the RTI applications. Provisions should be made for complaint to higher authorities (if possible, the offices of cabinet ministers) in case of unexplained delay in replying to the applications.
- Provisions should be made for a maximum limit beyond which the waiting period cannot exceed. The authorities should be reprimanded and explanation should be demanded in case of exorbitant waiting periods.
- More manpower should be added to the Information Commissions by increasing the strength of different posts and these posts should be filled from time to time.
- The bureaucrat culture of the Information Commissions should be broken by appointing non-bureaucrats on the top positions like ICs and CICs.
- Provisions should be made for strict maintenance of records in the Information Commissions and strict adherence to laws which require submission of reports after each reporting year should be observed.
- Supplementary laws should be made to aid the RTI Act and ensure its smooth functioning.

CONCLUSION

With its inception, the RTI Act has done a lot in strengthening the transparency in the functioning of the administrative bodies in India. In the 14 years of its existence, the RTI Act has proved to be a useful tool in the hands of the citizens for getting detailed information about

the various activities of the government and has helped in exposing many corrupt practices and scams. However, the performance of the sunshine law has not been satisfactory as is indicated by the large number of unanswered requests and the exorbitant delays in the releasing of the information sought. The reasons for these include lack of workforce, poor record-keeping practices, unwillingness to provide information etc. Also, the recent amendment introduced in the RTI Act regarding the tenure of the ICs and CICs has also made way for these bodies being subject to the whims and fancies of the government of the day.

The need of the hour is to take effective measures for keeping in check and if possible, eradicating the various factors responsible for hindering the smooth functioning of the RTI Act. We should keep in mind that the RTI Act is a very pertinent tool at our disposal which has provided us the power to discover the corrupt practices of the administrative bodies and it is our duty, as responsible citizens, to force the government to make its functioning as smooth as possible, so that we can keep the public authorities in check and they are not able to get away with acting according to their whims and fancies.

INTERPRETATION OF ARTICLE 21 TO PROMOTE THE INTENTION OF CONSTITUENT ASSEMBLY

- SIDDHANT NARAYAN

ABSTRACT

Article 21 which basically means that no person shall be deprived of life and personal liberty except according to procedure established by law. Article 21 is the main article in which the judiciary has given their sides of interpretation of the article and various sub-article have also been included under the ambit of Article 21.

This research paper talks about the general interpretation of Article 21 by the method of explaining various sub-rights, this paper also talks about the recent trend in Article 21 and also it talks about the judicial interpretation of Article 21 by the method of case laws and judgments in the case laws.

INTRODUCTION

Article 21 is one of the main Article in the Constitution embedded in Part III that deals with the fundamental rights and the Indian Government has time and again interpreted Article 21 in new and innovative ways in order to bring relief to the oppressed.[58] As we all know Article 21 basically means that no person shall be deprived of life and personal liberty except according to procedure established by law.

[58] Abhinav Pandey, Wide Interpretation of the Right to Life: The Question of Enforceability, SSRN, Pg.1 (2014)

The fundamental right to life deals with the most precious human right that basically forms the article of all other rights.[59]

The Government had not seen that what was the worth of Article 21 in which they were including in the Constitution. The Judicial Interpretation of Article 21 of Constitution of India and the judicial activism on the part of Supreme Court of India.

The role played by the Supreme Court of India in judicial creativity for the protection of the fundamental right of the citizens when the legislative and executive failed to perform the duties.[60]

The Article 21 is the most important right around which other rights are linked and therefore, the study assumes great significance.

SCOPE OF STUDY

For the purpose of this study, the time when Article 21 came into picture and what it is now is considered. Wherever necessary reference will be available. The purpose of this study is also to find out the recent trends in Article 21.

OBJECTIVES OF RESEARCH

[59] Neepa Jain, Article 21 of Constitution of India and Right to Livelihood, Volume 2 Issue 2, Pg.1 (2013)
[60] Dr. Gyanendra Kumar Sahu, An overview of Article 21 of the Indian Constitution, Volume 3, Issue 3, Pg. 98 (2017)

In order to know the past and current situation of Article 21, the researcher has selected the following objectives:

1. To know as to what factors were there which led to the introduction of changes in Article 21.
2. To know about the recent trends in Article 21.
3. To know about the judicial interpretation of Article 21.

HYPOTHESIS

- Article 21 which mainly focuses on right to life and personal liberty.
- Administrative support and its responsibilities towards people.
- The Judicial interpretation of Article 21.
- Rights which protect the human life.
- Indian judiciary which gives different verdict for human life.

RESEARCH METHODOLOGY

Doctrinal method of research is used.

CHAPTER-1

INTERPRETATION OF ARTICLE 21

1.1 Right to Live with Human Dignity

Right to live with human dignity is the first right that became known under Article 21. It was the first right in which Supreme Court held that no person shall be deprived of his/her life or

personal liberty. The law must satisfy the contents of Article 14, Article 19 read with Article 21. Right to live with human dignity means adequate nutrition, clothing and shelter with the facilities of reading, writing and to express one self.[61]

The above right is explained with a leading case law: -

Maneka Gandhi v/s Union of India[62]

Judgment

The court held that Sec. 10(3)(c) of the Passport Act, 1967 is void because it violates Article 14 of the Constitution of India, because it gives undefined power to the passport authority. It is also violative of Article 14 as it does not give an option to the party to be heard. It was also held violative of Article 21 since it does not affirm to the word "procedure" as mentioned in the clause, and the procedure performed by the passport authorities was the worst procedure. The court did not give any particular decree and said that the passport would remain with the authorities till they deem fit.

1.2 Right to Livelihood

A major step was taken in Article that 'life' in Article 21 does not only means mere 'animal existence' but also to live with human dignity. The real meaning is that the right to livelihood means getting adequate nutrition, clothing, shelter and getting facilities like reading, writing

[61] Rahul Gupta, Expanding & Ever evolving: Article 21 of the C.O.I 'Right to Life & Personal Liberty', Latest Laws (Oct. 4, 2020, 5:02 PM), https://www.latestlaws.com/articles/expanding-ever-evolving-article-21-of-the-constitution-of-india-right-to-life-personal-liberty/

[62] AIR 1978 SC 597

and expressing oneself in diverse forms, freely moving about and getting to know other people.[63]

The above right is explained with a leading case law:

Olga Tellis v/s Bombay Municipal Corporation[64]

Judgment

The court concluded by saying that although the inhabitants were entitled to an alternative approach yet, no one has the right to encroach on sidewalks or any other place reserved for public purposes. The section 314 of BMC Act is not unreasonable in the circumstances of this case. Slums existing for more than 20 years cannot be removed unless the land is needed for public purpose.

1.3 Right to Privacy

The right to privacy in India has came out from many decisions over the past 60 years. From the early two judgments, a mixed opinion was formed whether the right to privacy is a Fundamental Right or not. Under a leading judgment held by 9 judges, under Article 21, Right to privacy came out to be a Fundamental Right. Right to privacy basically means to be left alone and the right of a person to be free from any interference.[65]

[63] Subodh Asthana, Extended Jurisprudence of Article 21 through the lens of Right to Livelihood, Ipleaders, (Oct. 4, 2020, 5:09 PM), https://blog.ipleaders.in/right-livelihood/

[64] AIR 1986 SC 180

[65] Jyoti Pandey, India's Supreme Court upholds Right to Privacy as a Fundamental Right- & It's about time, EFF, (Oct. 4, 2020, 5:13 PM), https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time#:~:text=The%20right%20to%20privacy%20is,Part%20III%20of%20the%20Constitution.&text=The%20judgment%20also%20concludes%20that,exercise%20of%20other%20guaranteed%20freedoms.

1.4 Right to Clean Environment

Right to live in a healthy environment is an essential aspect of right to life, not only for human beings, but also for other species. Therefore, violation of the right to healthy environment is potentially a violation of the basic right to life. Environmental degradation could eventually endanger life of present and future generations. Right to life is therefore used in a diversified manner in India. It includes, the right to survive as a species, quality of life, the right to live with dignity and right to livelihood.[66]

The above right can be explained with the help of case law:

Vellore citizens welfare forum v/s Union of India[67]

Judgment

The Supreme Court held that the tanniers in India are the major Foreign exchange earner and they also provide employment to many. But at the same, it is known that it destroys the environment and poses a health hazard to everyone. The court ordered the judgment in favour of petitioners directing the tanniers to deposit a sum of Rs. 10,000 as fine in the office of collector. The court also ordered the state of Tamil Nadu to award Mr. M.C Mehta with a sum of Rs. 50,000 as appreciation towards his efforts for protection of environment.

[66] Right to clean environment- A basic human right, Legal service India, (Oct. 4, 2020, 5:15 PM), http://www.legalservicesindia.com/article/1509/Right-to-Clean-Environment:-A-basic-Human-Right.html#:~:text=Article%2021%20of%20the%20Indian,to%20procedures%20established%20by%20law.&text=It%20is%20by%20this%20second,right%20to%20a%20clean%20environment.

[67] 1996 (5) SCC 647

1.5 Right to free legal aid

Legal aid basically means giving legal services free to the poor people or to the people who are unable to afford it. In a statement by J. P.N Bhagwati, he stated that legal aid means providing an arrangement in the society which makes the machinery of administration of Justice easily accessible and in reach of those who have to resort to it for enforcement of rights giving to them by law.

The state shall also ensure that the working of the legal system promotes justice and shall provide free legal aid to the needy people by suitable legislation or schemes or in any other way, to ensure that the opportunities for securing justice is not denied to any person.[68]

The above right can be explained with the help of case law:

Hussainara Khatoon v/s State of Bihar[69]

Judgment

It was held by the court that if any of the person is not able to afford the legal services, then he has a right to free legal aid at the cost of the state.

1.6 Right to Education

The Constitution (86th Amendment) Act, 2002 inserted Article 21-A in the Constitution of India, to provide free and compulsory education to all children between the age of 6-14 years.

[68] Right to free legal aid, Legal service India, (Oct. 4, 2020, 5:18 PM), http://www.legalservicesindia.com/article/1176/Right-to-Free-Legal-Aid.html

[69] AIR 1979 SC 1369

[70]Education is important because it helps people to get to know about their other human rights. Education also improves the quality of life and helps to tackle poverty.[71]

CHAPTER-2

RECENT TREND IN THE INTERPRETATION OF ARTICLE 21

Recent trend in the interpretation of Article 21 is explained with a leading case law:

Ramlila Maidan Incident v/s Home Secretary, Union of India & Ors.[72]

Facts:

An incident occurred at Ramlila Maidan in New Delhi where, the protest was peaceful of Yoga Guru Baba Ramdev. He did the protest because of the prevalent black money and many other corruptions that are there in India. Baba Ramdev did a continuous fast till the government are taking some steps to remove the black money and other corruptions. The government tried to remove Baba Ramdev but they failed to do so. But at night, after taking permission from the home minister, P. Chidambaram, the police started firing teargas, water cannons and brutal lathi charge who were woken up from their sleep after this. This resulted with the death of one person and caused several injuries to others. Baba Ramdev, made an escape to Haridwar, yet the police caught him before he could be successful in his plan.

[70] Right to Education, MHRD, (Oct. 4, 2020, 5:20 PM), https://www.mhrd.gov.in/rte#:~:text=Overview%20%C2%BB%20School%20Education-,Right%20to%20Education,may%2C%20by%20law%2C%20determine.
[71] Right to Education, Theirworld, (Oct. 4, 2020, 5:21 PM), https://theirworld.org/explainers/right-to-education
[72] [In RE (2012) 5 SCC 1]

JUDGMENT

The court held that, both Ramdev & police force were responsible for the happening at Ramlila Maidan & directed criminal prosecution of police personnel & Ramdev's supporters who had behaved violently during the incident.

The court also noted that they had misused their power by assaulting sleeping victims by throwing teargas & doing lathi charge, thereby violating their Fundamental right.

The court awarded a compensation of 5 lakhs for the family members of the person who died, 50,000 to them who were severely injured and 25,000 to those with minor injuries.

The court held that the incident highlights the violation of "Freedom of speech & Expression" i.e Article 19(a) and also the "Right to assemble peacefully & without arms" i.e Article 19(b) of the Indian Constitution.

The judgment concluded with the inclusion of "Right to Sleep" as a Fundamental right under the ambit of Article 21 i.e "Right to life & personal liberty".

CHAPTER-3

ANALYSIS OF JUDICIAL INTERPRETATION OF ARTICLE 21

The fundamental right to life and personal liberty has become one of those rights that the judiciary can experiment with. This has almost led to some of the judgments being incorrect at times.[73]

[73] Abhinav Pandey, Wide Interpretation of the Right to Life: the question of enforceability SSRN (2014)

In a leading case of Ramlila Maidan Incident v/s Home Secretary[74], the two judge bench of Justice Chauhan and Justice Swatander Kumar included right to sleep as a Fundamental Right under the ambit of Article 21 because Delhi Police used its brutal action against followers of Baba Ramdev around midnight and Justice Chauhan in his Verdict told that the citizen had the right to sound sleep as sleep is a fundamental right to life.

In a case of Kharag Singh v/s State of U.P[75], a wide interpretation of Article 21 came into picture. Judges, started by saying that article 21 which says that, no personal shall be deprived of his life and personal liberty except according to procedure established by law. The judges said that personal liberty in Article 21 is used as a compendious term to include within itself the varieties of right which go to make up the personal liberties of man other than those within the several clauses of Article 19(1).

After the judgment in this case 'speedy trial of cases' got added under Article 21. Also, several judgments came in and rights such as right to a protected (clean and eco-friendly environment, right against solitary confinement, right against delayed execution, right against public hanging and also the right to expeditious police investigation came into picture under the ambit of Article 1.

CHAPTER-4

CONCLUSION

[74] [In Re (2012) 5 SCC 1]
[75] AIR 1963 SC 1295

Article 21 has been given a great importance by the Judiciary of our country. A number of rights have been included under the ambit of article 21 as sub-rights like right to pollution of free environment, right to free legal aid etc.

Scrutinizing right to life so as to incorporate fair treatment has expanded of the judiciary's power. Right to security, option to protect have now and again compensated for absence of enactment on the issue and along these lines the court has strived to secure the privileges of individual utilizing article 21 as an intense weapon.

The supreme court has begun to pronounce rights which are hard to authorize and maybe just be law for namesake. The court should contemplate the enforceability of a right or in all likelihood it will simply stay a vacant gurantee.

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- https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time#:~:text=The%20right%20to%20privacy%20is,Part%20III%20of%20the%20Constitution.&text=The%20judgment%20also%20concludes%20that,exercise%20of%20other%20guaranteed%20freedoms.

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MEDICAL NEGLIGENCE IN INDIA: THE ETHICAL CONUNDRUM & ENSUING REMEDIES

- AMEYA AVADHUT NAYAK

ABSTRACT:

Medical practitioners indulge in medical malpractice, which ultimately reduces the nobility of one of the oldest and most humanitarian profession itself. It is necessary to know what medical negligence is, how it occurs and what are the medical and legal repercussions of the same. Every person has the right to be treated correctly for the ailment that he suffers from, however, where they land up becoming victims of medical negligence, it becomes important to think whether the root of such unfortunate acts lie within the inefficient inculcation of medical ethics which every medical man is bound to follow.

The Indian Constitution being the supreme law of the land lays down the standards which are meant to be maintained with respect to one's health. The health care provider is ultimately responsible for providing correct treatment to patients, failing which negligence occurs and victims are then forced to resort of various remedies available to them. Whether a person chooses to be treated at a private hospital or a government run hospital also plays a role in determining the vitality of the negligence and deciding the relief to be provided to him/her.

The services of the doctors are systematically covered under the provisions of the Consumer Protection Act, 1986 wherein a patient can seek redressal of grievances from the Consumer Courts. The judges who decide these cases are no experts in the field hence there is a need to

strike balance between the 'cause and effect' factor in such cases and bring about improvement in existing mechanisms that tackle medical negligence. Lawsuits for medical negligence can be minimized by taking steps to keep patients satisfied, adhering to policies and procedures, developing patient-centred standard of care, and knowing ways of defending oneself against malpractice victimization.

'Whenever a Doctor cannot do good, he must be kept from doing harm.' – ***Hippocrates***.

The medical profession is the noblest profession. After all, it deals with the gift of 'life'. How often do we hear a person say, *you are like God to us!* This is a statement that is most often said to doctors or medical practitioners who have dealt with the lives of our loved ones.

However, everyone makes mistakes. To make mistakes is human. Though the patients see doctors as God and believe that their disease will be cured and they will be healed by the treatment, sometimes even the doctors make mistakes which can cost a lot to the patients in a lot of ways. Sometimes the mistakes are so dangerous that a patient has to suffer enormously and may even lose his/her life. Wherein, you are a part of a profession where the sickly, ill and suffering kinds are your patients who look upon you as God, an unconditional amount of concern is expected, and this kind of mistake occurs, then that is called negligence.

The medical profession that was once considered noble is now considered along with other professions in the liability of paying damages. Victims in need of monetary compensation for the alleged medical negligence used to earlier resort to the civil courts only as that was the only

option available. However, the coming in of the Consumer Protection Act opened further avenues for relief.

Medical Negligence: Definition

Medical negligence, also known as medical malpractice is improper, unskilled, or negligent treatment of a patient by a medical practitioner, physician, nurse, pharmacist, or any other health care professional.[76]

Medical misconduct occurs when a health-care provider strays or deviates from the accepted standard of care in the treatment of a particular patient. The "*standard of care*" is defined as what a reasonably cautious medical provider would or would not have done under the same or similar conditions. [77] Here, the vital problem is not about how to keep bad doctors from harming the patient, but how to keep good doctors from harming the patients. If we observe the scenarios around us, it is obvious that medical malpractice is now becoming an unreasonably intimidating exercise that is a serious threat to the medical community as well as the society at large.

Although a doctor may not be in a position to save the patient's life at all times, he is expected to use his special knowledge and skills in the most appropriate manner keeping in mind the interest of the patient who has trusted him with his life. Therefore, it is expected from doctors that they carry out necessary investigation whilst treating any patient.

[76] Nayak RK, "Medical Negligence, Patient's Safety and the Law", Regional Health Forum- Vol. 8, No.2 2004, p. 15.
[77] Vinitha Ashok Vs. Lakshmi Hospital and others (1992) (2) CPJ 372 (NC).

Furthermore, unless it is an emergency, he has to obtain consent of the patient before proceeding with any major treatment, surgical operation, or even invasive investigation. Yet, there are rampant episodes of medical negligence that do the rounds with one case at least occurring each day.

There have also been episodes where malpractices occur on purpose. The concept of 'ghost surgery' is a commonly practiced evil in the medical profession where the patient is informed about one particular doctor operating upon him and once the anaesthesia is administered and the patient is unconscious, a different person who is mostly the doctor's newbie assistant, or even a staff member may be the one who has carried out the operation. Further, doctors may sometimes even take advantage of their social status to cheat a patient, take bribes and indulge in corrupt practices such as organ transplantation, organ trading, etc. Where common people, as human beings, put our utmost faith in medical men and trust them with our lives, it is obvious that the medical men are also expected to be virtuous, honest and ethically sincere in their profession!

The Ethical Conundrum:

Firstly, it is crucial that the present-day medical practitioners possess progressing and standardised medico-legal education. Doctors have a ***legal duty*** to comply with the ethical and legal regulations in their daily medical practice.[78] Ignoring the law and its implications will be

[78] Varadappan Committee (1989), Report of the High-Power Committee in Nursing and Nursing Profession Ministry of Health and Family Welfare, New Delhi.

disadvantageous to the doctor even if he treats the patient in good faith with the aim and intention of lessening of the patient's suffering.

But all such acts that are done in good faith may not pass the legal test. With the rise in number of cases filed by aggrieved patients who seek legal remedies from doctors and medical establishments, it is no longer just a matter of choice, but a contextually compulsory legal mandate and prerequisite for the doctors to be well acquainted with the maintainability of their ethical standards as well as the basic legal issues involved in medical practice.

Relevance of medical ethics:

Medicine is one of the few professions that put down a code of performance for its practitioners. Previously, the relationship between the doctor and patient was highly limited as far as communication was concerned. Today this scenario has transformed. Increasing advancement of medical science and technology has made a tremendous impact on medical practice. The growing expenditure of medical care and scarce resources has led to increase in the number of dilemmas for the medical practitioners.

The Medical Council of India (MCI) regulations on undergraduate medical courses emphasise that medical graduates become excellent citizens by the observation of medical ethics, and fulfilling social and professional obligations, so as to respond to countrywide aspirations.[79]

[79] Medical Council of India - Salient features of regulations on graduate medical education, *Gazette of India*. 1997 May 17; part III, section 4.

Medical education views this as a prime objective. Stakeholders are required to adopt a cogent tactic to solve medical predicaments that they are likely to face in the future. The way they learn and understand various subjects to tackle medical problems, they also need to understand the ethics to solve the moral dilemmas that they are likely to face in their practice in the future.

Problems inculcating Medical Ethics:

Firstly, the MCI curriculum does not have medical ethics as a subject. Only when it is made a separate subject by the MCI, will all the medical colleges and universities in the country implement it. Collective effort has to be made in order to inculcate medical ethics as a core subject, considering the part it plays in the practice of the profession.

Secondly, medical ethics should be made a compulsory course with requisite attendance for the award of medical degrees. Studies have shown that making ethics an optional course in medical colleges does not serve its purpose.

Thirdly, medical ethics need to be structured in such a way that the student is exposed to ethical situations throughout the medical training period. This will not only help in imbibing ethical standards within the students but also help in testing how well equipped the student is in order to tackle such conundrums.

Also, a handful of qualified teachers are available in the country, but only a few of them work in medical colleges. There is a need to enlarge this pool. Many medical teachers have diplomas in medical ethics. There is an acute shortage of trained medical ethics faculty in the country. There is an urgent need to train staff if medical ethics is to be introduced as a subject.

Medical Ethics: The way ahead:

To begin with, advanced programmes can be organised for teachers who have undergone courses in medical ethics. Further, starting master's degrees in medical ethics can help too. If we encourage more clinicians to become ethics teachers, this will, hopefully, improve the standard of ethics practice and there will be better role models for students to follow.

It is possible to redress the lack of faculties of law, philosophy and social sciences in medical universities in the country. Faculty in these disciplines who are working in the regular universities must be given a chance to also teach in medical colleges and they should be actively involved in teaching medical ethics to students. Initiatives must also be taken to encourage medical universities to establish chairs and departments of medical ethics to develop the subject in the country. When the fruits borne by the tree are sour, it is probably because the roots were not nurtured correctly. Similarly, medical practitioners indulge in negligent practices because their ethical standards are not in the right place.

The Constitutional Perspective:

Lately, with the development made in diverse fields of study, we have come to a point wherein laws, rules and regulations have to be framed so that all sections of society can live in concord and harmony and take complete benefit of the developments in the scientific fields. Each nation has enacted its own system of rules and regulation in the form of what is known as the 'Constitution' which is absolute in carrying out dealings of the government and protecting the life and property of its people. The Constitution defines the rights and obligations of the citizens

and various organs of the government. Every citizen of the State is expected to comply with the Constitution and follow the rules and regulations set out within the Constitution.

Constitutionally speaking, wherever there is infringement of right to life and personal liberty, the person aggrieved or any public-spirited individual can move the Supreme Court or High courts by appropriate proceedings for the enforcements of rights so infringed by the state action. The courts are empowered to grant compensatory relief if the state fails to preserve the life or liberty of the citizen. It was in the classic case of *Rudul Shah V State of Bihar*[80] wherein the Supreme Court for the first time set up an important landmark in Indian Human Rights Jurisprudence by articulating compensatory relief for violation of Article 21.

Since then, the court started awarding monetary compensation as and when the ideology of the court was shaken. Award of compensation for the breach of Article 21 of the Constitution is not only a constitutional power but it also assures the citizens that, they live under a legal system wherein their rights and interests are protected and conserved. The courts have the obligation to protect the rights of citizens, since the courts and laws are made for the people. Therefore, they are expected to live up to the expectations of the people.

A medical practitioner or a doctor as we call it is also a citizen. Therefore he/she is also bound to obey the Constitution of the land. The Government, with the objective of protecting the interest of the general public and patients in particular, has passed various laws for medical practitioners of all branches of medicine such as, the Indian Medical Council Act, the Dental

[80] AIR 1983 SC 1086 (India)

Council Act, Indian Medicine Central Council Act, the Homeopathic Central Council Act, etc. These laws provide for the compulsory registration of medical practitioners with their respective medical councils before practicing in any branch of medicine.[81] The doctors who have enrolled with the Council concerned have to follow the rules, regulations and the code of ethics set out by the council.

Thus, from this, it is clear that, not every person who has graduated in medicine has a right to practice medicine. Every person who has done diploma or degree in medicine claims that he has studied medicine. But this is not the case.

The medical profession is governed by different laws that prescribe the standard of education and practice in the interest of the public and to maintain high standards within the medical profession. A person who does not have the knowledge of a particular system of medicine but practices in that system is a fake and a mere imposter who claims to have medical knowledge and skills. In fact, it must be mandatory that, a doctor should practice in the system of medicine for which he is registered as a medical practitioner and not any other system of medicine. For instance, a registered homoeopathic doctor is to practice Homoeopathy only, as it is his statutory duty not to enter other systems of medicine.

If he enters into a restricted system, then, he is liable to be prosecuted under section 15(3) of the Indian Medical Council Act and his conduct constitutes “medical negligence” for the injury

[81] Frankline CA, Modi’s Medical Jurisprudence and Toxicology, (ed.) Tripathi (p) Ltd. 1988, p. 503.

caused to his patient whilst practicing a system of medicine in which he does not possess the required skill and knowledge.

The Indian Constitution on the right to health:

The Constitution incorporates provisions guaranteeing everyone's right to the maximum possible standard of physical and mental health. Article 21 of the Constitution guarantees protection of life and personal liberty to every citizen.[82] The Supreme Court of India has held that the right to live with human dignity, enshrined in Article 21, derives from the directive principles of state policy and therefore includes protection of health[83]. Further, it has also been held that the right to health is integral to the right to life and the government has a constitutional obligation to provide health facilities.[84]

Public interest petitions have been filed under Article 21 in response to violations of the right to health. They have been filed to provide special treatment to children in jail,[85] on pollution hazards, against hazardous drugs, against inhuman conditions in after-care homes,[86] on the health rights of mentally ill patients, so on and so forth.

The essential ingredients of Medical Negligence:

[82] A K Gopalan vs State of Madras AIR (1950) SC 27 (India)
[83] Bandhua Mukti Morcha vs Union of India; AIR (1984) SC 802 (India)
[84] State of Punjab v. Mohinder Singh Chawla (1997) 2 SCC 83 (India)
[85] Sheela Barse v. Union of India (1986) 3 SCC 596 (India)
[86] Vikram v. State of Bihar (AIR 1988 SC 1782) (India)

In order to get a clear understanding of the concept it is necessary to know what would comprise of medical negligence. The essential ingredients are as follows: [87]

1. The Doctor must owe a **duty of care** to the patient
2. The Doctor must have made a **breach of that duty**, and
3. The patient must have suffered **damages** due to the said breach.[88]

At this point, we need to be aware that our Constitution does not guarantee any special rights to patients. The patient's rights are derivative, which originate from the obligation of the ***health care provider*** towards the patients. The Supreme Court, as we have seen earlier, in various cases has viewed that the Right to Life as enshrined in Article 21 of the Constitution of India includes the right to health and medical treatment. The Right to Life would be meaningless unless medical care is guaranteed to a sick person.[89]

Remedies to victims of Medical Negligence:

If you have been a victim of negligence at the hands of your doctor, these are the few main remedies available to you:

1. The victims can move the professional bodies like Indian Medical Council/State Medical Council seeking disciplinary action against the health care provider concerned.

[87] Jones MA, Medical Negligence, 2nd edition, Sweet and Maxwell (1996) Pgs. 2-4.
[88] Vishwanathan V.N., Consumer Rights in Service Sector, 2008 edition, Concept Publishing Company.
[89] Sharma MK, "Right to Health and Medical Care as a Fundamental Right" AIR (2005), pg. 255.

2. The victims can seek monetary compensation before the Civil Courts, High Court or the Consumer Dispute Redressal Forum under the Constitutional Law, Law of Torts/Law of Contract and the Consumer Protection Act.

3. The victims can file a criminal complaint against the doctor under the Indian Penal Code.

4. The victims can file a consumer complaint before the National/State Human Rights Commission seeking compensation for their loss.

When cases of medical negligence occur in Government hospitals through their doctors or staff, it is taken care of by the State. ***However, what happens when the same negligence takes place in private hospitals which are not supported by the Government in any manner?***

The persons who avail of the facilities of medical treatment in Government hospitals are not consumers. So, it is of utmost importance to know the difference between services rendered by Government hospitals and services rendered by private hospitals!

The Consumer Protection Act is not applicable to services rendered by the hospitals and the doctors working in the government hospitals and dispensaries. It means if a patient approaches a government hospital and gets wrong treatment or sustains injury due to the negligence of the doctor, no complaint can be made, because service is provided free of charge.[90]

[90] Held by the State Consumer Commission in the case of Sowbhagya Prasad vs. State of Karnataka (1994) (1) CPR 140) (India)

On the other hand, where a doctor makes available his services to potential users for a consideration (fees), the service will come under the purview of the Act.

Further it must be known that for the applicability of Consumer Protection Act, the National Commission has stated that the services rendered by the private health care provider for consideration, are services while the services rendered by the government hospital/nursing homes, would not be services within the purview of the CP Act.

Where an Ayurvedic medical practitioner administered allopathic medicines to the patient, without any evidence that he is entitled to prescribe or administer the injection of allopathic medicines, the doctor will be liable to the injured patient.[91] This is a clear-cut case of negligence, not just because the doctor is not entitled to prescribe allopathic medicines, but also because the patients right to choose is violated. When the patient 'chooses' to be treated allopathically, he is clearly entitled to be treated by an allopathic practitioner.

Similarly, if a Pharmacist claims to be an MD in Alternative Medicine, although he has not studied any branch of medicine recognised by the Medical Council, prescribes allopathic medicines to a patient, he becomes negligent and therefore liable for the same since the duty of the pharmacist is only to provide medicines required by the patient and not to prescribe the same.

There have been numerous cases of medical negligence that have been addressed to the Consumer authorities such as the District, State or the National Consumer Redressal Commission wherein the Complainants have received monetary relief in the form of compensation from their offenders. Such compensation is not just awarded for physical losses but also for mental agony and pain.

[91] As held in Kharitilal vs. Kewal Krishnan, 1 (1998) CPJ 188 (India)

Providing some sort of relief for the mental trauma that the victims and their families go through may somewhat serve the purpose of bringing about a qualitative change in the attitude of the hospitals of providing service to people as human beings. After all, treating human beings in a humane manner is imbibed in their code of conduct and it is what medical ethics primarily dictate! However, whether such reliefs bring about any change in the attitude of the medical fraternity is also something to ponder upon.

There have been cases where compensation has been awarded on humanitarian grounds as well. For instance, The Supreme Court in the case of *A.S Mittal Vs. State of UP*[92] while dealing with a public interest litigation alleging negligence on the part of the doctors in providing services at an eye camp organized by the Lions Club, observed that, although the intention of the camp was righteous, it proved to be a disastrous medical misadventure for the patients. Some 84 odd patients lost their vision due to a mistake on the part of the medical practitioner during eye camps. The court awarded compensation on humanitarian grounds and pointed out that, if any of the victims are eligible for pension under any of the existing schemes in force in the state, their cases shall be considered for such benefit.

The Landmark Anuradha Saha judgment:[93]

This case that was decided in the year 2013 raised one question, *"Will it set a precedent in the area of medical negligence?"*

[92] AIR (1989) SC 1571 (India)
[93] Balram Prasad vs Kunal Saha & Ors LNIND 2013 SC 950 (India)

Here, the Hon'ble Supreme Court held 3 physicians liable for the death of a lady in a Kolkata hospital and awarded record compensation amount which was welcomed as a probable turning point in the history of legal rulings in the expanse of medical negligence.

The distinction between "contract of service" and "contract for service" was elaborately deliberated upon wherein the provisions of the Consumer Protection Act have been extended to the medical profession and also included within its ambit the services rendered by private doctors as well as government institutions or non-governmental institutions, be it free medical services provided by government hospitals.

The Apex Court in its ruling dated 24th October 2013 established gross dereliction of duty by doctors and awarded the highest compensation ever granted in a medical negligence case in India amounting to an approximate 6.08 crores with 6% interest per annum from date of complaint to date of payment in favour of the claimant.

This judgment as pronounced by Hon'ble Justices Chandramauli Kr. Prasad and V. Gopala Gowda was labelled as a 'deterrent and a reminder' to the medical community while the legal experts termed it as 'something big' in a country such as India where the doctor-patient relationship is considered to be exceedingly unsatisfactory.[94]

[94] Medical Negligence: Will the Anuradha Saha case set a precedent? (Jan. 5, 2021, 9.50AM), https://www.livemint.com/Politics/rYITtOKCr3IO0iexKbvc6K/Medical-negligence-Will-Anuradha-Saha-case-set-precedent.html

Another interesting factor to think about is, *whether the judges who are appointed to give judgments in cases of medical negligence are 'technically' fit for the same?*

Just like medicine, the law is also a vast field with numerous concepts, unending issues and multidimensional solutions. Hence, it is not really possible to predict with conviction, a certain outcome in most of the cases. It depends on the facts and circumstances of each case, and also the personal philosophy of the judge who is hearing that case. However, the broad and general legal principles relating to medical negligence need to be understood and certain things have to be kept in mind.

The main thing is that Judges are not experts in the field of medical science; rather they are laymen when it comes to that aspect.

Moreover, the judges usually have to rely on the testimonies of other doctors, which may not be objective in all cases. However, there may be a possibility that, like in all professions and services, doctors too sometimes tend to support their own colleagues who are accused of medical negligence. Further, the judge may not particularly understand the testimony fully due to its technicalities. Such situations are likely to create further complications while deciding cases of negligence.

They rely on experts view and decide on the basis of basic principles of rationality and prudence. There is often a thin dividing line between the three levels of negligence i.e *lata culpa*, gross neglect; *levis culpa*, ordinary neglect; and *levissima culpa*, slight neglect.[95] The intensity of negligence depends on the complete circumstance which includes the place, the time, the individuals involved, and the level of complications.

[95] Madhubala vs Govt of NCT of Delhi. 118 (2005) DLT 515

It is necessary to strike a balance in such cases. While doctors who cause death or agony due to medical negligence should be penalised, no doubt, it must also be kept in mind that, like all professionals, doctors too can make errors of judgment, but if they are punished for this no doctor can practice his profession with composure.

Conclusion:

In India, there is no explicit law which solely deals with the rights and obligations of the health care providers and patients. It has to be clearly known that a patient cannot, legally claim medical service as a matter of right except in emergency cases. Emergency medical services have been interpreted as a right within the extent of Article 21 of the Indian Constitution.

However, the fundamental right to approach the Supreme Court or the High Court as the case may be, for the enforcement of Article 21 is generally available only against public health facilities and not against the private health care facilities.

The Constitution of India does not offer a remedy against private hospitals. If a private hospital indulges in a breach of obligations which they owe to the patient i.e., if there is negligence in treatment, the aggrieved will have to approach the civil court for remedy. But the proceeding in the civil court involves litigation expenses, strict evidence, and leads to unnecessary delay in disposal of the case.

In order to get a low-cost and immediate remedy, the victim concerned may approach the consumer court under the Consumer Protection Act 1986.

The Medical Council Act of 1956 shows that the Act provides for the establishment of the Medical Council to control the behaviour of medical practitioners and hospitals but there is a visible void, space or vacuum regarding the safeguarding of the interests of patients who are

affected by negligence or deficiency in the service rendered by members of the medical health care service.

Ultimately, how the menace is controlled and reduced is in our own hands. What is truly needed is change. Change is the unalterable truth in human life. Self-awareness and attitudinal changes are the most beneficial and most highly recommended ideas in this regard. [96]

While dealing with patients, it is necessary that a doctor does not let anything get in his way and put in his ultimate best while at the service of the patient. Further, there is a need to put an end to the 'blame game' when something goes wrong. The doctors must adopt a healthy and honest approach of accepting their faults or errors which could reduce the cost of medical malpractices, depending on the type of error of course. In the end, malpractice law suits can be avoided if one is conscientious or careful.

From the legal point of view, documentation plays a vital role. If the doctor does not document something that has happened, it is difficult to prove that it occurred. Keeping written records accurately can help to understand what actually happened to the patient. Additionally, documenting can assist in answering the questions raised about duty of care when called for a legal deposition after an event has occurred. Practically it is impossible to rely on one's memory for the facts.

[96] Borrell-Carrió F, Epstein RM. Preventing errors in clinical practice: A call for self-awareness; Ann Fam Med. (2004) Pgs 2310-2312.

The purpose of documentation, from a legal perspective, is always to accurately and completely record the treatment given to patients, as well as their response to that treatment. Documentation has legal credibility when it is contemporary, precise, truthful, and appropriate.

Finally, rapid advancements in medical science and technology have proved to be effective tools for the doctors in the better diagnosis and treatment of the patients. But they have equally become tools for the commercial misuse of the patients as well. The development of law pertaining to professional medical misconduct and negligence is far from acceptable. The legislations are not adequate and do not cover the entire field of medical negligence and hence improvement and further development is what is expected in order to achieve substantial fall in episodes of medical malpractice and negligence.

IPR AND THE CULINARY WORLD: A CLOSER LOOK AT THE VARIOUS PROTECTIONS AVAILABLE FOR FOOD RECIPES AND CULINARY CREATIONS

- SAGNICK CHOWDHURY

ABSTRACT

The food industry as we know it consists of producers, farmers, agriculturists and businesses. And all together form the culinary world. These groups of people inter-operate to cover all of the aspects of the production, sale and consumption of food. The aim of this paper is to question the role of Intellectual Property Rights(IPR) in the food industry. IPR provides protection in three ways; through copyright laws which protects any sort of creative work that is both original and in a fixed medium, through patent laws which protect novel and non-obvious, in other words, sufficiently inventive works, through trademarks which is a symbol, word, or words legally registered or established by use as representing a company or product and lastly through trade secrets. Innovators from various spheres of businesses (chefs/food scientists/food chains) seek protection in the form of IPRs for their recipes which denotes a set of instructions for preparing a particular dish, including a list of the ingredients required and they can apply for such protections in the form of patents, copyrights and trade secrets and all these laws provide protection in distinct ways.

INTRODUCTION

Innovation is a prerequisite to a thriving market. Innovation brings forward new ideas, inventions and methods which change the course of history and the ways a product is viewed

and consumed. For organizations and businesses the ability to get ahead of the competition is one of the most significant reasons to innovate. Through innovation successful businesses are able to keep their operations, services and products relevant to their customers' needs and changing market conditions. In the culinary world innovations generally come in the form of recipes. A recipe is defined as "a set of instructions for preparing a particular dish, including a list of the ingredients required". It should hypothetically consist of everything from the name and amount of ingredients required and time required for preparation to specific methods of preparation. The recipe of a dish determines its taste and look and thus it is very important for restaurants, independent chefs and food chains to create an unique tasting product which will increase their appeal towards the consumers which further leads to competition between different businesses. As stated above innovation leads to a thriving market, but such innovations become more and more scarce if no protection is available to the innovators and therefore they seek protection in the form of IPRs. Along with chefs, their investors too are interested in protection of original works. Many high profile chefs are now household names, and there is significant value in what they produce, so investors might be wise to demand intellectual property protections. Some also fear a growing trend in which corporations copy the inventive techniques and culinary creations of local establishments and use them in franchising chains.

COPYRIGHTABILITY OF A RECIPE

Copyright law

Copyrights laws were made to promote content creation. Content here refers to any literary, musical, dramatic, choreographic, pictorial, graphic, architectural and sculptural works as well

as sound recordings, pantomimes and motion pictures. While on the surface it may seem that copyright laws were made to protect creators from copyright infringement, its primary goal is to secure a fair return to the author for their creative labour and thus "stimulate artistic creativity for the general public good"[97].

Historically recipes have never been protected by copyright laws around the world and in India since protection available to recipes is very narrow. For the purposes of copyright law recipes can be considered to be "literary works" which is enshrined under section 2(o) of the copyright Act, 1957 and although an explicit definition isn't provided, the clause does state that literary works shall include "tables as well as compilations". Now recipes are just a listing of mere ingredients and according to section 2(o) should be protected under this act, but there is a nuance to this. The creativity of a recipe is seen as an idea and the Act is very clear about the fact that Ideas, methods, and systems are not covered by copyright protection. As far as US copyright laws are concerned The U.S. Register of Copyrights notes that "mere listings of ingredients as in recipes, formulas, compounds or prescriptions aren't subject to copyright protection [unless] [they are] accompanied by significant amount of literary expression in the form of an explanation or directions, or when there is a combination of recipes, as in a cookbook[98]. The justification behind this is that an individual recipe is a process of creating something, rather than a creative literary expression.Chefs and restaurants, unless they have published their recipes in compilations, have very little scope of protection under current copyright law.

[97] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)

[98] U.S. Copyright Office, Recipes, archived at http://www.webcitation.org/5WlLlW8EC.

Therefore a published cookbook is protected under copyright laws. This protection is available to the written content of the book, which is seen as a literary work and Illustrations and images which are seen as artistic works. But such protection will not be available to a mere compilation of ingredients.

Whether copyright laws should protect recipes and culinary creations

As stated before, the primary objective of copyright laws are to incentivize and promote creativity and in this case, incentivizing chefs to create new and interesting cuisines and some might argue that such creativity in the kitchen is alive and kicking, hence, tightening the screws of copyright protection will do more bad than good. The bar for originality under copyright law is low, requiring mere independent creation and some minimal degree of creativity. However, because of the sharing culture of the culinary industry, an infinite number of dishes (and their widely known variations) are in the public domain and therefore belong to everyone. It is already established that copyright only protects "original works", and thus copyrighting a recipe would only be possible if a chef is able to create an ordinary dish. The bar for originality for protection under copyright law is quite low and so there is a possibility that if recipes were brought under the umbrella of copyright laws, even one additional step would render a new recipe original and worthy of protection since in cooking, adding a small ingredient makes the end result vastly different and therefore making it possible to be copyrightable. Also copyright holders will have the right to control derivative works and chefs will have to spend more time and energy to create improved versions of such copyrighted dishes. On top of that there is also the cumbersome task of acquiring licenses and troll infringement suits. All of these will likely hamper the creation of new cuisines.

This will inevitably freeze the booming creativity of the whole industry as a primitive example, if chefs had to ponder on whether caramelizing onions for 10 minutes rather than for 15 is an expressive element of a recipe they will have no motivation in making new cuisines.

TRADEMARK LAW

Every product or a service presents itself to the consumer in distinct ways and trademark laws exist to protect those distinctions. Trademarks refer to any word, name, symbol, device, or combination thereof, which a producer uses to distinguish its goods from those of other manufacturers or sellers and to indicate the source of those goods. Current trademark laws encompass a wide variety of distinct characters of a product such as size, shape, color, textures, or graphics and it also includes designs. What trademark laws do not protect is the underlying product or the service but just the way in which it is presented to the consumers.

The basic purpose of trademark laws is to prevent businesses from passing off their goods as those of another, creating an environment of unfair competition thus these laws protect a specific manifestation of a concept or an idea which tells apart two different products. Unlike copyright laws, trademark laws do not aim to honour creativity or innovation and thus it will not reason on this basis.

Now that the groundwork for trademark laws are established it is now important to ask whether or not they can be used to protect cuisines/recipes and such.

In a traditional sense the business or the producer places a distinct mark on the product or the article and presents it to the consumer, doing such a thing for cuisines would be non-intuitive and un-practical. The practicality of applying trademark law is pretty obscure since it constitutes an attempt to protect the article, product, or substance of the product itself, which falls under the jurisdiction of copyright or patent law. Although trademarks can protect the

"total package" or image of a restaurant, composed of distinct elements that include cuisine, trade dress should not be construed to protect the cuisine itself. As far as restaurants are concerned, trademark protection can be applicable for the entire "image" of the restaurant which comprises distinct elements including the cuisine but not the cuisine exclusively. Cuisine or a dish is a functional feature of a chef's restaurant which is created with the aim to appease the consumers, the primary goal of the dish here is to satisfy the customers , not to serve as a "symbol" or to signify his or her restaurant's brand.

Food in itself is inherently functional and commonplace, made with generic ingredients and thus proving consumer confusion will be very difficult for a plaintiff. In addition to this obstacle proving consumer confusion is difficult because food is inherently neither distinctive nor will it acquire any secondary meaning. That being said, trademark laws might protect a unique style of presentation if its non-functional, has acquired secondary meaning, and there is a good chance of consumer consumer confusion[99]. For example if a chef copied the food presentations of another chef from a different restaurant, in such a case courts might consider presentations as product design. But again, the plaintiff will have to prove acquired secondary meaning which is very cumbersome.

And So the question arises whether courts and legislatures should look to reinterpret and increase the scope of trademark protections for culinary creations. From an altruistic point of view doing so will be contradictory to the nature of trademark laws since trademark laws encourage fair competition and bringing culinary creations under the umbrella of trademark protection will most definitely lead to formation of monopolies.

[99] Wal-Mart Stores, Inc. v. Samara Bros.

PATENT PROTECTION

Patent is an exclusive right granted to the inventor for an invention which permits the inventor to exclude others from making, selling or using the invention for a limited period of time and unlike trademark and copyright, patent law protection extends to both products and process. The purpose of granting patents to inventors is to encourage innovation through ip protection and royalties.

Patent rights are only granted when certain criteria is met;

1) Novelty: Novelty or new invention is defined under *Section 2(l)*[100] of the Patents Act as "any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art".
2) Inventive step/Non-obviousness: Inventive step is defined under *Section 2(ja)* of the Patents Act as "a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art". This means that the invention must not be obvious to a person skilled in the same field as the invention relates to. It must be inventive and not obvious to a person skilled in the same field.
3) Industrial application: Industrial applicability is defined under *Section 2(ac)* of the Patents Act as "the invention is capable of being made or used in an industry". This essentially means that the invention cannot exist in abstract. It must be capable of being

100 Indian Patent Act, 1970

applied in any industry, which means that the invention must have practical utility in order to be patentable.

Now that the groundwork for the grant of patent has been established, we shall look into the patentability of culinary creations. Meeting the patentability requirements pose a lot of challenges for culinary creations since recipes generally lack novelty and an inventive step or non-obviousness.

The key problem here is the lack of invention/novelty of food creations and recipes since they are generally not new in light of other recipes. Inability to prove non-obviousness also results in refusal to issue patents for recipes and culinary creations. In 1999, the J.M. Smucker Company(smuckers) started selling a food product under the brand name "Uncrustables"[101]. This product was a crustless peanut butter and jelly sandwich, which was patented by two inventors and received by Smuckers through assignment. The company then tried to enforce and expand the patent, due to which, litigation and reexamination of the patent ensued. The Board of Patent Appeals and Interferences eventually held Smucker's patent to be invalid partially due to obviousness because it was common knowledge in the field that putting peanut butter on both sides of the bread prevented both jelly from leaking out and sogginess, therefore those of ordinary skill in the art were aware of this knowledge.

Although non-obviousness hinders patenting culinary creations, some products have been successfully patented. Examples of such culinary inventions include the process of making a "fruit ganache", yogurt cream cheese, microwavable sponge cake, and sugarless baked goods.

[101] U.S. Patent No. 6,004,596 (filed Dec. 8 1997) (issued Dec. 21, 1999)

Industrial food companies and large food chains successfully use patents to protect their creations but incidentally many chefs ignore this system. Even though there is a strong argument for protecting highly innovative new cuisine most chefs do not use this method out of a sense of moral responsibility. Wylie Dufresne, a chef in New York and a practitioner of molecular gastronomy, believes it is rare that someone "wakes up one day and has a completely novel idea about food." There is a belief in the fraternity that "we are all standing on the shoulders of chefs who came before us." Chef Claudio Aprile thinks that if chefs assert that their cuisine is flat out theirs, they indubitably ignore the origins and derivative nature of what they are doing. Creating cuisine, recipes and dishes is a derivative process and the possibility that recipes and food creations are in circulation, which predate or anticipate a chef's work, is high. proving a lack of precedence is therefore exceedingly difficult.

Due to the immense competitive nature of the restaurant business the skills of chefs are very high and therefore the bar for non-obviousness is also very high and thus many patent applications will fail on this ground. But chefs can try to obtain a patent of a new cooking process or preparation method of their invention, this is known as a process patent. For example a chef discovers a new way of cooking steak by cooking it in the oven to the desired level of doneness and then searing it on a pan for colour and taste. He may try to obtain a patent for this specific process of cooking.

Then again the unsaid norms of the culinary fraternity will stop chefs seeking a benefit from this system since it is well known that opportunistic patentees and the effect of unpropitious patent litigations also pose a risk to the industry's culture of sharing and openness. The marketplace will be filled with patent trolls, filing patent applications, suing for infringements upon their broad claims and halt progress and innovation.

There is also the issue of the cumbersome process of filing and grant of a patent. The costs associated with the process serve as a significant deterrent for inventors.

TRADE SECRET

The method of protection of recipes by restaurants and food chains through trade secret laws is a tried and tested one. Trade secrets fall under the general category of intellectual property law. For example, CocaCola and KFC are notorious for keeping their recipes locked inside a vault. These recipes remain hidden from the public and thus known as trade secrets.

A trade secret may refer to a practice, process, design, instrument or a compilation of data or information relating to the business which is not generally known to the public and which the owner reasonably attempts to keep secret and confidential. In simpler words trade secrets are valuable both in its subject matter and in its limited public availability, thus providing the owners with a competitive advantage in the market against other businesses. As the name suggests, this information must be kept "secret" for it to receive legal protection.

New food chains and restaurants need to distinguish themselves in the marketplace to survive because the competition in this industry is immense and to do so restaurants rely on secret recipes, novel cooking techniques and unique menus. This information is very sensitive and is susceptible to being leaked by insiders and thus requires protection, through means of trade secrets and contract law.

Although courts in India decide on matters relating to trade secrets on the basis of equity and common law, it is still the most attractive avenue for protection of information due the the following reasons;

1) No time limit : Trade secret protection continues for an indefinite amount of time as long as the secret is not revealed to the public.

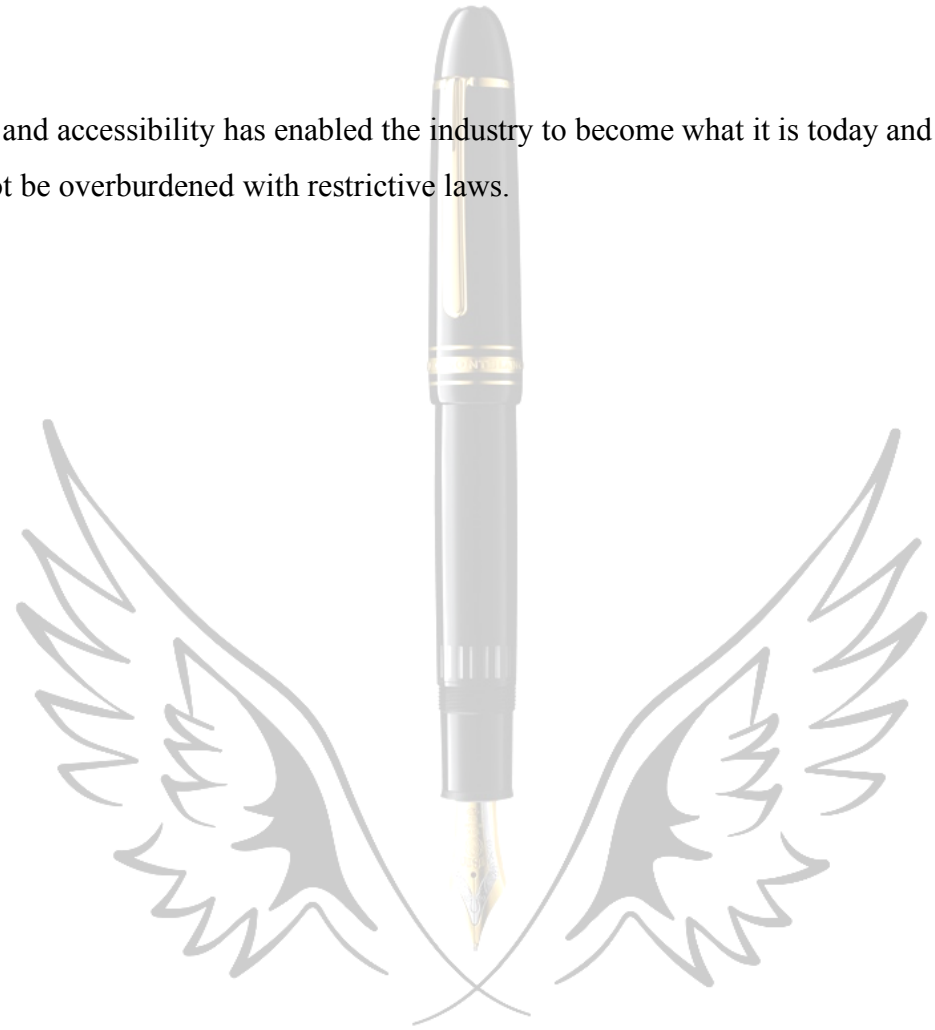
2) No registration cost: Trade secrets require no registration costs (though there may be high costs related to keeping the information confidential).
3) No waiting time: Trade secrets have immediate effect.
4) No disclosures required: There is no need of disclosure of the information to a Government authority.

Such secrecy is often criticized in the industry and one of the arguments against it is that trade secrets can negatively affect growth and improvement rather than promote creativity through IP protection. That may be true but given the amount of protection available to restaurants as far as IP laws are concerned, protection through trade secrets is one of the best routes available. That being said, trade secrets also have many drawbacks; Anyone is allowed to inspect and analyze the product(dish) and essentially reverse-engineer it and use it. A trade secret is more difficult to enforce than a patent. The level of protection granted to trade secrets varies significantly from country to country, but is generally considered weak, particularly when compared with the protection granted by a patent.

CONCLUSION

There is no doubt that improvements in the field of intellectual property right protections provided to culinary creations and recipes is required. But these improvements should not exclusively come in the form of widening of the scope of protection, rather, the boundaries need to be properly defined and conveyed especially in the case of copyright and trademark law. Enhancements should be made while keeping in mind the nature of the culinary industry. Even though everyday new culinary creations are made by chefs all around the world, it should be kept in mind that all these creations are derived from previous works. This nature of

openness and accessibility has enabled the industry to become what it is today and therefore it should not be overburdened with restrictive laws.



LIMITS OF PROBATION AND PAROLE WITH SPECIAL REFERENCE TO COVID-19 PANDEMIC

- MRIDUL YASH DWIVEDI & ANUPRIYA BANERJEE

INTRODUCTION

As the humanity moved towards the civilized society, it is now recognised that prisoners too have some basic human rights and they should be reformed. Thus, the concept of parole and probation was evolved as a means of reformative justice and as an alternative to custodial punishments.

The system of probation and parole gains our substantial attention when their applicability during the times of global, sectoral or national downturn is questioned that how the parole and probation of the offenders will be achieved. Recently, the Supreme Court of India in a suo motu writ petition action, has decided and directed the States'- UTs' governments to release prisoners on parole / interim bail and to form High Powered Committees (HPCs) in their respective territory which will look after the problem of overcrowding of prisons and correctional homes during COVID crisis and its nationwide lockdown because as per the SOPs issued by WHO, the only measure which can be employed to significantly tackle the problem of spread COVID-19 infection is the measure of social distancing. But, the conditions of Indian prisons which are devastating and social distancing cannot be achieved due to overcrowding and congestion, thus the basic human rights of the prisoners will get violated.

Authors in this article will try to analyse the current Indian law on probation from the lens of the COVID-19 pandemic. Also, authors in the later part of this article will critically analyse

the judgement / order pronounced by the Apex Court with respect to parole of prisoners during COVID-19 pandemic.

INDIAN LAW OF PROBATION & COVID CRISIS

In India, the national legislation dealing with probation of offenders is the **Probation of Offenders Act of 1958.** It was enacted with an objective to lay down rules and regulations regarding release of offenders on probation or admonition and other incidental matters related to them. The authors will deal with the relevant provisions of the Act from the lens of COVID crisis.

- **Section 3 – Admonition –** This section states that if any person is found guilty of the offences especially laid down in **Sections 379, 380, 381, 404 or 420 of Indian Penal Code of 1860** or any offense which is punishable with imprisonment not more than 2 years or with fine or both and such person is having no previous conviction against him, then if it is expedient for the interest of the public and offender, the court, after considering his good conduct and character, may release him after due admonition.

The authors want to convey that this is a workable alternative to sentencing policy of the criminal justice system especially during COVID crisis because the court can ensure decongestion and social distancing in jails especially in Indian scenario where the conditions of prisons are pathetic. Admonition respects the human rights of offenders if we look from the perspective of COVID-19 pandemic but as per the provision, the alternative of admonition can be availed by offenders guilty of petty offences only which is the only drawback of admonition.

- **Section 4 – Probation –** This section gives the court the power to send a guilty offender on probation by observing the fulfilment of certain criteria which are as follows –
  1. Person may be of any age irrespective of gender

2. Person should be found guilty of an offence which is not punishable with capital punishment or life imprisonment.
3. The circumstances and the facts under which the offence has been committed
4. The offender's character
5. The guilty should be released on probation after entering into a bond which can be or cannot be with sureties to appear and receive sentence which is prescribed for the offence for which that guilty offender is charged with.
6. The period of probation should not exceed a period of 3 years.
7. Person concerned has to maintain peace and good behaviour.
8. Such release is impermissible if the court exercising jurisdiction over the guilty person cannot locate him or his sureties owing to the reason that he or she may not have fixed place to live or for carrying on occupation.
9. Court has to take into consideration the report of probation officer.

Clause (3) of Section 4 says that in appropriate cases the court can pass a supervision order ordering the offender to remain under the supervision of a probation officer for minimum period of 1 year with such conditions necessary for such supervision. This clause is wide enough to engulf within its scope the scenarios created by pandemics like COVID-19 crisis. Since the mode of supervision is very wide and no restriction has been laid down under this clause, the probation officer can supervise the probationer during COVID-19 lockdown with ease without having any direct, face to face physical contact, through the use of CCTVs, ankle bands etc. With the use of such gadgets, the probation officers can keep the track of the activities of the probationers without any difficulty. But the problem may occur if the probationer is very poor or is lacking sufficient resources in order to get supervised by the

probation officer during the lockdown as he or she may not have proper devices or he or she may not have an efficient internet connection. In such cases, the government has to make some arrangements like the installation of internet or CCTVs so as to fulfil the supervision criteria. But many a times, government don't have much resources. During lockdown, all the economic activities other than the essential ones were aborted till further notice which are a source of government's income and they may face scarcity of monetary resources and funds. There are many other areas in which the government has to spend its manpower, resources in order to sustain the ill effects of lockdown and so, government may pay very little heed towards the problem of offender's probation. In such situations, the governmental advisory plays a very important role but since March 2020, no such advisories regarding probation have been issued by any state or central government. This may cause some serious repercussions.

- **Section 6 - Restriction on Imprisonment of Offenders –** If the offender, under 21 years of age, is found guilty of an offence which is punishable with imprisonment for any term not with life imprisonment, then the court should order the probation of such offender. The court, after giving in writing, sufficient reasons, can sentence that offender to such period of imprisonment after considering the facts and circumstances of the case and its nature. The authors want to say that this age centric criteria for such restriction on imprisonment is workable during the times of pandemics but it will not be enough. Many a times, there are offenders which are ailing with deadly or chronic diseases and for whom imprisonment might be prove to be deadly and thus along with the age centric approach, there should be health centric approach too in order to respect the human rights of the offenders because the disease with which such offenders are ailing might become an aggravating factor during times of pandemics.

- **Section 8 – Variance in the conditions of Probation –** This section gives the sentencing court the authority to make changes in the conditions imposed on a probationer under Section 4 of the Act if the probation officer has made an application in this regard. The court may vary the conditions of the probation if it finds such variance in the offenders' and public interest. Such variance can only be made during the existence of probation bond as once the period of 3 years of probation is over, no variation can be made. Clause (3) gives power to the court to discharge such probationer from the bond of probation which he has signed and entered upon, if on the application made by the probation officer, the court finds the conduct and behaviour of probationer enabling his discharge. In this regard, the authors want to submit that this section is equally applicable during pandemics. Courts can take into consideration the changing and vulnerable circumstances of pandemics and provide relief to probationers. This section is so wide that it engulfs such changing conditions owing to pandemics.
- **Section 9 – Probationer failing to observe conditions of Probation Order or Bond –** Court has the power to issue warrant or summons against the probationer if it believes that probationer has failed to observe the conditions laid down under the bond(s) entered by him. It should be kept in mind that such warrant or summons can only be issued once the court gets the report of the Probationer Officer in this regard and then it is having reason to believe that probationer has failed to fulfil the conditions. Authors submit that during COVID crisis, every individual of the society faces difficulty and probationers are no exceptions. There may be genuine instances where due to such pandemic conditions, the probationer may not be able to fulfil one or other conditions of their probation bond. In such cases, it would be against the ends of justice to arrest such probationer on such failure and thus, when special circumstances are generated

owing to pandemic like COVID-19 crisis, the probation officer has to be very vigilant in analysing the whole scenario and making reports to the courts. This section is also covering such varying conditions generated by COVID-19 lockdown. The important thing of focus is the section's wording. It says that the court should have reasons to believe in such failure of the probationer to fulfil the probation bonds' conditions. While making order under Section 9, the court has to give plausible reasons on which it thinks to arrest the probationer or to cancel his probation and send him to jail. Proper speaking, reasoned and written order should be passed in this regard especially during COVID-19 crisis.

- **Section 14 – Duties of Probation Officer –** This section lays down the duties of a probation officer. Probation officer plays a very important role. The complete probation scenario depends upon the evaluation of the Probation Officer. So, offender's post-sentence life, deeds, occupation etc. heavily depend on the Probation Officer's report. Thus, he must be very vigilant in assessing the complete scenario. This role is more important during the COVID crisis because an offender may not be able to fulfil the conditions imposed upon him due to pandemic and since the circumstances are changing frequently, the Probation Officer should take into consideration each and every hardship the offender would face. COVID crisis may prove to be a hardship for some offenders who wanted to have a good character before the court by fulfilling the bonds' conditions since social distancing is the new normal after the onset of COVID pandemic and lockdown and the entire system of the country has shifted to the electronic mode and it is necessary to supervise or to have e-communication channels with such offenders during probation period. These all things will be assessed by the Probation Officer. Thus, the Probation Officers are the key players in bridging the gap

between the probationers and the legal system especially during this COVID crisis. The section is inclusive in scope because its last clause follows that probation officers are liable to perform such other duties as may be published thus making the list of duties inexhaustive.

- **Section 17 – Rule making power –** This section is the most important provision of the Act from the point of COVID-19 pandemic. As the authors have said previously in this article that no law is perfect and it has to keep pace with the changing social, economic, legal values of the society, the Act is also having some serious faults with respect to offenders' probation COVID-19 pandemic which can be cured through rule making power under this section. The State Government of every state is having the authority to frame rules and regulations so as to carry out the objectives of the Act, set out in the Act's preamble. Thus, each state government can frame rules during COVID crisis. Provisions of gadgets, e-probation, e-supervision, and other aspects of probation during COVID-19 lockdown can be framed by the governments of the states and thus they can ease the probation period of the probationers.

CRITICAL ANALYSIS OF SUPREME COURT'S ORDER ON PAROLE IN COVID-19 PANDEMIC

The Supreme Court of India on 23rd March 2020, delivered a judgement on the matter of Parole of Prisoners during COVID-19 pandemic in order to decongest the prisons so as to maintain social distancing among prisoners in Indian prisons and to preserve the health-hygiene standards of the prisons so as to preserve prisoners' health during COVID-19 pandemic. This order is very important because in view of the authors, the approach which the court has applied in the pronouncement of this order regarding parole of prisoners needs a revisit so as to

calculate the soundness of the involved principles and the approach of this order. The authors in this part will critically analyse the order of the apex court passed on 23rd March 2020 read with the order passed on 13th April, 2020.

In Re: Contagion of COVID-19 Virus in Prisons (Date of Order – 23/03/2020)

- **Citation** – 2020 SCC OnLine SC 344
- **Bench** – 3
- **Judge(s)** – Hon'ble Chief Justice Arvind Bobde, Hon'ble Justice L. Nageswara Rao & Hon'ble Justice Surya Kant
- **Case No. –** Suo Motu Writ Petition (C) No. 1/2020
- **Date of Decision –** 23rd March, 2020
- **Parties Involved –** All the States and UTs of India
- **Facts –**
  - It is an action of the Apex Court resulting from its Suo Motu Jurisdiction. The court on its own had taken up the issues arising through this case.
  - Since the onset of coronavirus pandemic, it has been propounded by the International Medical Agencies like the **WHO, International Red Cross Society** etc that to prevent the infection of COVID-19 from spreading, it is essential to maintain social distancing between people and prevent the overcrowding of the people at any place which can aggravate the possibility of the spreading of the disease caused by the COVID-19 virus.
  - Various international agencies have issued SOPs in which they have instructed how to maintain social distancing through nation-wide lockdowns and isolation procedures. They have also acknowledged the issue of overcrowding of prisons around the world which have the potential to become the deadly hotspots for

COVID-19 virus, thus affecting the life of prisoners who are staying in such prisons and thus, these agencies have advised the national governments of the countries to de-congest the prisons so as to eliminate the possibility of spread of COVID-19 virus in prison areas and to secure the life of the prisoners thus preserving their right to life and other basic human rights.

- The conditions of Indian Prisons are worst when we talk about the health, sanitation and hygiene related issues of prisons and so, these prisons and correctional homes can possibly become vulnerable to the COVID-19 virus through physical contact, air, water etc.
- Supreme Court took note of the human cry owing to the spread of COVID-19 virus which can even result in the death of the persons contracted with the virus. Therefore, the apex court acknowledged the problems related to health-hygiene and sanitation with which the prisoners are living and facing in the prisons.
- To preserve and protect the health conditions of the prisons and to prevent the spread of COVID-19 virus in prisons and correctional homes, the Court issued a notice to the governments of all the states and the union territories on 16th March of 2020, asking them to file a reply before the court telling the court the measures they had adopted to cope up with the scenario generated by novel coronavirus and to prevent its spreading in the prisons and the correctional homes so as to preserve the life of the prisoners and to preserve their human rights related to life, safe environment and health.
- In reply to above stated notice, various states and UTs replied after laying down the precautions and steps taken by them in order to tackle the menace of COVID-19 crisis, when we talk about the prisoners and prisons.

❖ **Observations of the Court –**

- It is of utmost importance that prison authorities should check that proper social distancing among the prison inmates is there so as to avoid the spreading of novel coronavirus among the prisoners.
- It is dangerous to make prisoners physically present before the court in during COVID-19 pandemic as it can increase the spread of infection of COVID-19 virus due to travelling. Such presence of the prisoners before the court should be secured through online mode by video conferencing.
- It is not advisable to transfer prisoners from one prison to another for regular prison drives during COVID-19 pandemic. This kind of shift and transportation of the prisoners should only be resorted for the purposes of decongestion of the overcrowded prisons.
- Respective States and UTs' governments should consider the report named as **Interim Guidance on Scaling-Up COVID-19 Outbreak in Readiness and Response Operations in camps and Camp like Settings,** being developed jointly by *International Federation of Red Cross and Red Crescent* ***(IFRC),*** *International Organisation for Migration* ***(IOM),*** *United Nations High Commissioner for Refugees* ***(UNHCR)*** and *World Health Organisation* ***(WHO)***, which was published by *Inter-Agency Standing Committee of UN* on 17th March of 2020, to develop prison specific readiness and responsive plans towards COVID-19 pandemic for prisons and correctional homes.
- Issue of overcrowding of prisons and correctional homes is a matter of serious concern for the state governments especially during these pandemic times of COVID-19, if we look it from the lens of prisoners' safety and health.

- **Judgment / Order / Directions –** The operating part of the judgement delivered by the Apex Court is as follows –
  - *We direct that each State / union territory shall constitute a High-Powered Committee comprising of –*

i. Chairman of the State Legal Services Committee

ii. The Principal Secretary (Home/Prison) by whatever designation is known as

iii. Direction General of Prison(s)

to determine which class of prisoners can be released on parole or an interim bail for such period as may be thought appropriate. For instance, the State/Union Territory could consider the release of prisoners who have been convicted or are undertrial for offences for which prescribed punishment is up to 7 years or less, with or without fine and the prisoner has been convicted for a lesser number of years than the maximum.[102]

  - *It is made clear that we leave it open for the High Powered Committee to determine the category of prisoners who should be released as aforesaid, depending upon the nature of the nature of the offence, the number of years to which he or she has been sentenced or the severity of the offence with which he / she is charged with and is facing trial or any other relevant factor, which the committee may consider appropriate.*[103]

In Re: Contagion of COVID-19 Virus in Prisons (Date of Order – 13/04/2020)

- **Citation** – 2020 SCC OnLine SC 365
- **Bench** – 3

102 2020 SCC OnLine SC 344, non-numbered para 13
103 Ibid, non-numbered para 14

- **Judge(s)** – Hon'ble Chief Justice Arvind Bobde, Hon'ble Justice L. Nageswara Rao & Hon'ble Justice Mohan M. Shantanagoudar
- **Case No. –** Suo Motu Writ Petition (C) No. 1/2020 [MODIFICATION ORDER]
- **Date of Decision –** 13th April, 2020
- **Parties Involved –** All the States and UTs of India
  - The Supreme Court of India after pronouncing its judgment / order on the parole of prisoners during COVID-19 pandemic on 23rd March of 2020, modified its order on 13th April of 2020, by clarifying certain aspects of its decision.
  - **The operating part of this particular modification order is as follows –**

1. *We make it clear that we have not directed the States/UTs to compulsorily release the prisoners from their respective prisons. The purpose of our aforesaid order was to ensure the States / Union Territories to assess the situation in their prisons having regard to the outbreak of the present pandemic in the country and release certain prisoners and for that purpose to determine the category of prisoners to be released. We make it clear that the aforesaid order is intended to be implemented fully in letter and spirit.*[104]
2. *It would be appropriate to issue the following directions*[105]*:*
   a. *No prisoner shall be released if he or she is found to be infected with the novel coronavirus.*
   b. *If upon release, the prisoner is found to be infected with the COVID-19 virus, the prison authorities shall make every possible arrangements so as*

104 2020 SCC OnLine SC 365, para 5
105 Ibid, para 12

to secure proper quarantine or isolation facilities for such concerned infected prisoners.

c. *Full compliance to the social distancing norms and regulations should be given by the authorities in transferring the prisoners.*

d. *Order dt. 23rd March 2020 shall be made applicable on the correctional homes, detention centres and protection homes too.*

AUTHORS' REMARKS

Authors are of the view that this decision of the Hon'ble Apex Court is a welcoming step towards the wellness and safeguarding the rights and interests of the prisoners in COVID-19 pandemic. We all know that prisoners too have basic human rights which no one can deny and right to healthy, safe and better environment and right to life are among such basic human rights. Court through its orders on 23rd March and 13th April, 2020 has acknowledged such rights of the prisoners and directed the concerned state governments to take each and every possible step in this regard. The suo motu action taken by the court is commendable for which each and every citizen of this country should praise the activeness and justice doing approach of the Apex Court. But the authors want to comment on the approach of the apex court in delivering the decision and want to submit that Apex Court has certainly not done complete justice with all the prisoners who are possibly and potentially vulnerable towards the infection of novel coronavirus. If we look at the operating part of the decision which the authors have quoted verbatim from the judgement dt. 23/03/2020 itself, we will see that the approach which the court has employed in directing the respective governments to release the prisoners on parole or interim bail is an offence-centred approach because court has laid down the guiding principle for the High Powered Committees (HPCs) in order to release the prisoner on bail or

parole which is that the committee shall take into consideration the offence with which the prisoner has been charged with, its nature and severity, the number of the years of imprisonment for which the prisoner has been sentenced etc. So, we can clearly see that the cases of prisoners which will be made applicable for the release on bail and parole by the HPCs will depend on the crime and the duration of the punishment only and such approach has nothing to do with the health conditions of the prisoners concerned. Such offence-centred approach will not suffice the mandate of preserving the human rights of the prisoners alone.

In view of the authors, the court shall also take into consideration the health-centric approach for the purpose of considering the cases of prisoners applicable for release on bail or parole because there are prisoners who are suffering from various diseases which aggravate their vulnerability towards getting infected by the novel coronavirus and thus such already suffering prisoners will be the most potential victims of the COVID-19 virus. Suppose, HPC laid down that prisoners who are charged with an offence for which the minimum punishment is 10 years imprisonment are applicable for automatic temporal release on bail or parole during COVID-19 pandemic. Now, there can be prisoners charged with lesser punishment but are ailing with acute diseases and such prisoners shall, in comparison to the criteria laid down by the HPC, be looked after and considered for such release but in reality, they will not be released because they are not falling into the category devised by the HPC concerned. Hence in the view of authors, there should be a combination of offence as well as health centric approach to do complete justice with the prisoners, especially during times of this novel coronavirus' pandemic.

CONCLUSION

The global pandemic of COVID-19 virus has affected each and every domain of the human life very critically. This pandemic has also given birth to the new normal way of living the human life – the e-way of life where there is a requirement to avoid physical contact as much as possible and to maintain social distancing with everyone. Prima facie requirements of health, hygiene and proper sanitation are must so as to preserve human life and to avoid the spread of COVID-19 virus. But when we look upon the conditions of the Indian prisons, we can definitely come to a conclusion that maintenance of proper health-sanitation and hygiene in prisons is not a piece of cake. The conditions are so poor that it may cost the lives of prisoners too. It is of the prima facie importance that the prisoners shall be released on bail or parole or they should be shifted to a much healthy, safer and hygienic environment with proper sanitation facilities so as to curb the spreading of the virus and to prevent the overcrowding of the prisons.

In response to the global pandemic of COVID-19 pandemic, the state governments of Indian states have taken considerable measures so as to tackle the problem of contagiousness of COVID-19 virus. The prisons authorities in many states have implemented the rule that till further notice, no physical visitation hours are allowed to any prisoners and that the visitors who wish to see the prisoners ae not allowed to come to prisons. Instead, they are advised to meet the prisoners virtually through the medium of video conferencing. Many states have devised the mechanism of proper medical screening of the prisoners who have returned from their temporal release. Some states have also constituted special task force for the prisons to

prevent the transmission of coronavirus infection.[106] Some states like Punjab have identified several places which are close to the jail premises, which can be utilised by the jail authorities in placing some prisoners to such places on a temporary basis so as to decongest overcrowded prisons of the state. Some states have also identified potential prisoners on the basis of health, old age and diseases like respiratory ones which can possibly be prone to the coronavirus infection.

After going through the judgement of the Supreme Court, we can say that justice has not been fully delivered as the classification which the apex court has laid down in its judgement, which acts as a guiding principle for the HPCs constituted so as to consider prisoners for release on bail or parole, is not comprehensive enough to consider the health and the comorbidities of the prisoners. The offence-centric approach of the Supreme Court in releasing the prisoners on parole amidst COVID crisis is not enough as there is a potential number of prisoners who are heavily vulnerable to the COVID infection but are not made eligible for such release because of the non-meeting of the offence related requirement. The best example of this lacking is the Bhima-Koregaon Case of Maharashtra where the poet-cum activist Varavara Rao, Stan Swamy and others have been booked under the UAPA but were denied the release on bail or parole as per contemplated by the SC's order. This is so because the HPC of Maharashtra laid down that prisoners who are booked under the UAPA will not be allowed to be released on bail or parole as directed by SC. This exemption was made by the HPC without giving proper basis and rationale. And the prisoner in this case was an aged person and vulnerable to COVID-19

106 Coronavirus: Task force set up to ensure state prisons remain free of infection The Indian Express, https://indianexpress.com/article/india/coronavirus-outbreak-task-force-set-up-to-ensure-state-prisons-remain-free-of-infection-6321266/ (last visited Jan 05, 2021)

pandemic as he was 60 years old. The NIA had refused to grant bail on the basis that the prisoner is using the garb of pandemic as a ruse to get benefited.[107]

Authors welcome the Supreme Court decision but its approach is not sufficient. Also, the conditions of the Indian prisons are devastating and prisoners who are still staying in such prisons are vulnerable to such infection. So, in order to curb the spread of COVID infection, governments shall make arrangements for the transfer of such prisoners from prisons to a much better, safer, healthier and hygienic homes or isolation centres so as to protect the prisoners and their health and where their human rights to life, health, clean and hygienic environment are not infringed.

107 Bhima Koregaon case: Activist Stan Swamy's bail plea rejected Bangalore Mirror, https://bangaloremirror.indiatimes.com/news/india/bhima-koregaon-case-activist-stan-swamys-bail-plea-rejected/articleshow/78816543.cms (last visited Jan 01, 2021)

SOCIAL MEDIA REGULATIONS AND HUMAN RIGHTS

- AAYUSH SINGH

ABSTRACT

In this research we will examine the emerging trend of social media like **Google, Facebook, Instagram, Twitter, Snapchat**, **WhatsApp,** and its effect on individual life. Social media allowed ordinary people, civic groups, and journalists to reach a vast audience at little or no cost. Nowadays data is an essential part of everyone's, today information about all the things and people are easily accessible through the internet so this research process helps to tell about the connection between different social media platform and its major impact on day to day life of the human beings that how data and privacy are the two essential part of human rights that are being infringed by the impact of the social media. So the main aim is to protect the human from being violated by hacking, online frauds, data trafficking and many more such activities to make them aware of the internet and also protect their rights to be violated. However, the freedom of speech and expression does not confer on the citizen right to speak or publish without responsibility & the legislature may enact laws to restrict on several grounds, social media is open to misuse as well as several cybercrimes are committed through social media, and also about the government action regarding social media and also different laws that are made to curb the effect of social media violation.

