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

With this thought, we hereby present to you
Jurisperitus: The Law Journal.

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VIOLENCE AGAINST WOMEN IN TRIBAL AREAS OF ODISHA : AN OVERVIEW

- *Pooja Jha*

ABSTRACT:

Violence against the vulnerable sections of the society arising due to multitude factors in the era of globalization is a serious matter of social and academic discourse. Women at large are becoming to be the vulnerable section of the society, who bear the brunt of the process of social and economic transformations in the 21st century. Violence and its perceptions against tribal women as a legitimate human rights as well as social issue is examined under four broad parameters of globalization, development, displacement and migration.

India stands second in terms of tribal population after Africa in the world. There are different names assigned to the different community likewise we have Vanyajati, Vanavasi, Pahariya, Adimajati, Janajati, Anusuchit Jati and Scheduled tribes all of them means "aboriginal". According to census of 2001, the total population of the tribals is 84.2 million and it accounts to 8.2 percent of total country's population. They have lived mostly as isolated entities for centuries together and this explains their politico-socio-economic backwardness.

KEYWORDS: Violence, Vulnerable, globalization, development, displacement, migration, population, backwardness.

INTRODUCTION:

In Indian context, tribes or tribal people are those communities of people that live in relative isolation of hills and covered forest, and often in geographical areas inaccessible to the mainstream population. Tribes are generally the group who lacks written letter or scripts. Tribes stand out of the other sections of society as their sense of history is too shallow and vague and has mixed mythology in terms of customs, traditions or beliefs.

Women at gender category have been facing gender disparities throughout since the history of evolution of mankind. It is not prevalent in the current scenario rather ages, many continents as Europe have seen its darkest fight even before a century ago. Gender disparities itself is shown in

various forms such as declining female ratio in the past few decades, domestic violence and social orthodoxical stereotype at all levels. Discrimination against girls, adolescent, and women is persisting all around the country none of the states are at par from the heinous activities.

Globalization though has been considered as rise of the new awakenings but has also presented real challenges in terms of gender inequality and gender crimes. The present study in this article is an attempt to bring the emphasis on the real issues of the tribal women in Odisha, who are being subjected and exposed to whole lots of both in terms of opportunities as well as challenges due to the fast development in the field of economy which have brought them several constraints. These constraints are the real-life hardships and even exposure of violence either due to lack of knowledge or in their work environment.

BASIC GOVERNMENT SCHEME:[1]

Special Central Assistance to Tribal Sub-Scheme (SCA to TSS) is 100% grant from Government of India (since1977-78). It is charged to Consolidated Fund of India (except grants for North Eastern States, a voted item) and is an additive to State Plan funds and efforts for Tribal Development. This grant is utilized for economic development of Integrated Tribal Development Project (ITDP), Integrated Tribal Development Agency (ITDA), Modified Area Development Approach (MADA), Clusters, Particularly Vulnerable Tribal Groups (PVTGs) and dispersed tribal population. SCA to TSS covers 23 States: Andhra Pradesh, Assam, Bihar, Chhattisgarh, Goa, Gujarat, Himachal Pradesh, Jammu &Kashmir, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Odisha, Rajasthan, Sikkim, Tamil Nadu, Telangana, Tripura, Uttarakhand, Uttar Pradesh and West Bengal.

Grants-in-aid under Proviso to Article 275(1) of Constitution of India is 100% annual grant from Government of India to States. The programme, the Peoples Empowerment Enabling Transparency and Accountability or PEETHA aims to improve transparency in the distribution of individual and social benefits.

OVERVIEW ON KINDS OF VIOLENCE FACED BY TRIBAL & NON-TRIBAL WOMEN IN ODISHA:

The present government of Odisha has adopted various policies and schemes in order to combat the Disease called 'Illiteracy' from the people for the State. It has adopted schemes and policies called 'Anwesha'- an Urban Education Programme for SC ST since 2015-16, 'Akanshya' and few

[1] http://pib.nic.in/newsite/PrintRelease.aspx?relid=180875 (Visited on August 23, 2019).

'Ashram Schools'[2]- thereby focusing on the primary goal of Education. It has organized various schools as well as hostels facility for these under privileged strata who cannot afford their basic need for Education. Well, after these adoptions there has been still too many lacunas to be filled for its cure. Are these policies enough to eradicate illiteracy from that society!? Of course not! Our answers can be. There is much way to go still. We are stuck in between till now and lack many more such policies. During my tenure in the State Commission where I came across many cases about the violence faced by Women across the Capital city as well as across the State. That was too stunned knowing about the number of cases being reported on daily basis minimum of 14-15 cases relating to acts such as domestic violence, dowry-torture, dowry-detention, bigamy where the women were being subjected to these illegal act to crimes. The types and the incidents reported was a dead shock for me. In this era of Modern Gender Equality which we are demanding, there are still those women who cannot even have a safe and peaceful atmosphere at their respective homes. The idea for providing equality is yet at par.

The women had faced problems not only with respect to the type of violence but were one of those under-privileged who did not even have any rights known that have been conferred to them- To understand this I would like to mention a case which I came across there, was of a woman who came to the commission to file a case against his husband for denying her to give any recognition as a status of his wife. The woman came along with her mother to file a case while having interaction with the victim she was asked to provide details about her marital life and the tenure for how long she was in that relation. She reported that this was her second marriage and currently she was twenty-one-year-old. The very first marriage of hers was when she was seventeen-year-old. This was quite astonishing for the counselor too to know about her agony which she was made to do just because her family was poor and could not afford with the further studies yet they had no other option rather than to make their child marry. The poor young lady at the age of twenty-one had to suffer tremendously. She had no other rescue available now except to report the matter in order to seek the help for her ill faith problems. This is one of case which was a complete lesson from me where the Women around chooses a path called as- Marriage because she did not have any remedy to satisfy her basis need, therefore have to go through the harshness as well as torture too by the male dominant society.

Bigamy exists as the most common feudal criteria for both the upper as well as lower strata of society. Both to those women have been on the same verge in terms of this kind of act. Out of every 10 women out there 7 where being subjected to the act of bigamy where their husband has

[2] https://www.ndtv.com/india-news/odishas-new-programme-for-transparency-awareness-of-government-schemes-1957359 (Visited on September 02,2019).

some or other kind of extra-marital affair either with someone at their homes or outside. Women who knew about their rights could come up with a solution like either having a Mutual Separation or a Divorce but there are many women as such who cannot afford to have Divorce because they are financially very inconsistent and therefore have to abide by the ethics of marriage either they don't have a stable standard of living or due to their child who are not more than 3-5 years old and have to rely on their husband for few pennies. This makes them to go through such violence wordlessly just to carry on with their lives. Migration and displacement too have been an essential aspect when it comes about crimes related to Women. Both Traditional and Modern women have to undergo such situation either once in their lives either at their adolescence, teenage or at adulthood.

SAFEGUARDS PROVIDED UNDER VARIOUS LAW:

Generally, many of the women though residing in a village or in a town or in a city are ignorant about the various rights that are conferred on them by the legislation, it may happen due to lack of awareness about those rights and privileges which led the women around to face the crimes being illicit on them. Legislation have provided many safeguards and penal provisions when it comes about any such infringement. Such as for covering any act regarding domestic violence, dowry-torture, dowry-detention, etc.; it calls Section 3 of The Protection of Women from Domestic Violence Act,2005 and Section 4 of the same act, Section 4A of The Dowry Prohibition Act,1961, Section 304B of The Indian Penal Code 1860 and 498A of The Indian Penal Code, 1860. These are the few provisions being exercised against any activity which is related to any act of violence against women of India[3].

ANALYSIS:

Through this article, my main area was to bring concern on the present scenario where the country is developing as whole in terms of science, technology, where women are heading high to create a technology where they stand nears the Mars and then creating a science to land in Moon but there are still many who lacks basic standard to living; there are that strata to women hood who does not even know their bare subsistence, who by themselves are ignorant about their rights and privileges. One nation's full development can only be termed when each and every individuals of the country knows their rights and duties; when one strata are not forced to live a life of sacrifice; when their always equality before law and the laws empowers the strength to the citizens to combat with any

[3] http://ijcrt.org/papers/IJCRT1704195.pdf (Visited on September 10, 2019).

social disease; when before thinking about education we stand united without hindering anyone's rights; when there is equal pay without discriminating the gender then only in true sense we can stand and shout out that yes! We as the citizens to India are developed in all the sense when being women they are not supposed to sacrifice their wants at the cost of their living.

In today's atmosphere too, when we visit any remote part of the country after the birth of a girl child, parents are much more concerned about the marriage of their daughter instead of imparting education to her, it's quite obvious that due to the poor standard to living those young children are being subjected to child labor where they have to gain wholesome amount to earn food twice a day for their families thereby throwing them at par from this technologically developing fast society thus lagging them in the race. Education is the prime methodology which helps the person to exercise their rights. But sometimes the main concern becomes as is Education sufficient to impart strength to all persons for implementing its amplification's in all respect. In order to get through all these both Union and State should joined hand-in-hand, visualize the loopholes prevalent in the prevailing system of administration, understand the current demands of the society, work together, try to impart knowledge to all sections of the society through all possible mediums or channels it can. Thus, the nations where we have categorized it to be our "Mother" in true aspect it can be respected and honored , where the women whom we worship in this holy land in all the situations are payed for its beautification and where in our justice system, we do not find any case on dowry death, domestic desertion and the various heinous crimes faced by the women either in the modern urban places or it can be in any remote areas of our country and thus, we can pay a great honor to our Constitution which lays down in its Basic Structure to provide justice to all irrespective of its sex.

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SURROGACY IN INDIA: REGRESSIVE LAWS UNDER THE GUISE OF ETHICS

- *Apoorva Maheshwari & Saloni Kedia*

INTRODUCTION:

Women are gifted with a beautiful ability to procreate and give birth to a new life. It is always desirous on part of a matrimonial couple, or a woman to have a baby of their own, who is a part of them. Anciently, one of the primary objectives of marriage was to procreate and continue the family lineage. This notion still exists today. However, unfortunately, not everyone is blessed with this gift of nature and a large number of world's population faces infertility issues. According to World Health Organization estimate, the overall prevalence of primary infertility in India is between 3.9 to 16.8%. Primary infertility means that the couple has never conceived. This is the most prevalent form of infertility across the globe.[4]

The inability to conceive is considered as a stigma and infertile people are looked down upon, particularly women. The options for such people to have a child are to adopt a child or to take the help of Assisted Reproductive Technology (ART). ART includes artificial insemination, In-Vitro fertilization, embryo transfer, etc. Surrogacy is also a form of ART. In most simple words, surrogacy means a process whereby a woman agrees to become pregnant and give birth to a child for another person who is or will become the parent of the child. Till recently, the laws in India with respect to surrogacy have remained uncodified that has led to exploitation of surrogate mothers. However, in August 2019, the Surrogacy (Regulation) Bill, 2019 was passed by the Lower House of Parliament of India. Interestingly, though, the Bill intends to prevent exploitation of surrogate mothers, some of its provisions are highly regressive and encroach upon the rights of the people to procreate.

This paper will focus on the condition of surrogacy in India and the laws relating thereto. It will highlight some provisions of the Surrogacy (Regulation) Bill, 2019 and compare them with the global laws. Lastly, it will deal with the ban on commercial surrogacy in India and give some suggestions with regard to change in laws.

[4] National Health Portal India, Gateway of authentic health information, 'Infertility', at https://www.nhp.gov.in/disease/reproductive-system/infertility.

SURROGACY- DEFINITION AND MEANING:

Merriam-Webster defines **surrogacy** as the practice of serving as a surrogate mother.[5] It defines **surrogate mother** as a woman who becomes pregnant usually by artificial insemination or surgical implantation of a fertilized egg for the purpose of carrying the foetus to term for another woman.[6] As per the Black's Law Dictionary, **surrogacy** means the process of carrying and delivering a child for another person[7]

In Latin "*Surrogatus*" means a substitute *i.e.* a person appointed to act in the place of another.[8] According to Warnock Report (1984) HF&E, surrogacy is the practice whereby one woman carries a child for another with the intension that the child should be handed over after birth.[9]

If these definitions and meanings are analysed, then the only implication is that a surrogate is a substitute who gives birth to a child with intention of giving that child to the intending parent. There's no qualification as such required to be a surrogate or to be a parent.

EVOLUTION OF SURROGACY IN INDIA:

The roots of Surrogacy in Indian heritage can be sketched long back which provides marks of being a century old procedure.The technique became a fruitful and efficacious practice in India with the birth of world's second and India's first IVF baby Kanupriya alias Durga who was born in Kolkata on October 3, 1978. With this remarkable development, the field of Assisted Reproductive technology (ART) was developed hastily. But when legal background is considered for surrogacy, it is still in an embroyonic stage and still no legal recognition is achieved in India. Till date only gestational surrogacy has been upheld that too in a budding stage. In present scenario, the supervisory force is merely an agreement between the two parties i.e. the surrogate and the intended parents which is centred on ART guidelines. Adoption and implementation of codified laws are still in process.

In recent years, there has been a tremendous growth in the count of Intended parents in India taking up surrogacy which ultimately made nation a welcoming surrogacy destination. Surrogacy has always persisted to be the most disputed and questioned subject in India both legally and

[5] Surrogacy, Merriam-Webster, at https://www.merriam-webster.com/dictionary/surrogacy.
[6] Surrogate mother, Merriam-Webster, at https://www.merriam-webster.com/dictionary/surrogate%20mother.
[7] Oliphant RE. New York: Aspen Publishers; 2007. Surrogacy in Black law dictionary, family law; p. 349.
[8] **R.S. Sharma,** Social, ethical, medical & legal aspects of surrogacy: an Indian scenario, Indian J Med Research, Vol. 140 (Suppl. 1) (Nov, 2014), at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/.
[9] Warnock DM. London: Command of Her Majesty; 1984.Report of the committee of inquiry into human fertilisation and embryology; p. 42.

politically. In recent past, there are certain cases questioning surrogacy in India. And judgements delivered are both in affirmative as well as negative. Some judgements are in favour and some are against the practice of procedure when the ultimate attempt resulted in failure. In spiteof many obstacles and efforts, in 2002 commercial surrogacy was legalised in India.

In 2005, Indian Council of Medical Research[10] issued guidelines for accreditation, supervision and regulation of ART clinics in India for promotion of biomedical research and these guidelines also attempted to incorporate some trending issues related to social justice and gender inequality.

In past few decades,India has shown massive growth in reproductive techniques. Techniques includedinnovative door insemination techniques, in vitro fertilization techniques, embryo techniques and much more.With the case of *Baby Manji Yamada v. Inion of India*[11], in 2008 Supreme Court recognised the issue of commercial surrogacy in India. Then in 2009, 228th Law Commission Report was issued which recommended framing a law for surrogacy and banning of commercial surrogacy and even globally, commercial surrogacy has not been accepted wholeheartedly and condemned by many nations. With the changing needs of the society and socio-ethical culture, surrogacy has become the deep interest topic among government of different nations, medical departments and even public at large.

CONDITION OF SURROGACY IN INDIA AND THE LAWS THERETO:

With the legalisation of commercial surrogacy in India in the year 2002, the Indian economy witnessed a great boost. The legalisation was done with a view to promote medical tourism in India which is an industry which has generated US$2·3 billion annually.[12] When this step was taken by the Indian government, simultaneously, Indian Council for Medical Research (ICMR) in 2002 framed guidelines for surrogacy. Later in 2005, ICMR laid down "National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, which *inter alia*, discussed the conditions that ART clinics need to comply with. However, there was no binding force attached to these guidelines as there was not any legislative support.

In 2008, Assisted Reproductive Technology (ART) Bill was proposed but the same is pending with the government since 2014 after being revised thrice in 2010, 2013 and 2014.[13]The ART Bill, 2016

[10]National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India. 2005. Indian Council of Medical Research, New Dehli

[11]Baby Manji Yamada v. Union of India &Anr. (2008) INSC 1656 (29 September 2008). Judgement in the Supreme Court of India Civil Original Jurisdiction Writ Petition (C) No. 369 of 2008

[12]India's unregulated surrogacy industry, World Report, The Lancet, Vol. 380 (Nov, 2012) p. 1633-1634 at https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(12)61933-3.pdf.

[13]India's unregulated surrogacy industry, World Report, The Lancet, Vol. 380 (Nov, 2012) p. 1633-1634 at https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(12)61933-3.pdf

was also proposed later. While the 2008, 2010 and 2013 versions of the Bill were in conformity with the ICMR Guidelines but the later versions of 2014 and 2016 have diverted from the same. In other words, the former versions allowed ART to be available to single persons and foreign couples, the latter editions have restricted surrogacy to only infertile married Indian couples.

Though the ART Bill has not been passed yet, the Surrogacy (Regulation) Bill, 2019 recently got the approval of the Lower House of the Parliament. The said Bill is similar the 2016 version of the bill which had also the assent of Cabinet. The 2016 Bill was sent for review to the Parliamentary Standing Committee on Health and Family Welfare. The Committee 'strongly' recommended that the ART Bill be brought forth before Surrogacy Bill. According to the Committee, a mere enactment of the Surrogacy (Regulation) Bill would not serve the purpose of controlling commercialisation of surrogacy facilities across the country. Apart from that, the Committee in its 102nd Report criticised some of the provisions of the Bill and observed that the Bill is based on moralistic assumptions. The Report criticised limiting surrogacy to only be altruistic, it being available only to infertile married couples and also the five year waiting period for the couple to opt for surrogacy.[14]

The Surrogacy (Regulation) Bill, 2019: Despite the Report of the Standing Committee which was not in much favour of the 2016 Bill, the Lower House gave nod to the 2019 Bill which carries similar provisions to the earlier counterpart. The ART Bill which should have been tabled before the Houses was again left to stay in the shelves and the Surrogacy (Regulation) Bill, 2019 got hastily approved by Lok Sabha.

There are way too many problems with this new piece of legislation. The enactment starts with the aim to constitute National Surrogacy Board, State Surrogacy Boards and appoint appropriate authorities for regulation of the practice and process of surrogacy.[15] Some of the provisions of the Bill which leaves it open to debate and criticism are as follows-

a.) **Altruistic Surrogacy:** Section 4 of the Bill provides that only altruistic surrogacy will be allowed and commercialisation of surrogacy is completely impermissible and only ethical altruistic surrogacy is allowed. Altruistic surrogacy is the one in which no charges, remuneration, etc., monetary or otherwise, except medical expenses are given to the surrogate mother. Sec. 35 provides for penalty for commercial surrogacy.

[14]Department-Related Parliamentary Standing Committee on Health and Family Welfare. One Hundred Second Report on The Surrogacy (Regulation) Bill, 2016. New Delhi: Rajya Sabha Secretariat; 2017. Report No. 102. [cited 2017 Oct 22]. [Published in Gazette of India Extraordinary Part II Section 2, November 21, 2016.]; Surrogacy Bill useless without ART Bill: Committee to Rajya Sabha, The Economic Times, Prabha Raghvan, Aug 11, 2017 (12:25 AM IST), at https://economictimes.indiatimes.com/news/politics-and-nation/surrogacy-bill-useless-without-art-bill-committee-to-rajya-sabha/articleshow/60011253.cms.

[15] The Surrogacy (Regulation) Bill, 2019, Bill No. 156 of 2019.

b.) **Intending parents:** As per Sec. 4, an intending couple (heterosexual only) needs to be married for at least five years, to obtain a certificate of infertility from the appropriate authority, i.e., 23-50 years for female and 26-55 years for male. They can only be Indian citizens and should not have a surviving child by any means, except a child who is physically or mentally challenged.

c.) **Surrogate mother:** Sec. 2 defines 'surrogate mother' as a woman bearing a child through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4. Sec. 4 (iii)(b) provides that the surrogate mother needs to be a married woman of 25-35 years of age, having at least one child of her own and 'close relative' of the intending couple. No woman can be a surrogate more than once in her lifetime.

d.) **Abortion:** Sec. 3 that abortion during the period of surrogacy shall not be caused or conducted without written consent of surrogate mother and authorisation of the same by the appropriate authority.

This bill seeks to ban and penalise commercial surrogacy *in toto*. The authors believe that the bill lacks foresight and is based on ethics and morals and not on logic. The Standing Committee in 102nd Report said that expecting a close relative to be altruistic enough to become a surrogate and endure all the hardships associated with it was tantamount to another form of exploitation.[16] Further, Nayana Patel, Medical Director of Akansha Infertility and IVF Clinic, Anand, Gujarat, opines that the bill is based on the myth that the practice of surrogacy exploits surrogates. However, endorsing altruistic surrogacy will lead to emotional and social pressure on close female relatives and oblige them to be selfless, and not ask for any compensation for the loss of livelihood, and the immense emotional and bodily labour of gestation involved in surrogacy. This will lead to a form of exploitation.[17].

Next are the conditions put on the intending couple. The Bill does not allow single parents, homosexual couples, divorced or widowed women, live-in partners, and foreign nationals to opt for surrogacy in India. This provision is arbitrary and violative of Art. 14. The classification lacks *intelligible differentia*. Art. 21 includes fundamental right to privacy[18] and the Court in a case ruled that Art. 21 includes right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. The personal decision of the

[16]Department-Related Parliamentary Standing Committee on Health and Family Welfare. One Hundred Second Report on The Surrogacy (Regulation) Bill, 2016. New Delhi: Rajya Sabha Secretariat; 2017. Report No. 102. [cited 2017 Oct 22]. [Published in Gazette of India Extraordinary Part II Section 2, November 21, 2016.]
[17]Debate: Should Indian government put a comprehensive ban on commercial surrogacy?, DownToEarth, Kundan Pandey (13 Oct, 2016), at https://www.downtoearth.org.in/news/umbilical-discourse-55751.
[18] Justice K.S. Puttuswamy (Retd.) & Anr. v. Union of India & Ors., (2017) 10 SCC 1.

individual about the birth of children is called "the right of reproductive autonomy"[19].Hence, the restrictions put forth infringe this right of certain above-mentioned classes of people. Further, right to life and personal liberty is also inclusive of right to motherhood[20] and this Bill is violative of the same. The Bill also encroaches upon the right to privacy of the couple because of the requirement of certificate of infertility.As observed in *B.K. Parthasarthi* v. *Government of A.P.*[21], the Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy" and that the right to make a decision about reproduction is essentially a very personal decision.Such provision makes the couple hesitant and leaves it open to ridicule and social stigma. Lastly, the five year waiting period is totally unwarranted.

While the Juvenile Justice Act, 2015 allows a court to give a child for adoption to foreign parents and Central Adoption Resource Agency (CARA) Guidelines allow inter-country adoption as well as adoption by single parent; the surrogacy law seems to be have taken an unnecessary diversion.[22]

The Bill does not define close relative and gives a lot of scope for ambiguity. The Bill seeks to protect surrogate mothers from exploitation. However, the condition that they need to be a close relative of the parents is not connected with issue of exploitation. Such a provision restricts the scope of surrogacy as not many relatives would be willing to go for pain and hardship for nine months for someone with 'altruistic' feelings.

Lastly, requirement of approval of appropriate authority for aborting the child is another dangerous provision. Sometimes medical termination of pregnancy is needed on urgent basis and going through the formalities to get authority's approval for abortion might pose a risk to the mother's health.

While criticising the Bill, the authors acknowledge and appreciate the provisions which ensure the rights of the child born out of surrogacy and the welfare of the surrogate mother. While the law establishes Surrogacy Boards at national and state levels along with appropriate authority, it has failed to enact any provision to make sure the post-natal requirements of the surrogate mother.

IS BAN ON COMMERCIAL SURROGACY A GOOD STEP?

In 2008, the Supreme Court of India ruled that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate law governing surrogacy in India. However, the law which has come up bans commercial surrogacy.

[19]*R. Rajagopal* v. *State of T.N., AIR 1995 SC 264.*
[20]*Hema Vijay Menon* v. *State of Maharashtra, (2015) 5 AIR Bom R 370.*
[21]*B.K. Parthasarthi* v. *Government of A.P.*, AIR 2000 AP 156.
[22] The Juvenile Justice (Care and Protection of Children) Act, 2015, Sec. 59, Act No. 2 of 2016 [31st Dec 2015]; Adoption Guidelines, Central Adoption Resource Authority, at cara.nic.in.

In commercial surrogacy, apart from medical expenses, payment is made to the surrogate mother for carrying the child for nine months and giving it up to the parents later. This process gives a baby to a childless couple and a good income to the surrogate mother. 'Altruistic', as per Cambridge Dictionary, means 'showing a wish to help or bring advantages to others, even if it results in disadvantage for you'.[23] Hence, in this type of surrogacy, a selfless act with feelings of sacrifice is required by the surrogate mother. Since only altruistic surrogacy is permissible, the Bill obliges the relatives to bear a child for a couple with unselfish feelings, in return of no compensation for all the hardship borne by her. Nayana Patel, Medical Director of Akansha Infertility and IVF Clinic, Anand, Gujarat, believes that such kind of obligation on relatives exploits them and forces them to do labour. According to her, any force on a close relative either emotional or otherwise can amount to forced labour violating Article 23 of the Constitution.[24]The Parliamentary Standing Committee observes the same that altruistic surrogacy puts forth another form of exploitation.[25]

Regarding the term 'close relative', a reference can be made to the Transplantation of Human Organs Act (THOA), 1994, which prescribes that organ donors are allowed to donate their organs before death only to 'near relatives'. But unlike the Surrogacy Bill, the THOA identifies 'near relatives' as 'spouse, son, daughter, father, mother, brother or sister'.[26] It's a closed group of relatives within the structure of the nuclear family unit, members who may not be eligible to be surrogates, unfortunately.[27] Such ambiguity in the Surrogacy Bill paves way for abuse of the law as strangers would be dressed up as 'close relatives'.

In 2012, the Indian government banned surrogacy for gay couples. *The Conversation* reported that various infertility businesses in Delhi continued to sign on gay clients from all over the world. To avoid the ban, infertility clinics then 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 mothers and how they got back home remains unclear.[28]

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[23]Altruistic, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/altruistic.

[24]Debate: Should Indian government put a comprehensive ban on commercial surrogacy?, DownToEarth, Kundan Pandey (13 Oct, 2016), at https://www.downtoearth.org.in/news/umbilical-discourse-55751.

[25]Department-Related Parliamentary Standing Committee on Health and Family Welfare. One Hundred Second Report on The Surrogacy (Regulation) Bill, 2016. New Delhi: Rajya Sabha Secretariat; 2017. Report No. 102. [cited 2017 Oct 22]. [Published in Gazette of India Extraordinary Part II Section 2, November 21, 2016.]

[26] Transplantation of Human Organs Act, 1994, Sec. 2, Act No. 42 of 1994 [8th July, 1994].

[27] What is Altruistic Surrogacy, The Hindu (Opinion), Anindita Majumdar (24 Dec, 2018) (00:02 IST) at https://www.thehindu.com/opinion/op-ed/what-is-altruistic-surrogacy/article25814445.ece.

[28] Sharmila Rudrappa, **India outlawed commercial surrogacy – clinics are finding loopholes, The Conversation, a**thttps://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784.

This report suggests that banning commercial surrogacy comprehensively does not abolish the practice; it exposes the surrogate mothers to greater risks without any support of legal enforcement. Moreover, the new Bill does provide for penalty for commercial surrogacy but it fails to ensure its implementation.

The Surrogacy (Regulation) Bill, 2019 seeks to protect surrogate mothers from exploitation and safeguard interests of poor women who become surrogates for money. The Bill is based on the assumption that commercial surrogacy is unethical and leads to commodification of women. Down To Earth reported with respect to the Surrogacy Bill, "In its legitimisation of "altruistic" surrogacy within "close relatives", the bill draws upon the patriarchal assumption of women's nature as being sacrificial and altruistic. It also seeks to bring back reproductive labour from the market to the family and household levels, which are domains where women's labour is available as a "free" resource for consumption by "close relatives". We believe that banning commercial surrogacy is a hasty and bad move with a lot of flaws remaining unaddressed and loopholes remaining vacant.

GLOBAL SCENARIO W.R.T. INDIAN SCENARIO:

Surrogacy is a 'booming', globally. This section briefly introduces key information about the surrogacy laws universally. Later, an analysis of the laws of different countries shall be done in comparison with Indian law.

Countries have adopted different approaches regarding legality of surrogacy. There are some countries which prohibit all types of surrogacy, i.e., surrogacy contracts are null, void and prohibited in such states. France, Germany, Italy, Spain and Switzerland are the countries which fall under this category. The main motive behind prohibiting surrogacy is gross violation of human dignity of the child and the surrogate where values are reduced to mere contracts[29]. However, France gave the recognition to surrogate children born abroad in 2015 as French citizen but with certain condition that they must have atleast one French parent.[30]In 2014, German same-sex couples to whom child was born through surrogacy in California were given parental rights by the German Federal Court of Justice leaving all the queries open to discussions.[31]

There are certain nations that leave surrogacy unregulated. They do not expressly prohibit

[29]Sussane L Gossl, Germany, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 131, 131–34 (Katarina Trimmings & Paul Beaumont eds., 2013) (discussing the Adoption Placement Act and Embryo Protection Act of 1990).

[30] Cour de cassation decision July 3, 2015; see Press Release, Surrogate Motherhood Alone Cannot Justify the Refusal to Transcribe into French Birth Registers the Foreign Birth Certificate of a Child Who Has One French Parent, Cour De Cassation.

[31] Supreme Court of Germany decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13), December 10, 2014 < https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>.

surrogacy however, surrogacy contracts are unenforceable under general laws.[32] Sweden is the biggest example which has left surrogacy law unaddressed.

States That Expressly Permit and Regulate Non-Commercial Surrogacy There are certain countries that expressly permit non-commercial or altruistic surrogacy.

- In Australia, surrogacy is regulated at the state and territory level[33]. They prohibit commercial surrogacy but allow altruistic surrogacy with reimbursement of certain surrogate's costs.
- In South Africa, both full and partial altruistic surrogacy is legal, but compensation is not allowed except for "reasonable expenses."[34] But certain legal requirements relating to surrogate need to be fulfilled.
- In UK, altruistic surrogacy or non-commercial surrogacy is permitted and reasonable expenses incurred by surrogate can be reimbursed.

Jurisdictions That Allow All Types of Surrogacy

There are many countries that have a positive approach towards surrogacy including commercial surrogacy.

- One of the eminent example to accept surrogacy positively is Israel. Full surrogacy is permitted under legislation enacted in 1996[35].
- There are many other jurisdictions who have accepted surrogacy wholeheartedly mostly in developing or middle-income countries. The most welcoming state for intended parents where commercial surrogacy is legally performed is Ukraine[36]. Even Russia has become the most preferred destination in Eastern Europe.
- India recently banned international commercial surrogacy for foreign intended parents because of ongoing chaos relating to its exploitation. As of April 2016, countries that have recently banned international commercial surrogacy for foreign intended parent/s include

[32]Countries include: Argentina (legislative amendments to both allow and prohibit surrogacy have been proposed), Belgium (legislative amendments to criminalize commercial surrogacy have been proposed), Brazil, the Czech Republic (legislative amendments to allow altruistic surrogacy have been proposed), Ireland (legislative amendments to prohibit commercial surrogacy have been proposed), Japan, Mexico, Mexico (Mexico City) and Venezuela. Allan, supra note 53, at 131 n. 84; see also Katarina Trimmings & Paul Beaumont, General Report on Surrogacy, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 439, 462 (Katarina Trimmings & Paul Beaumont eds., 2013).

[33] See Parentage Act 2004 (ACT); Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Surrogacy Act 2012 (Tas); Assisted Reproductive Treatment Act 2008 (Vic); Surrogacy Act 2008 (WA). There is no legislation in the Northern Territory.

[34] Children's Act 2005, § 298(1).

[35] Sharon Shakargy, Israel, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 231, 231–2 (Katarina Trimmings & Paul Beaumont eds., 2013).

[36] Trimmings & Beaumont, General Report, supra note 72, at 451

India[37], Thailand,[38] Nepal,[39] and Mexico[40].

- In U.S.[41] legal approach to surrogacy vary widely. Currently there are four states which explicitly bans surrogacy. They areNew York, New Jersey, Indiana, and Michigan. There are fourteen states that regulate and permit some form of surrogacy via statute.

In California, surrogacy contracts are enforceable. Even they allow compensation to the surrogate mother. The state is very liberal with no restriction on who can be a surrogate mother or an intented parent with no residency requirement. Even Florida, Maine and Virginia are very liberal with their surrogacy laws.

SUGGESTIONS TO THE SURROGACY (REGULATION) BILL, 2019:

- The recent surrogacy regulation bill can be considered as insensitive towards the society. Surrogacy is a multidimensional medical procedure along with social, legal, cultural, biological and economic hurdles for which the bill is unable to provide enough justice. It is very difficult to ban commercial surrogacy in the way bill commands.
- The alternate solution to this heavy regulation can be at variance to the alarming consequences of the ban. Sufficient support can be provided with adequate screening, authentic documentation and proper analysis of cases in a supervised environment in comparison to a ban which is beyond reason an extreme step.
- Further, the oppostion to commercial surrogacy from sociological perspective can be easily exposed off with a very simple technique or a small change in the social behaviour of surrogate mothers. Surrogate mothers should be given the utmost importance who have all the right to know who the intented parents are, the privilege to choose the way she would get pregnant, to know all the information mentioned in contract which she is obliged to sign, and the right to maintain contact with the babies they give birth to. The most important factor is to maintain the bodily autonomy, integrity and dignity of the surrogate mother with due respect. And this can be obtained with adequate framing of policies and proper intervention of government in regard to laws commenting surrogacy.
- There is a myth that commercial surrogacy is exploitive in nature because the dimensions

[37]Nehaa Chaudhari, Regulating Assisted Reproductive Technologies in India, OXFORD HUMAN RIGHTS HUB, November 12, 2015, ; Aditi Malhotra & Joanna Sugden, India's Surrogacy Industry Needs Regulation, Not a Ban, Say Women's Rights Groups, WALL STREET J. BLOG, November 17, 2015.
[38] Thailand Bans Commercial Surrogacy For Foreigners, BBC NEWS, February 20, 2015
[39] EMBASSY OF UNITED STATES, KATHMANDU, NEPAL, Surrogacy In Nepal, October 30, 2015,
[40] Mexican State Votes To Ban Surrogacy For Gay Men and Foreign People, GUARDIAN, December 15, 2015
[41] Surrogacy Law and Policy in the U.S. Columbia Law School Sexuality & Gender Law Clinic (2016)

which views surrogacy is medical exploitation only. It is very essential to note that commercial surrogacy is equally a major source of income for many unemployed women. As females are already considered as emotionally week, supporting altruistic surrogacy will lead to emotional abuse of females by its close relative making it a social obligation. Instead of looking commercial surrogacy as a source of exploitation, why not look at it in a positive perspective considering it a major source of income for which compensation will be provided for rendering services in a profession manner.

- The government should make proper monetary arrangements for the women whose families are suffering due to lack of stable source of income and make adequate measures for minimum wage allowance. The surrogacy bill has only made surrogate mothers more expose to vulnerability by proposing stringent laws for women previously employed in practice. This bill has placed women in an insecure position leading to gender violence which takes place in family itself. As the bill states that the surrogate mother can only be the close relative of the intended parents which makes it more difficult for a surrogate mother to speak against a close relative rather against a professional surrogacy agency.
- The problem with the necessity of marriage is again a major hurdle which restricts commercial surrogacy. Even imposing restriction on single parents is unjustified as single parents are equally successful in nurturing children. State has no right to decide the modes of parenthood and cannot interfere with the decisions of persons to have children either naturally or through surrogacy.
- Considering surrogacy industry, its contribution to Indian economy is very significant. Commercial surrogacy has helped in massive revenue collection to Indian infertility clinics. Banning commercial surrogacy can be considered as an easier way out because regulating the same demands proper legislative machinery and judicial perspective. Banning is a proper escape on the part of government which ultimately shifts the responsibility for not being accountable to the public in general. Hence, the answer to the above question is definitely not prohibiting commercial surrogacy, rather regulating it with proper norms governing its existence.

CONCLUSION:

In light of the above stated facts, cases, opinions, authorities and submissions, it is hereby concluded that though the Indian Government has positively decided to codify the law relating to surrogacy, however, the same has been drafted hastily and lags behind when compared with similar

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laws of other countries. It encroaches upon a number of rights of the people of the country and hence, several modifications are required in it, besides codifying the law with respect to Assisted Reproductive Technology.

Furthermore, The regulatory surrogacy landscape is also currently in flux, as many jurisdictions have recently or are currently considering amending their laws. Each jurisdiction's policy towards surrogacy impacts other states, and the policy position of other states impacts all others'. Due to the international dimensions and growing complexities, it is argued that there is an urgent need for a multilateral, legally-binding instrument to establish a global, coherent, and ethical practice of international commercial surrogacy as well.

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PARIS CLIMATE AGREEMENT 2016: A CRITICAL ANALYSIS

- *Rushali & Akshat Kumar*

INTRODUCTION

One of our prime reasons of concern in the modern world is global warming. Global warming refers to the rise in average temperature of the earth over a long period of time. Earth contains some radioactive gases, called greenhouse gases, that tend to trap the warmth from the rays of the sun. This keeps the earth's atmosphere warm and helps sustain life. The entire process of heat trapping by greenhouse gases is called greenhouse effect. Most important and abundantly found greenhouse gas is carbon dioxide (CO_2). Other greenhouse gases are methane (CH_4), nitrous oxide (N_2O), Sulphur hexafluoride (SF_6) and other fluorinated gases. The rapid increase in the amount of greenhouse gases has led to its higher concentration in nature in turn leading to unnatural increase in temperature of the earth. Due to this increase in temperature:

1. Ice is melting worldwide, especially at the Earth's poles, including mountains, glaciers, ice sheets covering West Antarctica and Greenland, and Arctic sea ice. In Montana's Glacier National Park, the number of glaciers has declined to fewer than 30 from more than 150 in 1910.[42]
2. Much of this melting ice contributes to sea-level rise. Global sea levels are rising 0.13 inches (3.2 millimeters) a year, and the rise is occurring at a faster rate in recent years. The increase in the sea level is also increasing the risk of submergence of coastal areas. The submergence of coastal areas will mainly affect human habitations especially the poor who depend on wood for domestic fuel requirements.[43]
3. Rising temperatures are affecting wildlife and their habitats. Vanishing ice has challenged species such as the Adélie penguin in Antarctica, where some populations on the western peninsula have collapsed by 90 percent or more.[44]
4. Due to change in temperature many species are on move. Some butterflies, foxes, and alpine

[42] National Geographic, 'Cause and Effects of Climate Change' <https://www.nationalgeographic.com/environment/global-warming/global-warming-effects/> accessed 09 September 2019
[43] ibid.
[44] ibid.

plants have migrated farther north or to higher, cooler areas.[45]

5. On an average the Precipitation has increased across the globe. Yet some regions are experiencing more severe drought, increasing the risk of wildfires, lost crops, and drinking water shortages.[46]
6. Some species including mosquitoes, ticks, jellyfish, and crop pests are thriving. Booming populations of bark beetles that feed on spruce and pine trees, for example, have devastated millions of forested acres in the U.S.[47]

Since 1906, the global average surface temperature has increased by more than 1.6° Fahrenheit (0.9° Celsius) even more in sensitive polar regions.[48]

The greenhouse effect is a natural phenomenon. However, the increase in greenhouse gases is linked to human activities. In order to control this, United Nations Framework Convention on Climate Change (UNFCCC) was adopted on 9th May 1992 and was opened for signature at the Earth summit in Rio de Janeiro from 3rd to 14th June 1992, where 154 countries signed it. It came into force on 21st march 1994. Its objective is to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference in the environment. United nations framework convention on climate change states that all the parties to the convention should act in order to protect the earth from the climate change on the basis of common but differentiated responsibilities. All the developed countries who are a party to this convention should come up and take a lead in addressing climate change. Efficiency of the developing countries who are a party to this convention will depend on how effectively they implement rules and laws in order to fulfill their commitments under the convention. The commitments related to financial resources and transfer of technology under the convention will fully be taken into account, that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties. In order to discuss the ways and means to achieve the aim of this treaty, parties to UNFCCC have met at different conferences. The first COP meeting was held in Berlin, Germany in March, 1995.[49] The conference at Berlin gave rise to the Berlin mandate which states the commitments of the Annex I parties whose aim was to reduce the greenhouse gas emission to 1990 levels by 2000. It stated elaborate policies and measures for Annex I Parties to achieve the aim as well as "set quantified emission limitation and reduction objectives" (QELROs) for these Parties. In the Berlin mandate it was also reviewed that the Article

[45] ibid.
[46] ibid.
[47] ibid.
[48] ibid.
[49] United Nations Climate Change, 'Conference of the Parties (COP)' <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> accessed 09 September 2019.