INTRODUCTION

Today social media has each advantage and disadvantage, like advantage contains of providing data to the individuals and additionally educating regarding varied things and additionally

alternative platforms like Google, Facebook, Instagram, Snapchat, and WhatsApp area unit similar to the lifeline of today's generation. web in today's time is that the requirement of Associate in Nursing hour all the activities area unit performed with the help of web like in malls, banks, schools, offices, hospital, and much of alternative places, among of those activities the information is taken under consideration to be a very important a region of one's life and additionally it's a matter of privacy and personal freedom. The up to date web age poses myriad threats to human rights. Among these threats, protection of privacy at intervals the digital age is of high concern for lawmakers. Privacy has and may invariably be the necessary elementary right, it's Associate in Nursing intrinsic a region of individual life and personal liberty's right to privacy is that the fountainhead of various alternative rights just like the correct to expression, social media is progressively serving to not solely in watching the human rights emergencies however additionally to uncover information.[108]

Advancement of technology, quite benefiting plenty is changing into dangerous in hand of miscreants. the increase of smartphones & computers has unfolded the use of social media platforms. instead of exploitation the platforms for electronic messaging data or tight discussion, it's obtaining used for spew emotion, transfer incidents of human rights violations by perpetrators, and nearly open the consent of political parties or communal teams or organizations.

Today on-line life has created a replacement form of correspondence for U.S., that had a colossal impact on a daily day to day lifetime of the population. Human behaviour changes the foremost additional once they carry the foremost innovative product, notably web-based social networking. Web-based networking has reshaped the correspondence trade additionally

[108] https://www.researchgate.net/publication/331715928_Human_Right_and_Social_Media

reimagined the manners by that we tend to convey and specific. people additionally owing to the massive organization and even the govt. area unit exploitation the social media-based life stages for consistent communication with the voters. Internet-based life use has in addition been related to cyberbullying and digital mistreatment by mysterious purchasers on the web that prompt problems if confidence security then on.[109]

Use of social media- incidents of crimes have risen sharply in last year, the rise of the crime in India like cow-related violence lynching has been coupled with the use of social media

Fake news and fake videos have often helped spark communal violence, it is social media and therefore technology is the root of the disease of communal violence and mob lynching. Social media huge impact, several types of research conducted that 23% of billon people using the internet daily and 62% of people get their news from social media.[110]

SOCIAL MEDIA IMPACT ON HUMAN BEHAVIOR & SOCIETY

Today social media has created a replacement style of communication for North American country that has created an impact on the everyday lives of the folks. Social media Has brought folks with a customary interest along and expanded the horizon of ideas worldwide.

Good impacts- social media will add ability to our thinking as folks will share their views, it permits folks to explore, improve self-efficacy, property with families, friends, and a number of government safety organizations.

LinkedIn is one amongst the nice samples of however networking over social media has helped folks finding the roles among the domain of their interest.

[109] https://www.sabrangindia.in/article/social-media-and-violation-human-rights

[110] https://www.pagalguy.com/gd-pi-impact-of-social-media-on-human-behaviour-and-society

Bad impacts- there is not any face to face interaction that area unit necessary for the event of personalities, learning social skills, comparison with different lives has been created straightforward by social media, additionally has been associated with cyberbullying and cyber abuse by anonymous user on-line which ends within the matter of shallowness, privacy, etc.
Social media has been used as a tool to unfold negativity and rumours on-line that has light-emitting diode to an increase among the instances of violence among the society recently there is a rumour relating to the abductors over the WhatsApp have light-emitting diode to the death of innocent folks. With social media it's become nearly not possible to avoid dangerous news and so the negative influence on our lives.[111]

Does social media induce violence among youth?

Nowadays media influences each positive and negative manners, recently social media has become a giant a part of a life-style and options a huge impact on the behaviour and minds of people. whether or not we tend to use it for info to create new friends or to express our opinion. Social media today encourage youngsters to participate in violence and options an outsized impact on their behaviour. many reports of cyberbullying, criminal activity and gang violence have occurred the advancement of technology has light-emitting diode to nice access to a piece and harmful explosives totally different social platforms like Facebook, Twitter and Instagram area unit thought-about to be the drivers of violent crimes.

According to the study of the yank Academy of children and Adolescence, medical specialty media influences violence among each platform various factors like financial condition,

[111] https://www.linkedin.com/pulse/social-media-impact-human-behavior-society-

mistreatment, community violence, or different medical specialty disorders counsel that their exposures to media play a giant role in formation and increase of violent behaviour.[112]

SOCIAL MEDIA: THREAT TO FREEDOM & DEMOCRACY

Government and different partisan are leveraging the facility of social media platforms to spy on and control their people, this somehow block dissenting voices and erode the web freedom and privacy.

The report said social media have emerged because of the new battleground for democracy. within the past, governments have traditionally use censorship and site-blocking technologies. Now, government and partisan actors have used disinformation and propaganda to distort facts and shape opinions during elections in dozens of nations over the past year. Social media companies (SMCs) provide a platform for human rights defenders to share information and express opinions. Email surveillance, blocking of an internet site with content, interruption of services like WhatsApp are a threat to freedom of expression online.

Some of the incidents regarding the web which are a threat to freedom of expression that's in Brazil, the mobile text messaging app was interrupted for the last two years by a judge who demanded that conversation revealed as a part of the investigation the court ruling is disproportionate and maybe a direct attack on freedom of expression. In Honduras Elvin Francisco Molina for allegedly spreading false information on his Facebook page about the

[112] https://www.ibtimes.com/does-social-media-induce-violence-among-youth-2577472

country banking industry, accused of causing financial panic on social network Molina was investigated by order of national council of defense and security.[113]

social media platforms are terrific for democracy in some ways, but pretty bad in others not only due to new entrants. Governments around the world are increasingly using social media to control elections and monitor their citizen. The report said global internet freedom declined for a ninth consecutive year, as authorities in some countries simply stop internet access as a part of their manipulation efforts.

Data scraping is nowadays a standard threat to privacy and freedom that involves tracking people online activity and harvesting of their data and also conversation from social media, job site, and online forum. While one might argue that folks are knowingly sharing their detail on social media thus it's free for everybody to use and this raises a web privacy problem. One of the cases regarding this happen in May 2011 Nielsen co. a media research company was caught scraping every message off where people mention their emotional problem in what way they think maybe a safe environment.

It has been reported several times that certain fakebook apps are leaking identifying information about those that are using them to advertise and internet tracking companies

How this is often happening during the apps installation process you're prompt to simply accept certain terms and once you click to permit the appliance receives access taken, this access helps them to require to look to non-public data or chats logs and also your data is being transformed to 3rd parties thus your online privacy and safety are put in danger. We all use like, tweet and another button to share consent with our friends, but these social widgets are tracking valuable

[113] https://diginomica.com/social-media-threat-freedom-and-democracy-human-rights-group-warns

tool they worked with cookies a little files stored on a computer that permits tracking the user across different sites that uses these widgets, thus, your interest and online shopping behavior are often easily tracked and your internet privacy easily invaded. And things worsen when other social websites allow companies to put within ads a cookies piece of software which will track you and gather your information easily what you're doing on the web.[114]

WHAT HAPPENS WHEN YOUR PRIVACY IS VIOLATED?

Nine in ten individuals say they are involved regarding the access, collection, and storage of their knowledge on social media platforms, in line with a replacement Verizon Media survey, regarding two hundredth of users say that they'd their privacy profaned on social media.

Yahoo Finance took a stronger investigate the privacy violations users have seasoned on social media, together with Facebook, Instagram, Twitter, Snapchat, associated LinkedIn in an exclusive new study. The survey was conducted by Verizon, the parent company of Yahoo Finance in August 2019 among a sample of nearly one,000 respondents.[115]

Hacked accounts

More than half respondents (56%) say they are terribly involved regarding the probability of hackers gaining access to private knowledge by hacking an organization that collects it. and others below thirty-five were additional probably to say that they'd their privacy profaned.

[114] http://www.ipsnews.net/2016/12/threats-to-freedom-of-expression-in-the-social-networks/

[115] https://www.bullguard.com/bullguard-security-center/internet-security/social-media-dangers/privacy-violations-in-social-media

Hacked accounts were the foremost common variety of privacy violation among the two hundredth of users World Health Organization seasoned privacy breaches on social media. virtually 100% of users say their account was hacked.[116]

Identity theft -More than third-dimensional of respondents reportable that their identity was purloined via a social media platform.

There area unit many ways that during which your privacy may even be profaned web privacy could also be a set of the larger world of data privacy that covers the gathering, use, and secure storage of PI typically. web privacy cares primarily with net, through trailing and knowledge assortment, digital footprints area unit all over whenever you visit the placement enter your debit associated Mastercard detail provide out an email as {you're|you area unit} emotional your personal data into Net your PI may even be shared in ways that you don't expect or are unaware of. The potential for breaches of on-line privacy has full-grown considerably over the years, there is not any single law control on-line privacy. variety of the key federal law's poignant on-line privacy

• FEDERAL TRADE COMMISSION (1914)- federal regulator in primary arear and convey social control against corporations

• ELECTRONIC COMMUNICATION PRIVACY (1986)- defend bound wire, oral and transmission from unauthorized interception

• COMPUTER FRAUD & ABUSE ACT (1986)- involving unauthorized access of a pc to induce bound data to nobble or transmit the harmful item

[116] https://in.finance.yahoo.com/news/heres-what-happens-when-your-privacy-is-violated-on-social-media-153043245.html

• CHILDRENS ON-LINE PRIVACY PROTECTION ACT (1998)- needs bound websites and on-line service suppliers to induce verifiable parental consent before assembling or exploitation personal data.

Impact of laws on social media-

Social media laws square measure developing within the space of each criminal and civil facet, it covers legal issue associated with user-generated content and on-line sites it additionally includes privacy, as well as the rights of each social media user and third parties e.g.- once somebody photos square measure being been denote on-line while not the permission of the individuals and additionally defamation, advertising law, and belongings, materials typically share on social media will infringe a copyright or trademark alternative information science rights. Social media laws embody digital millennium, copyright act and laws associated with privacy and defamation today social media drastically destroying our system by manipulating our elementary rights and is additionally crucial for businesses, entrepreneurs and executives social media laws square measure regulated by the data technology act that was enacted within the year 2000 to manage, management with the difficulty arising out of IT.[117]

The major legal issue, once proceeding is anticipated or occurring involves the potential destruction of proof, sterilisation the privacy setting, deactivating the accounts, deleting the content may be this

• Posting of calumniator comment or material against someone-offense below sec sixty-six A of IT act

[117] https://www.winston.com/en/legal-glossary/social-media-law.html

• Posting or merchandising sexy material on net- offense below sec 292, 292 A, 293, 294 of IPC punishable with imprisonment.

• Posting secret info, the document of presidency, a photograph of prohibited places- punishable for violation of the official act.

• Posting derived material- offense below copyright.[118]

Recently the supreme court affected down the sec sixty-six A of the data technology act 2000 that semiconductor diode to arrest and folks WHO posting allegedly objectionable content on the net. The court additionally rejected the middle plea that it absolutely was committed to free speech and would fairly make sure the administration.

Social media and protest against CAA-

What happened at Jamia, JNU, AMU, and everyone over the country is present on social media. The video of what happened at Sabarmati Hostel in JNU or the video of the library of Jamia is out there in almost half the smartphone user population. The younger generations' access to the planet during a way that did not exist before 2010 has made it possible.

Prerequisite to rebellion, protest, and agitation is thru communication. the maximum amount because the regimes want to regulate the flow of data, it's now impossible to shut it down completely. While our Indian Media was giving fake news and also it had been social media that globally counters them.

This takes us back to the facility of the web and why the governments are hooked into Internet Shutdowns. India is that the only country to possess done the very best number of Internet shutdowns in history ever. When the press isn't ready to expose the brutalities of the

[118] https://www.legalhelplineindia.com/social-media-law-india/

establishment, it's grassroots protests recorded by the general public that brings truth to the worldwide community watching on the web.

What social media has wiped out the protest against CAA and NRC is to mix the people of India. Various social media handles update daily information about protests in every corner of the country. Poetry, music, songs, videos of protests are viral on the web.[119]

Laws related to fake news on social media

In India there are no such specific laws to deal with the fake news but there are statutory and self-regulatory bodies to act against the dissemination of misinformation the examples can be endless as dissemination of misinformation and fake news spreads on social media, the sheer vastness of the internet covers over 35 crore and social media user over 20 crore makes the origin of fake news.

The amended guidelines or the accreditation of journalists said that if the publication or telecast of fake news was confirmed, the accreditation of that journalist would be suspended for six months.

The government now withdraws the notification that the accreditation of a journalist could be canceled if the same is found generating or propagating fake news. There is also an arrest of news editor in Bengaluru for allegedly publishing fake news. Till now there is no specific law to deal with fake news, free publication or broadcast of new in India is considered as a fundamental right to freedom of expression under Article 19 however complaints can be lodged with the news broadcaster's association (NBA) which represents the television news and current affair. the NBA is the credible voice of news broadcaster to the government and also there is another body called Indian broadcast Foundation (IBF) which was created in 1999 to

[119] https://feminisminindia.com/2020/01/15/social-media-protests-against-caa/

look into the complaint against the content aired by 24x7 channels, the complaint against any broadcaster can be filled in online or offline for promoting smoking, abuse or any violent action.[120]

COVID-19 AND IMPACT OF SOCIAL MEDIA

The media square measure following each step of the journey with multiple stories, incessant headlines, and continuous updates across Asian country it has been more or less months since the COVID-19 outbreaks 1st reportable the constant barrage of the most recent data, new cases and recommendation square measure difficult to remain up with. a small number of stories you browse at some purpose may be entirely out of the day by resultant morning and this results in arising several queries from the final public and natural event of viruses. the matter with contemporary on-line media is that the unfold of information this has been a lot of talked concerning in political spheres, the unfold of information on SARS-COV-2 has been no completely different theories that virus was designed among the work or square measure caused by 5G mobile network. Another challenge in social media has been avoiding stigma early among the COVID-19 natural event before the virus several raise it as a result of the metropolis virus building stigma is unbelievably unhealthy for natural event management it will drive people to hide sickness and additionally discourage folks from seeking healthy behaviours. The politicization of this natural event has been another troublesome facet to manage political motives may be a crucial a part of their job with the aim of media being to hold government. The cyber cell of state police is searching 346 cases of fake news on numerous social media platforms related to COVID -19 the govt. had already warned that strict action would be taken in such instances and even FIR would be lodged UN agency square

[120] https://www.indiatoday.in/india/story/how-to-tackle-fake-news-legally-without-a-law-in-india-1203515-2018-04-03

measure been suspect of posting faux news on social media. Also, many social media accounts square measure blocked to curb the unfold of fake and inflammatory content or messages on social media. As the crisis in china open, social media unconcealed its world-shaping power by facultative or recording of assorted records of humanity and human interaction this record is maintained on smartphones, computers in bedrooms and enormous information centres everyplace the earth.

According to the study, a majority of the respondent in each country say that journalism helped them perceive the crisis however on the alternative hand they additionally say that journalism has exaggerated the pandemic. However, this additionally will increase the consumption of the net daily and additionally spreading rumours that square measure harmful to society.[121]

"Boys locker room" case (Social media threat to human right)

During social media observance, it had been detected that one in every of the Instagram cluster by the name of "boys locker room" was obtaining employed by the participants to share the obscene message and morphed footage of minor women and additionally passing comments on the rape that is not acceptable by anyone, the chat area exposed by a lady unfree among the cluster chat, in keeping with the sources the cluster was started by category twelve student on top of eighteen yrs. additionally fifteen a lot of students of distinguished urban centre faculties square measure questioned and their phones square measure appropriated, police have known twenty seven members of the cluster and some were underage. The supply additionally says that the bulk of the scholar did not notice the cluster which that they had been additional to it by others, it is the purest example of a violation of right as category eleven and twelve students nonchalantly discussing the gang-raping woman and additionally screenshots of their chats

[121] https://www.id-hub.com/2020/03/05/role-can-media-play-managing-covid-19-outbreak/

have gone infective agent on Twitter and different social media. The law-breaking cell (CCC) had lodged associate FIR when they came to grasp the Instagram cluster wherever teen boys from distinguished faculties allegedly shared photos of girls and engaged in sexually specific oral communication together with the threat of sexual violence. The 300 has known 5 different members they 0.5 already deleted their messages and account; police attempt to confirm if the cluster and are also taking opinion before apprehending them. Additional professional (Delhi police) the FIR was filed and additionally social media observance detected screenshots from the cluster. Instagram has been asked to produce the detail of alleged accounts concerned among the cluster and details square measure still expected. The minor members of the cluster square measure being self-addressed as per the availability of juvenile justice additional action goes to be taken supporting proof or material gathered.

The case was registered under that ACT (Information technology act 2000) and additionally IPC (Indian Penal Code) in addition to the current sharing of pictures underage women may be a violation of the POSCO (Protection of kids from sexual offenses act,2012) and additionally another law like sec 66E violation of privacy, sec 67A transmittal sexually specific material of IT act and sec 354C paraphilia below IPC.[122]

Government action on the misuse of social media

The government is drafting pointers which is able to bind corporations like Twitter, WhatsApp, YouTube, Facebook to reply over a grievance the new pointers square measure below the sec seventy nine on info technology act these square measure ready to curb the complaints concerning the unfold of rumours and false news on social media like incidents of execution

[122] https://indianexpress.com/article/cities/delhi/bois-locker-room-case-5-boys-questioned-over-messages-on-instagram-group-6396040/

sparked by rumours of child capture on WhatsApp the ministry of electronic and it has been causation a stern warning to WhatsApp to develop a mechanism to at once stop the unfold of info. As currently the government in India plans to manage social media as a result of it will cause "unimaginable disruption" to democracy, Prime Minister Narendra Modi's government aforesaid throughout a legal document filed among the nation's Supreme Court. the govt should regulate social media platforms offered by corporations like Twitter, Facebook to curb circulation of pretend news, rules can facilitate in curb growing threats to individual rights and so the nation's integrity, sovereignty, and security. India's Supreme Court is hearing a case filed by Facebook which is able to decide whether or not WhatsApp, alternative electronic communication services suppliers, and social media corporations square measure typically forced to trace and reveal the identity of the mastermind of a message. within the keenly watched case, Facebook invoked its users' right to privacy when a provincial government argued that corporations should reveal the identity of originators of messages throughout a bid to check kitty porn and hate speeches. the net big aforesaid WhatsApp messages square measure end-to-end encrypted however associate degree order among the case could cause changes among the merchandise globally. On Facebook's petition urging the Supreme Court to concentrate to the case, the best court had earlier restrained associate degree tribunal from passing any order among the case. The filing on weekday came when the court had directed the government to inform regarding the stage of framing of the rule. There square measure varied messages and so the content spread/shared on social media many that square measure harmful. There might even be messages that square measure against the sovereignty and integrity of the country in such circumstances there should be a properly framed regime to hunt out the persons/institutions/bodies United Nations agency square measure the originators of such content/messages. it's about to be necessary to urge such info from the intermediaries,"

the court had aforesaid whereas asking the ministry to supply definite timelines in respect of finishing the strategy of notifying the principles. the govt. aforesaid that among the previous few years there has been a large increase in social media because of lower web tariffs, accessibility of good devices.

On one hand this has LED to process and social development, however among the opposite, there has been associate degree exponential rise in hate speech, fake news, public order, anti-national activities, slanderous postings, and alternative unlawful activities exploitation internet/social media platforms. the government is currently operating with web service suppliers, search engines and social media platforms to frame the principles.[123]

CONCLUSION

After the ornate study of the research entitled, a important study on "SOCIAL MEDIA REGULATION AND HUMAN RIGHT" that the advancement of technology and so the net has each professionals and cons the threats square measure chiefly knowledge retention containing personal info that renders persons to vulnerability. Social networking sites square measure used for cyberbullying, cyberstalking incursive into someone's privacy, the analysis tells North American country regarding the most impact of social media regulation and therefore the manner it affects human rights.

There square measure a lot of mention social media, the question of privacy already arises in Hon'ble Supreme Court of India repeatedly people's privacy is desecrated by completely different media platforms like Facebook, Twitter, Instagram, WhatsApp, Google any content

[123] https://economictimes.indiatimes.com/news/economy/policy/india-plans-to-regulate-social-media-as-it-can-cause-disruption/articleshow/71695590.cms?from=mdr

that is open by anyone it's saved and there is conjointly knowledge chase to grasp regarding the particular interest of people over content viewed by someone on social media platforms. Also, there is unknown sharing data of information} some individuals while not even his/her knowledge.

Further, block explicit content on social media in several countries together with trendy democracy is typically ruled by obscure and discretionary law, several countries even India had to close up the net services because of CAA or Nuclear Regulatory Commission protest and spreading of pretend news that lands up in violence.

Overall glimpse of the following analysis is to travel through the dark facet of social media, nevertheless web or alternative media platforms have several blessings however today these square measures violating our rights and privacy. Also, to grasp regarding completely different social media threats, misuse of web, government action and measures square measure taken, and some of the laws for the protection of privacy.

FOUNDATIONAL INJUSTICE IN JUDICIAL SYSTEM: CHANGING OR NOT?

- ROHIT CHOUDHARY, RAHUL SODHI & SAHIL CHHILLAR

ABSTRACT

The pre-independence era witnessed huge number of instances where certain classes of people were placed on the periphery of the society by certain masses of the same society, who claimed it to be the inherent fate of such former classes. Post-independence, witnessed major developments in the nature of economic prosperity and vibrant democracy but such was actually not the case with socially discrete classes.

Since there is humongous discrimination subsisting between different groups of people, so in my essay, I would bring in focus one such group, that is, "gendered-differentiated group", growing in the soil of discrimination and the response of the functionaries of the democratic society.

I. INTRODUCTION

When we talk about the oppressed classes of society, the most manifest of such classes is the backward class, though there are various other such groups and I have opted for the "women section of the society". Since gender is a broad concept and gender roles is a whole different chapter, so going down the lane, I have picked upon the stereotypical-roles attached to women and the unscrupulous response to them, by the decision-making bodies. However, women have become a product of discrimination in not only one particular area but in almost every aspect as they are touching a new height every now and then, with the wings of discrimination on their back.

Thus, narrowing further the scope of my essay, I would be focusing on the pregnancy-related issues of women and the thorns in the way, merely because of bearing another life in her body.

II. CLASSICAL APPROACH OF THE STATE MACHINERY TOWARDS PREGNANCY: A DEROGATION?

The stereotypical position of women is deep-rooted in our society. There are certain assertions which are attached to women, thereby considering them to be dependent on their male partner, physically weaker than men, meant to be confined within the four-walls of home, those going out for work are of low self-esteem, certain vocations are not meant for them to work (Army, though has started becoming an occupation from past few decades), etc. One such stereotype is attached to the pregnancy of women which has come up in open in certain case law.

In **Ankita Meena v. University of Delhi**[124], a student was barred from writing the exam when she was in the end-semester, as she was unable to secure 70% attendance which was mandatorily required to sit in the exam. The reason for lack of required attendance was her pregnancy. After the University refused to pay any heed to her request and also, the dismissal of petition by the High Court led her to approach the Supreme Court. Although, the petition has not been decided yet.[125]

In a similar case of **Khushbu Sharma v. Bihar Police Sub Ordinate Service Commission and Others**[126], the petitioner had applied for the post of Police Sub-Inspector, for which she was required to pass three tests, of which, two were written exams and the other one was based on physical evaluation. She was unable to appear for the physical examination on account of

[124] 2018 SCC Del 9049
[125] See Satyajit Bose, *Sex Discrimination and Pregnancy – Reviewing Khusbu Sharma's Case*, Indian Constitutional Law and Philosophy, available at: https://indconlawphil.wordpress.com/tag/sex-discrimination/ (last visited on November 18, 2020)
[126] 2019 SC 1334

her pregnancy and did not receive any response against the request to conduct re-examination. After the High Court turned down her request, she knocked the doors of Supreme Court and finally, the commission was directed to conduct the physical exam again only for those candidates who were not able to appear earlier due to pregnancy.[127]

In Khushbu Sharma case, neither the immediate authority scrutinizing the issue of pregnancy nor the respective High Court, prima facie considered Article 16 which was actually in dispute. The court considered pregnancy as an *exception to the general rule of conducting physical exam on the assigned date*. If the court would have looked upon the case from the lens of Article 16(1)[128], it must have had said that since the petitioner has passed the first two tests and

[127] *Supra* note 2

[128] A. 16- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.
(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

was eligible to sit in the physical one, her opportunity to seek employment cannot be taken away because of pregnancy which is a matter of choice and therefore, cannot become a ground of exclusion.

However, the court did not go by the above reasoning and based its judgment on certain grounds, the very facets of which were discriminatory in nature. Firstly, the court said that the presence of women officers was necessary for combating crimes committed by women.[129] This means that if the required number of vacancies could have been filled even without considering the petitioner's plea, then the court would have never directed the commission to conduct the physical exam again as the court was deciding on the premise of need for more women officers and not that a woman has the equal opportunity to seek employment and thereby, pregnancy will not operate as a barrier. Secondly, the court made a peculiar statement that if the pattern of recruitment would have been pre-scheduled, then the candidates must have *planned their lives accordingly* and the physical test would not have been required to be conducted again.[130] However, the peculiarity in this statement was regarding the pre-planning of life, as the court meant that if a woman wants to go for services, then she cannot think of getting pregnant as the same would deprive her of fulfilling certain criteria and the job itself. But such would not have been true if the court would have looked on the matter from the lens of Article 16 and had guaranteed her the equal opportunity in employment.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

[129] See Prachi Bhardwaj, *Women who missed 2018 Bihar Police PET due to pregnancy should be considered for appointment*, SCC Online, available at: https://www.scconline.com/blog/post/2019/10/09/women-who-missed-2018-bihar-police-pet-due-to-pregnancy-should-be-considered-for-appointment/ (last visited on November 18, 2020)

[130] *Id.*

Also, a major reason behind the aforesaid view of the court is that the court did not adopt a substantive approach and somewhere, followed the stereotypical vision of the society that either a woman can work or be at home raising her family, or over any other thing, she had to prioritize her household matters like to stretch the line of descent further.

Though, the above judgments show the courts on a faulty side but it does not happen in every case. In **Inspector (Mahila) Ravina v. Union of India**[131], the petitioner was not able to appear for two pre-promotional courses on account of pregnancy which were required to be attended for promotion to the post of Assistant Commandant. But in the very next year, she attended both the courses and qualified for the post of Assistant Commandant. But she was not appointed for the same post as CRPF said that earlier when the courses were conducted, she did not attend them which showed her *unwillingness* towards the same and thus, what was protected thereby was her *chance* and not the *seniority* which means that she cannot claim consequential seniority.[132]

However, the court struck down CRPF's arguments stating them to be discriminatory because to get pregnant or not is her choice and she cannot be put at a disadvantageous position merely because she can get pregnant and a man cannot and this would justify a differential treatment for her which is discriminatory in nature. Finally, the court stated that by taking away her right of consequential seniority, CRPF is directly breaching Article 16(1) and (2) as well as Article

[131] W.P.(C) 4525/2014

[132] See Gautum Bhatia, *The Delhi High Court on Pregnancy and Sex Discrimination*, Indian Constitutional Law and Philosophy, available at: https://indconlawphil.wordpress.com/tag/sex-discrimination/ (last visited on November 18, 2020)

21[133] because it is her *choice* to get pregnant or not and if she gets pregnant, then the same cannot be detrimental to her promotions in employment.

Now, so far, I have discussed about the position of women in the society in the context of her state of pregnancy and how the society considers her pregnancy to be a burden which if she will carry, has to forgo her career. Now, I would like to dissect on the aspect of pregnancy by discussing about *sanitary pads* which are analogous to pregnancy itself and form a pivotal part of the period of pregnancy. The issue in this regard is the tax on sanitary pads which largely remained unchanged despite the complete exemption granted by the State in 2018, as the GST on raw materials used in the manufacture of a sanitary pad remains the same which has brought meagre difference in the price of sanitary pads for the customers.[134]

Unhesitatingly, the importance of sanitary pads cannot be dispended with and becomes more than a necessity for a woman undergoing menstruation, to prevent bleeding that occurs after birth or at the time of abortion or miscarriage. Since India is a developing country and only a miniscule fraction of women use pads with others still relying on a cloth which makes them highly prone to infections. Over the top, if the government would impose tax on the raw materials used in making pads, will somewhere defeat the purpose of pads. Since I have already stated that pads are indispensable before, during and even after the pregnancy is over; pregnancy being the fundamental choice and liberty of a woman alike ensuring the use of contraceptives by the other person, brings pads within the ambit of Article 21 as taxing of pads

[133] A. 21- No person shall be deprived of his life or personal liberty except according to procedure established by law.

[134] See Suhani Mohan and Kartik Mehta, *1 year later: Impact of GST exemption on Sanitary Napkins*, Saral Designs, available at: https://saraldesigns.in/1-year-later-impact-of-gst-exemption-on-sanitary-napkins/#:~:text=After%20GST%20exemption%3A&text=To%20be%20able%20to%20earn,get%20the%20tax%20credit%20back. (last visited on November 18, 2020)

would affect the liberty of a woman to purchase the same and any such act declining the use of pads, thereby affects the smooth functioning of period related to pregnancy and is a derogation of Article 21.

Also, Article 39(e)[135] casts a positive duty upon the State to ensure the health and strength of women and since, GST is a collective concern of the Union and the State governments, an initiative to abolish tax on raw materials used in the manufacture of pads while reserving the earlier decision of tax exemption on pads itself, will further the use of pads in the society.

Moving ahead on the initial discussion, in the case of **Dr. Sabu Mathew George v. Union of India and Others**[136], the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PC & PNDT Act) was invoked for banning certain websites such as Google India, Yahoo India and Microsoft Corporation (l) (P) ltd. for promoting the ways of knowing sex of an unborn child through information available on such websites. The Act came as a means to prohibit the activities of sex selection, as people used to rampantly exercise unfair means in order to know that whether the child bore by a woman is a girl or a boy and if it is a girl, she used to get killed before even taking birth. Thus, the Act is a response to such sex selection activities which are in derogation of Article 15(1)[137] and 21 of the Indian Constitution. The court was able to find a mid-path rather than banning the websites. The court directed to call a meeting of the representatives of such companies and then discuss the suggestions and apply them accordingly so as to ensure compliance with the provisions of this Act. The

[135] A. 39(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 avocations unsuited to their age or strength;

[136] (2018) 3 SCC 229

[137] A. 15(1)- The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

suggestions that were in prime focus like a warning shall appear upon searching for sex selection techniques or to auto-block such search results and it was also suggested that advertisements shall be put on such websites prohibiting the use of aforesaid mal practices and also, advertisements portraying equal respect for the women section of the society, as the use of aforesaid techniques infringe the dignity and honour of women.

III. PREGNANCY ISSUES IN NEED OF REFORM: TRANSFORMATIVE CONSTITUTIONALISM

In the discussion so far, one thing has been clear that the societal norms, irrespective of being discriminatory or not, shape judicial mind. In **Navtej Singh Johar v. Union of India**[138], a reflection of transformative constitutionalism was shown. The actions of the government are limited to what has been provided in the constitution, i.e. the fundamental law of the land and anything done beyond that will not be accepted. But what if the constitution remains static, will it be possible to check on the actions of the government then? No, because the constitution has stopped responding to the changing needs of the society and the government is exercising its powers in an unfettered manner. Thus, it is necessary for the growth of the society that the very ideals of justice, liberty, equality and fraternity embedded in the bedrock of the society be gardened by the changing aspirations of people, so that such ideals do not lose their essence and help the constitution in retaining its character of a "living and organic document".

Now, if we talk in the context of the issue in hand, i.e. pregnancy, there is still much room left to respond substantively to pregnancy related concerns. Out of all, the instances that have been enumerated up till now reflect a quest for equality, not being a formal equality but a substantive one. In the CRPF case, though the petitioner was promoted because of the chance so reserved

[138] (2016) 7 SCC 485

but did not gain seniority over her juniors and fellow cadre members which shows that though she was able to gain promotion but substantive equality will only be secured when her consequential seniority will be revived. Similarly, in the PC & PNDT Act case, a curb on the sex selection techniques was required as such techniques did not only create inequality between the unborn boy and the unborn girl but also discriminated against the woman bearing such unborn child whose liberty to deliver the child was being trampled upon.

Although, there are various questions which actually need the application of the doctrine of transformative constitutionalism. If I talk about the Ankita Meena and Khushbu Sharma case, why is it that the courts are being merciful to the state of pregnancy of petitioners and not to their loss of employment. The reason is that our society considers that one of the most important roles of a woman is to bear a child and bring happiness to home and this happiness shall not be compromised at the cost of such woman's job, which is not her primary duty and is that of the male counterpart. This unscrupulous approach has also influenced the court system to deliver justice seeking to her state of pregnancy and not by bearing her right of employment in mind. Also, another question emanates from this question that even though due importance has not been given to Article 16 but if a person's employment is taken arbitrarily as happened in the aforesaid two cases, then whether such right of employment would be considered as a part of Article 21, because she has been thwarted from proving her potential under the pretext of pregnancy and the same has been meaninglessly turned into unwillingness on her part, thereby derogating her liberty which forms a pivotal part of Article 21.

Another question which arises is that the miscarriage of woman bearing a child without her consent leads to punishment under section 313[139] of the Indian Penal Code but on the other

[139] Section 313- Causing miscarriage without woman's consent—Whoever com-mits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be

hand, if the same woman losses her employment on account of pregnancy, is not considered as a harassment inflicted upon her by the immediate body she was working for or looking further to work for. In **Nisha Priya Bhatia v. Union of India**[140], though the case was not based on the pregnancy issue but certainly has a say in that regard. The appellant was harassed by her immediate superior officers for refusing to join an internal sex racket. However, the harassment was not construed in a substantive manner as the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH) only considers sexual harassment like unusual touching or unwelcome sexual behaviour but does not include the other forms of discrimination like the one based on gender. Now, if I bring the CRPF case on the same footing as that of Nisha Priya Bhatia case, the petitioner in the CRPF case also faced harassment as she was not provided with the senior position despite qualifying all the tests and the courses. The harassment is neither sexual in nature nor it has been deliberately inflicted on her but is implicit in the administration of the CRPF and hence, again will not get covered by the POSH Act.

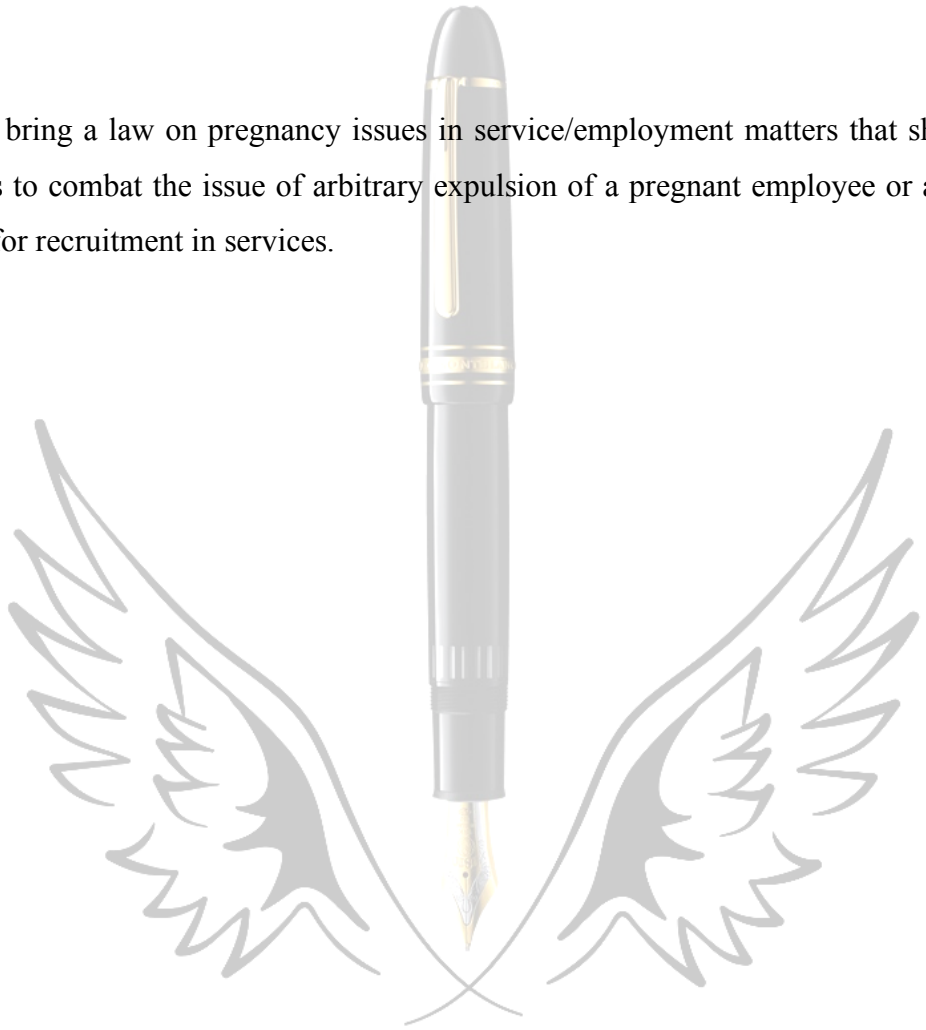
IV. CONCLUSION

From the whole submission, I can conclude three things, firstly, the judicial system of our country has to exercise the fundamentals enshrined in the constitution and not to get swayed by the unscrupulous mindset of the society in a particular case, secondly, there is a strong need of amendment in the POSH Act as it restricts the application of harassment to sexual behaviour only and do not include gender discrimination within its purview and lastly, the exigency of

punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[140] 2020 SC 394

time is to bring a law on pregnancy issues in service/employment matters that shall contain provisions to combat the issue of arbitrary expulsion of a pregnant employee or a contender applying for recruitment in services.



A CRITICAL ANALYSIS OF TRANSGENDER RIGHTS LAW AND ACTIVISM IN INDIA

- PARISHA DHEBAR

INTRODUCTION

The Constitution of India recognises equality before the law and equal protection of rights for everyone, but in reality we still have disadvantaged groups within our society. The Transgender Community is no stranger to being disadvantaged and being discriminated against. The recognition of their rights may appear to be progressive as compared to their historic situation, but this is only on paper and not in reality. In reality, this community is still at a disadvantaged position and is discriminated against. Gendering of laws is the norm and most of the laws in India are heavily gendered. The content of law in writing may appear to be gender-neutral, but in reality or in practice is deep-seated in the assumptions of the gender binary. Therefore, Laws that operate in the binary, automatically discriminate against identities such as transgender persons, who exist outside this binary. The problem with the so-called Gender-Neutrality of the laws is the very understanding of the term itself, because it has been restricted to it being a term which grants equal rights and equal footing to both men and women while, completely ignoring that the true meaning of gender neutrality includes not only the binary genders, but also individuals who fall beyond the scope of the binary structures. The laws have to recognise identities, in order to accommodate the different vulnerabilities associated with them. The NALSA judgment was a historic moment and made everyone think that this was the stepping stone to some substantial change. In 2014, the Indian Supreme Court in NALSA v UOI[141]

[141] National legal services authority (NALSA) vs. Union of India, AIR 2014 SC 1863

ruled that transgender people should be recognized as a third gender and enjoy all fundamental rights, while also being entitled to specific benefits in education and employment. The judgment further ordered that, "Transgender persons' right to decide their self-identified gender" should be recognized by state and federal authorities. The court made clear that "any insistence for [sex reassignment surgery] for declaring one's gender is immoral and illegal."[142]

Following which, the Navtej Johar Judgment[143] This further raised the bar of hopes the community had, but what followed was utter disappointment.

A RAY OF HOPE OR FALSE HOPES?

Just like the NALSA Judgment, there are several other cases which seemed to have been decided in favour of the Trans Community and progressive in nature at the prima facie level, but in reality are just a portrayal of how our Judiciary and Legislature resist intervening in places where the intervention is much needed.

RIGHT TO INHERIT-

Sweety (Eunuch) v. General Public AIR 2016 HP 148 and Illyas And Ors. vs Badshah Alias Kamla AIR 1990 MP 334-

These cases were one of the first cases wherein a High Court took into consideration the question of the devolution of a *Kinner*'s property or the question of inheritance rights concerning a transgender person. The religion of the deceased is unknown, but even if it was

[142] Kyle Knight, 'India's Transgender Rights Law Isn't Worth Celebrating, Human Rights Watch (05/12/2019), available at, https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating

[143] Navtej Singh Johar V Union of India, (2018) 1 SCC 791

known, the court upheld the custom of the Guru-Chela parampara in the Hijra Community while completely ignoring the religious identity and rights under personal law. They upheld the custom because the Religious Personal Laws didn't accommodate transgender persons and also because the deceased person was a member of the Hijra community. The question here is, will the excuse of custom always to the needful and is this a way of saying that the community can never be included within the Personal Law sphere? Furthermore, does it suggest that one loses their religion merely by fact of becoming a member of the *Hijra* community? The reasoning of the court to uphold the custom is vague and to an extent unknown. Was it because the religion of the deceased was unknown or because membership of such a community, one detaches oneself from their religious identity? Therefore it seems that the customary laws will always prevail over personal law in such cases. Furthermore, the description of a transgender person given by the Supreme Court says that transgender persons include eunuchs, intersex etc. However, such narrowly constructed judgments to an extent suggest that it governs intersex persons in *Kinner* communities and without established religions only and not the entire transgender community.[144]

RIGHT TO MARRIAGE-

Arunkumar and Sreeja v. The State WP(MD) No. 4125 of 2019-

Right to marry, which was otherwise a right that the Trans Community was deprived of, was granted to a transwoman Shreeja by the Madras HC in 2019 by allowing a registration of her marriage with a man. This is the first case to recognize the right to marriage of a transgender person. The court did not require the Shreeja to have undergone a sexual reassignment surgery

[144] Surabhi Shukla, Sweety (Eunuch) v. General Public [AIR 2016 HP 148], Law and Sexuality (05/07/2017), available at,https://lawandsexuality.com/2017/07/05/sweety-eunuch-v-general-public-air-2016-hp-148/

to be recognized as a woman, even though Shreeja was assigned the sexual identity of 'male' at birth. The court reasoned the granting of this right based on certain propositions of law recognized in the NALSA[145] case, viz. Fundamental Right to Gender Identity, Fundamental Right to Gender Expression Right to Equality, Dignity and Privacy, and right to marry. Importantly, the court did note that the families and doctors perform surgeries on intersex children when they are born, however the court found such surgeries in violation of NALSA[146] along with Article 39 of the Constitution[147] which directs the State to give children the opportunities and facilities to develop in a healthy manner in conditions of freedom and dignity. It also stated that intersex children are entitled to stay with their families and the onus fell on the government to launch programmes to address parental shame upon the birth of an intersex child.[148]

While the above cases may look like a step towards equality, they in reality are not progressive. They are reiterating the exclusion of the community. The question is, would the court rule in the same manner if the right to marriage case involved an intersex person who didn't identify as either of the binary genders? The answer in all probabilities is negative. Does this mean that right to marry can only be given to trans persons who identify as either of the binary genders and not the other? Where does the right to equality vanish then? All these questions are yet to be answered.

[145] Supra n.1
[146] *Ibid*
[147] Article 39, The Constitution of India,1950
[148] Surabhi Shukla, Arunkumar and Sreeja v. The State WP(MD) No. 4125 of 2019, Law and Sexuality (10/07/2019), available at,https://lawandsexuality.com/2019/07/10/arunkumar-and-sreeja-v-the-state-wpmd-no-4125-of-2019/

ADOPTION AND EMPLOYMENT

We might not have come across case laws that speak to the issue of right to adoption and employment of trans persons, but we sure do have examples of trans people who fought for this right but failed to validate it legally. The best example is of the Trans Activist, Shree Gauri Sawant, who is raising an orphaned girl as her own.[149] She filed a petition to legally adopted her, but failed as she wasn't allowed to adopt her legally given that she identified as a transwoman. She successfully runs an organization to help sex workers. The adoption forms, even today provide for only two options in the gender column and doesn't provide for trans gender persons.[150] Therefore, depriving trans persons of the right to adopt children and embrace parenthood, which is otherwise a part of life for every other person.

As far as employment issues are concerned, the battles fought by the members of the community to obtain an employment are not unknown. An example of the same is Sub-Inspector K. Prithika Yashini who fought a very long legal battle to become the first transgender sub-inspector in India.[151] She fought the battle and didn't lose hope, but what about people who can't afford to fight long legal battles? Is it not their right to earn a livelihood for themselves and live a life with dignity? Another reason as to why the members of this community are left behind in terms of employment is the way the society reacts to them being

[149]IANS, As transgender, bringing up daughter was difficult: Activist Gauri Sawant, The Pioneer (13/10/2018), available at, https://www.dailypioneer.com/2018/trending-news/as-transgender--bringing-up-daughter-was-difficult--activist-gauri-sawant.html

[150]Mini Muringatheri, 'Transgenders raise the adoption question' , The Hindu, (04/01/2020), available at, https://www.thehindu.com/news/national/kerala/transgenders-raise-the-adoption-question/article30481170.ece

[151] Aishwarya Subramanian, 'India's First Transgender Sub-Inspector Takes Charge. And She's Beat Incredible Odds To Get Here', The Better India, (05/04/2017),available at, https://www.thebetterindia.com/94432/irst-transgender-sub-inspector-india/

successful in their field, them trying to be a part of the society which treats them as an outcaste. A recent incident in Coimbatore, wherein a 59-year old transgender entrepreneur was murdered by a man. Apparently, the murderer claimed to be unhappy by the progress of the deceases Transwoman. The deceased was the head of Transgender's association in the district and use to run her own restaurant to earn a living.[152]

The above cases and incidents make us question the right to equality that we bask about as a nation, because when we can't give the very basic rights to a person, achieving equality in its true sense looks like a distant dream. The contribution by the abovementioned activists hoped for a substantial change, they fought for it and when finally a ray of hope appeared with the dawn of the NALSA Judgment, the 2019 Act just crushed all the hopes and aspirations of this community.

ISSUES WITH THE CURRENT LAWS

The cases we discussed above definitely seemed like a ray of hope and with those judgments in place ideally, post the celebrated judgment given in the case of NALSA v UOI[153] that recognised the rights and identity of the trans people, the laws and bills that followed should have addressed the issues relating to Inheritance, marriage, adoption, employment, etc. which are some areas in which the community has been treated in a discriminatory manner. However, to our utmost disappointment these bills continue to centralise the issue of identity as the main

[152] Staff Reporter, Man arrested for murder of Coimbatore transgender entrepreneur, The Hindu, (23/10/2020), available at, https://www.thehindu.com/news/cities/Coimbatore/man-arrested-for-murder-of-coimbatore-transgender-entrepreneur/article32927683.ece

[153] Supra n.1

problem and complicate things further instead of addressing the actual issues or loopholes within the law that have so far been discriminatory towards the Transgendered persons. The Transgender Persons (Protection of Rights) Act, 2019[154] makes the rights granted by the NALSA Judgement absolutely redundant. It further disappointed the LGBTQIA+ Activists and the whole community, as all the battles fought by them in their everyday life ever since to make the law take the first step towards change went down the drain. This act mandates a person who identifies as a trans person to prove their identity all over again by obtaining a legal certificate from a District Magistrate which confirms their identity as a trans person. This bill further mandates a medical examination and a sexual reassignment surgery. All these procedures make the rights and recognition given by the NALSA judgment redundant and useless. This is violative of rights to self-identification of gender, which is part of right to life under Article 21[155] as recognised in the 2014 judgment of the Supreme Court in NALSA v Union of India.[156] Furthermore, sections 4 to 6 of the 2019 Act[157] violate the right to equality under Article 14[158] since a non-trans person is not required to go through the process for certification of gender identity. This shows how we are still stuck at centralising the issue of identity instead of addressing the actual issues. Therefore, the question or the problem is, how do we include the Transgendered Persons within the legal sphere, is Gender Neutrality of Laws enough?

The Act, which is meant to uplift the community and grant them equal rights is in turn violative of their rights. It reaffirms the age old practices and treats the trans community with suspicion

[154] Transgender Persons (Protection of Rights) Act, 2019
[155] Article 21, The Constitution of India,1950
[156] Supra n.1
[157] S.4 & S.6, Transgender Persons (Protection of Rights) Act, 2019
[158] Article 14, The Constitution of India,1950

by reinforcing the prejudices against them. This so-called progressive laws are actually regressive in nature and are pushing the Transgender Rights by 5 decades.[159] Many Trans Activists have raised their concerns and disappointment towards the Law.

Transgender theatre artist and activist A Revathi expressed here disappointment by saying that the 2019 Act is belittling the being of the community and individuals as it gives authority to a third party to declare one's gender, i.e. the District Magistrate has the power to accept or deny their application for obtaining a Transgender ID card. She further adds that calling Transgendered people as the 'Third Gender', the Court of law is implying towards a hierarchy between genders and push the community further down. The absolute ignorance towards education and employment of the Trans Community has caused the community to face more difficulties securing education and employment.[160]

Another member of the Trans Community raises serious concerns with the 2019 bill wherein the discriminatory nature of laws is extended to the Criminal Law as well. The bill suggests a 2 year punishment for assault and other violence against the Trans individuals. The bill further asks these individuals to either stay with their biological families or the government shelter homes, while conveniently ignoring the realities such ill treatment and domestic violence faced by Trans individuals in their biological homes because of the conservative and unacceptable mindset. This insistence on them living with their biological family or a government shelter home is actually depriving them of the basic right to choose one's partner and it also deprives

[159]Vishnu Swaroop, Trans Bill is regressive, undermines rights: Transgender activists, The Times of India, (07/12/2019),available at,https://timesofindia.indiatimes.com/city/coimbatore/trans-bill-is-regressive-undermines-rights-transgender-activists/articleshow/72415616.cms

[160] *Ibid*

them from forming an alternative family structure. A functional family is not recognised by law, it only recognises the conventional structure of a formal family.[161]

The law which is meant to protect the rights of transgender people, was drafted and passed without approaching let alone including anyone from the community. No one from the community was asked about their needs, issues, concerns and requirements. As a result, the law is heavily based on assumptions based on stereotypes.[162]The Bill also mixes transgender people with intersex people further proving that it was not a well thought one and has been made with little or no knowledge.

The Bill further fails to address things like marriage rights, adoption rights, property rights, social security, employment, education, etc. This deprives the transgender community of some of the most basic rights which is yet again contradicting the NALSA Judgment.

Therefore, the law which is made for upholding the rights of the Trans Community has been clearly rejected by the very Community, for its regressive nature that would only make them more vulnerable to discrimination.

CONCLUSION

The law has failed miserably in granting basic rights to the community and by the reluctance and resistance from the Judiciary to intervene is only reaffirming the age old practices of treating the community as different, an outcast. Why can't we include them in the current legal structure? Why does the judiciary shy away? We often hear people refuting these claims by saying that, a Uniform Civil Code is the answer to all of our problems or a separate law for the

[161] Supra n.13

[162] Sasha R., Trans Bill 2019: Why India's transgender community is opposing a Bill which is supposed to protect their rights, Socialstory, (30/11/19), available at,https://yourstory.com/socialstory/2019/11/stoptransbill2019-india-transgender-community-rights

community would take care of the issue at hand, but as far as the Uniform Civil Code debate is concerned, we have argued based on the inequalities between males and females. However, this needs to change and we must move towards equality in its general sense to accommodate everyone. Basically the idea of gender needs to be done away with in its entirety as far as the law is concerned to achieve equality in its true sense. Furthermore, as far as having a separate law is concerned, we have seen how the separate law made for the Trans Community has turned out. The law is absolutely regressive in nature and snatches their basic rights from them granted by the NALSA judgment in 2014 while remaining silent on pertinent issues such as marriage, adoption, employment, inheritance, etc. Furthermore, when such a law was drafted and made, the community for which the law was being made was not even consulted. There was no representation of the community in making of the law. The government under the law has proposed to set up a National Council for Transgender Persons wherein the representation of the community will merely be 5 members.[163] This statistical dynamic is proof enough of how discriminatory the law and society as a whole are against the community. However, the question still persists as to why can't the community be treated as a part of the society in the real sense? Why do we have reiterate the age old practice of treating them as an outcaste. The Trans Activists and the Trans Community may continue to fight for the very basic rights that everyone in this country gets ever since their birth, but then is this what we mean by a nation that basks in the glory of Article 14 and 21? Is this how we prioritise personal liberty, freedom of expression and freedom of life with Dignity?

[163] The New Leam Staff, National Council for Transgender Persons Aimed at Providing Equality and Better Representation to Transgender People, The New Leam, (25/08/2020), available at,https://www.thenewleam.com/2020/08/national-council-for-transgender-persons-aimed-at-providing-equality-and-better-representation-to-transgender-people/

The Activism by the community and the Trans Activists has definitely raised the right questions and their ask is nothing extravagant. All they want is an equal footing, an equal opportunity in the society and in the eyes of law. However, the current laws and law makers seem to lack the activism and courage to intervene and bring about the change. If the Judiciary and Legislature, that is the authorities only shy away from implementing the change in its real sense then who will enforce them? The law grants the authority to the Judiciary to actively make changes in the law for the welfare and reformation of the society, but until this power is used in the correct way, no substantial for the good can be brought about and same is the issue when it comes to the laws concerning the Rights of Transgender Persons. Therefore, a change cannot be brought about by merely making a law, but a change can be brought about with a proper law that answers the questions and deals with actual issues along with a proper implementation of such laws.

We call ourselves a developing and a progressive nation, but what's the fun in developing or progressing in parts? What's the fun in leaving behind our fellow members of the society behind and moving ahead? We shall truly progress and develop once we all are given equal rights and equal opportunities. When everyone together moves a step towards development in every sense, like they say, 'Charity begins at home.'

ARE PUBLIC SECTOR UNDERTAKINGS BOUND BY THE SHACKLES OF INDIAN ADMINISTRATIVE LAW

- SAUMYA BAZAZ

INTRODUCTION

Public Sector Undertakings or 'PSUs' are companies or corporations in which the government either owns majority shares thereby making it an indirect owner or the corporation itself is a result of a legislation and therefore arises out of a parent act. These undertakings are built in order for the government to participate in the commercial sector to carry a trade or business. The Constitution of India under articles 19(6) and 298 extends the power to the government to carry a trade or business. It also gives the state the right to carry on any trade or industry by itself or through a corporation controlled partially or wholly by the state. This brings the concept of statutory and non-statutory corporations that constitute the public sector undertakings. Statutory undertakings are a result of a statute framed by the parliament and therefore are an instrumentality of the government. Whereas, non-statutory corporations are created when the government takes control over an already established enterprise by owning majority shares. The process of nationalisation of banks sought to achieve to make these banksa non-statutory corporation as an undertaking.

Administrative law are laws that govern the activities of the agencies or instrumentalities of the government as well as the relationship between the 3 bodies of state, the legislature, executive and the judiciary. It includes principles and concepts such as the separation of power, rule of law, discretionary powers, delegated legislation, etc. which will be discussed in detail

while analysing whether these principles are applicable on statutory and non-statutory corporations.

In this paper we shall analyse these principles, the authorities of cases which have settled the law on if and how administrative law has shackled the public undertakings in India as well as look at the various flaws of the present law and system of administration and recommend some reforms that can help create a more efficient and effective administrative system which can improve the degrading condition of the undertakings.

I. SEPARATION OF POWER:

In theory the separation of power does exist between the government and the public enterprise as the government department doesn't direct the workings of the enterprise and does not directly control functioning of the undertaking. However the extent of actual separation of power has been miniscule at best and exercised to a very limited extent.

The overbearing power of the government or the executive over the public undertakings begins from the very governing body that manages these public undertakings which is the Board of Directors. The members of the Board of Directors themselves have been appointed by the government which includes the nomination of a chairman. Therefore, the governance of a body that does not function as a government department has been assigned over to individuals who are appointed by the government. Moreover, there exists no obligation upon the government to specify certain qualifications/criteria upon which such appointment has been made. This

essentially implies that the government is free to appoint whomsoever it likes catering to its own vested interests. [164]

A. Disadvantages of Government Control over Undertakings

A public undertaking although an instrumentality of the government, is at its core a commercial enterprise working to extract profits as any other private company would. However, such unfettered power of the government over a public undertaking brings several complications and disadvantages. It does not only extinguish the principle of separation of power but also jeopardises the operations and functioning of the undertaking itself. Some of these disadvantages are:[165]

1. For a commercial enterprise to function separately from the government, it requires a certain extent of autonomy without the constant interference by the government. However, this autonomy is completely eradicated once too many government officials are appointed at head positions in the undertakings. These civil servants and government officials work more as a representative of their ministry rather than as an employee of the enterprise. They are not employed as a result of their skills or expertise in a particular field but due to the sole fact that they are associated with a particular government department.
2. The whole purpose and intent of making an autonomous body frustrates as the positions of the lead decision makers in the enterprise are taken over by government officials.

[164] 1 MP JAIN & SN JAIN, PRINCIPLES OF ADMINISTRATIVE LAW (Lexis Nexis 7th ed. 2017).
[165] *Supra* note 1.

3. Shuffling between two or multiple duties by an official appointed in an enterprise as well as working in the government department makes the official not be able to devote enough time to do justice to either of his duties efficiently.[166] It also leads to the blurring of the lines between his two positions of responsibility as a secretary/official of the ministry and the member of the board of directors.[167]

B. Recommendations of Committees to encourage Autonomy of Undertakings

Upon encountering the grim functioning of the public undertakings, several committees/commissions put forward their recommendations in order to ensure a more autonomous and efficient working of the undertakings devoid of the excessive control by the government ministry/department.

1. The Menon Committee recommended that a secretary or any senior official should not be appointed on the Board of Directors along with the fact that doing so will lead to a power imbalance before the parliament if the operations of such undertaking is questioned and the official can criticise his colleges on the board in the parliament without giving them a chance to reply to such criticism due to the fact that they are not members of the parliament. [168]
2. These efforts were however in vain as the Estimates Committee in 1963-64 found that the secretaries continued to be part of the board of directors for more than 8 enterprises

[166] Evolving Patterns in the Organisation and Administration of Public Enterprises, 9 IJPA 396 (1963).
[167] Sub-committee of the Congress Party in Parliament on Parliamentary Supervision over State Undertakings (1959).
[168] 9 I.P. MASSEY, ADMINISTRATIVE LAW (Eastern Book Company 9th ed. 2020).

at a time.[169] The Boards of these enterprises were dominated by government officials who took a direct strike at the autonomy of these undertakings. The committee also found that the organisational structure of the undertaking was also moving towards that of the government showing traits such as over-staffing and a hierarchical structure ranging to 4-5 layers of authority.

The Administrative Reforms Commission also commented that such domination by officials on the boards shifted the character of the enterprise towards more of a government committee than an autonomous body. In order to foster the independence of these undertakings and instil a sense of responsibility of the employees towards the undertakings themselves, the appointment of employees below the board of directors should be done by the board itself as it will lead to greater accountability and responsibility towards the board than if they were appointed by the government. An example of misuse of power by government officials in an undertaking that is perpetuated by the legislation is that of Trustees of Port of Bombay v. Premier Automobiles Ltd.[170] where the employees of the board where appointed under the Bombay Port Trust Act, 1879 and these employees enjoyed immunity for any malfeasance or misfeasance committed by them but the other employees who were appointed by the board were held responsible and answerable to the board for the same.

II. DELEGATED LEGISLATION

Statutory Corporations and built as a result of the enactment of a legislation that gives birth to the corporation. The legislation itself bestows certain legislative power upon the corporation

[169] 1 MP JAIN & SN JAIN, PRINCIPLES OF ADMINISTRATIVE LAW (Lexis Nexis 7th ed. 2017).
[170] Trustees of Port of Bombay v. Premier Automobiles Ltd, 1981 SCR (1) 532.

to make such rules or regulations as necessary for the efficient and effective functioning of the body. The public undertakings/ corporations usually make these rules prescribing the conditions of service/employment, etc. These rules are subject to the approval of the government as well as limited to the threshold of what is within the governing legislation. In Non-statutory corporations of Government Companies these rules are made by the company itself and are not bound to get an approval from the government for its validity.

A. Power of the Corporations to make their own Rules or Regulations

Legislation or a statute confers the power to make rules and regulations on the Central/State Government as well as on the corporation itself. It prescribes areas upon which each of the entities is permissible to make rules on. The legislation always has an overriding effect and any rule contrary to the provisions of the Act will be void.

There exists a hierarchy according to which the supremacy and validity of rules and regulations is determined. The Act establishing the corporation will always be highest on the hierarchy having paramount importance below which would be the rules made by the Government and then would come the rules made by the corporation itself in the order of importance and enforceability.[171] An example of such a rule is Section 8(2) and 45 of the air Corporations Act which empowers the corporation to make rules for conditions or service and administration of affairs of the corporation. These rules and provisions are standard in all the statutory corporations namely, Life Insurance Corporation, Oil and Natural Gas Commission, etc.[172]

[171] Life Insurance Corporation of India v. Sunil K . Mukherjee, AIR 1964 SC 847.
[172] C.K. THAKKER, ADMINISTRATIVE LAW (Eastern Book Company 2nd ed. 2012).

Although the legislative power to define conditions of service as well as employment has been provided to the corporations, there are certain areas within these conditions that require some uniformity across all corporations without which there arises a greater chance of harm than good from such delegation of power. One such instance is the rules for recruitment and promotion of employees where there are high chances of nepotism and favouritism.[173] The Estimates Committee has recommended for the government to make its own model rules regarding the same and the corporation can adjust and tweak the model rules to suit its own requirements which don't sway too far from or defeat the essence and the intent of those model rules. [174]

B. Statutory force of Rules and Regulations framed by the Corporations

There was an on-going debate upon the nature and status of the rules/regulations framed by the corporation and their extent of enforceability. The question raised was whether these rules were to be treated as having statutory force or as mere guidelines from which no legal consequences would follow. This debate was settled by two landmark cases before the Supreme Court:

1. In the case of Indian Airlines Corporation v. Sukhdeo Rai[175], an employee was dismissed by holding an enquiry which was in breach of the procedure that was laid down by the corporation itself. The employee filed an appeal before the Supreme Court to render such dismissal as void. The court however rejected this appeal and held that

[173] Estimates Committee, 52nd Report (III LS) 31 (1963-64).
[174] Estimates Committee, 52nd Report (III LS) 33 (1963-64).
[175] Indian Airlines Corporation v. Sukhdeo Rai, AIR 1971 SC 1828.

these rules are merely the conditions of service in the corporation and do not constitute as a statutory restriction on the grounds that the corporation can terminate the employee on.

2. The case of Sukhdev Singh v. Bhagatram [176]overruled the aforementioned case. Chief Justice Ray delivered the majority view and held that rules, regulations or by-laws made under statutory power and authority form the part of delegated legislation. Regulations that contradict the statute or are in excess of the statutory power are ultra vires.[177] Further, if a corporation is empowered to make rules that lay down the conditions of service and employment then they are not only binding on the employees but also on the public at large.[178]

C. Administrative Directions and Circulars

It is to be noted that making rules or regulations isn't the sole way to take an administrative action by a corporation. The corporation can use administrative directions or circulars to provide conditions of service or employment. These directions or circulars do not have to be placed before the parliament unlike the rules and regulations framed and they are not subjected to prior approval of the government either. The safeguard here is that these directions have to be within the ambit and framework of the parent legislation.

The case of V.T Khanzode v. Reserve Bank of India[179] held the above-mentioned principle and held that just because a corporation has the power to frame rules and regulations, that doesn't

[176] Sukhdev Singh v. Bhagatram, AIR 1975 SC 1331.
[177] *Supra*, note 13 at 1341.
[178] *Supra*, note 13 at 1348.
[179] V.T Khanzode v. Reserve Bank of India, 1982 (2) SCC 7.

devoid it of using alternate mechanisms such as directions and circulars to take an action until a rule upon the same is framed.[180] A regulation can only be amended by another regulation or a direction and this process requires parliamentary approval. However, a direction can be modified by another direction which can be done independently by the corporation.

III. DISCRETIONARY POWERS

A statutory or non-statutory corporation has certain discretionary powers vested with it by the parliament as well as the government. These discretionary powers allow the corporations to take certain administrative actions independently while adhering to the framework of the parent act as well as the public policy standards. These powers allow autonomy to the Board of Directors to make decisions and initiate actions that don't necessarily have to come down the hierarchy from the parliament or the government.[181] These powers are what provide these corporations with freedom to operate in a commercial sphere for its own benefit and profits.

A. Government Control

The government exercises control and supervision on these corporations in order to make sure that the activities and actions taken by them vest within the public interest which the government seeks to protect. It also makes sure that the policies of the enterprise incline with the overall economic and financial policies of the government to ensure that the funds used by these corporations are utilised in a manner that the government approves of. A certain amount

[180] *Supra*, note 16.
[181] 9 I.P. MASSEY, ADMINISTRATIVE LAW (9th ed. 2020).

of control on these corporations is required as long as it doesn't deter the autonomy of the undertaking as an expense. The solution here is to maintain a fine balance between autonomy and control. These two concepts need to be reconciled to reach a mechanism which doesn't let either take over another.

The government not only exercises control in the appointment of chairman, directors, officers, CEOs, etc. but it is also conferred rule making power by the legislation which it utilises to make policy-based decisions as well as keep a check upon the regulations made by the corporation itself. Another important aspect that the government exercises control over is the financial budgeting decisions that the corporations take. It exercises control over the expenditure, initiation of new projects, borrowing of funds through bonds or debentures, etc. since the funds required by these corporations are provided and accommodated by the government ministries and departments.

The corporations do exercise autonomy in the monetary decisions however the same has to be within the limit that has been sanctioned by the parliament and government. However, with regard to determining whether a decision is a policy matter or a day to day matter, Article 21 of the Life Insurance Corporation Act, 1956 provides the government with the ultimate authority if a question arises as to weather a direction relates to a policy matter in public interest upon which the government's decision will be final.[182]

In the recent Sen Gupta Committee report[183] autonomy has been held as the golden rule of government policy. The best way to ensure the commercial viability of the corporations is to

[182] Air Corporations Act, 1953, No. 17. Acts of Parliament, 1953 (India).
[183] 1 MP JAIN & SN JAIN, PRINCIPLES OF ADMINISTRATIVE LAW (Eastern Book Company 7th ed. 2017).

ensure meaningful and effective autonomy which can be achieved through non-interference in day to day affairs, better delegation of decision making power and appointing professionals in the head management who can ensure better initiative and enforce performance standards.

B. Parliamentary Control

Government ministries as well as ministers are in control of their corresponding departments which in turn is controlling these corporations. Therefore, in parliamentary sessions, the ministers can ask questions to the Board of such enterprises as they fall within their departments. These questions can be related to the policy or matter of public interest however the questions pertaining to the day-to-day administration of the undertakings is not admissible in order to protect the autonomy of the corporation.[184] These principles are followed diligently however often questions are raised regarding the day to day working of the enterprise. In order for the parliament to assess the performance of the undertakings and supervise their actions, reports and information are passed on for evaluation.

Section 619-A of the Companies Act, 1956[185], provides that the Central Government shall cause an annual report on the working of the affairs of a Government company (*a*) to be prepared within three months of the annual general meeting before which audit report is placed; and (*b*) as soon as may be after such preparation, to be laid before both the Houses of

[184] Government of India, Ministry of Commerce and Industry: Decisions of the Government of India on the Recommendations contained in the Report of the Krishna Menon Committee and other Reports and Studies on running of Public Sector Undertakings (1961).
[185] Companies Act, 1956, § 619-A, No. 1, Acts of Parliament, 1956 (India).

Parliament together with a copy of the audit report and any comments upon, or supplement to, the audit report, made by the Comptroller and Auditor-General of India.

In order to make its control more efficient and meaningful, it constituted The Committee on Public Undertakings (PCU). It is a standing committee to oversee and probe the working of enterprises. It was constituted as a result of the recommendations of the Menon Committee. The Estimates Committee as well as the Public Accounts Committee has been merged into the PCU. Taking account the principle of separation of powers as well as to prevent departmental influence, a minister is not allowed being a member of the committee. [186]

IV. PRINCIPLES OF NATURAL JUSTICE

A. Audi Alteram Partem

The archaic position of law was stringent towards employees of corporations not being entitled to the principles of natural justice such as the right to be heard as the courts believed that being independent bodies, the principles of administrative law were not applicable on these bodies. However, this position is no longer sustainable as these corporations are now considered as instrumentalities of the government and are entitled to principles of natural justice like any other statutory body.[187]

Principles of natural justice have to be mandatorily applied to all the instrumentalities including undertakings, failure to do which will lead to its practices and decisions taken devoid of

[186] C.K. THAKKER, ADMINISTRATIVE LAW (Eastern Book Company 2nd ed. 2012).
[187] K . C . Joshi v. Union of India, AIR 1985 SC 1046.

consideration of these principles as void and illegal.[188] The most common example of the application of the principle of audi alteram partem, that is the right to hear the other party is during the proceedings of disciplinary action against or the dismissal of an employee. If the regulations framed by the parent act or those framed by the corporation itself stay silent on the point of natural justice, then the court can demand the inclusion of such principles. The employee can also invoke these principles in court. The corporations are obligated to give the opportunity to the employee to be heard before their dismissal.[189]

In the case of Workmen, Hindustan Steel Ltd. v. Hindustan Steel Ltd[190], an employee was dismissed without an inquiry through a standing order to justify its actions. The order said that if the general manager is satisfied with the reason for the removal of the employee, he will be dismissed without a hearing. A standing order manages to confer arbitrary and drastic power to the manager to dismiss an employee. The court held that a standing order is basically a fire and fire order which is archaic and a violation of the principles of natural justice which has wide ranging effects including the destruction of livelihood of the employee.[191]

V. ANALYSIS AND CRITICISM OF THE ADMINISTRATION OF THE PUBLIC SECTOR UNDERTAKINGS:

A. Impact of vexatious litigations on the functioning of the undertakings

[188] Calcutta Dock Labour Board v. Jaffar Imam, AIR 1966 SC 282.
[189] Trustees, Port of Bombay v. Dilipkumar , AIR 1983 SC 109.
[190] Workmen, Hindustan Steel Ltd. v. Hindustan Steel Ltd, 1985 SCR (2) 428.
[191] *Supra,* note 23.

Two very significant landmark cases by before the Supreme Court have gone in great detail over the effects and the detrimental loss that the undertakings face because of vexatious litigations against them as they are an instrumentality of the government open issue of writs as well as can be held liable for violation of fundamental rights

In the case of BSNL v. Telephone Cables Ltd[192]. the tricky and vulnerable position of these undertakings as even though they have monopolies in certain sectors, they are under a constant disadvantage due to control by the government, legislature and the judiciary over their actions. This control is highly essential to make sure that these undertakings do not abuse the position of power they are provided; however, once this control becomes excessive, it tramples upon the very objective of the creation of these undertakings. These undertakings were created and placed in a position to compete with the private companies who do not have the security of funds and employment that the government provides.

These undertakings through working solely for commercial profits and earnings are expected to abide by the public policy decisions of the government including providing fair and equal opportunity to all businesses in the tender collection process. This leads to massive delays and funds spent to analyse all tenders. Tender evaluation cost and tender process period together lead to a hike in the material procurement expenditure whereas the private companies do not have these obligations and can directly deal in the market avoiding all these extended costs and delays thereby progressing faster for cheaper.[193] The Supreme Court has noticed how these public undertakings attract more criticism and litigations than their counterparts in private

[192] BSNL v. Telephone Cables Ltd, (2010) 5 SCC 2013.
[193] 9 I.P. MASSEY, ADMINISTRATIVE LAW (9th ed. 2020).

sectors would. This leads to the undertakings being stuck and tied down by these litigations during which the private sector gets an edge over them. There is a requirement over level the playing field between these two sectors.

The Supreme Court in the case of Caretel Infotec v. Hindustan Petroleum Corporation Limited[194] highlighted this same issue and brought forward the need to remedy the frequency with which these writ petitions are filed before the court which has become a matter of routine which add to the cause of why these undertakings are not able to compete with the private companies. The courts have made it clear in the past how these petitions should be brought in case of severe violation or in matters of policy decisions made by these undertakings. However, for causes as trivial as a discrepancy in contract, writ petitions are being filed in High Courts and Supreme Courts. The Supreme Court Annual Report, 2017- 18 states that there are about 32,51,326 civil writ petitions as of June 2018 related to public sector undertakings pending across all High Courts including writ petitions.

It is essential for the courts to not interfere with the administrative decisions of the undertakings when such petitions are filed. The remedy which can be availed by a civil suit under the Code of Civil procedure should not be availed using the recourse of writ petitions. They should only be availed in order to correct the arbitrary or illegal decisions of the undertakings. These litigations do not only lead to a lot of waste of public money and drain the funds from these undertakings but they also take away focus and attention of the departments of these undertakings towards the court proceedings when they should be utilised towards the expansion

[194] Caretel Infotec v. Hindustan Petroleum Corporation Limited, AIR 2019 SC 3327.

and growth of the undertaking itself. The constant threat of litigation also instils fear and uncertainty within the employees as they are scared of being dragged to the court for every decision that they make. [195]

B. Threat to autonomy and the inner workings of the public sector undertakings

The Estimates Committee in its recommendations also pointed out as to how these undertakings are basically treated as a subordinate organisation of the ministry. The committee stated that practices like these have harmful effects over the productivity of the undertakings as they are subjected to red-tapism and procedural delays that a government department might encounter. [196]

When ministers get too involved in the day-to-day workings, their focus shifts from the more important matters which might lead to shortcomings and lapses. Therefore, the government should get rid of control over details of the routine workings but focus more on strategic and vital points of their operation.

VI. RECOMMENDATIONS OF THE REFORMS THAT CAN BE BROUGHT TO THE ADMINISTRATION OF PUBLIC SECTOR UNDERTAKINGS.

1. There is immediate and urgent need for the parliament to enact such laws or make such alterations in the parent act of the corporation to ***distance the executive from the functioning of the enterprise.*** Especially in regards to the appointment of the senior level executives in the corporation, changes need to be brought so that the board itself

[195] C.K. THAKKER, ADMINISTRATIVE LAW (Eastern Book Company 2nd ed. 2012).
[196] 9 I.P. MASSEY, ADMINISTRATIVE LAW (Eastern Book Company 9th ed. 2020).

through discussions can employee or appoint directors, chairmen and other officials than to give the opportunity to the government to place their own agents in such position to secure their economic and political interests.

2. ***Greater autonomy*** is the fastest and the guaranteed way to level the playing field between public and private enterprises. This autonomy can only be achieved if the executive control is relaxed and the enterprise is given rough breathing space to take its own decisions without the constant interference by the ministers.
3. ***Initiation of the Ombudsman System:*** An ombudsman is basically an official that is appointed to investigate the complaints and claims of maladministration in a public authority. The ombudsman acts as an authority where such complaints can be registered and looked into as an alternative to filing suits and petitions in courts. This not only helps relieve the pressure of cases from the courts, it also saves public funds as well as efforts spent in such litigations by the enterprises which can be better utilised towards the growth of the enterprise. While dealing with grievances of the undertakings a mechanism or scheme needs to be placed where all the complaints and grievances are first placed before the ombudsman who shall conduct further investigation into the matter before disposing of the matter. These grievances can be related to either the day-to-day workings of the enterprise or relating to policy matters. If there is violation of any fundamental rights or an arbitrary decision taken by the authority, the same needs to be filed before the competent court to be looked into.

CONCLUSION

It is an established fact that the performance and management of public undertakings have been on a decline over the years with heavy wastage of resources and funds as well lower sense of accountability towards the public as well as the ministry. This is largely due to the lack of autonomy that has been instilled by the government in the undertaking. The parliament too does not lay down any standards of efficiency that are required in the parent act. The undertakings have now turned into an ineffective body which drains government funds protected by the ministers who use it as an agency of their ministries to secure their political and economic interests. This inefficiency on the part of the body translates towards its inability to compete with the private enterprises. The undertakings work as an instrumentality of the government which brings more complexities as it is bound to abide by the public policy rules and administrative principles that are applicable. They often invite insurmountable litigations against the enterprises which further distract the body from achieving its commercial goals and profits. The consumers are also discouraged from availing services from these undertakings due to their mediocre services and enhanced charges due to enterprises' incapability to compete with the private enterprises. There is an urgent need to get rid of the evils and implement the recommendations of various committees who have provided solutions as to how to make them more efficient and profitable. Providing the bodies with wider discretionary powers and separating them from the excessive control of the government ministries and departments is the need of the hour. These commercial enterprises should be devoid of being used as a means to an end for the government's own political motives and interests.

HOUSEWIFE-AN UNPAID WORKER

- VAISHNAVI BABURAMAN

ABSTRACT:

"In English, she is known as a "Housewife"! In Arabic, she is known as *"Rabbaitul Bait"* or "The Queen of The House". In an Institution called "Family" housewives are considered as a very important person without them nothing can be possible. Even though their contribution is higher to society, there is no legal regime recognizing and valuing their importance & their contribution go unrecognized in the Gross National Product. In recent times there is a demand for wages for housewives persist in our country. In this paper, this issue has been discussed. Further, the history of the demand, the surveys conducted by various institutions regarding their work, and methods of calculating the value of the work done by them are mentioned. Our study showed a strong correlation between a housewife and the economy. The paper also highlights the importance of housewife in society. Later, the important Judicial Precedents upholding the value of the housewife in society were also discussed. At the end of the paper, recommendations are given clearly to understand the need for recognition and wages to the housewife.

INTRODUCTION:

Recently, in Tamil Nadu Makkal Needhi Maiam party leader and actor Kamal Hassan has made an election promise that the salary would be paid to the housewife directly in their bank account if his party wins in the election.

And also, in the year 2017, During the question and answer round of the Miss World pageant, Manushi Chillar was asked, "Which profession should receive the highest salary in the world? She answered, "A mother's profession should receive the highest salary and respect in the world". This answer won her the title of Miss world 2017.

These two instances have instigated me to discuss this topic. whether salary should be given to Housewife? Whether their work should be recognized in the gross national product?

Who is a Housewife?

A Women who do not work outside the home and whose main job is to taking care of children, cooking, cleaning, etc.… [1] A Housewife who has children commonly called as Stay at home mom [1] or Homemaker.

Because of social and cultural norms, women have been made as a housewife generally and men have been allowed to work outside. Historically, a woman's position in the home was seen as a prerequisite to being a "good" wife and mother [2].

However, the spread of globalization has given rise to new opportunities for women to participate in market work, some women still continue to be as a housewife.

Even though women are working full time in the home and without any days off, she is Still Considered as a non-worker [3] and still in the category of Unpaid work that falls outside the production boundary.

Definition of Unpaid Work

Unpaid work is work that does not receive any direct remuneration. It includes unpaid work that falls within the production boundary of the System of National Accounts (SNA) and unpaid work that falls outside the production boundary (non-SNA) [4].

HISTORY OF DEMAND FOR A RECOGNITION AND WAGE [5]:

The Demand for wages for housework was first put forth by Selma James in the paper "Women, the Union and Work or what is not to be done" at the third National women's liberation conference during the 1970s in Manchester, England. Later, in the year 1972, International Wages for Housework Campaign (IWFHC) was started by Selma James for the recognition and wages for housework. It is the bedrock campaign of the demand for wages for housework. In Italy, the wages for housework campaign started in the year of 1974. Then, Selma James Co-authored a book called "The Power of Women and the Subversion of the Community" with Maria Rosa Dalla Costa which opened the "Domestic labor debate" in its 3rd edition and became the classic women's movement in the Year 1975. In the same year, Silvia Federici started the "Wages for Housework Committee" and opened an office in Brooklyn, New York. The Committee called for all the women to join them irrespective of their marital status, sexual orientation, employment, number of children, or nationality. She published a book called "Wages against Housework" in the year 1975. Finally, International Wages for Housework Campaign (IWFHC) during the 1980s and 1990s made the United Nations Pass the remarkable resolutions which recognizing the unpaid caring work that is being done at home by the women. Canada is the first country to collect the data of unpaid workers in 1996 and to recognize them. Silvia Federici and several other authors have continued to publish an article and book demanding the wages for the housework. Global Women's Strike has been called by the wages for housework campaign on March 8, 2000. In that, there was a demand for payment in wages, pensions, land, or other resources for all caring work. There were Women participants from more than 60 countries around the world. Since then, a call for the demand of wages for housework has been continued by Global Women's Strike network.

In India, the Ministry of Women & Child Development in the year 2012 toyed with the idea of paying a part of the husband's salary to the homemaker wife, but nothing came out of that policy [6].

SILENT CONTRIBUTION OF HOUSEWIFE TO SOCIETY:

Many say that housewife contributes nothing to the economy of the country, but this is not at all true. She contributes directly and also indirectly to the economy of the country. She is the largest consumer in the market. Many advertisements on television target only homemakers because they know that they're their direct consumers. Many companies run because of homemakers only. The Extraordinary saving capacity of the housewife helps the men in the home during the financial crisis. During this Covid-19 pandemic also many houses survived because of the saving done by the housewife. The women working at home, only producing the human being who is a future labor force [7], who is going to contribute to the economy of the country. She is the pillar of the house and teaching her child the ethical and moral values of society. There is a saying in English that "Behind every successful man there is a woman" this is 100% true. Because of women being at home only men are working freely without any stress about the family and children and contributing to society economically. So, both men and women are contributing to the house in a different way. If we take men they are contributing in the terms of money and the women who are housewife contributes to the house by supporting the members, taking care of them, Cooking, cleaning, washing their clothes, etc.……

National Sample Survey Organization (NSSO) (2012) about the Participation of Women in Specified Activities along with Domestic Duties [8]

Water collection is one of the primary jobs done by the housewife which consumes a lot of time. In rural areas, it takes around 20 minutes to travel for the source of water and up to 15

minutes to collect it. In urban areas, it takes about 15 minutes to travel for the source and up to 16 minutes. Not a single trip is enough. They had to make several trips to satisfy the household need. This time range differs state by state. In-State like Rajasthan and Jharkhand, it takes more than 30 minutes to reach the source of water and up to 20 minutes to fill a bucket. It also shows that over time, there has been an increase in women's involvement in were also engaged in activities like free collection of goods (vegetables, roots, firewood, cattle feed, etc.), sewing, tailoring, weaving, husking of paddy, grinding of food grains, making baskets and mats, preparation of cow-dung cake for use as fuel, tutoring of own children, etc.… for household purposes. Some women help her husband in small household businesses also. All these acts go completely unpaid. According to the International Labour Organization (ILO) Report, Women spend 4.1 times more time in Asia & the Pacific in unpaid care work than men. Time use survey in India, released by the Ministry of Statistics & Programme Implementation in the year 2019, estimated that the housewife on average spends about 299 minutes per day in the household work. World Economic Forum in its report said that the unpaid work per day is far higher for women than men globally. Even though the contribution of housewives is higher, it is not included in the Gross National Product (GNP) of our country. Why because there is no fixed wage for them and the calculation of their wages is highly impossible. Some economists say that if women's contribution is also added to our Gross National Product (GNP) then it would reach a different level of height and then only our country's original growth can be determined.

METHODS TO MEASURE THE VALUE OF UNPAID WORK:

There are 3 methods to calculate the value of unpaid work. They are

- Opportunity Cost Method

- Input/Output Cost Method
- Market Replacement Cost Method

Opportunity Cost Method

In this method, the value would be measured by calculating the amount of money the unpaid worker could be making if she is working as a labor in the market. For example, if she was formerly working as a teacher, now she is a homemaker; the value of the unpaid domestic work is the rate she could make if she were working as a teacher.

A Flaw in this method is unable to calculate the value of an illiterate housewife or who doesn't work formerly [9].

Input/Output Cost Method

In this method, the value would be measured by calculating the monetary value of goods and services produced by the unpaid worker [9].

Market Replacement Cost Method

In this method, the value would be measured by calculating the money which will be spent by a person if a paid labor is hired for that service instead of unpaid labor. For example, if a housemaid is hired for a household service then they will be giving a salary to that person. So, it should be the value of the unpaid work which is being done by housewife [10].

Several Economists have tried to arrive at a satisfactory method to calculate the input of housewives.

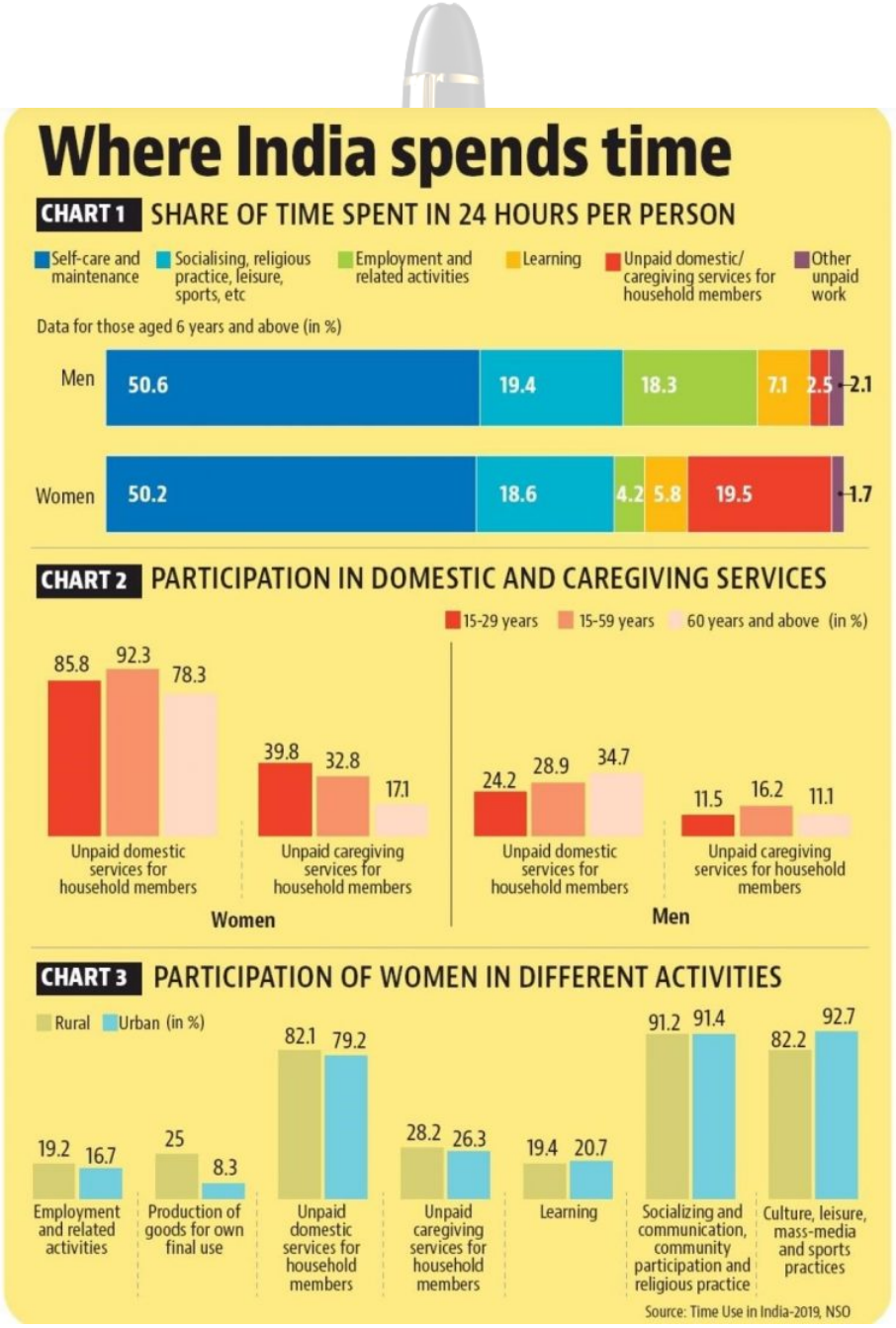
The United Nations uses the Extended System of National Accounts to calculate the value of unpaid work.

In India, a committee headed by Indira Hirway conducted a survey and developed a suitable method for calculating the value of unpaid work. It was published as a comprehensive report with the Department of Statistics, Government of India (CSO 2000).

CEDAW CONVENTION ON DOMESTIC ACTIVITIES OF WOMEN AND THEIR RECOGNITION:

Convention on the Elimination of All Forms of Discrimination against women was adopted by United Nations General Assembly on 18 December 1979. India became the signatory on 30th July 1980 and ratified on 9th July 1993. According to Article 17 of this Convention, a committee has been formed. The Committee on the Elimination of Discrimination against women has recommended the following steps to be taken by the State parties [11]:

- Encourage and support the research & experimental studies to measure and value the unremunerated domestic activities of women; for example, by conducting time-use surveys as part of their national household survey programmes and by collecting statistics disaggregated by gender on time spent on activities both in the household and on the labor market;
- Take steps, in accordance with the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and the Nairobi Forward-looking Strategies for the Advancement of Women, to quantify and include the unremunerated domestic activities of women in the gross national product;
- Include in their reports submitted under Article 18 of the Convention information on the research and experimental studies undertaken to measure and value unremunerated domestic activities, as well as on the progress made in the incorporation of the unremunerated domestic activities of women in national accounts.


Where India spends time
CHART 1 SHARE OF TIME SPENT IN 24 HOURS PER PERSON
Self-care and maintenance
Socialising, religious practice, leisure, sports, etc
Employment and related activities
Learning
Unpaid domestic/ caregiving services for household members
Other unpaid work
Data for those aged 6 years and above (in %)
Men
50.6
19.4
18.3
7.1
2.5
2.1
Women
50.2
18.6
4.2
5.8
19.5
1.7
CHART 2 PARTICIPATION IN DOMESTIC AND CAREGIVING SERVICES
15-29 years
15-59 years
60 years and above (in %)
85.8
92.3
78.3
39.8
32.8
17.1
Unpaid domestic services for household members
Unpaid caregiving services for household members
Women
24.2
28.9
34.7
11.5
16.2
11.1
Unpaid domestic services for household members
Unpaid caregiving services for household members
Men
CHART 3 PARTICIPATION OF WOMEN IN DIFFERENT ACTIVITIES
Rural
Urban (in %)
19.2
16.7
Employment and related activities
25
8.3
Production of goods for own final use
82.1
79.2
Unpaid domestic services for household members
28.2
26.3
Unpaid caregiving services for household members
19.4
20.7
Learning
91.2
91.4
Socializing and communication, community participation and religious practice
82.2
92.7
Culture, leisure, mass-media and sports practices
Source: Time Use in India-2019, NSO

India as a signatory has followed the first step in the year 2019, it has conducted a time use survey and collected statistics regarding the time spent on the household and the labor market. But there are no proper steps have been taken for the implementation of the second and third points prescribed by the committee.

TRIPLE 'R' APPROACH

Because of non-recognition of work done by the housewife and huge burden of work on the shoulder of them, creates gender inequality. To address this issue, the Triple 'R' Approach Should be followed. This approach has been first recommended by Diane Elson to ensure gender equality and to close the gender gap between males and females. Triple 'R' consists of Recognition, Reduce, and Redistribution.

- Getting paid is a formal recognition that the unpaid domestic and care work in India is not less than the other paid labor work.
- Reducing the time of work in domestic and care activities can create a stress-free environment for them. This can be done by improving the infrastructure of the house.
- Redistribution means shifting some unpaid work to the mainstream economy. For example, Anganwadis have been established for taking care of the children. A lot of working women quit their jobs for taking care of the child or elderly. If in the mainstream economy, these types of new jobs are created then it will be helpful for women who want to work outside. This Redistribution is very essential for creating a level playing field for women in the economy. Otherwise, women will end up as a housewife only.

JUDICIAL PRECEDENTS UPHOLDING THE VALUE OF HOUSEWIFE:

In a recent case, Kriti V. Oriental Insurance Company Ltd [12], the Supreme Court held that the value of housewife work at home was no less than that of her husband working at the office and also held that the calculation of the notional income of housewives must be based on their work, labor, and sacrifices. In Arun Kumar Agarwal & Anr V. National Insurance Company Ltd & ors [13], the court emphasized the role of a housewife includes managing budgets, Co-ordinating activities, balancing accounts, helping children with education, managing help at home, nursing care, etc….. so, the court held that the value of service provided by the housewife should not be undervalued. In Rambhau s/o Awadut Gawai and others Vs. Shivlal s/o Shalikram Belsare [14], the court remarked that the role of housewife in a family is the most challenging and important role which deserves much appreciation but least appreciated. Justice Kilor also commented that the woman only holds the family together emotionally and she is the pillar support of her husband, guiding light for her children, harbor for her family's elderly. He also noted that the housewife works round the clock without any days off but her work goes unacknowledged and is not considered as a 'job' at all.In Pravin Jagannath Bhalerao & ors V. MSRTC & ors [15], MACT held that the value of services of any housewife is invaluable. She creates a comfort zone in the house. Further, it was held that the housewife discharges many important duties and without her, nothing is possible in the house.

CONCLUSION:

"According to Manu (200B.C), in childhood, a female must be subject to her father, in youth to her husband, when her husband is dead, then to her sons; women never be independent". How long it would be continuing? It would be stopped if a woman attains her financial independence. Not every woman is working outside the house. Some may be due to their social or cultural norms and some may be in their own interest. Who will give financial independence

to the ones who are all working in their home itself? Though the work done by the housewife is a gratuitous service with love and affection for her family and cannot be labelled as a profession like others, it does need some amount of recognition, respect, etc….. Because they are also toiling hard to do household work. I think being a homemaker is one of the most difficult works in this world. Homemakers are the only ones who are all working 24/7 without any remuneration. No other professional work like this. In this Covid-19 pandemic period also, almost everyone took some rest but the homemakers are the ones who worked without any rest. According to the National Crime Bureau Report, the suicide rate among homemakers is much higher. I think the reason for this would be workload, stress, depression of not being valued, non-recognition by society, their financial dependency, etc…. So, a part of the husband's salary should be given to the housewife as per the idea of the Ministry of Women & Child Development. By making proper legislation to implement this government can make housewives also financially independent. According to Article 21 of the Indian Constitution, every person is having a Right to life with dignity. In this era, dignity, respect, and value are being attached with money only. So, this is the reason for the demand for wages for the housewife by a large number of people. But, the **ultimate aim behind this would be about being valued not about being paid.**

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ANALYSIS OF THE FARM BILL

- SIMRAN SUREKA

ABSTRACT

The three new Farm bill which was introduced by the Government in Lok Sabha on 14th September 2020**,** passed in Lok Sabha on 17th September 2020. It was passed in Rajya Sabha on 20th September 2020. The Bill received Presidential Assent on 24rd September 2020. It has got the opposition party angry particularly in Punjab and Haryana, which has got farmers agitating in Punjab and Haryana. The crescendo of voices rose suddenly, within days of the Bills being introduced in Parliament. The opposition has alleged that the bills were pushed through voice vote in violation of the rules. The three bills were- The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Ordinance, 2020; the Essential Commodities (Amendment) Ordinance, 2020; and the Farmer's Produce Trade and Commerce (Promotion and Facilitation) Ordinance, 2020. The idea behind these three bill is to liberalise the farm markets in the hopes that doing so will make the system more efficient and allow for better price realisations for all concerned, especially the farmers. The amendment in the three farm bill is trying to make farming a more remunerative enterprise than it is right now.

These new farm laws will severely affect farmers and labourers. The three Bills that have been passed opens up the traditional system of trade in agricultural commodities for competition from the private sector.

The bill seeks to force the farmers to sell their produce at but the minimum support price with an amendment whereby sale of wheat and paddy shall be valid as long as the vendor pays a

price adequate to or greater than the MSP announced by the central government. The bill provides for punishment to seller who buy wheat or paddy at but the MSP.

HIGHLIGHT OF THE BILLS

- **Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020**

This act allows intra and inter-state trade of farmers' produce beyond the physical premises of Agricultural Produce Market Committee (APMC) markets and other markets notified under the state APMC Acts. That means the farmers can sell their produce at places aside from APMC-regulated mandis. It supports seamless electronic trade. One of the foremost concerns that have arisen in relation to this Bill is regarding hoarding and black marketing.

- **Essential Commodities (Amendment) Act, 2020**

The Act was enacted in 1955 to ensure the delivery of certain commodities or products, the supply of which if obstructed owing to hoarding or black-marketing would have an impact on the normal life of the people. The commodities includes foodstuff, drugs, fuel (petroleum products) etc.

The second Bill proposes to permit agents to stock food articles freely. The amendment in the Act removes certain foodgrain such as cereals, pulses, oilseed, edible oils, onion and potatoes from the list of essential commodities. The Act seeks to control the production, supply and distribution of, and trade and commerce, in certain commodities through government intervention. Such commodities are declared as essential and State Government/Union territories can enforce provisions of Act to control prices of such essential commodities. The focus of Central Government presently is on agricultural sector. It has ignored other sectors like petrol and petroleum, jute, essential drugs, etc. A new sub-section 1A was inserted in Section 3 of the act which respect to control orders, which states that the supply of certain food

items may be issued only under extraordinary circumstances. However, the it does not expressly define 'extraordinary circumstances', but 'may' include war, famine, extraordinary price rise and natural calamities of a grave nature. Even in extraordinary circumstances, the government only 'may' choose to exercise regulation. Such ambiguity in the legislation wonder the entire reason of introducing this particular provision.

Radical changes such as the removal of stock limits and to provide exemption to exporters, traders and value chain participants may not help farmers directly. The amendment to the Act will allow big coporations to hoard essential commodities such as cereals, pulses, edible oil, onion and potato which will lead to rise in prices. The new bill erodes the Constitutional rights of the states since it is a highly centralising Act.

- **Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020:**

This act creates a framework for contract farming through an agreement between a farmer and a buyer before the production, under which the farmer sells produce to the buyer at a pre determined price. The third Bill provides the farmers to enter into contract farming that is signing a written contract with a corporation to supply what the corporate wants reciprocally for a healthy remuneration.

AGRICULTURE REFORMS IN INDIA:

India's agriculture reforms is one of the most controversial and problematic topic since time immemorial. There are too many inefficiencies in the current agriculture system. India farming sector is troubled. Agriculture system is a means of support to nearly 70 percent of the country. India used to face regular food shortages but the 1970's "Green Revolution" turned India into

one with a surplus and a major exporter. There has been no major reforms in agriculture for decades.

The government have been playing a crucial role for the development of agriculture marketing system in India. Agriculture is one among the foremost critical sector of the Indian economy. During the Britisher's rule the major concern was to stay the costs of food for the consumers and materials for industry in check. After independence there was the necessity to guard the interest of the farmers. Agriculture, with its allied sectors, is the largest source of livelihoods in India. 70 percent of its rural households still depend primarily on agriculture for their livelihood, with 82 percent of farmers being small and marginal[197]. The agricultural sector has been ignored despite being the primary source of livelihood of the majority of the population. This sector has faced economic, social and environmental neglect resulting in vast-ranging problems in the overall development of the country.

Agriculture was the only sector to grow for April-June 2020 among eight used to compute India's Gross Domestic Product (GDP). GDP shrank by a whopping 23.9 per cent according to the National Statistical Office's just-released estimates for the first quarter.[198] More than half of Indians work on farms, but farming accounts for barely a sixth of the country's GDP. Indian farmers are mostly small, they own less than one hector of land. The centre needs to redesign the reforms. There is a need to diversify agriculture and to expand services. A step must be taken to support and extend agriculture research. There are multiple issues due to which the agriculture sector is shrinking.

KEY ISSUES:

[197] http://www.fao.org/india/fao-in-india
[198] https://www.downtoearth.org.in/

The controversial bills were passed in Rajya Sabha on 20th September despite the opposition Members of Parliament posing for a division vote. The farmers believe that these big corporations would take over the traditional marketplaces and would gradually end any government incentive or support in agriculture.

The farmers have limited or no access to multiple markets with an inherent handicap of bargaining power to negotiate fair price contracts

It cannot be denied that the agriculture laws needs reform but not the way the Central Government did by causing such injustice to small farmers. These reforms will hurt small and marginal farmers. Farmers are demanding a total repeal of the new reforms oriented laws that provide for setting up private markets outside of designated mandis, allow contract farming without government regulation and also lift stockholding limits for farm produce. The central government has enacted the laws on agriculture which is a state subject.

Furthermore, the hastily attempt to pass the bill without proper consultation adds to the mistrust among farmers.

Another issue that is raised by the farmers is that it gives priority to corporations over cost of farmers' interests. In absence of any regulation, the farmers may find it difficult to deal with such big corporates, as they only have the one motive that is how to seek profit.

Amendment in the Essential commodities: It provides for lifting of stock holding limits on essential commodities. As per the new act any trader will be able to store unlimited quantities of cereal crops. The new farm laws enable a private entity to regulate and monopolise the market. Farm laws will do a lot of harm. According to the Government, these farm laws will benefit the farmer as the bill will allow the farmer to sell the crop anywhere outside the market. But outside the market the crop is sold for half the worth.

We need to ask a question that whether the new market reform is what the Indian agriculture needs?

The markets have changed drastically and the outcome of this bill is uncertain.

Amidst growing concern over the collapse of the economy, the government used the covid crisis to pass the bill without much involvement of the state government. The proceedings in parliament did not highlight the political ramification of those three bills. These bill goes to benefit the big corporate than the small farmers, it will enable the private players to invest in agri-food supply chains more easily. Many are distressed by the manner in which the bills were passed by the parliament in such a hurry. There are accusations that the farmers are being instigated by the political parties. These three bills represent complex issue.

The seventh schedule of the Indian constitution deals with the division of powers between the Central Government and the State Government. It has three lists. List I contains the Centre or the Union list , List II contains the State list and List III refers to the concurrent list where powers are divided between the State and Centre.

Entry 14 of the State list contains items concerning agriculture: "Agriculture, including agricultural education and research, protection against pests and prevention of plant disease". Therefore, from this we can state that agriculture is a State subject under the Constitution.

The Centre's encroachment into agriculture have been made even with none constitutional sanction. The states was constitutionally deprived of all powers, including in the sphere of agriculture.

The Farmer Bills is directly encroaching the powers and functions of the state as agriculture and markets are State subjects under Entries 14 and 28 respectively in List II of the Constitution of India. They are seen as going against the spirit of marble-cake federalism that have been enshrined in the Constitution. However, the Central government has contended that trade and

commerce with respect to food items which falls under Entry 33 in the Concurrent List, attribute constitutional propriety to the Farmer Bills. Although in accordance with Entry 33 inter-state trade with respect to food items would be subject to Central legislation, and any laws directly affecting intra-state trade are a direct interference with state powers and it will seriously curtail the efficacy of state legislations on matters listed under the State List. It has been pin pointed in the Sarkaria Commission Report on Centre State Relations, that Entry 33 has been used by the Centre inordinately to empower itself in matters relating to agriculture. Since the Farmer Bills have an overriding effect over State acts, questions regarding violation of the federal structure of the Constitution have arisen. The Central government is bound to respect the autonomy of states in a federal structure and any constraint on their powers and finances is ill-advised.

Entry 34 in the concurrent list mentions 'Price Control' again giving scope for the Centre's entry into agriculture and invasion into the powers of the states. Entry 33 and 34 in the concurrent list had a damaging impact on state autonomy in the sphere of agriculture and in its memorandum to the Sarkaria commission had demanded that Entry 33 and 34 be transferred from the concurrent list to the state list.

Agricultural markets comes under the responsibility of the states. At the same time, the centre has an overarching responsibility via Article 301 to ensure that there is free trade within the country: of ensuring "freedom of trade, commerce and intercourse.

The farmers have been on a strike, and they won't stop the protest until recent laws that will shrink their income are repealed. The farmers have been living in the streets. Farmers have already suffered due to Covid-19 pandemic, the Government are imposing policies that will further threaten the livelihoods of many farmers. The new farm bill, will leave farmers with no income and will seriously affect their livelihoods, it will threaten to push them into more debt

and poverty. Their protest have been met with repression, with police using water cannons and tear gas against peaceful protest.

Each of the three bills are designed to reduce the barriers by reducing reliance on traditional AMPC based intermediaries and by creating one nation one market. Commodities like wheat, rice, fruits and vegetables revolves around the Agriculture Produce Marketing Committees (APMCs). Reforming the farm sector by allowing private sector firms to invest in the farm economy along with contract farming has always been on the agenda of parties across the political spectrum. But in India's competitive politics, these reform efforts get derailed in the search for immediate political gains.

It is really disheartening to see what is going around. The bill was passed in such a haste during the time of such pandemic, it really raises question as to the intention of the Government.The farmers were not even consulted prior to the introduction of farmer bills in the parliament.

ISSUES IN THE BILL:

There are some issues that the farmers fear in relation to the Farmers' Produce Trade and Commerce Bill. The issues are-

i. Is there an end of Minimum Support Price?
ii. Is there an end of the existing APMC system?
iii. Will there be a loss of revenue and livelihood?

These three are the biggest fear of the farmers. They fear that they will be misused by the big corporations through hoarding and other malpractices. The aim of the Farmers' Produce Trade and Commerce Bill is to bring the monopoly of the APMCs to an end and give farmers the freedom to sell their farm produce to private persons.

However, even under the current system farmers are already free to sell to anyone, as most APMC acts contain exclusion clauses. Therefore, freedom to sell outside the APMC controlled mandis were never curtailed by these acts, and APMC laws only regulate the first transaction between farmers and the buyer- not the trade that followed.

The APMC system in Punjab has contributed a great deal towards the Green Revolution and the state already has a well-developed infrastructure for the purposes of storage, transportation from farm to mandis and open marketing. Implementation of the Bill will eventually pave the way for disbanding of the MSP regime as well as the food procurement regime. At present, procurement by the government pressurizes the implementation of Public Distribution System, which will be jeopardized as a result of reduced government intervention.

The new Bill will result in lack of information on market transactions, quantities and prices with the government, in a way facilitating the government to abdicate its responsibility of assuring MSP and PDS. Expansion of public procurement at remunerative MSP is what the farmers are demanding whereas the government is doing the opposite. Although the government has verbally ensured that these systems will remain intact, these will do so only on paper and be rendered redundant in the application by the legislations.

Section 6 of the Act provides for the waiver of market cess, fee or levy for all transactions made outside the APMC premises. This provision allows the trader to purchase farm produce outside mandi premises. It will affect the collective bargaining power of the farmers. A large part of the revenue is generated from fees or cess on transactions in farm produce in APMC markets. This revenue is utilised by states for developing rural roads and linkages with mandis.

AGRICULTURE PRODUCE MARKETING COMMITTEE (APMC)

Agricultural markets in India are mainly regulated by state Agriculture Produce Marketing Committee (APMC) laws. APMCs were set up with the objective of ensuring fair trade between buyers and sellers for effective price discovery of farmers' produce.APMCs can: (i) regulate the trade of farmers' produce by providing licenses to buyers, commission agents, and private markets, (ii) levy market fees or any other charges on such trade, and (iii) provide necessary infrastructure within their markets to facilitate the trade.

APMC ensures the availability of an MSP for farmers, it provides for collective bargaining for farmers on both price and non price matters. The bill is creating two distinct markets with two set of rules, which will eventually collapse the APMC.

Farmers have small landholdings, it is not feasible for these farmers to sell their agricultural produce outside their mandi or district when MSP is not a legal guarantee. The MSP system permits farmers to negotiate their prices and APMC system is an important medium for price discovery at the local level. Further, for a large number of small and marginal farmers, who would never be attractive to corporate buyers, APMC mandis are the last resort.

Year after year the farmers have been forced to sell their produce much below the MSP. Full control of agricultural produce has been assumed by private traders, who have set up small markets and charge commission from farmers. Farm produce is purchased at a rate well below the MSP and sold by such traders in other states at higher prices.

Another aspect that the Bill seems to ignore is that these farmers lack sufficient capital, understanding of free-market forces, price and market fluctuation as well as electronic and internet connectivity. Lack of storage facilities will also coerce the farmers to sell their products to corporations at lower prices, soon after the harvest.

The Farmers' (Empowerment and Protection) Agreement on Price Assurance and Farm Service Bill, 2020 aims to protect the farmers against price exploitation but the marginal farmers might

not be equipped to negotiate with private corporations to ensure themselves a fair price. The power shifts from the farmer to the big corporations.

Furthermore, according to the provisions of the Bill, the quality and grade measures and standards of farming produce can be mutually agreed upon by both the parties to the agreement. However, if the private players will attempt to bring uniformity, the quality might get affected, which will in turn have impact on agro-ecological diversity in India.

Though the bill will have limited restrictions on stock limits, but there is a fear of hoarding of food items by exporters, processors and traders during harvest season when prices are lower until a later time when prices tend to increase. The bill has no benefit for the farmers. The bill permits the big corporations to keep and hold food items without restrictions.

Instead of indirectly destroying the APMC regime, it will be feasible to strengthen the existing system. Reforms are necessary to improve the existing system, reforms such as to improve the APMC infrastructure as the small and marginal farmers are incapable of attracting corporate traders, and in turn the only resort left for them are mandis. The aim of reforms, therefore, should be widening the scope of MSP and making it a legal right rather than making it redundant through new policies, which has been a continuous demand of the farmers for years. There is a need to reform the existing APMC markets and sub-markets, rather than striping it indirectly, and also for the creation of new markets so as to reduce the burden on existing ones. Replacement of one flawed system with another flawed system is not the solution.

The amendment to the APMC Acts will denude them of the Minimum Support Price (MSP) and they will be left at the mercy of multinational companies and big corporate houses. The APMC safeguards the farmers from exploitation by **intermediaries**. Before the introduction of the **Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020,** the farmers can only sell their agricultural produce at the market yards of APMC.

APMC set up the market place i.e, Mandis in various places within the states, where farmer's produce were sold. To operate within the market, licenses are issued to the traders. There are around 2477 principal APMCs based on geography and 4843 sub- market yards regulated by the respective APMCs in India at present[199]. Now, the process of selling the produce is that after harvesting crops are brought to the Mandis or Markets where they sell the produce through auctioning or price discovery. Market fee of buyers and licensing fee from the agents are charged. Furthermore, small licensing fees are also charged from warehousing agents. Agents charge commission fees on transactions between buyers and farmer.

The Act will leave the middlemen out of work. With the end of APMCs, MSP will also practically end, this is the most important concern.

The Act doesn't even specify that whether the contract price of the crop should be at least equivalent or above the MSP. It means that the corporations can pay whatever price they want to the farmer. Contract farming is looked upon as privatization of farming.

Big private corporations, exporters, wholesalers, and processors will always have dominion in disputes. Furthermore, written contract is not mandatory that means farmer will never be able to prove violation of terms of contract. Farmers have a strong argument because they have seen privatization in markets of seeds and fertilizers where government believed prices will go down because of competition but results are opposite, and farmers fear the same.

The problem with the three bills isn't what they plan to do, but what they are doing not to. They lack a reputable regulatory architecture and they even lack a transparent recording of transactions. Perhaps the foremost problematic aspect of the bills is that there's an entire absence of regulation and regulatory oversight for both the new trade areas and for the

[199] https://www.indiabudget.gov.in/

new electronic platforms that might emerge. Another point of concern is the dispute resolution mechanism, it puts the onus entirely on the farmers. Jurisdiction of civil courts is ousted. Disputes to be referred to Sub-Divisional Magistrate. It is unclear how to resolve interstate disputes. The dispute resolution process for the Contract Farming bill too is not a credible recourse for a farmer. The basis of the dispute resolution mechanism relies on a receipt the farmer receives as proof of the transaction.

CONCLUSION:

It is ludicrous to believe that farmers who have small landholdings will have any bargaining power over private players. The creation of private mandis will drive agriculture business towards private mandis, ending government markets, intermediary systems and APMCs. Big corporate houses will overtake mandis, thereby procuring farm produce at incidental rates. It may delay the procurement which will turn the public markets inefficient and redundant. The written assurance from the Union Government is not a legal document and holds no guarantee. The new farm bill will dismantle the APMCs system. The new farm bill has no provision to regulate the traders.

As per the Central Government under the contract farming law, farmers will have the alternative to approach the court and their land will be safe as no loan will be given on farmers' land and their buildings by mortgaging it. This was rejected by the farmers as the history of contract farming has many examples of non-payment by the companies making various excuses like substandard produce. Many cases of non-procurement have been witnessed citing 'poor quality', driving the farmers into a debt trap. Thus, farmers do not have money to repay the loans and have no option to sell/lose their lands.

The new Farm Law bills is 'corporate-friendly' and 'anti-farmer'. The government priority is within the interest of the buyer over the interest of the farmers. The farmers are being robbed and exploited.

Now the farmers are demanding the repeal of three farms law. Taken together, the contentious reforms will loosen rules around the sale, pricing and storage of farm produce rules that have protected India's farmers from an unfettered free market place for decades.
The farmers are brimming with energy, hopes and dreams. They could lose more than they could gain from the new regulations.

Agriculture economist Sukhpal Singh has said that contract farming in India involves many malpractices against farmers including "one-sided (pro-contracting agency) contract agreements, delayed payments, quality-based undue rejections and outright cheating, besides poor enforcement of contract farming provisions by the state government." So the history concerning contract farming makes them scared. Because of the private hoarding, the farmers may earn less and the consumer may have to pay more.

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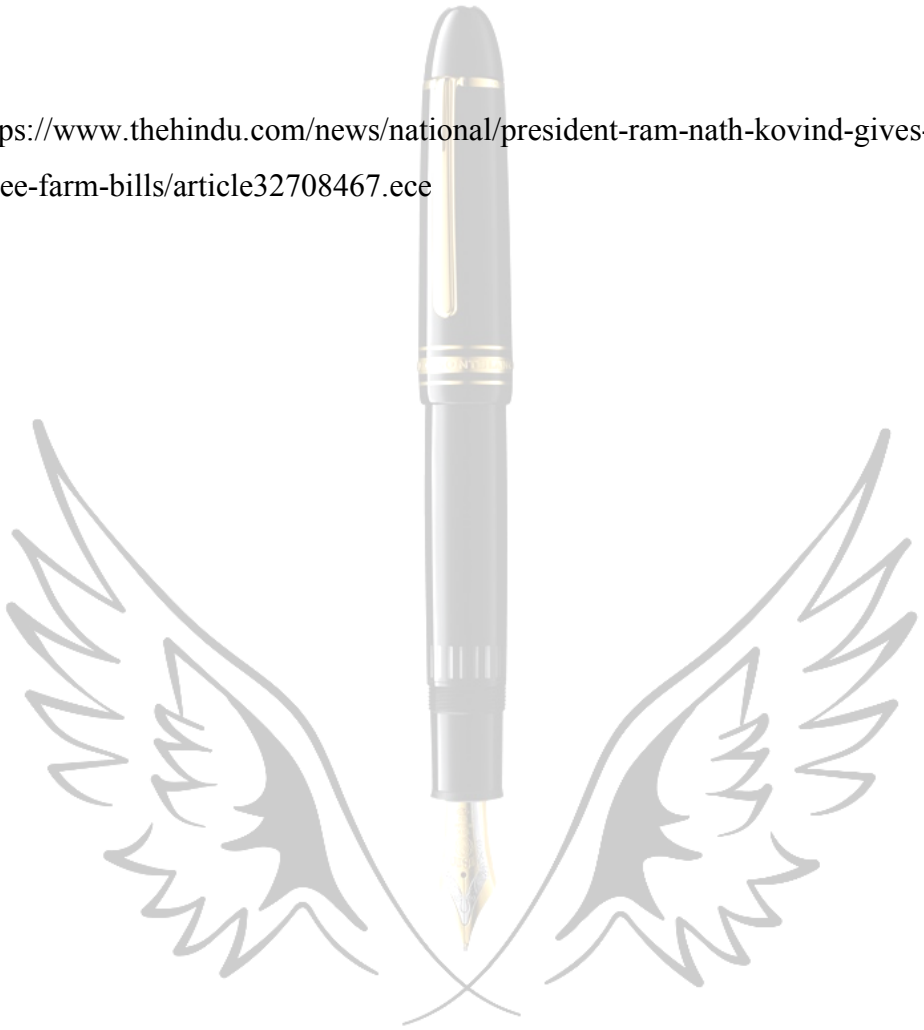

GOVERNANCE AND SUSTAINABILITY: AN INVESTIGATION INTO THE RELATIONSHIP BETWEEN CORPORATE GOVERNANCE AND CORPORATE SUSTAINABILITY

- NIKHIL ANAND & SHREYA PAHWA

ABSTRACT

Every company finds to make it sustainable—no business created for a limited period. Corporate governance guidelines for a company were followed in a long-standing company to help them perform better. In particular, it aims to understand better the relationship between the board structure, disclosure, related party transactions, shareholder rights and the boarding process, and sustainability performance[200]: economic performance, environmental performance and performance. On social justice - for companies in the Indian consumer goods sector.

The purpose of this research work is to understand the impact of corporate governance (CG) in the disclosure of economic, social and environmental sustainability. This article takes a sequential approach to explain mixed methods. The results suggest that companies with higher corporate governance indices are associated with better sustainability performance.

[200] https://www.sciencedirect.com/topics/computer-science/sustainability-performance

In this research report, the researchers tried to find out what impact the corporate governance and sustainability framework has on companies and how they are successfully implementing them.

INTRODUCTION

Today, companies are increasing the pressure for good governance and stability. Corporate governance and corporate sustainability are current business topics and an emerging area of research.

The *objective of this research* is to fill this gap by examining the effects of the elements of corporate governance on the different dimensions of the features of corporate sustainability. The inclusive development index (IDI) based on 12 performance indicators, with sustainability being one of the most crucial ranking indicators. Although India's per capita GDP[201] and labour productivity growth were strong, India's ranking was low. The report questions the sustainability of public spending since the country's GDP ratio is very high.

REVIEW OF COMPOSITIONS

Corporate governance is the structure with which companies directs and controls. Corporate governance came to the fore after the financial and Asian crises, and the collapse of Enron and WorldCom in the US Corporate governance has not only become necessary.

To strengthen corporate control mechanisms in industrialized countries but also developing countries have introduced various corporate governance programs through the development and introduction of corporate governance codes. The influence of CG elements on effective

[201] https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=IN

performance has been an important research question in accounting research. At the same time, awareness of sustainability has grown with a growing curiosity about corporate governance. Many researchers have found that a company's actions have an impact on the external environment and that therefore the organization is held accountable not only to shareholders but also to a broader audience. However, the effects of CG elements on various dimensions of corporate sustainability reporting are relatively unexplored.

Business stability(Corporate Sustainability) is another concern for modern companies. A growing number of authors in recent decades have argued that corporate activities have an impact on the external environment and therefore, must be held accountable to a broader audience than their shareholders. According to Blowfield and Murray, corporate sustainability includes transgenerational and transgenic equity, as well as the "eco-justice" and "eco-efficiency". According to Christofi and Sisaye, the concept of corporate sustainability, in general, is the result of previous concerns expressed in corporate social responsibility, environmental regulation, sustainable development and stakeholder theory. Four aspects of sustainability identified, and analyses carried out on these aspects, such as social impact, environmental impact, organizational culture and finances. From these four aspects, the researcher must determine whether "good corporate governance addresses the issue of sustainability or addresses it personally to social, environmental, organizational and financial culture."

MANAGEMENT LITERATURE

In academic management literature, the concept of corporate sustainability refers to the ability of a company to create value and continue to operate for long periods[202]. Companies publish sustainability initiatives in the form of sustainability reports, which are considered an integral part of the communication process between companies and various stakeholders. Vision-sound business performance is the leadership concerned as an object of the organization and the maintenance of the financial resources of the organization so that the management of the organization aligned with it's the stewardship of environmental resources. The difference, however, is that ecological resources are external to the organization. In context, the help of the company-the resources of the organization is affected in this sense.

CORPORATE GOVERNANCE PRINCIPLES

Since corporate governance can be too good in terms of control for business performance, companies need to know what corporate governance principles apply and how to improve the strategy to avoid those principles.

Four principles of corporate governance deal with:

(1) transparency

(2) accountability

(3) responsibility

(4) fairness

All these principles refer to corporate social responsibility. Therefore, compliance with the regulations of governance is essential for a company, but the real problem has to do with what exactly is corporate governance. Corporate governance processes determine all aspects of the

[202] https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-8683.00272

company's management function and seek to maintain balance and controls to increase both shareholder value and the satisfaction of other stakeholders.

In other words, corporate governance aims to reconcile the economic and social objectives of a company, including aspects such as the use of resources, responsibility in the use of power and balance with the behaviour of the company in its social environment. The meaning and measurement of good corporate governance are still under discussion. However, good corporate governance will address issues such as creating sustainable value, achieving GR goals, and maintaining a balance between economic and social interests. Additionally, good governance provides long-term benefits for some courses, such as: reducing risk and separating new investors, shareholders, and more capital.

INVOLVEMENT OF PARTIES

The most leadership parties involved in corporate governance are government agencies and agencies, stock exchanges, management (including the board of directors and its president, the CEO or equivalent, other officers and line management, shareholders, and auditors). Other influential stakeholders can include lenders, suppliers, employees, creditors, customers, and the entire community.

The agency believes that the shareholder waives the right[203] to decide (control) and gives the manager the responsibility to act in the best (ordinary) interest of the shareholders. Due in part to this separation between two investors and managers, corporate governance mechanisms include a control system designed to help managers balance the motivation of managers with shareholders. The agency's concerns (risks) for a majority shareholder are necessarily minor.

[203] A plea for less code of good governance and more market control

A director expects to play an essential role in running the business. The board of directors is responsible for supporting the organization's strategy, developing leadership guidelines, appointing executives, supervising and compensating, and ensuring that the organization is accountable to its investors and officers. All aspects of corporate governance have a direct or indirect interest in the financial performance of the company. Directors, employees, and management receive salaries, benefits, and prestige, while investors expect financial returns. For lenders, this is a fixed interest payment, while returns to equity investors come from dividend distributions or capital gains on their shares. Customers are concerned about the security of supply of goods and services of reasonable quality. Suppliers are concerned about compensation for their goods or services and potential business relationships. These parties add value to society in the form of financial, physical, human and other capital. Many parties can also be affected by corporate social performance.

An essential factor in any party's decision to participate or join the business is the belief that the company will deliver the party's expected outcome. If categories of stakeholders are not sufficiently convinced that the industry is being controlled and managed consistently with the desired results, they are less likely to interact with the business. When it becomes a feature of a spatial system, the loss of trust and market share can affect many other stakeholders and increase the likelihood of political action.

MANAGEMENT OF CORPORATE GOVERNANCE[204]

1. **Internal Management External Management**

[204] https://www.jstor.org/stable/258017

Internal management controls the monitoring of activities and then takes corrective actions to achieve organizational goals.

Monitoring by the board of directors: board of directors with legal authority to hire, dismiss and compensate management, insured invested capital Regular board meetings help identify, discuss, and avoid potential problems. Non-executive directors consider themselves more independent, but they do not always result in more effective corporate governance and performance improvement. Different consulting structures are ideal for other companies. Besides, the board's ability[205] to supervise company executives depends on access to information. CEOs know better about the decision-making process and therefore evaluate top management according to the quality of their decisions that lead to financial performance results. Consequently, it argues that CEOs go beyond financial standards.

Internal control procedures and internal auditors: Internal control procedures are guidelines that are implemented by the board of directors, the audit committee, management and other employees of a company to provide reasonable assurance that the company is achieving your objectives concerning reliable financial information, operational efficiency and compliance with laws and regulations. Internal auditors are a worker of a company who tests the design and implementation of the company's internal control processes and the reliability of its financial reports.

Balance of Power: The most straightforward balance of power is prevalent. For this, it is necessary to have a separate person from the treasurer of the president. This electrical isolation

[205] https://hbr.org/2012/11/a-more-effective-board-of-dire

application developed in companies where different departments review and balance each other's work. One group can propose company-wide administrative changes, the other group can review and veto the changes, and a third group can check whether people's interests (customers, shareholders, employees) are outside the three groups at the meeting of a class.

External control of corporate governance[206] includes the management of the organization of external interest groups.

Examples include:

1. Competition
2. Loan commitments
3. Request to evaluate the performance of government information (especially financial reports)
4. Managerial labour market
5. Media pressure
6. Take the control

PERFECT GOVERNANCE AND SUSTAINABILITY

At that time, several research studies examined the relationship between characteristics of a firm and its disclosure, and similarly, studies showed the benefits of CSR. These follow-ups are also directly related to the stability of this regimen, the success of the company. Therefore, it seems clear that special attention to sustainability in the management of the company.

[206] https://www.sciencedirect.com/science/article/abs/pii/S1042443118304463

Consequently, it is imperative to examine what mentioned concerning sustainability in corporate governance.

It expects that good *corporate governance* will promote sustainability in general, and that will accompany by the four elements of sustainability mentioned above.

Therefore, it is possible to formulate the following hypotheses:

1. Good corporate governance will address sustainability.
2. Good corporate governance will consider the social aspect of sustainability.
3. Good corporate governance will address the environmental impact of sustainability.
4. Good corporate governance will take into account the organizational culture aspect of sustainability.
5. Good corporate governance will address the governance aspect of sustainability.

Basic Work[207] to examine governance failures and challenges that lie ahead and these adapt as an idea to our concerns about the relationship between governance and sustainability. In today's business world, companies seek more sustainable performance by incorporating economic, social and environmental policies into their business functions. Corporate governance plays a vital role in this context by making effective decisions on proactive practices for sustainable development. Good governance should have a positive impact on stability performance for most pressures. Also, thanks to the "triple bottom line", management and stability are transformed into boardrooms for companies.

Its corporate governance profile strongly influences the sustainability performance of a company.

[207] Research work with proper valuable things

We introduce corporate governance measures that make a real difference for your company:

1. Improved efficiency of counselling
2. Improve risk monitoring and controls at the board level
3. Optimization of the audit committee and compensation committee structures
4. Review compensation policies and practices

We can help groups of companies improve their internal governance while their subsidiaries ensure their regulatory obligations dealt under proper ways.

SUSTAINABILITY

Sustainability-traditionally defined as the ability of an ecosystem to last. Increasing the carrying capacity of the planet worsens future generations. The term "desirable" is essential because you can raise future capital by inventing new patterns of production and consumption[208]. Efficiency depends on human talent and the degree of innovation. Sustainability reporting[209] and management services can help you identify the impact of critical social, environmental and economic issues and share that information with everyone involved, including regulators and the wider community.

It focuses on four activities:

1. Planning and reporting and communication strategy
2. Review and improve governance, systems and reporting processes in this area.
3. Stability report.

[208] https://www.un.org/sustainabledevelopment/sustainable-consumption-production/

[209] https://ecovadis.com/academy/sustainability-reporting/

4. Guarantee of analysis and feedback on non-financial information.

Global opportunity and growth[210] mean global corporate governance responsibilities. New levels of accountability arising not only from new laws and regulations but also from the expectations of a larger group of stakeholders have raised concerns about effective governance and governance at the board level. Solid and credible. Compliance mechanisms are in place and use. There is also an increased awareness that people must reconcile themselves to the right attitudes and behaviours to ensure that they continue to act in ways that protect the reputation of the organization.

CHALLENGES

Today, companies face higher stakeholder expectations and greater public scrutiny than ever. Financial markets, consumers, lobbyists, employees, and governments are among the people who own companies when it comes to how they define and execute their business strategies. In particular, users of the annual accounts receive transparent information on governance, risk management and corporate responsibility, in particular on the qualitative aspect that affects the financial situation of companies.

SYSTEMATIC POLICIES FOR SUSTAINABLE DEVELOPMENT

Innovation explores new ways to create value. Design is the lifespan of many companies, whose survival and development depends on the development of new technologies, products and services. A successful organization is a creative organization. In a successful organization,

[210] https://groww.in/mutual-funds/principal-global-opportunities-fund-growth

innovation is sustainable and continuous and not a process characterized by a "boom and bust" sequence of events. A creative organization is more of a "lead" organization than a "managed" organization.

A sustainable, innovative organization must be fluid and "organic", which is almost organic, to maintain sustainable creativity for the success of the modern organization. Innovation is not a "business as usual". A certain degree of security and stability is required to "incubate" creativity. In the competitive area of the 21st century, innovation potential is vital. The key elements to support innovation are:

Value creation: innovation is a process of adding value and promoting the survival and growth of the organization. Thoughts can come from anywhere. The reviews themselves do not add value. Successful innovative companies cultivate creative ideas that create added value.

Dynamic process: For the company, innovation is "oxygen for a living body". All cells must receive oxygen to survive throughout the body. The new organization involves everyone to generate ideas. Like the individual cells that serve the body, a truly innovative organization enables people to unleash their untapped potential and creativity. Successful innovation is a dynamic process that sustained.

Innovation is anything but business as usual - innovation happens to people to overcome their ego and realize that business is not always the best way to solve a problem. To help people broaden their perspective, think outside the box by allowing yourself to be creative. Getting people to have a different perspective is an important issue. People believe that the way they have always done business should be the best.

Innovation vs Invention: Invention looks for things that have never discovered before. Design, on the other hand, is the discovery of new ways to create value-not everyone can be an inventor, but everyone can be an innovator. Although not all inventions are inventions, all designs are

innovative. Both types of employees are valuable, but high performers can be more productive and creative. The key is to lead the cast for the front line.

INNOVATION IS THE KEY TO SUSTAINABILITY

A sustainability strategy without integrating 5DS is incomplete: diversity, dissatisfaction, dialogue, disclosure in the DNA of the organization[211], dissolution of the status quo. The pillars of sustainability are innovation, commitment, transparency and responsibility. Design requires a clash of ideas and dissatisfaction as added value. If two people feel the same way, only one is needed. It requires a culture in which people can freely discuss conflicting points of view. Ideas and innovations are solely motivated through diversity and difference. People cannot work together and develop relationships if they are not open to each other. Disclosure is an essential requirement for trust and the key to successful teamwork.

SUSTAINABLE DEVELOPMENT STRATEGY FOR THE CORPORATE (COMPANY)

Stability, long viewed by some as a costly disadvantage, is rapidly becoming a competitive advantage, a differentiator, and sometimes a matter of survival. Large companies know that focusing on sustainability is one way to improve profits and retain customers. Success not only means taking into account the values and principles of sustainability but also ensuring appropriate actions and decisions at all levels of the organization. A comprehensive sustainable development strategy must have a solid framework to ensure that its implementation is in line

[211] https://www.strategy-business.com/article/03406?gko=93609

with corporate governance and culture. The company's sustainability strategy provides that framework.

It addresses all aspects of sustainability, from measuring and mitigating future forces that can affect a company's strategy, portfolio, and operations, to assessing a company's environmental impact. The result is a roadmap that links measurable sustainability goals and objectives to business strategy.

Roadmaps are recorded and measured in terms of costs, revenue, and reputation. We assess and assess the impact of sustainability in all key areas, including:

1. Value chain (production, supplier selection process, logistics)
2. Products and services (materials, packaging, pricing strategies)
3. Organizational structure (government, sales and marketing, finance) Talent management (hiring, performance management)
4. Culture (leadership, change management)

A company's sustainability strategy not only integrates sustainability principles into an organization, but it also builds sustainability into the company's DNA. The sustainable development agenda has become an ideal form of "sustainable development", a concept developed by the Brundtland Commission in its 1987 report. It is, therefore, essential to understanding the historical context of sustainability and sustainable development. The Commission has defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their needs".

Although the term sustainability is not mentioned anywhere in the report, environmentalists have changed the words to sustainability and "sustainable development," creating confusion between the two that persists to this day. It damaged the cause of sustainability, as the discussion has limited to environmentalists.

RELATION- SUSTAINABILITY WITH GOVERNANCE AS PROOF

Although there is a clear connection between good corporate governance and all aspects of performance and organization, we do not have control over any particular part of corporate governance. We have accepted the phases of concept and focused our attention on what they say about the relationship between power and sustainability.

Therefore, 30% consider that their governance[212] is adequate because it adheres to the standard corporate governance code. Of course, anyone reporting to the London Stock Exchange must follow this Code, and therefore these Firms securities meet their regulatory obligations, and the remaining 70% also comply with the Code. Another 24% believe that corporate governance is just one part of investor relations and does not do much about it other than make investors / potential investors essential and to the point. These are the governance guidelines. Therefore 58% of them consider governance only in the context of the issues mentioned in the standard Code.

As an outcome, only 46% of respondents believe that there is a link between governance and other aspects of the business. Therefore, 27% recognize a clear connection between government and corporate social responsibility and try to combine the two. It is often just a matter of stating that good governance is part of your CSR policy and your relationship with shareholders and of course there are a lot of vague comments about claims companies going out of their way to be relentless without specifying perfectly what is meant by such a claim. However, some unique RMS values go further and provide explicit links to specific actions. Therefore, 5% recognize the relationship between financial stability and governance through

[212] https://www.sciencedirect.com/science/article/abs/pii/S0378426612000234

an understanding of the relationship between management and risk. Likewise, 2% are related to relations with the community; 4% ethical behavior towards employees; 3 per cent for environmental policies and practices; And 1% for their commitment to sustainable development.

CONCLUSION

The background document above deals with the basic concepts of corporate governance and sustainability as they have emerged, especially in the last two decades, as a background study for the Global Convention on the Institute of Directors for Corporate Governance and the challenges of the sustainability. This type of research that we have done is qualitative and therefore, insufficient to prove or disprove those things. Consequently, it cannot be said that good corporate governance will solve these problems. While it is possible to argue that a company that better understands both sustainability and corporate governance will address these issues more broadly.

AN ANALYSIS OF CORPORATE SOCIAL RESPONSIBILITY IN INDIA

- ANSHIKA VATS

Corporate Social Responsibility is a concept which is not new to India, which is rapidly growing and taking a prominent place in the business and has gained popularity amongst big companies. It unites business practices with social values. CSR ensures socio economic development of the country by way of various welfare activities undertaken by big companies. The role of companies is not only to grow and make profits but also to undertake responsive activities to improve the life of people. If the company is taking resources from the society it is also their duty to give something in return to the society.

INTRODUCTION

The concept 'Corporate Social Responsibility' (CSR) refers to 'soft', voluntary self regulation adopted by firms to improve aspects of the company; this can relate to labor, environmental and human rights issues.

Corporate Social Responsibility is about companies having responsibilities and taking actions beyond their legal obligations and economic/business aims. These wider responsibilities cover a range of areas but are frequently summed up as social and environmental - where social means society broadly defined, rather than simply social policy issues. This can be summed up as the triple bottom line approach: i.e. economic, social and environmental. Corporate social responsibility (CSR) also called corporate responsibility, corporate citizenship, responsible business and corporate social opportunity is a concept whereby organizations consider the

interests of society by taking responsibility for the impact of their activities on customers, suppliers, employees, shareholders, communities and other stakeholders, as well as the environment.[213]

DEFINITION OF CSR

The World Business Council for Sustainable Development in its publication Making Good Business Sense by Lord Holme and Richard Watts used the following definition:

"Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."

According to The European Union*:* "The voluntary integration of company's social and ecological concerns into their business activities and their relationships with their stakeholders. Being socially responsible means not only fully satisfying the applicable legal obligations but also going beyond and investing 'more' in human capital, the environment, and stakeholder relations."

DEVELOPMENT OF THE CONCEPT OF CSR IN INDIA

THE FIRST PHASE

This phase was driven by charity where culture, religion, family values and tradition and industrialization played an important role in CSR. The rich industrialist used to share a part of their wealth with common people by building up temples for the religion. These industrialists

[213] Corporate Social Responsibility – Evolution by Dr. Rajni Saluja IRJMSH Vol 8 Issue 11 [Year 2017] ISSN 2277 – 9809 (0nline) 2348–9359 (Print) International Research Journal of Management Sociology & Humanity (IRJMSH) Page 158 www.irjmsh.com

used to help people during famine and epidemics by providing food and money from their stock. But the influential families were not only driven by selfless and religious motives but also by caste and political objectives.[214]

THE SECOND PHASE

This phase was recognized by the independence movement, where Gandhi introduced the concept of 'trusteeship' by way of which industrialists had to manage their wealth in such a manner so as to also benefit the common man. According to Gandhi companies were 'temples of modern India'. Gandhi's pressure had compelled the companies to open school and colleges and training and scientific institutions.[215]

THE THIRD PHASE

This phase (1960-1980) was marked by mixed economy where there was emergence of Public Sector Undertakings (PSU's) and there was a setback for the private sector. Laws relating to labor and environment came up. This was the era of command and control. Due to high taxes and restrictions there were malpractices in the private sector. PSU's were set up to ensure equal distribution of resources.

THE FOURTH PHASE

In this phase (1980-2015) Indian companies started practicing sustainable business strategies. Globalization and liberalization gave a boost to economy because of which the companies were growing and became more willing and able to contribute to the social change.[216]

[214] Corporate Social Responsibility Practices in India: A Study of Few Companies by Ashish Baghla, in Journal of Advances and Scholarly Researches in Allied Education

[215] Corporate Social Responsibility Practices in India: A Study of Few Companies by Ashish Baghla, in Journal of Advances and Scholarly Researches in Allied Education

[216] Tandon, Nidhi & Kaur, Simran. (2017). The Role of Corporate Social Responsibility in India. Research Journal of Commerce & Behavioural Science-RJCBS. 6. 29-34.

LEGAL FRAMEWORK ON CSR

The Companies Act, 2013 has incorporated an innovative concept of Corporate Social responsibility by virtue of S135. Provisions relating to CSR are contained in S135 of the Companies Act, 2013 and the Companies (Corporate Social responsibility Policy) rules, 2014. S135 requires every company with specified financial thresholds to constitute a CSR committee, consisting of three or more directors, of which at least one director should be and independent director.

The companies covered under S135[217] are:

1. Having net worth of rupees five hundred crores or more, or
2. Having turnover of rupees one thousand crores or more, or
3. Having a net benefit of rupees five crores or more.

Activities which have been specified in Schedule VII of Companies Act, 2013 which might be included by companies in their Corporate Social Responsibility Policies are as per the following:

Activities relating to:—

1. Eradicating hunger, poverty and lack of healthy sustenance, advancing health care including preventive health care and sanitation [including commitment to the Swach Bharat Kosh set-up by the Central Government for the advancement of sanitation] and making available safe drinking water.

[217] Companies Act,2013 (Act No. 18 of 2013)

2. Promoting education, including special education and employment enhancing job aptitudes especially among children, women, elderly and the differently abled and livelihood enhancement projects.
3. Promoting gender equality, empowering women, setting up homes and hostels for women and vagrants; setting up maturity homes, day care centers and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically in reverse gatherings.
4. Ensuring environmental supportability, ecological balance, protection of widely varied vegetation, creature welfare, agro forestry, conservation of normal resources and keeping up quality of soil, air and water [including commitment to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga].
5. Protection of national heritage, workmanship and culture including restoration of structures and sites of verifiable importance and centerpieces; setting up open libraries; advancement and development of customary craftsmanship and handiworks.
6. Measures for the benefit of armed forces veterans, war dowagers and their dependents.
7. Training to promote country sports, broadly recognized games, Paralympic sports and Olympic Games.
8. Slum area development.

Expenditure to be incurred on CSR Activities

1. Every organization to which the arrangements is applicable must spend in any event 2% of the average net benefits of the organization made amid the three immediately preceding money related years in pursuance of the CSR Policy
2. No upper utmost has been specified with regard to CSR expenditure which essentially means that the organization can even spend more than the base requirement

3. Average net benefit will be calculated based on arrangements of Section 198[218] which is fundamentally "Benefit before Tax". Further, the benefit so calculated will not include the benefit from overseas branch and any dividend received from other companies in India which are covered under Section 135 of Companies Act, 2013
4. The organization will give preference to the neighborhood areas around it where it operates, for spending the sum earmarked for CSR activities.[219]
5. A organization may do CSR action either at its own or through implementing agencies or by working together with other companies subject to the conditions as might be set down.
6. Expenditure incurred by foreign holding organization for CSR activities in India will qualify as CSR spend of Indian auxiliary if, the CSR expenditure are routed through Indian subsidiaries and if the Indian backup is covered under the CSR arrangements.

The three tasks entrusted to the CSR committee by the act are-

1. To formulate and recommend to the board of directors a CSR policy indicating the action to be undertaken by the company, a specified in schedule VII of the act,
2. To recommend the amount of expenditure for such activities,
3. To monitor the CSR policy of the company from time to time.

Contravention of S135

If a company fails to spend the required amount on CSR the board of directors must specify the reasons thereof in the board's report. The CSR regime thus appears to be a 'comply or

[218] Companies Act,2013 (Act No. 18 of 2013)

[219] Corporate Social Responsibility in India - An Effort to Bridge the Welfare Gap Jayati Sarkar and Subrata Sarkar Indira Gandhi Institute of Development Research, Mumbai August 2015 http://www.igidr.ac.in/pdf/publication/WP-2015-023.pdf

explain' regime with consequential penalties being conspicuously missing from S135.[220] In such case S450 of the act shall apply which states as follows:

If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to ten thousand rupees, and where the contravention is continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.[221]

BENEFITS OF CSR

Benefits to the general public- education, employment, homelessness programs, charitable contributions, product safety, employees insurance.

Benefits to the environment- eco friendly manufacturing practices, recycling, use of renewable resources.

Benefits to the company- brand image and reputation, more ability to retain employees, capital enhancement, customer loyalty, increased sale, greater productivity.

CHALLENGES

[220] Companies Act,2013 (Act No. 18 of 2013)

[221] Corporate Social Responsibility in India, Dr. Reena Shyam, Vol.4 (Iss.5): May, 2016] ISSN- 2350-0530(O) ISSN- 2394-3629(P) Http://www.granthaalayah.com International Journal of Research - GRANTHAALAYAH [56-64]

1. Issue of transparency
2. Non-availability of well organized NGO's
3. Visibility factor
4. Lack of community participation
5. Need to build local capacities[222]

SOME CASES OF CSR INITIATIVES IN INDIA

1. Reliance Industries Ltd**.**

Reliance Industries Ltd. launched a countrywide initiative known as Project Drishti, to restore the eye-sights of visually challenged Indians from the economically weaker sections of the society.

2. Hero MotoCorp

Hero MotoCorp takes considerable pride in its stakeholder relationships, especially ones developed at the grassroots. The Company believes it has managed to bring an economically and socially backward region in Dharuhera, Haryana, into the national economic mainstream.

3. Infosys Technology Limited

Infosys promoted, in 1996, the Infosys Foundation as a not-for-profit trust to which it contributes up to 1% PAT every year. Additionally, the Education and Research Department (E&R) at Infosys also works with employee volunteers on community development projects.

[222] Empirical study of corporate social responsibility practices in India in changing global scenario and its' impact on companies' profitability (a sectorial comparison of selected public & private sector companies) submitted by: Babita Kundu

4. ITC Limited

ITC partnered the Indian farmer for close to a century. It is now engaged in elevating this partnership to a new paradigm by leveraging information technology through its trailblazing e-Choupal initiative. ITC is significantly widening its farmer partnerships to embrace a host of value-adding activities viz. creating livelihoods by helping poor tribes make their wastelands productive, investing in rainwater harvesting to bring irrigation to parched dry lands, empowering rural women by helping them evolve into entrepreneurs, and providing infrastructural support to make schools an exciting platform for village children.[223]

SUGGESTIONS

1. It is necessary to create an effective partnership between all stakeholders that is the local community, government, private sector, employees and the society for better implementation of CSR activities.
2. There is a need to create public awareness to make CSR effective.
3. It is necessary to monitor the CSR activities to check whether desired outcomes are achieved.
4. A long term commitment and dedication on the side of companies to work for the society is essential to make CSR activities successful.

CONCLUSION

[223] Corporate Social Responsibility, **Shalin Chaudhary,** http://www.legalservicesindia.com/law/article/944/3/Corporate-Social-Responsibility

CSR is working in various sectors but it need to pay more attention to the untouched areas for inclusive and sustainable development. This concept is not new in India it existed even during the British regime through charity and donations. The concept of CSR is incorporated in S135 of the companies act, 2013. The objective of CSR is to make the companies responsible for social change and to work for a social cause for the upliftment of the society. CSR is like good corporate governance where companies provide help to the downtrodden of the society. This concept has interwoven business with social inclusion and environment sustainability. Companies work hard to improve the quality of the life of people with the help of NGO's to facilitate extensive social change.

ARTICLE 19: AN ANALYSIS OF RIGHT TO FREEDOM WITH RESTRICTIONS ENSHRINED UNDER INDIAN CONSTITUTION

- ASMA FIROZ KHAN

ABSTRACT

Article 19 of Indian constitution provides various kinds of freedom to its Citizen. This freedom encompasses the right to express opinion by oral as well as in written forms. It lays down a foundation of democracy by allowing public discussion which is essential for governance. The freedom to assemble and the freedom of association are cornerstones of the life of citizens in a constitutional democracy. every citizen of India has the right to reside and settle in any part of the territory of India. The other right to freedom of movement is guaranteed by the Constitution, which provided that citizens can move from one state to another and anywhere within a state without any fear. A person free to move from any point to any point within the country's territories but with some restrictions. It is worth to note that all restriction exercise on a fundamental freedom is not only valid but all limitation made by government have to be test upon Constitutional ground. The Indian Constitution attempts to strike a balance between individual liberty and state control, it authorize the State to impose certain reasonable restrictions. Hence, rights provided under an article is not an absolute right, it have some responsibility to be follow.

KEY WORDS

Article 19, Constitution, case laws, Citizen, Fundamental right, Freedom, Restriction.

INTRODUCTION

The rights to freedom are the most important fundamental rights guaranteed by the constitution of India. It is the prevalence of these freedoms that make democracy meaningful. The final draft of the Indian Constitution which is the longest in the world, was adopted on 26 November 1949 after almost 2 years, 11 months an 17 days. It was legally enforced on 26 January 1950, the day that we celebrate as Republic Day ever since.[224]

The Constitution of India is the supreme law for India. The document lays down the framework demarcating fundamental political code, structure, procedures, powers, and duties of government institutions and sets out fundamental rights, directive principles, and the duties of citizens. It is the longest written constitution of any country on earth. B. R. Ambedkar, chairman of the drafting committee, is widely considered to be its chief architect.[225]

Article 19 is the most important and essential article which embodies the "basic freedoms" for the Citizens. these six freedoms is subject to some restrictions. Individual rights must be reconciled with the interests of the community as a rights can never be absolute. It is logical that equal rights for all must mean limited rights for any. the state may impose 'reasonable restrictions' upon the exercise of any of these rights. Rights to Freedom are given under article 19 of the Indian Constitution. Art. 19 of the Constitution provides a six types of freedoms.

[224] https://www.bloombergquint.com/politics/26-facts-you-didnt-know-about-the-indian-constitution-republic
[225] https://en.wikipedia.org/wiki/Constitution_of_India

Since the right to property enshrined in Articles 19(1)(f) was a fundamental right at the time. In Kesavananda Bharati v. State of Kerala[226] was decided that it is violated the "basic structure" of the Constitution, and therefore unconstitutional. It subsequent abolished by the Forty Fourth amendment.

ARTICLE 19: CONSTITUTION OF INDIA

Under article 19 of Constitution of India provided as,

(1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(g) to practice any profession, or to carry on any occupation, trade or business.

FREEDOM OF SPEECH AND EXPRESSION[227]

Article 19 of the constitution provides freedom of speech which is the right to express one's opinion freely without any fear through oral, written, electronic, broadcasting and press. The Constitution does not make any special or specific reference to the Freedom of Press but it all include under the article. Freedom of speech and expression is not an absolute. there are 8 restrictions on the freedom of speech and expression. These are made in respect of the sovereignty and integrity of the country which are as below,

[226] (1973) 4 SCC 225: AIR 1973 SC 1461

[227] Article 19(1)(a) of the Indian Constitution

1. Security of the state
2. Friendly relations with foreign states
3. Public Order
4. Decency or morality
5. Contempt of Court
6. Defamation
7. Incitement to offence
8. Sovereignty and integrity of India.

These restrictions were embodied in their current form in the constitution First Amendment Bill 1951, in Romesh Thapar v. State of Madras[228] this case is about the entry and circulation of the English journal "Cross Road", which is printed and published in Bombay and banned by the Government of Madras. The Supreme court held that a law restricting the freedom of speech and expression were directed solely against the undermining of the security of the state, the law could be held a reasonable restriction though if it sought to impose a restraint for the maintenance of public order.

In case of Kedar Nath v. State of Bihar[229] The Supreme Court held that section 124-A of the Indian Penal Code, 1860 was limited to acts involving an intention or a tedency to create disorder or disturbance of law and order or incitement to violence and was not violative of Article 19(1)(a) read with Article 19(2) of the Constitution.[230]

[228] 1950 AIR 124, 1950 SCR 594
[229] AIR 1962 SC 955
[230] https://shodhganga.inflibnet.ac.in/bitstream/10603/102441/9/09_chapter-2.pdf

Press Freedom & Censorship

There is no specific provision in the constitution for the press freedom and censorship. In Indian Express v. Union of India[231], it was held and interpreted under article 19 (1)(a) freedom of expression means the freedom to express not only one's own views but also the views of others and by any means including printing.[232]

FREEDOM OF ASSEMBLY[233]

This article has also been reviewed an interpreted by the Supreme Court many times. The constitution guarantees right to hold meetings and take out processions. The processions and meetings should be unarmed and peaceful. This right may be restricted in the interest of the,

1. public order
2. sovereignty and
3. integrity of the country.

It's worth to note that section 144 of the Sub-section (6), of the Code of Criminal Procedure can be imposed by the government in certain areas which makes the assembly of 5 or more people an unlawful assembly.

in the case of Kamla Kant Mishra And ors. vs State Of Bihar And ors.[234] challenging the said section of Crpc in Supreme Court on the basis that it violates article 19(1) of the constitution

[231] 1986 AIR 515, 1985 SCR (2) 287
[232] https://www.gktoday.in/gk/article-19-of-constitution-of-india-and-freedom-of-speech/
[233] Article 19(1)(b) of the Indian Constitution
[234] AIR 1962 Pat 292

and thus it becomes invalid. The Supreme Court in its judgment held that power conferred upon the State Government under Section 144, Sub-section (6), of the Code of Criminal Procedure, is constitutionally valid.

FREEDOM OF ASSOCIATION[235]

The freedom to assemble and the freedom of association are cornerstones of the life of citizens in a constitutional democracy. These freedoms enable organizing for the achievements of collective aims and for the engagement of citizens with each other. These freedoms also enable political organising.[236] The Constitution, however empowers the State to impose reasonable restrictions on the exercise of fundamental rights guaranteed under article 19(1)(c) only in the interest of the following,

1. Sovereignty
2. Integrity
3. Public order and
4. Morality

It may be stressed that freedom of association is not simply a constitutional right but it is a fundamental right too. These fundamental rights are placed on a high pedestal. The freedom includes to form companies, societies, partnership, trade union and political parties.[237]

[235] Article 19(1)(c) of the Indian Constitution
[236] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574555
[237] https://www.jstor.org/stable/43950116?read-w=1&seq=5#page_scan_tab_contents

in Damayanti v. Union of India[238], in this case the Supreme Court held regarding right to form an association that "any law by which members are introduced in the voluntary association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntary joined it, will be a law violating the right to form an association."

FREEDOM OF MOVEMENT[239]

The freedom of movement is guaranteed by the Constitution which provided that citizens can move from one state to another and anywhere within a state. A person free to move from any point to any point within the country's territories. But there are certain exceptions as the freedom of movement such as a citizen cannot be moved into Scheduled Tribes areas and army areas. Article 19(5) prescribe Restrictions for movement which are as follows,

- Restrictions can be imposed only by or under the authority of law. Restrictions can not be imposed by the executive action without legal authority.
- Restrictions must be reasonable.
- Restrictions must be related to the purpose specifically mentioned in clauses.

It is note that the "reasonable restriction" connotes the limitation imposed on a person in enjoyment of the right which should not be arbitrary, not having an excessive nature, required in the interests of the public and made with intelligent care and deliberation.

[238] 1971 AIR 966, 1971 SCR (3) 840
[239] Article 19(1)(d) of the Indian Constitution

In Ajay Canu V. Union of India[240], in this case the petitioner is a student and has a permanent driving licence of two-wheeler vehicle. The Petitioner has filed a writ petition in the Andhra Pradesh High Court Challenging the validity of Motor Vehicle Act, Rule 498-A on the ground that the it is a violative of the fundamental rights of the petitioner as guaranteed under Article 19 (1) (d) and Article 21 of the Constitution of India. The Court held that there can be no doubt that Rule 498-A is framed for the benefit, welfare and the safe journey by a person in a two-wheeler vehicle but aims at prevention of any accident being fatal to the driver of a two-wheeler vehicle which cause annoyance to the public. Hence, the said article is not a violative the fundamental right guaranteed under article 19 (1)(d).[241]

FREEDOM OF RESIDENCE[242]

every citizen of India has the right to reside and settle in any part of the territory of India. The object of the clause is to remove internal barriers within India or any of its parts. The words "the territory of India" as used in this Article indicate freedom to reside anywhere and in any part of the State of India. However, under clause (5) of Article 19 reasonable restriction may be imposed on this right by law in the interest of the general public or for the protection of the interest of any Scheduled Tribe.

[240] 1988 AIR 2027, 1988 SCR Supl. (2) 632
[241] https://www.lawyerservices.in/Ajay-Canu-Versus-Union-of-India-and-Others-1988-08-29
[242] Article 19(1)(e) of the Indian Constitution

It is to be noted that the right to reside and right to move freely throughout the country are complementary and often go together. Therefore most of the cases considered under Article 19(1)(d) are relevant to Article 19(l)(e) also. This right is subject to reasonable restrictions imposed by law in the interest of general public or for the protection of the interests of any Scheduled Tribes.[243]

In the landmark case of Olga Tellis & Ors vs Bombay Municipal Corporation[244], People were evicted from the pavements, footpaths or accessory roads and slums. The court held that no one has the right to encroach on trails, sidewalks or any other place reserved for public purposes. According to the Justice Y.V. Chandrachud, although the petitioners are using unauthorized pavements and public property, are not in any way "criminal intruders" under section 441 of the Criminal Code of India, since their objective or reason for doing so is not to commit a crime or intimidates, insults or annoys any person, rather they are forced by unavoidable circumstances and are not guided by choice. They only manage to find a habitat in dirty or swampy places. This decision widened the term 'life'.[245]

FREEDOM OF TRADE & OCCUPATION[246]

Constitution of India provides Right to practice any profession or to carry on any occupation, trade or business to all citizens subject to Art.19 (6). It also enumerates the nature of restriction that can be imposed by the state upon the above right of the citizens. Sub clause (g) of Article

[243] http://www.mcrhrdi.gov.in/91fc/coursematerial/pcci/Part3.pdf
[244] 1986 AIR 180, 1985 SCR Supl. (2) 51
[245] http://lawtimesjournal.in/olga-tellis-and-ors-vs-bombay-municipal-corporation-and-ors/
[246] Article 19(1)(g) of the Indian Constitution

19 (1) confers a general and vast right available to all persons to do any particular type of business of their choice. But this does not confer the right to do anything consider illegal in eyes of law or to hold a particular job or to occupy a particular post of the choice of any particular person. However, under Article 19(6), the state is not prevented from making a law imposing reasonable restrictions on the exercise of the fundamental right in the interest of the general public. A law relating to professional or technical qualifications is necessary for practicing a profession. A law laying down professional qualification will be protected under Article 19(6).[247]

In P.A. Inamdar v. State of Maharashtra[248] The 7 bench of Supreme Court judges held that the State can't impose its reservation policy on minority and non-minority unaided private colleges, including professional colleges.[249]

The restriction under article provided that it must be reasonable, and not against the interest of general public. The provision state that the State is not prevented to,

(a) Impose a reasonable restrictions in the interests of general public

(b) Prescribe professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business,

(c) Carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.