4, paragraph (a) and (b) of the united nations framework convention were not adequate.[50] In further conferences it was decided that the target of Berlin mandate was not enough. Further discussions led to the Kyoto protocol which sets emission targets for developed countries which are binding under international law. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakesh, Morocco, in 2001, and are referred to as the "Marrakesh Accords." The Kyoto protocol has 2 commitment periods. It's first commitment period started in 2008 and ended in 2012.[51] The first commitment period included 37 industrialized countries and the European community then. The second commitment period was agreed to in 2012 and runs from 2013- 2020, known as the Doha amendment to the Kyoto protocol. The Kyoto protocol could not give expected results. It was the wrong solution at the right time. Not simply inadequate in its scope, but carrying high opportunity costs that derailed global efforts at achieving stable atmospheric concentrations of greenhouse gases (GHGs). The concern is not simply that the Protocol failed in even its minimal effort at reducing global emissions. The real crime of Kyoto is that it has subjected the world to an ineffective path-dependent model for solving climate change. In addition to contributing to Kyoto's own halfhearted performance, many of the principal design features have persisted and influenced climate policy making by other countries. Kyoto, in short, is a case of institutional design failure, one with lasting and potentially catastrophic impact on the world. Experts have pointed out that even full participation and compliance with Kyoto would not have prevented widespread climate change. Kyoto required an average GHG emission reduction of 5.2 percent below 1990 levels. However, the 2007 report by the IPCC asserts, "the numerous mitigation measures that have been undertaken by many Parties to the UNFCCC and the entry into force of the Kyoto Protocol in February 2005 are inadequate for reversing overall GHG emission trends" (IPCC 2007). The report from the IPCC (2007) starkly stated what was required:

To limit the temperature increase to 2 degree Celsius above pre-industrial levels, developed countries would need to reduce emissions in 2020 by 10-40 percent below 1990 levels and in 2050 by approximately 40-95 percent. Emissions in developing countries would need to deviate below their current path by 2020, and emissions in all countries would need to deviate substantially below their current path by 2050. A temperature goal of less than 2 degree Celsius requires earlier reductions and greater participation. These requirements stand in stark contrast to the 8 percent or less reduction that industrialized countries were asked to make. The IPCC 2014 report noted that

[50] United Nations Framework Convention on Climate Change, 'Report of the Conference of the Parties on its First Session, held at Berlin from 28 March to 7 April 1995', FCCC/CP/1995/7/Add.1.
[51] United Nations Climate Change, 'What is the Kyoto Protocol?' <https://unfccc.int/kyoto_protocol> accessed 09 September 2019.

the trajectory remains bleak: "the current trajectory of global annual and cumulative emissions of GHGs is inconsistent with widely discussed goals of limiting global warming at 1.5 to 2 degree Celsius above the preindustrial level" (IPCC 2014, 4). Even perfect compliance with the regime, therefore, would still represent an under-management of the global warming threat.[52] Hence, even though Kyoto protocol set relatively low threshold for emission reductions, states still struggled to comply. Some states such as Canada left the protocol entirely while others like Japan continued the protocol but failed to achieve the goals and decided not to participate in the second commitment period. As a result, in 2011 parties adopted Durban platform for enhanced action. In this the parties agreed to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties. In 2015 all the then parties to the convention met in Paris and adopted by consensus the Paris Agreement, aimed at limiting global warming to less than two degrees Celsius, and pursue efforts to limit the rise to 1.5 degrees Celsius. The Paris agreement was brought into force on 4th November 2016. In this research paper I am going to present an analysis of India's stand on Paris agreement and the steps taken by India towards climate change.

The Paris Agreement is an agreement within the United Nations Framework Convention on Climate Change (UNFCCC), dealing with greenhouse-gas-emissions mitigation, adaptation and finance, starting in the year 2020. The agreement's language was negotiated by representatives of 196 state parties at the 21st Conference of the Parties of the UNFCCC in Le Bourget, near Paris, France and adopted by consensus on 12 December 2015. The Paris Agreement opened for signature on 22 April 2016 (Earth Day) at UN Headquarters in New York. It entered into force on 4 November 2016, 30 days after the so-called "double threshold" (ratification by 55 countries that account for at least 55% of global emissions) had been met. Since then, more countries have ratified and continue to ratify the Agreement. As of March 2019, 195 UNFCCC members have signed the agreement, and 185 have become party to it. The Paris agreement aims to:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production and

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and

[52] Amanda M Rosen, 'The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change' (2015) 43(1) Politics & Policy <https://onlinelibrary.wiley.com/doi/pdf/10.1111/polp.12105> accessed 09 September 2019.

climate-resilient development.

The Paris deal is the world's first comprehensive climate agreement. Contributions each individual country should make to achieve the worldwide goal are determined by all countries individually and are called nationally determined contributions (NDCs). The contributions should be reported every five years and are to be registered by the UNFCCC Secretariat. Each further ambition should be more ambitious than the previous one, known as the principle of 'progression'. The Paris Agreement has a 'bottom up' structure in contrast to most international environmental law treaties, which are 'top down', characterized by standards and targets set internationally, for states to implement. the Paris Agreement, with its emphasis on consensus-building, allows for voluntary and nationally determined targets. The specific climate goals are thus politically encouraged, rather than legally bound. Only the processes governing the reporting and review of these goals are mandated under international law. This structure is especially notable for the United States because there are no legal mitigation or finance targets, the agreement is considered an "executive agreement rather than a treaty". Because the UNFCCC treaty of 1992 received the consent of the Senate, this new agreement does not require further legislation from Congress for it to take effect. Paris Agreement emphasizes the principle of "Common but Differentiated Responsibility and Respective Capabilities". The acknowledgement that different nations have different capacities and duties to climate action but it does not provide a specific division between developed and developing nations.

The negotiators of the agreement, stated that the NDCs and the 2 °Celsius reduction target were insufficient. Instead, a 1.5 °Celsius target is required, noting "with concern that the estimated aggregate greenhouse gas emission levels in 2025 and 2030 resulting from the intended nationally determined contributions do not fall within least-cost 2°C scenarios but rather lead to a projected level of 55 gigatons in 2030", and recognizing furthermore "that much greater emission reduction efforts will be required in order to hold the increase in the global average temperature to below 2°Celsius by reducing emissions to 40 gigatons or to 1.5°Celsius." Though not the sustained temperatures over the long term that the Agreement addresses, in the first half of 2016 average temperatures were about 1.3 °Celsius (2.3 degrees Fahrenheit) above the average in 1880, when global record-keeping began. When the agreement achieved enough signatures to cross the threshold on 5th October 2016, US President Barack Obama claimed that "Even if we meet every target ... we will only get to part of where we need to go." He also said that "this agreement will help delay or avoid some of the worst consequences of climate change. It will help other nations ratchet down their emissions over time, and set bolder targets as technology advances, all under a strong system of transparency that allows each nation to evaluate the progress of all other nations."

A pair of studies in Nature have said that as of 2017, none of the major industrialized nations were implementing the policies they had envisioned and have not met their pledged emission reduction targets, and even if they had, the sum of all member pledges (as of 2016) would not keep global temperature rise "well below 2 °Celsius". According to UNEP the emission cut targets in November 2016 will result in temperature rise by 3 °Celsius above preindustrial levels, far above the 2 °Celsius of the Paris climate agreement. In addition, an MIT News article written on April 22, 2016 discussed recent MIT studies on the true impact that the Paris Agreement had on global temperature increase. Using their Integrated Global System Modeling (IGSM) to predict temperature increase results in 2100, they used a wide range of scenarios that included no effort towards climate change past 2030, and full extension of the Paris Agreement past 2030. They concluded that the Paris Agreement would cause temperature decrease by about 0.6 to 1.1 degrees Celsius compared to a no-effort-scenario, with only a 0.1°Celsius change in 2050 for all scenarios. They concluded that, although beneficial, there was strong evidence that the goal provided by the Paris Agreement could not be met in the future under the current circumstances. A 2018 published study points at a threshold at which temperatures could rise to 4 or 5 degrees compared to the pre-industrial levels, through self-reinforcing feedbacks in the climate system, suggesting this threshold is below the 2^0 temperature target, agreed upon by the Paris climate deal. At the same time, another 2018 published study notes that even at a 1.5^0 Celsius level of warming, important increases in the occurrence of high river flows would be expected in India, South and Southeast Asia. Yet, the same study points out that under a 2^0 Celsius of warming various areas in South America, Central Africa, Western Europe, and the Mississippi area in the United States would see more high flows, thus increasing flood risks.

Although the agreement was lauded by many, including former French President François Hollande and former UN Secretary General Ban Ki-moon, criticism has also surfaced. For example, James Hansen, a former NASA scientist and a climate change expert, voiced anger that most of the agreement consists of "promises" or aims and not firm commitments. He called the Paris talks a fraud with 'no action, just promises' and feels that only an across the board tax on CO_2 emissions, something not part of the Paris Agreement, would force CO_2 emissions down fast enough to avoid the worst effects of global warming. Institutional asset owners associations and think-tanks have also observed that the stated objectives of the Paris Agreement are implicitly "predicated upon an assumption that member states of the United Nations, including high polluters such as China, the US, India, Japan, Brazil, Canada, Russia, Indonesia and Australia, which generate more than half the world's greenhouse gas emissions, will somehow drive down their carbon pollution voluntarily and assiduously without any binding enforcement mechanism to

measure and control CO_2 emissions at any level from factory to state, and without any specific penalty gradation or fiscal pressure (for example a carbon tax) to discourage bad behavior." Proper enforcement of the Paris Agreement has not been possible because the 'contributions' of the NDCs themselves are not binding as a matter of international law, as they lack the specificity, normative character, or obligatory language necessary to create binding norms. Furthermore, there will be no mechanism to force a country to set a target in their NDC by a specific date and no enforcement if a set target in an NDC is not met. There will be only a "name and shame" system or as János Pásztor, the U.N. assistant secretary-general on climate change, told CBS News (US), a "name and encourage" plan. As the agreement provides no consequences if countries do not meet their commitments, consensus of this kind is fragile. A trickle of nations exiting the agreement may trigger the withdrawal of more governments, bringing about a total collapse of the agreement.

To summarize it all:

I. Where the Agreement succeeds:

- An explicit acknowledgement by 195 countries that climate change is a serious threat,

• An overall aim to limit global temperature rise to 1.5˚Celaius above pre-industrial levels,

• Inclusion of a legally binding five year review process of national emission plans, supported by a transparent monitoring system,

• Continued and sustained commitment to financing mitigation and adaptation initiatives in developing countries and countries hardest hit by climate change;

• The allocation of responsibility to developed nations to “take the lead” on reducing greenhouse gas emissions.

- Overall, the Paris Agreement provides the impetus for more ambitious and progressive change.

II. Where the Agreement fails:

- The Agreement does not include any reference to leaving fossil fuels in the ground;
- No specific date is set for a peak in global greenhouse gas emissions;
- The Agreement does not include emissions from global shipping and aviation;
- Vague references are made to technologies and actions which may pave the way for false solutions with potentially harmful social and ecological

implications.[53]

Keeping all this in mind, there are different achievements made by different countries. Some of the major contributions made by different countries are:

- France: In July 2017, the then French Environment Minister Nicolas Hulot announced a plan to ban all petrol and diesel vehicles in France by 2040 as part of the Paris Agreement. Hulot also stated that France would no longer use coal to produce electricity after 2022 and that up to €4 billion will be invested in boosting energy efficiency.
- Norway: To reach the agreement's emission targets, Norway will ban the sale of petrol- and diesel-powered cars by 2025.
- Dutch: Electric trains running on the Dutch national rail network are already entirely powered by wind energy.
- Netherlands: The House of Representatives of the Netherlands passed a bill in June 2018 mandating that by 2050 the Netherlands will cut its 1990 greenhouse-gas emissions level by 95%—exceeding the Paris Agreement goals. Netherlands will ban the sale of petrol- and diesel-powered cars by 2030.[54]
- European Union: The European Union has decoupled greenhouse gas emissions from economic growth, its 1990–12 GDP growth was more than 44 percent while emissions decreased by 19 percent. The European Union has adopted policies to reduce emissions by at least 40 percent below 1990 levels by 2030 and established a target to reduce emissions by 80–95 percent by 2050. European Union policies aim to increase the share of renewable energy in its energy consumption mix to at least 27 percent and increase energy efficiency by 30 percent by 2030. The European Union Emissions Trading Scheme, launched in 2005, is operational in all 28 EU member states plus Iceland, Norway, and Liechtenstein. It was the first large greenhouse gas emissions trading scheme in the world and remains the largest, covering 45 percent of EU greenhouse gas emissions.
- China: China has set targets to reduce its CO_2 emissions per unit of GDP by 40–45 percent from 2005 levels by 2020 and 60–65 percent by 2030. In an historic joint announcement with the United States, China committed that its CO_2 emissions will peak around 2030 and that it will increase its forest stock volume by 4.5 billion cubic meters (compared with 2005). China has committed to increase the share of no fossil fuels used in its primary energy consumption to about 20 percent by 2030. This requires China to deploy an additional 800–1,000 gigawatts

[53] 'The Paris Agreement: Successes, disappointments, and the road ahead' <https://www.jesuit.ie/wp-content/uploads/2015/12/Paris-review-JCFJ.pdf> accessed 09 September 2019.
[54] 'Paris Agreement', <https://en.wikipedia.org/wiki/Paris_Agreement> accessed 09 September 2019.

of non-fossil generation capacity, which is close to the entire installed capacity of all the power plants in the United States. In 2014 China was the world's number one investor in renewable energy, investing $83.3 billion nearly a third of total global investment. China plans to establish a national emissions trading system starting in 2017-8. It currently has seven city and provincial carbon-trading pilots, which together constitute the second largest carbon market in the world, after the European Union Emission Trading System. China's Top 10,000 Energy-Consuming Enterprises program (actually about 17,000 enterprises) covers mostly the industrial firms that account for two-thirds of the country's energy use. It targets energy savings of 250 million metric tons of coal equivalent to shutting down 143 coal-fired plants for one year.

- Mexico: In 2012 Mexico passed one of the first climate laws in a developing country, the General Law on Climate Change, outlining the country's transition to a low carbon economy with a 50 percent reduction in emissions from 2000 levels by 2050. Mexico committed to reduce its greenhouse gas emissions by 22 percent and its black carbon by 51 percent by 2030 relative to business-as-usual levels. Mexico set a target for 40 percent of its energy to come from low-emission energy sources by 2035, and 50 percent by 2050 including renewables as well as nuclear and fossil fuels with carbon capture and storage. Mexico set a target to cut deforestation rates to zero by 2030. In 2013, Mexico adopted light-duty vehicle CO_2 and fuel economy standards that aim to avoid 265 million tons of CO_2 emissions by 2032, equivalent to annual greenhouse gas emissions from 50 million passenger vehicles.
- Indonesia: Indonesia committed to cut emissions by 29 percent from business-as-usual levels by 2030. Indonesia aims to achieve 87 percent of its 2020 mitigation target by reducing emissions from deforestation and peat land conversion. In May 2015, the Indonesian government renewed a two-year moratorium on new palm oil plantation concessions in primary natural forests and peat lands. The first moratorium, set in 2011, aimed to protect an area the size of Japan from development. Indonesia has also targeted 12.7 million hectares for social forestry and ecosystem restoration by 2019 as part of its national development plan.
- Brazil: Brazil committed to reduce greenhouse gas emissions 37 percent in absolute terms below 2005 levels by 2025. Brazil has set a target to increase its share of renewables other than hydropower to 28–33 percent of its total energy mix by 2030. Currently hydropower generates about 66 percent of Brazil's electricity and other renewable energy sources, less than 10 percent. Over the past decade, the rate of deforestation in the Brazilian Amazon has dropped 70 percent compared with the previous decade, keeping 3.2 billion metric tons of CO_2 emissions out of the atmosphere. This is equivalent to taking all U.S cars off the road for

three years. In a recent U.S.–Brazil Joint Statement,30 Brazil indicated that it will restore and reforest 12 million hectares by 2030, which is equivalent in size to the state of Pennsylvania. The national energy policy, revised in 2014, aims to increase renewable energy to 23 percent of primary energy supply and to reduce the share of oil in the energy mix to less than 25 percent by 2025.

- Ethiopia: Ethiopia aims to achieve middle-income status by 2025 in a carbon neutral way through its climate resilient green economy strategy. In line with the strategy, Ethiopia committed to reduce emissions by 64 percent from business-as-usual by 2030. Ethiopia made a significant pledge to restore 15 million hectares of degraded and deforested land one sixth of its land area to productivity by 2025.
- Chile: Chile committed to reduce CO_2 emissions per unit of GDP 30 percent below 2007 levels by 2030. Chile is the first country in Latin America to set a binding renewable energy generation target that requires that by 2025 at least 20 percent of the countries will come from renewable sources excluding large hydroelectric plants (solar, wind, geothermal, tidal, biomass, and small-hydro). Chile also set an ambitious target to generate 70 percent of its electricity from renewable sources, mainly solar and wind, by 2050, a sevenfold increase from current levels. To reduce emissions from power generation, Chile approved a carbon tax on thermal power generators of 50 megawatts or more as part of a broader fiscal reform. Starting in 2017, emitters will have to pay US$5 per metric ton of CO_2 emissions.[55]
- India: India has set targets to substantially increase its renewable energy capacity, including increasing its solar capacity to 100 gigawatts by 2022 twentyfold increase from current levels of 4 gigawatts and increasing its wind power capacity to 60 gigawatts by 2022 from current levels of 23.76 gigawatts. India has committed to increase its non-fossil fuel energy sources to 40% of total energy sources by 2030. India has committed to reduce CO_2 emissions per unit of GDP 33–35 percent below 2005 levels by 2030. India is the first developing country to adopt a market based mechanism, "Perform, Achieve and Trade" (PAT), to improve energy intensity in industries and aims for an emissions reduction of 26 million metric tons of carbon dioxide equivalent by 2015, thus contributing to the national target, and avoiding CO_2 emissions from the equivalent of six power plants annually. India's Ministry of Power set average fuel consumption standards for passenger cars in January 2014 to take effect in April 2017 and result in a cumulative reduction of 22.97 million metric tons of fuel consumption,

[55] World Resources Institute, 'What are other countries doing on climate change' <https://wriorg.s3.amazonaws.com/s3fs-public/uploads/WRI15_BRO_Country-Action-v8.pdf?_ga=2.121566094.783237245.1556996793-178951808.1555439241> accessed on 09 September 2019.

avoiding more than 66 million metric tons of CO_2 emissions by 2025. This is equivalent to avoiding the CO_2 emissions of 13 million cars annually.