[247] http://www.mcrhrdi.gov.in/91fc/coursematerial/pcci/Part3.pdf
[248] AIR 2005 SC 3226
[249] https://prayatna.typepad.com/education/2005/08/summary_of_the_.html

GROUND OF REASONABLE RESTRICTIONS

It is difficult to give an exact definition of the word 'reasonable'. There is no definite test to adjudicate reasonableness of a restriction. It is the duty of the Court to decide and each case is to be judged on its own merits. In other words, no abstract standard or general pattern of reasonableness is applicable uniformly to all cases.[250]

The term 'reasonable' implies intelligent care and deliberation, i.e. the choice of a course, which reason dictates. It seeks to strike a balance between the individual right secured by Article 19(1) and social control permitted by Article 19(2) to (6) of the Constitution. The limitations imposed by Articles 19(2) to 19(6) on the freedoms guaranteed by Articles 19(1)(a) to (g) of the Constitution serve two fold purposes,

i) they specify that these freedoms are not absolute but are subject to regulation;
ii) they put a limitation on the power of a legislature to restrict these freedoms. A legislature cannot restrict these freedoms beyond the requirements of Articles 19(2) to 19(6).[251]

CONCLUSION

The first principle of a free society is unstoppable flow of words. Liberty means to express opinions and ideas without hindrance, and especially without fear. The rights conferred under Article 19 of the Constitution are the rights of free citizen. These right contained natural law

[250] M.P. Jain, "Indian Constitutional Law" Lexis Nexis Butterworths Wadhwa Nagpur, Gurgaon 2012, p. 1073.
[251] M.P. Jain, p. 1072.

or common law rights which is not created by a statute. Hence, every citizen is entitled to exercise such rights subject with provided conditions to be imposed required by the State. In a civilized society punishment plays significant role in the development of that particular society and ultimately for that state too. In modern State, it has been realized that freedoms cannot be guaranteed in absolute terms and cannot be uncontrolled. From the above case law analysis, it is evident that the Court has develop a broad interpretation on the value and contents of Article 19(1), making it subjective only to the restrictions permissible under Article 19.

MORAL & LEGAL ASPECTS OF SURROGACY

- GARIMA GUPTA & RICHA PANCHAL

ABSTRACT

Infertility has become a common occurrence these days and is a serious issue for the childless couples who have to go through the pain of being childless. As a result, such childless couples are subjected to family pressure and psychological torture. Surrogacy has proved to be a means to overcome such a grief. It widens the scope for such couples over and above the option of adoption. However, surrogacy carries along with it a lot of baggage comprising of the various social, legal and ethical issues. The concept of surrogacy dwells into various legal aspects involving legal issues like citizenship, custody and inheritance rights of the surrogate child, rights of surrogate mother v. intended parents, etc. Banning commercial surrogacy as per The Surrogacy (Regulation) Bill 2019, does not necessarily implies reduction in the exploitation of rights of the surrogate mother and surrogate child. These rights have to be comprehensively formulated and adhered to.

HYPOTHESIS

Although numerous legal and moral issues underline the concept of surrogacy, however it does not ensue any right of exploitation or abuse towards the surrogate mother, surrogate child and the intended parents.

RESEARCH METHODOLOGY

The research method which has been adopted by researcher is a combination of Analytical and Doctrinal approach with qualitative research, whereby help is taken from various sources like Journal Publications, Journal Articles, Internet websites, Statutory Provisions and Case Laws. A detailed analysis is done by the researcher after going through the various sources mentioned above.

INTRODUCTION

The greatest joy in anyone's marital life is to be a parent, which is the best gift bestowed upon any couple by nature. However, not every couple is able to enjoy this joy due to reasons which may vary from biological issues to psychological or being same-sex couples. At such a point where the parents become extremely desperate to have a child even when they are well aware that it is not possible for them to procreate, options like adoption and surrogacy are good options. Surrogacy may be preferred over the adoption option as a surrogate child somehow appears to be the closest option to being a biological child even if he cannot be considered one in the literal sense. Whereas, in adoption the child cannot be considered to be a biological child to the adopted parents. This could possibly result in the issues between family members and unnecessary discontent.

Before the Surrogacy (Regulation) Bill 2019, surrogacy in India was broadly of two types- *commercial surrogacy* and *altruistic surrogacy*. The only criteria which differentiate between these two types is monetary involvement. Post the surrogacy bill 2019, commercial surrogacy has been banned completely. The reason behind such a ban was that such a practice was highly derogatory and exploitative towards the surrogate mother and the surrogate child. It not only encouraged baby-selling but also diminished the dignity of women. This encouraged

the establishment of a huge market for paid surrogacy leading to influx of foreigners in search of Indian surrogates. India had always been a preferred destination of surrogate mothers as the cost involved in the entire process is relatively much less to that of US and UK. The bill has further been silent on the clear-cut definition of 'close relative' and neither has the bill thrown any light on the issue of citizenship of the surrogate child.

The concept of surrogacy has two-found effect on the Indian social framework which are very different from each other and in a way contradictory. One being that surrogacy is a way of hope for those childless couples who have to go through the pain of being childless that the society would entail upon them. At the same time, they have to face the legal and moral issues pertaining to surrogacy, thus making them weigh their options as to whether to go for it or not.

The issues that the researcher would try to answer through this research paper include the level or ability to which the ban on the commercial surrogacy has proved to be beneficial towards the trade. It will also touch upon the legal and moral aspects related to the issues pertaining to the citizenship, custody and inheritance rights of the surrogate child. Further the researcher would also deal with the balance of the rights of the surrogate mother and the intended parents.

As discussed before, the Commercial Surrogacy has been banned in India after the Surrogacy (Regulation) Bill, 2019. Even though the commercial surrogacy has been banned, it does not ensure that the commercial trade has come to an end. Banning commercial surrogacy in India is not the solution to put an end to this trade as there are many countries where

commercial surrogacy is legalized like Russia and Ukraine. Post the ban, infertility clinics have found ways or means to continue with this trade of commercial surrogacy whereby surrogate mothers are transferred beyond borders to the countries where the activity is considered legal, in order to materialize the trade. As a result, the surrogate mother stands to face risks. "*When India first banned surrogacy for gay couples in 2012, various infertility businesses in Delhi continued to sign on gay clients from all over the world. To avoid the ban, infertility clinics moved surrogate mothers across international borders into Nepal. This emerging trade route between Delhi and Kathmandu halted when an earthquake hit Nepal on April 25, 2015, killing 8,000 people and injuring more than 21,000. While various governments airlifted babies belonging to their citizens, the fate of the Indian surrogate mothers and how they got back home remains unclear.*"[252]

As a result, illegal commercial surrogacy is still prevalent even after the ban, which goes beyond the law enforcement jurisdiction of the country. It would be right to say that instead of targeting the illegal aspect of commercial surrogacy, ban is done on legal commercial surrogacy.

There are also instances where surrogate mothers from foreign countries are made to go through the entire process of IVF treatment in India and later, they go back to their own country.

[252] Alolika A. Dutta, 8 Questions About The Surrogacy Bill That Our Government Needs To Answer,YKA (Oct 13, 2019 https://www.youthkiawaaz.com/2019/01/surrogacy-regulation-bill-2018-8-questions-that-we-should-be-asking.

This practice, as a result does not stop the trade even if there is no involvement of Indian surrogate mother or intended parents.

A ban on commercial surrogacy in India would lead it to be in a similar situation as that of Cambodia. "In Cambodia, *surrogate mothers from Phnom Penh are being sent to Bangkok, Thailand to deliver babies. Thai law bans commercial surrogacy transactions, but enforcement agencies are unable to distinguish surrogate mothers in hospitals from other pregnant women. Cambodian surrogate mothers are also being sent to Laos, where there are no laws, to deliver babies in clinics staffed by Thai doctors who once worked in Thailand when commercial surrogacy was still legal there*."[253]

It is thus evident from "the discussion that what the ban on commercial surrogacy has done is merely taking the trade out of one country and establishing it into another. Banning the commercial surrogacy would push it further towards more illegality, thus widening the scope of the activity. As a result, it becomes difficult to keep a tab on the activity through the perspective of domestic laws. From the perspective of the surrogate mother, it becomes difficult to take advantage of the remedies available for any kind of abuse, financial issues, or medical malpractices."

The other issue to be discussed here is the status of a surrogate child in context to the citizenship, custody and inheritance rights. "The right to citizenship is a very important right

[253] Ibid.

of an individual as it is the basis of his civil and political rights. Citizenship is generally understood as referring to the relationship between the individual and the state."[254] There is an inter-connection between Citizenship & Civil Law. Any country provides its citizens with full civil and political rights. Hence its essential for an independent to obtain citizenship. In context of surrogacy arrangement, to obtaining a citizenship of the child has been a tedious task. The Citizenship Act of India does not recognize a surrogate child as the Citizen of India. This was witnessed in the *Baby Manji Yamada Case*[255] & *Jan Baaz Case*[256]. It is extremely important to understand that the child is not to be blamed for this and this affects the mental health of the child.

During the recent years the application of surrogacy procedures has significantly expanded not only domestically but internationally. India has become a paradise for using surrogacy. Foreigners go in for surrogacy in India because it is available at reasonable cost without any legal restraints. With expanded use of cross-boundary surrogacy, the citizenship of the surrogate child is questionable.

In a small town in Gujarat, Anand twin babies were born out of a commercial surrogacy arrangement to a German couple at a self-regulated fertility clinic. The said suit arises when the couple applied for Visa for the new-born twins as the fertility clinic mentioned the commissioning couples as the parents on the birth certificate of the twins, however they failed

[254] Anupama Roy, Citizenship and Right|, available at http://www.du.ac.in/fileadmin/DU/ Academics_03.pdf

[255] AIR 2009 SC 84

[256] 2010 (2) ALL MR (Journal) 14

to record in the birth register maintained by the fertility clinic. The Court had issued several sets of interim orders in said case. The court ordered reflate the change in the name of the twins to their surrogate mother. The court also noticed that it would be more feasible to have the name of the surrogate mother on the birth register as the law of Germany acknowledges the women who has given birth to the child. The Court appears to agree to the agreement of surrogacy and dealt with the issue by adapting the birth certificates of the twin babies so the visa could be granted to them.

In the traditional cases of adoption, the intended parents having no biological relationship with child, had no legal rights which could be enforceable to acquire the custody of the child since they were never living with that child. In matters relating to surrogacy the situation was more complex. There are different set of rules for various situations whether the insemination was artificial or nature, whether the mother has a husband or not. When the mother is unmarried then both the biological parents have equal custody rights to the child. Firstly, sperm donors can have the same parental rights as in case of unmarried parents, in cases where there is private insemination. Such regulations may benefit the biological father in a surrogacy arrangement. Despite of the fact that sperm donors usually win over the rights of parents they are associated to obligations, for instance it is not easy to understand whether the mother of the child can force the financial responsibility of the child on the sperm donor who wants to detach himself from the child. In the usual surrogacy agreement where the insemination is by the parties on their own where the mother is determined to take the custody of the child and charge the father for identifying his responsibilities to support the mother and child. When the insemination is through a doctor and not in private, a couple of sperm donors who entered into a contract but cannot execute the said contract will try to obtain the right to custody of child as the father.

The law regarding the rights and responsibilities of parents, not being married to each other. The responsibilities of the biological father will differ in case of the mother being married to him or not. Conventionally a child born during the marriage is assumed to be during subsistence of the marriage. This is refutable only when the child's mother or the husband of the mother is allowed to refute. There are cases in which for the best interest of the child the natural mother who is married and her husband act as parents. Theoretically many cases of surrogate arrangements are concluded without any struggles, it also aforesaid that the parental rights should vest in initiating parents. As per "Section 13(1) of the Hindu Minority & Guardianship Act, 1956 declares a person as a guardian of the best interests of the minor are to be of paramount consideration."[257] This has been argued under "Section 25 of the Guardians and Wards Act, 1890, if the ward is removed from the custody of the guardian, the court may in the best interest of the child order to return the child to the de fact guardian."[258] In Spite of adoptive parents assumed to have the custody of the child, it may be given back to the biological mother.

The surrogacy arrangements have made the inheritance laws critical. As the time is changing ladies are ending up increasingly cognizant about their transporter also, future. Ladies in their late 20s and mid 30s are sparing their eggs and need to center on their professions and haven't met the correct accomplice yet. The ladies' eggs could be utilized to produce a kid regardless of whether the lady never needed the eggs utilized after her demise. The question emerges whether the kids brought into the world with new innovation under a surrogacy course of action

[257] Section 13(1) of the Hindu Minority and Guardianship Act, 1965
[258] Section 25 of the Guardians and Wards ACt, 1890

are qualified for acquire with indistinguishable rights from a characteristic conceived youngster. Consider the case of a debilitated individual who, before experiencing chemotherapy that will cause sterility, gives sperm or eggs to be solidified, in order to have youngsters later. The patient

means to have the youngsters after recuperation. Be that as it may, should the patient kick the bucket without something recorded as a hard copy expressing this expectation, the enduring accomplice could have a case on that hereditary material and could utilize it to deliver a youngster. In 2007, The New York County Surrogate's Court decided in the case *in re Martin B*[259] that two posthumously conceived children could benefit from trust created by their grandfather, Martin B, for his two sons and any grandchildren. The case was brought jointly by Martin B's wife and the widow of their son, whose frozen sperms had been used to conceive two children three and five years after his death. They wanted to know whether the posthumously conceived children were descendants for the purpose of trust.[260] "Biologically, were they the grantor's grandchildren?" The answer is yes. But legally, were they his grandchildren? The issue needs to be resolved. When the trust document does not address the issue, children born with new technologies are entitled to inherit the same rights as natural born children.

The third issue dealt through this research is rights of the surrogate mother and intended parents and whether these rights should be balanced out or leverage should be given to either of the

[259] Re Martin B 841 N.Y. S.2d 207 (2007)
[260] Ibid.

two. Intended parents have to go through various legal issues. "The critics are of the opinion that act of surrogacy should not be awarded constitutional protection as it would destroy marital institution and would lead to commercialization and exploitation of surrogate mother."

The rights for the intended parents include- "right to personal liberty, right to procreate, right to find a family and decide on the number and spacing of children, right to privacy and right to enjoy benefits of scientific and technological progress,"[261] Intended parents "enjoy certain rights in context to surrogacy. On the other hand, they are bound to follow and comply towards the duties allotted to them as intended parents. These rights and duties go hand in hand to ensure a balance and to determine the parentage right of the child born out of surrogacy. These rights and duties of intended parents is not mentioned expressly" in any legislation. Some of these rights include-" Right to Select a Surrogate Mother, Right to Information and Visit Surrogate Mother During Pregnancy, Right to Custody and Parentage of Child, Right to Maternity and Paternity Leave for Intended Parents."[262] Alongside these rights are certain duties like "Duty to Refrain from Sex Selection, Duty to Accept the Child after Birth, Duty to Maintain Surrogate Child as Natural Child, Duty to Appoint Local Guardian."[263]

Similarly, there are certain rights and corresponding duties for the surrogate mother. These include- "Right to Personal Liberty and Right to Privacy, Right to Benefit from Scientific Progress and Right to be a Surrogate, right to an Informed Consent, Right to Remain

[261] Aneesh V. Pillai, *Surrogacy Under Indian Legal System: Legal And Human Rights Concerns*, (Oct 14, 2019) https://dyuthi.cusat.ac.in.
[262] Ibid.
[263] Ibid.

Anonymous, Right to Visitation with Consent of Intended Parents, Right to Maternity Benefit"[264]

Also, the duties include "Duty to Permit Medical Examination, Duty to Undergo Regular Medical Checkups During Pregnancy, Duty to Take Adequate Health Care During Pregnancy, Duty to Avoid those Practices which Adversely Affect the Normal Development of the Child, Duty to Carry the Child for a Full Term, Duty to Relinquish the Right over the Child and to Hand over the Child."[265]

Thus, we can see that both the intended parents and surrogate mother have their own rights and duties towards each other which should be adhered to so as to ensure that the procedure of surrogacy is completed without any hindrance or issues. These rights and duties are not mentioned in any legislation although these can be inferred from various judgments. It means there is no such legislation in place that explicitly lays down these rights or duties. The rights of both the intended parents and surrogate mother should be kept at equal footing and balanced so that there is no scope of any ambiguity or issues with respect to the process of surrogacy.

CONCLUSION

Surrogacy is both a peril and a chance. From one viewpoint it gives fruitless couples and surrogate moms the likelihood to satisfy their wants to have a kid and the chance to care more for their family individually. Then again there is a chance that with the commodification of kids and parenthood, ladies are abused and transformed into child makers. A few explanations

[264] Ibid.
[265] Ibid.

behind and against surrogacy have been given what's more, one can only with significant effort choose what is ethically right and what's going on. Notwithstanding, both rivals and supporters of surrogacy concur that surrogacy represents a progression of social, moral and legitimate issues. Despite the fact that there are presently a few standards and guidelines set up, not enough is done at a national level to secure the interests of Indian ladies who fill in as surrogate moms, the kids they bear, or those proposed guardians who travel significant separations to appointing pregnancies.

There is a lacuna in law relating to Citizenship, Inheritance & Custody of the child born out of surrogacy. Provisions relating to child born out of artificial insemination specifically in surrogacy arrangements are construed not in its legal sense. To avoid such confusions, the legislations should be enacted to cover all these aspects relating to surrogacy.

The basic presumption of the Bill, that banning commercial surrogacy will necessarily erase its exploitative potential is, we argue, highly problematic as it dismisses the possibility that altruistic arrangements can be equally as exploitative as commercial ones, although in different ways.[266] The Bill explains that lack of legislation on surrogacy has led to its rampant commercialization, unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. In line with the recommendations of the Law Commission of India, it proposes to address these issues and protect the rights of surrogate mother and child.[267]

[266] Regulation of surrogacy in India: whenceforth now? Brownyn Parr & Rakhi Ghoshal BMJ Glob Health. 2018; 3(5): e000986. Published online 2018 Oct 8

[267]https://www.businesstoday.in/current/policy/surrogacy-regulation-bill-2019-infertility-indian-council-of-medical-research-icmr-surrogate-mothers-in-vitro-fertilisation-ivf/story/372797.html

RECOMMENDATIONS

Post the ban on commercial surrogacy, instances of cross-border practices in surrogacy have led to continuance of the illegal activity. As a result, there is no uniformity in the laws. Therefore, there is a need for having "uniform international regulations leading to a consensus on the legality of the aspect so as to avoid hardships to the intended parents/parent and surrogate child. In this regard it is suggested that a declaration or a convention may be adopted at international level for recognizing overseas surrogacy practices as well as to accept the parentage certificates issued by another country."

The Maternity Benefit Act, 1961 must be "amended so as to include within its ambit the surrogate woman also, if she is a working woman. The welfare provisions of the Act such as, Prohibition of hazardous employment, and other eligible leave with pay etc. must be provided to surrogate woman. However, in surrogacy as the child is handed over to the intended parents/parent immediately after birth, the maternity leave to a surrogate mother can be limited to such period as required for improving the health of the surrogate mother as per medical advice."

The refusal by the "intended parents/parent to accept the surrogate child shall be considered as an offence. If the surrogate or any close relative of intended parents /parent are ready to accept the child, the child shall be handed over to them. If they are not willing to accept the child, the child may be put in an orphanage or given for adoption and the intended parents shall be held liable for providing maintenance expenses to such child till adoption or up to the age of majority of the child."

Traditional definition of "parent should be expanded to include the modern developments in reproductive technologies, particularly surrogacy. Thus, the intended mother shall be considered as the legal mother and the intended father shall be considered as the legal father irrespective of the fact, whether he or she contributed their genetic material to such child."

The legal parents shall be given "the custody of the surrogate child. In case of any custody dispute between the intended parents and surrogate mother, it shall be considered as a breach of duty on the part of surrogate mother and the custody must be given to the intended parents. In case of any dispute between the intended parents themselves "the best interest of the child" shall be considered as the criteria to award custody. However, if both parents are equally fit to take care of the child, the genetic relationship" can be considered as the deciding factor.

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CRITICAL LEGAL STUDY OF SURROGACY THROUGH THE VARIOUS FACETS OF NATURAL LAW THEORY

- AHAN GADKARI

"*There is too much at stake to leave the lives of so many millions of Innocents - both women and unborn children - up to mere personal whimsy or political bartering.*"

ABSTRACT

Scholars for surrogacy state that it is supported by the principle of self-preservation. Women who would otherwise be unemployed fine themselves able to procure work. This debate even enters into feminist jurisprudence wherein many scholars state that women have a right to enter into a contractual arrangement for bearing a child and receiving a monetary benefit for their service. Scholars against surrogacy state that every individual has a duty to achieve self-satisfaction and self-fulfilment.[268] The act of surrogacy or hired maternity does not allow the family nor the surrogate to enjoy self-fulfilment. In case of the family, the child is as a result of their choice of extramarital reproduction. In case of the surrogate, her body naturally feels the child is hers, but she knows that it is not. This denies both of them self-satisfaction and self-fulfilment. This debate will be examined by this paper in the case of surrogacy.

The paper will begin by examining the nexus between law and morality and how they intersect even though they are independent. The paper will use Thomas Aquinas' theory of Natural law as stipulated in Summa Theologica. His theories regarding the promulgation of life and self-fulfillment will be critically examined while looking at surrogacy. Criticism for this theory will

[268] Supra Note 2, Q. 3, art. 1, pp. 595-96.

be derived from positive law theorists of differing opinions as well as from positive law theorists.

INTRODUCTION

Surrogacy refers to the process of transferring of maternity from one individual to another, for financial or social gain. It is considered an assisted reproductive technology and has been persistent from the biblical ages. There are many examples through history of this act. However, only in the year 1986, when the Baby M case happened, did this medical process receive some legal grounding. There are two different types of surrogacy methods, genetic and gestational, but both result in the mother relinquishing her parental rights after giving birth thus making it a contractual agreement between the surrogate and the prospective parents.

Scholars for surrogacy state that the principle of self-preservation supports it. Women who would otherwise be unemployed fine themselves able to procure work. This debate even enters into feminist jurisprudence wherein many scholars state that women have a right to enter into a contractual arrangement for bearing a child and receiving a monetary benefit for their service. Scholars against surrogacy state that every individual has a duty to achieve self-satisfaction and self-fulfilment.[269] The act of surrogacy or hired maternity does not allow the family nor the surrogate to enjoy self-fulfilment. In the case of the family, the child is as a result of their choice of extramarital reproduction. In the case of the surrogate, her body naturally feels the child is hers, but she knows that it is not. This denies both of them self-satisfaction and self-fulfilment.

[269] SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, q. 94, a. 2, (2nd. ed. 1920).
[269] Stenberg v. Carhart, 595-96 U.S. 914, (2000).

This paper will examine this debate in the case of surrogacy.

AN EXPLANATION OF THE FACETS OF NATURAL THEORY

Natural theory refers to a school of thought that believes that all law is subordinate to morality itself. Law is not regarded as separate from morality; however, it is beyond the law itself. The sources of moral authority include religious codes, intellectual discourse and the laws that existed naturally. The theory and jurisprudence of law are that if a law is against morality, it should be discouraged, and the law should not be followed. The theory is flawed as it is not true that everyone would ascribe to the same moral code and if there are any conflicts, it will be difficult to decide which morality to ascribe to and what would be a suitable way to solve conflicts.

SURROGACY – NATURAL LAW

Natural law theory consists of many important facets, but the paper aims to focus on the divine aspect of the theory, as according to Aquinas one cannot have a natural law view if one ascribes to atheism. Divine law theory refers to the law that is derived from religious institutions, and the word of god is the law. One of the most famous proponents of this theory is Thomas Aquinas. In his book, the Summa Theologica he uses principles of Aristotle and attempts to glean an explanation of the origin, operation, and purpose of the entire universe. He attempts to explain that the very core foundational basis of rational and comprehensive theories is rooted in the theological system of beliefs that were followed then. His discourse and ideologies are primarily embedded in Christianity as he determines the purpose of man and the working of the universe. Aquinas is a moderately tolerant thinker and believes that non-Christian thinkers are not sinful or corrupt. However, he does explain in his book that true happiness can only be

sought after one aligns his wants and needs with that of the Divine will. Since his theories are rooted in Christianity, it would thus help to note the framework so applied to the context of surrogacy for a divine natural law analysis will be from such perspective. The divine law imposes certain rights and duties amongst human beings, and such rights and duties are necessary to be abided by. These duties are derived from the Vatican Instruction on Respect for Human Life in Its Origin and on the Dignity of procreation.[270] This document basically refutes surrogacy as immoral based on three factors – a violation of certain basic good, violation of personal duties and violation of the rights of others.[271] In this context, the basic goods refer to the unity of marriage and the dignity of procreation of a man.[272] The duties here refer to the mother's love for her child and her duty of fidelity to her spouse, and her own personal fulfilment as a mother.[273] The rights here refer to the child's rights to receive love from his parents and the family's right to stay a family and not be divided.[274] The unity of marriage refers to an institution in of marriage, and surrogacy violates that institution. If the man is married to one woman and the surrogate is not a part of this institution, the result is genetically asymmetrical as the institution of marriage as stated by the Vatican Institutional Framework deems that a child of the marriage is born with genetical symmetry.[275] The vice versa is also true if the woman surrogate is married. This institution believes that there is no violation of marriage if the child is born out of a marriage of two people as they determine that

[270] . *Congregation for the Doctrine of the Faith, Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, reprinted in Pope John XXIII Medical-Moral Research and Education Center, Ethics & Medics (Supp. April 1987), p. 20

[271] Ibid

[272] Ibid

[273] Ibid

[274] Ibid

[275] Ibid, p.18

there is no pleasure attached to it. Furthermore, in contracts that include money as a means or an end to facilitate the process induces violation of the unity of marriage. Therefore, the Church and divine law in this context determine that hired maternity is an immediate and implicit violation of the unity of marriage.

In Catholic teachings, human reproduction needs to meet three requirements to be deemed moral and accord the same with the dignity of a human being. The three requirements are summed in a single sentence as including the unconditional parental devotion between parents and children; the child must not be used as an instrument or means to procure some other goods and lastly the sanctity of marriage.[276] What this essentially means is that hired maternity violates these three requirements, as the parent giving up her child fails at being devoted to her child and no loyalty towards the same. Secondly, the child is here being used as a bargaining chip on the surrogates side to acquire money, whereas the parents who are receiving the child will have essentially "purchased the child" and the child is treated as an object and as a means of acquiring some other purpose rather than an "end in him or herself". Finally, as discussed above, the sanctity of unity of marriage is broken, and hence hired maternity is violative of the three requirements mentioned under the Vatican Instruction.

The violation of duties of a mother essentially refers to her duty to the child as the hired maternity violates the same. The Vatican instruction imposes that a mother needs to love her child unconditionally, but by giving the child up for surrogacy, the mother is in violation of her duty. The spouses also have a duty to each other to ensure that they do not have unilateral disposal of one's fertility as the other party is interested in it by being part of the Institution of marriage. The principle of this teaching is that the family asymmetrically procreates, and the

[276] Ibid

spouse who wishes for unilateral procreation is morally wrong, especially considering the duty of monogamy that these couples owe to each other. Finally, the Vatican instruction imposes a duty to the self, and in case of a surrogate mother, she is alienated from her union with her child despite the bodily experiences that are integral to the experience of her body. They compare the act of surrogacy to that of prostitution and deem the same as depersonalizing and dehumanizing and thus leaves the duty to self, unfulfilled. The concept of hired maternity also violates the rights of the child to have a home with unconditional love from the parents as the child has a right to both his birth parents whose love is grounded in unconditional commitment and creates an environment for love and nurturance. And denial of the same results in grave harm of the psychological sense. Hired maternity as a practice is also violative of the right to have a family united by physical, psychological, and moral factors. The framework is of the opinion that the organic meaning of child, parent and spouse are destroyed, and the relations between such people are devalued. In this divine view, only God can confer morality. The basic understanding is that procreation is one of God's gifts to humanity and making a contract out of the same is not appropriate, as birth becomes no more than negotiation and the motherhood is a commodity in the market. Moreover, thus, in natural divine theory, hired maternity is immoral.

CRITIQUE OF NATURAL LAW THEORY (UTILITARIANISM AND FEMINISM) - SURROGACY

Proponents of surrogacy claim that women finally have an opportunity to work and many liberal thinkers feel that individuals have a right to do whatever they want with their bodies. It is necessary to understand that this is usually the modern perspectives and being a surrogate liberates the individual to have a choice in the way their body is used. Furthermore, the

remuneration of the surrogate means that her efforts as she goes through all this effort to give birth to another child and ensure that some parents cannot have children could be considered moral in a realistic perspective sense. In the utilitarianism theory proposed by Bentham, he states that the choice that makes the most people happy will be the correct and therefore, the moral choice. Consider the example of surrogacy, while there is a contract for money, the parents who have not had children will be able to get children finally. Furthermore, if the surrogate is from a poor background, she will have earned money to get by on her living. The autonomy of granted to the individual is of a great deal as it basically tears down the notion of the idea that the woman is not in control fo her body. Even now, in the USA, the members of parliament debating the validity of abortion are straight white, older men, which is very discomforting to a lot of people. Once again, patriarchal forces are at play in determining what a woman can do with her body and what she cannot. The critique of natural law theory from a utilitarian perspective is that the natural divine law theory fails to consider the personal choices and individual freedoms that could make an individual happy. Instead, the natural law theory sets up a framework that it finds as "legitimate" from its interpretation of religious texts. This is indeed a tragic belief system as it does not actually consider the implications of freedom given to individuals and instead puts forth another system that has its hand in oppressing women. This is where the feminist theory steps in.

Feminist legal theory is based on the belief that law has been fundamental in women's historical subordination, discrimination, and a victim of male oppression. It has two objectives: It seeks to explain ways in which the law played a role in women's former subordinate status, and It is dedicated to changing women's status through a rework of the law and its approach to gender. The term 'feminist jurisprudence' is a substitute for feminist legal theory. It was first used in the late 1970s. "The term was first published in 1978 in the first issue of the Harvard Women's

Law Journal. The foundation of the feminist legal theory was laid by women who challenged the laws that were in place to keep women in their respective places in the home. A driving force of this new movement was the need for women to start becoming financially independent. Feminist legal theorists today extend their work beyond overt discrimination by employing a variety of approaches to understand and address how the law contributes to gender inequality." Liberal Feminism "operates from within the liberal legal paradigm. Liberal Feminism embraces liberal values and the rights-based approach to law, though it takes issue with how the liberal framework has operated in practice." Equality amounts to equal opportunity. Women must have the same legal rights and privileges as men in areas such as suffrage, right to graduate from universities and right to a job. Women are capable of making rational decisions. They realized that despite formal legal assurances, they were not treated equally. Treating everyone equally is the most significant inequality. Reed v. Reed – Supreme Court of United States struck down the law which gave preference to men over women in the appointment of administrators to administer the estate of a deceased man. The Court did not find any "material difference" between the two sexes that allow the State to treat them differently.

Cultural Feminism emphasizes on the significance of gender discrimination and holds that this discrimination should not be obscured by law but should be considered by it. Only by considering differences can the law provide adequate remedies for women's situation, which is, in fact, distinct from men. This, too, focuses on the differences but look at it more positively. They recognize that there are genuine differences between men and women, but the female contribution is not recognized or is undervalued by the male-dominated society. Robin West's 'connection thesis' – women are inherently connected and not mainly separated from the rest

of human life, through pregnancy, sexual intercourse, breast-feeding and menstruation. However, West has critiqued of being an essentialist.

Radical Feminism the other hand It rejects liberal Feminism and views the legal system as a mechanism for the perpetuation of male dominance. "Radical theorists understand gender inequality as a result of an imbalance of power between women and men and believe the law contributes to this subordination of women." Radical theorists see women as a class which is subject to male domination. In the legal context, they try to bring changes in the law to bring up the status of women in society. They differ from the liberal feminists. While the latter ask for getting mixed in the male world, the former demand to see according to their own will and not being defined by the men. "Dominance Approach' by Catherine MacKinnon – abandoning the male idea of equality ad shift attention to the subjugation of women. "Women's sexuality is socially constructed by male dominance, and the sexual domination of women by men is a primary source of the general social subordination of women." According to MacKinnon, the "legal system perpetuates inequalities between women and men by creating laws about women using a male perspective."

Now considering the above theories, it is easy to understand and agree with these theorists who claim that the law serves to exploit the dominance of the ones who hold power upon the meek who do not have access to such power. Take, for example, India till very recently considered adultery a crime only when a man performed it but not when a woman did the same. To the eyes of law and society, the woman does not have her own autonomy to decide to commit adultery and is treated like a piece of property, upon whom the 'men' have all the rights. This is a gross carriage of injustice as it refuses to acknowledge women as an individual with her own thoughts and ideas. Even considering the USA, when the matter of abortion was to be decided in a Tribunal, all the members of the tribunal were white men talking on the authority

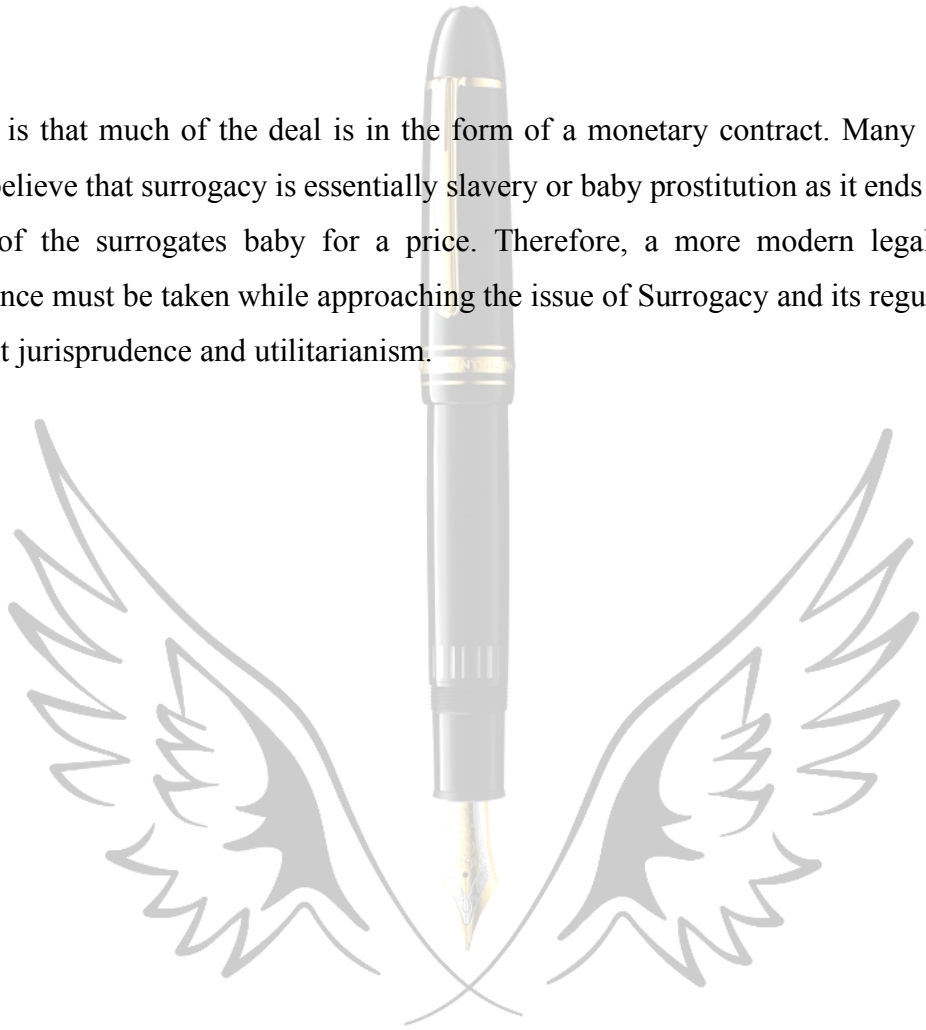
of what a woman could do with her body and what she could not. The legal system and laws are treated as tools of power to enforce upon the minorities, the viewpoints of a sector of society that decides what is wrong and what is right. The law was designed and started out as a means of securing justice. However, if the mechanism itself is made by people who perpetuate injustice, it does not bode well for the tenets of democracy and thereby the law.

The feminist critique of natural divine law is that the theory is regressive as it ascribes to ancient patriarchal notions of jurisprudence determined by the Church and its institutions. Natural law theory refers to the application of theory that has been established not by the human element. However, it can be argued that most of the natural law theory is a product of a vastly male-dominated society. This means that notions of this theory are inherently biased towards the application of such theories to women. Therefore, it is safe to assume that the natural law theory perspective on surrogacy is a very poor interpretation of what an individual is free to do with their bodies, especially women. It is unfair and unequal treatment because the considerations undertaken while explaining the framework, are groundless and biased. It is possible to have a loving marriage with unconditionally loving parents even if there is a genetical asymmetry between the child and his/her parents. Any other assumptions so made by the Church are rooted in deeming surrogacy immoral and deeming any non-organic families as immoral.

CONCLUSION

It is important that the society thus determine the implications of the process of surrogacy, and it must be determined which legal theoretical aspect is to be aligned with considering the current status quo of society. The conclusion that I have arrived at is natural law theory cannot be used as a suitable perspective to regulate the unregulated field of surrogacy due to its outdated nature of thinking. Even though secular natural theorists do exist, the implication of

surrogacy is that much of the deal is in the form of a monetary contract. Many natural law theorists believe that surrogacy is essentially slavery or baby prostitution as it ends up with the "selling" of the surrogates baby for a price. Therefore, a more modern legal theory of jurisprudence must be taken while approaching the issue of Surrogacy and its regulation, such as feminist jurisprudence and utilitarianism.



ANALYSIS OF THE INTERNATIONAL HUMANITARIAN LAW

- SOFIA DASH

ABSTRACT

The International Committee of the Red Cross dictates the Laws of War. Cumulative humanitarian spirit led to the first Geneva Convention of 1864. It encompassed basic limits of how war can be fought and who or what may be attacked and protected. It stated that civilians should not be attacked. Such an act would be declared as a war crime. Furthermore, civilians have a right to receive the help they need.

Moving on, detainees are protected from torture. They must be given food, water, allowed to communicate with loved ones. This protects their dignity. Moreover, medical workers are to help the sick and wounded. The Red cross institute must not be attacked. All sick and wounded must be tended to. Bringing into perspective, advances in weapons and technology have changed the rules of war. Autonomous robots may fight wars in the future. All weapons should and must be aligned with the rules of law.

The International Humanitarian Law (IHL) assists in preserving dignity during times of war. Through this article, we will dive deep into the subject of IHL and analyse its relevance in today's world. The basic conclusion, one will come to, after reading the article would be that although flawed in several manners, variables and factors both known and unknown to this subject, the IHL if followed judiciously and treated with respect is effective in times of war.

INTRODUCTION

International Humanitarian Law, also known as the law armed conflict or jus in bello or simply IHL is a specialized field of public international law which primarily regulates the conduct of parties engaged in an armed conflict.

IHL seeks to limit the consequences of armed conflict and aims to protect individuals, whether they're civilian or military and whether wounded or active. To mitigate the effects of war, belligerent states and other armed groups engaged in the conflict are obliged to conduct hostilities within certain legal boundaries. IHL ultimately seeks to strike a balance between two main underlying principles, the principle of humanity and the principle of military necessity.

-The principle of military necessity permits the use of force that is necessary to achieve the aim of a conflict, but with limits to the expenditure of life and resources.

-The principle of humanity forbids the infliction of suffering, injury or destruction which would be unnecessary to win the war.

These two principles shape the entire body of law and are inherent in most of the more detailed rules stemming from the Geneva Conventions or the Hague regulations. On the basis of the fundamental idea that military necessity needs to be balanced with humanitarian considerations, a few operational principles follow that must be applied by armed groups on the battlefield.

These principles include those of:

1. distinction,

2. proportionality,
3. precautions and the
4. prohibition of unnecessary suffering.

What areas does IHL cover?

Generally speaking, IHL covers two areas or branches known as Hague law and Geneva law.

Hague law restricts the means and methods of warfare. According to these rules, there are certain limitations upon the weapons that can be used in armed conflict, and hostilities can only be conducted in limited ways.
This area is also referred to as the law governing the conduct of hostilities.

Geneva law protects persons in armed conflict, such as military personnel and civilians who are not or who are no longer directly participating in hostilities. This branch of IHL dictates that fighters who have laid down their arms, medical personnel, detainees, civilians and women and children should always be treated humanely and stipulates certain standards on how to treat them. This area is also referred to as the law governing protected persons.

These two branches of IHL draw their names from the cities where the respective treaties were initially codified, the Hague and Geneva. Hague law refers to the Hague Convention of 1899 and 1907 and the laws on the protection of certain individuals were laid down in the four 1949 Geneva Conventions.

A substantial part of IHL has been codified in the revised 1949 Geneva Conventions. Nearly every state in the world has signed and ratified these conventions. They have become one of the most widely accepted international treaty bodies in the world.

Both the Hague regulations and the Geneva Conventions have been developed and supplemented by the Additional Protocols of 1977, relating to the protection of victims of armed conflicts. The protocols aimed to combine these two branches of IHL, and as a consequence, the distinction between Hague law and Geneva law has since become less relevant.

In addition to these key sources of IHL, there are other agreements which explicitly prohibit the use of certain weapons and military tactics, such as the 1980 Convention on Certain Conventional Weapons and its five protocols. Many provisions of IHL are now accepted as customary law which means that they bind all states, regardless of whether these states have rectified their respective treaties.

BRIEF HISTORY OF IHL

From ancient battlefields to industrialized war

War is as old as mankind, and all civilizations and religions have tried to limit its devastating effects by subjecting warriors to customary practices, codes of honour and local or temporary agreements with the adversary. These traditional forms of regulating warfare became largely ineffective with the rise of con- scripted mass armies and the industrialized production of powerful weapons in the course of the nineteenth century – with tragic consequences on the battle- field. Military medical services were not equipped to cope with the massive number of

casualties caused by modern weaponry; as a result, tens of thousands of wounded, sick and dying soldiers were left unattended after battle. This trend, which began with the Napoleonic Wars in Europe (1803–1815) and culminated in the American Civil War (1861–1865), set the stage for a number of influential humanitarian initiatives, both in Europe and in North America, aimed at alleviating the suffering of war victims and driving the systematic codification of modern IHL.

Humanitarian initiatives and first codifications

In Europe, the move towards codification of IHL was initiated by a businessman from Geneva, Henry Dunant. On a journey through northern Italy in 1859, Dunant witnessed a fierce battle between French and Austrian troops and, appalled at the lack of assistance and protection for more than 40,000 wounded soldiers, improvised medical assistance with the aid of the local population. After returning to Geneva, Dunant wrote *Un souvenir de Solferino* (*A Memory of Solferino*), in which he made essentially two proposals. First, independent relief organizations should be established to provide care to wounded soldiers on the battlefield and, second, an international agreement should be reached to grant such organizations the protection of neutrality. His ideas were well received in the capitals of Europe and led to the founding of the International Committee of the Red Cross (1863) and to the adoption by 12 States of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864). The Convention adopted the emblem of the red cross on a white background – the colours of the Swiss national flag inverted – as a neutral protective sign for hospitals and those assisting the wounded and sick on the battlefield. A parallel development was triggered by the atrocities of the American Civil War and led to the adoption by the government of the United States of the so-called Lieber Code or, more accurately, the Instructions for the Government of Armies of the United States in the Field (1863). Although the Lieber Code was

a domestic instrument and not an international treaty, it has influenced the development and codification of modern IHL well beyond the borders of the United States.

Towards universal codification

Since the adoption of these first instruments, the body of treaty IHL has grown in tandem with developments in warfare to become one of the most densely codified branches of international law today.

In 1906, the original Geneva Convention was extended to further improve the condition of sick and wounded soldiers and, in 1907, the Hague Regulations concerning the Laws and Customs of War on Land formulated the basic rules governing the entitlement to combatant privilege and prisoner-of-war status, the use of means and methods of warfare in the conduct of hostilities, and the protection of inhabitants of occupied territories from inhumane treatment. After the horrors of chemical warfare and the tragic experience of millions of captured soldiers during the Great War (World War I), these instruments were supplemented by the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) and, a few years later, a separate Geneva Convention relative to the Treatment of Prisoners of War (1929).

After the cataclysm of World War II, which saw massive atrocities committed not only against wounded, captured and surrendering combatants but also against millions of civilians in occupied territories, the 1949 Diplomatic Conference adopted a revised and completed set of four Geneva Conventions: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), the Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) and the Convention relative to the Protection of

Civilian Persons in Time of War (Fourth Geneva Convention). The four Geneva Conventions of 1949 are still in force today and, with 196 States Parties, have become the most widely ratified treaties.

With the establishment of the United Nations and the consolidation of the bipolar world order of the Cold War, war no longer took place mainly between sovereign States (international armed conflicts), but between governments and organized armed groups (non-international armed conflicts). On the one hand, former colonial powers were increasingly confronted with popular demands for independence and self-determination, resulting in wars of national liberation – from the Malay Peninsula through the Middle East to the Maghreb and sub-Saharan Africa. On the other hand, policies of mutual nuclear deterrence entailed a military stalemate between the United States and the Soviet Union, which in turn resulted in a proliferation of non-international proxy wars between governments and organized armed groups, in which each side was supported by one of the superpowers.

So far, the only provision of treaty law applicable to non-international armed conflicts had been common Article 3, which essentially requires the protection and humane treatment of all persons who are not, or no longer, taking an active part in hostilities. It was only in 1977 that two protocols additional to the Geneva Conventions were adopted to further develop treaty IHL. Additional Protocol I, "relating to the Protection of Victims of International Armed Conflicts," not only improves and clarifies the protections already provided by the Geneva Conventions, it also contains the first systematic codification of IHL governing the conduct of hostilities. It also assimilates certain wars of national liberation against colonial domination, alien occupation and racist regimes to international armed conflicts, thus providing members of the insurgent forces the same rights and privileges as are enjoyed by combatants representing a sovereign State.

Additional Protocol II, "relating to the Protection of Victims of Non- International Armed Conflicts," strengthens and further develops the fundamental guarantees established by common Article 3 for situations of civil war.

At the same time, efforts to avoid unnecessary suffering among combat- ants and to minimize incidental harm to civilians have resulted in a range of international conventions and protocols prohibiting or restricting the development, stockpiling or use of various weapons, including chemical and biological weapons, incendiary weapons, blinding laser weapons, landmines and cluster munitions. Moreover, States are now obliged to conduct a review of the compatibility of any newly developed weapon with the rules and principles of IHL.

Concurrently, State practice has resulted in a considerable body of customary IHL applicable in all armed conflicts, and the case-law of the Nuremberg and Tokyo Tribunals, the ICJ, the ad hoc Tribunals for the former Yugoslavia, Rwanda and Sierra Leone, and, most recently, the ICC has significantly con- tributed to the clarification and harmonious interpretation of both customary and treaty IHL.

Today, after 150 years of development, refinement and codification, the once fragmented and amorphous codes and practices of the past have emerged as a consolidated, universally binding body of international law regulating the conduct of hostilities and providing humanitarian protection to the victims of all armed conflicts. It is precisely at this point of relative maturity that the advent of the new millennium has posed fresh challenges to the fundamental achievements of IHL.

CORE PRINCIPLES OF IHL

1. Equality of belligerents and non-reciprocity

IHL is specifically designed to apply in situations of armed conflict. The belligerents therefore cannot justify failure to respect IHL by invoking the harsh nature of armed conflict; they must comply with their humanitarian obligations in all circumstances.[277] This also means that IHL is equally binding on all parties to an armed conflict, irrespective of their motivations or of the nature or origin of the conflict.[278] A State exercising its right to self-defence or rightfully trying to restore law and order within its territory must be as careful to comply with IHL as an aggressor State or a non-State armed group having resorted to force in violation of international or national law, respectively (equality of belligerents). Moreover, the belligerents must respect IHL even if it is violated by their adversary (non-reciprocity of humanitarian obligations).[279] Belligerent reprisals are permitted only under extremely strict conditions and may never be directed against persons or objects entitled to humanitarian protection.

3. Balancing military necessity and humanity

IHL is based on a balance between considerations of military necessity and of humanity. On the one hand, it recognizes that, in order to overcome an adversary in wartime, it may be militarily necessary to cause death, injury and destruction, and to impose more severe security measures than would be permissible in peacetime. On the other hand, IHL also makes clear

[277]GC I–IV, common Art. 1; CIHL, Rule 139.

[278]AP I, Preamble, para. 5.

[279]GC I–IV, common Art. 1; CIHL, Rule 140.

that military necessity does not give the belligerents carte blanche to wage unrestricted war.[280] Rather, considerations of humanity impose certain limits on the means and methods of warfare, and require that those who have fallen into enemy hands be treated humanely at all times. The balance between military necessity and humanity finds more specific expression in a number of core principles.

4. Distinction

The cornerstone of IHL is the principle of distinction. It is based on the recognition that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy,"[281] whereas "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations." Therefore, the parties to an armed conflict must "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

5. Precaution

The principle of distinction also entails a duty to avoid or, in any event, minimize the infliction of incidental death, injury and destruction on persons and objects protected against direct attack. Accordingly, IHL requires that, "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." This applies both

[280]4 AP I, Art. 35(1); Hague Regulations, Art. 22. For further information, see Françoise Hampson, "Military necessity," in "Crimes of War," webpage, 2011. Available at: https:// web.archive.org/web/20130809183729/http://www.crimesofwar.org/a-z-guide/mili- tary-necessity/

[281]St. Petersburg Declaration, Preamble.

to the attacking party, which must do everything feasible to avoid inflicting incidental harm as a result of its operations (precautions in attack), and to the party being attacked, which, to the maximum extent feasible, must take all necessary measures to protect the civilian population under its control from the effects of attacks carried out by the enemy (precautions against the effects of attack).

6. Proportionality

Where the infliction of incidental harm on civilians or civilian objects cannot be avoided, it is subject to the principle of proportionality. Accordingly, those who plan or decide on an attack must refrain from launching, or must suspend, "any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[282]

7. Unnecessary suffering

IHL not only protects civilians from the effects of hostilities, it also prohibits or restricts means and methods of warfare that are considered to inflict unnecessary suffering or superfluous injury on combatants. As early as 1868, the St Petersburg Declaration recognized:

"That the only legitimate object during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

[282] AP I, Arts 51(5)(b) and 57(2)(a)(iii) and (b); CIHL, Rules 14, 18 and 19.

That the employment of such arms would, therefore, be contrary to the laws of humanity." Accordingly, in the conduct of hostilities, it is prohibited "to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

8. Humane treatment

One of the most fundamental rules of IHL is that all persons who have fallen into the power of the enemy are entitled to humane treatment regardless of their status and previous function or activities. Accordingly, common Article 3, which is considered to reflect a customary "minimum yardstick" for protection that is binding in any armed conflict, states: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." Although IHL expressly permits parties to the conflict to "take such measures of control and security in regard to [persons under their control] as may be necessary as a result of the war," the entitlement to humane treatment is absolute and applies not only to persons deprived of their liberty but also, more generally, to the inhabitants of territories under enemy control.

SOURCES OF IHL

Just like any other body of international law, IHL can be found in three distinct sources: treaties, custom, and the general principles of law.[283] In addition, case-law, doctrine and, in

[283] ICJ Statute, Art. 38(1).

practice, "soft law" play an increasingly important role in the interpretation of individual rules of IHL.

1. Treaty law

Today, IHL is one of the most densely codified branches of international law. In practice, therefore, the most relevant sources of IHL are treaties applicable to the armed conflict in question. For example, in situations of international armed conflict, the most important sources of applicable IHL would be the four 1949 Geneva Conventions, their Additional Proto- col I, and weapons treaties, such as the 1980 Convention on Certain Conventional Weapons or the 2008 Convention on Cluster Munitions. Treaty IHL applicable in non-international armed conflicts is significantly less developed, the most important sources being common Article 3 and, in certain circumstances, Additional Protocol II.[284] Given that most contemporary armed conflicts are non-international, there is a growing perception that certain areas of treaty IHL governing these situations may require further strengthening, development or clarification.

The advantage of treaty IHL is that it is relatively unambiguous. The scope of applicability of the treaty is defined in the text itself, the respective rights and obligations are spelled out in carefully negotiated provisions, which may be supplemented with express reservations or understandings, and the States Parties are clearly identified through the act of ratification or accession. This does not preclude questions of interpretation from arising later, particularly as

[284] Other applicable treaties include the 1998 Rome Statute, the 1954 Hague Convention on Cultural Property and its Second Protocol of 1999, and a number of specific weapons treaties, namely the Convention on Certain Conventional Weapons of 10 October 1980 and its Article 1, as amended on 21 December 2001, the 1997 Anti-Personnel Mine Ban Convention, the 1993 Chemical Weapons Convention, and the 2008 Convention on Cluster Munitions.

the political and military environment changes over time, but it provides a reliable basis for determining the rights and obligations of belligerents and for engaging in dialogue with them on their compliance with IHL.

2. Custom

While treaty law is the most tangible source of IHL, its rules and principles are often rooted in custom, namely general State practice (usus) accepted as law (opinio juris).[285] Such practice has consolidated into customary law, which exists alongside treaty law and independently of it. Customary law does not necessarily predate treaty law; it may also develop after the conclusion of a treaty or crystallize at the moment of its conclusion. For example, a belligerent State may have ratified neither the 1980 Convention on Certain Conventional Weapons nor Additional Protocol I, which prohibits the use of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." There is, however, a universally recognized customary prohibition against such means and methods of warfare.[286] Thus, that State would be prohibited from using such munitions under customary IHL.

The advantage of customary IHL is that it is a dynamic body of law constantly evolving in tandem with State practice and legal opinion. Customary law can therefore adapt much more quickly to new challenges and developments than treaty law, any change or development of which requires international negotiations followed by the formal adoption and ratification of an agreed text. Also, while treaties apply only to those States that have ratified them, customary IHL is binding on all parties to an armed conflict irrespective of their treaty obligations. Customary law is relevant not only where an existing IHL treaty has not been ratified by a State

[285] ICJ Statute, Art. 38(1)(b).
[286] CIHL, Rule 70.

party to an international armed conflict; it is particularly relevant in situations of non-international armed conflict, because these are regulated by far fewer treaty rules than international armed conflicts, as explained above. The disadvantage of customary law is that it is not based on a written agreement and, consequently, that it is not easy to determine to what extent a particular rule has attained customary status. In reality, State practice tends to be examined and customs identified by national and international courts and tribunals tasked with the interpretation and adjudication of international law. The ICRC's extensive study on customary IHL is also a widely recognized source of reference in this respect.

The fact that customary law is not written does not mean that it is less binding than treaty law. The difference lies in the nature of the source, not in the binding force of the resulting obligations. For example, the International Military Tribunal at Nuremberg, in the trials following World War II, held not only that the 1907 Hague Regulations themselves had attained customary nature and were binding on all States irrespective of ratification and reciprocity, but also that individuals could be held criminally responsible and punished for violating their provisions as a matter of customary international law. Similarly, the ICTY has based many of its judgments on rules and principles of IHL not spelled out in the treaty law applicable to the case at hand but considered to be binding as a matter of customary law.

22 23

3. General principles of law

The third source of international law, next to treaties and custom, consists of "the general principles of law recognized by civilized nations."[287] There is no agreed definition or list of general principles of law. In essence, the term refers to legal principles that are recognized in

[287] ICJ Statute, Art. 38.

all developed national legal systems, such as the duty to act in good faith, the right of self-preservation and the non-retroactivity of criminal law. General principles of law are difficult to identify with sufficient accuracy and therefore do not play a prominent role in the implementation of IHL. Once authoritatively identified, however, general principles of law can be of decisive importance because they give rise to independent international obligations.

Most notably, the ICJ has on several occasions derived IHL obligations directly from a general principle of law, namely "elementary considerations of humanity," which it held to be "even more exacting in peace than in war." Based on this principle, the ICJ has argued that the IHL obligation of States to give notice of maritime minefields in wartime applies in peacetime as well, and that the humanitarian principles expressed in common Article 3 are binding in any armed conflict, irrespective of its legal classification and of the treaty obligations of the parties to the conflict. Moreover, the ICTY has argued that "elementary considerations of humanity" are "illustrative of a general principle of international law" and "should be fully used when interpreting and applying loose international rules" of treaty law.

In this context, it would be remiss not to refer to the Martens Clause, which provides that, in cases not regulated by treaty law, "populations and belligerents remain under the protection and empire of the principles of inter- national law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[288] The Martens Clause was first adopted at the First Hague Peace Conference of 1899 and has since been reformulated and incorporated in numerous international instruments.[289]

[288] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 (Hague Convention No. II), Preamble.
[289] Hague Regulations, Preamble; GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158; AP I, Art. 1(2); AP II, Preamble; Convention on Certain Conventional Weapons, Preamble.

While the extent to which specific legal obligations can be derived directly from the Martens Clause remains a matter of controversy, the Clause certainly disproves assumptions suggesting that anything not expressly prohibited by IHL must necessarily be permitted.

4. The role of "soft law," case-law and doctrine

While treaties, custom and general principles of law are the only sources of international law, the rules and principles derived from these sources often require more detailed interpretation before they can be applied in practice. For example, while the law makes clear that IHL applies only in situations of "armed conflict," the precise meaning of that term must be determined through legal interpretation. Similarly, IHL provides that civilians are entitled to protection from direct attack "unless and for such time as they take a direct part in hostilities." Again, a decision as to whether a particular civilian has lost his or her protection depends on the meaning of the term "direct participation in hostilities."

Of course, guidance on the interpretation of IHL can be given by the States themselves as the legislators of international law. This may take the form of unilateral reservations or declarations, or resolutions of multilateral organizations, but also of support for non-binding instruments. Examples of such "soft law" instruments relevant for the interpretation of IHL include the United Nations Guiding Principles on Internal Displacement (1998) and the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

Absent such State-driven guidance, the task of interpreting IHL falls, first and foremost, to international courts and tribunals mandated to adjudicate cases governed by IHL, such as the ad hoc international criminal tribunals established for specific conflicts, the ICC and, of course, the ICJ. In addition, the teachings of the most highly qualified publicists are also recognized

as a subsidiary means of determining the law.[290] Also, in view of the special mandate of the ICRC, its Commentaries on the 1949 Geneva Conventions and their Additional Protocols are regarded as a particularly authoritative interpretation of these treaties.

IHL IN INTERNATIONAL LEGAL ORDER

IHL is that body of international law which governs situations of armed conflict. As such, it must be distinguished from other bodies of international law, particularly those that may apply at the same time as IHL, but which have a different object and purpose. The most important frameworks to be discussed in this context are: (1) the UN Charter and the prohibition against the use of inter-State force; (2) international human rights law; (3) international criminal law; and (4) the law of neutrality. It should be noted that, depending on the situation, other branches of international law, while not specifically discussed here, may be relevant as well. They include the law of the sea, the law governing diplomatic and consular relations, environmental law and refugee law, to name but a few.

1. IHL and the prohibition against the use of inter-State force

IHL governs situations of armed conflict once they arise. It does not regulate whether the use of force by one State against another is lawful in the first place. This function falls to the law governing the use of inter-State force, also referred to as jus ad bellum (or, perhaps more accurately, jus contra bellum), the basic premises of which are set out in the UN Charter and corresponding customary law. Article 2(4) of the UN Charter provides that States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of

[290] ICJ Statute, Art. 38.

the United Nations." In essence, this amounts to a general prohibition on the use of force, or on the threat thereof, in international relations between States. Although irrelevant under IHL, the question of whether the prohibition against the use of inter-State force has been violated is an important part of the legal and political context of any armed conflict involving cross-border operations on the territory of another State.

The UN Charter stipulates only two exceptions to the prohibition against the use of inter-State force. First, Article 51 states that the prohibition does not impair a State's "inherent right of individual or collective self-defence if an armed attack occurs." In essence, this means that a State may lawfully resort to inter-State force in self-defence to the extent that this is necessary and proportionate to repel an armed attack. Second, Article 42 states that the Security Council may use, or authorize the use of, inter-State force "as may be necessary to maintain or restore international peace and security." It must be emphasized, however, that both exceptions derogate only from the Charter prohibition on the use of inter-State force, but cannot terminate, diminish or otherwise modify the absolute obligation of belligerents to comply with IHL (equality of belligerents).

2. IHL and human rights law

While IHL regulates the conduct of hostilities and the protection of persons in situations of armed conflict, international human rights law protects the individual from abusive or arbitrary exercise of power by State authorities. While there is considerable overlap between these bodies of law, there are also significant differences.

Scope of application: While the personal, material and territorial applicability of IHL essentially depends on the existence of a nexus with an armed conflict, the applicability of human rights protections depends on whether the individual concerned is within the "jurisdiction" of the State involved. For example, during an international armed conflict, IHL

applies not only in the territories of the belligerent States, but essentially wherever their armed forces meet, including the territory of third States, international airspace, the high seas, and even cyberspace. According to the prevailing interpretation, human rights law applies only where individuals find themselves within territory controlled by a State, including occupied territories (territorial jurisdiction), or where a State exercises effective control, most commonly physical custody, over individuals outside its territorial jurisdiction (personal jurisdiction). More extensive interpretations of jurisdiction have been put forward that would extend human rights protections to any individual adversely affected by a State, but they remain controversial.

Scopes of protection and obligation: IHL is sometimes inaccurately described as the "human rights law of armed conflicts." Contrary to human rights law, IHL generally does not provide persons with rights they could enforce through individual complaints procedures. Also, human rights law focuses specifically on human beings, whereas IHL also directly protects, for example, livestock, civilian objects, cultural property, the environment and the political order of occupied territories. Finally, human rights law is binding only on States, whereas IHL is binding on all parties to an armed conflict, including non-State armed groups.

Derogability: Most notably, IHL applies only in armed conflicts and is specifically designed for such situations. Therefore, unless expressly foreseen in the relevant treaty provisions, the rules and principles of IHL cannot be derogated from. For example, it would not be permissible to disregard the prohibition on attacks against the civilian population based on arguments such as military necessity, self-defence or distress. Human rights law, on the other hand, applies irrespective of whether there is an armed conflict. In times of public emergency, however, human rights law allows for derogations from protected rights to the extent actually required by the exigencies of the situation. For example, during an armed conflict or a natural disaster, a government may lawfully restrict freedom of movement in order to protect the population in

the affected areas and to facilitate governmental action aimed at restoring public security and law and order. Only a number of core human rights, such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery remain non-derogable even in times of public emergency.

Interrelation: Despite these fundamental differences, IHL and human rights law have rightly been said to share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity."[291] As a general rule, where IHL and human rights law apply simultaneously to the same situation, their respective provisions do not contradict, rather they mutually reinforce each other. Thus, both IHL and human rights law prohibit torture or inhuman and degrading treatment and afford fair-trial guarantees to anyone accused of a crime. In some areas, the interrelation between IHL and human rights law may be less straightforward. For example, with respect to persons who do not, or no longer, directly participate in hostilities, IHL prohibits violence to life and person, in particular murder in all circumstances. For obvious reasons, however, it does not provide such protection to combatants and civilians directly participating in hostilities. Universal human rights law, on the other hand, protects all persons against "arbitrary" deprivation of life, thus suggesting that the same standards apply to everyone, irrespective of their status under IHL. In such cases, the respective provisions are generally reconciled through the lex specialis principle, which states that the law more specifically crafted to address the situation at hand (lex specialis) overrides a competing, more general law (lex generalis). Accordingly, the ICJ has held that, while the human rights prohibition on arbitrary deprivation of life also applies in hostilities, the test of what constitutes

[291] IACHR, Juan Carlos Abella v. Argentina (La Tablada case), Case No. 11.137, Report No. 55/97, 18 November 1997, para. 158. See also ICTY, Prosecutor v. Anto Furundzija (Trial Judgment), IT-95-17/1-T, 10 December 1998, para. 183.

arbitrary deprivation of life in the context of hostilities is deter- mined by IHL, which is the lex specialis specifically designed to regulate such situations.[292] Similarly, the question of whether the internment of a civilian or a prisoner of war by a State party to an international armed conflict amounts to arbitrary detention prohibited under human rights law must be determined based on the Third and Fourth Geneva Conventions, which constitute the lex specialis specifically designed to regulate internment in such situations.

In other areas, the question of the interrelation between IHL and human rights may be even more complicated. For example, while treaty IHL con- firms the existence of security internment in non-international armed conflicts as well, it does not contain any procedural guarantees for internees, thus raising the question as to how the human rights prohibition of arbitrary detention is to be interpreted in such situations.

Finally, even though, in armed conflicts, IHL and human rights law generally apply in parallel, some issues may also be exclusively governed by one or the other body of law. For example, the fair-trial guarantees of a person who has committed a common bank robbery in an area affected by an armed conflict, but for reasons unrelated to that conflict, will not be governed by IHL but exclusively by human rights law and national criminal procedures. On the other hand, the aerial bombardment of an area outside the territorial control of the attacking State, or any belligerent acts committed by organized armed groups not belonging to a State, will not be governed by human rights law but exclusively by IHL.

3. IHL and international criminal law

In regulating the conduct of hostilities and protecting the victims of armed conflict, IHL imposes certain duties on those involved in the conflict and prohibits them from engaging in

[292] ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 8 July 1996, ICJ Reports 1996, para. 25.

certain acts. In order to enforce these duties and prohibitions, IHL obliges all parties to a conflict to take the measures necessary to prevent and repress violations of IHL, including criminal prosecution and sanctions. The 1949 Geneva Conventions and Additional Protocol I also identify a series of particularly serious violations, referred to as "grave breaches" and, in Additional Protocol I, as "war crimes," which give rise to universal jurisdiction. This means that any State, irrespective of its involvement in a conflict or its relation to the suspects or victims in an alleged crime, has an international obligation to conduct an investigation and to either prosecute the suspects or to extradite them to another State willing to prosecute them.

In short, IHL obliges States to prevent and prosecute serious violations of IHL, but it does not attach sanctions to these violations, does not describe them in sufficient detail to make them prosecutable in court, and does not establish any procedures for the exercise of jurisdiction over individual suspects. This is the role of criminal law, whether on the domestic or the international level. In other words, criminal law, in contrast to IHL, does not define the duties of the belligerents, but creates the legal basis needed to prosecute individuals for serious violations of these duties.

Traditionally, the enforcement of IHL at the level of the individual was largely ensured by the belligerent States themselves, through disciplinary sanctions and criminal prosecution under their national laws and regulations. It was at the end of World War II that serious violations of IHL were first considered to give rise to individual criminal responsibility as a matter of international law and were prosecuted as war crimes by the International Military Tribunals in Nuremberg and Tokyo. These trials remained tied to specific contexts, however, and prosecuted only crimes committed by the defeated parties to the conflict. When the UN Security Council established the ICTY and the ICTR in 1993 and 1994, respectively, their jurisdiction was still confined to particular contexts. It was only with the adoption of the Rome

Statute, in 1998, that the international com- munity finally created a permanent International Criminal Court with jurisdiction over international crimes committed by nationals, or on the territory, of a State party to the Statute, or referred to it by the UN Security Council. Today, the Rome Statute has been ratified by more than 120 States; however, a number of militarily important States have yet to do so.

4. IHL and the law of neutrality

The law of neutrality is traditionally regarded as part of the law of war (jus in bello) alongside IHL. It is rooted in customary law and codified in the Hague Conventions, Nos V and XIII, of 1907. In essence, the law of neutrality has three aims: (a) to protect neutral States (i.e. all States that are not party to an international armed conflict) from belligerent action; (b) to ensure neutral States do not militarily support belligerent States; and (c) to maintain normal relations between neutral and belligerent States. Most notably, the law of neutrality obliges neutral States to prevent their territory, including airspace and waters subject to their territorial sovereignty, from being used by belligerent States. If combatants belonging to either party cross into neutral territory, they must be interned by the neutral State; the Third Geneva Convention also requires that they be treated as prisoners of war.[293] The belligerents, in turn, must respect the inviolability of neutral territory and may not move troops or convoys of ammunition or supplies across the territory of a neutral State.

Strictly speaking, the law of neutrality applies only in international armed conflicts. Over the course of time, however, its rationale has gradually found its way into the practice of non-international armed conflicts as well. For example, with regard to the standards of internment to be applied by neutral States to combatants on their territory, the ICRC has formally stated

[293] Hague Regulations, Art. 11; GC III, Art. 4(B)(2).

that Hague Convention No. V "can also be applied by analogy in situations of non-international conflict, in which fighters either from the government side or from armed opposition groups have fled into a neutral State."

By the same token, in political reality, the consequences of non-State armed groups using the territory of a neutral State to conduct attacks against a belligerent State are similar to those foreseen in the traditional law of neutrality and include, most notably, the loss of the neutral territory's inviolability. For example, when attacks were launched by al-Qaeda against the United States from within Afghanistan (2001), by Hezbollah against Israel (2006) from within Lebanon, and by the FARC against Colombia from within Ecuador (2008), all the States that had been attacked conducted cross-border incursions against the groups in question, because their neutral host States were unable or unwilling to protect the attacked States' interests within their territory. The international lawfulness of such cross-border incursions remains widely controversial, particularly in view of the UN Charter's prohibition on the use of inter-State force. However, the basic obligation of States to prevent non-State armed groups within their territory from engaging in hostile activities against other States is generally recognized.

CONCLUSION AND ANALYSIS

The legal and practical difficulties arising as a result of changes in the contemporary security environment have caused confusion and uncertainty not only about the distinction between armed conflict and law enforcement, but also about the traditional categorization of persons as civilians and combatants and the temporal and geographic delimitation of the "battlefield." As most poignantly evidenced by the controversies surrounding the legal framework governing the various aspects of the United States' "war on terror," that confusion and uncertainty have also provoked doubt about the adequacy of existing IHL to cope with the emerging security

challenges of the twenty-first century. In response, various key stakeholders have launched important processes aimed at analysing, reaffirming and clarifying IHL in areas of particular humanitarian concern, including, most recently, the ICRC's initiative on strengthening legal protection for victims of armed conflicts and the joint initiative of Switzerland and the ICRC on strengthening mechanisms for the implementation of IHL. These processes remain ongoing, but preliminary observations can already be drawn from the preparatory work and initial discussions. There may indeed be certain areas of IHL that require further strengthening in order to better protect individuals exposed to contemporary armed conflicts. The most urgent humanitarian need, however, is not to adopt new rules but rather to ensure actual compliance with the existing legal framework.

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THE CRUX OF ENVIRONMENT IMPACT ASSESSMENT, 2020- DRAWBACKS

- SWETA PANDEY & BHUMI AGRAWAL

ABSTRACT

Ever since human evolution, what has remained consistent is the ecological system. Amidst all the developments, humans have found their way of living but what has consistently suffered is the environment. After much outlash and volition incurred by the environment protection organisations, it was undertaken by the Government to have checks and balances to look after issues pertaining to the environment. Initially, there was no express act for the protection and conservation of the environment apart from the Constitutional Provisions. However, after the catastrophic Bhopal Gas Tragedy attention was drawn towards preserving our only abode. The article would take you through the evolution of Environment Impact Assessment ("EIA"), process in India, stressing mainly upon the drawbacks of the current EIA,2020. The study also aims at sensitising people about the process of EIA and its mandates.

KEYWORDS: - Environment Impact Assessment, EIA, environment, drawbacks.

INTRODUCTION

With the pandemic keeping us restricted to the boundaries of our homes, we have experienced and undergone various positive shifts. Apart from these shifts being encountered, a significant improvement is the environment was also witnessed in the lockdown. There was an up-

gradation in the air quality with lesser vehicles on the road, migration of birds took place which was negligible. Mother Nature was rejuvenating during this entire when we were at our homes, however, this rejuvenation was nullified when the draft of the EIA Notification, 2020[294] was introduced. There was a lot of public outrage and backlash which was received upon its release. Two clauses were in conflict primarily, one was where the provisions were arbitrary and in contravention with the parent act, Environment Protection Act, 1986. Another concern was said to be limiting the scope of public consultation and participation in matters relating to the clearance which to be obtained. The EIA, 2020 draft was said to be supporting violations against the environment and in a way encourages violators.

ENVIRONMENT IMPACT ASSESSMENT,2020

History

Before delving directly into the EIA,2020 it is quintessential to have a clearer idea of what an EIA is, its evolution and its functions. The Environment Impact Assessment is a measure to analyse the potential impacts on the environment by a commercial project or development. Views of both the ends are taken into consideration per se. As per the UNEP an EIA as a tool used to identify the environmental, social and economic impacts of a project prior to executing it. Its objective is to predict environmental impacts at an early stage in project planning and design, find remedial measures to bring down these unfavourable affects, shape these projects to suit the local environment, and anticipate and suggest options to policymakers decisions. The EIA receives statutory support from the Environment Protection Act, 1986 which also comprises of the methodologies and procedural aspects related to the EIA.

[294]Environment Impact Assessment,2020 Draft
Source Internet search http://environmentclearance.nic.in/writereaddata/Draft_EIA_2020.pdf

The EIA came into action back in the 1970s when the legislative authorities decided to have a check on the atrocities of the upcoming water projects from an environmental perspective.
The Ministry of Environment, Forests and Climate Change (MOEFCC) notified new EIA legislation in September 2006**.**

- The Notice makes it mandatory for a variety of projects such as mining, thermal power plants, river valley, infrastructure (roads, highways, ports, harbours and airports) and industry, including very small electroplating or foundries, to achieve environmental clearance.
- However, unlike the 1994 EIA Notice, the new legislation has placed responsibility for offset projects on the state government, depending on the size or capacity of the project.

PROCEDURAL ASPECT UNDER EIA

The EIA involves numerous steps to be done before a draft is brought forth the public eye for implementation. These steps involve the following: -

- ❖ Screening of project plan for statutory clearances
- ❖ Scoping the potential impacts and need for scrutiny.
- ❖ Collection of baseline data such as the environmental status
- ❖ Impact prediction of all degrees is carried out in the ambit of the said project
- ❖ Mitigation measures are listed out in the EIA report for probable damages to be mentioned.
- ❖ Public hearing for those living in the vicinity for their consultation.

- Decision making is done by the Impact Assessment Authority keeping in mind the EIA and the Environment Management Plans ("EMP").
- Monitoring and implementation of EMP phases.
- Assessment of alternatives delineation of mitigation measures and EIA reports shall also be made to keep statutory implications at bay.
- Risk assessment which is also a part of the index of the EIA

DRAWBACKS

Upon the release of the EIA Draft of 2020, lot of backlash from the public was received. Not only did environmentalists raised their voices, but many corporate stalwarts expressed their dismay due to the clear violation of judicial principles. Some even termed the EIA, 2020 draft to be a violators rights being protected. The areas recognised to be problematic in the EIA, 2020 draft can be elucidated as follows:-

A) No room for public opinion- One of the primary concerns of the EIA Draft of 2020, is that there was no scope left for the general public to post their environmental concerns. This in a way was violating the Freedom of Speech guaranteed by the Constitution. Furthermore, the draft was not published in other regional languages as mandated earlier.

B) Backs Illegal Functions- The draft of EIA again poses a threat to the environment at large as it allows heavy industries to function illegally without having procured an environmental clearance before approving the project. The word project is being used as an umbrella term to cover activities such as mining, mineral extraction etc.

C) Arbitrary Power for Strategic Projects- Initially, the projects under Strategic categories were only limited to National Security and Defence ventures, however, under the current regime it

also brings under its ambit projects in coastal areas, wetlands etc. The term strategic projects refer to non-disclosure of the details related to its commercial and infrastructural developments.

D) Defies the Three Pillars of Aarhus Conventions- The new EIA draft is blatantly going against the three pillars of the Aarhus Convention, by recategorizing the industries, thereby discouraging public consultation, by releasing the problem only in one language, thereby limiting the access to information and lastly, limiting their access to justice by taking away their power of reporting violation.

E) Amendments in the Ecologically Sensitive Areas- Ecologically Sensitive Areas essentially means areas such as wetlands, marshals and grasslands. As per the past EIA, 2006 there shall be no developmental projects in the vicinity of the area as they are home to various indigenous plants and animals. But the present EIA, 2020 draft removes such protection given to these areas. Such an amendment is in no way progressive and defeats the importance of preserving our ecosystem.

COMPARATIVE ANALYSIS OF PREVIOUS EIA WITH THE CURRENT DRAFT EIA.

With the outbreak of Covid-19, many natural changes were witnessed like Ozone layer is getting repaired[295], Flamingo birds returned to Mumbai after a long time[296], etc and this all changes have made humans realise how much damage they cause to the Ecosystem. The Environment Impact Assessment is a tool in the hands of humans to strike a balance between ecosystem and their existence. Therefore, it can be said that it gives a chance to people to protect the ecosystem in the best way possible so that everything can co-exist peacefully. The Environment Protect Act, 1986 mandates the government to enact EIA notifications to be adhered to by the organisations. Various EIA notifications were passed in India, firstly in the year 1994[297] then in the year 2006[298] and now a draft EIA has been proposed in 2020.