In order to combat climate change India has set up national action plan on climate change (NAPCC). Total of eight missions form the core of this plan. These missions are:

I. National Solar Mission
II. National Mission for Enhanced Energy Efficiency
III. National Mission on Sustainable Habitat
IV. National Water Mission
V. National Mission for Sustaining the Himalayan Ecosystem
VI. National Mission for a Green India
VII. National Mission for Sustainable Agriculture
VIII. National Mission on Strategic Knowledge for Climate Change

The major step taken by India is the national solar mission. Using solar power is both cost effective as well as reliable. India being largely located in equatorial sun belt of the earth receives about 5000kWh/year. It is also an extremely clean form of generation with no form of emission at the point of generation. To make use of this India has started an alliance of 122 countries called the International Solar Alliance. It mostly includes the sunshine countries which lie partly or completely between tropic of cancer and tropic of Capricorn. The primary objective of the alliance is to work for efficient exploitation of solar energy to reduce dependence on fossil fuels. It was launched in an India - Africa summit in November 2015. It is headquartered in India. In January 2016, Narendra Modi, and the then French President François Hollande jointly laid the foundation stone of the ISA Headquarters and inaugurated the interim Secretariat at the National Institute of Solar Energy (NISE) in Gwal Pahari, Gurugram, India. The Indian government has dedicated five acres of land on the NISE campus for its future headquarters. It also has contributed ₹1.75 billion (US$25 million) to the fund to build a campus and for meeting expenditures for the first five years. The alliance is also called International Agency for Solar Policy and Application (IASPA). The launching of such an alliance in Paris also sends a strong signal to the global communities about the sincerity of the developing nations towards their concern about climate change and to switch to a low-carbon growth path. India has pledged a target of installing 100GW by 2022 and reduction in emission intensity by 33–35% by 2030 to let solar energy reach to the most unconnected villages and communities and also towards creating a clean planet. India's pledge to the Paris summit offered to bring 40% of its electricity generation capacity (not actual production) from non-fossil sources (renewable, large hydro, and nuclear) by 2030.

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One of the reasons why Paris agreement has not been much of a success is because of the freedom from any punitive damage. Since there is no punitive damage associated with the agreement, it solely becomes a choice for the nations. There should be a punitive damage that UN should associate with the agreement, exempting the financially weak countries.

The problem with India is that there are a lot of laws already made to safeguard the environment. But these laws are barely abided by. There will not be any need for further making of laws if the laws already made are enforced by the people. The laws should be kept in check via a vigilant police and repeated raids at the factories and industries. Repeated raids would ensure that the factories are not dumping their waste into the rivers. It would also ensure that the factories are not releasing the harmful gases without treating them into the atmosphere. Laws should be made in order to charge hefty fines from the people who do not throw garbage's in the dustbin. The license of the industry or factory should be cancelled in case the industry or factory does not abide by the rules and regulations related to the environment. In the end we would like to conclude by saying that not only the government is responsible for the damage being caused to the environment today, each one of us is equally responsible. If everyone does their bit of keeping the environment clean, then there would be no problem at all.

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RELATION BETWEEN CONTRACTUAL RESTRICTION ON TRADE SECRETS AND THE SPRINGBOARD DOCTRINE: COMPARATIVE PERSPECTIVE

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ABSTRACT:

Springboard injunction (as it is often called), simply put, is the restrictive covenant which the courts are approached to enforce against the employees of an enterprise in order to prevent them from using the knowledge/information that they gained in their previous employment to unjustly enrich themselves in subsequent engagements. The given research paper is aimed at answering the question: Whether the Springboard Doctrine conflicts with the right to trade of an individual, as established vide some of the statutes and judicial precedents? This paper will analyze the extent to which such springboard injunctions are granted in India. While analyzing the same, the paper will discuss the point till which a person can be restricted to use the knowledge that he/she has gained while working at an organization, how to figure out if he/she knows 'enough' and whether such restriction are against his/her freedom of trade rights? Since this area of law is still developing in India, the paper would consider the position of law in the US and the UK, and then compare it with the position that exists in India. The present paper has been divided into two parts: firstly, the paper concentrates on the doctrinal and theoretical foundations of the law of trade secrets, and, secondly, it looks into the actual position of law in the above mentioned jurisdictions and the specific judicial pronouncement on the Springboard Doctrine in India.

INTRODUCTION

It is often said that that the formula of Coca-Cola is locked in a vault with only two of their executives having access to the same.[56] This illustrates that a critical information that is of value to the corporation and gives it certain advantages over the competitors must be protected for the interest of the business. Release or dissemination of this information to others may cause economic hardships to the original owner, who may then have to face people using this information to

[56] Arijit Biswas, *Coke v. Pepsi: Local and Global Strategies*, Vol. 34(26), ECONOMIC AND POLITICAL WEEKLY , 1701 (1999).

compete with him[57], in other words such information may be used as a *springboard* by such an individual to the detriment of the original owner. This type of information that must be kept confidential in order to retain its competitive advantage is generally called a '*trade secret*'.[58] To illustrate, the secret hand written recipe listing eleven herbs and spices developed by KFC founder Harlan Sanders, 'is safe and sound, locked in our vault', according to a spokeswoman for the company, and the company has often said that only a few people know the recipe, and they have signed strict non-disclosure agreements.[59]

A trade secret is that information which is used in the enterprise and is sufficiently valuable in order to accord an actual or potential economic advantage over others to the information holder.[60] A recipe, a formula, a method of conducting business, a customer list, a price list, a marketing plan, financial projection, and a list of targets for potential acquisitions are some constituents of the list that can constitute trade secret.[61] The above shows that there is no requirement that a trade secret should be unique or complex, as even something as simple and non-technical as a list of customers can qualify as a trade secret as long as it affords its owner a competitive advantage and is not common knowledge.[62] Thus, generally, to qualify for trade secret protection, information must:[63]

- Be valuable
- Not be publicly known
- Be the subject for reasonable effort to maintain its secrecy

If the idea and concept of trade secrets were not legally protectable, companies would have no incentive for investing time, money, and effort in research and development that may ultimately benefit the public at large, whether directly or indirectly. Trade secret law (judicial precedents to be read in as law here for reasons mentioned later) not only provides an incentive for companies to develop new methods and processes of doing business but also, by punishing wrongdoers, discourages improper conduct in the business environment.[64] Before dwelling into the law as it exists and the jurisprudential scenario, it is important to first look into the academic determination of various concepts under the theme – Trade Secrets.

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[57] Abhik Guha Roy, *Protection of Intellectual Property in the Form of Trade Secrets*, Vol. 11, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 193(2006).
[58] Id.
[59] Mark S. Vander Broek, *Protecting and Enforcing Franchise Trade Secrets*, Vol.25(4), FRANCHISE LAW JOURNAL, 192(2006).
[60] Supra at 2.
[61] Supra at 4.
[62] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 6 (Ed. 4, 2012).
[63] Id at 468
[64] Patrick P. Phillips, *The Concept of Reasonableness in the Protection of Trade Secrets*, Vol. 42(3), THE BUSINESS LAWYER, 1030 (1987).

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1. THEORETICAL AND DOCTRINAL FOUNDATION OF TRADE SECRETS

Let us now deal with the theoretical and conceptual basis of trade secret protection before dwelling into the analysis of the precedents.

1.1 Determination of Trade Secret Status

We will see below that there exist several factors which have been discussed by authors to be considered while determining whether an information qualifies as a trade secret or not. It should be noted that none of the factors are solely determinative of the right, and courts have balanced these factors and weighed them against each other in determining whether an information qualifies as protectable trade secrets or not.[65]

1.1.1. The extent to which the information is known outside the company[66]

The fact that the information is known by people outside the corporation would not disqualify the same from being categorized as a trade-secret, however, more the number of people possessing the same outside the corporation, less become the chances of the protection being accorded to such an information. It is also argued that such secrets may not be exclusive and may be reasonably disseminated by the rightful possessor for the purpose of his business or trade activities, however, in some of the cases open publication of such information may lead to loss of the trade secret tag.[67]

1.1.2. The extent to which the information is known within the company[68]

The fact that an information is used by a corporation for the purpose of its business implies that the chances of the same being known to multiple personalities increase (because of operative logistics of trade and business of such nature). The employer in such cases is free to disseminate the same on a 'need to know' basis. Having said that, it is also important that such a company puts in place sufficient mechanisms for the purpose of protection of the information and does not itself take the protection lightly.[69]

1.1.3. The extent of the measures taken by the company to maintain the secrecy of the information[70]

This condition to the conferment of trade secret flows from the above point of the company being serious about the protection that it wants to accord to the information available to them. Forums are unlike to uphold the protection to such companies in case the enterprise has itself not taken the

[65] Ann E. Georgehead, BUSINESS TORTS LITIGATION, 99 (Ed. 2nd, 2005).
[66] Id at 100.
[67] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 471 (Ed. 4, 2012).
[68] Ann E. Georgehead, BUSINESS TORTS LITIGATION, 100 (Ed. 2nd, 2005).
[69] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 472 (Ed. 4, 2012).
[70] Ann E. Georgehead, BUSINESS TORTS LITIGATION, 101 (Ed. 2nd, 2005).

measure to do the same and have taken the same, to simply put it, lightly. Having said that, it does mean that the company should put in place 'state of the art' arrangement for such an information, but the same should be reasonably protected.[71]

1.1.4. The extent of the value of the information to the company and its competitors[72]

Another very important constituent of trade secret protection is that the information that is sought to be protected should be of some value to the possessor, according him a comparative advantage over his competitors. It is an important criteria since it ensures that protection to generic information is not sought, simply in order to create commercial blockages.[73] In other words, the ease of duplicity of the information is also to be considered while considering the protectability of the same[74]

We have seen above through direct and referred extracts from doctrinal resources that not all information qualifies for trade secret protection. Further, the courts have held in matters that a restaurant's recipes, for example the American staples such as barbequed chicken and macaroni and cheese, are not trade secrets as they are so basic and obvious that they could be easily duplicated or discovered by others.[75]

1.2. Misappropriation Of Trade Secrets

Misappropriation of a trade secret, put simply, occurs when a person possesses, discloses, or uses a trade secret owned by another without express or implied consent, and when such a person[76]:

- Used improper means to gain knowledge of trade secret;
- Knew or should have known that the trade secret was acquired by improper means;
- Knew or should have known that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy.[77]

To illustrate the above, examples of trade secrets obtained through proper means include independent invention of the trade secret, discovery by reverse engineering, public observation of the item or method, or obtaining the trade secret from published material.[78]

1.2.1. Employer–Employee Relation

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[71] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 472 (Ed. 4, 2012).
[72] Ann E. Georgehead, BUSINESS TORTS LITIGATION, 101 (Ed. 2nd, 2005).
[73] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 472 (Ed. 4, 2012).
[74] Ann E. Georgehead, BUSINESS TORTS LITIGATION, 102 (Ed. 2nd, 2005).
[75] Buffets Inc. v. Klinke, 73 F3d 695 (9th Circuit, 1996).
[76] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 473 (Ed. 4, 2012).
[77] Id.
[78] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470,476 (1974).

Misuse of trade secrets by employees and former employees is litigated very often (as will also be seen in the analysis below). As has been discussed above, the employers are generally supposed to ensure that the employees coming across the information are made to execute instruments to prevent them from disseminating the same, however, it should also be noted that the non-execution of such an instrument would not give such employees a free hand to propagate the same.[79] Further, it should be noted that higher the level of expertise that is possessed, higher is the incident of confidentiality that is attached to the profile, meaning thereby that the senior executives possess a greater duty of confidentially than the clerical or non-professional employees of the enterprise.[80] Having said the above, the lesser level of responsibility on the non-professional staff does not absolve them of penal liability, meaning thereby, that they may be charged appropriately in cases of them stealing the relevant information.[81]

It should be mentioned here that something invented by the employee within his own time and space, whether before or after the course of employment, is to be considered in the possession of the employee.[82] However, it should be clarified here that if such an employee is involved in the employment for the particular purpose of development of the scheme, then the employer will have the exclusive right and ownership over the same.[83] It should be mentioned here that this idea of shop right concept has its roots in patent law.[84]

1.2.1.1. Agreements

The agreements which are generally restrictive of trade practices, and are entered into by the corporations with their employees, are enforced by the courts in case they are reasonable**.**[85] The agreements usually include four specific aspects: ownership of inventions, non-disclosure provisions, non-solicitation provisions and non-competition provisions.[86]

A variety of factors are taken into account in determining whether such covenants are enforceable –

- **Purpose** – Courts while issuing restrictive injunctions often consider as to whether or not the same would serve the purpose for the enterprise. For instance, a restriction by Mc Donald's that its food handlers could not later work for any other restaurants was held to be unenforceable, while a restriction by an airline that its senior engineers could not later work

[79] Servo Corp. of America v. General Elec. Co., 337 F.2d 716, 724-25 (4th Cir. 1964).
[80] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 475 (Ed. 4, 2012).
[81] E.I. Du Pont de Nemours & Co. v. Christopher, 431 F.2d 1012, 1015 (5th Cir. 1970).
[82] In Painton & Co. v. Bourns, Inc., 442 F.2d 216,224 (2d Cir. 1971)
[83] Id.
[84] Supra at 31.
[85] Patrick P. Phillips, *The Concept of Reasonableness in the Protection of Trade Secrets*, Vol. 42(3), THE BUSINESS LAWYER, 1045(1987).
[86] Id.

for other competitor airlines for a particular amount of time would likely be enforced by a court.[87]

- **Reasonableness** – It is very important that such a negative covenant is reasonable in nature and does not put an onerous responsibility over the employee. The agreement should clearly lay down the type of business and duration of time for which the engagement is prohibited, neither of which should be unreasonable in nature.[88]

It should be mentioned here that the doctrine of severability is often read by the courts in such agreements and the court often has been inclined to even take the liberty of even reformulating the terms of such engagement/non-engagement.[89] In cases of ambiguity, the same has been read in favour of the employee.[90] It should further be noted that the courts have not been inclined to enforce the restrictive covenants in the event where the employment was left by the employee due to breach of the employment contract by the employer.[91]

2. JURISPRUDENCE *QUA* THE ABOVE MENTIONED

Let us now deal with the law as it exists and jurisprudential discussion around trade secret protection -

2.1 International Regulations

Prior to the TRIPS agreement, the Paris Convention had some provisions, which came to the aid of the people seeking relief, under Article 10*bis*. The specific acts prohibited under the said provision do not include the wrongful misappropriation of trade secrets or confidential information. Nevertheless, the protection of industrial and business secrets is implied by the general obligation under Article 10*bis* (1) and (2). It is pertinent to mention that TRIPS now makes adherence to Article 10*bis* obligatory for all WTO members, along with other substantive provision of the Paris Convention.[92]

In the TRIPS agreement, trade secret is defined under Article 39.2. This definition in substance is based on the definition as given in the Uniform Trade Secrets Act of the US.[93] There is no requirement that the protected information be acquired by the owner at some expense or effort, as there is in some common law countries, although this could be an additional point of equity that

[87] Donald S. Chisum, UNDERSTANDING INTELLECTUAL PROPERTY LAW, 136 (Ed. 2nd, 2011).
[88] Id.
[89] Deborah E. Bouchoux, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHT, PATENTS, AND TRADE SECRETS, 477 (Ed. 4, 2012).
[90] Id.
[91] Verma SK, *Legal Protection of Trade Secrets and Confidential Information*, JOURNAL OF THE INDIAN LAW INSTITUTE, 44(3) (2002), 336.
[92] Article 2.1, TRIPS Agreement.
[93] Jayashree Watal, INTELLECTUAL PROPERTY RIGHTS, 192 (Ed. 3rd, 2009).

may be considered by a court, particularly in deciding the quantum of damages.[94]

The requirement that the information not be generally known is carefully circumscribed further that it not be known in its precise configuration and assembly of its components.[95] Thus, the component of information could be separately published or known but the precise configuration may have commercial value and be kept secret. [96] It is significant to note here that the definition of trade secrets as discussed above has been implemented in various ways in different WTO member countries, however, no common law country appears to have instituted any statute to meet the TRIPS obligation on trade secrets.[97]

2.2 Law in the USA

In the United States of America, trade secrets were usually protected under various state laws.[98] Many states had legislated their own laws while some relied on the common law principles. Then, the Uniform Trade Secrets Act, as the name also suggests, tried to bring in uniformity in the law, however, this law was adopted only by forty eight states and so could not give a federal cause of action but only a cause of action in the states.[99] Thus, the US lawmakers have passed the Defend Trade Secrets Act of 2016, which provides a federal cause of action for trade secret protection.[100]

Though there exists a specific law under which rights may be claimed, view of the courts of a country is always important as that is where the actual relief is granted or denied. In one such US case, the court observed that the paper lists of the clients were left openly with agents with no contractual requirement to protect the lists, although the lists were digitally protected.[101] The court in this case held that reasonable measures were not taken to protect the information and, thus, no trade secret protection was granted.[102] Under the law, both injunctive and monetary reliefs could be claimed. It is pertinent to mention here that these reliefs can only be claimed when there is misappropriation and wrongful use of the trade secret. Even when the use is not wrongful but the access to information was unauthorized, the claim will lie, however, if an individual *bonafidely* reverse-engineers a product and gets to know the trade secret, the protection may not lie. It should be mentioned here that under the Economic Espionage Act of 1996, criminal actions can also be instituted against the defaulter.[103]

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[94] Id.
[95] Article 39.2, TRIPS Agreement.
[96] Supra at 50.
[97] Jayashree Watal, INTELLECTUAL PROPERTY RIGHTS, 193 (Ed. 3rd, 2009).
[98] Congressional Research Service Report, Protection of Trade Secrets: Overview of Current Law and Legislation (2016), *available at, https://www.fas.org/sgp/crs/secrecy/R43714.pdf,* last visited – 15th November 2016.
[99] Id.
[100] Id.
[101] Nationwide Mutual Insurance v. Mortensen, 606 F.3d 22 (2010)
[102] Id.
[103] Supra at 50.

2.3 Law in the UK

With respect to the practice in the United Kingdom, there is no specific law *qua* the protection of trade secrets, however, there are certain imputations that may be made from some of the existing legislations. Most common relief that is claimed in an action for breach is that of injunction. And in practice courts usually grant the relief taking into account balance of convenience that exists.[104] However, Article 12(3) of the Human Rights Act of 1998 provides that a relief should be refused unless the applicant is able to prove that such a publication should not be allowed. If the claimants are able to show this, then they get injunction but the same cannot be claimed as a matter of right.[105]

Qua the quantum of damages, the courts have held that damages should be assessed with reference to the market value of the information at hand.[106] Other ways include damages by way of just remuneration for a license, loss of profit to the claimant, or depreciation in value of the rights to have the information to be kept confidential.[107]

2.4 Law in India

Many perceive that India is far behind as compared to the standards followed in the above two jurisdictions, as India does not have an exclusive legislation to this effect, but it should be noted that neither does UK.[108] India, like the UK, does not possess a dedicated law for protection of trade secrets, and so we need to figure out the law referring to the various case laws that exists at hand. Let us now deal with them in detail.

The Calcutta High Court has tried to reason out the purpose of the law at hand, by stating that *"the essence of this branch of law whatever the origin it may be, is that a person who has obtained information in confidence is not allowed to use it as springboard for activities detrimental to the person who made the confidential communication."*[109]

Trade Secret is often considered to be something that is held confidentially by the owner himself. However, in the businesses of some kind, such secrets may have to be disclosed to the employees who work for him. And when such employees resign from the job (as they may not be asked to leave, considering the fact that the secret has been disclosed to them) then the owner of the secret would want that such an individual should not use his secret to have a head start in his personal endeavor and become a competitor or divulge this information to existing competitor(s) and

[104] Hubbord v. Vosper, [1972] 2 QB 84.
[105] Article 12(3), The Human Rights Act of 1998.
[106] Seager v. Copydex [1969] 2 All ER 718.
[107] Bainbridge D, INTELLECTUAL PROPERTY, 5th edn (2003) p.281-288.
[108] Abhik Guha Roy, *Protection of Intellectual Property in the Form of Trade Secrets*, Vol. 11, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 194(2006).
[109] Fairfest Media Ltd. v. Ite Group Plc & Ors, CS No. 329 of 2014, decided on 8th January 2015 (Calcutta High Court).

threaten his business in the market.[110] To give effect to this, more often than not, there exist written agreements such as non-compete agreements in place.