EIA notification derives its powers from the main legislation, Environment Protection Act, 1986, which can also be referred to as the parent act. The EIA notification is drafted by the executives through the principle of delegated legislation; however, it is mandatory to lay the

[295] Ozone layer repairing, redirecting wind flows, new study says, Global news, Source Internet Search https://globalnews.ca/news/6734991/ozone-layer-repairing-wind-flows-study/

[296] Flamingo birds turn Mumbai city pink amid lockdown blues, The Economic Times, Source Internet Search https://economictimes.indiatimes.com/news/environment/wild-wacky/watch-flamingo-birds-turn-mumbai-city-pink-amid-lockdown-blues/videoshow/75500670.cms

[297] Environment Impact Assessment notification, 1994, Source Internet Search http://www.kspcb.gov.in/Acts-Rules/EIA-Notification-1994.pdf .

[298] Environment Impact Assessment notification, 2006, Source Internet Search http://www.environmentwb.gov.in/pdf/EIA%20Notification,%202006.pdf

bill or any notification, if made via delegated legislation, before the parliament[299] and this EIA notification has not been presented before any of the houses of parliament.

On 11th April, 2020, the EIA 2020 notification had been published by the Ministry of Environment, Forest and Climate Change (MOECC), inviting the public to express their views and opinions over the same. In order to allow people to express their views over the draft notification, considering the diverse language speaking population in India, the draft must have been released in various regional and vernacular languages. However, the draft had only been released in Hindi and English.

The new EIA 2020 removes certain types of industry which were earlier in category A and places the same in category B2. The industries I category A requires the approval to be obtained from MOECC and category B2 requires approval from the state. By putting these industries in the B2 category implies that these industries now lie out of the scope of public consultation. However, the method of public consultation was introduced, primarily, keeping in mind the democratic and socialist preferential nature of the country. This new notification, however, has made the above- mentioned changes in order to speed up the process and also to encourage decentralisation. The state government is further advised to timely dispose of the proposals and also to inculcate technology, if required, while doing so.

Furthermore, the draft has introduced the concept of post-facto environment clearance for coal and non-coal mineral prospecting. This implies that these industries can start working before getting the environment clearance licence from the respective government and can obtain the licence later.

[299] *Narendra kumar v. Union of India,* Supreme Court of India, AIR 1960, SC 430

Additionally, the industries in the previous EIA notification were supposed to submit two reports pertaining to their compliance with the environmental laws, this has however been limited to only one report via the new 2020 draft.

Earlier public also had the power to report non-compliance or any violation but in the new draft this power has been taken from the public and now only the violator, promoter, government authority, appraisal committee or regulatory authority can report.

Therefore, it can be inferred from the changes made in the new EIA that the legislature is trying to ease the laws relating to environmental protection and conservation.

The United Nations Economic Commission for Europe held a convention, popularly known as the Aarhus Convention, which was signed on 25th June 1998. This main objective of this convention was to encourage public participation, access to justice and access to information in matters relating to the environment, these are considered to be the three pillars of this convention. This convention was ratified by countries in Europe and Central Asia mainly. It must be noted how beautifully the European Union is following this convention by enacting laws that encourage public participation in decision making in matters relating to the environment. One such law is the water framework directive[300], which aims to achieve freshwater bodies in the European Union.

SUGGESTIONS:

I. The legislature needs to realise that there is a need for laws that creates a feeling of responsibility amongst the people towards the environment. Instead of relaxing the laws, stricter laws should be implemented that would deter people from committing any offence against nature.

[300] Directive 2000/60/EC

II. India must look at how the European countries are enacting laws relating to environment and accordingly the laws must be incorporated in our countries.

III. A regular environmental check must be done and the reports must be published so as to make the people also realise how much damage we are causing to the environment. Guidelines to reduce such damage must also be communicated from time to time.

IV. The failure for submission of environmental control report was found on the part of the river valley, hydroelectric and thermal power projects. These projects, if handed negligently, can cause very damage to the environment. Therefore, greater liabilities need to be imposed on the industries that can cause serious damage to the environment.

V. Recently, in the gas leak at LG Polymers, Vishakhapatnam[301], the environmental ministry informed the National Green Tribunal that the unit lacked environmental clearance licence. This implies low effectiveness of laws in India and therefore, stricter penal consequences must be introduced.

VI. Furthermore, a draft document should be made mandatory for submission to the chambers of parliament; this will not only increase accountability, but also filter out loopholes, if any, before it is published.

VII. Patents ensuring lesser environmental abuse shall be given incentives through which the traditional method of doing things change and modern eco-friendly methods are used which would allow to contribute in saving the environment

[301] LG Polymers: Was negligence behind India's deadly gas leak?, BBC News, Source Internet Search https://www.bbc.com/news/world-asia-india-52723762

VIII. An independent EIA authority shall be created free from political or commercial influence. Furthermore, these authorities shall also be under judicial scrutiny and free from bias.

CONCLUSION:

Industrialisation is a primary concern for infrastructural development but along with it, attention shall also be drawn towards the repercussions to the environment in the backdrop. There is a need to strike a balance between the two or else the entire human race will have to pay a heavy cost for even leading their lives with basic available necessities. Development and environmental concern should go hand in hand in order to attain sustainable development to the peak.

Whatsoever be said, the eye of the public spares none. Therefore, it is imperative that the public shall be active in putting up trivial questions to the legislative. Due to this public backlash, the environmentalists were encouraged to work towards the amendments for the betterment of our environment at large. There shall be a harmonious balance between the ecosystem and development.

WOMEN'S RIGHT TO ABORTION: A COMPARATIVE STUDY

- **APARNA SUBRAMANIAN**

1.1. INTRODUCTION

The 1994 International Conference on Population and Development's (ICPD) Programme of Action calls the governments to strengthen their commitment to women's health by addressing unsafe abortion, to ensure access to abortion when legal, and to guarantee all women quality post-abortion care.[302]

Women's ability to access safe and legal abortions is restricted in law or in practice in most countries in the world. In fact, even where abortion is permitted by law, women often have severely limited access to safe abortion services because of lack of proper regulation, health services, or political will. At the same time, only a very small minority of countries prohibit all abortion. In most countries and jurisdictions, abortion is allowed at least to save the pregnant woman's life, or where the pregnancy is the result of rape or incest.[303]

As the World Health Organization (WHO) has recognized, restrictive abortion laws do not reduce the number of abortions—instead, they force women to seek out clandestine and unsafe abortions, which jeopardize their lives and their health. Today, unsafe abortion still accounts for roughly 13 percent of maternal mortalities, resulting in approximately 47,000 maternal

[302] *Johanna B. Fine, Katherine Mayall, and Lilian Sepúlveda,* The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally, Health and Human Rights Journal (February 4,2020, 16:10 p.m.), https://www.hhrjournal.org/2017/06/the-role-of-international-human-rights-norms-in-the-liberalization-of-abortion-laws-globally/

[303] Abortion, Human Rights Watch (February 4, 2020, 15:43 p.m.), https://www.hrw.org/legacy/women/abortion.html

deaths from unsafe abortion annually worldwide. In some countries, the percentage of maternal deaths resulting from unsafe abortion is much higher, accounting for upwards of 30 percent.[304] Right of abortion is a complex topic considering the fact that most of the countries believe that abortion deprives the rights of the unborn. This conflict between women rights and rights of the unborn child has resulted in occasions where the women have faced human rights violations.

The question here is whether right of abortion is a basic human right guaranteed to a woman and whether it can be brought under the framework of Fundamental Rights under Part III of the Indian Constitution. India having a patriarchal society is one such nation where women rights are still ignored. Gender equality is still an issue. As such it can be seen people and the government are still reluctant to talk about reproductive rights of women.

1.2. RIGHT TO ABORTION: WORLD SCENARIO

The right relating to privacy, right to reproductive autonomy, right to self-determination etc. was discussed first in the case Roe v. Wade[305]. In this case court held that women's right to reproductive autonomy is an absolute right. This case was however discussed in the light of ethics. Court considered the question whether women can take decisions regarding child in womb. The church was against abortion and contraceptives. Court however held that women have the choice to decide whether to get pregnant or not and what to do after getting pregnant.

[304] ICPD AND HUMAN RIGHTS: 20 years of advancing reproductive rights through UN treaty bodies and legal reform, Abortion, UNFPA (February 4,2020, 16:13 p.m.), https://www.unfpa.org/sites/default/files/pub-pdf/icpd_and_human_rights_20_years.pdf

[305] 410 U.S. 113 (1973)

In another case, Planned Parenthood v. Casey[306], question was whether while going for abortion is the consent of the other parent necessary. Court held requirement of consent does not interfere with a woman's right to reproductive autonomy.

With Roe v. Wade case being decided in USA, most of the nations across the globe started discussing the rights of women regarding reproductive autonomy.

In England, evolution of laws prohibiting abortion is understood as a by-product of Victorian ideologies and social concerns which prominently aimed at illicit sexual relationships. During the Victorian age, women were treated like goods and there were numerous cases of their sexual exploitation. Banning abortion was considered as method to control these activities. With England establishing their power over India, it is not surprising to see the fact that their age old law crept into the Indian system.

In R v. Bourne[307] it was observed that there was no provision for carrying out abortion even in case of rape induced pregnancies. The doctor in this case was arrested for performing abortion without adhering to the legal provisions.

As a result, U.K. constituted a committee for looking into the provisions of abortion. The committee submitted its findings in 1939 which suggested for medical termination of pregnancy by medical professionals in specific cases such as rape induced pregnancies, threat to health of mother, abnormality in child in womb etc.

In 1967, U.K. saw the enactment of Abortion Act which permitted medical termination of pregnancy till 24th week of pregnancy. India is currently planning on adopting a similar provision.

[306] 505 U.S. 833 (1992)
[307] 3 All E. R. 615 (1938)

1.3.RIGHT TO ABORTION: INDIAN SCENARIO

1.3.1. Sections under Indian Penal Code

IPC 1860 uses the word 'miscarriage' to refer to abortion. Sections 312 to 316 under IPC deals with miscarriage. Section 312 of IPC talks about the act of causing miscarriage. Even a woman who causes herself to miscarry is included. Punishment is imprisonment up to 3 years and fine. The only exception to this section is when miscarriage is caused in good faith for the protection of mother's health. If the woman is quick with child, punishment is imprisonment up to 7 years and fine. Section 313 deals with a situation where miscarriage is caused without the consent of the woman.

Under IPC there are two kinds of miscarriages being discussed. One with the consent of the woman and the other without her consent. The sections that deal with miscarriage caused without the consent of the mother even leading to her death are favourable to women as they provide a legal protection against forceful miscarriage. In a country like India, where female foeticide is extremely common, these provisions under criminal law help in regulating miscarriages done with an aim to abort the female child.

However, the provisions that prevent a consenting woman from miscarrying is to be looked into. IPC in general considers miscarriage an offence and allows it only to protect the mother from any harm to her health. Here, we can see that women's right to abortion is being completely overlooked. It is not a matter of right but rather a last resort.

IPC was enacted in 1860 and this view could have originated from the British who banned abortion during those days. It is necessary to however note that no change in ideology has taken place even though India now speaks about gender equality.

1.3.2. Medical Termination of Pregnancy Act 1971

This act does not legalise abortion. It also does not guarantee right to reproductive autonomy to women. However, this Act is important as it decriminalises abortion done by medical professionals in certain situations.

Medical termination of pregnancy can be done only by registered medical practitioners in places that are authorised by regulations.

Medical termination can be done as per the following conditions:

- If pregnancy is below 12 weeks, a woman can opt for MTP with opinion of one doctor.
- If pregnancy exceeds 12 weeks and is below 24 weeks, two registered medical practitioners should approve the termination.

As per Section 3 of the Act, medical termination of pregnancy should be done in good faith and considering the physical and mental health of the mother.

The difference between IPC and MTP Act is that in the former only physical health of the mother is considered while in the latter both physical and mental health of the mother is taken into account.

Situations that are said to affect the mental health of the mother includes:

- Rape induced pregnancy
- Failure of contraceptive measures in case of married women
- Very little age gap between children

Rape induced pregnancy till 20 weeks of conception can be terminated if court finds that it causes mental agony to mother. Failure of contraceptive pills is applicable only in case of married women and this cannot be a ground for stating mental health has been affected in case of unmarried women. Interestingly frequent pregnancies are also considered to cause mental agony to women.

When considering the status of unmarried women, it can be seen that they are not protected under MTP Act 1971. Indian community as such is not in support of living relationships however, the fact that a lot of couples nowadays prefer this kind of system especially in the metropolitan areas and thus this need should also be considered.

MTP Act provides legal medical termination only up to 20 weeks. Thus women are not permitted to terminate pregnancy after 20 weeks. Such a permission is granted only in cases where mother's life is in danger. Here, women's right to reproductive autonomy is ignored as medical termination of pregnancy is not considered to be an absolute right.

In India, various cases saw this discussion at the judicial level though no such enactments have been brought into place.

In X v. Union of India[308] court held that the decision to have abortion is the absolute right of the woman. In Ms Z v. State of Bihar[309] too this decision was taken by court. However, in another case it was held that reproductive autonomy is not a fundamental claim of the woman. In Minor R Deepakala v. District Collector[310], Madras High Court looked into various factors. It was found by court that this was neither a case of rape nor caused any mental agony to the mother. It was a healthy pregnancy and medical termination was requested at the 12th week. Doctor refused to do MTP and court held that doctor was justified to deny MTP. This case is a classic example of how MTP Act provides no reproductive autonomy to the woman. MTP can be seen to be a method to be adopted only in grave issues.

Medical Termination of Pregnancy (Amendment) Bill 2020 proposes to increase the maximum time period from 20 to 24 weeks for medical termination of pregnancy. This amendment is a

[308] Writ Petition No. 14173 of 2017
[309] Appeal (Civil), 10463 of 2017
[310] Writ Petition No. 24250 of 2018

result of the fact that physical, mental and chromosomal disability in children can be identified only in the 19th week and the period of termination being only till 20 weeks causes great mental agony to the mother. Moreover, it becomes extremely difficult for the woman to get permission for termination of pregnancy.

1.4. PRESENT SCENARIO

In the U.S, under the previous Trump Administration, a lot of the states saw anti-abortion laws being passed by the governments which portrayed a negative approach considering U.S.A. was one of the first few countries in the world that recognised right to reproductive autonomy.

In India, with contemporary issues like gender equality and right to privacy creating a shift in thinking, the government has been forced to reconsidering the existing laws on abortion and related issues which has also led it to consider the time limit prescribed under MTP Act for termination of pregnancy. Even though a slight change has occurred, Indian law still has a long way to go.

1.5. CONCLUSION

"No woman can call herself free who does not control her own body."

-Margaret Sanger

The matter of right to abortion is a conflicting topic as rights of women seems to clash with rights of the unborn child. While looking into the issue from a legal point, it is all about right to equality. When considering the issue from an ethical or a social perspective, the situation changes. There comes the conflict between rights of mother and the unborn child.

In India, with the judgment in Puttuswamy v. Union of India[311], right to privacy is a fundamental right. Patients' rights over method of treatment has gained wider scope with this decision. Also the decision in Common Cause v. Union of India[312], has brought in the need to discuss bodily autonomy, self-determination and right to have a choice.

Regulation on abortion can also not be out rightly criticised as India is a country which is largely known for female foeticide. With our nation being gender biased, control on pre-natal diagnosis tests and abortion leading to female foeticide is in a way positive. However, the fact that Indian women do not have reproductive autonomy even after Wade's decision in 1970s is disheartening.

[311] Writ Petition (Civil) No 494 of 2012
[312] 5 SCC (2018)

CRITICAL ANALYSIS OF RE- INHUMAN CONDITIONS IN PRISONS

- HARSHITA BHATT

"Law and order exist for the purpose of establishing Justice and when they fail in this purpose, they become the dangerously structured dams that block the flow of Social progress."

MARTIN LUTHER

ABSTRACT

The initiation of Human Rights activism and an increasing need for an integrated criminal justice system has added fuel to the already very strong issue of prisons reforms in the backdrop of several directives issued by the apex court. In Re-Inhuman Conditions in 1382 Prisons. In the Past, there have been many attempts to improve the condition of Prisons in India but unfortunately nothing come into views to have changed on the ground. The paper has a two-pronged approach; firstly the paper will critically examine the present case in the light of issues related to the cases which are mentioned in the Supreme Court order and issues customary in India's prison management system and then progress to conduct a reality check with respect to the implementations of these directives and other modern steps undertaken in this direction. Finally, the paper concludes with the suggestions and conclusion of the author drawn from the analysis made in the article along with the recommendations of various governmental and non-governmental organizations.

INTRODUCTION

Prisons have existed in India for time immemoria1; however, with the suitable passage of time, the conditions of prisons and their administration have gone through a significant change, outstanding shift from deterrence theory of punishment to reformative theory. Prisons through the ancient times were governed mainly by Manu, Yagnava1kya and Kautilya. The punishments awarded at that time were quite different from those days in present such as by shaving off head, ride on donkeys, garland of shoes on neck etc. These were most1y focused on humiliation of accused and also as such there were no proper record or upholding of prisons Prison reforms have been the subject matter of symposium rendered by the Court from time to time over the last 35 years. Even though Article 21 of the Constitution require a life of dignity for all persons, but the state of affairs today has appeared to be more critical and a mass consideration is required to this[313]. Instead of these issues being resolved are getting more complicated, not only for the humans treated as animals in prisons but also for the administration looking forward to them.

Back in 1980, the Court had occasion to deal with the rights of prisoners [314]In that decision, this Court gave a very palpable answer to the question with regard to the prisoners at liberty to fundamental rights while in custody, although they might have violated the fundamental rights. The court held that prisoners being human beings have all such rights.

In another case Court has abandoned the hands-off doctrine and it has been ruled that fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration[315]. Court has its own opinion that prisoners are

[313]Francies Corale Mul1in vs. the Administrator, Union Territory of Delhi & others", the Supreme Court explained the ingredients of personal under Article 21.
[314] Sunil Batra (II) v. Delhi Administration (1980) 3 SCC 488
[315] In Batra case, (1978) 4 SCC 494 1978 Indlaw SC 289

peculiarly and doubly handicapped. Firstly, a few things are common in most of the prisoners that they belong to the weaker segment, in poverty, literacy, social station and Secondly, the prison house is isolated world which is impossible for them to communicate to the human world, which results that the bonded inmates are invisible, voices inaudible, justices unheeded. In another case in 1997 [316] the court identified nine issues regarding prisons where they need reforms. The court tried to draw immediate attention toward the problems but unfortunately nothing happened.

In 2000 in another case[317] the court advocated a positive approach where they pointed out that there could be several factors that lead a prisoner to commit a crime but nonethe1ess a prisoner is required to be treated as a human being who is entitled to all the basic human rights, human dignity and human sympathy .Further it was pointed out that this philosophy has persuaded the Courts in a series of decisions to project the need for prison reforms.

Former Chief Justice of India R.C. Lahoti on June 13th .2013 , informed the Chief Justice of India P.Sathasivam through a letter drawing attention to the poor inhuman conditions of prisoners in jails after reflecting to the Graphic story appearing in a newspaper.

Further this letter was registered as Pub1ic Interest Litigation and notice was issued to other related appropriate authorities after obtaining list from other Attorney General. Later on 13th March ,2015 the Social Justice Bench passed an order to the Union of India to investigate and go through the prob1ems related to the overcrowding in prisons and alternate to resolve this. An order dated on 24th April 2015 with a detailed information of prisoners under trail who have been over crowded in jails was issued, the Bureau of Police Research and development was informed by the Ministry of Home Affairs to review the Modern Prison Manual within 3

[316] In Rama Murthy v. State of Karnataka (1997) 2 SCC 642
[317] T. K. Gopal v. State of Karnataka (2000) 6 SCC 168

months. Thereafter a direction was issued to ensure the Under Trial Review Committee is established in all districts to dismiss the matter within a month considering the guidelines in manual.

4th August ,2015 NALSA filed a compliance report on how the districts and state legal authorities should take steps to help the other prisoners who are not been able to furnish their bail bonds and to move appropriate applications on their behalf. The Bench issued an order on 18th September, 2015 and the order was passed on 16th October ,2015

29th January ,2016 a progress was made by on executing the guidelines and was circulated to all the States and the Union territories where further addition was also made to take steps in case of offences that are compoundable .It ensured that the steps should be taken to compound the offences so as to reduce the overcrowding the jails.

Perhaps, after all the discussion, decisions and thereafter changes made in the order finally an outcome was initiated by all the states and union territories in its execution. The aforesaid sum and substance discussion is evidently put forward that prisoners, all human beings deserve to be treated with dignity and not like animals.

ISSUES RELATED TO THE PRISONERS

The chain of issues have been constantly been increased since the year 1980 but formally these issues had been categorised and clubbed together so more attention drawn by the government toward the problems that can be solved together or which issues have the same solution.

In 1980 in the case *Rama Murthy v. State of Karnataka*[318] this Court identified as many as nine issues facing prisons and needing reforms. They are:

[318] (1980) 3 SCC 488

- over-crowding;
- Delay in trial
- Torture and ill-treatment
- Neglect of health and hygiene
- Insubstantial food and inadequate clothing
- Prison vices
- Deficiency in communication
- Streamlining of jail visits
- Management of open air prisons.

Over the years these issues had no solution critically the situation got worst and later on the attempt to suicides and natural deaths was grown too much which required immediate attention towards it. Thereafter the letter that was filed as PIL through the former Chief Justice of India which drew attention by the courts and forced to SUO MOTO this and to reform the provision. In 2013 when the letter was sent to the Chief Justice of India by R.C. Lahoti there were four main issues pointed out that was

- Overcrowding of prisons
- Unnatural death of prisoners;
- Gross inadequacy of staff
- Available staff being untrained or inadequately trained.

On 5th February 2016 issue of overcrowding was done but the second issue of unnatural deaths was still reliable on the information of National Crime Records Bureau (NCRB) which was unclear in the deaths that was caused naturally and deaths caused unnaturally in prisons.

It was considered that the unnatural deaths can also be caused due to non facility of medications to the prisoners that could be lack of proper management as well.

Another classification was given by the NCRB which had as category of "others''. The court was unclear about the fact of this category that would all could be included in this category?

Attention was drawn by the *amicus* of the court to the Guidelines on Investigating Deaths in Custody by the International Committee of Red Cross (ICRC) it gave court the solely distinction between the "natural'' and 'unnatural" death it said that the death is to be considered to be natural when is solely caused by disease and/or aging process and it is unnatural is it is caused by any external ,such as intentional injury like (homicide /suicide) like unintentional (death by accident) or negligence.

The court have considered these guide1ines and have persuaded this to the Central Government and to the other States as well.

TRIAL REVIEW COMMITTEE ORDINANCE AND PROCEDURE

In several districts across the country, the persons in who are not produced before courts and are kept in custody for days together is the reason for bad mechanism of under trail committees . This happens even at the stage where the charge sheet has still not been filed. There are many cases with undesirable reasons where the accused was produced before the court after arrest and was remanded to custody but thereafter was not produced on several dates meant for remand. The reasons given for the same are generally non availability of sufficient number of armoured vehicles and of personnel to produce the persons in custody before the courts and that at times the accused are required to be produced in other courts. This is also contrary to the mandate of Code of Criminal Procedure and also violates the basic rights of the persons in

custody as enshrined in the Constitution and in several landmark cases and most importantly is an impediment to their liberty. Due to non-production of the persons in custody before the courts at regu1ar intervals, the courts are unable to consider whether the persons in custody are facing any problems. Legal representation to them cannot also be ensured in such circumstances due to uninformed of the presence of such cases

Certainly, the people in jails tend to languish in jails while the app1ications of bail are moved on their behalf and also in the cases where they have been provided with the bail bond and still not been informed the status of their bail. Therefore, there should be certain ways to figure out the awareness between the person accused and the legal services provided to them where they are aware of their rights and legal status of their cases.

Sphere of Justice: A National Report [319]on Under Trial Review Committee was published and it was denoted with regards to the conditions of jails and the treatment given to prisoners, an initiative made by the CHRI aiming to compliance with the directions of Supreme Court.

In this case RE- inhuman conditions in prisons the Supreme court made in its order on 24th April ,2015 directed the NALSA along with MHA and SLSA's to ensure that the UTRC is formed in every district of the country and also to ensure that they meet quarterly to report their work and records timely.

UTRC is district level committee headed by the District & Sessions Judge, with District Magistrate and Superintendent of Police and Secretary, The court relied on the MHA advisory issued on 17 January 2013 for the purpose of imp1ementation of S.436A of the Code of Criminal Procedure, 1973 the court mandated these committees to review the cases of [320]under

[319] This article is an extract from the 'Circle of Justice: A National Report on the Under Trial Review Committees'.

[320] National Crime Records Bureau's Prison Statistics India 2015

trials who are unable to furnish surety after being granted bail by the court and of those accused of compoundable offences

NEED FOR UTRC:

The condition of prisoners in India are chronically overcrowded, this certainly need to be improved. Sixty seven percent of India prisons population comprises under trials those who are awaiting or are undergoing trials and not yet proven. Since 2006 to 2015 there had been an average increase of 15% in under trial population. Prisoners awaiting the trails have to wait longer than a decade which could have been released on bail earlier cause the trails are taking to too long to complete. In 2001, 19% spent more than a year in prison awaiting trail now this has increased and come to 25% .The proportion of prisoners who have spent less than a three months in person has decreased from 40 to 35 percent in 2015.

OBSERVATIONS:

The findings show only 149 districts out of 357 districts which responded held meetings within three months and therefore 60 percent of the districts did not comply with the mandate of holding quarterly meetings with unidentified reasons. Only 54 districts reviewed all the three categories of under trial cases. This essentially means that 85 percent did not follow the full mandate as directed by the Supreme Court.

UTRCs in 16[321] states recommended 2112 cases for release which led to the release of 515 under trials. This report finds follow-up action by the UTRCs to track the implementation of their own recommendations of release to be weak. Therefore, it becomes difficult to assess the

[321] Andaman & Nicobar Islands, Bihar, Chandigarh, Chhattisgarh, Dadra & Nagar Haveli, Daman & Diu, Delhi, Goa, Haryana, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Maharashtra, Meghalaya, Mizoram, Odisha, Puducherry, Punjab, Rajasthan, Sikkim, Tamil Nadu, Telangana, Tripura, Uttar Pradesh & West Bengal.

number of beneficiaries and the impact of the functioning of UTRCs leaving the circle of justice incomplete. Overall, only few states are able to perform well under these directions.[322]

CHRI's report provides detailed recommendations to full potential of this powerful multi-agency mechanism since every case would require a follow up unique to the circumstances of the case, period of detention, and offence allegedly committed also quarterly UTRC meetings should be supplemented with monthly.

Based on the good practice of reviewing additional categories of cases by the various UTRCs it is recommended that the mandate must include the following cases of undertrials who

- do not have a lawyer and are eligible for legal aid
- Have not been physically produced for the last two consecutive hearings due to lack of police escorts.
- who charged with offences punishable with death sentence, and thus are beyond the purview of section S.436A CrPC.

PRISON ADMINSTRATION IN INDIA

As we all know that crime rate in India is escalating at a rapid pace. But adequate facilities are not provided to the prisoners in our country to accommodate them for a decent living inside the prison. Even though there are certain rules and guidelines concerning prison system and administration, many of them are not enforced properly due to the prevailing condition of prisons in India. Various surveys state that roughly 80% of the prisoners are under trial prisoners, and the balance 20% includes people who are convicted of various offenses as well as women prisoners. The present condition of numerous of the prisons is that the prison authorities are unable to meet requirements of the prisoners. In the light of such situation, it

[322] An extract from the Supreme Court order dated 3 October 2016 in W.P. (Civil) No. 406 of 2013 titled 'Re-Inhuman Conditions prevailing in 1382 Prisons in India

can be stated that it leads to an infringement of the fundamental rights of prisoners to a great scope prisoners have undergone various unwell treatments and negligence from the part of the prison authorities. *Neena Rajan Pillai v. union of India*,[323] wherein this case, Court was of a view that there is a clear case of violation of fundamental rights for the deceased from the part of prison authority, and it 1ead to the death of the deceased. The court also stated that during such situations wherein urgent medical assistance is required for the prison inmates, basic arrangements may be made without any setback or else it may lead to an infringement of the right to life under Article 21 0f the Constitution[324].

RIGHTS OF PRISONERS

As we know that India is a democratic country, each and every person is entitled to certain fundamental rights depending upon the nature of his living this also includes prisoners who are of main concern here are, they are denied of certain rights available to other citizens in our country. There are other rights also been provided exclusively to the prisoners which include [325]

- Right to speedy trial
- Right against solitary confinement, handcuffing and bar fetters and protection from torture
- Right to meet re1atives, friends and consult legal practitioner of his choice
- Right to reasonab1e wages in prison
- Right to expression
- Right for reasonab1e health care

[323] Neena Rajan Pillai v. Union of India WP (c) 1894/1998. Retrieved on :https://indiankanoon.org/doc/1524596
[324] https://blog.ipleaders.in/analysis-prison-administration-rights-prisoners
[325] Retrieved on : http://www.legalserviceindia.com/articles/po.htm

Therefore prison and prison administration plays a foreseeab1e role in the criminal justice administration system in India. Various crimino1ogists have stated that no one in this world born as criminal, but his economical and socia1 desires or backgrounds make him a criminal under this pressure of words such it has to be stated that the prisoners as well as the prison administration has to be changed in such a way that they shou1d not feel secluded in this society. Vacancies in the prisons staff from the note of learned Amicus Curie, it was found that once again there is a litt1e interest being shown by prison authorities and state Governments to recruit staff in prisons. This of course, to have its own impact on the prison administration. Also to remove this prob1em they need to recruit and train good men and this could only be done by the administration and their proper functioning of system toward this at 1ast there must be a hope in the mind of prison that they also can change themselves and be a part of advance in their society. Proper food, shelter, health care treatment and 0ther such basic necessities must be fulfi1led by the concerned prison authorities in order to make the prisoners a creative group of the society after their period of confinement.

However, there emerge a need of introducing Open Prison System in India.

OPEN PRISONS

Society must strongly condemn crime through Punishment, but brutal deterrence is a fiendish folly and is kind of a crime by Punishment. It frightens never refines it wounds never heals."[326]

The concept of open prison was general1y taken by the United Nations on Ne1son Mande1a Rules for the treatment of prisoners their rights and liberty .Open prison plays a two fo1d purpose of eliminating criminals from society and reformation of offenders under institutional

[326] Words by Justice Ayer in his order dated 17.02.2017

treatment by covering out conditions which in the first place turned them to 1aw violators it is a new position in the jurisdiction where it gives freedom to the prisoners, better environment for survival and does not exile the convicts from society. It also ensure better efforts and measure for protecting the rights and dignity of the prisoners and to faci1itate the goal of their reformation and rehabi1itation in open jails there is much liberty given to the prisoners in case of families, allowed to find employment, here prisoners are allowed to go out for work and have to be back into the premises by the time as allotted.

ORIGIN OF OPEN PRISON:

The establishment of the first open prison was in Switzerland in 1891, followed by United States in 1916, Britain in 1930, and Netherlands in 1950. By the time of 1975, the number of open prisons in England were 13, in the United States were 25, 4 in Sri Lanka and the Australia was also estab1ished with 4 open prisons, 3 in Hong Kong, 2 each in New Zealand, China, Japan, Malaysia, Pakistan, Philippines and Thailand, and 23 in India [327]

CURRENT SITUATION IN INDIA

In India currently, there are 69 Open Jai1s out of which Rajasthan (29), and Maharashtra (13) having the highest number. As per the data of 2015 [328]Open prisons have 3786 prisoners out of which 2227 prisoners are in the Maharashtra and Rajasthan prisons which is almost 60% of the total prisoners in the open prisons are determined in two states. Apart from this many states have an open prison but do not have room for any prisoners. The reasons for this is

[327] http://tinkatinkaprisonreforms.org/notes-on-open-prisons-in-india/
[328] NCRB Data on Number of Jails in India.
https://data.gov.in/resources/stateut-wise-and-jail-type-wise-number-jails-their-location-and-video-conference

overcrowding and at the same time under-uti1ization could be because the Jails are a component of the state list and hence a col1aborative loom cannot be adopted by the states where the concept of Open Jails are prisons without boundaries and cells[329].

ADMISSION FOR OPEN PRISON

There were certain eligibi1ity criteria for admission to open prisons that varied from state to state. The main conditions are:[330]

- Prisoners should be wil1ing to abide by the rules of open prisons
- They should be physically and mentally fit to work
- They should have been sentenced for terms of one year or more and must have spent at least one fourth of the total term of imprisonment in jail
- They shou1d have record of good behaviour in prisons
- They shou1d not be below 21 years or above 50 years as prescribed by the state
- They shou1d not have been convicted for certain types of crimes (like dacoity, forgery, counterfeiting, etc.)
- They shou1d not have any case pending in the courts
- [331]They should not be habitual offenders

ADVANTAGES OF OPEN PRISON

[329] https://blog.ipleaders.in/open-prison-part-jail-reforms-india/
[330]https://www.worldwidejournals.com page 577
[331] https://data.gov.in/resources/stateut-wise-and-jail-type-wise-number-jails-their-location-and-video-conference

The concept of Reformative Punishment does not support the traditional inhuman jai1s with bars but is more moderate and supports the concept of open prisons, which is a trust-based prison with minimum security.[332] Therefore, later the trail experiments of open jai1s it had worked so we11 in many aspects that they are being adopted by many states some of the common advantages are:

- They he1p in reducing overcrowding in jails.
- The construction cost is fairly reduced
- The operational cost of open prisons is far less than he enc1osed prisons.
- engaging inmates of open air prisons in productive work reduces idleness and keeps them physically and mentally fit
- Open prisons offer opportunities for se1f-improvement and re socialisation to the inmates.
- The taking away of prisoners from general prison to an open prison aided in preservation of natural resources and widens the range of rehabilitative process

Perhaps, the scheme of open jails for prisoners is in essence based on the twin system of probation and parole which have gained popularity as correctional techniques of reformation in modern penology.

CRITICISMS OF OPEN JAILS IN INDIA

[332] Ghosh. Open Prisons and Inmates- A socio-psychological study.https://books.google.co.in/books
NCRB data on Number of prisoners in Open Jails In India
https://data.gov.in/node/3086521/download

- Under-uti1isation of the Open Prisons, despite the heavy overcrowding in the closed prisons open prisons is si11 vacant. The capacity to accommodate 25776 prisoners are higher as compared to the accommodation been provided to 3786 prisoners current1y.[333]
- The prisoners in most states are se1ected by a committee, which leads to little or more partiality and corruption because they have no accountability over them.
- There is no provision of Open Jails to under trial prisoners.
- Inadequate Open Prisons in every state. Some states are reso1ute with Open Prisons while some just have one and also no Union Territory in India has an Open Prison. This inequa1ity exists among different states due to the state subject list.
- Open Prisons are the only rehabilitative prisons in India this also favour only a diminutive number of convicts. in order to reduce the amount of custodial death there is a need for more rehabi1itative provisions for other convicts[334]
- The rules and laws governing the se1ection and administration are extreme1y old and thus unfit for the present situations.

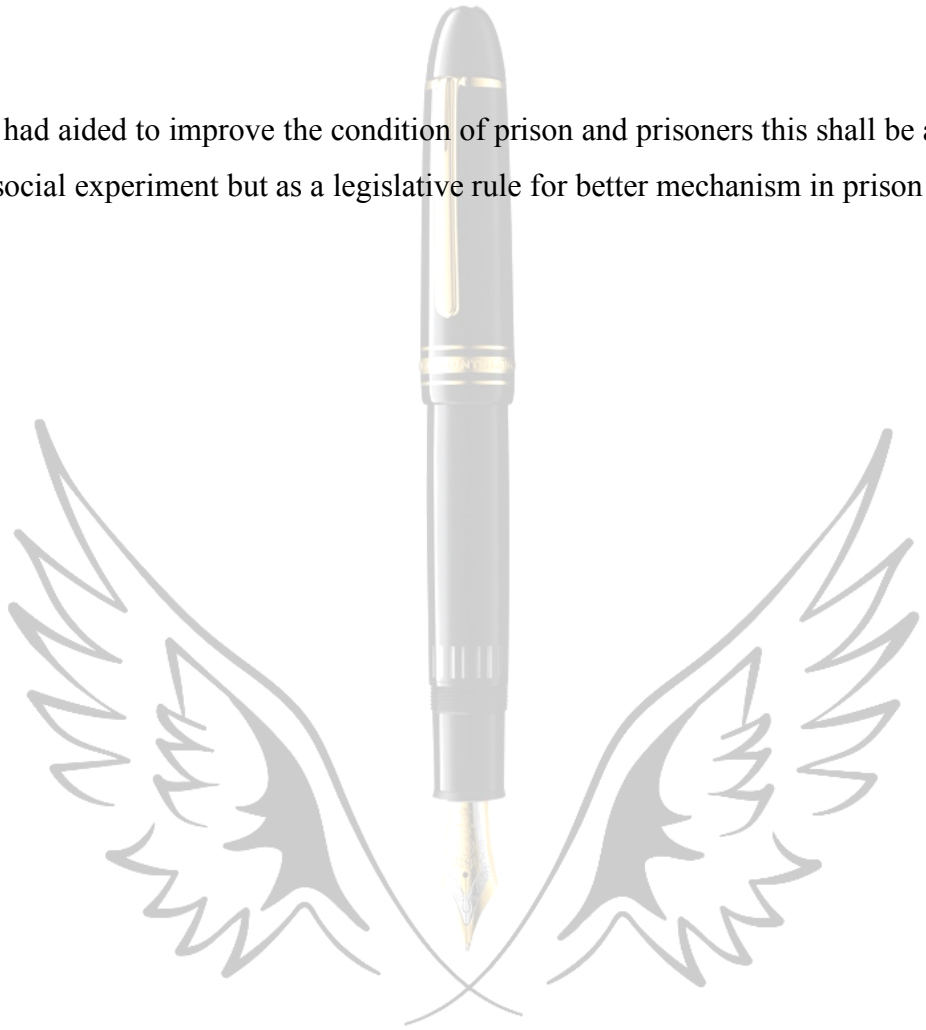
CONCLUSION

Prisoners are just those human beings who are getting convicted for their crime; this does not deny them the rights of being human. They shall be treated as an equal citizen who lives with

[334] Reformative Theory of Punishment. Raw octopus blog. https://www.lawctopus.com/academike/reformative-theory-of-punishment/

freedom in the country. Prison is just a confinement to the movement of the physical activity of those human beings; this is just done for the purpose of treating their bad activity against certain punishments by the state. Certainly, this also affects the mental health of a human being including where there are people accommodated out of limits in one space this also gives a major affect to the human nature. Coming over the problem of overcrowding which gives the root to other issues such as unnatural deaths, mental illness. Custodial deaths are another issue that was raised in the NHRC report, for this certain recommendation was also given by the NHRC to resolve this issue. New reforms shall be made to remove them casualties by the administration which had been recommended by the UTRC under the standard operating provisions. But this till far does not give anyone permission to treat them with cruelty, dishonour, irrationally, ruthlessly, or hurt them with any physical or mental injury. To avoid this kind of circumstance the staff members are given trainings and manuals, on clearing certain examinations they are hired which had been mentioned in training manuals by Bureau of Police Research and Development. This is applicable to both men and women therefore, whereas women with children shall be provided with extra medical facility during the period they are in prisons with their children. It was different in earlier times where number of women criminals was less but today this has also increased by the countable numbers where they also need to have proper rights and facilities available to them as per the recent changes made by the recommendation of Nelson Mandela Rules. During all the issues being critically analysed and being resolved there was one major experiment to change the status of prison from closed to open. This did not only help in solving the problem of overcrowding but also aided the prisoners to improve themselves in a better way and does not disconnect them from the social world. This experiment had changed a lot of point of view of the many people and authorities.

Since this had aided to improve the condition of prison and prisoners this shall be adopted not only as a social experiment but as a legislative rule for better mechanism in prison reforms.



INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS: AN INTERFACE

- VARUN AGRAWAL

CHAPTER-1: INTRODUCTION

Both Intellectual Property Rights and Human Rights have evolved greatly on their own with the changing times. Intellectual Property Rights are rights which provide ownership to the creators in a particular subject matter. These rights provide incentives to the individual of societies to contribute to the technological and intellectual advancement of the country. For example, right of patent can be nearly termed as a monopoly right, granted for a limited duration of time. Whereas, Human Rights are such natural rights which are fundamentally linked to the concept of human dignity and are endowed upon each living individual.

Thus, though once the two scopes of law were alien and strangers to each other are now overlapping. With the changing paradigms, the activities in both the fields can be traced mapping one another. There are various kinds of links between IPR and Human Rights. For example, the patent laws recognize that both the interest of patent holder and that of society has to be taken into consideration, therefore patent rights are granted for a specified time period, after which the Intellectual property falls within the public domain. Thus, it can be said that these Intellectual Property Rights include both economic and moral aspects.

Debate over the relationship between both the spheres of law has been a tense one. On one side is a coordinated coalition of developed countries, MNCs, trade associations that advocate that growth and development of economy is possible only through by rationalizing and following the stringent rules of Intellectual Property. On the other side, is an alliance, which though less

coordinated, screams for distributive justice, especially the ones which are fundamental to every living individual like life-saving medicines, educational materials, seeds and resources to farmers in poor and underdeveloped countries.

1.1Intellectual Property in Human Rights Instruments

There has always been a controversy with respect to the place of property rights in human rights bills and treaties. The reason of such controversy is twofold; first, it is difficult to include property rights in the ambit of human rights, as these are recognized as something inherent and fundamental to human beings, second, there are several debates with respect to the position of property rights in society.

On one hand, property rights provide a sense of security and help in the realization of other fundamental rights like right to privacy. However on the other hand, the negative side entails that property rights creates division and unequal distribution of wealth in the society. It creates such ownership rights which do not have any legitimate reasoning behind it.

However, property rights and intellectual property rights are treated differently in human rights instruments. "Thus, while property rights are addressed at Article 17, culture and science come up at Article 27 in the context of the socioeconomic rights recognized in the Universal Declaration. Further, the right to property was not included in the ICESCR while the rights recognized under Article 27 were substantially incorporated in Article 15(1) of the Covenant."[335]

Both UDHR and ICESCR are important from the point of view of culture and science-related provisions. "Article 15 of the Covenant reads as follows:

1. The States Parties to the present Covenant recognize the right of everyone:

[335]Universal Declaration of Human Rights, Arts. 17, 27, available at http://assets.wwfindia.org/downloads/human_rights__ipr_in_trips_era_3.pdf.

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."[336]

Thus, this Article clearly provides different sets of rights with respect to cultural and scientific development, and that everyone is entitled to the same. However, it also provides that special incentives have to be given to the authors so as to encourage more such technological advancement.

This Article applies both at national and international levels. The dissipation of benefits of science and technology has to be ensured at national level in a way, where the govt. ensures equal access to all of such resources and at international level that such advances are to benefit the world as a whole community, i.e. is to people of all countries.

1.2 Statement of Problem

One of the basic and outstanding features of Indian Constitution is that it provides to its citizens certain basic fundamental rights, such as right to live with dignity. This right to live with dignity means to live with and attain better standards of living. It includes within its ambit the right to access to medicines as well. However, with the stringent IP laws in force at both national and international level, somehow the fundamental rights and Intellectual Property Rights, stand in conflict with each other.

This project focuses on the clashing interest of Intellectual Property Rights and Human Rights. It provides that the instruments dealing with IP Rights also find such rights stemming from human rights. It is the right of the author/creator to benefit from the interests, both moral and

[336]International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 15(1), available at https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

material, provided by the product. This right stems from right to dignity of an individual, and is important in order to encourage more such contributions to science, technology, literary and artistic work in the society. However, when such contributions form an essential part upon which, the rights of others depend, it becomes difficult to offer protection to such rights. For example, patent of life-saving drug harms the fundamental rights of others and affects their rights to access to medicines.

1.3 Research Objectives

1. To understand how Intellectual Property Rights stand in conflict with Human Rights.
2. To analyze the enforcement of TRIPS Agreement in the Indian Context.
3. To understand Right to Health in light of Intellectual Property Rights in Indian context.
4. To understand the concept of Traditional Knowledge and how bio-piracy is affecting the communities in India and worldwide in realization of their human rights.
5. To develop an understanding of culture with respect to Intellectual Property Rights.

1.4 Research Questions

1. Due to the emergence of which issues, the once stranger scopes of Intellectual Rights and Human Rights, stand in conflict with each other today.
2. How is TRIPS in contravention of the human rights?
3. What are the effects of enforcement of TRIPS in the Indian Context, with respect to right to access to medicines?
4. What is the concept of Compulsory Licensing and how is it an exception to the rights provided by Patents.
5. What is Traditional Knowledge? How has India defended its claims of bio-piracy by other countries?

1.5 Research Methodology

The Doctrinal method of research has been used for conducting this research. The researcher has relied upon secondary sources like books, bare acts, articles, journals, reports, newspapers, etc. The source of internet has also been used by the researcher for a better understanding of the issue.

1.6 Scope of Study

The scope of this research deals with how Intellectual Property Rights stand in conflict with and affects the human rights of others, like right to health, right to culture, etc. The study also deals with the effects of amendment in Patents Act to bring it in conformity with International standards of TRIPS Agreement.

It provides an interface of IP rights and economic, social and cultural rights. The research also aims to provide a human rights approach to effect the realization of IP rights, access to benefits of science, medicine and technology so that no individual is wronged by the implementation of such rights.

CHAPTER-2: THE TRIPS AGREEMENT: HUMAN RIGHTS IN INTERNATIONAL IP SYSTEM

In the arena of strengthening Intellectual Property Rights, the TRIPS Agreement has been the most controversial, yet most effective international agreement. It was adopted in 1994, and "unlike the Paris and Berne Conventions, the TRIPS Agreement came with legal teeth."[337] However, not all countries have benefited equally from the agreement. The developing countries had to make several changes in their domestic legislation to stand in conformity, which has seriously affected the realization of human rights in such countries. "TRIPS oblige

[337]Ruth L. Okediji, Does Intellectual Property need Human Rights?,http://nyujilp.org/wp-content/uploads/2019/01/NYI101.pdf.

countries to provide patents in all fields of technology"[338], therefore due to such obligations, medicines have to be patented as well, this makes a direct impact on their accessibility and affordability.

The Doha Ministerial Conference Declaration[339] stressed on the overlapping areas of IP and Human Rights. It recognized the gravity of the issue by taking into consideration the lack of resources available with the less developed countries to afford and provide access to medicines to fight HIV/AIDS, malaria, etc. "The main contribution of the Ministerial Conference was that it agreed that the TRIPS agreement should not prevent members from taking measures to protect public health. It affirmed that the agreement should be implemented in a manner that is supportive of World Trade Organization (WTO) member's right to protect public health."[340] However, such a declaration could not act as a binding force, and the governments of several less developed countries face various patentability issues with Pharmaceutical companies.

India finally adopted the TRIPS obligations in 2005 through Patents Amendment Act, 2005. The amendment provides for product patents, which has made serious implications on the price of medicines in India. Before this, companies were permitted to make generic versions which provided for cheaper drugs, but now since the product has been patented, it cannot be manufactured through any other cost-effective technique.

CHAPTER-3: RIGHTTO ACCESS TO MEDICINE: INDIAN CONTEXT

[338]International Environmental Law Research Center, Intellectual Property, available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1020&context=stusch_lawrev

[339]DOHA WTO MINISTERIAL 2001: TRIPS, (Wt/Min(01)/Dec/2), Declaration on the TRIPS agreement and public health , http://docsonline.wto.org/DDFDocuments/t/WT/min01/DEC2. doc.

[340]Id.

Indian Constitution provides to its citizens certain fundamental rights, like right to life, personal liberty, etc. The spirit of Indian Constitution is in its fundamental rights, and that no action can deprive the citizens of their fundamental rights. However, there is an overbearing force upon India to provide for more stringent and effective implementation of IP regime. India has been time and again criticized for its lack of protection to patents owned by various MNCs. The Supreme Court of India has interpreted Article 21 to include within the scope of right to life the right to live with dignity and better standards. Therefore, the Supreme Court has interpreted Art.21 to provide for the right to 'access to medicine' to all its citizens. This has also been provided under International Human Rights standards.

3.1 Indian Patent Amendment Act (2005) and Access to Medicines

India had to finally adopt the obligations laid down in TRIPS in its domestic legislations and therefore the amended 2005 Act came into force. The Act provides for product patent and forbids the practice of Reverse Engineering, through which the same drug could be manufactured through a different process at a cost-effective way, thus making it affordable. "One news channel reported that India has finally moved from price driven mentality to a proprietary technology driven mentality."[341]

The act has not only provided for product patents to pharmaceutical giants, but has also made changes in the definitions of 'new invention', 'Inventive Step', and 'Pharmaceutical Substances'. The new inserted definitions have certain technicality loopholes which can be exploited by the companies to have ever-green of Patents. This is likely to increase cost of drugs, thus making it inaccessible to people belonging to lower strata of society.

[341] See Jeffrey D. Hsi, Patent Law in India Focuses Strongly on R & D, 25 Genetic Engineering News 16 (September 15, 2005).

Section 2(1)(ja) of Patents Act defines inventive step: "inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in that art."[342] This definition provides room for loopholes and confusion, which can be abused by the applicant in obtaining patent over a technical invention that just has economic significance.

Another section that is controversial and has opened room for more loopholes in the act is, section 3(d). It provides that "the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant, is not an invention.

Explanation.—For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy."[343]

Thus, this allows patenting of an already existing substance, with a minor change, say for example, by addition of a salt, the new substance thus obtained can be patented.

Though by following strictly the regime for protection of Intellectual Property, India's economy and foreign investment will receive a boost, but at the same time it will be done at the cost of life of those who cannot afford such patented products, and also at the cost of fundamental rights of rights of its citizens.

[342]The Patents (Amendment) Act, No. 15, Acts of Parliament, 2005.
[343]Id.

3.1.1 Compulsory Licensing

As per general parlance, the patent holder has sole right over the product for a given time period, and the same product cannot be exploited by others without his prior permission. But, the exception to the rule of patent is Compulsory License granted by Controller General granted without the permission of patent holder. Section 84-92 provide for compulsory licensing.

"As per Section 84, any person, regardless of whether he is the holder of the license of that Patent, can make a request to the Controller for grant of compulsory license on expiry of three years, when any of the following conditions is fulfilled –

1. the reasonable requirements of the public with respect to the patented invention have not been satisfied
2. the patented invention is not available to the public at a reasonably affordable price
3. the patented invention is not worked in the territory of India."[344]

Also, such a compulsory license can be suo moto granted by the Controller under the circumstances of "national emergency, extreme urgency or in cases of public non-commercial use."[345]

3.1.1.1 Cases pertaining to Compulsory License:

1. ***Natco Pharma Ltd. v. Bayer Corporation***[346]

This was the first case in India where the Controller granted the compulsory license to Natco Pharma, to manufacture a life saving drug "Nexavar" utilized for treating cancer of kidney and liver. The drug was sold by Bayer Corporation at an exorbitantly high and unaffordable price of Rs 2.8 Lakh for per month dosage. The Natco Pharma Co. offered to manufacture the drug

[344] Id. Section 84
[345] Id. Section 92
[346] Natco Pharma Ltd. v. Bayer Corporation, 2012 (50) PTC 244.

and sold it at Rs.9000. Thus, such a decision was made keeping in mind the benefit of general public and to make available and accessible the drug to all sections of the society.

2. BDR Pharmaceuticals Pvt. Ltd. v. Bristol Myers Squibb[347]

This case emphasized the point that before making the application for grant of compulsory license, the applicant should have first approached patent holder and only after the failed attempts to obtain such a license from the holder, can Controller grant Compulsory License. Also, no prima facie case was made by the applicant for grant of relief under section 87 of the Act.

Thus, it can be concluded that rights of patent holders cannot be disturbed until a strong prima facie case has been established which clearly depicts the need for access of such product in the beneficial interest of the public.

CHAPTER-4: TRIPS, TRADITIONAL KNOWLEDGE AND BIO- PIRACY IN INDIA

Traditional Knowledge is defined under Art.8(j) of Convention on Biodiversity as "Each contracting Party shall, as far as possible and as appropriate:

Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and +involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices."[348]

[347] M/s. BDR Pharmaceuticals International Pvt. Ltd v. M/s. Bristol Myers Squibb Company … Patentee C.L.A. No. 1 of 2013 Decided on October 29, 2013.

[348]Convention on Biological Diversity 31 ILM 8182, Art. 8(j), https://www.cbd.int/traditional/.

Traditional knowledge is possessed by the local people of a community, passed onto them by their ancestors. This is a specialized knowledge that exists with the locals of a community about the traditional use of resources for various sustainable living patterns, such as for medicines, cooking, and other day to day activities.

This traditional knowledge has lately been exploited by the big MNCs by manufacturing such products out of this knowledge, which they later get patented. Thus, the communities are deprived of the economic advantages they have the right over. These MNCs not only exploit the knowledge available with the community by manufacturing products out of it, "but also fail to acknowledge the source and even pass off productions and works as authentic expressions or products when they are not."[349]

Amongst the others, bio-piracy is one of the huge threats to Traditional Knowledge. "Bio-piracy generally refers either to the unauthorized commercial use of biological and or associated technical knowledge from developing countries or to the patenting of spurious inventions based on such knowledge or resources without compensation."[350]

Piracy is known as the unauthorized use of the work of the author/creator. Bio piracy is exploiting the traditional knowledge to obtain such products which are later on patented by the corporations, and without even compensating or giving the credit where it is due. In the recent past there have been cases where such traditional knowledge pertaining to medicinal value of plants and herbs have been exploited by the corporations, and patented. This deprives the communities of the developing countries their right to revenue and profits out of such knowledge possessed originally by them since generations.

[349]TRIPS and Human Rights: The Case of India, Subramanya Sirish Tamvada, TRIPS Related Aspects of Traditional Knowledge, 33 Case W. Res. J. Int'l L. 233, 249 (2001), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1020&context=stusch_lawrev

[350] Id.

4.1 Case Studies

1. Turmeric

It is a plant grown in India and has been used as a spice, for textile dyeing and also for medicinal properties since decades. The USPTO granted a patent for "the use of turmeric in wound healing."[351] India challenged it on the ground of violating the traditional knowledge of communities of India, and that the invention is not novel. The CSIR had to produce journal published in 1953 and Sanskrit ancient texts to prove the same. The USPTO cancelled the patent, citing that the patent was not novel and that it was traditional knowledge primarily existing in India, and old practice followed there.

2. Neem

It is one of the many trees, traditionally and widely grown in India. The tree has several medicinal properties and has been used for treating a varied range of issues like diabetes, ulcers, skin diseases, etc. It is since time immemorial that Neem has been used as a toothbrush in various households, both rural and urban, and Indian toothpaste market has been flourishing with its properties ever since. However, the USPTO granted a patent of both product and process to an individual using Neem extracts. On being opposed vehemently by India, that it is a traditional knowledge and already existing as a practice in India, and thus lacks novelty, the patent was withdrawn.

CHAPTER-5:ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND IP/HUMAN RIGHTS INTERFACE

[351] Shubha Ghosh, Globalization, Patents and Traditional Knowledge, 17 Colum. J. Asian L. 73, 90 (2003-2004).

5.1 General Comment No. 17

This chapter focuses on Art.15 of International Covenant on Economic, Social and Cultural Rights and its implementation by ESCR Committee. The said committee has adopted a General Comment 17 in 2005 which provides for a strong authority on Art.15(1)(c). This comment is an authoritative and important document with respect to the relation between Art.15(1)(c) and the other rights provide for in the Covenant.

Art. 15(1) (c) states that:

"The States Parties to the present Covenant recognize the right of everyone: 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."[352]

Thus, at the very beginning the committee recognizes the personal rights of the author or creator of the work, be it scientific, literary artistic, etc. It acknowledges that the creator of the work has a right to benefit from it in terms of moral and material interests. The committee seeks to point out that this is a human right of the author. The committee thus, contrasts the human rights with the IP rights by sighting this logic and puts forth the idea that "it is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c)."[353]

The committee has also broadened the scope of works through which authors can claim moral and material interests. It includes the indigenous knowledge and the practices possessed by local communities as well.

[352]International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 15(1)©, available at https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

[353]General Comment No. 17, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 35th Sess., U.N. Doc. E/C.12/GC/17 (2006).

However, the committee has put a restriction as to who can be an author. The General Comment states that no legal entity can be an author. The committee through this approach wants to reiterate the human rights point of view. However, the short coming of this point of view is that it has become very difficult to distinguish the work of an individual with that of the corporation under which it works. Also, the corporations or firms enjoy the same rights and privileges with respect to the safeguarding of the interests as that of a real person. In today's world, it is the big corporations and fewer individuals who hold the patents. Thus, it becomes difficult to differentiate between the two.

Also, on further analysis of the General Comment, the question raised is with respect to the other sub-sections of Art.15. There is a relation between all the three sub sections of Art.15(1). Therefore, all the sub sections have to be read in harmony with each other. Sub-section (a) and (b) provide a wider interpretation as compared to what has been provided under (c). This relationship is of significant importance, as this is the example and structure of balance that has should have been maintained between IP rights and Human Rights. The Committee has rather decided to focus only upon Art.15(1)(c) and not sub sections (a) and (b). This makes a negative impression about the priority of the rights enshrined under Art.15, and thus makes the harmonization of IP rights and Human Rights even difficult to comprehend.

5.2 Alternative reading of Art.15(1)(c)

Thus, there should be an alternative interpretation of Art.15 (1) (c) based on the following principles:

1. The protection should be accorded to the least advantaged in the society, and that is how human rights should be interpreted. Thus, Art.15(1)(c) should begin with the protection to the interests of traditional knowledge holders, who are time and again abused by the IP regime through bio-piracy.

2. Protection to such contribution in knowledge should take into account if such a product has prospects for commercialization or not.
3. The protection under this provision shall only be given to those who are not benifitted by the other existing rights available for the same subject matter.

There needs to be protection of traditional knowledge, which will further the goal of Intellectual Property rights-based approach. The question that arises is, whether traditional knowledge the same as knowledge contributed through literary, scientific and artistic work? Also, if no, should it be accorded the same protection as other Intellectual Property? "Since, traditional knowledge is often not individually held and because it progresses incrementally"[354] it should not be accorded the same status as that of other IP. Thus, though the concept of benefit sharing, traditional knowledge can be preserved and thus can be accorded similar protection as that of other IP.

Thus, traditional knowledge can be protected with a human rights approach. The same can be done through following ways:

1. Signatory parties to ICESCR should recognize and acknowledge that traditional knowledge falls within the scope of Art.15(1) (c), to uplift the most suppressed and disadvantaged communities. This can be done through a formal General Comment.
2. Negotiations and discussions on benefit sharing and other aspects of Traditional Knowledge should not be done merely keeping in mind the state's economy.
3. Every state shall, at national level, determine and identify the various forms of traditional knowledge possessed by its local communities.

[354]Philippe Cullet, Human Rights and Intellectual Property Protection in the TRIPS Era, Bioprospecting or Biopiracy?: Intellectual Property and Traditional Knowledge in Biotechnology Innovation, 7 J. World Intell. Property 35 (2004), http://assets.wwfindia.org/downloads/human_rights__ipr_in_trips_era_3.pdf

CHAPTER-6: CONCLUSION & SUGGESTIONS

When it comes to instruments of Intellectual Property, it can be said that the effects of IP laws on human rights have not been acknowledged properly. Where on one hand it's the duty of states to strive to achieve better standards of living and access to medical care to more people, onthe other hand the effective implementation of International standards for protection of IP becomes a hurdle in this process. Thus, it is apparent why TRIPS could be implemented in developing states with more trouble than others.

Whereas, human rights instruments have taken into consideration the ever-increasing scope of IP and have provided a link between the growing technologies, need for a better economy etc. and the interplay of Intellectual Property and Human Rights. For example, take into consideration ICESCR, it provides for the duties and rights of everyone with respect to enjoyment of scientific and technological advancement. It also provides for the rights and duties of the contributors to the knowledge which is derived from basic human rights, such as, dignity of the author etc. Art. 15(1) provides for a platform where the debate over interplay of IP and Human Rights can be broadened.

There are many challenges that are faced with respect to the stringent IP laws, but the main issues that need to be tackled both nationally and internationally are:

1. It must be ensured that measures are taken to strengthen the position of those negatively and seriously impacted by the implementation of IP laws. There are certain fields where the impacts of such laws are apparent prima facie, like right to health and access to medicine. Thus, a permanent solution needs to be devised to help those wronged by such implementation of property rights.

2. The time has come when the question of ever-increasing scope of science and technology needs to be addressed with respect to its beneficial enjoyment to all, and not just for handful of rich persons who can afford it.

Also, special attention should be paid to traditional knowledge. There needs to be protection of traditional knowledge, which will further the goal of Intellectual Property rights-based approach. The question that arises is, whether traditional knowledge the same as knowledge contributed through literary, scientific and artistic work? Also, if no, should it be accorded the same protection as other Intellectual Property? Thus, where traditional knowledge is with respect to agriculture, medicines, etc. a human rights approach should be taken.

The approach of both Intellectual Property Rights and that of Human rights is the ultimate welfare and development of the mankind. When seen without the ultimate object, both fall short. Thus, it should be harmonized in such a way so as to bring out the best of two, for the benefit of the world at large. Various human rights instruments like UDHR recognize the rights of the author and instruments like ICESCR create awareness regarding equality, human dignity and welfare of each member of society by the knowledge contributed by one.

What is more important is, each nation should develop such laws which are in harmony with each other and which best promote the interest of its communities, members, etc. These laws should no doubt, be in consonance with the International standards, but first, must primarily deal with its own interests. Through such a way, every country will be able to contribute to the best of its capabilities in the development of a better world.

Efforts should be made to keep the burning question of IP-Human Rights interface alive, by critically examining its various new aspects, which will only become patent with the passage

of time, so that any lacuna can be treated for the betterment of human beings, i.e. to achieve the maximum potential.

6.1 Suggestions:

1. Trade Secret-

Traditional Knowledge can be preserved and protected as a trade secret. The object of securing the knowledge can be lawfully done by non-disclosure as done with a trade secret. This can prevent bio-piracy and the interest of communities can thus be secured.

2. Database-

A database can be created for all the existing traditional knowledge. Such a database could be very helpful while granting a patent, to check if the work is novel or not, or whether there exists prior art in this field. Such a database should be worldwide accessible.

3. Judicial Interpretation-

What is most needed is judicial activism when it comes to the effective realization of human rights. The courts should take into account the various aspects while strictly enforcing the IP laws, which are in direct contravention of fundamental human rights. It is the interpretation by judiciary which can cure the lacunas in the instruments and legislations of IP.

4. **Leniency and flexibility should be accorded to developing countries** to oblige with the International standards, keeping in perspective the cultural, social and economic factors of its territory. Developing countries should not be kept at par with the developed countries, as this will be violation of the principle of justice and equity.

GLOBALIZATION AND ITS IMPACT ON WORLD POVERTY

- KARTIK SHARMA & VARUN

ABSTRACT

Poverty is the biggest challenge in the world, and the imbalance in the distribution of global wealth is frightening. Eighty percent of the world's seven billion people live on less than $10 a day and only 5 percent of the world's income was generated by the poorest 40 percent of the world's population, while the richest 20 percent of the world's population accounted for 75 percent of global income. There have been numerous studies that connect globalization to inequality, and the topic has been discussed and unfinished.This paper therefore addressed the two schools of thought on this topic, the optimists who believe that globalization is the solution to poverty and inequality, and the pessimists who believe that globalization is the cause of poverty and inequality.

KEYWORDS: Globalization, poverty, optimistic view and pessimistic view

INTRODUCTION

The globalization process presents society with a golden opportunity to contribute to a major worldwide poverty reduction. While the potential for poverty reduction is strong, its magnitude will depend on many factors including, in particular, the growth pattern adopted by developed and developing countries and the global policy system as a whole. A frequently posed question is whether the real distribution of benefits is equitable and whether the disadvantaged benefit

from globalization less than proportionately— and could potentially be affected by it under certain circumstances. Globalization's risks and costs can be important for weak developing economies and the poor of the world. During periods of frequent international financial and economic crises, the drawback of globalization is most clearly epitomized. The costs of recurrent economic and financial globalization-related crises seem to have been borne by the developing world predominantly, and often especially so by the most economically people. On the other hand, globalization gains in booming times in the global community are not necessarily shared broadly and equally.

Globalization in the form of increased integration by trade and investment is an important reason why substantial progress has been made over recent decades in reducing poverty and global inequality. But the unrecognized improvement is not the sole reason. It is also important for good national policies, strong institutions and domestic political stability. Given this development, poverty remains one of the world's most serious challenges facing up to 1.2 billion less developed countries, 4.8 billion people are still living in extreme poverty.But the proportion of the world population living in poverty has declined steadily and the total number of poor people has stopped rising since 1980 and appears to have dropped in recent years, despite strong population growth in less developed countries. Unless, after 1987 alone, the proportion of people living in poverty had not dropped, about 21.5 million people would be living in extreme poverty today[355].

GLOBALIZATION

[355]Harrison A, McMillan M (2007). On the links between globalization and poverty, IMF publications, pages: 123-134.

Globalization is the increasing integration of the world's economies and societies. This ranges from problems of goods and services, capital movement, world population development and inequality, global migration to promoting worldwide transportation and interaction. It is a complex process that affects many lives and, above all, increases countries ' economic interdependence. The International Monetary Fund (IMF) identified four fundamental aspects of globalization— capital and development flows, trade and transactions, information sharing, and human migration and movement.Globalization process affects and is affected by factors such as political, economic, socio-cultural, legal, and natural. Globalization has been related to growth around the world in many ways, one of which is poverty reduction as one of the ultimate goals of globalization. The debate on globalization and inequality has expanded with the unprecedented entrance of developed and low-income countries into global economic integration. Scholars and economists are discussing whether globalization is the cause of poverty or a cure.

POVERTY

Poverty is usually explained as the shortage or condition in which a person lacks certain material possessions or income. It is a situation in which the basic needs of a group or an individual to enjoy a minimum standard of living in society are lacking. The UN defines poverty as the inability to make choices and opportunities. This is described in various scenarios as not having enough to feed and clothe a family, not having access to education and a school to go to, not having access to medical services or a hospital to go to, not having the land to grow food for personal consumption and/or not having a job to earn a living.The United Nations sees this as a violation of human rights as the lack of basic capacity to participate effectively in society results in vulnerability, powerlessness and exclusion into the mainstream

of populations of people, households and communities. The World Bank defines poverty as a well-being deprivation that is taken into account in many dimensions. These include low income and the inability to acquire basic goods and services that are considered necessary for dignified survival. Other dimensions include poor access to clean water and sanitation, low health and education levels, inadequate physical safety, lack of voice, and inadequate ability and opportunity to improve one's life.Poverty is usually measured either as absolute or relative. Relatively speaking, equality is shown as an index of income inequality. Poverty research is often related to globalization as the impact of globalization is widely debated on the world's poor.[356]

ISSUES REGARDING ADMINISTRATION OF GLOBALIZATION

Globalization and poverty debates give rise to extreme views. With many seeing the globalization process as a critical development driver that has resulted in remarkable increases in human welfare, too many have opposing views of the effect of globalization on poverty. The belief that globalization has improved wages and living standards in many parts of the world is supported by a large body of IMF literature. The World Bank has a similar view of globalization as well. Some, including state, non-governmental organizations and academics, have argued that the gains of globalization and trade cannot be shared by many poor people.Some researchers have reported conflicting arguments and estimates that overall poverty is declining, while others claim that poverty is rising.

Nevertheless, the common connection with globalization and poverty reduction masks substantial differences in their experiences with international economic integration between

[356]Collier P, Dollar D (2002). Globalization, Growth, and Poverty: Building an inclusive World Economy. Oxford University Press, New York

countries and also within countries. The subject leaves much room for discussion with the disappointing statistics and the still incapacity to reach consensus on the effects of globalization on world poverty. The violent street demonstrations following the World Trade Organization (WTO) ministerial meeting and similar protests at meetings of the World Bank and International Monetary Fund show that this debate is still going strong.[357]

IMPACT OF GLOBALIZATION

Looking at the effects of globalization, we can always see of globalization both positive and negative views. Many decades of rising trade and capital flows, increasing numbers of multinational corporations, and increasingly globalized cultural exchange have not silenced public debate about globalization's merits. There was a tendency on both sides of the globalization debate to claim an unreasonable degree of causation between liberalizing policies and observing poverty trends.The causal arguments are so confused that as a result of their own policies, both sides claim the success of the Asian tigers and the letdown of many of the African states as a result of the opposing policies. Therefore, supporters of globalization say the development of China and Taiwan in recent decades as a result of their economies ' liberalization, while opponents of globalization argue that these same countries have been able to capitalize on the opportunities afforded by globalization, both in the past and in the present, due to strong government involvement.Critics of globalization claim that the woes of Africa come from other sources (including corrupt or incompetent governments), but the forced liberalization imposed by structural adjustment programs and other requirements for borrowing has not provided the growth expected. However, globalization has only made living conditions

[357] Masson P (2001). Globalization: Facts and figures. IMF Policy Discussion Paper. Available at: https://www.imf.org/external/pubs/ft/pdp/2001/pdp04.pdf

worse for the poor by reducing government programs and growing insecurity. Research on the ties between globalization and absolute poverty, as calculated by population share living below one dollar of purchasing power parity (PPP) per day, was therefore unable to provide conclusive evidence of their relationship.[358]

The concept of outsourcing has been created by globalization. Work such as software development, customer support, marketing, accounting and insurance is outsourced to countries like Tanzania, which are least developed. So the business that outsourced the job enjoys the advantage of lower costs because the wages are far smaller in less developed countries than in developed countries. The workers are getting jobs in the developing countries. Developing countries have access to cutting-edge technology.[359]

Increased competitiveness among companies lower the prices, and end customers in third world countries profit in the long term. One example is the telecommunications industry, where many international firms have ventured into the local market and thus increased competition has resulted in lower calling rates. Increased media coverage is drawing world attention to violations of human rights. Which contributes to human rights improvements. Civil wars in Sudan, DRC Congo and many other less developed countries, for example, have contributed to the withdrawal of humanitarian aid from international organizations such as the UN agencies that provide basic needs and protection during such times.

However less developed countries outsourced production jobs and white collar jobs. This means fewer people jobs. This has arisen since manufacturing work is outsourced to developing

[358]Naidu, Y. Gurappa. "GLOBALISATION AND ITS IMPACT ON INDIAN SOCIETY." *The Indian Journal of Political Science*, vol. 67, no. 1, 2006, pp. 65–76. *JSTOR*, www.jstor.org/stable/41856193. Accessed 12 Jan. 2020.

[359]Birnie, Esmond. "Globalization against Poverty." *Fortnight*, no. 437, 2005, pp. 14–14. *JSTOR*, www.jstor.org/stable/25561511. Accessed 12 Jan. 2020.

countries such as China where the manufacturing cost of goods and employment is lower. This in turn led to increased poverty in this country due to limited job opportunities. Programmers, editors, scientists, accountants, and other professionals lost their jobs due to outsourcing to cheaper locations such as India.Because of globalization rivalry in the labor market has contributed to job insecurity. People in earlier times had stable, permanent jobs. Already people are living in constant fear that their jobs will be lost to competition. Increased employment demand has resulted in lower wages and, therefore, lower living standards. Because of globalization, people work from the internet in different locations, thus decreasing the ability to encourage others to work. Although globalization does not increase inequality within countries.Fields such as technological growth, new business opportunities for small and medium-sized businesses, importance of quality management, new possibilities in rural areas and financial institution privatization. Technology manufacturing and technology management are two distinct important domains in the world.es on average, it disguises the fact that there will be unique winners and losers in every society.

OPTIMISTIC VIEW

The advocates of globalization claim that poverty is diminishing, mainly due to the forces of globalization and the growth that it induces. These advocates, in other words, attach great importance to globalization as a major and relevant engine of growth and in the fight against poverty. Globalization is a process that is surprisingly controversial. Amazing, that is, to the many economists and politicians who agree that it is the best way to bring stability to the world's largest number of people. Supporters of economic globalization have tended to

conclude that the result of ignorance or vested interest is dissent and critique.[360]. When going through the words of J. Bhagwati, it offers a good illustration of the way that some exponents of globalization have reacted to critics: "No one can escape the antiglobalists today.... This motley crew comes almost entirely from the rich countries and is overwhelmingly white, largely middle class, occasionally misinformed, often wittingly dishonest, and so diverse in its professed concerns that it makes the output from a monkey's romp on a keyboard look more coherent. (p. 134)"[361]Bearing in mind the effect of globalization on world poverty, there was a common argument in favor of endogenous growth theory, indicating that the correlation between globalization and growth can be attributed to aspects of globalization, such as trade liberalization, contributing to faster integration and therefore development. It was then suggested that the development made possible by globalization had a beneficial effect on world poverty, and evidence appears to suggest that the more liberalized an economy is, the higher the rate of progress will be. Thus,liberalization of economic policies was responsible for the vast improvement in global poverty alleviation through growth. The World Bank takes the same view that globalization, through its effect on growth, has played a major catalytic role in global prosperity and in lifting more people out of poverty in the last century than in all human history. This says it is not transparency, but the lack of it is something that raises inequality between nations, noting that closed developing economies have been much poorer than more open economies.It can also be noted that several factors of growth— such as open-mindedness to international trade, strong rule of law, and established financial markets— have little systemic outcome on the income share which accumulates to the lower quintile. As a result,

[360]Bardhan P (2003). Globalization and the limits to poverty alleviation. University of California at Berkeley, Department of Economics. Available at: http://www.dagliano.unimi.it/media/LecturePranabBardh an.pdf.
[361] Bhagwati J (2000). Globalization in your face: A new book humanizes global capitalism. Foreign Affairs. Pages:134–139.

these factors favor society's poorest fifth as much as anybody else. There is little weak evidence that stability due to high inflation and decreases in government overall size not only raises employment but also increases the income share of the poorest fifth in society.In a thorough analysis of globalization problems, they try to recognize the benefits of globalization and chart a course that ensures that the benefits of globalization are widely shared. Collier and Dollar found that globalization helped to reduce poverty, but they also postulated that supporting policies would help to make better use of these benefits.

PESSIMISTIC VIEW

Conversely, supporters of the pro-poor, while acknowledging the mandatory position of transparency and development, claim that it is not adequate conditions to reduce poverty. The United Nations (2005) stated that while in recent years there has been unprecedented growth and improvement in living standards in some parts of the world, poverty remains unshakable and many of the world are trapped in a situation of inequality. This study also focuses on the disparity between the widening gap between skilled and unqualified workers, formal and informal economies, increasing inequalities in education, health, and opportunities for cultural, social and political involvement.Some consider the empirical evidence skeptically in support of globalization as they see globalization as a mechanism through which power is concentrated upward and away from the poor. They see transnational companies in particular as gaining a lopsided amount of political and market power. Globalization opponents are also steadfastly of the opinion that corporations will use their increased power in ways that benefit themselves and hurt the poor.

To assess the effect of globalization on inequality, most scholars have used the macroeconomic viewpoint to analyze the income distribution of people living in developing countries as one

group, and people living in developed countries as another group. There is also another classification of developing countries into two groups: those that globalized and those that did not globalize, as during this time of research not all developing countries globalized. Their study found that real personal income in both developed and developing countries rose and flourished, but faster in developing countries like China and India.Nonetheless, when looking at the estimates of real personal income in terms of the three main central tendency indicators, they found that the ratios between developed and developing have been significantly reduced over the period, especially in the mode where the most extreme poverty lies.[362]

One of the recent study on the effect of globalization on poverty was by Bergh and Nilsson in their paper on' Globalization and Absolute Poverty' to investigate the relationship between economic and social globalization and absolute income poverty using panel data from more than 100 countries around the world from 1998 to 2016. They found that there is no evidence that globalization, in developing countries, is associated with higher levels of poverty.They concluded that less constraints on trade and greater flows of data are robustly associated with lower levels of poverty, suggesting that globalization reduces poverty more when the informal and rural sectors are comparatively larger. They also found clear evidence that the bulk of the declining effect of poverty is not mediated through the growth channel.Finally, they noted that while the fact that many low-income countries have embarked on external economic liberalization initiatives in recent decades has been intensively debated, their analysis suggests that the fundamental assumptions of current and previous poverty reduction strategies are correct: reducing poverty can be accomplished through closer economic integration and higher levels of globalization The proof from reading globalization critiques is that people are more

[362]World Development Report 2004: Making Services Work for Poor People. Oxford University Press, New York

interested in the best policy mix to maximize benefits for the poor while mitigating the negative impact of such policies on any subgroup of the poor.They also want to ensure that growth is sustainable socially, economically and environmentally. It is believed that social justice allows poverty to be held to a certain level.[363]

CONCLUSION

The relationship between globalization and poverty is complex and heterogeneous, with multi-faceted channels involved. Globalization-poverty relationships are highly likely to be non-linear in many ways, involving multiple threshold effects. It may be futile to try to determine theoretically, as uniformly measurable circumstances, the impact of globalization on poverty on a prior basis. Indeed, any sub-set of links embedded in the nexus of globalization, growth, income distribution and poverty may be controversial and contentious.In addition to the' development' effects of globalization on poverty (i.e. the effects of globalization on poverty directly mediated by economic growth), it is understood that the cycle of globalization / integration occurring through various other channels produces winners and losers, impacting both vertical and horizontal inequality. Such sources include shifts in relative factor and good prices, factor trends, the essence of technological change and distribution, the effect of globalization on uncertainty and insecurity, global information flow, and global disinflation.