However, the Delhi High Court in the case of *John Richard Hardy v. Chemical Process Equipment*[111], was faced with a situation where there did not exist a written agreement at hand. The court in this case discussed the springboard doctrine. The court observed that even in the absence of an express confidentiality or non-compete agreement, confidentiality is implied and that the defendant was held liable for breach of confidential obligation.[112] Thus, we can see that one may not always need a written agreement in order to claim relief.

One may then think that things should be much easier in case there are written agreements in place, which is actually not the case, as the courts often look into the reasonableness of the limitations that are placed in the contracts. The need for the same arises because of existence of a public policy provision in the Indian Contract Act.[113] The Apex Court in a matter observed that limiting an agreement's operation in the period of the contract of employment cannot usually be taken to be in restraint of trade. It also stated that a negative covenant that the employee should not engage himself in a trade or business or get self-employed and perform similar or substantially similar duties, is not a restraint of trade unless the contract is "unconscionable or excessively harsh or unreasonable or one sided".[114] Complementing the second part of the observation made in the above case, the Supreme Court has also observed that there exists inherent inequality between the positioning of the employee and the employer, and at times the employee may not even give a fair thinking to the contract of employment initially.[115] The court further observed that a restraint may be there but the same should not be more than necessary, and it should not affect the individual's means of earning a livelihood.[116]

However, the Apex Court has also sometimes taken strict view of the situation when it could see *malafide* on part of the employee. In *Hi-tech System and Services Ltd v. Suprabhat Roy*[117] the court could see that the respondents were carrying out business based on the information that they had received while they were under the employment of the claimant. The court injuncted the respondents from approaching the existing clients of the claimant and asked to obey the existing non-compete that was there in existence. In the case of *Niranjan Golikari* (*supra*), the court upheld the injunction that was granted against non-disclosure of specialized information to the rival

[110] Id.
[111] John Richard Hardy v. Chemical Process Equipment, AIR 1987 Delhi 372.
[112] Id.
[113] §27, The Indian Contract Act of 1872.
[114] Niranjan Shankar Golikari v. Century Spinning Mfg Co. Ltd, 1967 AIR 1098.
[115] Superintendence Company of India v. Krishan Murgai, 1980 SCR (3) 1278.
[116] Id.
[117] Hi-tech System and Services Ltd v. Suprabhat Roy, AIR 2015 Cal 1003.

company by saying that the same *"is restricted as to time, the nature of employment and as to area and cannot therefore be said to be wide or unreasonable or unnecessary for the protection of the interests of the respondent company"*.[118] In another case it was held that a former employee cannot practice the information that he gather working for the employer to damage his business, even in absence of a non-soliciting agreement.[119] It is pertinent to mention here that when the case involves covenants among companies the court have taken a more liberal view, and the same is evident from cases such as *Gujarat Bottling Company v. Coca Cola*[120] and *Fairfest Media*[121].

It should be mentioned here that if the employee is removed from the employment by the employer and he does not leave on his own free will then it may not be that easy for the employer to enforce the restrictive covenants as easily as they are when the employee leaves the employment on his own sweet will.[122]

In *Escorts Construction Equipment Ltd. v. Action Construction Equipment*, a former employee after working for considerable time in a company left it and then established his own company carrying similar business. The court gave an injunction on the ground of breach of confidence, as the former employee had tried to appropriate the information and design of the claimant. It held that *"the balance of convenience was in favour of the plaintiff as unless the defendants were restrained by the ad interim injunction, irreparable loss or injury which could not be estimated in terms of money would be caused to the plaintiff"*.[123] It must be noted here that in this case, like John Richard[124], there existed no written agreement which was breached. In some of the cases, by considering the balance of convenience, the courts have even gone ahead and issued injunctions against third parties.[125] Theft of confidential information held by anyone, whether physical or digital,[126] has always been reprimanded by the courts.[127]

Misappropriation of information that is physically held will be punished under the provisions of the Indian Penal Code[128]. In addition to this criminal liability, the liability of similar nature may also be attracted under the provisions of the IT Act of 2000. These liabilities have been discussed by the court in the case of *Pramod v. Garware Plastics*[129]. It is pertinent to mention here that the court in

[118] Supra at 13.
[119] Embee Software v. Samir Kumar Shaw, AIR 2012 Cal 141.
[120] Gujarat Bottling Company v. Coca Cola, 1995 SCC (5) 545.
[121] Supra at 8.
[122] Verma SK, *Legal Protection of Trade Secrets and Confidential Information*, JOURNAL OF THE INDIAN LAW INSTITUTE, 44(3) (2002), 336.
[123] Escorts Construction Equipment Ltd. v. Action Construction Equipment, 81 (1999) DLT 122.
[124] Supra at 10.
[125] Base International Holdings Vs Pallava Hotels Corporation Limited, 2006 (1) KCCR 429.
[126] Syed Asifuddin and Ors v. the State of Andhra Pradesh, 2005 CriLJ 4314.
[127] Id.
[128] §§ 405–409, 418, The Indian Penal Code of 1860.
[129] 1986(3) BomCR 411.

the above case did not convict the accused but observed that there is a possibility of the same being done. The above discussion shows that despite there being no legislation to the effect, the Indian courts have managed to develop a jurisprudence that caters to most of the contemporary needs of dispute resolution.

CONCLUSION AND ANALYSIS

In the above discussion, we have dealt with the concepts on trade secrets *vis-à-vis* the springboard doctrine in sufficient detail. In analyzing the conceptual framework, we saw that the need of keeping certain information secret is necessary for certain businesses. We also saw that if it is necessary for the business to keep secrets, then some efforts are also to be made towards the same and one cannot without making any effort claim the benefit of trade secret protection.

We also saw that benefit of trade secret protection can be claimed only against one who either *malafidely* procures information and uses it or against those who are disqualified from the usage of the information but still use the same. The former are the people who try to steel physical documents or try and get into databases of the companies through unlawful means. The latter are those categories of people who are or have been part of the employment of the owner of the information, and are, thus, disqualified. If a person *bonafidely* reverse engineers the product that he obtains by lawful and legitimate means then an action for trade secret protection would not lie against such an individual. This leads us to the assertion that trade secret protection cannot be said to be exclusive protection, unlike patents.

In order to protect the information, the company can make both physical as well as contractual efforts. Under the former, it can restrict access of the information only to some of the employees and keep a vigil on those to whom the same has been disclosed. A company is entitled to make all sorts of arrangements to restrict such an access. Under the latter category, corporates can enter into restrictive covenants with its employees. While entering such agreements, it is important that the companies adopt smart drafting techniques and the employee exists due diligence on his part, such that there is balance between the two.

It is also pertinent to mention here that we saw through the above discussion that these restrictions on the employee will be enforced only when an employee finds better prospects elsewhere and decides to voluntarily leave the job. The courts will generally abstain from otherwise enforcing such restrictions as then it may strike at the right of the livelihood of an individual.

Under the jurisprudential analysis, we also saw that out of the three considered jurisdictions, only one i.e. United States, has a dedicated statute for trade secret protection. UK has the common law

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development of the law at hand. India, despite being a relatively new entrant in the arena and lacking a dedicated statute, we saw, has managed to develop rich jurisprudence in this regard. It is pertinent to mention here that the United States does not seem to have any public policy consideration while deliberating on the issues at hand, while India and UK do consider right to trade and human rights, respectively, under the law.

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PATTERNS OF POLICING IN COMMUNAL CONFLICTS: A NEED FOR REFORM

- *Tanvi Bharti*

ABSTRACT

General understanding of a riot is that it is a spontaneous outburst of violence between two communities. Although, it is said to be a spontaneous act, it is rarely so. Most of the riots are pre-planned and scrupulously executed. That's the reason why communal riots are also called as "organised crimes" since they are generally pre-planned or pre-concerted.

The role and attitude of police in communal riots has been very often questioned. Being the most essential law enforcement agency, it plays a vital role in communal riots. Failure of the police at all three stages—prevention, control and relief, occurs due to prejudiced attitude towards the minority community and their subordination to politicians. From the 1984 anti-Sikh riots to the present day, the failure of the State to prosecute those involved in "organised crimes" calls for an urgent need for police reforms. Therefore, this paper attempts to explore the difference between the patterns of police behaviour while policing in general as opposed to policing in communal violence cases. Further, the paper will highlight the suggestions outlined by various Committee Reports on Police Reform and their implementation so far.

INTRODUCTION

Police is the country's most important law enforcement agency whose primary role is to uphold and enforce laws through investigation, while ensuring that the security of the country is maintained. Although, it is unfortunate to say that India is experiencing decades of partisan policing, wherein police refuses to register FIRs, make arbitrary detentions, torture and kill people at the behest of national and state politicians, thereby leading to public distrust and police fear among the people. The police is often under the fear of punishment in case they act against individuals with political connections. Communal violence across the country has also shown us that police is politically motivated to act a certain way, leading to a failure to protect religious minorities. Therefore, this history of alienation of the police from the general public has rendered it as a group that is widely despised, considered as corrupt and ineffective. Hence, it is pertinent to analyse the problems with the patterns of policing and make recommendations in order to improve their training and education. It is also important to sensitise the police officers before recruiting

them in the force so that they are freed from their biasness towards any community and can therefore act impartially while following the law of the land.

RESEARCH PROBLEM

Taking into account the fact that the police are tasked with battling India's most pressing problems, there is a compelling need for police reforms in our country so that a communally surcharged atmosphere is maintained. As every communal riot is a serious blow to our country, the role of police in such cases becomes complex and even difficult. Therefore, the prevailing patterns of policing calls a need for a deliberate reform.

RESEARCH QUESTIONS

1. What are the patterns of policing in general?
2. What are the patterns of policing during communal riots?
3. Whether any recommendations have been given by Law Commission or Judicial Committee Reports on Police Reforms?
4. Whether the recommendations have been implemented?

RESEARCH METHODOLOGY

The paper is a literature review of various reports and committee recommendations on police reforms. The paper attempts to understand the patterns of policing during different crime scenarios and analyse them under the light of various recommendations.

RESEARCH OBJECTIVE

a) To analyse the lacunae in patterns of policing in general as opposed to the patterns of policing especially in communal violence cases.
b) To suggest measures in order to remedy the loopholes prevelant in policing patterns.

POLICING IN GENERAL

When we talk about policing in general, there are various problems and patterns that the police force in India faces and follows. One of the few problems is that the police infrastructure is crumbling. Six decades have passed since the end of the British rule, and we're still continuing the police structure based on a colonial law which does not provide for advanced professional training for the lower ranks such as constables. Hence, they are not even trained to investigate crime

complaints even though they constitute the majority part of the police force. Upon a survey done by the Human Rights Watch[130], it was found that the police fear reprimand and punishment if they act against individuals who have political connections. Moreover, the police officials were often found to refuse to register complaints at the behest of central or state politicians, resulting in lack of trust in public and fear of the police. It also has been seen that the local and state politicians tell the police officers to drop investigations against people with political connections and harass them to file charges against the political opponents.

On the other half of the problem meter the police have failed to register complaints (FIRs) and investigate crimes, blaming their failure to investigate cases either on personnel insufficiency or heavy workload. It was observed that they make illegal arrests and detention, engage in activities involving torture and ill-treatment, lack sufficient ethical and professional standards and are unable to match with the public expectations. Section 197 of the Code of Criminal Procedure[131] provides impunity to the police officers so that no vexatious or frivolous complaints are filed against them, thereby giving them a license to commit extrajudicial killings. Although, it was recommended that this protection available to the police officers should be withdrawn, it wasn't accepted by the central or the state governments. Therefore, such laws should be repealed and the actions taken by the police officials under the name of "official duty" should be well defined in the code in order to exclude any unconstitutional conduct.

In the light of the above problems, the Human Rights Watch came up with few key recommendations in order to remedy the loopholes in police functioning. First, is to ensure that each and every complaint is registered under an FIR. Second, to create a system of effective independent investigation into complaints against police abuse or misconduct. This could be done by establishing an independent Police Complaints Authority (PCA) at the district and the state level by providing such bodies independency to carry out their duties so that public trust and confidence in police is restored (August, 2009). The Supreme Court in 2006 came up with a landmark judgement in *Prakash Singh and Others v. Union of India and Others*[132] wherein the court directed the central and state governments to enact new police laws to reduce political interference. But unfortunately, most state governments and central government failed to implement the court's order. Third, to increase investigation resources and training. The Malimath Committee[133] in its

[130] Broken System: Dysfunction, Abuse, and Impunity in the Indian Police. (2009, August). Retrieved July, 2019, from https://www.hrw.org/report/2009/08/04/broken-system/dysfunction-abuse-and-impunity-indian-police

[131] Criminal Procedure Code, Sec. 197 states: "No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union whole acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

[132] Prakash Singh v. Union of India, 8 SCC 1 (2006).

[133] Malimath Committee Report (March, 2003).

findings has also pointed out that the investigation agency is understaffed and ill-equipped. Therefore, these gross inadequacies in infrastructural facilities with respect to accommodation, mobility, use of technology, training and basic facilities need attention. Lastly, in order to address acute shortage of police personnel and improve the training of the constables, the vacancies should be filled up, their curriculum shall be revised and more instructions regarding the law and police's legal duties should be provided.

The manner in which these investigations are conducted is definitely of great importance for the functioning of the criminal justice system. Any serious miscarriage of justice will result if the nature of the evidence that is collected is vitiated by error or malpractice. The Committee Report found out that the police often resort to short-cut methods during investigations, are rude in nature, use third degree methods and lack innovativeness. They also found out that often the judges are reluctant to accept the testimony of the police officers during the observations done in the court in trial. Moreover, due to inadequacy of manpower and long working hours, there is an excessive workload on them. There is a lack of logistical support and inadequacy of trained investigating personnel. It therefore becomes necessary to address these problems and strengthen the investigation agency. Following these concerns, the Law Commission of India discussed this issue in its 154th Report[134] and recommended that the investigating agency should be separated from the law and order agency. This recommendation was based on the view that investigation requires some professionalism and specialization that is yet not fully achieved by the police officials and therefore, separating both these wings will bring the agencies under judicial protection and would perhaps reduce the possibility of political influences. It would also reduce the possibility of unwarranted and unjustified prosecutions, speedier investigation, which would in turn entail speedier disposal of cases. Additionally, such separation would also increase the expertise of the investigating officers and since the investigating police would be dressed in plain clothes, they would be able to develop good rapport with the public in general.

Since the success of the prosecution is determined by a proper coordination between the prosecutor and the investigating officer, the prosecutor should be able to work independently. Prior to the amendment in the Code in 1973, the prosecutors were functioning under the control of the Police Department. This being a concern, the Law Commission of India in its 14th Report[135] observed that it was not possible for the public prosecutors to exhibit that degree of 'detachment' that was necessary in prosecution if they are the members of the police organization. Therefore, a separate prosecution department should be constituted and placed under Director of Public Prosecution. As

[134] Law Commission Report No. 154. (http://lawcommissionofindia.nic.in/101-169/Report154Vol2.pdf).
[135] Law Commission Report no. 14. (http://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf).

a result of this recommendation, Sections 24 and 25 were incorporated in the Cr.PC and as a consequence of the same the Prosecution wing was separated from the Police Department.

In the light of all these problems, Malimath Committee Report along with the Second National Police Commission Report[136] and Sixth National Police Commission Report[137] has come up with certain possible solutions. First is to remove the distinction between cognizable and non-cognizable offence and making it obligatory for the police officer to investigate all offences in respect of which a complaint is made as it was often found that the police officials sometimes report a cognizable offence as a non-cognizable offence by twisting the facts. If such a differentiation is scrapped, each and every complaint would then get registered. Second, all the prosecutors should work in close cooperation with the police department and help them in assisting speedy and efficient prosecution of criminal cases. Third, to enact a new Indian Police Act from the draft prepared by the National Police Commission, as the Indian Police Act, 1861 has now become outdated. Apart from this, National and State Security Commissions at the state level should be constituted to lay down broad policy guidelines and directions for performing the functions of the police. Besides, these would also timely evaluate the performance of the state police every year and present a report to the State Legislature informing the same, followed by a review of the functioning of the police in each state.

ROLE OF POLICE IN COMMUNAL RIOTS

After a thorough discussion on the problems with policing in general and what the Law Commission or Judicial Inquiry Commissions have to say about it, we move on to the patterns of policing in communal violence conflicts. An outbreak of riots in Bhiwandi tells us a lot about the police behavior and their patterns while curbing the violence. It was found that the policemen didn't prevent Hindu rioters from indulging into acts of violence, looting, etc. The police showed communal discrimination in dealing with rioting mobs or while making arrests and even lodged few incorrect FIR's. Moving on, during the Anti-Sikh Riots the Nanavati Commission Report[138] found the police to be totally absent from the scene and acting just as passive spectators. They were passive, callous and indifferent in controlling and protecting the Sikh community from this outburst and hence, it was found that the riots were "organized" with police's direct involvement. Similar patterns were seen in the Delhi riots of 1992, where an organized mob violence was aided and abetted by the police. They were also actively participating in lootings and killings. Crucial

[136]Second Report of the National Police Commission (1980).
[137]Sixth Report of the National Police Commission (1981).
[138] Justice Nanavati Commission Of Inquiry (1984 Anti-Sikh Riots) (Vol. 1). Retrieved from https://mha.gov.in/sites/default/files/Nanavati-I_eng_0.pdf

evidences were collected in the Shrikrishna Commission Report[139], formed during the Mumbai Riots in 1992-93, that highlighted police bias against Muslims. On inquiring as to why the police failed to register cognizable offences against the accused persons, it was found that even the police officers at junior level appeared to have an in-built bias against Muslims. It was only after the Gujarat Riot in 2002 that we saw a pattern of police failing to effectively deal with the outbursts of communal violence time and again.[140] These incidents reveal police's failure to control riots by either favoring the majority community or by providing active support to the perpetrators. In the rest of the cases, we find the police either actively participating in the violent activities or acting as passive onlookers.

Such patterns were also noted by the Second (1978)[141] and the Sixth (1981)[142] Police Commission Report and the Report of Working Group of the National Integration Council (NIC)[143]. The Commission Reports also found a common behavioural pattern in policing. Either the police officials were totally absenting from the scene or directly participating in the orgy of violence. As per the PUDR Report that came right after the Anti Sikh riots, *"Who are the Guilty"*[144], it was found that the police refused to record people's complaints after all the destruction and murders. A few individual police officers who tried to intervene and stop the act of violence found their efforts in vain primarily due to the lack of cooperation from the political bosses on the top.

Nanavati Commission Report (March, 2002) also points out the police's reluctance to stop the acts of the mobs. They were also seen telling the mobs to do as much damage and looting as possible before the army gets called in order to control the situation. Keeping all these patterns and problems in mind, the Commission came up with certain solutions. One being that the police personnel should be given mid-career training since it seemed that many of them didn't know basic procedures of even filing an FIR correctly, leading them to make decisions that are not in sync with the constitution. Therefore, it is imperative for the police officials to have a fresh memory of what powers they have and what they don't. In large number of cases, the incidents reported by the aggrieved persons were not reflected in the chargesheets even though they had spoken about them during the course of investigation of those offences. The chargesheets that were filed in the courts

[139] The Srikrishna Commission Report into the Bombay riots of December 1992 (January, 1993).
[140] Role of Police in Communal Riots - Shodhganga. (n.d.). Retrieved June 1, 2019, from http://www.bing.com/cr?IG=52967BF0904844208CA06EF53F98332F&CID=091F4130641F652B07464ADC65B06490&rd=1&h=BgsLJ56qgrH14UL85L8FGnfIx17N2CfzGopafkTrK68&v=1&r=http://shodhganga.inflibnet.ac.in/bitstream/10603/40546/13/16_chapter7.pdf&p=DevEx.LB.1,5525.1
[141] Second National Commission Report, 1979.
[142] Sixth National Police Report, 1981.
[143] Ministry Of Home Affairs Government of India, Report of Working Group of the National Integration Council To Study Reports Of The Commissions Of Inquiry On Communal Riots (2007).
[144] Gobinda Mukhoty & Rajni Kothari. (1984). *Who are the guilty?* Retrieved June 1, 2019, from http://www.pucl.org/Topics/Religion-communalism/2003/who-are-guilty.htm

were often couched in general terms and were vaguely referring to each incident. Therefore, the Commission felt the need to introduce a comprehensive syllabus for the officers not only at the level of Deputy Inspector General and above, but also for the constables and the sub-inspectors. There should be a number of sessions on topics relevant to maintaining public order, riot policing, unlawful assembly and interfacing with minorities.

A Roundtable on Policing and Public Order[145] held in 2006 discussed the recommendations of various inquiry commissions. Inquiries into the most major communal riots, from those in Ahmedabad (1969) to Gujarat (2002), reveals that it is this direction from the political bosses, the police's indecision and a lack of clear direction to the administration and the police that made the state force to either become passive onlookers of the violent acts or use indiscriminate force. The inquiry commissions further revealed that large sections of personnel have been communally biased with biased perceptions and attitudes. It is an admitted fact that in communal cases, the notions about the minority sections among some sections of officers in the administration and the police are still present. Moreover, it is also pointed out that the composition of the administration and the police has been of majoritarian composition.

THEMES EMERGING FROM PATTERNS OF POLICING

Culling out the themes and patterns that have evolved in the light of the discussions made so far, one is police bias and prejudice against the minority community. Police has been found to behave partially during most riots. Instead of acting as a neutral law enforcement agency, they acted more as a 'Hindu force'. Such perceptible discrimination was also seen in the use of force, preventive arrests, enforcement of curfews, treatment of the detainees at the police stations, reporting of facts and investigations and prosecutions of cases that are registered during riots. Another theme is regarding the lack of trust in police officials or their relationship with the minority community in general. The sort of perception of police personnel in the minds of Hindus and Muslims during communal conflicts is diametrically opposed. Where the Hindus view policemen as their friends or protectors during the riots, the Muslims consider them their enemies in similar situation. Their expectations from an average policeman therefore, are communal. Another theme is the political pressure and lack of cooperation. Failure to file FIR's or complaints and majoritarian composition of the police force are other themes *inter alia*.

Conclusively mentioning, the suggested measures that could be taken from the overall literature includes encouraging regular training programmes that must offer a comprehensive course in human rights and the removal of prejudices and negative stereotypes against Muslims and other

[145]Roundtable on Policing and Public Order: Indian Citizenry and Police Reform & Excerpted Recommendations of Reports of the National Police Commissions. (June, 2006).

minorities. Police officials should be mandated to attend periodic seminars on community relations and inter-group conflicts. A step should also be taken to change police's image in people's minds. With regard to addressing the majoritarian composition in the police force, socially diverse composition should be aimed for in order to give a sense of assurance to the minorities and to neutralize the biases present in the police personnel of a majority group. Moreover, reforms also call for the need to modify the police manual on the use of force and firearms since the police usually use firearms at the initial stage, irrespective of the nature of the situation and potential threat.

CONCLUSION

A series of extremely detailed inquiries by serving judges of higher courts between 1961-2002 have provided us with, what should have been an institutional understanding, the causes behind the perpetration of such violence. After analyzing all the paradigms relating to problems with policing in general and policing in communal riots cases, we see how the institutions have constantly and 'deliberately' failed to apply this institutional memory or understanding in any event thereafter. Given a variety of detailed and well-studied recommendations, it still could not bind any Government into implementation. Worse, the analysis provided by them did not even serve as necessary institutional cautions or reminders to prevent such outbreaks and perpetrated tragedies in the future. Perhaps, one of the reasons for this reluctance to institutionally absorb the findings and transform this experience into policy formulation could be the accompanying failure of the Indian criminal justice system to actually punish those who are guilty of violations of the law.

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AN ANALYSIS OF THE LAWS RELATING TO RESERVATION IN SCHOOLS

- *Tushar Seth & Tanuj Dewan*

ABSTRACT

"The main hope of a nation lies in the education of its youth." - Erasmus

In the journey of becoming a human resource from a human being, education plays an indispensable role. Every State should ensure that its citizens get quality education, especially during their school life. For a country like India, education is one of the strongest pillars for its growth and development. In light of this, the Government of India introduced the Right of Children to Free and Compulsory Education Act, 2009, which provides that every private school shall reserve 25% seats for poor and under-privileged children, along with other rules, regulations and guidelines to ensure quality education. This was enacted to actually implement the Article 21A of the Constitution of India which makes right to education a fundamental right.

Therefore, this article aims to trace the concepts of free and compulsory education, and reservation in private schools in India, along with an analysis of Right to Education Act, and various judicial pronouncements dealing with the same.

INTRODUCTION

Since the inception of the Constitution of India, we have caste-based reservations in our country which includes affirmative actions like reserving a percentage of opportunities in areas like educational institutions, government jobs, legislatures, etc. However, there was no provision for State to make reservations in private educational institutions till the year 2005, when the government came up with the Constitutional Amendment which added clause (5) to Article 15.

Reservations in schools were initiated in the year 2009 with the passing of Right to Education Act of 2009. It makes education a fundamental right of every child between the ages of 6 and 14 and mandates all private schools to reserve 25% of seats for the poor and other disadvantaged children. This Act was passed to give force to Article 21A, which makes the right to education a fundamental right.

It was felt that the education system in India lacks equality and justice and the State is compelled to give reservations in higher educational institutes and public employment because the school

education in India is not same and good enough for every person. Several attempts were made to emphasize free and compulsory education for all children up to the age of 14. This was included in twenty-point programme of India, Sarva Shiksha Abhiyan, etc. but unfortunately, the objectives could not be fulfilled and it finally led to the passing of RTE Act in 2009.

The **history of free and compulsory education** in independent India goes back to the time of Constituent Assembly when this idea was being debated. In the report on 'Fundamental Principles of Governance' presented before the Assembly in August 1947, clause 8 read "Every citizen is entitled to free primary education, and it shall be the duty of the State to Provide within a period of 10 years from the commencement of this Constitution for free and compulsory primary education for all children until they complete the age of 14 years." It was debated on 23rd November 1948 and was adopted, with some amendments, as Article 36 of the Draft Constitution, which later became Article 45 in the adopted Constitution of India.

In 1990, Ramamurti Committee expressed that the time had come to recognize the right to education as one of the fundamental rights. In 1997, Saika Commission also recommended that the Constitution should be amended to include right to education as a fundamental right. Therefore, Article 21A was introduced through Constitution (Eighty Sixth Amendment) Act, 2002, and to give effect to this right, RTE Act, 2009 came into force on 1-04-2010.

KOTHARI COMMISSION

The Government of India in 1964 set up the Commission under the chairmanship of Shri Daulat Singh Kothari, the then chairman of University Grants Commission. The objective was to examine different aspects of the educational sector across the country. It also aimed at the evolution of a general pattern of education. It was the sixth commission in India post-independence and the first commission with comprehensive terms of reference on education. The Commission submitted its Report on 29 June 1966; its recommendations were accommodated in India's first National Policy on Education in 1968.

The main recommendations in the area of educational administration are as follows:[146]

- Free and compulsory education

The committee recommended that strenuous efforts should be made for the early fulfillment of the Directive Principle under Article 45 of the Constitution seeking to provide free and compulsory education for all children up to the age of 14. For this, suitable programs should be developed to

[146] *Main Recommendations of "Education Commission" (Kothari Commission) (1964-1966),* Edugyan (last accessed Aug 16, 2019, 3 PM) http://www.edugyan.in/2017/02/education-commission-or-kothari.html

reduce the prevailing wastage and stagnation in schools and ensure that every child who is enrolled in school successfully completes the prescribed course.

- Status, Emoluments and Education of Teachers

It recommended that emoluments of the teachers and other service conditions should be adequate and satisfactory since it is on the teacher's personal qualities and character, his/her educational qualifications and professional competence that the success of all educational endeavor ultimately depends.

- Equalization of Educational Opportunity

It was the view of the committee that arduous efforts should be made to equalize educational opportunity. Regional imbalances in the provision of educational facilities should be corrected and good educational facilities should be provided in rural and other backward areas. Further, to promote social cohesion and national integration the Common School System as recommended by the Education Commission should be adopted, and efforts should be made to improve the standard of education in general schools. Educational facilities for the physically and mentally handicapped children should be also expanded.

- Secondary education

Educational opportunity at the secondary (and higher) level is a major instrument of social change and transformation. Facilities for secondary education should accordingly be extended expeditiously to the areas and classes which have been denied these in the past. Moreover, focus should also be made towards increasing vocational and technical training.

- Education of Minorities

Games and sports should be made not only to protect the rights of minorities but to promote their educational interests as suggested in the statement issued by the conference of the Chief Ministers of States and Central ministers held in August 1961.

RIGHT TO EDUCATION & ARTICLE 15(5) OF THE CONSTITUTION OF INDIA

Article 21A was inserted in the Constitution via the Constitution (Eighty Sixth Amendment) Act, 2002 and it states that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.[147]

Article 15(5) authorizes the State to make special provisions for the advancement of socially and educationally backward classes or for the Scheduled Castes or the Scheduled Tribes in so far as

[147] Indian Const. art 21A

those provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.[148]

This clause was added by the Constitution (Ninety-third Amendment) Act, 2005 to override certain decisions of the Supreme Court which had created confusion regarding the application of State's reservation policy to private educational institutions.

In *T.M.A. Pai Foundation v. State of Karnataka*[149], the Supreme Court had held that the State could not make reservations of seats in admissions in privately run educational institutions. However, in *Islamic Academy*[150] case the Court held that the State could fix quota for admissions to these educational institutions but it could not fix the fees. In *P.A. Inamdar v. State of Maharashtra*[151], the Court once again held that the State could not impose its reservation policy on private educational institutions. Thus, the government inserted a new clause in Article 15.

The validity of Constitution (Ninety-third Amendment) Act, 2005 was upheld by the Supreme Court in the case of *Ashok Kumar Thakur v. Union of India*[152].

However, the word used in this clause is "educational institutions", which can include both schools as well as colleges/universities.

RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009

After the Constitutional Amendment of 2002, it was felt that Article 21A alone is insufficient in achieving the goal of education, and that there must be some legislation to ensure the implementation of the same. Thus, by using the power given in Article 15(5) and to give force to Article 21A, the government came up with this Bill.

The draft Bill which was prepared in year 2005 had caused considerable controversy due to one of its mandatory provisions which said that even the elite and private schools would have to provide 25% reservation for disadvantaged poor children. The sub-committee of the Central Advisory Board of Education which prepared the draft was of the view that this provision was a significant prerequisite for creating a democratic and egalitarian society.[153]

The Act makes education a fundamental right of every child between the ages of 6 and 14 and specifies minimum norms in elementary schools. It requires all private schools to reserve 25% of

[148] Indian Const. art 15, cl. 5
[149] T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors., AIR 2003 SC 355
[150] Islamic Academy of Education & Anr. v. State of Karnataka & Ors., AIR 2003 SC 3724
[151] P.A. Inamdar & Ors. v. State of Maharashtra & Ors., AIR 2005 SC 3226
[152] Ashok Kumar Thakur v. Union of India & Ors., AIR 2008 SC 2899
[153] Seethalakshmi, S., *Centre buries Right to Education Bill*, The Times of India (last accessed on Aug 25, 2019, 4 PM) https://timesofindia.indiatimes.com/india/Centre-buries-Right-to-Education-Bill/articleshow/1748745.cms?referral=PM

seats for the poor and other categories of children. The RTE act requires the authorities to conduct surveys that will monitor all neighbourhoods, identify children requiring education, and set up facilities for providing it.

The World Bank education specialist for India, Sam Carlson, has observed:

"The RTE Act is the first legislation in the world that puts the responsibility of ensuring enrollment, attendance and completion on the Government. It is the parents' responsibility to send the children to schools in the US and other countries."

India became one of 135 countries to make education a fundamental right of every child when the act came into force on 1 April 2010.[154]

But this concept of right to education was not new in India. The very idea of it was incorporated by our constitution makers in the Article 45 which read (till 2002) that "the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

Some Important Provisions[155]

Chapter 2 of the Act deals with 'Right to Free and Compulsory Education'. **Section 3** of the Act provides to every child of the age of six to fourteen years the right to free and compulsory education in a 'neighbourhood school' till the completion of elementary education. The idea of neighbourhood schools can be traced to the National System of Education as elaborated in the Kothari Commission report, whereby the neighbourhood school is meant to be a common space, where all children cutting across caste, class, gender lines learn together in the best inclusive manner. It is therefore meant to be a site for inclusion, so that the school becomes a common space for education. This concept has been incorporated in the RTE Act. In providing for the right of every child to free and compulsory education in a neighbourhood school, the RTE Act does not restrict the choice of the child to seek admission in a school which may not be in the neighbourhood of the child's residence. In other words, there is no compulsion on the child to seek admission only in the school in his or her neighbourhood.

The term 'free education' is explained to mean that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. The term 'free education' must be read in consonance with the provisions of section 12(1)(a)-(c) which specify the extent of the school's responsibility for free and compulsory education.

Chapter IV deals with the 'Responsibilities of Schools and Teachers'.

[154] *Ibid*
[155] The Right of Children to Free and Compulsory Education Act, 2009

Section 12 explains the responsibility of schools for providing free and compulsory education to children, in the following cases: -

(a) All Government schools shall provide free and compulsory education to all the children

(b) Government aided institutions shall provide free and compulsory education to such percentage of students in elementary classes which equals the percentage of recurring aid received by it from the Government to the annual recurring expenditure incurred by the school, subject to a minimum of 25%

(c) Private unaided institutions and special category schools shall provide free and compulsory education to at least 25% children belonging to disadvantaged groups and weaker sections admitted to class I or pre-primary classes. Such schools would be entitled to reimbursement at the per-child cost incurred by the Government.

Section 16 prohibits holding back and expulsion of a child from school till the attainment of elementary education. The 'no detention' provision is made because examinations are often used for eliminating children who obtain poor marks.

CASE ANALYSIS – SOCIETY FOR UNAIDED PRIVATE SCHOOLS OF RAJASTHAN *V.* UNION OF INDIA & ANR.[156]

Summary of decision

In this decision, the Supreme Court of India upheld the constitutionality of section 12 of the Right of Children to Free and Compulsory Education Act (RTE Act), which requires all schools, both state-funded and private, to accept 25% intake of children from disadvantaged groups. However, the Court held that the RTE Act could not require private minority schools to satisfy a 25% quota, as this would constitute a violation of the right of minority groups to establish private schools under the Indian Constitution.

Significance to the right to education

This case affirms that the authority of the State to fulfil its obligations under the right to education can be extended to private, non-State actors. Because the State has the authority to determine the manner in which it discharges this obligation, it can elect to impose statutory obligations on private schools so long as the requirements are in the public interest.

Context

In 2009, the Indian Parliament enacted the Right of Children to Free and Compulsory Education

[156] Society for Unaided Private Schools of Rajasthan v Union of India & Another, (2012) 6 SCC 1

Act (RTE Act), pursuant to Article 21-A of the Indian Constitution which requires the government to provide free and compulsory education to all children aged 6-14. Section 12 of the RTE Act requires that all aided (state-run) and unaided (private) schools reserve 25% of their admissions for students from economically weaker and socially disadvantaged backgrounds.

Facts

The Society for Unaided Private Schools – an association of privately run schools – challenged the constitutionality of section 12 of the RTE Act on the ground that imposing regulatory requirements on private schools violated the right to practice any profession or occupation free from government interference under Article 19 of the Constitution, and the right of minority groups to establish and administer schools under Article 30 of the Constitution. Several private unaided schools challenged the constitutional validity of Section 12(1)(c) r/w Section 2(n)(iv) of the Act, which provided for a quota of 25% of school seats to be reserved for children from economically weaker and disadvantaged sections in all schools - whether government or private schools; both aided and unaided.

Issue

The main issue before the Court was the constitutionality of the RTE Act, with two primary questions:

1. Whether requiring private schools to satisfy mandatory quotas violated Article 19 of the Constitution, which guarantees the right to practise any profession or occupation.
2. Whether requiring minority private schools to satisfy quotas violates Article 30 of the Constitution, which protects the right of minority groups to establish and administer private schools.

Analysis

The majority opinion (2:1) stated that the 2009 Act is "child centric and not institution centric"

Understanding the need behind Article 21-A, the majority opinion recognized the deficiency of simply including a declaratory right to education under Article 21. The task of imparting quality education across financial barriers to all children was thus one of priorities, and Section 12(1)(c) just did that. Irrespective of the fact that Section 12(1)(c) might burden private unaided schools, it was seen as a necessary and desirable initiative and therefore was upheld. According to the majority opinion, Article 21-A quite literally provides the State with the power to determine the legal manner in which it will discharge the obligation under RTE. This enables the State to freely include any type of schools within the ambit of the RTE Act, including private unaided schools. Moreover, the legal obligation to provide education is placed not only upon the State, but also on all stakeholders involved, according to the majority opinion. A reciprocal agreement is envisaged

between the State and parents, and can be appropriately distributed amongst the private schools as well, for it only helps to ensure better quality education to children of all classes.

However, the minority opinion noted the absence of any positive obligation being cast upon private non-state actors in Article21-A. The basis for the introduction of Article 21-A and the deletion of original clause (3) from article 21-A (that specifically excluded unaided institutions from the purview of the obligation) was due to judgment of Unnikrishnan *v.* State of AP. Article 45 and Article 51-A(k) were inserted in the Constitution on 12.12.2002, a month after the judgment in TMA Pai Foundation and Ors v State of Karnataka and Ors was pronounced overruling Unnikrishnan on 31.10.2002. TMA Pai judgment stated that such reservation of seats in private unaided institutions leads to nationalization of seats. The Parliament was assumed to have been aware of the judicial dicta and thus, the absence of an affirmative duty being cast upon private players in Article 21A can be inferred to be a deliberate and conscious decision. A closer look at the wordings of Article 21-A would show the expression "State shall provide", and not "provide for". These words go a long way in indicating the responsibility was laid solely and imperatively upon the State in a clear and unambiguous tone. Extending such an obligation to private unaided institutions would amount not just to doing violence to the express language of the Constitution, but also to offloading of the State's burden on such institutions. An interesting observation was made by the minority opinion in relation to a series of national and international case laws on various socio-economic rights and their enforcement: even in jurisdictions where such rights were given a constitutional status, such rights were only and only available against the State, and not private unaided actors. Moreover, quoting Articles 28(1) and 29 of the UN Convention on the Rights of the Child, Radhakrishnan J. stressed that there existed express provisions to exclude private players from the Convention's obligations. TMA Pai and Inamdar have established a negative obligation on private educational institutions in the sense that there be no profiteering, excessive fee, maladministration etc. Art. 51(A)(k) of Part IV has imposed a constitutional duty on parents to provide educational opportunities to children and Part III has rendered the State's obligation to be absolute, but no such obligation has been cast either in parts or in whole on private unaided educational institutions. Thus, all that existed was a negative obligation upon such institutions to not unreasonably interfere with the realization of children's rights. The above-mentioned observations nowhere indicate that private schools have any kind of a positive obligation under Article 21-A. In this context, mandating them to take in such a substantial chunk of students against their wishes does indeed seem like the State offloading its legal obligations onto private schools.

Establishing a private school under Article 19 supplements the primary obligation of the State, the

Court held that the State can regulate private schools by imposing reasonable restrictions in the public interest under Article 19(6). The Court further concluded that the 25% quota imposed on private schools is in the public interest and is a reasonable restriction for the purposes of Article 19(6). Therefore, the 2009 Act was deemed to be constitutional and enforceable against private schools.