Generally speaking, while globalization in the context of opening up the economy to trade and long-term capital flows will limit some policy options and wipe out some existing jobs and entrepreneurial opportunities for poor and small businesses, in the medium to long term, it does not have to make the poor much worse if appropriate domestic policies and institutions are in

[363]Bergh A, Nilsson T (2018). Globalization and Absolute Poverty – A Panel Data Study. IFN Working Paper No. 862, 2018

place and the correct foundations are in place. If it is possible to manage institutional prerequisites, globalization opens the door to some new opportunities, even for the poor. Domestic institutional reform is not easy, of course, and requires political leadership, public participation, and administrative ability, which is often lacking in poor countries. One can only say that focusing on agitating against transnational corporations and international organizations such as the WTO is distracting attention in those countries from the deleterious effects of domestic institutional vested interests and postponing the day of political challenge. In reality, opening up the economy will unleash forces for such a challenge in some cases.

SHOULD PROFESSIONAL ETHICS IN THE LEGAL WORLD BE DISTANCED FROM THE INFLUENCE OF RELIGION AND PERSONAL VALUES?

- AMOGHA KRISHNAN AYYANGAR

ABSTRACT

This piece of work is an attempt to understand how personal values and religion influence professional ethics in law and observe whether it is absolutely necessary to keep professional ethics and personal values apart while dealing with cases in a Court of Law or not. Laws are established and there are codes. Why should an intermittent variable, such as personal values or religious principles, be introduced to a well-oiled machinery? Religion, on one hand, has indeed influenced and rocked the legal world in India on many occasions. With personal laws sprouting from religious values and customs and the common public claiming stake at the judicial system, the pressure arising out of religious morality have definitely taken over conflicts, proceedings, arguments and verdicts. Is it possible, in a country like India, to keep religion and personal values away from an effective body such as the Courts? The answer, whether yes or no, emphasises the need to educate people on the separation of professional ethics from personal values and religion. This will eventually reduce the public scrutiny of the courtroom players and the eventual backlash they face while handling complex cases.

INTRODUCTION- ETHICAL CRISIS IN THE LEGAL PROFESSION

For a long time now, across the globe, systems have been working towards a more approachable, people-oriented and an ethical space in the legal world. Legal ethics have been

under the radar due to the rise in the constant criticism of the approach undertaken to any given case of immense public interest and speculation. There have been huge debates on 'ethical crisis' in the legal profession. The public, at any given point of time, has become more vocal in expressing concerns and questioning the objectivity of the process. As a result, the legal society as an entity ends up on the receiving end, or as H. Perkin states, results in '*the backlash against professional society*.'[1]

Secondly, with the evolution in the capacities of crimes and disorder, there is a subsequent rise in the need for a more structured, meticulous and sometimes even unethical defence. Plenty of lawyers in India are 'infamous' for the kind of cases they take up and eventually 'win' while the overwhelming due process and taxing sessions emerge more powerful than the muffled opinions of the public and the now hostile witnesses. Indians today are aware of the crooked circumstances that they shall be exposed to once they initiate a suit. Yet, they muster up the courage and knock at the doors of Justice for they still, somewhere, like to believe that goodness shall prevail over the evil and that they shall not be wronged at a Court of Law. Zygmunt Bauman, in 1993, clearly spoke of the then status quo as *"...we are entering a world of modernity without illusions in which we are assailed by fin de millennium doubts and fears of moral decline.*"[2]

Julian Webb identified that 'Law' as a discipline has built up a relatively substantial and formally coherent internal epistemology, in which, beyond the realms of normative jurisprudence and ethical knowledge playing little part as the underlying problem.[3] These are some of the instances where writers, researchers and advisors have felt the dire need to incorporate ethics in the professional zone.

WHAT CONSTITUTES ETHICS?

Ethics, simply put, is a set of principles that guides the decision of what is right and wrong. Many interpretations and definitions of the word incorporate the key term "moral" to it. For example, definition by the Merriam-Webster Dictionary states ethics as the discipline dealing with what is good and bad and with moral duty and obligation. Hence, a broad understanding of 'professional ethics' could lead to the simple understanding that it is a set of principles that direct the morally acceptable conduct of a person within the limits of his obligations as a professional. So, in the legal field, where do we draw the line? Are we guided morally or are we guided by the rules?

In India, there are a number of texts that suggests the most appropriate conduct of a member of the Bar and Bench. There are also a handful of laws and regulations that govern the conduct of law professionals. But, are these enough to find common grounds to the conflict within? Do these 'guidelines' really navigate the people when they face complex scenarios? It is to be understood that these guidelines are general and there will come a need for alterations which will heavily depend upon the situations individuals are put into. If we include morality to the already complex mixture, we will be bound to understand whether each code of conduct is moral enough to every individual who is a part of the legal society. Majority of the rules that govern ethics are basic in nature. It does not include any understanding of ethics that is motivated by personal values. Here, we can understand that the rules in India give preference to professional obligations than to the personal understanding of moral conduct.

DO PERSONAL BELIEFS AND MORALS AFFECT DECISION MAKING?

Many writers across the globe are of the opinion that personal beliefs and what a person considers 'moral' as an individual affects a great portion of decision making in a professional zone. Rand Jack and Dana Crowley Jack recorded that individuals act on the basis of a "*special*

blend of moral understanding which is affected by culture, ethnicity, social and economic class, and historical experience."[4] To further prove their point, they conducted a survey involving 36 lawyers. It was a mixed group of both male and female professionals.

In examining the lawyers' responses to ethical dilemmas, they found that there were four major perspectives which ranged from a maximum role identification, where personal and professional morality did not appear in conflict and the respondents fully identify with their legal role, to minimum role identification where personal and professional obligations were distinct and often conflicting.[5]

It was observed that nine members resolved to the minimum role identification (Position 4) and eleven members to the absolute maximum role identification (Position 1). The rest of the respondents stuck to Position 2, which still held the post to professional obligations (seven respondents) and Position 3, which moved towards the moral aspect (nine respondents), and as the scenario worsened, it was more evident that they would have moved towards minimum role identification. We can see that the respondents were torn apart in equal numbers given the same situation.

It is only natural to assume that the current state of mind of people is no different in India for the people are swayed by emotions, personal values and moral belief system. The present work population is resorting to conservative thoughts and values under such circumstances.

INDIA AND ITS DEEP-ROOTED RELIGIOUS FOUNDATION

India is home to 6 major religions (99.2%) and multiple other religions and persuasions (0.8%).[6] India is the homeland of Hinduism. From it, sprouted the religions of Jainism and Buddhism in the middle of the first millennium. It was not until the conquest of Sind by the Arabs in 712 AD that the then people of Bharatvarsha heard of Islam. And it was only during

the 11th century AD, Islamic conquerors and rulers began occupying the country. As far as Christianity is concerned, the conversion of the people of India into Christianity did not begin before the invasion by the British East India Company. Many smaller belief systems and tribal cultures have long existed alongside the evolution of these major religions. In present-day India, it is impossible to look into a catalyst of social change without the immediate association it has to a religion. The significance of civil and criminal laws in India are observed, analysed and criticised through a focal lens that is heavily tinted by religion.

Every passing year produces more people influenced by religion, who in turn influence the political scenario of the nation. It was not until 2014 that the society has radically involved itself in the process of modifying the widespread norms of communities that were against a section of the society practising the particular religion.

Religion has always been a ground for a conflict of interest among the public, the legislature and the judiciary. Certain aspects of the Indian society remain unchanged even today due to the fear of triggering the people of the country who are motivated by a certain belief system and personal morals arising out of them. It is a fact to be learnt the hard way that India can never be distanced from the religions it houses and it is almost impossible for two religions to achieve common grounds on a conflict for there is rarely a win-win situation.

BEING A PERSON OF PROFESSION FROM A PARTICULAR COMMUNITY

A profession in law calls for the understanding of social, economic and political ideas and philosophies. Lawyers and judges are expected to be learned, even if partially, in a variety of disciplines like medicine, technology, religion and culture and many others that practically influence human life every day.

India is a secular country. Equality of opportunities is secured in the Preamble of the Constitution. In order to facilitate the growth of every community in the country, laws regarding minorities were and are legislated. Education, in India, function on the foundations of the Reservation System. Some provisions facilitate the autonomous management of minority institutions for the benefit of the people belonging to certain communities. Any person is in a position to enter into the legal education system and there is no restriction on an advocate to be enrolled at the Roll based on his religion or faith. The Constitution prohibits discrimination of all kinds.[7] No rule stops a law professional from becoming a judge simply on the basis of his caste, race or religion.

So, the system clearly does not stop anyone from becoming "representatives of their community" provided, they meet all the requirements. Being adequately represented is a constant cause of concern among the public. People from certain communities find it extremely unfair that the Bench does not call for a reservation for the position of judges in the Apex and subordinate courts. Martha Minow, in her essay, comments that persons of the profession from a particular community "cannot be simply isolated individuals" and that "it occupies pages in academic journals, bulletin boards and panel discussions at professional schools and, increasingly, broad public debate".[8]

Proving her right, there were articles on newspapers and journals in September 2016 on the sudden non-existence of Muslim Judges in the Supreme Court for the first time in 11 years. This was indeed a cause of great concern for a few and, for the others, just another bait for spicy political agendas. This situation raised a lot of eyebrows and attracted serious criticisms. An article in The Quint states, "this is not to impute that the "learned judges" on the collegium discriminate on grounds of religion but it does leave hanging the question whether the higher judiciary suffers from wilful religious blindness" and that "plaintiffs and respondents who enter

Indian courtrooms often face a predictable presence on the bench- a Hindu Male".[9] After three years, in January 2019, new articles on the status quo of reservation in Indian judiciary hit the headlines.

As Martha Minow writes, "*it is not at all clear whether it is a triumph for the religious to use the secular framework of pluralism and equality to be heard or a more profound victory for the secular*".[10]

It is true that it was not until 1968 that a Muslim became the Chief Justice of India[11] and the number of judges from minority communities is marginal. But, no one is denied justice in a Court of Law on the basis of religion. Judges are trained to be the guardians of law and not people pleasers- to be swayed by the sentiments of the public. A Hindu-majority bench hearing Muslim cases would still follow the Principles of Natural Justice and pronounce verdicts based on the provisions of law. This would help in objective reasoning and is proof of advanced professionalism. If there is a need for a change in the law itself, the Courts would recommend it for the greater good of the society. They are ethically bound to do so. Administration of justice and professional ethics work well without the influence of religion and values arising out of it.

To be fair, great verdicts have been pronounced by Hindu-majority benches that have indeed upheld the true principles and values that the country stands for. Be it the Kesavananda Bharati Case[12] or the Shah Bano Case[13] in the late 1900s or the cases of recent times such as the Decriminalization of Homosexuality[14] and Transgender Rights Case,[15] constitutional values of the country and progressive realization of basic human rights have been given priority over the dissent of the "*minuscule minority*". This is yet another proof of professionalism not being

influenced by personal values, eventually paving the way to better results and progressive judgements.

THE DILEMMA OF THE LAWYERS AND THE JUDGES- SEEING THE RIGHT AND DOING THE RIGHT

As professionals, judges are bound by duty to do what is right- by law and by moral. A lawyer, however, is bound to do what is right only to cater to the interests of his client. Hence, it is evident that the lawyers are bound to be judged for their duties and the choices they make while performing them. An independently practising lawyer has the liberty to drop cases if he believes they are conflicting to his personal values. He simply has to maintain the confidentiality of the details entrusted to him by his clients. However, a lawyer who is nominated by the Court to take up a case is under a great conflict. He performs his duty at the cost of his personal belief system. Such obligations and responsibilities are seldom understood by the public and lawyers are often a target of moral policing in the society.

The legal world entrusts upon the professionals a task much more profound than aiding verdicts and pronouncement of judgements. They are the guardians of laws. They cannot deviate much from the call of duty. They cannot interpret and apply laws as per their whims just to aide their cases or ideas. It is only in imperative cases can they widen the scope of laws, chiefly to assist the advancement of public and national values.

PROFESSIONALISM, INDIAN LEGAL SYSTEM AND THE SOCIETY

The Shah Bano Case

The Shah Bano Case that was a precursor to the abolition of Triple Talaq in India, caused a widespread uproar among the Muslim community in India in 1985 and for many years to come.

While women activists and women liberation associations welcomed the verdict and hoped that the judgement brings a new era in the name of women empowerment and protection of women rights, the majority of the Muslim community found it against the principles of the Sharia. People today speak so highly of this case, but no one speaks of how the case actually ended. Due to societal pressures and the reinforcement of religious teachings by the Muslim scholars who schooled Shah Bano on her "grave mistake," the woman who unknowingly stirred a rebellion and kindled in the hearts of many affected Muslim women some hope, gave up on the case and refused to take her maintenance after her brief visit with the then Prime Minister Rajiv Gandhi, who only spoke of the political crisis caused.[16]

This case led to a clash of interest between the Judiciary and the Legislature of the country. According to an article written in 2015, "what should have been a women's rights issue grew into the focal point of religious antagonism between Hindu and Muslim extremists."[17] Shah Bano declared that she would be a true Muslim instead of claiming her rightful maintenance. Tahir Mahmood had remarked in 1985 that it was not how the Supreme Court had settled the issue of divorced wives' maintenance but its assumption of authority to interpret the Holy Quran and it is disturbing that the Muslim's

Divine Scripture had been 'brought into the mischief of the so-called judicial activism.' The case was approached under the purview of the Code of Criminal Procedure and not as a civil case. Nonetheless, Justice Mirza Hameedulla Beg's words was of some solace. The former Chief Justice advised, "*Although we may make some compromises with Mulla-led Muslims, we have to try to lead them out of darkness into light and not allow them to lead us into darkness*."

A.R Momin's analysis of the case presents more criticism on the act of the judiciary to ease the situation of Muslim women in India.[18] The Shah Bano case is a great example to prove that

professional duty and ethics in law must definitely be kept apart from religious beliefs as it can disintegrate advancement in the society brick by brick.

The Delhi Gang-Rape Case

Advocate A. P Singh was the lead counsel for the convicts in the case of Mukesh & Others vs State for Delhi NCT & Others. Apart from performing his duty to provide all defences to his clients, he was also personally motivated to take up the case upon the insistence of his mother. His utter disregard for the victim and his personal interest to pursue this case can be spotted in many of his interviews. He took a misogynist defence while addressing the media. In his words, "*If my daughter or sister engaged in pre-marital sex and disgraced herself and allowed herself to lose face and character by doing such things, I would most certainly take this sort of sister or daughter to my farmhouse, and in front of my entire family, I would put petrol on her and set her on fire*."[19]

Such statements, though made in a situation of desperation, comes off as an attempt to justify what is, in reality, a penal offence. This image of morality that he has assumed on a personal level cannot be a ground to attack a judge in his courtroom or to undermine the character of a dead victim. Taking a low road to justify such actions is, morally, ethically and personally, a let-down. He may not be a people pleaser by performing his duty to his clients, but he cannot attempt to make right a crime and curb women rights. He, as a professional, needed to take into consideration the consequences of his reckless statements, both in the courtroom and before the media.

Advocates and Judges are catalysts of social change and development. A.P Singh's case can be quoted for the contrary- promoting regressive ideas and violence against women. No one questioned his duty to his clients, but it was his irresponsible remarks and opinions that attracted major concerns as it came from a place of great influence.

Cases Related to the Mumbai Terror Attacks

The terrorist Ajmal Kasab who was hanged to death for murder, waging war against India among other charges, had a series of lawyers defending him in the court of law. They were mostly appointed by the court. Anjali Waghmare was one such lawyer. She had to drop his case when she realized she was representing a victim of the terror strikes in another case. But, before she let go of defending Kasab, she was threatened by the political activists from Maharashtra's political party, the Shiv Sena. They were said to have demonstrated rage and protests outside her Worli residence in 2009.

Defence Lawyers Amin Solkar and Farhana Shah, who took up the case of Kasab on the orders of the then Chief Justice of the Bombay High Court, faced the disapproval of their colleagues. Shah, in an interview states, "*Many lawyers have asked me to leave the case but I didn't because I saw Kasab as just another client*."[20] The two lawyers had, together, argued against the death penalty on a daily basis for almost nine months. As per the many newspaper articles in 2010, 2011 and even in 2018, ten years after the trials began and eight years after the execution of the terrorist, they are yet to receive payment for their services from the State Government. Shah has given up hopes and calls this a pro-bono case to assuage her disappointment.

Another story that was popularly tracked during the time was the case of Faheem Ansari. He was wrongly charged with participation in the terror strikes. ATS Chief Hemant Karkare, who was killed on duty during the rescue operations, was the only one to defend Ansari's innocence. Ansari's defence lawyer Shahid Azmi was killed by unknown gunmen in his office for protecting the 'aide' of the terrorists who wreaked havoc in Mumbai. Faheem Ansari was released after a whopping 12 years in jail on the grounds of lack of sufficient proof to

substantiate beyond doubt his participation in the strikes. Justice for Advocate Shahid Azmi is no-where to be seen.

Evidently, sentiments swayed by religion and morals arising out of it has done no good to anyone in this case. Advocates have not been paid for their services and in the worst-case scenario, even killed. An innocent spent over a decade in prison for no reason as a result of widespread paranoia among the public.

These are only a few among the many cases that have conveniently taken shield behind political agendas and religious sentiments of the people. This in turn has had a major impact on the administration of justice. Many other cases such as the Ram Janmabhoomi Land Dispute in Ayodhya, The Exodus of the Kashmiri Pandits, the Ban on Triple Talaq and the Review of the Citizenship (Amendment) Act of 2019 are speculated and analysed in the purview of right-wing politics and the Centre's growing desire to establish a "*theocratic state*"[21] in India rather than the legal approach it should have and have had in some cases. As long as the Courts are under the scrutiny of such public, no matter what it does for the benefit of the public and the protection of national values and laws, the people are never going to be satisfied.

OBSERVATION

There are published research articles and papers that suggest morally inclined professional ethics could do great things to the process of administration of justice and the society at large. But, real-life instances direct otherwise. Religion, personal values and morals negatively affect the due process of law and the productivity of persons of the profession. The codes of professional ethics in law across the globe have been derived keeping in mind the constitutional validity and morals that govern the world of law. Incorporating personal value-based ethical code of conduct will crush the Principles of Natural Justice.

The general public is widely unaware of the ethics and values that persons of professions have to follow as lawyers and judges. They are swayed by emotion and sentiments related to their religion and their idea of being morally upright. This causes adverse damages to the overall goodwill of professionals in the legal field. The society is unforgiving and it is always the law professionals who are on the receiving end of such violent dissent.

CONCLUSION

Law, Ethics, Religion and Personal Values may be interrelated. But, if taken into consideration all at once, it will lead to chaos and eventually mar progression. There is a myriad of reasons as to why the Natural Law Theory is not considered to be the foundation philosophy for legislation of laws in advancing nations. The same thought applies to professional ethics. Religion and the personal values that arise out of it, make decisions biased, subjective and politically partisan- exactly the consequences that law and those who practice it must steer clear from. The sentiments of the people are respected and it is only fair that the people respect the liability and limitations of a professional.

There is no actual necessity for a more value-based code of professional ethics to 'enhance' existing conditions and wipe out the "ethical crisis". It is enough that the lawyers and judges stick to upright professionalism and let the law do its job. General awareness about the intricacies of the profession among the public is important for them to understand and appreciate the larger picture. Priority, through and by law, must be given to the advancement of the society, upholding peace and respecting the identity and dignity of a fellow human being. As the legal maxim 'boni judicis est ampliare jurisdictionem' suggests, a good judge always knows his role in society and his responsibilities. It is not the job of the law to serve the interests of religions or personal belief systems of the public but it is its job to serve humanity.

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11 Former Chief Justice of India, *Mohammed Hidayatullah* (1968-1970). Also the 6th Vice President of India (1979- 1984)

12 *Kesavananda Bharati vs State of Kerala*, AIR 1973 SC 1461

13 *Mohd. Ahmed Khan vs Shah Bano Begum*, AIR 1985 SC 945

14 *Navtej Singh Johar & Ors vs Union of India*, Writ Petition (Criminal) No. 76 of 2016

15 *National Legal Services Authority vs Union of India*, AIR 2014 SC 1763

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ABUSE OF DOMINANT POSITION LEADING TO UNFAIR COMPETITION UNDER THE COMPETITION LAW 2002

- **HUZAIF JAMIL**

THEME;

This paper attempts to describe the relevance of the competition law of 2002 in the 21st where the methods of doing business have grown multifold and big corporations have apparently controlled the major chuck of market and possess the power to influence it at any point of time owing to its control and reach. The paper talks about the development of law of competition globally and its evolution to the present state. It discusses how the competition law in India developed post independence and evolved from MRTP act which controlled trade to the present Competition Law of 2002 which was fundamentally different from its predecessor and regulates the process& mechanism of trade. The paper describes in detail about unfair means and abuse of dominant position used by corporations and how the Competition act of 2002 addresses the same issue and regulates it. The paper further, describes the various factors which determine the abuse and the process to address the problem.

INTRODUCTION:

Law has been a helping hand for the hoi polloi at all the times. Laws since time immemorial have been framed keeping the well-being of the human being or persons at priority. The branches of law have evolved with the society & with time those new developed branches of law have undertaken the task of making the life of persons better.

Competition law is a branch of law which developed with the developing trends of the market in order to keep the conduct of market in control & anti- competitive practices at bay. In contemporary times, each and every person working for his livelihood undergoes some sort of competitions in order to succeed and emerge efficiently in the market to earn that livelihood. Competition Law in all this process happens to play a pivotal tool to promote competition. It works on making sure that the competition is of a fair and non-arbitrary nature. It ensures that a person can earn his livelihood in any way which is not unlawful.

The purpose of competition law is guaranteeing a good marketplace for customers and producers by prohibiting unethical practices designed to garner larger market share than what can be accomplished through honest competition. The consequences of anti-competitive practices embody not simply issue for smaller firms getting into or succeeding in a very market, however conjointly higher shopper costs, poorer service and fewer innovation.[364]

In India, the last decade of 20th century has been a crucial one, as the new economic policy has opened the gates of Indian market for the world. The Liberalization, Privatization and Globalization brought by the economic Policy of 1991 have progressively widened the space for market forces and reduced the role of Government in business and various other economic sectors. Subsequently, it was realized that the existing Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) had gone obsolete in multiple aspects and that there was a dire necessity to shift focus from curbing monopolies to promoting competition in the Indian market. Hence, on the recommendation of a high level committee, a new competition law, called the Competition Act 2002 was enacted which repealed the previous MRTP act.

[364] F. Bellis, IP and Competition, 5 Journal of European Competition Law & Practice , 113-121 (2014)

It is on the edifice of this new legislation that the whole framework of regulating unfair competition is built. The legislation aims at eliminating market distortion caused by anti-competitive practices on the part of businesses.

HISTORICAL EVOLUTION OF COMPETITION LAW

Competition laws have had a long history. The ancient example of modern competition law's ancestors is "**Lex Julia de Anona**[365]" during the roman civilization which aimed to protect corn trade & various measures were taken to maintain fair trade practices.

The first prohibition of contracts in modern history that restrained trade can be traced to English common law of the early fifteenth century.[366] The study of competition began formally in the 18th century by introducing new terms to describe restrictive practices. The first modern body of competition law can be traced back to the enactment of the Sherman Act of 1890 and the Clayton Act of 1914 in the United States.

The second half of the nineteenth century with expansion of Railroads and steam ships increased the scope of markets, and innovations led to formation of larger corporations and trusts.The century also witnessed the formation of cartels in Germany and other European countries. These Cartels owing to no government control and censorship eventually expanded their economic activities and importance in almost all European countries thus creating monopolistic markets and few families and trusts controlling almost all major sectors like mining, infrastructure etc. It was only after the great recession of the 1930 that the European

[365] Sukacic, Marko, "Consumer Protection In Ancient Rome– Lex Iulia De Annona And Edictum De Pretiis Rerum Venalium Asprohibitions Of Abuse Of Dominant Position?" Jun 30, 2017

[366] *Passmen Berend R., "Multilateral Rules on Competition Policy: An Overview of the Debate", Comercio Internacional Serie 2, International Trade Unit, Santiago, Chile, December 1999.*

countries realized the need for control and regulation of markets to promote free & fair competition thus, began to follow the US' model & enacted competition laws.

COMPETITION LAW IN INDIA

The origin of competition laws in Indian civilization can be traced from "Kautilya's Arthashastra". India has had a history of competitive markets. Arthashastra dealt with statecraft and economic policy. Kautliya believed that fair trade practices leads to the financial growth of the state. His thought process persuaded him to promulgate such policies which promoted the idea of public interest yet also promoted the growth of trade and commerce through fair trade practices. In his Arthashastra he made different provision to promote trade and commerce and to keep check in rise and fall of prices of the commodities in order to ensure healthy competition in the market.

India post Independence adopted its first legislation relating to competition way back in 1969 in the form of Monopolies and Restrictive Trade Practices Act (MRTP). It was introduced in the Parliament in the year 1967 & came into force from the year 1970. The enactment of MRTP Act, 1969 was based on the socio – economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution of India. The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991.

However, with the changing nature of business, market, economy on the whole within and outside India, with the introduction of new economic policy and opening up of the Indian market to the world, a necessity was being felt to replace the obsolete law & there was a need to shift focus from curbing monopolies to promoting competition in the Indian market. Acceding to the needs of changing market, the Government of India in the year 1999, constituted a High Level Committee under the Chairmanship of Mr. SVS Raghavan to advise

a modern competition law for the country in line with international developments and to suggest legislative framework. The Raghavan Committee presented its report to the Government in May 2000.

RAGHVAN COMMITTEE

The Raghvan committee suggested the following amendments along with the major recommendations:

1) Recommended suitable legislative framework relating to competition law
2) Changes required in the provision of restrictive trade practices
3) Suitable administrative measures required to implement the proposed recommendations.

Major Recommendations of the committee

i. Competition law should cover all consumers who purchase goods or services, regardless of the purpose for which purchase is made.
ii. The government enterprises as well as the departments should be brought under the ambit of the competition law; exception is given to the sovereign functions of the government like Defence.
iii. The three arenas on which competition laws primarily affects
iv. Agreement among Enterprises
v. Abuse of dominance
vi. Mergers or more generally ,combinations among enterprises
vii. The committee highlighted the shortcomings of MRTP Act and reported that it is inadequate to combat against unfair trade practices in the market and cannot eliminate

anti competition environment. This new competition law will ensure on prevention of anti competitive practices that adversely affect the welfare.

viii. The committee suggested to repeal The MRTP Act 1969 and cases pending in MRTP Commission may be taken for adjudication by the Competition Commission of India

ix. Competition Commission of India was formed to implement the Indian Competition Act. It will hear competition cases and also play the role of competition advocacy. It should also have power to review the orders of regulatory authorities as the touchstone of competition.

On the basis of the recommendations of the Raghavan Committee, a draft competition law was prepared and presented in November 2000 to the Government and the Competition Bill was introduced in the Parliament, which referred the Bill to its Standing Committee. After considering the recommendations of the Standing Committee, the Parliament passed December 2002 the Competition Act, 2002.

COMPETITION LAW 2002[367]

The Act provides for establishment of a Competition Commission of India or "CCI" which will be a quasi judicial body. It will have all the powers of a civil court for gathering evidence. There are three major elements in the Competition Act

- Anti-competitive Agreements (Section 3)
- Abuse of Dominant Position (Section 4)
- Combinations (Section 5 and 6)

Anti-competitive Agreements

[367] https://blog.ipleaders.in/abuse-dominant-position-competition-act-2002/ (last visited: 19-01-2021)

Anti-competitive Agreements are prohibited under the Competition Act. The following agreements entered into by enterprise, association or persons are considered as anti-competitive:

1. Agreement having appreciable adverse effect on competition(AAEC)
2. Any agreement entered into, including cartels engaged in identical or similar trade of goods or provision of services, which determine purchase or sale prices, limits or controls production, supply, markets or provision of services, results in bid rigging or collusive bidding having AAEC in India.
3. Agreement at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services.

If the aforesaid agreement causes an AAEC in India, then such agreements will be considered as anti-competitive agreements and such agreements are prohibited under the Act.

Remedies against Anti-competitive Agreements have been mentioned in Section 27 of the act.

Regulation of Combinations

As per the Competition Act, Combinations include Mergers, Acquisitions, and Amalgamations. Section 5 defines various types of mergers & acquisitions. Section 6 provides for regulation of combinations so that they do not have an adverse effect on competition.

Dominant position, its abuse & unfair competition

Dominant position under section 4 has been defined as a position enjoyed by an enterprise whereby it enables it to:

1. Operate independently of competitive forces prevailing in the relevant market : or
2. Affect its competitors or consumers or the relevant market in its favor.

The abuse of dominant position is one of the ways to intervene with competition in the market place. Abuse is said to occur when an enterprise or group of enterprises take undue advantage of their dominant position in the relevant market in an exploitative manner. Abuse of dominant position dissuade fair competition between fair competition between firms swindling consumers and makes hard for other players to compete with the dominant undertaking on merits.

Abuse of dominant position includes:

- Imposing unfair conditions or price
- Predatory Pricing
- Limiting Production of any commodities or provision of any services
- Creating barriers to entry and applying dissimilar conditions to similar transactions denial market access
- Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which have no connection with the subject of such contracts.

Abuse of dominance which prevents, restricts, or distorts healthy competitive environment in the market needs to be ward off by competition law. Section 4 of the Competition Act provides for the prohibition of abuse of the dominant position. The act considers dominance as perversion not as anti competitive.

In the case of **Shri Neeraj Malhotra ,Advocates v. North Power Ltd.** the CCI observed that section 4 do not prevent an enterprise from holding a dominant position in market rather it entrusts a special responsibility on such enterprise not to take undue advantage of their dominant position. The CCI further states that actions, conduct of the an enterprise have to be

checked keeping in mind the factors and situation of each case to determine whether such conditions amount as an abuse of dominance in respect of section 4 of the Competition Act.

Factors determining Dominant Position

Section 19(4) enumerates 13 factors which are considered by the commission while determining whether an enterprise enjoys a dominant position or not.

1. Market share of the enterprise
2. Size and resources to the enterprise
3. Size and importance of the competitors
4. Economic power of the enterprise including commercial advantage over competitors
5. Vertical integration of the enterprise or sale service network of such enterprise
6. Dependency of the consumers on the enterprise
7. Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or public sector undertakings or otherwise
8. Entry barriers including barriers such as regulatory barriers ,financial risk, high capital cost of entry, marketing entry barriers ,technical entry barriers ,economies of scale , high cost of substitutable goods or service for consumer.
9. Countervailing buyer power
10. Market structure and size of market
11. Social obligation and social cost
12. Relative Advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely have appreciable adverse effect on competition
13. Any other factor which the commission may consider relevant for the inquiry.

DETERMINING OF ABUSE OF DOMINANCE & UNFAIR COMPETITION

Determining of abuse of dominance & unfair competition whether it is an individual enterprise or that of a group involves a three stage process:

- First is the determination of relevant which is assessed on the basis of relevant product /geographical market.
- The second stage is the determination of dominance in the relevant market
- Third is the determination of an abuse of that dominant position.

Relevant Market

The determination of the relevant market is a key to measure a defendant's ability to lessen or destroy competition. Therefore, it is essential to define the relevant market and it must be defined both from geographical and product point of view.

Section 19(5) of the act provides that in order to determine what constitute "relevant market" the commission shall consider "relevant geographic market" and "relevant product market".

Relevant geographic market means a market constituting the area in which the situations of competition for supply of goods or provision of services or demand of goods and services are distinctly homogenous and can be differentiated from the situations prevailing in the neighboring areas.

The following factors should be kept in mind by in determining relevant geographic market:

- Regulatory trade barriers
- Local specification requirements
- National procurement policies
- Adequate distribution facilities
- Transport costs

- Language
- Consumer preferences
- Need for secure or regular supplies or repaid after sales services

Relevant product market means market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of characteristics of the product or services, their prices and intended use.

Section 19(7) talks factors to kept in mimd by commission in order to determine "relevant product market":

- Physical characteristics or end use of goods
- Price of goods and services
- Consumer presences
- Exclusion of in house production
- Existence of specialised producers
- Classification of industrial products

SITUATION IN WHICH THERE CAN BE ABUSE OF DOMINANT POSITION

Section 4(2)(a to e) provides five circumstances in which there can be abuse of dominance

1. Imposing unfair or discriminatory conditions or price including predatory pricing as ab abuse of dominant position [section 4(2)(a)]
2. Limiting or restricting production ,market, technicolor scientific development relating goods or services as abuse of dominant position [section 4(2)(b)]
3. Practices resulting in denial of market access as abuse of dominant position [section 4(2)(c)]

4. Conditional contract as abuse of dominant position [section4(2)(d)
5. Using dominant position in one relevant market to enter other relevant market as a abuse of dominant position [section 4(2)(e)]

In re: M/S Maharastra State Power Generation Company Ltd and Ors v. Coal India Ltd.andOrs.

In this case it was held that CIL through its subsidiaries operated independently of market forces and is in position of dominance in the market of production and supply of non cooking coal in India which is beyond the provision of Section 4(2)(a).

Shri Surinder Singh Barmi v. Board of Control of Cricket in India (BCCI)

In this case an instant complaint was filed by the informant who happened to be a cricket fan alleging that there were irregularities in the organization of Indian Premier League (IPL). It was held by the commission that:

- The BCCI was an enterprise for the purpose of the Competition Act, 2002 and comes under the ambit of competition law principles.
- The relevant market is the organization of private professional cricket leagues/event in India.
- The BCCI was dominant in that market and abused that dominant position by denying market access to potential customers.

INTELLECTUAL PROPERTY RIGHTS AND ABUSE OF DOMINANCE

IPRS is exempted from the ambit of Section 3 of the act but it is not exempted from abuse of Intellectual Property Rights by right holders in specified abusive acts under Section 4(2) of the Act. Section 4(2) is applicable to IPR holders provided such rights are considered by the commission to render the holder a dominant player in the relevant market.

CONCLUSION

The competition law 2002 was enacted in India when the world along with India was in a phase of transformation because of the globalization, liberalization and privatization and this changing time was setting newer challenges because of which the existing MRTP Act was getting incapable to cater the rising needs of the modern era. All these reasons led to the enactment of the new Competition Act. The new act emphasized on regulating the conduct or behavior of the players in the market and was result oriented rather than being procedure oriented like the previous MRTP Act.

Use of unfair means of abuse of position in the market is necessary as competition benefits the *Consumers* as they get wider choice of goods and services, better quality and improved value for money; it benefits the *Businesses* as a standard playing field is set and a redressal of anti-competitive practices is available which happens to be the main purpose of the act. The inputs from within the market are competitive, the businesses work on enhancing productivity and ability to compete in global markets and most importantly it benefits the state as there is optimal realization from sale of assets and there is enhanced availability of resources for social sector. Thus, by protecting competition in the market the competition law helps benefit all the players in the market which in turn is beneficial for the economy as a whole.

INTESTATE SUCCESSION TO THE PROPERTY OF A HINDU FEMALE: AN ANALYTICAL STUDY

- ANANYA GOGOI

ABSTRACT

The personal laws say a lot about the functioning of a community. It dictates various matters of the community including succession, marriage, adoption, separation, divorce, guardianship etc. In the case of the Hindus, their matters of succession is dealt with by the Hindu Succession Act, 1956 which was later amended in the year 2005 with the intent to introduce certain progressive changes. It was amended primarily because of the discriminatory and archaic nature of the act which can be evidently traced from the provisions reflecting gender based disparities such as the difference between the intestate succession of females and males under this legislation. It also fails to take into consideration the changes that the society have had undergone over the decades. This paper analyzes the rationale and pragmatism behind these provisions of the legislation and tries to examine the scope of reformation that is obtainable under the present law.

Keywords: *Intestate Succession, Discrimination, Reform, Hindu Succession Act, 1956.*

1. INTRODUCTION

In Hindu law, succession of property can be either testamentary or intestate by nature. The testamentary succession of property is applied when the deceased male or female Hindu had left behind a will stating the direction or the manner in which the property shall be devolved to

his or her heirs. On the other hand, when the deceased leaves behind no will or testament, capable of taking effect in law, then the devolution of his or her property to his or her legal heirs takes place in accordance to the laws of inheritance or of intestate succession. Here, the person who dies leaving no will or testament is called the intestate, and the persons who are entitled the shares of the intestate's property when the succession opens, are called the heirs and the process in entirety is called intestate succession.

In case of a female Hindu dying intestate, Section 15 and 16 of the Hindu Succession Act, 1956 (Un-amended), hereinafter HSA 1956, is applicable. While Section 15 of the Act envisages a uniform and explicit design for the succession of property of a female Hindu intestate, Section 16 lays down the order in which the property of such female Hindu would devolve to her legal heirs. Both these sections read together give us the general rules of succession. However, Section 15 fails to take into consideration the impartiality of the fate as far as self-acquired property of a female Hindu dying intestate is concerned. Perhaps, the framers of the legislation discarded the possibility of any women ever holding a self-acquired property and thereby restricting their focus to only the capacity of a male Hindu intestate to hold separate property.

Gender analyses of Hindu law concerning a woman's access to property within the home reveal a constant pattern of subordination of women's economic interests.[368] Women's right to property are always influenced and motivated by social and legal structures in a given society, which by nature are flexible and open to interpretation, and such change is further influenced by gender norms and various demographic, social and economic pressures. Even when efforts are made to bring women on an equal pedestal to men, yet it fails to bring complete justice to women in the long run. The thrust of this paper lies on this very aspect and is elucidated and

[368] Archana Mishra, *Devolution of Property of the Hindu Female: Autonomy, Relationality, and the Law*, IJLPTF, 2015, at 1.

deliberated upon in various parts. It briefly glances at women's property rights and also takes a look at the factors that accelerates the requirement of reforms in the law while presenting suitable suggestions referring to various Law Commission reports, demographic statistics and current trends of women's position in the Indian society.

2. WOMEN'S RIGHT TO PROPERTY

Throughout the timeline of history, women's right to property has had been a controversial and neglected issue. The ancient texts and commentaries of the Vedic age, amongst the dictates of Manu, often hints at the negation of women's right to ownership of any property. [369] However, amidst all the negativity and rejection surrounding the matter, there were still ample opportunities in the past which indicate that women were always capable of owning property and even dispose it at their will, except that there was a marked difference between theory and practice. In theory, she could own property but in practice, the quantum of property she held in comparison to her male counterparts was meager and bleak. At the same time, while her right to dispose of the property at her will was qualified, it was still subject to the whims of the patriarchal set up of the society where the idea of an independent woman holding property was seen as a threat to her traditional responsibilities and duties as a female in the household affairs.[370]

In the past, women weren't completely deprived of their entitlement to property – they had property rights over, what used to be known as the estate and the "Stridhan". Stridhan literally means "women's property" upon which she enjoyed larger powers of disposal. Generally,

[369] DR. POONAM PRADHAN SAXENA, FAMILY LAW II 348 – 349 (LexisNexis 4th ed. 2019); Muthukaruppa v. Sellethanmal, (1916) 39 Mad. 298 (India).
[370] DR. POONAM PRADHAN SAXENA, FAMILY LAW II 348 – 349 (LexisNexis 4th ed. 2019).

Stridhan was comprised of the property that a woman received as a way of gifts and presents from her parents, husband or close relatives of the family, during the marriage or at the time of performance of ceremonies, of bride price, property acquired by adverse possession, of bequests from strangers or relations,[371] property given to her in lieu of maintenance,[372] and of savings or purchases made with Stridhan.[373] On the other hand, there was non-Stridhan property upon which she had a limited interest and which mainly comprised of property received from a male or female relation.

Stridhan property could be further categorized into "saudayika" and "asaudayika", as regards the power to alienate it. In the case of the former, the woman possessing it had absolute authority over it including the power of alienation, irrespective of her marital status. So, even under any exceptional circumstances, when the husband had to borrow the saudayika stridhan he had to return it to his wife after the obstacle was averted. However, in the case of asaudayika Stridhan, that included property received from non-relations, her powers of alienation were curtailed after marriage as the husband's consent was necessary before she could alienate the property by way of a transfer. Moreover, he wasn't obliged to repay the Stridhan even when used for his personal benefit. Therefore, it can be rightly inferred that in ancient India, the socially and legally accepted norm was that only males were entitled to be the absolute owners of property with the power to alienate the property at his will. So, her economic independence and security was completely dependent on the pleasure of men – whether be it her husband, father, brother or son.

[371] Damodar v. Parmananda Das, (1883) ILR 7 Bom 155 (India); Muthukaruppa v. Sellethammal, (1916) ILR 39 Mad. 298 (India).
[372] Subramanian v. Arunachelam, (1905) ILR 28 Mad. 1 (India).
[373] Venkata Prasad v. Venkata Surya, (1880) ILR 2 Mad. 333 (PC) (India).

Keeping that in view, efforts were made as early as in 1865 to strengthen the position of women in respect to their rights and powers over property. Section 4 of The Indian Succession Act, 1865 laid down that 'no person shall, by marriage, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own : property which he or she could have done if not married to that person.' [374] One of the natural consequences of the application of this act was the Married Women's Property Bill 1874 which acknowledged the earning of any woman through the employment of her knowledge, skills or art as her separate property while additionally vesting in her the right to file a suit in respect of her own property. Initially, this bill was specifically applicable to Christian married woman so naturally excluding Hindu, Muslim, Parsi, Sikh and Jain communities within its purview.

It was in 1923 that classic efforts were made to honor the economic rights and independence of Hindu women in holding property. In that year, the Married Women's Property Bill, 1874 was amended so as to bring Hindu women and others within its jurisdiction. Section 4 of the Widow Remarriage Act, 1856 entitled a widow to share of her husband's property, yet the scope of the same was very limited. So, this amendment widened women's right to property to a certain extent.

The Widow Remarriage Act, 1856[375] was amended in 1927 to safeguard the interests of the husband and in 1929 the Hindu law of Inheritance (Amendment) Act, 1929[376] was passed which preferred some nearer degrees of female heirs over remoter degrees of male heirs. It sought to ensure that the inheritance rights of female heirs were either retained between the

[374] The Indian Succession Act, 1865, No. 10, Acts of Parliament, 1865 (India).
[375] Widow Remarriage Act, 1856, No. 15, Acts of Parliament, 1856 (India).
[376] Hindu Law of Inheritance (Amendment) Act, 1929, No. 2, Acts of Parliament, 1929 (India).

father's father and her uncle. However, the act was very limited in its scope as it only dealt with the separate property of a male Hindu who died intestate rather than altering the law in respect of the female's property. In other words, it only ensured that in the event of any Hindu women dying intestate, the husband would succeed to his deceased wife's stridhan in the like manner as it was his own property, when succession opens after her death. So, it can be regarded that this act was far from being satisfactory.

It was followed by the Hindu Women's Right to Property Act, 1937[377] the intention of which was to honor the rights of women in respect to property but unfortunately it failed to serve its purpose. The next significant legislation in the Hindu Law relating to female's right to property was the HSA 1956[378]. It received assent from the then President and became a law on 17th of June, 1956. The HSA, 1956 provided a share to the female in a Mitakshara Joint family property and specified her position in the order of succession without disrupting the Mitakshara coparcenary.[379] The act had have insurmountable impact on the property rights of women and one of its features that mark it distinct from other personal laws is the existence of two different lists of succession, separate for males and females dying intestate, on the basis of which succession of the properties takes place.[380]

Through the operation of Section 14 of the act, women became absolute owners of the property, which were in her possession, as a result of any pre-existing right.[381] Explanation to the Section further includes stridhan under the expression "property" and may include any immovable or

[377] Hindu Women's Right to Property Act, 1937, No. 18, Acts of Parliament, 1937 (India).
[378] Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).
[379] Ayushi Singhal, *Female Intestate Succession under the Hindu Succession Act, 1956: An Epitome of Inequality and Irrationality*, CULJ, 2015 at 148.
[380] Archana Mishra, *Devolution of Property of the Hindu Female: Autonomy, Relationality, and the Law*, IJLPTF, 2015 at 15.
[381] Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

movable property, acquired by a woman through the employment of her skills and knowledge, in lieu of her maintenance, at partition, by purchase, by way of inheritance or gift or retained by her as stridhan immediately before the commencement of this Act. It laid down different categories of heirs for a male and a female dying intestate. Section 14 (2) further dictates that the terms of any such property shall not prescribe a limited interest in it as it will contest the absolute ownership of the women over the property.

The general rules of succession in the case of a Hindu female dying intestate are dealt with by Section 15 of the Code. It states that the property of the intestate shall devolve - (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband; (c) thirdly, upon the mother and father; (d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother.[382] The general norm of succession to all kinds of property is that the property shall devolve upon the heirs of the deceased i.e., children (or if children pre-deceased the female, to the predeceased children's children) and husband. But in case, the intestate is issueless, the law under Section 15 dictates that the first kind of property shall be devolved upon the heirs of the father and the second category of property upon the heirs of the husband. Intend of the legislature, behind such a provision, has always been explained as an attempt to revert the property back to the original source rather than introducing a stranger to it. This specific order of divestment of property of the intestate is highly discriminatory and unfair and reflects the obnoxious character of the Hindu personal laws. Furthermore, Section 16 specifically lays down the rules that need to be followed for the devolution of the intestate's property amongst the heirs as specified in Section 15 of this Act.

[382] Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

3. FAILURES OF HINDU SUCCESSION ACT, 1956

The HSA 1956 can't be considered as a gender neutral piece of legislation. It is subject to immense gender based disparities in many ways and this is reflected in most of its provisions especially those concerning the succession of a female intestate's properties. Although this nature is comprehensible from a simple reading of the text, yet a close perusal of the classic case of *Om Prakash v. Radha Charan*[383] presents a clearer understanding to the issue. The judicial pronouncement of this case created history with its surprising and shocking result which managed to shake the core values that governs a common man's conscience.

The main area of contention in the case[384] was in relation to the succession of the self-acquired property of the intestate named Narayani. She was thrown out of her matrimonial home when her husband died from snakebite, shortly after marriage. As a result, she was compelled to return to her paternal family who later spent resources, educated her thus enabling her to get a well-paid job. In the process, she through the employment of her skills and knowledge acquired immense quantities of properties including bank accounts, provident funds etc. Following her death, her in-laws (respondents), who never bothered to make any sort of contact with her in 42 years, forwarded their claim in her properties when succession opened. This led Narayani's mother (plaintiff) to challenge her in-law's application for shares and thus this case.

A close understanding of the case clearly establishes the emotions and sentiments associated in the matter, as some of the core determining factors of the case. However, relying on a

[383] Om Prakash v. Radha Charan, 2009 (7) S.C.A.L.E. 5: (2009) 15 S.C.C. 66 (India).
[384] Om Prakash v. Radha Charan, 2009 (7) S.C.A.L.E. 5: (2009) 15 S.C.C. 66 (India).

plethora of judgments,[385] the court plainly refrained to base their judgments on sentiments and sympathy and rather opted to side with the technical application of Section 15 of the HSA, 1956. The sentiments and the socio-psychological impact that persisted in the matter and which were so important, were simply kept out of purview.

Narayani's properties were her self-acquired property and not some ancestral property meaning that she had absolute ownership and alienation powers over the same. However, the law doesn't differentiate between a self-acquired and a separate property and rather both are synonymously treated under Section 15 (1) of the Code. Moreover, since the law was already discriminatory by giving preference to a female Hindu intestate's husband's heirs over her own blood relatives, the decision of the court can only be understood in the light of absurdity.

The contention of the plaintiff relied on the most logical argument i.e., the intent of the legislature to retain the property in the hands of the joint family or to revert the property back to the original source of the property but the court overlooked it. The thrust of Section 15 (2) of the Code rests on the ground that property should not pass to those whom justice would require it should not pass. Therefore, in respect of these, the HSA has certain disqualifications specified from Section 24 to 26 of the Code. And given the cruelty and torture done to the intestate in the present case, it was only rational for the court to deny the *locus standi* to claim the shares in the intestate's property who they had unbelievably and shamelessly disregarded for over four decades.

[385] M.D., H.S.I.D.C. and Ors. v. Hari Om Enterprises and Anr, 2008 (9) SCALE 241 (India); Subha B. Nair & Ors. v. State of Kerala & Ors., (2008) 7 SCC 210 (India); Ganga Devi v. District Judge, Nainital & Ors., (2008) 7 SCC 770 (India); Bhagat Ram (Dead) v. Teja Singh, (1999) 4 SCC 86 (India).

Therefore, the judgment can be criticized on the ground that it fails to oblige to the principles of equity, good conscience, justice and public policy.[386] Definitely, it was morally inappropriate to vest the respondents with the entitlement to enjoy the intestate's properties over her blood relatives whom she would have preferred had she been alive. The case serves as a damaging precedent to future litigations owing to the interpretation it has provided to the Code and henceforth should be carefully examined.

The Hindu law of succession is quite disappointing in terms of ideas like fairness, equality and justice as opposed to other personal laws. Despite continuous efforts and amendments, the HSA is immensely criticized for its glaring gender disparities and other inequalities. It miserably failed to eliminate the differences between both the genders or to shed the patriarchal set up of the code or to bridge the gap. Over the duration of 62 years, the act has dejectedly failed to embrace the canons of an ideal succession law.

Generally, when a female Hindu dies intestate, preference is given to the husband's legal heirs over her own blood relatives based on the fact that every woman, at a certain point of time, leaves her natal place along with the natal relations to her husband's place. This way the female intestate's entitlement to the share may get disrupted by even the distant relatives of the husband, which is totally unfair and unwarranted. Far more troubling is the fact that the same is not carried out in the case of a male Hindu dying intestate as the female's heirs are not preferred over her husband's heirs when the succession opens. This justification often cited by the courts and legislature, is a thing of the past and should be discarded.

Today, women are owners of property, with vested coparcenary rights, liabilities and status except with the ability to devolve her property in a manner that she wants. Considering the

[386] Ayushi Singhal, *Female Intestate Succession under the Hindu Succession Act, 1956: An Epitome of Inequality and Irrationality*, CULJ, 2015 at 150.

legislature's intend to revert the property back to its original source, it is only right when the female intestate's blood relatives inherit the property but unfortunately the law doesn't allow it to happen and instead judicial impositions can be found favoring the husband's heirs over the female's heirs. The present law treats women not in their individual capacities but as an extension of her husband. Her independent identity is hardly appreciated under the law. The fact that the marital status of man don't affect his property rights and devolution schemes but the marital status of a woman does, is probably the most evident discrimination under the act. Furthermore, the act fails to embrace the change in respect to family systems. In the 21st century, almost all traditional joint families have eroded and nuclear families are in vogue. With such family systems, the communication and involvement between the family members is very intimate. Naturally, the woman in the family is closer to her natal family than her matrimonial family. So, it is certainly illogical to devolve the woman's property to some distant relative of her husband's over her immediate heirs. Additionally, the preference to agnates over cognates is yet another depressing factor present in the system which should be effectively dealt with by bringing both at the same level. Keeping in view the vast changes in the society and the failures of the present system of the Hindu Code, it has become essential to bring reforms in the law.

4. PROGRESSION AND THE URGENCY OF REFORM

While violation of Article 15 (1) of the Indian Constitution, leaking justice and infringement of the provisions of international instruments supporting gender equality are in themselves sufficient reasons to reform the current system of the Code, the expanding role of women in today's society is yet another imperative factor to be taken into consideration. Today, women own more than 21.5% of propriety establishments in the country, with nearly 40 % of them

working in the government or private sector units, 53 % of them having their own saving accounts, and being more learned than men by 53 % thereby making them more than capable of just owning property.[387] These socio-economic changes evidently contest the archaic provisions and procedures relating to the schemes of devolution of women's property stipulated under the Hindu Code.

Theoretically, Article 14 and 15 of the Constitution would render any personal law void if found discriminating against any person based on gender differences but the extent to which it is practically availed is uncertain. There is an ongoing controversy surrounding as to whether personal laws can be challenged upon the touchstone of fundamental rights enshrined in part III of the Constitution or not. [388] The first constitutional challenge relating to the validity of personal laws was raised in the landmark case of *Narasu Appa Mali* [389] whereby it was opined that neither the principles enshrined in Part III of the constitution apply to personal laws nor are they "laws in force" under Article 12 of the constitution as they are based on philosophical and religious values. The Indian Judiciary is yet to give a clear opinion on whether personal laws fall within the ambit of "laws" or "laws in force" under Article 13 of the constitution as only those laws under its ambit can be challenged.

The Supreme Court usually adopts a cautious approach to deal with the issue but in several instances, the Court have also intentionally refrained from taking steps or to peruse appeals

[387] Devendra Damle, Siddharth Srivastava, Tushar Anand Viraj & Joshi Vishal Trehan, *Gender discrimination in devolution of property under Hindu Succession Act, 1956*, NIPFP WORKING PAPER SERIES 2020, 2020 at 28-29.

[388] Krishna Singh v. Mathura Ahir, AIR 1980 SC 707 (India); Maharshi Avdhesh v. Union of India, 1994 Supp (1) SCC 713 (India).

[389] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84 (India).

concerning the reformation of various personal laws with reference to constitutional rights.[390] Unlike the Supreme Court, the High Courts have candidly expressed their stand on the same from time to time. In *Saumya Ann Thomas v. Union of India*[391], the Division Bench of Kerala upheld that all law, be it pre-constitutional or post-constitutional are subject to the test of constitutionality thereby calling it an unfair step to exempt the personal laws, in a secular country like India, from the wide ambit of Article 13 and Part III of the Indian Constitution.

Mamta Dinesh Vakil v. Bansi S. Wadhwa[392] is an interesting case law at this point. Despite being a regular case relating to the intestate succession of a female, yet it stands as one of the watershed judgments under Hindu law to have interpreted the HSA in a new prospect. It didn't conform to the restrictive approach adopted in *Om's* case, which was previously the held norm of the court in determining family law cases, and rather challenged the constitutional validity of the law in the present system. Its main thrust of contestation was regarding the validity of Section 8 and 15 of the code. The court upheld the principles of equality and prohibition of discrimination laid down in the Indian constitution. It didn't reiterate the decisions of the court in earlier cases like *Om's* case or the case of *Sonubai Yeshwant Jadhav*[393] which had broaden the gender disparities in the law instead of bridging it.

The court was of the opinion that Section 8 and 15 of the Code were discriminatory on the basis of gender differences and not family ties. Had the legislature purely intended to keep the property within the family, then sisters and daughters wouldn't have been entitled to inherit the property in the first place. So, it was evidently an intended gender differentiation with access

[390] Archana Mishra, *Devolution of Property of the Hindu Female: Autonomy, Relationality, and the Law*, IJLPTF, 2015 at 4.
[391] Saumya Ann Thomas v. Union of India, 2010 (1) KLT 869 (India).
[392] Mamta Dinesh Vakil v. Bansi S. Wadhwa, LNIND 2012 BOM 748 (India).
[393] Sonubai Yeshwant Jadhav v. Bala Govinda Yadav, AIR 1983 Bom 156 (India).

to property rights. The provision interferes with even the self-acquired or separate property of a woman as it is not inherited by her immediate heirs but her husband's heirs thereby disabling her to absolutely enjoy her property as she faces competition from the other distant and near heirs when the succession opens. Thus, it can be said that the said section is *ultra vires* the constitution and hence invalid. Such position of the law is a dark spot which decelerate the advancement and progress of an ideal gender neutral society.

With the amendment of the HSA, 1956 in 2005, there have been some undeniable progressive changes in the system such as the omission of Section 23 which deprived women to a share in the dwelling house, the Southern amendments and most importantly Section 6 of the act which provided coparcenary rights to women thus bringing them at an equal par with their male counterparts. Further, in its Review of Laws and Legislative Measures Affecting Women: No. 19 The Hindu Succession Act, 1956 (30 of 1956), the National Commission for Women (NCW) suggested for a gender-neutral formulation of schemes of devolution of property in the case of males and females dying intestate.[394] It recommended that there should be only one provision dealing with the intestate succession of both males and females under Section 8 and that Section 15 should be omitted. However, it failed due to three reasons :- Firstly, by retaining Section 8 of the code, agnates would be preferred over the cognates thus giving preference to a male line descendants over female line descendants; Secondly, it doesn't amend the Schedule, thus retaining the discrimination against persons who are related to the deceased by female relatives over the male relatives; and finally, it doesn't propose the repeal of Section 10, 11 and 16 of the Code.

[394] Devendra Damle, Siddharth Srivastava, Tushar Anand Viraj & Joshi Vishal Trehan, *Gender discrimination in devolution of property under Hindu Succession Act, 1956*, NIPFP WORKING PAPER SERIES 2020, 2020 at 25.

The National Institute of Public Finance and Policy, in its analysis of 174th report of Law Commission of India (LCI), also offered some of their recommendations to make gender-neutral schemes of devolution of property.[395] It suggested the change in the language of Section 8 and 15 so as to make it applicable to both the genders or to omit Section 15 so that Section 8 could be applied in the devolution of female's property. Some of its other recommendations included making agnates and cognates equally eligible to inherit the property of the intestate and the repeal of Section 10, 11 and the schedule by virtue of the application of the revised Section 8. The 207th LCI Report, 2008 brought out some similar recommendations.[396]

With the apt implementation of any of the concerned recommendations together with an irrefutable stand of the Supreme Court on the validity of personal laws against fundamental rights, the advocates of reform could challenge and eliminate the bottomless discrimination that is present in the system. A law for different communities and cultures may be acceptable but a law that differentiates people based on gender is impossible to be embraced. Henceforth, judicial interference is a must to bring out the true meaning of equality and to do justice to the aggrieved.

5. CONCLUSION

The existing scheme of devolution of property under the HSA, 1956 is discriminatory to women. It restricts women to a passive state of affairs as compared to men in respect to her property rights. Although, by the implementation of the Hindu Succession (Amendment) Act,

[395] Devendra Damle, Siddharth Srivastava, Tushar Anand Viraj & Joshi Vishal Trehan, *Gender discrimination in devolution of property under Hindu Succession Act, 1956*, NIPFP WORKING PAPER SERIES 2020, 2020 at 27-28.

[396] Ayushi Singhal, *Female Intestate Succession under the Hindu Succession Act, 1956: An Epitome of Inequality and Irrationality*, CULJ, 2015 at 157.

2005, she now possess the incidental characteristics of a coparcener having the same rights, liabilities and status that previously the males used to enjoy exclusively, yet it is not enough to completely eliminate the deep rooted discriminatory character of the act. Rather it is quite irrational in terms of an ideal law of succession. Moreover, the provisions of the HSA are incompatible with international instruments like CEDAW as well as with the current socio-economic trends of shifting position of women in society. In order to eliminate these arbitrary outcomes, constant and combined efforts of the Judiciary and the legislature are very crucial. The involvement of the courts, government and the individuals in achieving a gender-neutral code truly opens a wide potential for further reforms and in the clearest terms vocalize that the ambit of personal laws is not above the scope of reform which is necessary to achieve conformity and compatibility with the socio-economic changes in any given society.

DISCUSSING THE STATUS OF CORPORATE WHISTLEBLOWING IN INDIA

- SHOURYA PRATAP SINGH TOMAR

RESEARCH METHODOLOGY

This research is descriptive and qualitative in nature. This paper includes a historical and legal analysis of whistleblowing policies in India. A comparative study has been done with respect to the US legislation on whistleblowing. Most of the data used is gathered through secondary sources like websites, articles, law commission reports and SEBI directives.

INTRODUCTION AND RELEVANCE

"Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private"

Thomas M. Devine[397]

The Companies Act, 2013, defines whistleblowing as an activity where an individual aims to shed light on any form of illegal or unethical practices of a company. They can do so by making a public disclosure. This system ensures that cases of alleged corruption or wilful misuse of power or discretion don't go unnoticed. Any individual who chooses to expose or make a "disclosure" about certain crimes or illegal activities, with the required evidence to support the

[397] 179th Law Commission Report

allegation is said to be a whistleblower. The said disclosure can be made from within or outside the organization and is usually raised by a current or a former employee or even third parties like shareholders, auditors, and lawyers.[398] The disclosure must demonstrate information based on facts and can not be entirely speculative.

With globalization and Start-up culture rapidly growing, the economic motives tend to precede overall virtues and traditions, making it imperative to emphasize protection of larger public interest from corporate scandals. Globally, whistleblowers have been recognized to be the most effective source of detecting corporate fraud and ensuring corporate governance. "While professional auditors were only able to detect 19% of the frauds on private corporations, whistleblowers exposed 43%. Executives surveyed estimated that the whistleblowers saved their shareholders billions of dollars."[399]

The Indian economy caters to the most number of listed companies as compared to any other country, making the financial sector one of the biggest factor for growth and development and so it is imperative that the financial sector be completely transparent and corruption free. A report prepared by Indiaforensic Consultancy Services (ICS), said that a minimum of 1200 companies listed on domestic stock exchanges have forged their financial accounts.[400]

[398] Upadhyay JP, "Just How Safe Are Whistleblowers under Indian Law?" (*mint*October 22, 2019) <https://www.livemint.com/news/india/just-how-safe-are-whistleblowers-under-indian-law-11571763505941.html> accessed October 6, 2020

[399] Economic Crime: People, Culture and Controls" <https://www.whistleblowers.org/wp-content/uploads/2018/11/pwc_survey.pdf> accessed October 6, 2020

[400] Udit Prasanna Mukherji / TNN / Sep 23 2008, "1200 Listed Companies Forged Accounts: Study - Times of India" (*The Times of India*) <https://timesofindia.indiatimes.com/business/india-business/1200-listed-companies-forged-accounts-Study/articleshow/3515467.cms> accessed October 6, 2020

Introduction of the Public-Private Partnership model made corporate governance more complex as the interests of all concerned parties needed to be balanced. Another factor that majorly contributed to the growing complexity is the rampant fraudulent practices which have impacted economies across the world and have caused stockholders losing confidence in the managers of their funds. This calls for a study in the area of corporate governance in India with special reference to the whistleblowing mechanism. As the Indian economy is rapidly growing, huge foreign investments continue to pour in, the Indian government expects MNC's to provide capital and technical skills to fund major projects. Therefore this study aims to highlight the importance of the corporate governance norms with respect to whistleblowing mechanisms and other regulations for the effective functioning of the companies.

INDIAN LAWS ON WHISTLEBLOWING

It has been 70 years since the Indian Constitution got adopted, ever since three reports have been drafted by the National Commissions[401], the Government of India passed a resolution, and the Supreme Court has passed directions in writ petition hearings[402]. The Whistleblowers Protection Act, 2014 received the presidential assent in 2014, however, it still hasn't been implemented.

[401] (*Law Commission of India*) <http://lawcommissionofindia.nic.in/reports.htm> accessed October 6, 2020

[402] In 2004, in response to the petition filed after the murder of whistle blower Satyendra Kumar Dubey, the Supreme Court had directed that suitable machinery be put in place for acting on complaints from whistle blowers till specific laws on the matter are enacted

The Indian enactment has been thinking about the reception of informant insurance laws throughout the last few decades. In 1999, The Law Commission was asked to draft a bill to actualize an arrangement to reveal degenerate acts of public functionaries and shield legit individuals for making such divulgences. The Veerappa Moily Commission pushed that a genuine local official, aware of data identifying with net debasement, maltreatment of power or grave bad form, ought to be urged to uncover it in the public enthusiasm unafraid of requital. They accepted that the Freedom of Information act related to the Whistleblowers Protection Act would prompt straightforward and legitimate administration of the nation.[403]

The law commission of Indian recommended adoption of the Public Interest Disclosure Act in 2002. Subsequently, the bill was approved in 2011, and was renamed as "The whistleblower's Protection Bill, 2011". The vision envisaged was to receive complaints concerning the disclosure of allegations of corruption and wilful misuse of power by public servants, and to provide immunity against victimization of people making such complaints. It was decided that the identity of the complainant was not to be revealed but the CVC has been given the authority to ignore frivolous complaints. However, there are no clear criteria laid out for the same making it completely discretionary. The bill was finally enacted only in 2014, as the "The whistleblower's Protection Act 2014" and currently applies only to public servants.[404] However only if the company is listed by a significant amount of public money can the Right to Information Act and Whistleblower Protection Act be made applicable.[405]

[403] V. Venkatesan, Defending the Whistle-Blower, Frontline, Vol. 21 Issue 5.

[404] "Why the Whistleblower Law Doesn't Extend to the Private Sector - India News , Firstpost" (*Firstpost*August 18, 2013) <https://www.firstpost.com/india/why-the-whistleblower-law-doesnt-extend-to-the-private-sector-1040889.html?utm_source=ref_article> accessed October 6, 2020

[405] Listing Agreement, Sub-clause 7 of Annexure I D, Clause 49 .

The law is extremely vague and weak for companies in the private sector. All listed companies are required to establish a "vigil mechanism" to report genuine concerns as per The Companies Act, 2013 coupled with Listing agreements clause 49. The act explicitly states that the mechanism must be coupled with adequate safeguards being provided to informants. The policy followed by the company is supposed to be included in the board of directors report as well as the official website of the company.[406] However, to prevent repeated frivolous complaints, the audit committee has been given leeway to take suitable action against the director or employee making false claims including reprimand.[407]

To ensure maximum efficiency the (SEBI) has also made it compulsory for every listed company to implement an internal policy and inform the staff, to enable them to report instances of the leak of unpublished price sensitive information.[408] To incentivise employees to report violations of insider trading laws, SEBI introduced a reward mechanism in December 2019.[409] Moreover, as per the LODR[410], listed companies are also required to disclose material events to the stock exchanges, thereby ensuring complete transparency.[411] The ministry of corporate affairs has also issued the "CARO 2020"[412] to strengthen the corporate governance

[406] The Companies Act, 2013, s177; Companies and (Meetings of Board and its Powers) Rules, 2014, rule 7.
[407] The Companies and (Meetings of Board and its Powers) Rules, 2014
[408] Regulation 9A (6), Securities and Exchange Board of India (Prohibition Of Insider Trading) Regulations, 2015.
[409] Chapter IIIA, Securities and Exchange Board of India (Prohibition Of Insider Trading) Regulations, 2015.
[410] Listing Obligations and Disclosure Requirements) Regulations, 2015
[411] Regulation 30, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.
[412] Companies (Auditor's Report) Order, 2020

framework under The Companies Act, 2013. The scope of this report extends to every company, including foreign companies. The intention was to bring greater transparency in the financial affairs of companies by prescribing enhanced due diligence and disclosures by the financial auditors. The auditors have been given the additional responsibility to oversee the whistleblower's complaints received during the year and how the company dealt with such issues. However unfortunately the Indian code still doesn't have any specific law concerning whistleblowing for private employers. A few progressive companies have incorporated internal policies to protect individuals or groups calling out an illegal act done by other members.

LACUNAS IN THE LAW

There has been constant recognition of whistleblowers and the need for a policy to safeguard their rights, however as per status quo, India is still far away from developing comprehensive caveats for the same. A supreme court bench held that there was an 'absolute vacuum' which could not be allowed to go on and directed the centre to configure an administrative mechanism for protection of whistleblowers.[413] Indian law still doesn't prescribe the procedure companies are expected to follow while dealing with such matters. The lack of a proper legal setup to deal with such matters, in turn, leads to more red-tape and bureaucratic issues as the company has a brief window to take actions before the regulators come to inspect the matter. Another issue is that the board of directors and audit committees of the company are primarily responsible for the functioning of the company, including framing and implementing policies, and it the onus for identifying and ensuring there is no fraud fraud is also on their shoulders, making it extremely redundant as it gives them absolute power and freedom to get away with bogus acts.

[413] Parivartan & Ors. v. Union of India & Ors., WP(C) No. 93 of 2004.

The directors of the company are vested with a fiduciary obligation to act in good faith, and the best interest of the company, shareholders and employees. Therefore they are expected to and required to make disclosures about illegal practices. However, a system like this would only work in an idealistic environment and is not practical in a cutthroat capitalistic setup full of corruption.

There is still no established guideline or protocol that has been laid out for statutory auditors to follow while investigating the accounts of a company based on a complaint. Not only does this make it completely subjective, but also leaves a lot of scope for any form of systematic investigation to be executed. With a setup like this, there is just too much ambiguity for full transparency, thereby making it impossible to comply with the true intent of the concept of whistleblowers. The procedural aspect in terms of investigation and compliance of such complaints is still a grey area in the law. For example, the stage of the investigation, the stock exchange has to be informed about a disclosure pertaining to a whistleblower complaint has not clearly been defined. The protocol for conducting an internal investigation also needs to be clearly defined. The Companies Act, 2013[414] merely provides for a vigil mechanism with safeguards, no guidelines or norms have been set out on how such a mechanism must operate, and how the investigation must be carried out. A former employee of Tata Consultancy Services made a complaint to SEBI, questioning the ambiguity of the vigil mechanism itself.[415] Rolling out of CARO 2020 is a step in the right direction as the statutory auditor is required to

[414] The Companies Act, 2013, s177

[415] Zachariah RKand R, "TCS Vigil Mechanism Is under Sebi Watch" (*The Economic Times*July 30, 2019) <https://economictimes.indiatimes.com/tech/ites/tcs-vigil-mechanism-is-under-sebi-watch/articleshow/70442467.cms?utm_source=contentofinterest> accessed October 6, 2020

investigate the matter, but the Indian legislature still has to establish a comprehensive and uniform procedure that must be adhered to, to ensure that whistleblowers complaints are dealt with efficiently.

It has been established that other than the specific clauses under the companies act, there is no codification making it optional for private, unlisted companies to implement a policy with respect to protection of informants. . Although most MNCs have adhered to section 177 of the companies act, the policies in place are voluntary and if they fail to follow such policies, there would be no legal repercussions. The intention of the legislators has not been met by the regulations imposed.

INTERNATIONAL LAW ON WHISTLEBLOWING

International law gave recognition to Whistleblower protection back in 2003 when the United Nations adopted the Convention Against Corruption.[416] The United Nations Convention against Corruption compels nations that have ratified it to implement a wide range of laws and practices to further anti-corruption measures. Article 8(4), 13(2) and 33 of the convention directly deal with whistleblowing laws. Article 8(4) facilitates that when a public official notices a corrupt act, he is bound to report it. 13(2) prescribes that the public must be informed about the relevant anti-corruption bodies, access to such bodies must also be made available to the public. Article 33, on the other hand, talks about granting immunity to the informer, wherein

[416] "Guidance for Whistleblowers Outside the U.S." (*Nati*onal Whistleblower CenterAugust 20, 2020) <https://www.whistleblowers.org/know-your-rights/international-whistleblower/> accessed October 6, 2020

domestic systems are required to protect any person making a complaint in good faith and on the reasonable ground to the competent authorities.

The United States currently has the strongest and most established whistleblower protection laws, as they have enacted dozens of federal and state laws directed towards protecting whistleblowing, thereby incentivising them to come forward. In Fact, these US laws have been used by thousands of people from all over the globe to report cases of fraud and abuse of power. The Federal Whistleblowers Protection Act, 1989 covers not only protection against reprisals but also against the removal of duties, failure to provide training or reprimand.[417] In some of the States, the protection is extended to employees in the private sector also. They also have laws in place that bestows employees with the 'right to disobey' illegal orders of superiors.[418]

The Sarbanes Oxy Act (SOX)[419], lays out guidelines asking o publicly listed companies to structure their businesses and management with the intention of reducing workspace crime. The act grants blanket immunity to employees of public entities who report fraud to any law enforcement agency. The act mentions that employees who are retaliated against will be "entitled to all relief necessary to make the employee whole."[420] The SOX also requires audit committees to act upon and develop comprehensive reporting mechanisms for the recording, and tracing of the information provided by individuals anonymously. This ensures that the

[417] The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent' by Thomas M. Devine, vol. 51, Administrative Law Review (1999), p.531

[418] "State Whistleblower' Statutes and the Future of Whistle Blowers Protection" by Robert G. Vaughn, in Administrative Law Review (1999), Vol.51, page 582).

[419] Sarbanes-Oxley Act, 2002.

[420] Sarbanes-Oxley Act, 2002, s806.

SOX is directly mandating policies and protection for reporter wrongdoing, and is not just encouraging companies to be more supportive and reactive like the case is in India. In fact, the SOX extends the whistleblowing policies beyond public corporations. Section 1107, extends protection to any individual making a disclosure about a violation of any federal law to any law enforcement officer. Such whistleblowers are given complete immunity from any retaliation by the offender and a violator may be fined and imprisoned up to 10 years.[421]

CONCLUSION

After a careful analysis of all the aforementioned facets of Whistleblower Law, it is not surprising that the lack of codified law on this subject does not live up to the true intentions of the legislators. The Apex Court has consistently held that reporting information with the intention of disclosing corruption must be the rule, and secrecy an exception.[422] However, the status of informants in our country has been extremely unfavourable, with underwhelming safety measures being set up. These policies were enacted with the intention of penetrating the corporate "walls of silence" concerning illegal activities. To increase the public accountability of corporations and governments, it is imperative that complete transparency must be propagated.[423] As pointed out, though India is moving in the right direction with respect to policies on whistleblowers, we are still a long way from enacting comprehensive codified laws, to safeguard the rights of the whistleblowers and give companies clear guidance on how such

[421] It appears India has followed this recommendation and prescribes an imprisonment of 10 years to the violator under WB PID Bill of 2006.

[422] SP Gupta v. Union of India, AIR 1982 SC 149.

[423] McCambridge R and others, "Homepage" (*Non Profit News | Nonprofit Quarterly*October 5, 2020) <http://www.nonprofitquarterly.org/> accessed October 6, 2020

cases are to be dealt with. It is extremely astonishing that the Companies Act 2013, is completely silent when it comes to the protection of whistleblowers.

The 'whistleblower policy' ought to be made a required corporate-administration apparatus for all private as well as public organizations. Just amending Clause 49 of the Listing Agreement will not do the trick. Necessary changes must be brought about in the Whistleblower Protection Act, 2014 so that it is not just a policy in place for the sake of it existing, but makes a real impact on the confidence of potential informants. India must try to inculcate policies similar to the SOX Act[424], 2002[425], which in turn has proved to be an effective means to protect whistleblowers in the U.S. Further, it is extremely important for India to establish laws modeled like the Dodd-Frank Whistleblower Rules, to ensure complete protection of the informants.

In a country like India where tons of investors have lost their savings and hard earned money through a plethora of corporate scams, the corporate sector has blatantly abused the whistle-blower policy and many other corporate governance norms imposed by the Securities Exchange Board of India.[426] It is about time the Indian legislature passes a comprehensive and detailed regulation with respect to whistleblower policies.

[424] The Sarbanes Oxley Act, 2002 has made it a criminal offence, which is punishable by fine and up to 10 years in prison, for taking any action- harmful to a person who provides truthful information about a federal offence to a law enforcement officer

[425] The Sarbanes-Oxley Act, 2002; Enacted by the 107th United States Congress; The SOX, 2002, increased the independence of the outside auditors who review the accuracy of corporate financial statements, and increased the oversight role of the Board of Directors.

[426] George Mathew, 'SEBI forced to review whistle-blower policy', December 17, 2003

THE COMMISSIONER OF SALES TAX v. M/S. BOMBAY SOUND SERVICE AND ORS.

- ERA GUPTA

The constantly arising issue with respect to the Central Excise Act, 1944 or in fact any other sales tax act raises contentions with regard to the levying of duty on certain commercial goods. A perusal of the doctrine of fixtures has come from the differentiation between immovable and movable property, which determines if something is embedded in earth or is attached to what is embedded in the earth, it will be held as immovable and will not attract additional tax liability. The case at hand elucidates the same arrangement with respect to immovable property by objectively looking at all the fixtures.

BACKGROUND

In the present case, the assesses are the owners of cine laboratories and studios which has various recording, dubbing and sound mixing devices attached to the studios with electrical fittings for the purposes of producing songs. Assesses let the studios for hire by various film and song producers who use the studios for recording purposes and assesses provide them with manpower and required pieces of equipment. Assesses also own fully furnished mini theatres to exhibit the films before release. The appeal was to determine if the transactions arising due to hiring of the studios and its machines would be subject to tax liability due to it being 'sale'. The commissioner held that all the activities of hiring the machines and instruments along with the studio would amount to sale and thus would attract tax liability. Whereas, the Maharastra tribunal held that only the hiring of recording, dubbing and editing machines would come under

the purview of sale. The present retrial in the Bombay HC is the result of the dissension between the commissioner of sales tax and Bombay sound service. The counsel for the revenue averred that the tribunal was wrong in adjudicating the case the way it decided. His chief contention was that the question of the significance of transaction is not about the frame of the studios as studios but about the hiring of the various musical instruments and materiel required which were a part of the studios. He primarily claimed that the instruments and pieces of equipment embedded to earth can be removed without much damage and hence separated them from the setting of the studio thereby allowing for tax arrears for the sale of those movable instruments. The counsel for assesses asserted that the producers do not hire studios for its equipment but for its acoustic setting where all the instruments and equipment are thoroughly fitted in a studio where they complement each other. He also put forth that those instruments have no utility on their own. The soundproof backdrop and the other diminutive allocations added up to make the studio easy to use and desirable by producers for producing music. After contemplating the submissions from both the sides, the high court had to decide if the case at hand was the transfer of right to use any movable property. And if so the case, did the producers ever intend to hire only the equipment and machinery and not the setup of the studios. But before these questions, the court had to decide whether the case at hand required them to start from scratch and decide if the property in question was movable or immovable. Court went forth with the justification presented by the counsel of the assesses and contended that the studios were constructed for their absolute usage and the instruments will be near to worthlessness without the formal setting of the studio. Court called it to be an immovable property and relieved the assesses of any further monetary liabilities.