However, the Court made a distinction between private schools and private minority schools, established under Article 30 of the Constitution, and held that the government cannot require private minority schools to satisfy a 25% quota. To do so would constitute a violation of the right of minority groups to establish private schools under Article 30. The court reasoned that Article 29(1) of the Constitution protects the right of minorities to conserve their language, script or culture, and Article 30(1) protects their right to establish and administer schools of their choice. Therefore, imposing a quota on such schools would result in changing their character and would therefore violate these rights.

Interpretation

This case affirms that the authority of the State to fulfil its obligations under the right to education can be extended to private, non-State actors. According to the majority opinion, the State has an obligation to provide free and compulsory primary education, and to ensure educational equality. Because the State has the authority to determine the manner in which it discharges this obligation, it can elect to impose statutory obligations on private schools so long as the requirements are in the public interest. The broad nature of the State's authority in this regard is demonstrated in the dissenting opinion of Judge Radhakrishnan, which found that the RTE Act should not apply to unaided private schools.

OTHER RELEVANT CASES

***Environmental & Consumer Protection Foundation v. Delhi Administration & Others*[157]**

In response to a petition filed by an Indian charity, the Supreme Court of India directed the governments of all States and Union Territories to ensure that all schools, whether private or state-run, provide proper toilet facilities, drinking water, sufficient classrooms and capable teaching staff. The court held that, under the Right of Children to Free and Compulsory Education Act (2009) and the Indian Constitution, central, state and local governments have an obligation to ensure that all schools, both public and private, have adequate infrastructure. Adequate infrastructure includes safe drinking water, toilet facilities for boys and girls, sufficient classrooms and the appointment of teaching and non-teaching staff.

[157] Environmental & Consumer Protection Foundation v. Delhi Administration & Others, (2011) 7 SCC 55

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Pramati Educational and Cultural Trust & Others v. Union of India & Others[158]

In this case, the India Supreme Court upheld the constitutionality of Articles 15(5) and 21-A of the Constitution of India, so far as they require unaided private schools to provide compulsory education for children aged 6-14. However, the Court further held that private minority schools could not be compelled to provide free, compulsory education to children belonging to disadvantaged groups, as this would constitute a violation of the right of minority groups to establish private schools under Article 30 of the Constitution.

INTERNATIONAL LAWS

There are several international laws, conventions, declarations etc. which talks about the importance of education and expects all the States to make it a fundamental right. A few of such laws are as follows: -

Article 26 - Universal Declaration of Human Rights

It declares that everyone has a right to education and that education should be free, at least in the elementary and fundamental stages. It further states that elementary education shall be compulsory. It also vouches for technical and professional education being made generally available and higher education be equally accessible to all on the basis of merit. Moreover, it states that education should be directed to the full development of the human personality and strengthening of respect for human rights and fundamental freedoms.

Articles 13 and 14 - International Covenant on Economic, Social and Cultural Rights

According to Article 13 of the Covenant, the State parties recognize the right of everyone to education.

The States Parties to the Covenant recognize that, with a view to achieving the full realization of this right:

- Primary education shall be compulsory and available free to all;
- Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

[158] Pramati Educational and Cultural Trust & Others v. Union of India & Others, (2014) 8 SCC 1

- The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

The States Parties to the Covenant also undertook to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools.

Article 14 states that "Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all."

Article 28 - Convention on the Rights of the Child

The parties to this convention recognized the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they decided to undertake various steps, which were similar to those mentioned in Article 13 of International Covenant on Economic, Social and Cultural Rights.

CONCLUSION

Among the most jarring arguments against the clause in the Right to Education (RTE) Act - which calls for a 25% reservation in private schools for children from disadvantaged groups and economically-weaker sections of society - is that such children will feel out of place in elite schools. Simply because some schools do a miserable job of social integration isn't reason enough for all schools to do so.

The arguments against RTE make it sound as if rich and poor children have never shared a classroom bench before, which is untrue. A small but significant number of private schools opened their doors to the poor long before the RTE. Mahindra United World College, a coveted IB school on the outskirts of Pune, admits children from the surrounding villages, who rub shoulders with students from around the world. In Loreto, Sealdah, 50% of children are from wealthy backgrounds and 50% are from poor families and don't pay fees. Activity School at Pedder Road, among Mumbai's poshest locales, has always included children of the school sweepers, gardeners and office staff, who fit in quite well with children from better-off families. While such schools may be an oasis in the desert, they are visible proof that if a school wants to integrate poor children into an elite classroom, it can certainly do so.

While working out reservations for disadvantaged children at private schools, a figure of 25% was arrived at keeping in mind that such children need to form a critical mass of the total number in class in order to feel at home. According to the 2001 census, Scheduled Castes constitute 16.2% and Scheduled Tribes 8.2% of the population. Together, this works out to 24.4%. Further, the Tendulkar Commission on poverty estimates 37.2% of the population below the poverty line. Both economic and social deprivation was considered while arriving at the figure of 25%.

Another argument against RTE is that it has shifted the burden of educating the poor from the government to the private sector. This is untrue. RTE's budget of 2.31 lakh crore over five years is largely meant to upgrade teaching and infrastructure at government schools. It would be foolish to imagine that 25% reservation for the poor in Class I each year will shift the state's responsibility to the private sector.

The elite have rarely taken to the streets to protest the decline of government education. All these years, while a section of the private sector has profiteered from the education industry, the elite have never pressured the government to reclaim the education sector. But suddenly, when the private sector is asked to lend a helping hand with the enormous task of universalising education, the elite suddenly believe that the government alone is responsible for education. That several private schools avail of highly-subsidised infrastructure is itself reason enough for them to pay back their debt to society. The government will reimburse schools as per the cost of educating a child in a government school.

Many such schools are run by the country's wealthiest corporates, which can very well use their corporate social responsibility towards the worthy goal of educating the poor.

Many feel the policy will also greatly benefit rich children, and will be a sort of reality check. While wealthy children have, for long, collected money for 'the poor', sharing a bench at school with 'the poor' will be an altogether different experience and will surely help them put their own lives in perspective.

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ETHICS OF INSIDER TRADING AND THE REGULATIONS IN INDIA

- *Ketan Swaraj Nair & Akshita Jain*

THE PREMISE FOR RESTRICTION OF INSIDER TRADING

Modern economies possess a complex system which includes financial instruments that are traded in the market. These instruments are a mechanism to attract and raise investments which consequently help in infrastructure activities, manufacturing and also contributes to the overall economic growth. They encourage households and other units to mobilize their savings by incentivising them with a probability to make profits. Trading on account of information is a lucrative business for people with financial knowledge to reap benefits out of. Traditionally, the only method for a company to raise money was through internal sources and debt financing and they largely relied on these for any expansion and diversification.

Trading is an activity primarily pinpointed on making profit. The general definition of trading involves buying and selling of goods and services for profit. Securities are financial instruments having a commercial value that are issued by a company or government that vests certain rights on the holder of the instrument. Securities are traded in the secondary market which refers to the market for trading of those financial instruments which are easily transferrable by sale.

Insider Trading is the trading of securities done on the premise of information which is not public. The United States of America was the first country to formally regulate the practice of insider trading under the Securities Exchange Act of 1934. The Securities Exchange Commission (S.E.C.) in 1942 enacted Rule 10(b)-5 which is the provision relating to *Employment of Manipulative and Deceptive Devices* under Section 10(b) of the Exchange Act. When it was first enacted and adopted, the Securities Exchange Commission did not consider its possible application to restrict the practice of insider trading. It was in the 1960*s*, that the commission initiated the application of this legislation to restrict the practices of insider trading occurring on impersonal markets in an administrative procedure.[159] However, the recognition was limited as the application was limited to an administrative procedure. It was in 1963, that the principle of equal access to information was recognized in S.E.C. v. Texas Gulf Sulphur[160]. The Second Circuit Court aligned with the arguments of the S.E.C, and held that an insider in possession of material, non-public information,

[159] Re *Cady, Roberts & Co.* 40 S.E.C. 907 (1961).
[160] 401 F.2d 833 (2nd Cir. 1968).

had to either disclose the information to the public or abstain from trading. Since then, economies around the globe have recognized the need to restrict the practice of insider trading.

In stock markets, insider trading is generally characterized as buying or selling of shares of stock on the basis of information known only to the trader or to a few persons. If such information was not privileged, and was known publically, it would affect their decisions and actions in relation to their trading. Several theories have been developed in relation to insider trading. The basic argument against the restriction of insider trading is that, it is the advantage of information which supplements the entrepreneurial spirit. Having information does not put the public at a disadvantage rather it puts the individual or entity at an advantage. Consequently, there are certain arguments or theories which supports the restriction on insider trading. The basic feature of these arguments is that, the practice should be restricted in order to create a level playing field whenever stock is offered to the public. Ethics does play a large role in determining the question whether an activity should be prohibited or allowed. Ethics of insider trading is a much debated topic with ethical grounds arguing in favour of restrictions imposed on it and entrepreneurial arguments against any restriction on insider trading.

THEORIES SUPPORTING RESTRICTION

The collective contentions in favour of the restriction of insider trading relies majorly on the grounds of its 'unfairness' to the public. When a security is offered to the public for attracting investments in a company, it implies that it has run out of internal sources of raising capital and is seeking a larger forum to invest in the company for the purpose of its expansion. People invest in the company by subscribing to the shares because they hold confidence in the company that it is going to perform well and they will be able to witness a return on their investments in the form of dividends. The confidence stems from information which is publically accessible. If the directors of a company have the knowledge that there will be an increase in the value of the stocks of the company on the basis of a forthcoming merger, and a director by the use of this information purchases shares, it will be 'unfair' to the public to which the shares are already offered. This would be unfair to the existing subscribers of the shares of the company, as they did not have access to the information of the merger and hence were not able to capitalize on the opportunity.

For the advocates of the 'fairness' argument, the essence of the argument comes from the 'parity of information'. Information which is not generally available but only available to a selected individual unit. The proponents argue that the trading should be done on a 'level playing field'. The disparities in information lead to an advantage of certain groups over the public in general. Therefore, investors will lose confidence in the company and may even exit the market. The problem which accompanies the level-playing field argument is that it is neither possible nor

desirable to have a level-playing field in the realm of an economy.[161]

George Will states that, 'Insider trading is the opposite of speculation as it rewards without any risk. It causes injury to others by exploiting information to gain an unfair advantage.'[162] The crux of his argument is clear that no one should profit from exploitation of accessibility of important information which is not available to the public.

Patricia H. Werhane argues that, insider trading is not a mere complication in the free market mechanism. She contends that if insider trading is allowed, it will demolish the premise of free market, as people would not be acting on the basis equal information.[163] Therefore, it would neglect the idea of a free market on the basis of denial of competition on equal information. If restriction of insider trading negatively affects the 'insider', allowing it will negatively impact the market.

It is interesting to observe that the Supreme Court of United States of America in Chiarella v. U.S. rejected the theory of equal access to information and curbed its potentially broad reach.[164] It further adopted that a fiduciary duty had to owed by the insider to the investors for the disclosure of information. Merely possession of material, non-public information would not attract the penalties of insider trading. Hence, the United States went from the equal information theory to fiduciary duty based insider trading.

Theories Against Restriction

There are multiple theories which condemn the act of restricting insider trading. The basis of their argument is generally, if no one is harmed by the possession of an information and that information is being utilized for an individual's personal benefit, it shall not be restricted. One of the most significant entrepreneurial advantage that one could possess is information. The fundamental economic argument, one no economist has ever denied, is that insider trading will always push stock prices in the 'correct' direction.[165]

It is argued that when the shares are traded on information or probabilities rather than plain speculation, it reflects the market more accurately. The actual economic status or financial activities of a company will be better represented if the trading is done on the basis of certain concrete information, rather than rumours and whims. Therefore, the proponents argue that insider trading shall be allowed as it is a viable and efficient economic practice and hence can be the cause

[161] Robert W. McGee, *Applying Ethics to Insider Trading*, 77, No. 2, Journal of Business Ethics, 205-17, (2008).
[162] George Will, '*Keep Your Eye in Guiliani'*, Newsweek, March 2, 1987, at 84.
[163] Patricia H. Werhane, *The Ethics of Insider Trading,* 8, No. 11, Journal of Business Ethics, 841-45 (Nov., 1989).
[164] 445 U.S. 222 (1980).
[165] Hsiu-KwangWu, *An Economist Looks at Section 16 of the Securities Exchange Act of 1934*, 68, Columbia Law Review, 260-69 (February 1968).

of serving the best interests of the shareholders in the economy at large. If an insider trades with his information, the process of the stock will rise or go down due to real, rather than factual information.

Manne, asserts that insider trading is a powerful incentive for creativity and is the only appropriate method to reward entrepreneurship.[166] Manne's work is one of the vital arguments when it comes to insider trading. A highlight of his arguments are that he does not evaluates the topic from an ethical standpoint and rather focuses on the economic viability. He favours insider trading because it is economically efficient. An alternative argument of his in favour of insider trading rests on the compensation of the executives. He states that if corporate executives are allowed to trade on the basis of the information that they possess, it would incentivise them in work for the benefit of the company and shall also reduce the amount of salaries which have to be paid to them.

Milton Freidman, in support of insider trading stated that it shall be encouraged as the market shall be made aware about the shortcomings of a company by anyone who holds such information. He argued that a trader should not be required to disclose his trading as the market, buying and selling pressure, is information for the market.[167]

THE REGULATIONS IN INDIA

Insider trading is a menace for small investors as they lose their hard earned money. Basic principles of corporate governance should be followed for the development of the capital market. Accountability, fairness, and transparency are the pillars of corporate governance.

In 1988, the Securities and Exchange Board of India (SEBI) was first established and given statutory powers under the Securities and Exchange Board of India Act, 1992. The objective of the Act is to safeguard the interest of the investors and expand the securities market by providing the code of conduct for the intermediaries involved in the trading and to prevent fraudulent practices. After getting statutory recognition SEBI enacted the SEBI (Insider Trading) Regulations, 1992 which is now replaced by SEBI (Prohibition of Insider Trading) Regulations, 2015.

The Dawn of Regulations in India

Post-independence, in 1948, the first attempt was taken to restrict insider trading by constituting the Thomas Committee. In 1956, section 307 and section 308 were added in the Companies Act, 1956, which made it mandatory for every company to record the number, description and amount of shares or debentures in the register and the duty of the director to give notice to the company and make disclosure of shareholdings. Subsequently, the Sachar Committee (1979), the Patel

[166] Manne, H.G., Insider Trading and the Stock Market. The Free Press, New York, (1966).
[167] Larry Harris, *'Trading & Exchanges'*, Oxford Press, 2003. Chapter 29 "Insider Trading.

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committee (1986), and the Abid Hussian Committee (1989) proposed certain reforms for controlling insider trading in India. The Sachar Committee recommended to made amendments in the Companies Act, 1956 as the promoters, directors, auditors, employees, etc. of the company may have information relating to shares which may affect the price of securities of the company and as a result, they can take unfair advantage by manipulating stock prices. Further the Patel committee defined the term insider trading as "trading in shares of the company by the persons who are in the management of the company or are close to them on the basis of undisclosed price sensitive information regarding the working of the company which they possess but not available to others" and proposed that the Securities Contract (Regulations) Act, 1956 be amended. Subsequently, the Thomas Committee recommended SEBI to formulate separate regulations for preventing insider trading and suggested to impose civil and criminal sanctions on insider trading activities.

The SEBI (Insider Trading) Regulations, 1992 came into force due to the multiplication of manipulative and deceptive activities in the advancing securities market. The protection of interests of investors is required to create trust and confidence among them. To plug certain lacunae which existed in the insider trading regulations of 1992, amendments were brought in 2002. However, flaws were observed in 1992 regulations in cases like Rakesh Agarwal v. SEBI and Hindustan Lever Limited v. SEBI. Subsequently, to tighten the gap in existing norms, the SEBI (Prohibition of Insider Trading) Regulations, 2015 were introduced. The new regulations were formulated on the recommendation of the N.K Sodhi committee. In 2018, further amendments were made by the SEBI in the SEBI (Prohibition of Insider Trading) Regulations, 2015 which came in effect from 1st April 2019.

New regulations provided clarity and a more structured disclosure regime. Further, a step was taken by including provisions regarding the prohibition of insider trading concerning all companies in the Companies Act of 2013.

Prohibition of insider trading under the Companies Act, 2013

Section 195 of the Companies Act prohibits the director or key managerial person of a company from indulging in insider trading. Further, the section explains the meaning of the term "insider trading". Insider trading means buying and selling by the top management of the company based on information which will affect the prices of the shares in the market and is non- public.

The Central Government may delegate power to the SEBI to enforce provision relating to insider trading and the power to file a complaint in the competent court under section 458 (1) of the Act.

The SEBI (Prohibition of Insider Trading) Regulations, 2015

The SEBI (Prohibition of Insider Trading) Regulations, 2015 consists of five chapters and three

schedules.

Regulation 2(g) defines the word "insider". The insider can be any person who is in receipt of or has access to the price sensitive information which is not published yet.

Regulation 2(l) defines the term "trading". Trading includes buying, selling, subscribing and dealing in the securities of the company.

Regulation 2(n) defines the term "unpublished price sensitive information". The definition has been expanded as previously, it has reference to a company only. But now, it includes both companies as well as securities. So, the information which is not generally available relating to a company or securities and on disclosure, this will affect the price in the securities market would be considered as unpublished price sensitive information such as information relating to dividends, financial results, change in capital structure, merger, de-mergers, acquisitions, etc.

Regulation 3(1) prohibits the communication of unpublished price sensitive information by the insiders relating to companies and securities to any person including other insiders. *Regulation 3(2)* prohibits the procurement of such information except in the discharge of legal obligations and in the ordinary course of business provided that such sharing has not been carried out to avoid the prohibitions. Whereas, the unpublished price sensitive information can be communicated and procured in the following cases:

- In the case of mergers, takeovers, and acquisitions involving trading in securities and change of control unpublished price sensitive information should be made available in the letter of offer and where the Board of Directors is of the opinion that sharing of such information is in the best interests of the bank under *Regulation 3(3)(i).*
- When there is no obligation to make an open offer but the Board of Directors is of the opinion that sharing of such information is in the best interests of the bank than unpublished price sensitive information should be made generally available at least two trading days prior to the proposed transaction being effected under *Regulation 3(3)(ii).*

Regulation 4 prohibits trading in securities by a person possessing unpublished price sensitive information as it would be presumed that his trades have been motivated by the knowledge and awareness of such information in his possession and would be considered as insider trading.

The regulations also provide for certain exceptions when the person can trade even after possessing unpublished price sensitive information:

1) In an off-market trade between promoters:
    a. Transaction was carried out through block deal window mechanism between persons and other bona fide transactions.

b. Provided that there should not be a breach of *Regulation 3* and both have informed and made conscious trade decisions.

2) In the case of non- individual insiders:

a. When the individuals who were in possession of such unpublished price sensitive information were different from the individuals taking trading decisions and the individuals taking trading decisions were not in possession of such unpublished price sensitive information at the time when they took decision to trade and there was no communication of unpublished price sensitive information by the individuals possessing the information to the individuals taking trading decisions.

Regulation 6 - Disclosure of trading can be made by any person and include those relating to trading by such a person's immediate relatives and of other persons for whom the person concerned takes trading decisions under *Regulation 6*. The purpose of the regulation is to prevent misuse of information by trading when in possession of unpublished price sensitive information.

THE INSTANCES OF INSIDER TRADING IN INDIA

Regulations regarding insider trading were issued on November 19, 1992. Cases of insider trading in the securities market are taken up by the SEBI. Before the enactment of SEBI regulations for insider trading, there was no authority to take any action in order to protect the interest of investors and to reduce fraudulent practices. It is necessary to regulate insider trading activities to maintain stability in the market and to keep a check on unfair advantages taken up by the insiders having unpublished price sensitive information. Investors tend to lose their interest and faith in the stock market because of unfair dealings by insiders. The analysis of the following insider trading cases in India is important to understand the severity of this situation.