CRITIQUE

The judgement is unerringly determined. What we contend is that the court came up with the decision by following a very systematic manner. The step by step and a methodical approach to reach the conclusions are what make this judgement fairly concise and easily apprehensive. The issues established in the judgement at the beginning were undoubtedly repetitive with the only difference being the activities being done and the dates on which the activities were being done but they are laid out in a very plain sailing fashion. This technique has assisted the judges throughout the judgement in differentiating between the technical and irrelevant parts of the issues to make sure that only the questions at hand are answered with utmost accuracy. The fact that the court has looked at every small detail related to the studio and everything installed in it along with their functions, also implies that the scenario has been looked at very thoroughly. The itemized procedure of the working of the studios was not really necessary to look at. The certain things which the court considered were inside information on the studio's functioning but it has mostly been reviewed to make the process of formulating a decision for the judgement as clinical as possible. With the issue in the present case for determining that whether the hiring of the studio was in its entirety or was it just hire of the various music equipment and instruments required for recording and editing of music, the court took two extra steps ahead to scrutinize the meaning of "goods" and "sale" under the 1985 Act and the entire concept of fixtures. Before anything else, they used an equitable test to determine if it was immovable property which was, if a thing is embedded to the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is a part of the immovable property. They concluded that since the equipment and utensils attached could only be used in fully equipped and set studio, they cant be used anywhere else on their own with the same amount of accuracy. The Modus Operandi of establishing the nature of the property along the lines of the what is prescribed in the 1985 Act was simple and clear cut with

no jargons included. It was decided that the renting of the studio and its equipment don't amount to sale and hence the assesses were not held legally responsible for the tax liabilities. The process of decision making was exhaustive and included all possible aspects to it. Not only the court critically looked at the 1985 Act and went on to look for the definition of movable property from Transfer of property act, 1882 but also looked at the analogy established and used in other case laws. In the case of Hemendra lal v Indo swiss trading[427], the question arose before the High Court was whether the plants and machinery and transmission lines as necessary structures in a powerhouse would be called fixtures. The court answered the question in affirmative and said since the fixtures could only be used in and along with the structure of powerhouse, it should be called an immovable property. In another case Carborundum universal v CIT[428], the court held that the printing machinery embedded in earth would be immovable property. The court used the same analogy of these cases line to line and applied to the case at hand. The decision of the court was unprejudiced and upright. It would have caused injustice in terms of unnecessary loss of money if it had been decided any other way. There is, in fact, the rule of paying stamp duty during registration or at the time of making a conveyance deed in the cases of immovable properties. The case Triveni Engineering v Comm of central excise[429] has similar scenario where the turbo alternator was said to be a permanent part of the manufacturing process and couldn't be removed and sold loose. Hence the excise authority was not allowed to seek excise duty due to it being called immovable property. In the case of Duncan industries v State of UP[430], the appellants had to pay stamp duty to the collector

[427] AIR 1955 Pat 375
[428] 1984 149 ITR 759 Mad
[429] 2000 (67) ECC 562
[430] AIR 1998 All 72

on their plant and machinery being held as embedded in the earth and thus immovable property. These cases are the examples that right differentiation between movable and immovable properties is necessary to make sure a party is not at jeopardy, and a lawful commercial arrangement is not causing them loss. The legislature has laid down several statutes to formalize the process of seeking taxes which is for the greater good of a state. However, certain cases are sensitive and require the careful interpretation of these statues to protect its subjects from sizeable loss. The case at hand is an unambiguous delineation of the same. It cannot be called an extraordinary judgement. However, this judgement was vital to make things fair in this lawful mercantile setup because if this judgement would have been passed in favour of the revenue, the assesses would have incurred unfair tax liabilities.

The assesses were not held to be liable to pay sales tax to the revenue due to their nature of business being all-inclusive and not separate from the immovable property, i.e. the studio. The judgement is equitable and with just the fair delivery of justice.

DEFAMATION UNDER INDIAN PENAL CODE & IT'S ESSENTIAL ELEMENTS

- SIDDHARTH JHA

ABSTRACT

This article deals with Defamation in general we can say Defamation is vanishing the reputation on someone; it has two varieties, slander and libel. Any intentional false communication, either written or spoken that harms a persons reputation decreases the respects regards or induces disparaging, hostile or disagreeable opinion or feelings against a person is known or as we can say it is the act of making untrue statements about another which damages his/ her reputation. Is the act of saying false things in order to make people have a bad opinion of someone. It deals with facts, cases and essential elements of Defamation. After going through this article it will clear the concept regarding this topic.

INTRODUCTION

Any intentional false communication, either written or spoken that harms a person's reputation Decreases the respects regards or confidence in which a person is held; or induces disparaging, hostile or disagreeable opinions or feelings against a person is known as defamation.

Balance between one person's right to freedom of speech and another's right to protect their good name. A man's reputation is considered valuable property and every man has a right to protect his reputation. This right is acknowledged as an inherent personal right and is a jus in rem i.e., a right good against all persons in the world. Defamation refers to any oral or written statement made by a person which damages the reputation of another person. As per Black's

Law Dictionary, defamation means "The offence of injuring a person's character, fame, or reputation by false and malicious statements". If the statement made is written and is published, then it is "libel". If the defamatory statement is spoken, then it is a "slander".

It is believed that it is the right of each person to have an unimpaired good reputation during his life time and the law against defamation is a protection to that. In simple words, defamation is an injury to the reputation of a person. It is basically the publication of statements which harms the reputation of the person in the eyes of reasonable minded persons of the society.

In the case of defamation, the malice does not refer to the mere intention but in addition to the fact that the act of defamation was done without any lawful justification or excuse. Taking advantage of the opportunity to defame someone and injure someone's reputation indicates malice. If the defamatory matter is repeated by some other person than the defendant, that other person will be liable in the same way as the originator. The liability that arises in the case of defamation is strict liability.

Defamation

Every man has a right to have his reputation preserved inviolate. This right of reputation is acknowledged as inherent personal right of every person. It is a jus in rem a right good against the entire world. A man's reputation is his property, more valuable than other property. The wrong of defamation protects reputation and defences to the wrong truth and privileged protect the freedom of speech. The existing law relating to defamation is reasonable restrictions on the fundamental right of freedom of speech and expression conferred by Article 19(1) (a) of the Indian Constitution and is saved by clause (2) of article 19.

Defamation may be committed either by way of writing (or its equivalent), or by way of speech. Defamation is of two kinds libel and slander. If the statement is made in writing and

published in some permanent and visible form, then the defamation is called libel. If the statement is made by someone spoken words then the defamation is called slander. The term 'libel' is used for the former kind of utterances and 'slander' for the latter. Libel is a written and slander is a spoken defamation. Defamation is the act of making untrue statements about another which damages his/ her reputation. Is the act of saying false things in order to make people have a bad opinion of someone.

ENGLISH LAW ON LIBEL AND SLANDER

In English criminal law, libel is treated as a crime but slander is not treated as a crime. In English law slander is only a civil wrong.

Their are two reason

1. Under criminal law, libel has been recognised as an offence. Slander is no offence.
2. Under the law of torts, slander is actionable except in few cases where special damages is proved but libel is always actionable i.e. without any proof. However, slander is also actionable in 4 case.
    - Imputation of criminal offence to plaintiff.
    - Imputation of an infectious disease to plaintiff it has effect of preventing other from contact with the plaintiff.

Example- A makes a statement in his office that his colleague is suffering from AIDS. Here he can be liable for defaming his colleague.

- Imputation that a person is incompetent, he is dishonest or he is unfit in regards to the office, profession, trade or business carried on by him.
- Imputation of adultery to any woman or girl.

INDIAN LAW ON LIBEL AND SLANDER

Like English law, Indian law also does not make any distinction between libel and slander these both are treated as criminal offenses under section 499 IPC.

INNUENDO

Statement is prima facie defamatory when it's natural and obvious meaning it leads to that conclusion. Sometimes it may happen that the statement was prima facie innocent but some secondary meaning it may be considered to be defamatory. For secondary instance plaintiff must prove the secondary meaning innuendo which makes the statement defamatory.

ELEMENTS OF DEFAMATION

- **The Statement should be made-** A statement can be made by words either spoken or intended to be read, or by signs or by visible representations. For example, A is asked who stole B's diamond ring. A points to C, intending to cause everybody to believe that C stole the diamond ring. This is defamation.
- **The Statement must refer to the plaintiff-** The defamatory statement must refer to the person, class of persons or the trustees of a company. The reference may be express or implied. It is not necessary that the plaintiff has to be mentioned by name, if he can still be recognized. The person referred to in the defamatory statement can be living or dead, however, defamation suit on behalf of a dead person can be filed only if the person filing the suit has an interest.
- **The Statement must be defamatory-** Defamation starts with someone making a statement, and any person who makes a defamatory statement can be held liable for

defamation. A defamatory statement tends to diminish the good opinion that others hold about the person and it has the tendency to make others look at him with a feeling of hatred, ridicule, fear or dislike. Abusive language may also be defamatory, for example, to call a man hypocrite or a habitual drunkard. A few illustrations to understand what is defamatory and what is not. To say a motorist drives negligently is defamatory. To criticize goods is not defamation. To say that a baker's bread is always unwholesome is defamatory[431]. To state that a person has not that degree of skill which he holds himself as possessing is defamatory.

- **The intention of the wrongdoer-** The person making the defamatory statement knows that there are high chances of other people believing the statement to be true and it will result in causing injury to the reputation of the person defamed.
- **The Statement should be false-** A defamatory statement should be false because the truth is a defence to defamation. If the statement made is true then there is no defamation as the falsity of the statement is an essential ingredient of defamation. The law does not punish anyone for speaking the truth, even if it is ugly.
- **The Statement should not be privileged-** In some cases, the statements may be privileged i.e. the person who has made the statement is protected from such liability.
- **The Statement must be published-** For defamation to occur, the statement should be published. The statement should be communicated to a third party. Any statement written in a personal diary or sent as a personal message does not amount to defamation, but if the sender knows that it is likely that a third person may read it, then it amounts to defamation.

[431] Rishabh Soni, Defamation, ipleaders, available at https://www.google.com/amp/s/blog.ipleaders.in/defamation-and-its-essentials/amp/

CASE

1. ***Mahendra Ram v. Harnandan Prasad***,

The defendant was held liable because he had sent a defamatory letter written in Urdu despite knowing the fact that the plaintiff could not read Urdu and ultimately the letter will be read by someone else.

- **The third party believes the defamatory matter to be true-** The other people of the society believe that the defamatory matter said about the plaintiff is true.
- **The Statement must cause injury-** The statement made should harm or injure the plaintiff in some way. For example, the plaintiff lost his job because of the statement made.

2. ***Shreya Singhal v. Union of India*** ,

The petitioners challenged the validity of Section 66A of the Information Technology Act (ITA) contending that it was not a reasonable restriction on the freedom of speech and expression guaranteed under Art. 19(1)(a) of the Constitution. They argued that the impugned section was unconstitutional because it provided protection against annoyance, inconvenience, insult, injury, or criminal intimidation which is not covered in Art. 19(2). The court found section 66A of (ITA) to be vague and invalidated it on the ground of being violative of the right to freedom of speech and expression.

DEFAMATION MAY BE A CIVIL CHARGE OR CRIMINAL CHARGE UNDER SECTION 499 AND 500 IPC.

SECTION 499 OF IPC

Whoever by words either spoken or intended to be read or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person is said to defame the person.

Section 500 of IPC

Whoever defames another shall be published with simple imprisonment for a term which may extend to two years or with fine or both.

Defences available under defamation

The following are the defences taken in an action for defamation:-

1. Justification of truth - if defendant proves that the defamatory statement is true, no action will lie for it even if the statement is published maliciously. It is not necessary to prove that the statement is literally true, it is sufficient if it is true in substance.
2. Fair and bonafide comment – A fair and bonafide comment on a matter of public interest is a defence in an action for defamation. The essentials of a fair comment

A. That it is comment or criticism and not a statement of fact.

B. That the comment is on a matter of public interest.

C. That the comment is fair and honest.

3. Privileged statement- law makers have decided that one cannot sue for defamation in certain instances when a statement is privileged or unprivileged is policy decission that rests on the shoulders of lawmakers

Privilege

As from word we can understand giving special status. The law recognize that the right of speech or right of free speech or right to defamation and a actionable in law perspective. Privilege is of two kinds

1. Absolute privileges- Is the statement which is false and defamatory and even though no action lies made with express malice e.g. words spoken in Parliament or state proceedings. Also this is based upon the principle that the interest of the community rider the interest of the individual.

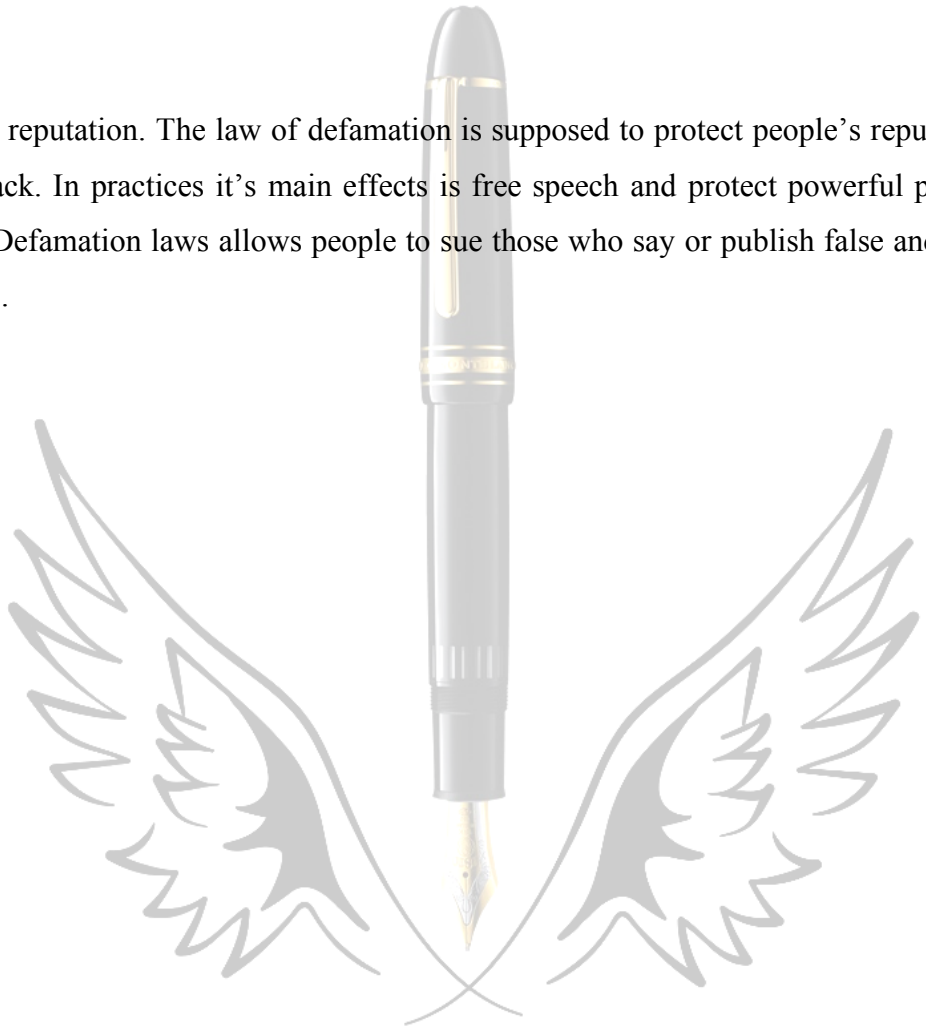
2. Qualified privileges- Is the statement where no action lies for it even it is false & defamatory unless the plaintiff proves it or express malice.[432]

CONCLUSION

Defamation is tort resulting from an injury to ones reputation. It is the act of harming the reputation of another by making a false statement to third person. Defamation is an invasion of

[432] Rishabh Soni, available at Ipleaders https://www.google.com/amp/s/blog.ipleaders.in/defamation-and-its-essentials/amp/

interest in reputation. The law of defamation is supposed to protect people's reputation from unfair attack. In practices it's main effects is free speech and protect powerful people from scrutiny. Defamation laws allows people to sue those who say or publish false and malicious comments.



THE DYNAMICS OF MEDIA AND LAW IN ELECTORAL POLITICS IN INDIA

- RICHA MISHRA

ABSTRACT

This study will explore media and law's influence on electoral politics in India. In India, the social media has become an intrinsic part for political communications during election campaigning nowadays. The paper would also explore media-politics-society relationship with each other. It attempts to understand how media and law have impacted the political behaviour of the campaigning parties as well as the voter behaviour. Social media has presented itself as a platform wherein the political parties can directly involve themselves with their voters. Firstly, the paper presents a comprehensive understanding regarding the purpose of free and fair elections in a democracy. It attempts to find out the ways in which the focus has been hugely shifted to social media campaigns in the recent times. Secondly, it would discuss its impact on the society and how political parties integrate traditional and social media as a key strategy to influence public opinion through the manner of opinion and exit polls. The focus would be on what role the law plays in dealing with the consequences arising out of it. It would also cover its positive as well as negative use in today's time with relevant examples. The data of the project will be based on extensive research done from various legal resources. The research work follows the secondary sources like articles, journals, research papers, and study materials. It covers depth consideration about the dynamics of media and law in electoral politics, specifically in India.

Keywords: social media, electoral politics, election campaigning, political communications, voter behaviour, media law

[1] INTRODUCTION

While the legislature, the executive and the judiciary form the three pillars of the democracy, press stands as the fourth estate. It is a foundation which uses extensive power and impact and in this manner should be fixed with duty and responsibility.

In 1927, Bhagat Singh regretted the fall off in the quality of news coverage in an article written in Kirati. He expressed: "*the profession of journalism, which was highly respected once, has become extremely dirty today. These people provoke the feelings of people by giving bold headlines against each other and make them fight. Not at one or two places, but at several places riots broke out because local newspapers published provocative articles.*"[433] The significant discussion is regarding the reason for addressing media's validity. Is it on the grounds that the way 'realities' are being introduced? It is on numerous instances said that media reporting must be straight, plain-spoken and objective.[434]

The electronic media have assumed a significant role in Indian general elections for certain many years, the emergence of a variety of new digital technologies and social media platforms such as WhatsApp, Twitter, YouTube, Facebook and TikTok, and so on have contributed much to the whole process of election campaigning since the 2014 elections. This has resulted in the modification in the character of such types of communication technologies. A significant aspect of the part that social media are probably going to play in the elections is the practice of

[433] Chaman Lal (ed.), Bhagat Singh Key Rajneetik Dastavez 17 (National Book Trust, New Delhi, 2007).
[434] Sudhanshu Ranjan, Media and Judiciary: Revitalization of Democracy, 57 JILI (2015) 415.

fake news and misinformation. The months and years paving the way to the 2019 elections in India have just exhibited an expansion of this practice. From reports of social clash to all out bits of rumours spreading, this had led up to a new dimension of social communication among the masses. Aside from making social strains and slanting the particulars of public thinking, the thickness of such transmissions is with the end goal that many don't have the capacity or fortitude to recognize reality and fiction.

[2] THE MEDIA-SOCIETY-POLITICS RELATIONSHIP IN THE INDIAN CONTEXT

Media's relationship with politics and society in the Indian context has transformed over the last two decades. India's economy, its market along with its society is constantly emerging and becoming more apparent. India has been industrially developing and parallel to which the media expansion in the country has also been substantial. India has come to have been known as the largest democracy in the world and for this reason, the participation and the role of the electorate during elections is vitally important. Once any political news is received by the society which is comprised of the electorate/voters, it results in influencing the general public and their thinking. The political parties are largely depended on the media for the circulation of political news and information. This, in turn, affects the political opinion of the electorate which then reflects on the political results of the elections.

In the recent times, social media has come to be at the forefront of all political communication strategies. The political parties and the candidates contesting the elections have been using the social media platforms extensively in order to directly connect with the voters, to break news and to provide comments on any political news. This shows a growing dependency of the political parties on social media in order to promote their political ideologies and thinking. Besides, this relationship works other way around too. Not only the political parties but the voters have also been using the social media to put forward their political opinions and

participate in the election campaigning in their own way. This leads to creating more political content and news, regardless of the fact that if it is a substantive content or not. It also helps the political parties to be well aware of the choices and opinions of the general public by taking a note of what is happening on social media.

In this way, the social media along with the mainstream media contributes to the political advertising to the society at large. The interrelationship between the media, society and politics is one that is vital in a democratic setup. When it comes to determining the political situation of the country, the other two elements namely; the media and the society which is comprised of the voters play an equally crucial role. An ideal situation of a democratic state would be one where both the media and the electorate have full freedom and independence with regard to their expression of political opinion. However, if we look at the functional level of it, the case is a bit compromised. This is due to the fact that some media houses are owned by private investors while others are state owned. This leads to difference in the way they enjoy the freedom to express their political stances and also the way political content are distributed. It then influences the way facts are viewed and politically debated in the society. This clearly indicates the inter-dependence of media, politics and society.

Dr. Manmohan Singh, the former Prime Minister of India can be said to be the one who begun the liberalization of the Indian economy. He was then serving as the Finance Minister in the P.V. Narasimha Rao government in the 1990's. He encouraged reforms that helped in the transformation of the country's economy. It led to a massive economic boom which included the transformation of media as well. When the policy of liberalization was brought in, it also encouraged foreign investments in the field of media. This resulted in the liberalization and

globalisation of Indian Media. In 1991, India adopted the New Economic Policy.[435] This led to a huge expansion of Media in India.

[3] AN INFORMED VOTER AND FREE AND FAIR ELECTIONS

Since the new media has come into picture, the observation of political activity is done by more people than before. This results in facilitating the public opinion of the electorate at a larger scale. The media helps in shaping public attitudes of the citizens. This forms a multifaceted relationship between media and public opinion. Since the media industry is undergoing immense variation and growth, the political news and information now reaches a broader public at a faster pace. This results in the change of political attitudes of the public on a daily basis. In this way, the public at large also contributes to the decision-making process by the legislators in a democracy. The legislators through the medium of social media platforms or the opinion polls come to find out about the opinions formed among the public and can further refer to those opinions to take major decisions concerning the state and the citizens.

In order for a democracy like India to function effectively, it is integral for the public to gather and retain the political information or news that are being spread or communicated through the medium of media, traditional or new. It then leads to forming of opinions in a reasoned manner. In this way, the public contributes to the political decision making in the state. The citizen engagement is crucial in a democratic setup and governance. Another point that the author would like to highlight here is that it would not be practical to anticipate that the manifestation

[435]Economic Liberalization in India was started by the then Prime Minister P.V. Narasimha Rao, with a target of making the country's economy market oriented and to leave enough room for privatization and foreign investment.

of consistent public and political opinions among the public during the period of every election. This is where the role of media comes into play. The fickleness in the minds of the voters these days is a dominant factor to reason with. If the electorate feels and makes out that their interests are not well considered by the leading party/government, it has the ability to immediately shift its political stance. Furthermore, this shifting of the said political stance in a way is greatly influenced by the media. It largely depends on how the media presents and passes on the information and news concerning politics and the government. The media plays the crucial role of collecting, framing and distributing information among the electorate. In this way, the media contributes in the formation of public and political opinions.

In acknowledgment of the above mentioned, elections have been on numerous occasions been set up by Indian Courts to be fundamental to any legitimate democracy. When we talk about a democratic election, mass media plays a major role. It is an essential element to conduct a free and fair election. An election in a democratic setup provides for right to vote to all its citizens in a politically mature manner. However, in order to ensure an effective election whilst maintaining its integrity, it is important that the electorate is well informed not only about the parties and candidates but also educated on how to exercise their democratic rights. The media helps in enabling the full public participation by providing a platform for the political parties and their candidates to be in communication and get their message across to the electorate during the election campaign. Over and above that, this communication works both the ways. The media provides a platform to the public as well to put forward their concerns, opinions regarding matters of public and political importance. In this way, the public can interact not only with the political parties and the government but also among themselves. It then significantly impacts the public's views, way of thinking and somewhere or the other determines the political agenda. This results in shaping of public opinions and sometimes their

manipulation. An informed voter is fundamental for a strong democracy which maintains the standards of free and fair elections. Consequently, it is basic to guarantee the right to a citizen to receive the information that is indispensable for casting his vote.[436]

[4] OPINION POLLS AND EXIT POLLS: ROLE OF SURVEYS

For the manner of achieving free and fair elections, the founding fathers of the Constitution committed a different part, Part XV, which consists of Arts. 324 to 329 of the Constitution to elections, it additionally brought about the Election Commission of India, whose responsibility was to assist in the fulfilment of the objectives of Part XV. In reference to this, the court in the Mohinder Singh Gill case[437], imposed two limitations in exercise of its authority and power. Firstly, it talks about when Parliament or any State Legislature has made any legitimate law relating to or identifying with elections, the Commission, shall act in conformity with such and secondly, the Commission shall be responsible to the rule of law, act bona fide and be compliant to the norms of natural justice.[438]

The mass media becomes very active during elections in India. Opinion polls have also gained attention. The expansion of electronic media in the 1990s gave a rise to opinion polls since the reach of media increased with time. Opinion polls are the election surveys of public opinion and seat predictions by the mass media every time there is an election in the country. These are conducted by almost all media houses to predict the winners of the elections by capturing the interests of the electorate. Opinion polls have come to gain good publicity when they are used

[436] Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294.
[437] Mohinder Singh Gill v. Chief Election Commissioner, (1978) 2 S.C.R. 272.
[438] Amrita Vasudevan and Bhanu Partap Singh Sambyal, A Constitutional Analysis of the Restrictions on Prediction of Voters' Preferences by the media, 1.3 CALQ (2013) 61.

by the media to predict the elections result. These polls have the ability to influence the voters in their casting of vote. Moreover, political parties to an extent are also influenced by the opinion polls to decide their timings for elections and also form and adapt an election campaign strategy. Nevertheless, pre-election surveys and exit polls have become common and usual in today's time. Although polls are liable to error, especially in Indian conditions, it is possible to derive from sample surveys a far more precise picture of the voting intentions and political attitudes of the Indian electorate than from any other source.[439]

The business of opinion and exit polls have prospered during last one and half decade. The enormous number of surveys directed among the Indian electorates during last one decade is a declaration to industry in the country. The three general elections namely held in the year 2004, 2009 and 2014 shows a furious rivalry in the Indian media for gathering information for surveys and exit polls. In fact the assessments based on opinion polls and exit polls give title to the print and electronic media as headlines. There is no uncertainty that news television in India is presently unmistakably moulding the elector perspectives. After the rise of television news stations the television has reached from metro to metropolitan, at that point semi-metropolitan also, presently in rural areas. The limit of information television to shape the elector attitudes have been extended because of expansion of television in rural areas and as we realize that greater part of our electors live in that part of India. However, the far and wide observation about the opinion polls surveys is that the estimates may impact and influence citizens, particularly the unsure. This is one of the significant reasons, the objection arises to poll results. Likewise people also feel that some of the surveys are subjective since they are sponsored by the private parties.

[439] David Butler, Ashok Lahiri, Prannoy Roy, India Decides, Elections 1952-1995, pp. 5.

Right now in India, opinion polls are prohibited 48 hours preceeding to voting. The restriction on opinion polls has been looked for in light of the fact that the surveys and polls confuse the voter, consequently influencing the sanctity of the electoral process. During the silence period, which as a rule starts 48 hours before the voting day and finishes subsequent to polling ends, no dynamic campaigning by the candidates or political parties is permitted, and television or any advanced media can't convey any election related issue.

In India, Section 126 of the Representation of People Act, 1951 commands a time of 48 hours until the finish of the survey and poll for election silence. In 2016, the commission proposed an alteration to incorporate "print media" in the boycott under, as right now, just computerized or digital media comes under election silence recognition rule. Prior, in 2015, the election board needed to utilize its constitutional powers to boycott paper ads dependent upon the situation during the time of Bihar Assembly election races in October-November 2015. After that point, in August 2018, the commission once again brought up the issue at an all-party meeting. In January, the commission had kept in touch with the law ministry looking for amendments to Section 126 of the Representation of the People Act to bring print media, news entries and online media under the domain of the 48-hour restriction on electioneering before the finish of survey or poll. It additionally looked for inclusion of a provision in Section 126(2) that will expect courts to just take cognisance of grievances made under the authority of the ECI or the state chief electoral officer, with respect to infringement of the silence period. The ECI said it had considered a prior report of the council set up to review provisions of Section 126, and was proposing amendments to expand the extent of the 48-hour boycott to cover print media and "intermediaries" as characterized in Section 2(w) of the Information Technology Act.[440]

[440]"EC wants print, social media under purview of 48-hr ban on electioneering before poll", The Times of India, Updated: Feb 9, 2019.

ECI then set up refreshed rules as per the guidelines and rules so as to implement the silence period in an effective fashion. According to the commission's notification, the provisions of Section 126 of the Representation of the People Act, 1951— inter-alia —restrict election campaigning activities through open meetings, processions, etc, and so forth, and showing of election matter by methods for television and similar mechanism. The reason tried to be served by this preclusion is to give a time of quietness i.e. the silence period for the voters before the day of election. Additionally, issues identified with a supposed infringement of the provisions of Section 126 must be raised before the commission, especially on violation of the provisions of clause (b) so as to manage the broadcast of election matters on electronic media during the silence period. The ECI letter expresses that after that for investigating the working of Section 126 with regards to advancements in communication technology and ascent of online media, a board was comprised by the commission with the command of exploring the provisions of Section 126 of the Representation of the People Act, 1951 and other related provisions and to make appropriate proposal or recommendation in such manner. Furthermore, the board also took the perspectives of all recognised national and state parties.[441]

The committee submitted and put together a report that was apart from the different recommendations. In the report, the committee proposed for an advisory to political parties to comply with the letter and spirit of the provisions of Section 126 of the Representation of the People Act, 1951. Then the committee looked in on all political parties and asked them to instruct, train and brief their leaders and campaigners to guarantee that they follow the rules set for the silence period on all types of media as proposed under the Act, and their leaders and

[441] Id.

units don't submit any demonstration or act in a certain way that may disregard the very spirit of Section 126 of the Representation of the People Act, 1951.[442]

Sometimes when there is a multi-phased election going on, it is possible that the silence period of the last 48 hours might still be on in specific voting electorates while the campaigning is progressing in different electorates. In such an occasion, there ought not be any direct or indirect mention of or remark adding up to requesting support for parties or candidates in the electorates observing the silence period. Furthermore, campaigning in one electorate which will go for polls after, ought not impact on or disrupt the silence period being seen in another electorate which is set to cast a vote in the instant next phase. Likewise, the campaigners and other political leaders involved in campaigning activities have to avoid and desist from giving a discourse to the media in way such as press conferences or giving interviews regarding election discussions, during the silence period. In the meantime, the party's organisational handles cannot advocate for the party even on social media platforms. If they do so, they would account for a breach of Section 126 of the Representation of the People Act, 1951 and will get infringement for the same.

The link between opinion polls and social media ends up being further perilous. In earlier times, opinion polls were just discussed and delivered through television or print media, but now with social networking portals coming up and gaining more attention, this conversation has become furiously dynamic and constant. Despite the fact that the outcomes on opinion polls were delivered numerous days preceding the administered no-release time period. The citizen can even now and again on his own, go over these surveys, in this way, impacting his/her decisions generally. Platforms like YouTube can be used to check old videos of opinion polls with

[442] Id.

dynamic conversations occurring on it as of now, which will undoubtedly impact his/her decisions here and there or the other. One cannot curtail the right to surf social media websites as it would lead to curtailment of fundamental rights. However, a proper, legitimate and ideally coordinated guideline can be released in furtherance of the ideals with respect to which the Election Commission boldly bases itself upon.[443]

The role of media does not end here. It extends to the coverage of elections, reporting results and vote counting. It also has the role to scrutinize the electoral process and look into the electoral management so as to evaluate the fairness and ensure efficiency of the electoral process. In this way, the media makes sure and ensures free and fair elections by keeping an eye on elections and the manner in which it is conducted. Therefore, media is known as the watchdog of democracy.

Article 324 of the Indian Constitution has endowed the Election Commission with wide powers in compatibility of its grave obligation of leading free and fair elections to Parliament and State Legislatures.[444] It can give rules and orders to independent channels, for example, the media where the issue relates to electoral process. The basic motivation behind such a force intrinsically vested inside the Commission is to ensure that it can lead elections in a free, fair and reasonable manner. This reasonableness and fairness additionally incorporates the obligation to settle on sure that the decisions and choices of the citizens are not unjustifiably affected or one-sided. The Election Commission has as of late put forth a few attempts to complete this mandate as rules and orders.

[443] Sujoy Sur and Siddharth Sharma, Need for Regulation of Opinion/Exit Polls : A Contemporaneous and Juxtaposed Analysis, 1 CMET (2014) 26.
[444] INDIA CONST. art. 324.

The Election Commission in the year 1996 issued the primary distinguished order concerning to coverage of elections by the media. Order 491/96/MCS[445] was concerned with the way media persons should be backed up in their coverage of elections process. This order perceived the importance of televisions as a medium of coverage of elections process with broad effects. The order examined actions such as debates, opinion polls by non-political organisations and a voting pattern analysis in addition to other things. A "balanced and fair over a period of time" methodology was assumed by electronic media for news.

An exceptionally pivotal phenomenon, which is essential for the pre-election media buzz, is the phenomena of Opinion and Exit Polls. In Order No. ECI/MCS /98/01, the Election Commission gave guidelines for publication and dissemination of the results of Opinion Polls/Exit Polls. The order set forth definite and distinct rules for the conducting opinion polls and electoral polls. It also stated that opinion polls cannot be conducted anywhere between 2 days in advance to the first day of the elections until half an hour in the wake of closing of polls in all states and union territories.[446] For exit polls, the rules stated that the results of such polls cannot be declared or published in any way and in any event from the day when the polling starts until half an hour after the polling has shut in all states and union territories. This order was a *mutatis mutandis*, i.e., with the necessary changes having been made it shall be applicable to future elections as well.

[445] Election Commission, Facilities to Be Provided To Media For Coverage of Election (1996).
[446] Election Commission of India, Guidelines for Publication and Dissemination of Results of Opinion Polls/Exit Polls (1998).

Through an order dated 2009, the Election Commission formed a guideline with respect to Opinion and Exit Polls. In Order No. ECI/PN/54/2009 of 2009, the Election Commission set out and defined the time-frame inside which results of such polls could not be released. As According to the guidelines, on account of a single phase election, results of opinion/exit polls carried out whenever, cannot be published, publicized or disseminated in any way, for a time of 48 hours finishing with the hour that is fixed for ending of the poll.

The 2009 general elections acted in accordance to the 1998 guidelines. Likewise, the after effects of the opinion/exit polls conducted at any given time, could not be published, publicized or disseminated in any way, 48 hours before the hour fixed for finish of the poll in the first phase of the election, till the finish of the poll in the last phase of the election.

From end to end of these election orders, it very well may be observed that the Election Commission has been reliable in its methodology towards the publication of these orders to the media with respect to opinion and exit polls, however the main concern is to what extent has the Election Commission been successful to check how constantly these orders and guidelines have been followed. Likewise, with the coming up of social media and that too so prominently, the Election Commission appears to have not been quite successful in mulling over its effect and impact on the electors in a backhanded manner.

Where the Election Commission orders were coming as a path forward towards efficient and solid guidelines with respect to opinion and exit polls but on other hand, it can be seen that the

Supreme Court faded into the background during a civil writ petition filed before it against the Election Commission order of 1998 and 1999.[447]

This petition was filed against the ECI's restriction through the orders of the Election Commission by which they directed the dissemination and publication of Opinion and Exit Polls. The Court held and decided that the Commission Guidelines exceeded the power of superintendence, direction and control recognized by Article 324 of the Constitution which means that ECI had no power to impose such guidelines. Hence, the guidelines were observed to be against the freedom of speech and expression guaranteed in the Constitution under Article 19(1)(a)[448], which also lays the foundation for the functioning of the media. A similar petition in the case of D.K. Thakur v. Union of India[449] for the prohibition of opinion and exit polls is pending before the Supreme Court.

Along these lines, as of now India lacks solid guidelines and comes up short on any legal provision, legislative guidelines or Supreme Court orders which could manage the media with regard to elections.

[5] CONCLUSION AND RECOMMENDATIONS

It is only because of the existence of Independent Media, India is able to identify itself as the world's largest democracy. The expanding impact of electronic media animated it and gave citizens access to various news sources instead of the sole government directed news channel

[447] 'SC Refuses Ban on Opinion, Exit Polls', The Tribune (2014).
[448] INDIA CONST. art. 19, cl. 1.
[449] Writ Petition (Civil) No 207 [2004].

of the pre–liberalization time. There is a growing need to have corrective-penal laws to set about and handle the expanding reach of social and electronic media in spreading news, ideas and opinions which may prove to be inefficient and completely opposite to the ideals and notions set by the Election Commission in conducting free and fair elections. Under this, the Representation of People (Second Amendment Bill), 2008 will likewise be thought upon, as one of its primary issues was the need for guidelines with respect to opinion and exit polls.

Self-regulation by media houses is the most efficacious and legally acceptable practice to hold itself within proper limits. Exit polls are conducted for the general public and should be unbiased and primarily neutral. The method to conduct these polls ought to be apparent, public, and recorded. These objectives can be accomplished by openly outlining the methods preceding the conduction of exit polls and by sticking to the guidelines of minimal divulgence outlined. When detailing results from exit polls, data collectors and researchers should be mindful so as to keep their analysis and comments completely reliable with the information. Interpretations and commentary ought not be named as data-based reporting. Limits and shortcomings in the plan of an exit poll, its implementation, and the results should be noted in all reports and investigation. Results ought to be delivered to people in general and other invested individuals through the general media and all the while made open to all.

The constitution provides support for exit polls, either in the form of freedom of speech of the media and the citizens or the citizen's right to know. Both of these concepts are widely familiar and brought into play by the Indian Judiciary during appropriate instances. Extending the same to protect exit polls is both wise and reasonable.

WOMENS' AGE OF MARRIAGE IN INDIA – A CONCERN!

- MALVIKA MOHAN

Marriage is a matter of one's personal concern. It has long lasting impressions on a person's life. Subsequently, the provisions and laws formulated by the government and the legislature, in collaboration, should be well calculated and the impacts of the following legal pieces must be envisaged. Unfortunately, in patriarchal set ups of the world especially in developing countries such legislations, if not designed appropriately or given requisite attention with the changing scenarios, can have profoundly bleak ramifications on the comprehensive development of young girls. How the situations concocted through marriage laws in India are highly disadvantageous to the well being of the Indian women will be the pivotal point of discussion below.

INTRODUCTION

Marriageable Age is the minimum legal age subject to certain societal approvals, which must be attained by an individual to be eligible to get married. Different countries have set different legitimate marriage ages for their subjects. For example, in Australia[450] and the UK[451], it is 18 years for both males and females; in Bangladesh, it is 18 years for females and 21 years for

[450] Kathy Gollan, 'Marriage in Australia' (ABC Radio National, 23 May 2018) https://www.abc.net.au/news/2017-04-17/marriage-in-australia-how-love-and-law-have-changed-in-130-years/8430254?nw=0 accessed 28 January 2021

[451] Hannah Summers, 'Back bill to ban marriage for under -18s in England and Wales' (The Guardian, 6 October 2020) https://www.theguardian.com/global-development/2020/oct/06/back-bill-to-ban-marriage-for-under-18-in-england-and-wales-mps-urged accessed 28 January 2021

males[452]. Similarly, in India, The Prohibition of Child Marriage Act 2006 determines the marriageable age for females to be 18 years and to be 21 years for males. Various yardsticks are used for reference for ascertaining this legal bar. These can be parental, religious, social depending upon the societal framework of nations.

In India, marriage age has been a giant legal issue for years. It is primarily because of an unwarranted difference of 3 years in male and female marriage age. However, marriageable age should not be confused with the age of majority which is 18 years for both the sexes according to The Age of Majority Act, 1875. This difference is socially, economically, emotionally and physically very deleterious for young women. Unprecedented health conditions due to unintended pregnancies, depression, lack of family planning decisions, missed out educational opportunities due to early marriages, lack of financial autonomy etcetera have a deplorable impact on the all-round development of women and young girls. The above issues are, unfortunately, a grave reality in India and its fellow developing nations. Over the years, this legal concern has been a matter of mammoth discussion, deliberation, debate and legislation but with no consequence. The government and the other law making entities soon need to come up with some necessary amendments in the current laws to avoid the condition of women from worsening any further.

BACKGROUND OF AGE OF MARRIAGE LAWS IN INDIA

Marriage age laws in India have a deep-rooted history. Such laws evolved over a period of time and were a direct result of the efforts of Indian social Reformers and organizations like Raja Ram Mohan Roy, Arya Samaj etcetera in collaboration with the British-Indian governments

[452] Meghan Werft, 'Girls of Any Age Can Be Married in Bangladesh With New Law' (Global Citizen, 3 March 2017) https://www.globalcitizen.org/en/content/child-marriage-bangladesh-law/ accessed 28 January 2021

before independence and the Indian parliament took the charge of this legal responsibility 1947 onwards. Under the crown rule, around the late 1820s, the British had expanded their jurisdiction over the social ambience of India with English officers like Lord Willam Bentinck, Governor-General of Bengal (1828-33) and then the Governor-General of India (1833-35) putting a ban on vicious Indian social traditions like Sati by passing Bengal Sati Regulation, 1829. In 1856, the Hindu Widows' Remarriage Act was passed which allowed the Hindu widows to legally remarry, also under Lord Bentinck, serving as one more measure to enhance the status of Indian women.

Around the mid 1800s, the matter of a legitimate minimum age for women to establish sexual relationships with them was a hot topic. In furtherance to this debate in 1860, a few sections of the IPC made sexual intercourse with a girl less than 10 years of age a criminal offence. Subsequently in 1891, the Age of Consent Act was passed which increased the age of consent for sexual intercourse for all girls, married or unmarried, from 10 years to 12 years. This Act X of 1891 received a tremendous level of criticism from the elite Indian masses including eminent nationalist leaders like Bal Gangadhar Tilak because this was being identified as a blasphemous and grotesque attempt from the side of the British to invade the centuries old internal traditional fabric of the Indian people. Following this, the Age of Consent (Amendment) Act, 1927 was given a legal mandate which redefined the provisions of rape laws declaring marriage with a girl under the age of 12 years a penal offence.

Regardless of all such efforts no improvement in the status of women was noticed as all the regulations passed had been defeated. Rapes and physical oppression of women were the dark realities of that period in the Indian society. Women were socially, economically and mentally

defiled on the premises of the facts supported by illogical religious arguments. Therefore, this urged women organizations in India like All India Women's commission and National council of women to demand an increase in the legitimate age of marriage of young girls. As a result of this, The Child Marriage Restraint Act was passed on 28 September 1929 which set 14 years and 18 years as lawful marriageable ages for girls and boys respectively. This Act is also known as Sarda Act as the person who presented this bill in the assembly was a former Indian judge (and also a member of Arya Samaj), Har Bilas Sarda. Therefore, this was the growth of the age of marriage laws in India prior to independence under the British rule.

After attaining independence, the then government of India codified a new set of laws governing this matter. The Special Marriage Act, 1954 which later became the Hindu Marriage Act, 1955 was passed which determined the minimum legal age for marriage to be 18 years for girls and 21 years for boys. Consequently, Sarda Act was amended in 1978 fixing the marriageable ages to be 18 years for females and 21 years for males. Further, the Sarda Act was repealed in 2006 and replaced by the Prohibition of Child Marriage Act, 2006[453].

This has been the history of evolution of marriageable age laws in India in the last 400 years but viewing the current socio-economic-politico circumstances prevailing, this mere difference of 3 years in the respective legal ages of marriage for men and women begets new challenges facing women --- challenges of health, motherhood, psyche, depression, inequality and much more.

[453] Fatima Khan, 'In Budget 2020, govt sets agenda to revise motherhood age to curb maternal mortality' (The Print, 1 February 2020) https://theprint.in/health/in-budget-2020-govt-sets-agenda-to-revise-motherhood-age-to-curb-maternal-mortality/357965/ accessed 29 January 2021

PROBLEMS OF THE PRESENT

There is a very comprehensive set of hurdles that women have to face due to such laws. Also, there is no modest scientific reasoning for justifying the 3 years deficit that women have with the men. The following issues have been discussed in detail below.

Health: This is the biggest cause of concern for women and the government. Marriages in teenage years are a huge reason behind India's high Maternal Mortality Rates. India's MMR was 130 per 1 lakh live births in 2014-2016 and 122 per 1 lakh live births in 2015-2017 which are frightening figures[454]. Most women who die while giving birth fall under the age group of 15 years to 19 years.

Due to the above reasons even the present government of India has taken several measures or the betterment of such figures. In the Budget Session of 2020, the Finance Minister Nirmala Sitharam, announced a committee looking into the matter of female marriageable age. In addition, the Prime Minister Narendra Modi also mentioned about the initiative in his Independence Day speech on 15 August, 2020. According to highly placed sources in the government, the task force, led by former Samata Party chief Jaya Jaitly and NITI Aayog Member (Health) V.K. Paul, submitted its report to the Prime Minister's Office and the Ministry of Women and Child Development (WCD) last month[455]. The recommendations of

[454] Sanya Dhingra, 'Increase women's marriage age to 21 for health benefits' (The Print, 15 January 2021) https://theprint.in/india/increase-womens-marriage-age-to-21-for-health-benefits-modi-govt-task-force-recommends/585519/ accessed 29 January 2021

[455] Jagriti Chandra, 'Government may re-look age of marriage for women' (The Hindu, 15 August 2020) https://www.thehindu.com/news/national/government-may-relook-age-of-marriage-for-women/article32364889.ece/amp/ accessed 30 January 2021

increasing the age from 18 years to 21 years in a phased manner has been made to the concerned authorities so that women are able to enjoy proper healthcare facilities at the right time and have the autonomy to make decisions for their own bodies.

This comes with an additional risk of soaring Child Mortality Rates as children born to adolescent mothers also had 10 percentage points higher prevalence of low weight unlike the one's born to adult mothers[456]. Also, situations like these have a deplorable impact on the well-being of a child as he or she is left without a parent. In some extraordinary cases, when the father denies taking any responsibility of the infant and the mother expires during the birth, the poor child is left with the fate of being an orphan for the rest of his or her life. Such ignorance can be a boost for the child to be exploited mentally and physically if by the negative zealots giving them an easy way into the criminal periphery. Therefore, children with such harsh personal experiences fall prey to their vulnerability.

Other perils emanating from early marriages involve the risk of acquiring sexually transmitted diseases (STDs) like HIV-AIDS, HPV etcetera. It can cause unwanted pregnancies. Likewise, in the recent times, there have been talks about the concerns stemming from Post-Natal Depression.Being teenage mothers, it often becomes strenuous for them to blatantly speak up about their telepathic concerns due to the magnitude of societal pressures that prevail around. Such circumstances confine them into a nefarious cycle recovery from which is very painful.

[456] Poornima Advani, 'Raising women's marriage age will be first step to India's global ambitions' (The Print, 4 September 2020) https://theprint.in/opinion/raising-womens-marriage-age-will-be-first-step-to-indias-global-ambitions/495437/?amp accessed 29 January 2021

Economic or Financial Dependence: Marriage at such young ages deprives women of reasonable jobs and earning opportunities. Unfortunately, many Indian women are condemned to a life like that even in this utterly modern 21st century. This leads to utter dependence of women on their spouses and other family members for monetary needs. Due to them being unskilled from the technical aspect, young girls struggle to financially make a mark for themselves. At times, the in-laws discourage women to go to work due to their youthful exuberance. This was one subject matter in the Finance Minister Sitharaman's Budget 2020 announcement speech. Early marriage of women affects our nation's economy drastically. Increasing women's labor force participation by ten percent could add $ 770 billion to India's GDP by 2025[457]. This also received a vivid mention in Prime Minister Modi's Independence Day speech last year where he stated that a rise in the women's marriage age from 18 to 21 years can be a financial booster for the Indian economy. The contribution of India to women's workforce is presently around 18 percent only as most Indian women are confined to unskilled domestic tasks even though we are in a technological atmosphere. Due to marriages at a young age not even a quarter of women in India get the labor force despite accounting for almost half of the 1.3 billion population and women earn 35 percent less on average than men which infringes their right to equality and this, in other words, amounts to reckless squandering of genuine talent[458]. Empowering women with such basic provisions will further hike India's

[457] Vrishti Beniwal, 'Big Gains in India Seen From Higher Legal Marriage Age of Women' (Bloomberg Quint, 22 October 2020 https://www.google.com/amp/s/www.bloombergquint.com/amp/economy-finance/big-gains-in-india-seen-from-higher-legal-marriage-age-of-women accessed 30 January 2021

[458] Ravi Prakash Kumar, 'Why Modi's plan for higher legal marriage age for women is enormous economic booster' (mint, 23 October 2020) https://www.google.com/amp/s/www.livemint.com/news/india/why-modi-s-plan-for-higher-legal-marriage-age-of-women-is-enormous-economic-booster/amp-11603354241286.html accessed 29 January 2021

HDI, GHI etcetera which will automatically have a progressive impact on the overall count of the Indian economy. Even a SBI report labeled 'Increasing the legal age of women marriage: A dominant strategy for societal good, financially empowering' entails that raising the women's age of marriage to 21 years will be a potent measure in empowering them with the ability of being financially sovereign, to serve economy India's and to freely bear their personal expenses to upgrade their living standards[459]. In furtherance to all this, financial standing can help women build confidence to face the outer ambiences in our societies.

Incomplete Education: Marriages at 18 years or below is clearly a missed golden opportunity for the young girls to attain higher education at universities and colleges. This leaves them only as Blue-collars workers and diminishes their capacity to be involved in professional functions. As per assessment if the marriageable age for women is scaled to be a minimum of 21 years there are expectations that the percentage of females doing graduation will rise by at least 7 percentage points from the current level of 9.8 percent[460]. Education is an extremely commanding guard against early marriages. Women in the rural areas get married much prematurely than the women in urban areas simply because cities and towns have much better educational institutions and facilities than the outskirts. Plenty of inquiries elicit the fact that

[459] Ravi Prakash Kumar, 'Why Modi's plan for higher legal marriage age for women is enormous economic booster' (mint, 23 October 2020) https://www.google.com/amp/s/www.livemint.com/news/india/why-modi-s-plan-for-higher-legal-marriage-age-of-women-is-enormous-economic-booster/amp-11603354241286.html accessed 29 January 2021

[460] Prof Susan M Sawyer, Peter S Azzopardi, Dakshitha Wickremarathne, Prof George C Patton, 'The age of adolescence' (The Lancet, 17 January 2018) https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(18)30022-1/fulltext#:~:text=The%20UN%20Convention%20on%20the,and%2019%20years%20of%20age.&text=The%20strategy%20for%20women's,health%20(2016%E2%80%9330). Accessed 30 January 2021

women who seem to have completed 12 or more years of academic qualification get married at much later stages of their lives. Specialized education is paramount in establishing a good stable career and this initiative shall ensure that women access those opportunities before they get married. The following measures will also aid in improving India's literacy rate and subsequently its productivity. Therefore, it is high time that women's education is taken into serious consideration.

Denial of Equality and Perpetuation of Stereotypes: The difference between the marriage ages of men and women has no logical explanation. There are no such scientific estimations justifying that women can marry at 18 years and men at 21 years. Through this women are denied equality against men. Countries of the west like France, the UK, the USA, Germany etcetera have set same ages of marriage for both the sexes and hence, it is one of the reasons for why the economic, political and mental conditions of women are much better in the said countries when compared to patriarchal societies like India. Such a situation creates a lot of social barriers for women where they have to deal with the conventionality of people. The belief that wives should always be younger to their husbands is an assumption directly drawn from laws like the present times. Quite often, biology is presented upon as an argument to justify women's age of marriage to be 18 years but societies need to understand the fact that women are not machines for producing children. Any marriage related concept for women's basic well being is frequently given a forced corollary with their utility or the ability to beget children. Consequently, mentality of such kind creates troubles for old and unmarried women who are independent in their own ways. They are scorned by society for not having a husband and children. Delicate relationships like marriage, for women, are much more than just bearing babies. They must be emotionally ready to handle the burden of such mammoth responsibilities. The aforesaid state of affairs smothers women's self confidence which is

precarious for their thorough development. Therefore, we need to increase the age to 21 years for women as soon as possible.

Lack of Maturity: Adolescence is the phase of life stretching between childhood and adulthood, and its definition has long posed a conundrum and roughly spans from 10 years to 19 years of age[461]. Adolescent marriages are harmful for both men and women but more so for women because at 18 years of age they are literally at much pre mature stages of their lives, plus, they are psychologically not prepared to be bound by such complex unions like marriage. Also, according to the well known Eric Erikson theory of psychosocial development, a healthy individual should pass through a series of developmental stages, from infancy to childhood. The significance of adolescence (between 13 and 19 years), and the transition to adulthood is a particularly crucial stage of development, when a growing child encounters a range of confusing and changing ideas about how they can fit into society. If a society forces a teenager into an entirely new, and potentially hostile, external environment even before their adult self has properly developed, it is denying them a period of growth and self-discovery. It's like nipping the growth of a potential artist, scientist or a computer professional or any other specialist from different fields of innovation and creativity and pushing them into a life of virtual enslavement, saying that society does not have the means to nurture the adolescent[462].

[461] Poornima Advani, 'Raising women's marriage age will be first step to India's global ambitions' (The Print, 4 September 2020) https://theprint.in/opinion/raising-womens-marriage-age-will-be-first-step-to-indias-global-ambitions/495437/?amp accessed 29 January 2021

[462] Prathma Sharma, 'PIL in Delhi HC on different minimum marrying age for men, women' (mint, 17 August 2019) https://www.livemint.com/news/india/pil-filed-in-delhi-high-court-on-different-minimum-age-for-marriage-1566033867205.html accessed 30 January 2021

That is what early marriages do to women. Hence, it is primetime that the government brings the required amendment to the age of marriage law in India.

Legal Issue: Equal marriageable age for both men and women in India at the age of 21 years is not a nascent point of argument and conflict. In 2019, a petition was filed in the Delhi High Court by advocate and BJP leader Ashwini Upadhyay seeking abolition of different minimum age for marriage of men and women under article 226 of the Indian constitution wherein he stated that the following marriage provisions violate fundamental rights of 'Right to Equality' under article 14, 'Right against Discrimination' under article 15 and 'Right to Life' under article 21 of women and further went on to say that there are more than 125 countries in the world that have set equal ages for both the sexes and India is just blatantly practicing an irrational and patriarchal tradition[13]. Mr.Upadhyay is also known as India's PIL man. Two significant Supreme Court rulings can act as precedents to support the petitioner's claim.

'In 2014, in the 'National Legal Services Authority of India v Union of India' case, the Supreme Court, while recognizing trans-genders as the third gender, said that justice is delivered with the "assumption that humans have equal value and should, therefore, be treated as equal, as well as by equal laws".

In 2019, in 'Joseph Shine v Union of India', the Supreme Court decriminalized adultery, and said that "a law that treats women differently based on gender stereotypes is an affront to women's dignity".'[463]

[463] Apurva Vishwanath, Esha Roy, 'The logic of, and debate around minimum age of marriage for women' (Indian Express, 17 August 2020) https://indianexpress.com/article/explained/pm-modi-74th-independence-day-women-empowerment-marriage-age-6555937/ accessed 30 January 2021

Domestic Violence: Getting married early increases the risk of domestic violence. According to the International Council of Research on Women (ICRW), women who are less educated and married between 15 to 19 years of age are more likely to be victims of domestic violence compared to more educated women and a possible explanation for this could be that there exists an imbalance of power between couples consisting of younger women and older men[464].

CONCLUSION:

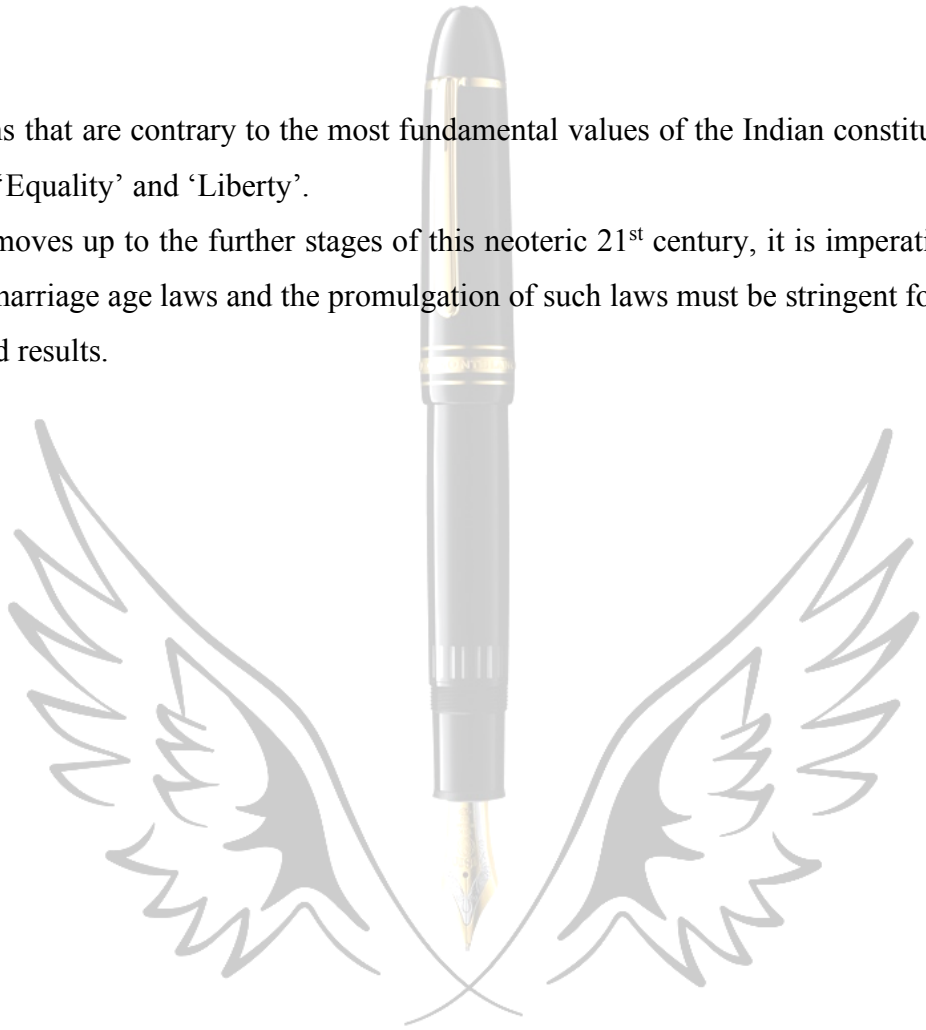
Marriage is a complex institution and thus, requires cerebral and somatic sophistication. It is a union subject to certain cultural and societal approvals. The first law regulating the minimum age of marriage was the Sarda Act or the Child Marriage Restraint enacted in 1929 which was a dead letter and never implemented to protect the sentiments of various communities. However, post-independence an amendment was made under the Act in 1978 increasing the age of marriage to 18 years for women and 21 for men and till the present day, this law has been inforce, although it is fragile in its implementation as child marriages are prevalent in India even now[16].

Post Independence, the law settling women's and men's ages of marriages to be 18 years and 21 years respectively but the concerned authorities must attempt to understand the fact that early marriages of women are a cause of concern not only for women but also men because such aberrations and lopsidedness of power in a relationship of spouses lead to disharmony. Young women can't be deprived of their right to their own bodies, minds, decent healthcare and apt educational facilities because of our imperious understanding of the concept of marriage. Accordingly, now is the right time to let go decades old flagrant and colloquial

[464] Ayush Verma, 'Age of marriage to be increased from 18 to 21 for girls' (iPleaders, 9 October, 2020) https://blog.ipleaders.in/age-marriage-increased-18-21-girls-sarda-act/ accessed 30 January 2021

legislations that are contrary to the most fundamental values of the Indian constitution --- the values of 'Equality' and 'Liberty'.

As India moves up to the further stages of this neoteric 21st century, it is imperative to bring parity in marriage age laws and the promulgation of such laws must be stringent for it to yield the desired results.



CONTEMPT OF COURT IN RELATION TO ARTICLE 19 OF THE INDIAN CONSTITUTION

- **NIKITA BARRETO**

ABSTRACT-

"Law is not law if it violates the principles of eternal justice"

- Lydia Maria Child

This paper focuses on analyzing The Prashant Bhushan case from the perspective of law as well as the media. This paper has discusses how the case comes under the purview of contempt of court and the media trial. The study also focuses on the role of the media in society and how it can be misused to spread the news which hasn't been proven in the court. We would understand the limitations of these platforms and how they can be challenged in court. Contempt of court is any behavior or wrongdoing that conflicts with or challenges the authority, integrity, and superiority of the court. These acts might include failure to comply with requests, witness tampering, withholding evidence, interruption of proceedings, or defying a court order. These wrongful acts may be committed by attorneys, officers of the court, court personnel, jurors, witnesses, protestors, or any party involved in a court proceedings. Contempt of Courts Act is justified to ensure proper administration of justice and Contempt of Court comes under the ambit of reasonable restriction. It is justified as it important for it to be so because if it will not do so, the people will lose their faith in the judiciary and if this happens, and then the judiciary cannot protect the public interest at large.

Key words: Contempt, freedom of speech, justice, judiciary, authority

ARTICLE 19 OF THE INDIAN CONSTITUTION:

The Supreme Court may hear contempt matters in relation to any court or judicial body in India. Though Freedom of Speech and Expression is guaranteed under the Constitution of India under Article 19(2), this freedom is not absolute because the makers of the Constitution have imposed certain restrictions upon it to ensure that this freedom is not abused to the effect of scandalizing the institution as a whole and the people who are a part of this said Institution, who cannot defend themselves publicly, and the same cannot be permitted in law. The reasonableness of this restriction is justifiable as it allows serving the larger collective interest of the nation as a whole and upholds the administration of justice against such malicious and contemptuous attacks.

Though a fair criticism of judgment is permissible in law, a person cannot exceed the right under Article 19(1) (a) of the Constitution to scandalize the institution. It is also a given that the criticism of the judiciary is not protected under Article 19(1)(a) of the Constitution and that fair criticism is based on the authentic and acceptable material permissible but when criticism tends to create apprehension in the minds of the people regarding integrity, ability and fairness of the Judge, it amounts to contempt. Matters like these that tend to disrupt the public's confidence upon the administration of justice, where justice is jeopardized by a gross or an unfounded attack on the Judges or the Institution as a whole, where such an attack is calculated to obstruct or destroy the Judicial process should be dealt with seriously. While the right to freedom of speech and expression is essential to a free society, the Constitution had itself imposed restrictions in relation to contempt of court, to ensure that people do not get away with scathing and malicious remarks against the biasness of the Judge and the offence of criminal

contempt should not be done away with, in order to ensure that the public confidence in the Judiciary is upheld.

The relationship between the Constitution and the Contempt Act is uncertain and the definition given under this Act has been followed for decades together and even with the Contempt of Court (Amendment) Act in 2006, there were no changes brought about in Section 2(c)(I) of the Act, as it is a given that a broad scope of offence is necessary for scandalization of the court because wide variety of acts could potentially undermine public confidence in the administration of justice, henceforth why the Contempt of Court is also given as a reasonable restriction under Article 19(2), and does not impunge the Right to Freedom of Speech and Expression when such an attack is intimidatory, malicious or offensive beyond condonable limits.

DOES BONAFIDE OPINION REGARDING CORRUPTION IN ANY SECTION OF THE JUDICIARY AMOUNT TO CONTEMPT

Section 13(b) of Contempt of court Act clearly states that truth acts as a valid defense in cases where justification can be given that it was said in the interest of the public or request for invoking the said defense is bona fide. In the case of Baradakanta Mishra vs. The Registrar of Orissa High Court[465] it was held that constructive criticism helps to establish a systemic correction in the system, so such cases won't fall under the ambit of Contempt of Court. Nevertheless, it was observed by the same judge in Re: S. Mulgaokar[466] that "the Court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the judges and where the attack is calculated to obstruct or destroy the judicial

[465] Baradakanta Mishra v. The Registrar of Orissa High Court, (1974) 1 SCC 374
[466] Re: Shri S Mulgaokar, (1978) 3 SCC 339

process."In this case, Justice Krishna Iyer observed, that if the judges are condemned of derogatory allegations beyond condonable limits, then in such cases for public interest and justice, the condemner will be punished for challenging the supremacy of law by making false allegations against it. In another case, Mohd. Zahir Khan vs. Vijai Singh and Others[467] , an impetuous litigant was held liable for contempt of court and was held guilty and sentenced to a month of imprisonment immediately after he said in a loud voice in the court that either he was an anti-national or the judges were anti –national.

The Supreme Court of India has been vested with the constitutional power of Contempt of Court and has also been granted the power to punish contempt of court under Article 129 of the Indian Constitution. Superior courts of record have the powers to punish contempt relating to the judges of those courts and the proceedings therein. The main reason for the existence of Contempt of Court is so that the dignity of the court is protected and the due administration of justice. In the case of M.B. Sanghi v. High Court of Punjab & Haryana & Ors[468], it was observed that "The foundation of our system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officer with impunity" It was said that and important judiciary is free important and to maintain this not only executive or legislature but also those who are an integral part of the system must understand that for this we will have to protect the judicial independence. In the case, O.P. Sharma & Ors. v. High Court of Punjab & Haryana[469], it was held that violation of principle of professional ethics by an Advocate is unfortunate and

[467] Mohd. Zahir Khan vs. Vijai Singh and Others *(1992)SC 642*

[468] M.B. Sanghi v. High Court of Punjab & Haryana & Ors., (1991) 3 SCC 600

[469] O.P. Sharma & Ors. v. High Court of Punjab & Haryana, (2011) 5 SCALE 518

unacceptable. Article 19(2) of the Constitution states that right to freedom the freedom of speech and expression granted under Article 19 is not absolute and it imposes reasonable restrictions in relation of contempt of court. This is done so that this fundamental right keeps a check and balances so that it is not misused and be used as a license to false accusations against the judiciary. No doubt, that while exercising the right of fair criticism under Article 19(1), if a citizen bonafidely exceeds the right in the public interest, this Court would be slow in exercising the contempt jurisdiction and show magnanimity. However, when such a statement is calculated in order to malign the image of judiciary, the Court would not remain a silent spectator. When the authority of this Court is itself under attack, the Court would not be an onlooker. The word 'authority' as explained by Wilmot, C.J. and approved by the Constitution Bench of this Court in Baradakanta Mishra does not mean the coercive power of the judges, but a deference and respect which is paid to them and their acts, from an opinion of their justice and integrity. As held by this Court in prior decisions, to which we have eluded hereinabove, the judiciary of India isn't just one of the pillars on which democracy stands yet is the focal pillar. The Constitutional democracy government remains on the bedrock of rule of law. The trust and confidence of the residents of the nation in the legal framework is the sine qua non for the presence of rule of law. An endeavor to shake the very establishment of democracy must be managed an iron hand. Judiciary is considered by the citizens in the nation with the most high esteem and respect. The judiciary is considered as a last expectation when a resident neglects to go anyplace. The Supreme Court is the exemplification of the Indian judiciary.

Criticism of the Supreme Court doesn't just have the impact of tending an ordinary litigant of losing the trust in the Supreme Court yet additionally will in general lose the trust in the mind of different judges in the nation in its highest court. A chance of different judges getting a feeling that they may not stand shielded from pernicious assaults, when the Supreme Court has

neglected to shield itself from malevolent suggestions, can't be precluded. Accordingly, so as to ensure the bigger public interest, such endeavors of assault on the most elevated judiciary of the nation ought to be managed immovably. Almost certainly, that the Court is needed to be charitable, when analysis is made of the judges or of the foundation of organization of equity. In any case, such magnamity can't be extended so much, which may add up to a weakness in dealing a vindictive, profane, determined assault on the very establishment of the organization of the judiciary and consequently harming the very establishment of the democracy. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is sought to be shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded.

THIRD PARTY LIABILITY IN CONTEMPT PROCEEDINGS:

The judiciary goes about as a gatekeeper of rule of law, which is the establishment of a just society. It acts as the third column; however the focal mainstay of a law based State. It is the responsibility to follow the ethics, which are made for the betterment of the society and to bring credibility to them. There are a few times when the websites fails to abide by the preset standards, this was one such time when we saw this in practice. In the case of Re Prashanth Bhushan & Anr[470], Tehelka magazine published something which was derogatory to the judiciary. Section 7 of the PRB Act raises the presumption in respect of a person who is named

[470] Re Prashanth Bhushan & Anr (2020) SCM No. 000001/202

the Editor and printed as such on every copy of the newspaper. The Act does not recognize any other legal entity for raising the presumption". The editor in chief is the head of the entire production to be published, thus it's his responsibility to conduct a fact check before publishing it. In the given case it is evident that the contempt of court is being practiced.

Section 3 of Contempt of Court talks about innocent publication. But under Section 3(2) it is said that this will not apply to cases which are not in conformity with Section 5 of Contempt of Court Act which talks about the fair criticism of judicial act. The comments made were not fair and merely an expression of opinion, there was no proof to prove that whatever said was true and fair. Rule 3(8) requires that the intermediary, upon receiving actual knowledge in the form of a court order, or on being notified by the appropriate government authority or its agency, under Section 79(3) (b) of the Act, shall remove or disable access to unlawful acts relatable to Article 19 (2) .For this case they can't be considered as innocent because there are stages involved before publishing. The main work of the editor of any media company is to fact checks before publishing. This is done to give the credibility to any information and thus spreading the right news

Section 79 of the Information Technology Act talks about the exemption of intermediaries and that they cannot be held liable for third party information. But this defense cannot be taken by. Section 79 (3) (a) also states that if the intermediary is a conspired or abetted or aided or induced whether by threat or otherwise in commission of an unlawful act, then he will be held liable. For such an act they can't be considered as innocent because there are stages involved before publishing. The main work of the editor of any is to fact checks before publishing. This is done to give the credibility to any information and thus spreading the right news. Democracy needs to work productively, it is basic that the legal executive isn't just liberated from outside impacts, rather, has a capacity to keep up its highness and authority. So as to guarantee that the

pride and authority of the legal executive is regarded and ensured, Courts have been enabled with the "phenomenal power" of discipline for their disdain. Law serves public interests and trust in the legal cycle. At the same time, the media is considered as a watchdog for our 3 pillars of society. It is also considered as the fourth pillar of the constitution, which facilitates the function of other three. The main function is to pass on correct information and sensitize the citizens of India about the rights and responsibilities of a citizen.

Can this case be considered a case of a media trial?

Media is viewed as one of the four pillars of the Indian democracy. What's more, it assumes an indispensable part in embellishing the assessment of the general public and it has the capability of changing the entire perspective through which individuals make their insights on different occasions. Media Trial portrays the effect of TV and paper inclusion on an individual's standing by making an inescapable impression of blame independent of any decision in a courtroom. Media Trials can be followed back to the twentieth century despite the fact that the expression "Media trial" had been instituted of late however the adage had gotten its importance from the instance of Roscoe "Greasy" Arbuckle (1921) who was released by the courtroom, yet had lost all his standing and distinction alongside his work after the media had announced him "blameworthy". Another prestigious case was the preliminary of O.J. Simpson (1995), where the media had advanced the case and profoundly impacted the brains of the watchers even over the status of the court. Clearly media profoundly energizes or impacts the perspectives of the open. There has been no general set of laws where the media is enabled to attempt a case. Each coin has different sides so is the situation with media preliminaries and news-casting, at specific occurrences writer depicts a pre-chosen picture of a person blamed in this manner tearing his/her standing that can in the long run influence the preliminary and the judgment,

from now being investigated by the media. Sheena Bohra murder case is a renowned case wherein according to the media has impacted the individual existence of the principle charged Indrani Mukherjea that emerged a discussion on the matter of media preliminary of the blamed. In the alert of such cases the ethics of journalism were typically addressed. In this case also the prestige of the Chief justice was challenged and the information regarding him was spread through the print medium. All the allegations put forth on him were not proven in the court and thus the media had its own stance and spread certain information which was not appropriate. Thus this case can be considered as the case of negative media trial, where the media is highly involved in the spread of unproven information, further leading to contempt of court.

DOES THIS CASE CHALLENGE THE ROLE OF ETHICS IN JOURNALISM?

Journalistic ethics are the normal qualities that manage journalists. They spread out both the desires and commitments that writers, editors, and others working in the field ought to follow to execute their work mindfully. Reporting morals have advanced over the long run. Most news associations have their own composed codes of ethics, as do proficient participation bodies. In the event that an expert columnist or news association violates these moral guidelines, they will lose credibility.

There are a few key moral guidelines that show up across worldwide news associations. At the most significant level, they approach columnists to look for reality, act in the public interest, and limit hurt.

- Trustworthiness- Writers have a commitment to search out reality and report it as precisely as could be expected under the circumstances. This requires steadiness: this

implies bending over backward to search out the real factors pertinent to a story. Writers ought to likewise prove any data with various sources.

- Autonomy- Writers ought to try not to take political sides and ought not to follow up for the benefit of particular vested parties. Any political affiliations or monetary speculations that may establish an irreconcilable situation with the subject they are expounding on ought to be proclaimed to editors and peruses. A few associations portray this standard as "objectivity," while others, particularly non-benefit municipal news coverage projects, reject this term, as they position themselves expressly in favor of public interest.
- Decency- Notwithstanding being autonomous, writers should show unbiasedness and balance in their revealing. Most reports have more than one side, and writers should catch this. All things considered, they ought not to place two alternate points of view on equivalent balance where one is unsupported by proof. The exemption for the fair-mindedness rule is assessment composing, just as "gonzo" news-casting and innovative verifiable.
- Public responsibility- News associations ought to tune in to their crowd. To empower people in general to consider them responsible, columnists ought to compose under their own bylines and acknowledge obligation regarding their words. At the point when media sources distribute real mistakes, they need to give a rectification.
- Damage minimization- Only one out of every odd actuality that can be distributed ought to be distributed. On the off chance that the measure of mischief that could come to private people—especially kids—because of divulgence surpasses the public great that would happen to it, at that point media sources may decide not to distribute the story.

This is to a lesser degree a thought with regards to well known people. It is enormous, nonetheless, in issues of public security, where lives could be on the line.

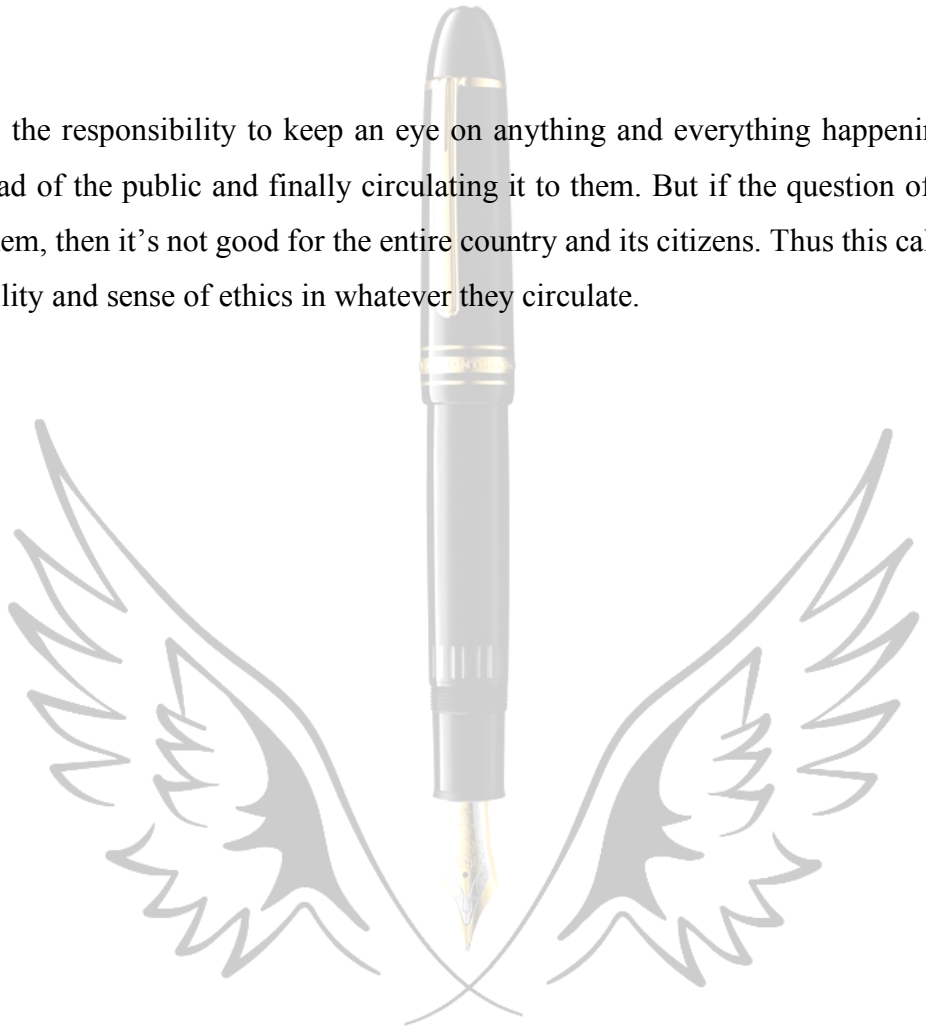
- Staying away from defamation- This is lawful just as an ethical basis for writers. Columnists can't print bogus proclamations that harm an individual's standing. In many purviews, genuine explanations can't be offensive, so columnists can ensure themselves by thoroughly checking realities.
- Legitimate attribution- Writers should never copy. In the event that they use data from another news source or writer, they need to credit it to them.

It is easy to agree on the principles of ethical journalism, but applying them in real life is harder. Because the goal to reveal the truth can sometimes clash with the duty to limit harm, it is up to journalists and editors to choose how to act. These decisions are very crucial in nature because it can reveal the truth of any situation or can mislead it and influence the public drastically. There have been instances in the past where it has been helpful as well as harmful. In this case, the information lacked the facts, thus it wasn't considered as credible. It was here that the editor can be punished for publishing information which lacked proof. Thus this is a clear violation of ethics in this case.

CONCLUSION:

This case helps us understand the importance of the fair criticism and spreading of the credible news. Prashant Bhushan case is one of the major cases where we understand the importance of fair criticism in the judicial system and the media platforms. Contempt of court is one of the most powerful laws which are made to safeguard the democratic system and create integrity and peace in the country. Media is considered as the fourth pillar of the democratic system

which has the responsibility to keep an eye on anything and everything happening with the good or bad of the public and finally circulating it to them. But if the question of credibility rises on them, then it's not good for the entire country and its citizens. Thus this calls for more responsibility and sense of ethics in whatever they circulate.



KRAMER V KRAMER TO MARRIAGE STORY: EVOLUTION OF MATRIMONIAL LAW IN THE UNITED STATES AND IN INDIA

- **BALAPRAGATHA M**

In the past 40 years, from Kramer v Kramer to Marriage story, the way law looks at divorce, custody and other family related issues has changed multitudes. It is worthy to analyse these changes and similarities of law in two different time periods, to ascertain the social and legal evolution. Naturally, the question would arise, why would taking the view point of films in analysing legal evolution and implications be relevant. In this 21st century the integration of film in legal academia is spreading in the Anglo- American and Continental legal academia[471]. Though one could argue that films are for commercial pleasure and on the other hand law is a system of organised power, but in a more nuanced perspective, both of them play a significant role in contemporary socio-cultural formation by being the vehicles for society to narrate and recreate[472]. The study of law and film is an interdisciplinary field in the making, with pivotal connotations. Movies with their insightful and 'unique' portrayal of individuals and the society, through narrativity and textuality, reflect the underlying value system. Legal scholars argue that films operates in parallel to law and legal system, '*films enact viewer-engaging judgment'*, '*films elicit popular jurisprudence*'[473]. John Denvir notes '*we can learn a great deal about law*

[471] Black, D. A. 1999. *Law in Film: Resonance and Representation*, University of Illinois Press, Champaign.
[472] Chase, A. 2002. *Movies on Trial: the Legal System on the Silver Screen*, New Press, New York.
[473] Kamir, O. 2005. '*Cinematic judgment and jurisprudence: a woman's memory, recovery and justice in a post-traumatic society (a study of Plains's Death and the Maiden)*', in Law on the Screen, eds A. Sarat, L. Douglas & M. Umphrey, University of Michigan Press, Ann Arbor.

from watching movies'[474] and Rebecca Johnson in her paper on 'Leaving normal: constructing the family at the movies and in law' argues that films present and explore 'deviant families' which are usually banned from the normative construction by family laws[475].

Further, a comparison of legal jurisprudence in India and U.S in family related matters would facilitate in intellectual exchange between these two legal systems and would cultivate a culture of understanding. The discipline of comparative law, by interpreting various legal systems aids the domestic law to evolve and adapt to the changing circumstances by broadening the horizon for legislators and law reformers[476].

This paper seeks to analyse the various implications and reflections of the societal norms, values and development, by considering the two movies under study. Kramer v Kramer directed by Robert Benton was released in 1979 and Marriage Story directed by Noah Baumbach was released in 2019. Though both the movies revolve around two couples who are going through separation and the legal battle that lies ahead of them, it portrays the development in law and the different legal processes the couple have to endure. These changes and evolution of law as identified through the plotline of these movies will be the foundation for the analysis in the paper.

[474] Denvir, J. (ed.) (1996) *Legal Reelism: Movies as Legal Texts*, University of Illinois Press, Champaign.
[475] Johnson, R. 2000 '*Leaving normal: constructing the family at the movies and in law'*, in New Perspectives on Deviance: the Construction of Deviance in Everyday Life, ed. L. Beaman, Hall, Eaglewood Cliffs, NJ, pp. 163–179.
[476]K.G., C., 2008. *The Role Of Foreign Precedents In A Country'S Legal System, Lecture At Northwestern University*. [online] Scribd. Available at: <https://www.scribd.com/document/451876468/article-manuscript> [Accessed 17 May 2020].

Firstly, I would discuss the different positions of Custody Law in the United States and India by taking the aid of the movies under study. And in the latter half of the essay, I would discuss the differences and similarities of divorce laws in these two.

"What law does say that a woman is better parent by virtue of her gender"[477]**,** it is the agony and anguish filled lines of Ted Kramer ,when the court blatantly goes with 'motherhood' and denies him the custody of his son. The court oversees the fact that, his wife, Joanna Kramer, abandons her son for 16 months as she thinks " He (Billy Kramer, her son) is better off without me (Joanna Kramer)"[478]. But 40 years later, in Marriage Story we can see that, this idea of 'Presumption of mother as the sole custodian' changes to the 'Presumption of Joint Custody' where both parents are treated in an equal footing. As we can see, the U.S custody laws have evolved over the years by considering a child's welfare as the 'paramount consideration'[479]. But prior to the 20th century, the child's interest was of no significance as they were 'little more that chattels of their parents'[480]. Children were the 'entitlement'[481]of the father who was the economic head of the family and it 'made sense'[482] for him to have custody and guardianship of his children, who were his 'economic assets'[483], privately owned and controlled by him. This narrative transformed with women's right movement, when the idea that '*from nature,*

[477]Ted Kramer in the movie Kramer v Kramer, 1979.
[478] Joanna Kramer in the movie Kramer v Kramer, 1979.
[479] Wilder – Newland v Kessinger, 967 N.E.2d 558, 565 (Ind.Ct.app.2012); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 972 (Mass.2003)
[480]Re Westerville, No.12114 (Mich. Prob. Ct.1976).
[481]People ex rel. Barry v Mercein, 3 Hill 399,420 (N.Y. Sup. Ct. 1842) (Cowen, J.)
[482] Hasday J. 2014. *Family Law Remimagined* , Harvard University Press.

[483] Bartlett K. 1984. '*Rethinking Parenthood as an exclusive status: the need for legal alternatives when the premise of the nuclear family has failed',* [online] Available at: < www.jstor.org/stable/1072945> Accessed 17 May, 2020

habit, or both, the mother is much more capable of administering to their(children) health '[484] and denying the mother of custody is to '*hold nature in contempt and snatch helpless child from the bosom of an affectionate mother*' [485]. Echoing this change in ideology, the U.S courts formed the 'tender year doctrine', according to which the mother had sole custody which could be rebutted only if the father proves that she is 'unfit'. In 1873, this presumption was extended until the child reached sixteen and as the doctrine was widely practised, almost all the courts around the world, accepted the doctrine. It was established in most of US and Europe states by the end of 20th century. The conundrum being, the movement condemned the law that gives the children to the father, no matter what his character or condition, but embodied the same in the doctrine with a 'presumption of motherhood' without considering the suitableness and ability of the mother to raise her children. The later part of the 20th century, witnessed an emergence of fathers' rights movement with the ordained notion of 'men and women, both, as capable parents'. The courts also recognised that, the tender years doctrine created an extensive burden on the women by stigmatising that '*maternal love, care, nurture and self- sacrifice as secondary sex characteristics*" [486] of a women or as Nora in Marriage Story puts it '*We can accept an imperfect dad. We accept their fallibility but not with the mother because the basis of the judeo Christianism is Mary, and she is perfect. As a mother you will always be held to different higher standard'*[487]

When the social and economic clout were no more purely male dominated, there was a call for a gender-neutral custody law, and the courts reacted with the 'Presumption of joint custody',

[484] Ernestine L. Rose at the second National Convention in Worcester (Oct 15 and 16 , 1851).
[485] Helms v franciscus, 2 bland 544,563 (Md.Ch.1830)
[486] Hasday *Supra* note 12.
[487] Nora Fanshaw, Lawyer of Nicole Barber, Marriage Story, 2019

embodying the 'best interests of child doctrine'[488], as can be seen in Marriage story. It showed that there was no monopoly in being a parent as 'each parent shared the function of making parental decisions'[489].

In India, the Guardians and Wards Act was enacted in 1890 by the colonial state, which continued the legacy of Common law by recognising the supremacy of the 'paternal right' in guardianship and custody of children. Mainly women were not given an independent legal status apart from that of her father or husband. With the deep rooted emphasis on the father as the 'Karta', who has to ensure the propagation of family lineage and protect 'economic prospects', the gendered influence on custody and guardianship laws were hard to breakdown. According to The Hindu Minority and Guardianship Act, 1956, Section 6, the father is the natural guardian and 'after'[490] him, the mother. Further, a Presumption of Custody with the Mother arises in case of custody of a minor below the age of five[491]. In the decorated case of ***Gita Hariharan v. Reserve Bank of India***[492], the constitutionality of section 6 (a) was challenged for violating the principles of equality guaranteed under the constitution. The court held that the word 'after' in the statue shouldn't be interpreted as 'after the lifetime' but as 'absence', which could be a 'temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise'. But the judgment fell

[488] Gerif, J.B. 1979. *'Joint Custody: A Sociological Study'* , Trial Magazine, 32.

[489] *Ibid.*

[490] Section 6 (a), Hindu Minority and Guardianship Act, 1956
[491] Section 6 (a), Hindu Minority and Guardianship Act, 1956
[492] AIR 1999 2 SCC 228

short by not dealing with the preferential position of the father and didn't provide an equal position to the mother, as she could be a guardian only in 'exceptional' circumstances[493].

Under the Muslim law, the father acts as the natural guardian and the custody of the child is with the mother, the 'Hazina', which terminates when a female child attains puberty and when a male child attains seven years of age[494]. Thereafter, it becomes a legal 'right'[495] based on the rule of law rather than awarding the most suitable parent the custody. The Kerala High Court in ***Suharabi v. D. Mohammed[496],*** held that the mother should have custody of her one and a half year old daughter even though she was financially instable to care of the child. In similar vein, in ***Md. Jameel Ahmed Ansari v. Ishrath Sajeeda[497]***, the Court decided that the custody of an eleven-year-old boy should be with the father as Muslim law allows the mother to have exclusive custody only until the age of seven in case of male children and the Court didn't get into what would be in the best interest of the child. It is important to note that, under Hanafi law, in case of death or legal incapacity of mother, the 'cognate relations'[498] will become the custodian of the child, which stems from the social fiction that '*emotional bondage is assured only in the lap a female*'.

A cursory perusal of the statutory provisions shows that, primacy is given to the father for being the natural guardian and superior position of the mother in custody, which are seated on

[493]Rafiq, A. 2014, '*Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World'* 4(5) International Journal of Humanities and Social Science, 267 [online] <http://www.ijhssnet.com/journals/Vol_4_No_5_March_2014/29.pdf> accessed 17 May 2020

[494]

[495](*Commonlii.org*, 2011) <http://www.commonlii.org/in/journals/NALSARLawRw/2011/9.pdf> accessed 17 May 2020

[496] AIR 1988 Ker 30

[497] AIR 1983 AP 106

[498] Maternal grandmother or great grandmother, paternal grandmother or great grandmother, sister or her daughter, maternal aunt and paternal aunt, in this order.

the stereotypes and stigma about heterosexual, cisgender married couples. The issue is magnified when the judicial thinking through the recognition of *parens patriae jurisdiction,* that is a 'higher parental authority of the state supersedes the natural guardianship'[499] runs contrary to the codified statutory provisions. In the case of ***Soora Beddi v. Cheema Reddy***[500], the mother was awarded guardianship based on the welfare principle embodied in Section 13 of the Guardians and Wards Act, 1890 act, even though the father was not found 'unfit'. While talking about the presumption in favour of mother in case of a minor, the Apex court held that '*we make it clear that we do not subscribe to the general observations and comments made by the High Court in favour of mother as parent to be always preferable to the father to retain custody of the child. In our considered opinion, such generalisation in favour of the mother should not have been made'*[501]. In a recent 2015 judgment, Justice Vikramjit Sen held that an unwed mother can be a sole guardian of the child without the consent of the biological father and even without disclosing his name[502]. Though Courts are implementing progressive developments, there is still remains a legal uncertainty and lack of judicial consensus about the standard of 'best interest of the child' as there is no statutory backing to it, which ironically results in affecting the interest of the child, as they are used as pawns by the parents to strike 'pre-court bargain'[503] in the long saga of matrimonial litigation.

It has to be noticed that while considering the welfare principle, the courts presume that the best interest of child is to grant sole custodianship and guardianship. In few instances, Courts

[499] O'Hara (1990) 2 IR 232/

[500] AIR 1950 Mad 306.
[501] Kumar V. Jahgirdar vs Chethana Ramatheertha, MANU/SC/0194/2004.
[502] ABC v. The State of NCT of Delhi, 2015 SCC OnLine SC 609.
[503] Deshpande S. 2009. *'Divorced Dads Unite For Custody Rights',* Times of India

have envisaged 'Joint custody' as the best interest for the child , as it provides 'sustainable growth of the minor child'[504]. The law commission in it 257th report, proposed that joint custody should be allowed in majority of the cases, with sole custody being an exception. Psychological studies too, support shared parenting as it enhances the quality of the child's life with higher personal development during the crucial years[505]. Courts recognising Joint Custody could be the best path to achieve the needed equality between the treatment of qualified parents, irrespective of their gender, by recognising the common responsibility and right they share[506]. Thus, a reformed custody law with unambiguous and clear provisions and guidelines for enforcing joint custody could help unscramble many disputes. Further, in Kramer v Kramer the opinion of the child is not taken into consideration, but in Marriage story the court appoints a child expert to wvaluate and inform the Court about the relationship he enjoys with this parent. U.S Courts are increasingly implementing such strategies to understand the needs of the children and this shift symbolises the change in understanding on what constitutes 'best interest' of the child. A mere evaluation of economic sustainability of the parents is not the only standard followed by the Courts but they look into the 'comfort'[507] of the child with the parent. Indian courts do not employ many such techniques, but appointment of a guardian *ad*

[504] KM Vinaya v. B Srinivas, AIR 2013 SC 102

[505] Glover R,& Steel C. 2006. *'Comparing The Effects On The Child Of Post-Divorce Parenting Arrangements'* 12 Journal of Divorce Law.

[506] Article 18, Convention on the Rights of the Child ,1989

[507] Thomas A. 2015. *'Can Children Express Preference In Maryland Custody Proceedings?'* <http://www.divorcenet.com/resources/a-childs-preference-maryland-custody-proceedings.html> accessed 17 May 2020

litem[508] or a social worker or mental health professional to represent and testify on the behalf of the child could prove to be significant in identifying the best interests[509].

I asked him to tell me my number, He dint know. So I left. In Marriage Story, Nicole says, '*I didn't belong to myself and it was small stuff, stupid stuff and big stuff. All the furniture in our house was his taste, I don't know what my taste was because I had never been asked to use it'*[510]. In Kramer v Kramer, Joanna says '*I am leaving because I have to find something interesting for myself to do*'[511]. We can see a commonality in the sense of 'feeling out of place'[512] among women, after marriage. When Nicole says '*I just became Who ? The actress who was in that thing that time? I got smaller and smaller*[513]', we can understand that in both the scenarios, the reason for separation was not because of a legally recognised fault of the husband. Then, can divorce be granted on the ground of 'incompatibility' between the couples? Firstly, there are two main theories in this regard that legal jurisprudence has formulated: Fault theory[514] and No-Fault theory[515]. The Former, compels in recognising a guilty and an innocent party and only the innocent party who is affected by a 'matrimonial offence' can seek for the remedy of divorce. California in 1970 was the first state in U.S, to introduce No-fault divorce, granted on the grounds such as irreconcilable differences, irretrievable breakdown of the marriage and incompatibility, or after a period of separation, and now almost all states have

[508] An attorney appointed by the court to investigate a case and report its findings and recommendations to the court.
[509] Slepkow, Slepkow& Associates, Inc., *Child's Preference and Awarding Custody in Rhode Island*, (20
[510] Nicole Barber, Marriage story, 2019
[511] Joanna Krmaer, Kramer v Kramer, 1979
[512] *Ibid.*
[513] Nicole Barber, Marriage story, 2019
[514] *divorce a vinculo matrimonii*
[515] *divorce a mensa et thoro*

codified no fault divorce provisions[516]. In most states a spouse can't object to another's petition for a no-fault divorce, as the objection in itself would be considered as an irreconcilable difference[517].

If we shift to India, it is undoubted that marriage is seen as a 'fundamental' institution of the society, in fact, the 'foundation' of it. That's why, not only in the solemnization of marriage but even in the separation, religious and societal sentiments play a pertinent role. As a result, the divorce laws haven't evolved to a great extent. The Indian law provides for only an exhaustive number grounds for divorce based on fault theory, under Section 13 of Hindu Marriage Act, 1955, including Adultery, Cruelty, Desertion , Conversion to another religion, Mental Disorder , suffering from incurable form of Leprosy, Venereal Disease in a communicable form, Renunciation and Not Heard Alive for a period of seven years. Legal critiques of these strict standard for divorce grounds, contend that they are inadequate to deal with a broken marriage and once a marriage has broken beyond repair it would in fact be harmful for the society and injurious to the individuals. '*The marriage becomes a fiction, though supported by a legal tie*'[518] and it is 'inhumane'[519] and unreasonable to force the parties to keep up the 'empty shell'[520] of marriage. As a response to this issue, Law Commission in its 71st Report recommended to include 'irretrievable breakdown of marriage' as a ground for

[516] Ehrlich, J. Shoshanna. 2008. *Family law for paralegals* (4th ed.). New York, NY: Aspen Publishers/Wolters Kluwer.

[517] Jamil S, *An Analysis of Irretrievable Breakdown of Marriage as a Ground for Divorce* (October 10, 2015). Law Mantra Online Monthly Journal Vol 3 (Issue 1)

[518] Law Commission, 217th Report, [online] Available at: <http://lawcommissionofindia.nic.inreport217.pdf> Accessed 17 May 2020

[519] Ram Kali v. Gopal Das, (1971) 1 ILR Delhi 10 (F.B.).

[520] *Ibid.*

filing divorce[521]. The earliest case of recognising irretrievable breakdown of marriage as a ground was in ***V.Bhagat v D. Bhagat***, where the court invoked its inherent power under Article 142 to pass the judgement and many court following this precedent have considered it as ground[522]. But courts have also reiterated that '*the marriage between the parties can't be dissolved by the trial Court or even by the High Court only on the ground of marriage having been irretrievably broken down*'[523]. In ***Ms. Jorden Diengdeh v. S. S. Chopra***, the court observed that '*time has come to recognise irretrievable breakdown of marriage as a ground for divorce'*, to ensure an era of women-friendly divorce laws.

But the aforementioned Report and Judgments view marriage as, two independent individuals coming together voluntarily, which is not often the case in India. As Amy March in Little women puts 'marriage is not just a sacrament but an economic proposition'[524], which fosters financial dependence of the wife on her husband. Indian society, still treats the household as the domain of the women and in several ways the labour of the wife is owned by the husband[525]. The U.S law based on society where women like Nicole in Marriage story who are fighting for 'a piece of earth that is theirs' and independency can't be easily replicated in the Indian society. By seeing marriage as a 'coalition' rather than as a 'economic partnership'[526],the Report turns

[521] *Reiterated in* Naveen Hohli v Neelu kohli AIR 2004 All 1.
[522] Romesh Chander v. Savitri (1994) 107 PLR 361, Ashok Hurra v. Rupa Zaveri 1997 (4) SCC 226, Sangamitra Ghosh v. Kajal Kumar Ghosh, 2006 AIR (SCW) 5983; Kanchan Devi v. Pramod Kumar Mittal air 1996 SC 319.

[524] Amy March, Little Women, 2019.
[525] Agarwal, B. *A Field of One's Own: Gender and Land Rights in South Asia*. Cambridge: Cambridge University Press, 1994.
[526] Chitkara , R. 2014. *Between Choice and Security: Irretrievable Breakdown of Marriage in India*, Available at: <https://www.researchgate.net/publication/280170319_Between_Choice_and_Security_Irretrievable_Breakdown_of_Marriage_in_India> Accessed 17 May 2020.

a blind eye to the burden it would conceive on women for sustenance and economic stability. Even with the merits of the 'No fault' theory, there is a duty on the court to understand if the status quo and the societal norms would render it possible and whether it is indeed the right time to choose a way out of 'broken marriages'[527] over 'economic insecurity (for women)'. Divorce and custody proceedings results in a ' grave consequence'[528], as a result it becomes important to deal with them delicately to protect an important institution of the society. While reformation in matrimonial law is necessary, it becomes pertinent to keep in mind that the reformation don't create an inverse effect by being counterproductive and end up affecting the group of the society that the reformation was conceived to benefit.

[527] *Ibid.*
[528] Sushila v. Mahendra , AIR I960 Bom 1 1

SHAYARA BANO V. UNION OF INDIA AND ANR: WOMEN IN ISLAM- OPPRESSED OR LIBERATED?

-ABARNA D.S, GAYATHRI MENON P & FEBA ELIZABETH GEORGE

INTRODUCTION:

"Is it fair for a man to say "talaq" thrice over the phone and Muslim woman's life gets ruined? This issue shouldn't be politicized"

-Narendra Modi[529]

India is one of the countries which is religiously and ethnically diverse in nature. In such a country, religious matters are greatly sensitive and the most recent debate in Muslim Law is the Triple Talaq Case. The issues with relation to Muslim women, have acquired a great deal of importance for various reasons. The Supreme court's decision in favour of Shah Bano's case (1985) to enact a uniform civil code, to Shayara Bano's case (2017) in declaring triple talaq to be unconstitutional has created a fear among the Muslims that their personal laws is being interfered with. In this case, 'talaq-e-biddat', polygamy, nikah halala were challenged before the court.

The word 'Talaq' means the dissolution of the marriage tie by declaration of the husband.[530] There are namely three modes by which talaq may be pronounced- 'Talaq-e-ahsan', 'Talaq-e-hasan' and 'Talaq-e-biddat'. 'Talaq-e-ahsan', and 'talaq-e-hasan' are both approved by the 'Quran' and 'hadith'. But 'talaq-e-biddat' is neither recognized by the 'Quran' nor by 'hadith'.

[529] Bloomberg|Quint, https://www.bloombergquint.com (last visited Jan 26,2021)
[530] Asha Bibi v. Kadar Ibrahim Rowther, ILR (1909) 33 Mad 22.

Talaq-e-biddat is an irregular and sinful, though lawful, form of talaq where the husband does not follow the approved form of talaq, neither pays an attention to the period of purity nor to the abstention from intercourse. It is defined in the Hedaya as a divorce where the husband repudiates his wife by three divorces in one sentence, or where he repeats the sentence separately thrice within a single tuhr.[531] Most importantly, this form of talaq can be in oral, written or electronic form and is irrevocable.

On August 22, 2017, the verdict by the Honourable Supreme Court of India in the case of Shayara Bano v. Union of India[532] declared the pronouncement of 'talaq-biddat' by Muslim husbands as void and illegal and proposed to make it a punishable offence. By the majority of 3:2 ratio, the practice of talaq-e-biddat was set aside, holding it violative under Article 14 and not protected under Article 25 of the constitution. This paper gives a brief comment on the case 'Shayara Bano v. Union of India'.

BACKGROUND OF THE CASE:

Shayara Bano was married to Rizwan Ahmad for 15 years. On 10.10.2015, her husband divorced her by pronouncing talaq three times in the presence of two witnesses (Mohammed Yaseen, son of Abdul Majeed and Ayaaz Ahmad, son of Ityaz Hussain). The petitioner has sought a declaration stating that the 'talaq-e-biddat' pronounced by her husband be declared as void ab initio. She argued before the Supreme Court of India that three practices – triple talaq, polygamy, and nikah halala were unconstitutional. She also contended that the divorce irrevocably terminates the ties of matrimony purportedly under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937. Various women's right organisations including

[531] Hedaya, 73.
[532] (2017) 9 SCC 1

the Bebaak collective and Bhartiya Muslim Mahila Andolan supported Ms. Bano's plea stating the practice to be unconstitutional. The case was called before a constitutional bench of the apex court consisting of 5 judges from different grounds.[533] The main issues of this case are:

1. Whether Talaq-e-biddat (specifically instantaneous triple talaq), which is concededly sinful, an essential practice of Islam?
2. Whether the Muslim Personal Law (Shariat) Application Act,1937 Act confer a statutory status on its subjects regulated by the legislation?
3. Whether the practice of triple talak violates any fundamental rights?

The laws regarding this case includes the fundamental rights- Article 13(3)(b) (Laws inconsistent with or in derogation of the fundamental rights), Article 14(Equality before law), Article 15(Prohibition of discrimination on the basis of religion, caste, sex, race or place of birth), Article 21 (Protection of life and personal liberty), Article 26(b) (Freedom to manage religious affairs). Article 25(1) (Freedom of conscience and free profession, practice and propagation of religion to all citizens).[534]

JUDGEMENT DELIVERED:

A. Issue I:

Whether Talaq-e-biddat (specifically instantaneous triple talaq), which is concededly sinful, an essential practice of Islam?

The petitioner contended that 'Talaq-biddat' does not have its source of origin from Quran and whatever is sinful, cannot hold the sanction of law as Talaq-biddat is bad in theology. Thus,

[533]Malcolm Katrak Feminist Law Professors. BLOG; (Jan.23,2021,9:29PM); http://www.feministlawprofessors.com/2017

[534] INDIA CONST. art.13cl.3.cl.b, 14, 15, 21, 26(b) § 25. cl.1

the practice was patriarchal and cannot have a place in today's world of equality. In order to validate this statement, reference was made to practices of 'sati', 'devadasi' and 'polygamy'. The practice of sati commonly described as widow to immolate herself on her husband's pyre was declared unacceptable[535], 'talaq-e-biddat' was also pleaded to be declared as unacceptable. The practice of Devadasi which means a girl dedicated to the worship and service of a deity or temple was abolished in various states as the life of 'devadasi' was disrepute and resulted in a life of destitution. The practice was done away by legislations such as Tamil Nadu Devadasis (Prevention of Dedication) Act 1947, Bombay Devadasi Protection Act 1957, Andhra Pradesh Devadasis (Prohibition of Dedication) Act of 1988 and is therefore apparent that the instant practice was withdrawn. The practice of polygamy (a state in which a man marries more than one woman at the same time) was initially permitted among Hindus. This practice was not only done away amongst Hindus but it was made a punishable offence.[536]

The petitioner averred that all these instant practices was eliminated by legislation and thus 'talaq-e-biddat' was also pleaded to also be annihilated.

Per contra, the defendant contended that different practices of talaq among the Muslims have their origin in hadiths and other Muslim Jurisprudence. Even 'Talaq-e-hasan' and 'Talaq-e-ahsan' which the petitioners acknowledged to be 'proper' and 'most proper' forms of divorce respectively does not have a place in Quran. Therefore, just because it is not mentioned in Quran, it cannot be considered as a valid justification for setting aside the practice.

The Supreme Court after hearing the divergent views of both the parties elucidated that an essential religious practice would be the one that is only protected under Article 25 of the Constitution. So, an essential practice means the core beliefs upon which a religion is founded

[535] The Commission of Sati (Prevention) Act, 1987, No.3, Acts of Parliament, 1988(India).
[536] The Hindu Marriage Act,1955, No.25, Acts of Parliament, 1955 (India).

and those practices which are fundamental to follow a religious belief. A practice may be a religious practice but not an essential and integral part of practice of that religion.[537]

The Honourable Supreme Court pronounced the judgement by applying the five-degree tests. Triple talaq does not fall under first, second, and fifth degree, but it falls best within the third degree and squarely under the fourth degree. It is because triple talaq is a permissible action as to which religion is indifferent and it is reprobated as unworthy. It is therefore clear that triple talaq is not protected under Article 25(1) of the constitution. The Supreme Court made it clear that triple talaq is only a form of talaq which is permissible in law, but at the same time, stated to be sinful by the Hanafi school which follows it. Therefore, this was held that it would not form part of any essential religious practice.

B. Issue II:

Whether the Muslim Personal Law (Shariat) Application Act,1937 Act confer a statutory status on its subjects regulated by the legislation?

It is significant to point out that unlike other articles of Part III of the Constitution, articles 25 and 26 of the Constitution of India begins with limitation first and then speaks about the rights. Conceivably the reasons may be - A citizen of India is a citizen of India first and a Hindu, Muslim, Christian, Sikh, Parsi, Jain or Buddha thereafter.

The issue placed was concentrating on the arbitrability of law and not gender equality under Art. 15, as a foundation for stating Triple Talaq to be unconstitutional. The discussion of the issue was cleverly made, and it was kept away from the concern that Talaq, as an instrument, was available only for males and not for females.

[537] Javed v. State of Haryana, (2003) 8 SCC 369

Majority bench contended that triple talaq is unconstitutional and it can be changed because the personal laws got transformed into statutory law. A learned counsel stated that has become a part of a State enactment before the Constitution of India came into force all laws in force immediately before the commencement of the Constitution, would continue to be in force even afterwards.[538]Minority bench contends that Triple talaq cannot be subject to a challenge on the ground, that they are violative of the fundamental rights contained in Part III of the Constitution.[539] The simple logic in all the issues relating to different personal laws which were converted into the rule of the decision could no longer be regarded as private matters between the parties, nor they can be treated as matters of personal law.

So, the answer to this issue is that the practices of Muslim personal law Shariat should not be satisfying the provisions contained in Part III Fundamental Rights, of the Constitution, applicable to State actions, in terms of Article 13 of the Constitution.[540]

C. Issue III:

Whether the Practice of Talaq-e-biddat violates any fundamental rights?

The state has a responsibility for each citizen's constitutional rights that transcend the rights of the religious group to which he or she may belong. Indian Constitution mandates that the state should ensure equality for all.[541]

India adopts a plural legal system, wherein different religious communities are allowed to be governed by different personal laws, applicable to them. They can have different laws, but it must meet the constitutional validity or constitutional morality. The right to freedom of

[538] Shayara Bano vs Union of India (2017) 9 S.C.C 1 (India).
[539] Ibid 10
[540] Ibid 10
[541]Baijayant Jay Panda, THE TIMES OF INDIA.BLOG (Jan.25, 2021, 8:15PM) https://timesofindia.indiatimes.com/blogs.

conscience should be subject to public order, morality, health, and the other provisions contained in Part III of the Constitution.[542] In the case State of Bombay vs. Narsu Appa Mali[543], the court laid down that if any religious practice is against public morality or public policy, it should subordinate the welfare or good of the people. And also, in Krishna Singh case[544], the Supreme Court held that Part III does not touch upon personal laws so long as they are not "altered by any custom or is modified or revoked by statute" ("personal law" is not included in the expression "laws in force" used in Article 13(1) of the Constitution). Talaq-e-biddat as stated by the petitioner clearly violates the mentioned constitutional and public mandates. Learned senior counsel expressed a personal view that for all communities in India, divorce could only be obtained from a judicial forum.[545] Hence the right to annul a marriage, by a unilateral private talaq, was clearly against public policy, and required to be declared as impermissible in law, and even unconstitutional. In the case - State of W.B. v. Ashutosh Lahiri[546], the Court held that slaughtering of cow is not an essential practice and the only way of carrying out religious functions on Bakrid which is required as part of the religious ceremony. An optional religious practice is not covered by Article25(1).

In Ahmedabad Women Action Group case[547], the court laid down the following observations:

1. Muslim Personal Law which permits polygamy is void as the practice offends Articles 14 and 15 of the Constitution.

[542] INDIA CONST. art.25
[543] AIR 1952 Bom HC 84
[544] (1981) 3 SCC 689
[545] INDIAN KANOON, https://indiankanoon.org/ (last visited Jan.25, 2021).
[546] (1995) 1 SCC 189
[547] AIR 1997, 3 SCC 573

2. Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, as void, offending Articles 13, 14 and 15 of the Constitution.
3. The fact that a Muslim husband can take more than one wife is considered an act of cruelty within the meaning of Clause VIII (f) of Section 2 of Dissolution of Muslim Marriages Act, 1939.[548]
4. Muslim Women (Protection of Rights on Divorce) Act, 1986[549] is void as infringing Articles 14 and 15.
5. The provisions of Sunni and Shia laws of inheritance discriminating females in their share as compared to males of the same status is void as it's discriminating females on the ground of sex.

Considering the above precedents, In August 2017, the Supreme Court declared talaq-e-biddat unconstitutional thereby ruling that pronouncement of "talaq" three times by a Muslim man to his wife does not end their marriage. The triple talaq bill seeks to make instant triple talaq a criminal offence punishable with three years in jail and declares instant triple talaq as a cognisable offence. The Union Government claims that this legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help sub-serve their fundamental rights of non-discrimination and empowerment.

COMMENT:

The majority bench (Kurian Joseph, J., R.F. Nariman, J., U.U. Lalit, J.) agreed to the concept "what is bad in theology cannot be good in law". They were of the opinion that if 'talaq-e-

[548] Dissolution of Muslim Marriages Act, 1939, No.2, Acts of Parliament, 1939(India).
[549] Muslim Women (Protection of Rights on Divorce) Act, 1986, Acts of Parliament, 1986(India).

biddat' is an essential religious practice then it would have not been banned in countries of Arab States, Southeast Asian States and Sub-continental States. Moreover, 'talaq-e-biddat' is accepted only among the Hanafi school of law, while it is considered sinful by all schools of Sunni Muslims and as invalid by all the Shia Muslim Schools, it could not be treated to be a part of Muslim personal law. The majority put the onus on the objects of the act which mention that Muslim Personal Law should be made applicable all over the country, CJI Khehar emphasizes the legislative debates to understand the intendment behind the Act.[550]

The interpretation of S.2 of the Muslim Personal Law (Shariat) Application Act, 1937 was approached by understanding the "Non-obstante" clause, laid down in Aswini Kumar Ghose v. Aurobindo Bose case; "It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment."[551] By attaching this rule to the section, we can say that only those customs and usages which are conflicting to Shariat are considered as invalid; whereas other such customs and usages which are not conflicting with Shariat and neither are part of Shariat are still valid.[552]

The minority bench was ignorant of the problems connected with the said practice. They also said that in the absence of any legislation, personal laws in the Indian context, could not be

[550]Glcmag, Case Commentary on Shayara Bano v. Union of India, The Magazine Committee of Government Law College, (Jan 28,2021 9:46am), http://glcmag.com/2017/09/13/case-commentary-on-shayara-bano-vs-union-of-india.

[551] Aswini Kumar Ghose v. Aurobindo Bose 1953 SCR 1

[552] glcmag, Case Commentary on Shayara Bano v. Union of India, The Magazine Committee of Government Law College, (Jan 27,2021 11:08am), http://glcmag.com/2017/09/13/case-commentary-on-shayara-bano-vs-union-of-india.

assailed on the basis of any conflict arising between the provisions contained in part III of the Constitution. The expression custom and usage in article 13 of the constitution, would not include faith of religious dominations embedded in their personal laws. Also, the petitioners were merely challenging the procedure adopted by the Muslim husbands while administering talaq-e-biddat and not the finality of talaq, which has the immediate consequence of finality. In this case, it was proposed that it was the absurdity which came in between the drafting of the objects of the act that led to such different and contradicting conclusions by the judges.

CONCLUSION:

Various Islamic states had prohibited triple talaq, which not only showed that the state was undeniably capable of intervening with personal law, but this also led to the paradox that Muslim women in a secular state like India had lesser rights than Muslim women in Islamic states.

The judgement of the apex court on the issue of triple talaq requires an appreciation for making a constitutional culture in the country having multi-religious identities. Nevertheless, the majority bench has succeeded in limiting the appalling submission of personal law. The judicial approach concerning uncodified personal law still requires a comprehensive analysis of article 13 of the Constitution, though courts have consistently been relied upon Narasu Appa mali, ruling to justify their position, the progressive society and constitutional values are still looking for a convincing answer.

Nevertheless, a clarity on gender justice and inequality in personal laws and how they are to be treated was not found in the judgement. It also did not address if “setting aside” triple talaq meant that it had no legal effect at all, or three utterances meant one. But this judgment certainly showed that the apex court has learned from its mistakes on personal law. So, it is a move

towards equality and has become a backbone to issues regarding future personal law and social amendments. The court ensured that Muslim women enjoy the same position in society as women from other religions and also made sure that there will be no discrimination against women.[553]

[553] Pooja Kateel, Shayara Bano vs Union of India Case Analysis A '5th VOICE' Is Born. Voice by The People, For the People, (Jan 27, 2021 1:04pm), https://5thvoice.news/legalnews.

SHIFTING PARADIGM OF CSR IN THE ERA OF PANDEMIC

- AKSHAY BHARGAVA

ABSTRACT

Corporate Social Responsibility is an integral part of the Indian corporate regime. It reflects the core values of the society, which are pioneer for a corporation. An unprecedented Covid-19 pandemic has been posing great challenges to the society and to the world at large that are chaotic enough to deal with. Corporate world and the economy of developing as well as developed countries are forced to seek some effective solutions for these prevailing challenges. The most difficult challenges have led to most novel suggestions as well. The term Corporate Social Responsibility is dynamic in itself. The government has narrowed it down to certain points in order to aid the corporations in achieving their goals and establishing its values in the society in a productive manner.

The era of pandemic has changed the meaning of this term in various ways. Corporate Social Responsibility is no longer limited to certain points only that are categorically specified. Initially, fulfilling the obligations as part of their CSR policy, great entrepreneurs were enthusiastic enough to comply with their Corporate Social Responsibility with a view to build their reputation in the eyes of society but now it has become a dire necessity for corporations to share some of the pains of public for the sake of its own survival in the pandemic era. The announcement made by the government to include expenditure of CSR funds for COVID-19 as eligible CSR activity, has widened the scope of the CSR regime and since then it has also been proven as an important step inserted in the very spirit of CSR. However, the response to this initiative step was different, depending upon the response of different organisations.

The objective of the paper is to analyse the steps taken by the corporations to comply with the CSR rules in the era of pandemic and response to different government policies with a view to widen the scope of CSR for the benefit of all the stakeholders of the society. The present study will also endeavour to provide suggestions for effective implementation of government policies and to meet the sustainable goals in balance with the personal goals of the corporations.

Key words: Corporate Social Responsibility, Policies, Goals, Sustainability, Corporate Sector

1. INTRODUCTION

The joy of giving stands above all the happiness, which are essential for humanity. The society has created its own standards of behaviour, culture, management, organisation, education etc. These standards or values are dynamic and ever changing. Indian society has recognised the charity as the most important part of the culture along with other functions of a State or emperor. The focus of the charity is to help underprivileged section or stakeholders of the society but it does not include uplifting of society or underprivileged stakeholders. For that purpose, it is important to focus on certain areas of functions of States, which can ultimately aid the underprivileged stakeholders.

Corporate Social Responsibility has long been recognised in the world as an important management concept. It does not include strategies only for giving back to the society but also consists of some important parameters for achieving sustainable goals for the corporation and maintaining the brand reputation in the society. It reflects the core values of the society, which are pioneer for a corporation.

2. WHAT IS CSR?

"Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operation and interactions with their stakeholders." [554]CSR is a concept which includes social activities that strives to benefit the public and stakeholders of the company and to build a brand value of the company. CSR mandates a company to focus on broad difficulties of the society and to fabricate it into the management of the company which in turn thereby, paves the way for company to connect itself more smoothly to the society. "CSR is a process which aims at embracing responsibility for the company's actions and encourages a positive impact through its activities on the environment, consumers, employees, communities, stakeholders and all other members of the public sphere who may also be considered as stakeholders."[555]

CSR has long been considered as a philanthropic activity of corporations. In 2014, India has become the first country to mandate CSR activity which includes national priorities such as public health, education, livelihood, water conservation, natural resource management etc. This concept of mandatory CSR has been successfully changing the landscape of corporate regime since few years back. Companies are seen focusing more on human rights and other social issues with the aid of area experts. Some of the largest companies in India have made significant social impact through their efforts towards CSR. These efforts have been proved much effective in gaining public trust and strengthening brand value of the company.

3. PRE-PANDEMIC CSR:

[554]United Nations Development Organisation (UNIDO), (Jan. 17, 2021)www.unido.org.
[555](Jan. 18, 2021)www.corporatesocialresponsibility.com.

CSR in India has always been a part of corporate sector long before its mandatory nature. The level of understanding the impact and implementation of CSR in management of the companies is increasing by leaps and bounds. Mandatory CSR received critical responses at the beginning of its implementation as medium and small enterprises were believed to be incapable to follow the goals effectively. The landscape of corporate sector has been evidently changed with the implementation of CSR in the affairs of the company. It helps the companies to build stronger relations with its stakeholders.

The aim of mandating CSR was to mobilize the resources for the larger benefit of the society. However, some companies focuses only on certain activities of CSR to satisfy the mandate.

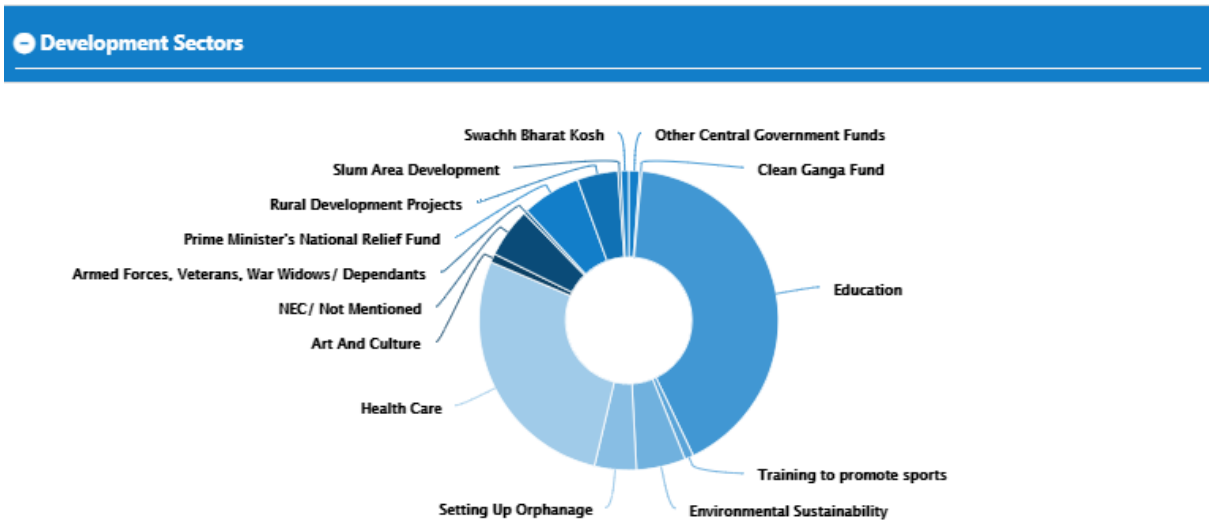
Development Sector-wise

	Development Sectors	Amount Spent FY 2014-15 (INR Cr.)	Amount Spent FY 2015-16 (INR Cr.)	Amount Spent FY 2016-17 (INR Cr.)	Amount Spent FY 2017-18 (INR Cr.)	Amount Spent FY 2018-19 (INR Cr.)	Amount Spent FY 2019-20 (INR Cr.)
1	Clean Ganga Fund	5.47	32.82	24.37	4.54	5.41	0.40
2	Education, Differently Abled, Livelihood	3,188.09	4,921.06	5,559.13	5,960.17	7,499.81	3,582.33
3	Encouraging Sports	57.61	140.11	180.32	227.75	295.10	98.97
4	Environment, Animal Welfare, Conservation Of Resources	853.99	971.06	1,317.70	1,368.56	1,516.63	537.34
5	Gender Equality , Women Empowerment , Old Age Homes , Reducing Inequalities	189.92	342.67	468.74	501.23	517.88	176.48
6	Health, Eradicating Hunger, Poverty And Malnutrition, Safe Drinking Water , Sanitation	2,525.92	4,633.46	3,667.14	3,339.07	4,959.23	1,811.27
7	Heritage Art And Culture	117.37	119.16	305.57	284.05	189.89	48.07
8	Other Sectors (Technology Incubator And Benefits To Armed Forces And Admin Overheads)	9.50	37.48	60.95	43.33	119.71	16.02
9	Prime Minister's National Relief Fund	228.18	218.04	158.80	175.84	300.12	164.67
10	Rural Development	1,059.34	1,376.16	1,554.77	1,479.80	2,308.83	971.43
11	Slum Area Development	101.14	14.09	51.49	35.10	50.23	1.29
12	Swachh Bharat Kosh	113.86	325.52	184.06	213.67	93.80	6.15
13	Any Other Fund	277.09	334.34	419.98	255.62	710.59	402.50
14	NEC/ Not Mentioned	1,338.39	1,051.15	388.95	1.04	87.54	5.51
	Grand Total (in Cr.)	10,065.93	14,517.21	14,342.04	13,889.86	18,654.82	7,822.50

Source: CSR Spent: Development Sector-wise (https://www.csr.gov.in/index16.php)

This table indicates the expenditure of CSR funds by the companies in various sectors through the span of five years.[556]Education and health sectors are both the major sectors in which companies prefer to spend their CSR funds. Environment, rural development and gender equality are also more focused areas other than Prime Minister's National Relief Fund.

Health sector mentioned in the above table includes eradicating hunger, poverty and malnutrition, safe drinking water and sanitation. Companies can focus any of these areas and can be counted as expenditure towards health sector.



Source: CSR Spent: Govt. vs. Other than Govt. Companies (https://www.csr.gov.in/index16.php)

[556]CSR Spent: Development Sector-wise, (Jan. 23, 2021)https://www.csr.gov.in/index16.php.

This chart also indicates expenditure of CSR funds sector wise by government companies and other than government companies.[557] The former are deeply inclined towards rural development, PM National Relief Fund and Armed Forces sector whereas Non Government companies are more inclined towards education, health care and environment sector. The reason behind this trend was perhaps to focus more on brand building and strengthen the internal management of the companies.

Another important aspect of CSR is human rights' approach of the company which though been encapsulated in the mandate of CSR but still it has been considered as a luxurious aspect of the corporation. India has variety of other corporate laws including Constitution of India, which emphasizes upon human rights and working conditions of workers. This aspect is not explicit in these CSR data.

4. POST-PANDEMIC CSR:

Ahead of the Union Budget 2020-2021 Prime Minister called to strengthen efforts to make India a USD 5 trillion economy, which was later reflected in the budget by the Finance Minister targeting the GDP growth of 10%. All these high hopes were halted when the world and India was forced to prepare itself for facing the challenge of pandemic. Market was having a scary feeling of 2008 crisis, which Indian market survived effectively. Investors were losing hopes as all foreign investors were showing signs to exit from the market. On the contrary, technology and pharmaceutical shares remained the best performer for the market. CPI Inflation rate in was 6.93 percent in November 2020, which was eased to 4.59 percentage in December 2020.

[557]CSR Spent: Govt. vs. Other than Govt. Companies (Jan. 23, 2021)https://www.csr.gov.in/index16.php.

"For one, [COVID-19] has taught companies that it can no longer be at liberty to run its business as usual. For another, it has helped focus on the idea of corporate irresponsibility as the obverse of corporate social responsibility."[558] These two lines reflect the transition which Indian economy witnessed last year due to pandemic. The after effects of this phase are still affecting the market. Employer and employee relations, working environment, working hours, etc. are few of many things that have changed since last year. Working environment is slowly changing back to the prior pandemic situation for few sectors. These small changes affected certain sectors and small enterprises so adversely.

The Government introduced certain short-term and long-term policies for various sectors and industries to aid them to recover the damage caused due to the pandemic. One of such was declaration of spending of CSR funds for COVID-19 to be eligible CSR activity after WHO declared the COVID -19 as pandemic and Indian Government notified to treat it as a notified disaster. It further stated that funds may be spent for various activities related to COVID – 19 under item nos. (i) and (xii) of Schedule VII relating to promotion of health care, including preventive health care and sanitation and disaster management. Further, as per General Circular No. 21/2014 dated 18.06.2014, items in Schedule VII are broad based and may be interpreted loosely for this purpose.

Schedule VII of the Companies Act, 2013 provides specifications regarding activities which can be considered as CSR activities. It reads as follows:

"Activities which may be included by companies in their Corporate Social Responsibility Policies Activities relating to:—

[558] PushpaSundar, *Covid has pushed CSR deeper into corporate consciousness*, The Hindu BusinessLine, September 09, 2020, (Jan. 23, 2021) https://www.thehindubusinessline.com/opinion/indias-csr-a-work-in-progress/article32561479.ece.

(i) Eradicating hunger, poverty and malnutrition, ‘‘promoting health care including preventive health care” and sanitation including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation] and making available safe drinking water.
(ii) Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and the differently abled and livelihood enhancement projects.
(iii) Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.
(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga.
(v) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional art and handicrafts;
(vi) measures for the benefit of armed forces veterans, war widows and their dependents, 9[Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans, and their dependents including widows;
(vii) Training to promote rural sports, nationally recognised sports, paralympic sports and olympic sports
(viii) contribution to the prime minister's national relief fund or Prime Minister’s Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) or any other fund set

up by the central govt. for socio economic development and relief and welfare of the schedule caste, tribes, other backward classes, minorities and women;

(ix) (a) Contribution to incubators or research and development projects in the field of science, technology, engineering and medicine, funded by the Central Government or State Government or Public Sector Undertaking or any agency of the Central Government or State Government; and

(b) Contributions to public funded Universities; Indian Institute of Technology (IITs); National Laboratories and autonomous bodies established under Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs).

(x) Rural development projects

(xi) Slum area development.

Explanation.- For the purposes of this item, the term `slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.

(xii) Disaster management including relief, rehabilitation and reconstruction activities."[559]

[559] General Circular No. 10/2020, Ministry of Corporate Affairs, (Jan. 23, 2021)https://www.mca.gov.in/Ministry/pdf/Covid_23032020.pdf.

Schedule VII has been amended and Clause (xii) was added keeping in view the need to face the pandemic. Research work, specifically in the field of science, technology, engineering and medicine aimed at promoting Sustainable Development Goals have been considered as most important factor for early discovery of vaccine as countries compete with each other for effective cure of COVID-19. Looking to recent trends as well, small discoveries in the field of science is considered as the most important tool for the humankind. This trend is more focused on showing and proving political and structural strength of a nation at the global front.

Other options which the companies preferred over other areas of CSR, is health sector. Indian economy was emerging out of certain difficulties due to banking fraud, auto sector and real estate inflation. Government introduced the budget amid all the crisis with the high hopes but the investors started losing their confidence as coronavirus was approaching so passionately at the doors of every country. The United Nations provided certain guidelines to avoid contracting the coronavirus as the perfect cure which has still not been found till date. Companies were more inclined towards running their business amid ongoing pandemic challenges to survive the global crash. Companies directed the workers to work from home as far as possible. Pharmaceutical and energy sector also had to switch the shifts of its employees with limited working hours.

Government introduced various policies to revive the economy, which has proved to be effective as investors considered the period as 'safe heaven'. Amid this new normal, creating awareness for keeping safe distance, maintaining hygiene and compulsorily wearing masks is considered as spending CSR funds towards CSR activity. Declaration by the UN regarding hygiene and lack of awareness among people led to the collective effort of government and corporate sector to spread more awareness and to promote hygiene. As for working environment, employees and employers started working from home and the scenario is still

continued in the sectors where it is a feasible option. Working from home was considered as a luxury option for employees and other factors like working environment, working hours were considered uncontrollable but the pandemic, and development in the technology came to the rescue providing apt environment.

Prior to the pandemic, NGOs were considered to be the easiest way to spend CSR funds. Due to pandemic and unstable economic conditions, NGOs have dried out of the funds. During the pandemic, government also established PM CARES Fund and corporations as well as individuals were encouraged to donate sufficient fund to aid the government to fight the pandemic and to assure the safe survival of marginalised section of the society. This sudden change left a great impact on the economic condition of the NGOs.

Pandemic came in the form of unemployment for a major section of the society regardless of economic status. Marginalised sector of the society which is dependent upon other sectors faced the challenge of rehabilitation for a long period. Rehabilitation is still a question for these sections and CSR activities aided these sections during unfortunate phase of pandemic. Economy received a boost due to collective efforts of government and corporate sector but these sections are still facing bitter effects of pandemic.

The major challenge at the global level during the grave phase of pandemic was to provide effective treatment to COVID patients and it is still a problem for many countries. Construction of hospitals during a short period of time is a difficult task and it also involves financial backup. CSR rule to include reconstruction and disaster management in CSR activity proved to be a boon for medical sector. Companies exhibited great interest in converting infrastructure into temporary COVID hospitals and to create special COVID wards. Effective treatment during critical phase of infection proved to be vital for saving human lives.

CSR have been introduced as philanthropy, which is now a part of very functioning of the company. The focus has shifted from the pre-decided planned framework of CSR to activities related to fight against the novel coronavirus disease (COVID-19), which would reap indirect benefits from the operating segment in which companies operate.[560]

Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) has been one of the major receivers of CSR funds. This unique initiative by the government in the situation of the pandemic with the focus on various areas and sectors provided a platform to utilise the CSR funds towards the deprived section of the society. However, the companies themselves felt relieved of their duty after contribution to the fund and there was no need to look beyond for other areas which are also important and need collective participation for effective resolves.

5. CONCLUSION

Large companies have played their role effectively with the aid of the government during the pandemic but the MSMEs struggled initially for running business due to worldwide lockdown and increase in productivity compared to sell. Agriculture sector also faced the similar situation due to hardships in transportation of produce.

Pharmaceutical and energy sector remained big gainers despite pandemic and other companies gained their momentum soon after government declared certain policies to revive the economy. CSR rules played major role in fighting the COVID transmission as the corporate sector

[560]Rutvi Mehta&ArchanaKoli,*Corporate social responsibility practices in the times of COVID-19: A study of India's BFSI sector*, DownToEarth, Thursday 10 Dec. 2020, (Jan. 25, 2021), https://www.downtoearth.org.in/blog/governance/corporate-social-responsibility-practices-in-the-times-of-covid-19-a-study-of-india-s-bfsi-sector-74583.

developed healthy and hygienic regime and spread awareness regarding measures to reduce the transmission.

Changes in CSR rules also forced the corporate sector to re-strategise the principles of employer and employee relations. The employee is no longer in the situation to bargain the right for work life balance. Employees also have to adapt themselves to new working environment and required to be prepared to get back to the working routine with changed working regime. The government also declared to pay wages to the employees of the companies but it is not included in CSR activity. Health of employees also proved to be an important aspect for companies to function properly.

Specific data about CSR expenditure is still not available till now to analyse but the health sector and education sector are supposed to remain the major beneficiaries of CSR funds. Additionally, the government also declared to interpret the rules more liberally for implementation which encouraged the corporate sector to break through the limit of CSR expenditure of two present of the average net profits of the company made during the three preceding financial years.

The policies introduced by the government encouraged companies to spend their CSR funds in a more effective way without creating any chaos. Also, it is high time now to revisit the CSR rules and to encourage corporations to take active part in fighting the pandemic or any future calamity. Scientists and researchers have also confirmed that this type of virus may attack the humanity again in the future. The corporations also need to shift their focus from mere satisfying the mandate to focus on the relevant conditions and needs of the society. Indian economy has successfully survived the peak era of pandemic and now it is the time to focus on small businesses, which faced difficulties to survive. Companies also need to ensure that there is work life balance in working pattern of the company.

Liberal interpretation of CSR rules has encouraged the companies to spend the CSR funds beyond the required limits. This kind of steps should be taken in sensitive issues as well, like climate change and research activities. Clean energy and carbon emission are the major challenges which the world has accepted at large. Steps shall also be taken towards reduced use of personal vehicles and work from home should be accepted as rule in the areas which are possible.

"CSR spends continue to exceed the mandatory requirement of 2% of their average 3-year net profit for the second year in a row: 79 out of the 100 BSE companies spent 2% or more of their average 3-year net profit. And in line with regulations, many loss-making companies continue to spend on CSR."[561]Corporate Social Responsibility Committee of the companies' board should also ensure that emergency fund should be created to fight the future challenges and to aid the government and society at large in the period of such pandemics. The same can also be incorporated in the respective legislatures. CSR has become part of the daily management of the companies and its ambit is vast then it's been used in the past and companies should also ensure that they are providing back the society with the more effective and responsible ways.

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CHILD SEXUAL ABUSE IN INDIA- LEGAL IMPLICATIONS

- **PRANJAL SHAH**

ABSTRACT

The phrase Child Sexual Abuse refers to sexual behaviour or sexual act forced upon a child by another person. CSA becomes a disquieting reality for the victim. The aftermath of having to endure such acts are devastating and the trauma imparted from it is horrid enough to impair a child's ability to live a normal life. Studies of the past 3-4 years show that CSA is on the rise in India at an alarming rate. The recent lockdown has further added fuel to the fire. Children are an important part of society and have a proportionate share in human rights. Therefore, it becomes important to understand the impact of CSA on the rights of children. Further, to safeguard children, various legal changes have taken place over the years. Through several important precedents, Courts in India have guided the way towards the POCSO Act. However, there is still a long way to go. There is still a need to bring about changes in the society at the individual level.

INTRODUCTION

The phrase Child Sexual Abuse (hereinafter referred to as "CSA") refers to sexual behaviour or sexual act forced upon a child by another person. The World Health Organisation defines child sexual abuse in the following manner.

"*The involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or that violates the laws or social taboos of society."*[562]

[562] World Health Organization, *Guidelines for Medio-Legal Care for Victims of Sexual Violence* (2003) 75

CSA ranges from some extremes acts such as rape, incest, molestation, pornography, intercourse, commercial sexual exploitation, exposing oneself in front of a minor, masturbating in front of a minor or forcing a minor to masturbate to some more subtle yet equally disturbing forms such as obscene phone calls, texts, and other types of digital communications, fondling and such other acts. Child marriage is also considered as CSA.[563] One key observation made by the American Humane Association is the physical contact between the perpetrator and the child is not essential in the case of CSA.[564]

CSA becomes a disquieting reality for the victim. The aftermath of having to endure such acts are devastating and the trauma imparted from it is horrid enough to impair a child's ability to live a normal life. The child, so victimized, often feels the effects for the whole of her/his life. This crime serves as a gross violator of the rights of children. Children are also included in the discourses talking about human rights however, such a fierce transgression against the precious rights of children, our future, has staunchly escaped limelight.

Many governments around the world and various international organisations are working vigilantly to counter this heinous crime. India has also seen various legal developments leading up to the Protection of Children from Sexual Offences Act, 2012. However, despite such inspirational efforts, CSA is on a constant rise in India. It is assisted by a pervasive underreporting of the same in India.

In spite of the pain and anguish this horror leaves behind, there is not much research surrounding it. The media also does not show a lot of interest when it comes to discussions surrounding this terror.

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[563] Asha Bajpai, 'The Legislation and Institutional Framework for Protection of Children in India' [2010] Working Paper No. 5 IHD-UNICEF Working Paper Series 1, 20

[564] 'American Humane Association' <http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-sexual-abuse.html> accessed 10 September 2020

In light of these facts, this paper starts off with a discussion of the scenario surrounding CSA in India, how it affects the various Rights of Children and the legal developments in India towards the protection of children.

INDIAN SCENARIO WITH REGARD TO CSA

India sees her children as the future of the nation. Children consist more than 40% of the Indian population with their numbers ranging around 440 million.[565] Despite the high pedestal on which children are placed and them being a major chunk of the population, crimes against children are rampant in the country.

A study conducted by World Vision India in 2014-15 with a sample of 45,844 respondents across 26 states found that one in every two children is a victim of sexual abuse. The survey reveals that 90% of children below 10 years are unsafe and are prone to sexual abuse (World Vision India, 2015).[566]

Studies of the past 3-4 years show that CSA is on the rise in India at an alarming rate. According to the data released by National Crime Records Bureau in 2018, 32,608 cases were reported in 2017 while 39,827 cases were reported in 2018 under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). Almost 109 children were sexually abused in India

[565] Taxolawgy, 'Exploitation of Children in India: Violation of Fundamental Rights' (Latest Laws, 11 April 2020) <https://www.latestlaws.com/articles/exploitation-of-children-in-india-violation-of-fundamental-rights/> accessed 11 September 2020

[566] Pradeep Nair, 'Child Sexual Abuse and Media Coverage, Representation and Advocacy' [2019] 6(1) Sage Publications <https://journals.sagepub.com/doi/pdf/10.1177/2349301120190106> accessed 11 September 2020

everyday which stipulates a 22% increase from the previous year. As many as 21,605 child rape cases were recorded in 2018.[567]

Furthermore, in the first six months of 2019, from January to June, alone, 24,212 cases of child abuse reports reached the Supreme Court of India, notwithstanding the cases which did not reach the Honourable Court. This means more than 4000 cases per month.[568] Moreover, in a study conducted by Google and Thorn, an international anti-human trafficking organisation, in collaboration with National Centre for Missing and Exploited Children (NCMEC), India was at the top of the list of countries from where the maximum number of reports related to suspected online child sexual abuse imagery originated.[569]

Moving on to the recent lockdowns due to the Coronavirus Pandemic, CSA has shown an even further increase in India. Vikas Puthran of Childline India Foundation reported that in the 10 days of lockdown, between March 20 to 31, they saw an increase of 50%, amounting to a total of 3 lakh, in the calls received by them. Of these Close to 30% (therefore almost 92,000) were in relation to protection from abuse.[570] Recent data also reveals that about 90% of the abusers

[567] Press Trust of India, '22% Jump in Cases of Child Sexual Abuse in 2018, Says Report' (NDTV, 12 January 2020) <https://www.ndtv.com/india-news/22-jump-in-cases-of-child-sexual-abuse-in-2018-says-report-2162716> accessed 11 September 2020

[568] Nandini Priya, 'Is India Doing Enough to Tackle the Rising Number of Child Rapes?' (Youth ki Awaaz, 29 July 2019 <https://www.youthkiawaaz.com/2019/07/every-5-minutes-a-rape-incident-was-registered/> accessed 11 September 2020

[569] Ambika Pandit, 'India Tops List on Reported Child Sexual Abuse Imagery' (The Times of India, 1 October 2019) <https://timesofindia.indiatimes.com/india/india-tops-list-on-reported-child-sexual-abuse-imagery/articleshow/71383544.cms> accessed 11 September 2020

[570] Devina Buckshee, 'Child Abuse, Pornography on the Rise in India's COVID-19 Lockdown?' (The Quint Fit, 12 August 2020) <https://fit.thequint.com/coronavirus/is-child-abuse-on-the-rise-in-indias-covid-19-lockdown> accessed 11 September 2020

perpetrating CSA are known to the victim and occupy a position of trust in the life of the victims.[571]

CSA AND RIGHTS OF CHILDREN

The debate on human rights has unequivocally stated, time and again, that humans have certain rights which they possess from the moment of their birth by virtue of them being just that; human. These range from the right to adequate nutrition to the right to live with dignity to the right to make decisions regarding and affect their own life. The main motive behind according these broad rights to people in the society is to allow every human to grow and develop in a secure, safe and healthy environment so as to lead to the progress of the society and the human race as a whole. Thus, the importance of the availability of human rights to every single individual, for the sole reason that they are a part of the human species cannot be undermined, nor underestimated.

Children, being considered as much a part of civilisation as adults, have an equal share in the resources and tribulations of the world. Therefore, it is inevitable that they also command a part in the deliberations surrounding human rights. According to the United Nations Convention on the Rights of Children, all children have the following rights from their birth which are fundamental to their being.

- Right to Survival; that is, the right to life and to health and nutrition, and to have a name and identity.

[571] Reethu Ravi, '90% of the Abusers are Known to the Victim: How this NGO is Prepping Families to Fight Child Sexual Abuse in India' (The Logical India, 30 April 2020) <https://thelogicalindian.com/exclusive/lockdown-child-sexual-abuse-cases-20852> accessed 11 September 2020

- Right to Development; that is have access to proper education and care along with recreational and leisurely activities which contribute to growth.
- Right to Protecting; to be free from exploitation, abuse and neglect, so that they can grow up in a safe environment.
- Right to Participation; to be able to express their thoughts and ideas, have access to information and take part in religious activities.[572]

In India, these basic rights of children are reflected in the various Fundamental Rights enlisted in Part III of the Constitution while some others are enshrined under Part IV in the Directive Principles of State Policy. The rights provided to children in India can be divided in two categories. The first category consists of rights that are meant specifically for children while the second are guaranteed to them for they are equal citizens of India just as any other adult.[573] The primary objective behind providing all these rights is to ensure that children are provided with the safe and healthy environment they require to develop. It is platitude that children need nurture and protection while growing up, their innocence and vulnerability warrants attention and assistance. CSA broadly encompasses some of the worst crimes which could be committed against children. Hence, it is only fitting that a dialogue on CSA will also incorporate a discourse on its effects on the rights of children.

To recognise the footprints CSA leaves of the rights of children it is critical to understand its aftermath from the focal point of children. CSA has profound impacts on the lives of the children so victimised. Depression, self-blame, stress and anxiety have been found to be the

[572] 'About Child Rights' (Child Rights and You) <https://www.cry.org/child-rights> accessed on 20 September 2020.
[573] 'Constitution of India' (HAQ Centre for Child Rights) <https://www.haqcrc.org/child-rights/constitution-of-india/> accessed 11 September 2020

most common long-term effects of CSA. Some children carry away guilt and shame from a childhood incident which often stays with them for the rest of their lives. Moreover, some children have been reported with negative self-image; feeling dirty or ugly and struggling with body image and eating disorders. Post traumatic stress symptoms are also not uncommon.

All of these, ranging from serious mental disorders to dissociative coping mechanisms fundamentally impair children from embracing their environment. Oft-times, the ultimate result is a stunted development of children, with them rarely taping into their full potential. As is the universal rule, there is the occasional outlier, but such rarities do not negate the glaring reality. CSA and its aftermath impair maximum development of children, which is considered a natural human right of children. The act of sexually abusing children itself violates their right to safety and protection.

LEGAL DEVELOPMENTS

Many legal developments led up to the POCSO Act passed in 2012. Mostly, these include case laws and directions from the Honourable Judges on various different matters surrounding CSA. It is a matter of record that the POCSO act, 2012 is an outcome of the direction given by the Judiciary. It prescribes child-friendly and victim-friendly procedures for investigation and trial of such cases and further provided establishment of Special courts.[574]

As early as 1996, in the case of State of Punjab vs Gurmit Singh[575], the Supreme Court acknowledged the deep-rooted problem of CSA and observed that "of late crimes against children in general and of sexual abuse in particular, are on the rise. It is an irony that while we

[574] Population First, 'Judiciary Lays the Foundation for POCSO Act' (She the People, 10 December 2019) <https://www.shethepeople.tv/top-stories/judiciary-lays-foundation-pocso-act/> accessed 12 September 2020

[575] AIR 1996 SC 1393

are celebrating children's rights in all spheres, we show little or no concern for her/his honour and right. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of victims of sexual abuse, especially when the victims are children." Thus, the apex court has apt describes the problem of CSA in India. The same case also established that all judicial proceedings relating to victims of sexual abuse must be conducted in an 'in-camera trial', that is, in private.

In the landmark judgement of Sakshi vs Union of India[576] the Honourable Court laid down several guidelines to be followed when holding the trial of CSA or child rape. These are:

- Some arrangement be made by way of which the victim or witnesses who may be equally vulnerable, shall not have to see the body or face of the accused.
- The questions of cross-examination to be asked to the victim on behalf of the accused which relate directly to the incident should be submitted to the Presiding Officer of the Court who may then ask them to the victim in a clear language which is not embarrassing or offending to the victim.
- The victim of such crime should be allowed sufficient breaks as and when required while giving testimony in court.

Later, in another case, Sheeba Abidi vs State of Delhi[577], the Delhi High Court laid down further guidelines for child victims to be followed in trial.

- It was established that child victims could testify outside the court environment if so required.
- Further, child victims were entitled to get a support person during trial.

[576] AIR 2004 SC 3566
[577] LQ 2004 HC 5735

These various judgements eventually aided the enactment of the path breaking POCSO Act in 2012. There was no separate provision for the CSA of any form before. The Indian Penal Code is also silent on this crime. The IPC only provides for rape under Section 375 which is also specific for girls. So the importance of the POCSO Act is palpable.

POCSO Act is a gender-neutral act, which is exhaustive and broadens the scope of actions being termed as criminal under the purview of 'penetrative sexual assault' on account of the problems faced in cases like State vs Pankaj Chaudhary[578], where the accused could only be prosecuted for 'outraging the modesty of a woman' for digital penetration of the anus and vagina of a 5-year-old child. The prosecution was unsuccessful in proving rape as the High Court ruled that digital penetration was not recognised as an offence under the India Penal Code. POCSO also criminalises a range of behaviours as sexual assaults on children which are short of penetration. All the offences are treated as 'aggravated' on the basis of circumstances surrounding the questioned act, such as if the perpetrator is in a position of trust or authority over the child or if the victim so hurt is mentally ill, which calls for more stringent punishment. The POCSO Act further makes provisions for avoiding re-victimization, child friendly atmosphere through all stages of the judicial process and gives paramount importance to the principle of "best interest of the child" with the help child friendly mechanisms incorporated in the judicial process, speedy and in-camera trial and provisions to maintain confidential the identity of the child. [579] It also provides for the Special Court to determine the amount of

[578] AIR 2018 SC 5412

[579] Sydney Moirangthem, Naveen C. Kumar, and Suresh Bada Math, 'Child Sexual Abuse: Issues and Concerns' [2015] 142(1) Indian Journal of Medical Research <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4557243/> accessed on 12 September 2020

compensation to be paid to a child who has been sexually abused, so that this money can then be used for the child's medical treatment and rehabilitation.[580]

ANALYSIS AND THE WAY FORWARD

CSA is in flagrant violation of quite a few of the Rights provided to children by the Constitution of India. Primarily, the POCSO Act works to counter this blatant evil. Other legislations enacted with regard to children also supplement is to an extent. Some provisions provided in these other acts do not outright provide against CSA but their provisions form a link in the chain to further weight behind the provisions of POCSO ACT. Thus, the various acts such as the POCSO Act 2012, Prohibition of Child Marriage Act 2006, the Commissions for the Protection of Children's Rights Act 2006, the Juvenile Justice Act (Care and Safety of Children) Act 2006, are linked, although, their connection is not always apparent, and they increase the feasibility of each other. However, the journey is far from over.

The POCSO Act is a path breaking achievement when it comes to countering CSA in India. It is exhaustive and comprehensive. Nonetheless its application is not as effective as was envisioned. Several factors interplay when we look at the shortcomings of the Act which are not necessarily inherent in the Act itself.

One problem occurs with the delivery of justice. Section 35 of the POCSO Act provides for speedy justice for victims of CSA, that is, trials are to be completed within one year. Special Fast Track Courts are to be set up for enabling this provision. However, there is still a high pendency of cases. Data collected in January 2020 showed the over 1.66 lakh cases of CSA

[580] *Ibid.*

were pending before the Judiciary.[581] This has partly to do with the overburdening of the Judiciary. However, there are also instances where the states are not being cooperative. States like Uttar Pradesh and West Bengal continue to ignore Supreme Court's directive to set up the Special Fast Track Court under the POCSO Act despite the high pendency rates.[582]

Nevertheless, the special Fast Track Courts for POCSO cases which have been set up are making a difference. Delhi-based advocate Chandra Suman, who has represented victims in many POCSO cases, said that there is a difference in Delhi where there are 27 POCSO courts set up. He said that now the hearings are held faster and trials are speeding up in POCSO cases.[583] Furthermore, the Amendment of the POCSO Act in 2019 is expected to make the law more efficient.

Moreover, if we look at the mindset of the society in India. Several factors such as non-indulgent social attitude, double standards towards CSA, poor community and authority response, non-denial and hesitant response, insensitive police and medical fraternity[584] and unwillingness of the children suffering such crimes to come forward interplay to become a barrier in the effective eradication of CSA. Often times the victim faces more social stigma then the perpetrator especially if the victim is a girl. This results in a lot of underreporting of CSA with the families hesitant to come forward and report such tribulations of their children. That is one of the reasons why not much data is available pertaining to this issue. Some studies

[581] Sonal Kellogg, 'High Pendency of Child Sexual Abuse Cases Render POCSO a Toothless Law: Uttar Pradesh Accounts for 25% of All Cases Under the Act' (Firstpost, 9 January 2020) <https://www.firstpost.com/india/high-pendency-of-child-sexual-abuse-cases-render-pocso-a-toothless-law-uttar-pradesh-accounts-for-25-of-all-cases-under-the-act-7883801.html> accessed 13 September 2020

[582] *Ibid.*

[583] *Ibid.*

[584] Dr. Jyothi Vishwanath, 'Legal Framework Concerning Child Sexual Abuse in India- A Critical Assessment' [2016] 1(1) Journal on Rights of the Children 18, 20

also show the one in every two children are the victims of CSA.[585] However, when we look at the number of cases actually reported, the aggregate is staggeringly low.

Just the same, people today are become more aware and vigilant. There is pressure on the Government and Judiciary to ensure effective application of laws against CSA. Many NGOs are coming up which work to safeguard the children against crimes. These NGOs are unapologetic in their work and are not afraid to go on a showdown with the Government for making better provisions nor do they hold back from moving the Judiciary if the need be.

One such Delhi based NGO, called Sakshi, is working vigilantly even in the Lockdown. #MakeHomeASafeSpace is a part of #StopChildSexualAbuse initiative by The Rakshin Project of Sakshi, which aims at spreading awareness regarding the importance of an accountable adult community, which is alert, informed and vigilant to secure their homes against potential abuse of children. For the past 27 years, the NGO has been working against Sexual Harassment and Child Sexual Abuse in India.[586]

The awareness about CSA is spreading and people are getting on their feet. Recently, two lawyers Sumeer Sodhi and Aarzoo Aneja wrote a letter to the Chief Justice of India SA Bobde requesting him to take suo motu cognizance of increase in the number of child abuse cases during the ongoing nationwide lockdown.[587]

The peregrination, however, is long. People have to be encouraged to report the crime. Moreover, the victim has to be trusted. Post reporting, the child has to be treated with care and

[585] 'One Out of Two Children Face Child Sexual Abuse: The Growing Problem of Child Sexual Abuse in India' (Newsgram, 16 December 2017) <https://www.newsgram.com/children-face-child-sexual-abuse-problem-india/> accessed 14 September 2020

[586] *Supra* note 10

[587] Press Trust of India, 'Lawyers Write to Chief Justice on Rise in Child Abuse Cases Amid Lockdown' (NDTV, 12 April, 2020) <https://www.ndtv.com/india-news/coronavirus-updates-lawyers-write-to-chief-justice-of-india-sa-bobde-on-rise-in-child-abuse-cases-am-2210443> accessed on 14 September 2020

delicateness by the parents and all the officials involved. Harsh and infelicitous treatment will further add to the trauma of the child and family. Further, delayed disclosures and reasons for delay ought to be allowed keeping in mind the fact that CSA incidents are reported much later in time, post the occurrence.[588] The judiciary has to ensure a stricter approach towards the accused. Police need to be given the opportunity, time and means to be able to investigate properly, preserve evidence and apprehend the accused.[589] Moreover, the accused should be dispensed with more stringent punishment.

With regard to the society, there is a need for more awareness about CSA among parents and children. There is a need to educate students in the school about what constitutes sexual harassment.[590] The education system, teachers, and families need to work together. Mere awareness can go a long way.

CONCLUSION

Although defined in distinct terms by different institutions, the essence of CSA is much the same all over the world. It transcends class, status, religion and caste. It is not specific to any particular community. CSA is a widespread crime in India. Statistics point of a much greater scale of CSA then is apparent and its rate continuously ascending. It leaves lasting impact on the victims and their families and is a gross violation of the rights of children. There is undoubtedly a pressing need to address the issue.

[588] Christopher. T. Fell, 'Crying Out for Change: A Call for a New Child Abuse Hearsay Exception in New York State' [2012] 76.3 Albany Law Review 1853

[589] *Supra* note 22, 30

[590] Edward.S. Cheng, 'Boys being Boys and Girls being Girls- Student-to-Student Sexual Harassment from the Courtroom to the Classroom' [1997] 7 UCLA Women's Law Journal 263

The Judiciary has bravely faced this issue and provided guidelines for the same. On the same lines the Parliament has enacted the POCSO Act. Society, however, is a different story. A lot of social stigma is attached to the victims of CSA especially if they are girls. In a lot of cases, the society shuns them rather than supporting them. While the legal developments are path breaking and have already altered the law, society will take longer to change.

More effort needs to be put into changing the views of the society. There is an acute need of more awareness among children as well as parents. One way to do this is through the education system. Another way is through organisations and NGOs, of which, India has many inspiring examples. The legal system has already provided us with a strong support pillar. Now, it is on us as individuals and members of the society to change the social implications of horrible crimes covered under the gambit of Child Sexual Abuse.

The legal response to CSA in India has been phenomenal. Vigorous efforts have led to the formulation of a strong and vigilant institutional framework. But the need of the hour is to come down to the grassroot level. Organisational endeavours need to be backed by individual assays. One way to do this media and another is education.

CSA is a crime against the future generation. While isolated, both, institutional framework and efforts of social workers, psychologist and child activists have been wonderful in tackling CSA, there is a need to bridge these two to make them more effect for the society at large still has a long way to go.

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