TISCO case (1992)

Tata Iron and Steel Company (TISCO) Limited was incorporated in 1907. The company phased into a major decline in the profit for the first half of the financial year 1992-93 to ₹50 crore compared with the previous financial year profit of ₹278.16 crore. Majority of shares were traded by the company between 22/10/1992 and 29/10/1992 before releasing the financial results for the first half of the financial year 1992-93. The prices of the shares fell sharply and SENSEX registered a decline of 8.3%. Bombay Stock Exchange (BSE) authorities suspected insider trading and started an investigation. But the regulations regarding insider trading were not present when it took place. And therefore, conducting investigation was not possible.

Aftermath:

SEBI (Insider Trading) Regulations, 1992 were enacted by the SEBI to prevent the interest of the investors and ensure proper trading.

Hindustan Lever Limited v. SEBI (1996)[168]

In 1996, Hindustan Lever Limited (HLL) and Brook Bond Lipton India Ltd. (BBLIL) were subsidiaries of London based 'Unilever'. Two weeks before the public announcement of merger of HLL and BBLIL, HLL bought 8 lakh shares of BBLIL for ₹350.35 per share on 25/03/1996. After the merger, the share price of BBLIL had an incremental rise. In 1997, SEBI suspected insider trading and investigated the matter.

After conducting 15 months of enquiry, SEBI came to the conclusion that HLL bought the shares of BBLIL on the basis of unpublished price sensitive information from Unit Trust of India (UTI) and held HLL as an "insider" under Section 2(e) of the SEBI (Insider Trading) Regulations, 1992 as HLL and BBLIL were under the same management. Thus, SEBI initiated criminal proceedings and issued a show cause notice to the Chairman, all Executive Directors, and the Company Secretary and the then Chairman of HLL. SEBI had directed HLL to pay compensation to UTI. HLL pleaded that the information regarding the merger was known in the market at that time.

HLL filed an appeal before the Securities and Appellate Authority asking on what basis they can be termed as an insider. The Appellate Authority agreed with the SEBI's contention and held that the information regarding the merger will be considered as unpublished information.

Currently, the matter is pending before the Hon'ble Supreme Court.

Aftermath:

SEBI passed the SEBI (Insider Trading) Amendment Regulations, 2002 by changing the definition of the term "unpublished" under Section 2(k). After the said amendment, the speculative reports in the print or electronic media shall not be considered as published. Thus, in the present case, after the SEBI (Insider Trading) Amendment Regulations, 2002 the information regarding the merger of HLL and BBLIL will be considered as unpublished information.

Dilip Pense v. SEBI (2001)[169]

Dilip Pendse was the managing director of TATA Finance Ltd. (TFL). *Niskalp* was a subsidiary of TFL. TFL offered rights issue between 31/03/2001 and 30/04/2001. *Niskalp* suffered a huge loss of ₹79.37 crores on 31/03/2001 which ultimately affects the profits of TFL. The MD was aware of heavy losses incurred by *Niskalp* but no such information was disclosed in the final Letter of Offer.

[168] (1998) 18 SCL 311 (AA).
[169] Dilip Pendse vs SEBI MANU/SB/0159/2009.

This was an 'Unpublished Price Sensitive Information' which Dilip Pendse was aware of. He passed on this information to his wife and based on this information she sold 2,90,000 shares of TFL. On 30/04/2001, the information was disclosed to the public. SEBI suspected insider trading and conducted an investigation.

Dilip Pendse was held liable for having 'Unpublished Price Sensitive Information' and therefore effected insider trading. The penalty was imposed on the accused and banned him from accessing the capital market.

Satyam Computer Services Ltd. Case (2009)[170]

Satyam Computer Services Limited was incorporated in 1987. In 2007, it was one of the four largest companies in India. The financial fraud started when the financial accounts of the company were doctored. The assets and liabilities were misrepresented by the promoters to show the company's financial health in a good position. The fraud led to the increase in the prices of shares initially. Ramalinga Raju, the founder and former chairman maintained the financial accounts and minutes of the meetings since 2002. There were certain irregularities in invoices and bills prepared by him as they were manipulated by using various software applications. The auditors were also involved in the fraud as they verified the business records and held them valid and legal even after knowing that the accounts were falsified. Later on, they were found corrupt. In 2003, the share price was ₹138.08 per share and in 2008 share price became ₹526.25. Things went wrong when Ramalinga Raju purchased some genuine assets out of the fake cash to decrease the difference between the actual and the book value of the assets he showed in the balance sheet as inflated cash and bank balance of Rs. 5,040 crores as against ₹5,361 crores was reflected in the books. The shareholders were panicked when they came to know about this purchase as Ramalinga is taking an unfair advantage in MATYAS. Ramalinga had 37% stake in MATYAS. As a result, shareholders started to sell their shares and hence the stock market crashed and share prices were dropped drastically. Ramalinga Raju resigned after notifying SEBI that the financial accounts had been falsified on 7/01/2009. SEBI conducted a detailed investigation. He was arrested by the police and Satyam was removed from Sensex, Nifty and NSE. The special CBI court held Raju and nine other officials guilty of cheating.

Aftermath:

Changes have been introduced concerning the corporate governance after the Satyam scam in India. SEBI made amendments in the listing agreements to include provisions relating to the role of Audit Committee in cases of suspected fraud or irregularity. In 2015, SEBI framed the SEBI

[170] SEBI Order in the matter of Satyam Computer Services Ltd., WTM/RKA/EFD-SRO/108-117/2015, SRSR Holdings Pvt. Ltd. v. SEBI (SAT Mumbai, Appeal No. 463 of 2015).

(Listing Obligations and Disclosure Requirements) Regulations, 2015 provide guidelines to disclose or report any suspected frauds.

THE RECENT AMENDMENTS TO THE REGULATIONS

SEBI has made certain amendments to the Insider Trading Regulations. The two of the most important aspects of this amendment is to attract foreign investments and to increase the volume and efficiency of collecting information regarding insider trading. The chairperson, Ajay Tyagi, stated that along with the virtual redrafting of the regulations regarding Foreign Portfolio Investors (FPI) there is also emphasis on individuals proving credible and original information of insider trading. The mechanism will reward the individuals at 10 per cent of the disgorgement amount up to ₹1 crore. It has notified the Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2018. These regulations, effective from 01/04/2019 were brought on the basis of the report of the Committee of Fair Market Conduct.

It amendment requires 'designated persons' (which is to be determined by the Board of Directors) of a listed company, a particular access to the Unpublished Price Sensitive Information (UPSI) and also has to be assigned a function regarding such information. The designated persons are also required to make certain disclosures regarding their educational institutes, previous employers among others. This will enable SEBI to link particular individuals in the organization with insider trading, a shortcoming which was previously a strenuous task. Effectively it will help in establishing a case of Insider Trading.

FPIs would no longer be required to meet the 'broad-basing' criteria, under which at least 20 investors were required to establish a fund. Also, central banks that are not members of the Bank for International Settlements (BIS) will be allowed to register as FPIs. Offshore funds floated by Indian mutual funds will be permitted to invest in the domestic markets under the FPI route.[171]

It has also notified the Securities and Exchange Board of India (Prohibition of Insider Trading) (Second Amendment) Regulations, 2019 on 25/07/2019 which makes certain minor changes regarding certain words which were ambiguous.

[171] Samie Modak, '*Sebi eases FPI norms, approves changes in rules prohibiting insider trading,* Business Standard', Aug 22, 2019.

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JUDICIAL PATH TOWARDS HOMOSEXUALITY

- *Jaiveer Singh Bhati*

INTRODUCTION

Love is something which cannot see religion, caste, creed, sex. In a same way our perception of love is not strictly confined to heterosexuality only it can also be homosexuality. Now India also joined the list of countries which legalise the homosexuality. Today also our public did not wholly accept the concept of homosexuality. The public has varied views regarding the acceptance of homosexuality. This debate still continues dividing the states into two half, the ones protesting for equal rights and the others criticizing and blaming the very existence of homosexuals.

But in the past two decades there has been vast and eminent changes seen around the world. And the countries are on the leading way towards giving the dignity and respect to the homosexuals. The tendency for scrapping section 377 of IPC first start when the report name '**LESS THAN GAY**' published in "**AIDS Bhedbhav Virodhi Andolen**" which demanded section 377 repeal.

The section 377 of the Indian penal code states that : "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."[172]

The **FIRST** initiative was taken in the case **NAZ FOUNDATION VS. GOVT. OF NCT DELHI** in which the NGO called NAZ foundation filed a PIL in Delhi High Court in 2001, seeking a legislation which does not prohibit homosexual relationship. The PIL was rejected by the Delhi High Court. The NGO appeal in the Supreme Court against the decision which dismissed the petition. The Supreme Court after considering the matter sent the case back to High Court for reconsideration on merit.

On 2nd July 2009, the two bench judge of High Court given the landmark judgement stated that, if homosexuality is considered as a crime it would be violative of fundamental rights of citizens guaranteed by the constitution under Article 14, 15, 19(1)(a), 19(1)(d), and 21 i.e. right to life, dignity, personal, liberty and privacy. Thus, the court legalised the consensual homosexual relationship.

LATER , the appeal has been filed against the Delhi High Court decision in the case named

[172] Section 377 , Indian penal code

SURESH KUMAR KAUSHAL VS. NAZ FOUNDATION in which the three issues has been raised are:

1. Whether section 377 of IPC is constitutionally valid or not ?
2. Whether section 377 of IPC violates any provision of part III of the constitution ?
3. Whether criminalisation of sexual intercourse between two adults of the same sex violate the Article 21 of the constitution ?

In First Issue, the SC panel of two judges namely Justice G.S. Singhvi and Justice S.J. Mukhopadhaya overruled the 2009 judgement of Delhi High Court. The court stated that section 377 of IPC does not experience the ill effects of Unconstitutionality or Unlawfulness.

In second Issue, the court said section 377 of IPC does not classify any particular group on the basis of gender, therefore section 377 does not violates any provision contained in the part III of the constitution.

In Third Issue, the court held that Article 21 expanded and dealt with various interpretations but the implications of those interpretation is based on the notion brought about by the founding fathers of the constitutions who had given liberty to the state to deprive any person of his/her personal liberty in accordance just, fair and reasonable procedure established by law.

After this judgement in January 2014, a review petition was filed against the Suresh Kumar Kaushal case by the Central Government, NAZ Foundation and others but it was dismissed by the Supreme Court.

In 2015 and 2016, The Indian National Congress member Shashi Tharoor introduced a private member bill for decriminalization of section 377 of IPC, but the motion get rejected both the times by the house.

On 6th September 2018, the Supreme Court five judge bench in case **NAVTEJ SINGH JOHAR VS. UNION OF INDIA** struck down the Section 377 of IPC regarding the criminal offence of cardinal intercourse, as the court finds that is violative of Article 14, 15, 19, 21 and overruled its own 2013 Suresh Kumar Kaushal case judgement.

But, In case of sex with minor, non-consensual sex and also bestiality the Sec.377 of IPC still remain in practice.

Between **Suresh Kumar Kaushal** and **Navtej Singh Johar** case the two major landmark decision was given by the Supreme Court in **NALSA VS. UNION OF INDIA** and **K.S. PUTTUASWAMY VS. UNION OF INDIA**

In 2014, Supreme Court bench of Justice K.S. Radhakrishnan and Justice A.K. Sikri declared the landmark judgement in NALSA vs UNION OF INDIA to safeguard and protect the rights of the

transgenders guaranteed in the constitution. It was declare that:

- Hijras must be treated as third gender.
- Transgender persons right to decide their self-identified gender is also upheld.

In 2017, the Supreme Court nine judge bench in the case K.S. PUTTUASWAMY VS. UNION OF INDIA held that Right to privacy is fundamental right under Ar.14,19 & 21 of the constitution. The judgement also includes discriminating an individual on the basis of sexual orientation is offensive in nature & the Right to privacy & sexual orientation lies at the centre of the Fundamental Rights under Article 14,15 & 21 of the constitution.

CONCLUSION:

The same sex relationship are being accepted by most of the countries and now this list also includes India. But in India, still half of our society does not accept this concept. But this judgement on homosexuality gave a new birth of freedom to the homosexuals and touched the heart of millions who believe in the power of Judiciary. And still it is the long path to give the identity of the homosexuality in the society. People need to understand that homosexuality is not the disease in the society it is merely a choice of love. And stop disrespecting the individual's choice through all the social and emotional abuse, alienation and discrimination. Still only half of the path has to be made by recognising homosexual marriages.

And at last I quote the Former CJI Deepak Mishra words:

"History owes an apology to the members of this community and their families for the postponement in providing redressal for the same, ignominy and ostracism that they have suffered through the centuries."

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PLEA BARGAINING: EVOLUTION AND CONCEPT IN INDIA

- *Tushar Tomar*

INTRODUCTION

A new chapter, that is chapter XXIA on 'Plea Bargaining', has been introduced in the Criminal Procedure Code. It was introduced through the Criminal Law (Amendment) Act, 2005, which was passed by the parliament in its winter session. This has certainly changed the face of the Indian Criminal Justice System. Some of the salient features of 'Plea Bargaining' are that it is applicable in respect of those offences for which punishment is up to a period of 7 years. Moreover it does not apply to cases where the offence committed is a socio-economic offence or where the offence is committed is committed against a woman or a child below the age of 14 years. Also once the court passes an order in the case of 'Plea Bargaining' no appeal shall lie to any court against that order. Now the question is will it work in Indian Judiciary? Do we need this? Are we equipped to deal with this new facet? This article makes an attempt to analyze the concept of 'Plea Bargaining', its necessity, its drawbacks and tries to find out the feasibility of this new idea.

'Plea Bargaining' can be defined as pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution. The Wikipedia Encyclopedia defines it as to make an agreement in which the defendants plead guilty to a lesser charge and the prosecutors in return drops more serious charges. The object of 'Plea Bargaining' is to reduce the risk of undesirable orders for the either side. Another reason for the introducing the concept of 'Plea Bargaining' is the fact that most of the criminal courts are over burdened and hence unable to dispose off the cases on merits. Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes.

In other words, a 'Plea Bargaining' is a deal offered by the prosecutor to induce the defendant to plead guilty. 'Plea Bargaining' can be of two types. Charge bargain n and sentence bargain. Charge bargain happens when the prosecution allows a defendant to plead guilty to a lesser charge or to only some of the charges framed against him. Prosecution generally has vast discretion in framing charges and therefore they have the option to charge the defendant with the highest charges that are applicable. 'Charge Bargain' gives the accused an opportunity to negotiate with the prosecution and reduce the number of charges that may have framed against him. As far as sentence bargain is concerned, it happens when an accused or defendant is told in advance what his sentence will be if

he pleads guilty.

A sentence bargain may allow the prosecutor to obtain a conviction in the most serious charge, while assuring the defendant of an acceptable sentence. Therefore we can safely say that 'Plea Bargaining' is nothing but a contract between the prosecution and the defendant or accused and both the parties are bound by this contract. For most defendants the principal benefit of plea-bargaining is receiving a lighter sentence than what might result from taking the case to trial and losing. Another benefit which the defendant gets is that they can save a huge amount of money which they might otherwise spend on advocates. It always takes more time and effort to bring a case to trial than to negotiate and handle a plea- bargain. Incentives for accepting plea-bargaining, as far as judges and prosecutors are concerned are obvious. Over crowded courts do not allow the judges to try every case that comes before them. It also reduces the caseloads of the prosecutors.

History: It would be wrong to assume that the concept of 'Plea Bargaining' found favour of courts only in the recent past. In fact it is used in the American Judiciary in the 19th century itself. The Bill of Rights makes no mention of the practice when establishing the fair trial principle in the sixth amendment but the constitutionality of the plea-bargaining had constantly been upheld there. In the year 1969, James Earl Ray pleaded guilty to assassinating Martin Luthar King, Jr. to avoid execution sentence. He finally got an imprisonment of 99 years. More than 90 percent of the criminal cases in America are never tried.

The majorities of the individuals who are accused of a crime give up their constitutional rights and plead guilty. Every minute, a criminal case is disposed off in an American Court by way of a guilty plea or nolo contendere plea. In a landmark judgment **Bordenkircher V. Hayes**, the US Supreme Court held that the constitutional rationale for plea bargaining is that no element of punishment or retaliation so long as the accused is free to accept or reject the prosecutions offer. The Apex Court however upheld the life imprisonment of the accused because he rejected the 'Plea Guilty' offer of 5 years imprisonment. The Supreme Court in the same case, however in a different context observed that, it is always for the interest of the party under duress to choose the lesser of the two evils. The courts have employed similar reasoning in tort disputes between private parties also. In countries such as England and Wales, Victoria, Australia, 'Plea Bargaining' is allowed only to the extent that the prosecutors and defense can agree that the defendant will plead to some charges and the prosecutor shall drop the remainder. The European countries are also slowly legitimizing the concept of plea bargaining, though the Scandinavian countries largely maintain prohibition against the practice.

Plea Bargaining in India: To reduce the delay in disposing criminal cases, the 154th Report of the

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Law Commission first recommended the introduction of 'plea bargaining' as an alternative method to deal with huge arrears of criminal cases. This recommendation of the Law Committee finally found a support in Malimath Committee Report. The NDA government had formed a committee, headed by the former Chief Justice of the Karnataka and Kerala High Courts, Justice V.S.Malimath to come up with some suggestions to tackle the ever-growing number of criminal cases. In its report, the Malimath Committee recommended that a system of plea bargaining be introduced in the Indian Criminal Justice System to facilitate the earlier disposal of criminal cases and to reduce the burden of the courts. To strengthen its case, the Malimath Committee also pointed out the success of plea bargaining system in USA. Accordingly, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament.

The statement of objects and reasons, inter alia, mentions that, The disposal of criminal trials in the courts takes considerable time and that in many cases trial do not commence for as long as 3 to 5 years after the accused was remitted to judicial custody.. though not recognized by the criminal jurisprudence, it is seen as an alternative method to deal with the huge arrears of criminal cases. The bill attracted enormous public debate. Critics said it is not recognized and against public policy under our criminal justice system. The Supreme Court has also time and again blasted the concept of plea bargaining saying that negotiation in criminal cases is not permissible.

More recently in **State of Uttar Pradesh V. Chandrika** 2000 Cr.L.J. 384(386), The Apex Court held that It is settled law that on the basis of plea bargaining court cannot dispose of the criminal cases. The court has to decide it on merits. If the accused confesses its guilt, appropriate sentence is required to be implemented. The court further held in the same case that, Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced. Despite this huge hue and cry, the government found it acceptable and finally section 265-A TO 265-L have added in the Code of Criminal Procedure so as to provide for raising the plea bargaining in certain types of criminal cases.

While commenting on this aspect, the division bench of the Gujarat High Court observed in **State of Gujarat V. Natwar Harchanji Thakor** (2005) Cr. L.J. 2957 that, The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure and redressal and it shall add a new dimension in the realm of judicial reforms. This article would be incomplete if it does not discuss the flaws

that are hidden beneath the whole concept. No doubt, plea bargaining is nothing but a cover up the inadequacies of the government in dealing with each and every case that comes before it. It indirectly shows the incompetence of the traditional procedural laws.

Plea Bargaining in US The Sixth Amendment to US Constitution enshrines the fair trial principle. But it did not mention the practice of plea bargaining. However the US judiciary has upheld the constitutionality of this process. The classic case of adoption of plea bargaining is the case of assassination of Martin Luther King Jr. in 1969 accused James Earl Ray pleaded guilty to the murder of Martin Luther King Junior to avoid death penalty. He got 99 years of imprisonment. Today the Plea bargaining became a significant part of the criminal justice system in the United States; as the vast majority (roughly 90%)of criminal cases are settled by plea bargain rather than by a jury trial. In a criminal trial in the United States, the accused has three options as far as pleas are concerned: A) guilty, B) not guilty or C) plea of nolo contendere=(I do not wish to contend). At every minute, a criminal case is disposed off in a US court based on guilty plea bargained or nolo contendere plea.

As held in "Fox v. Schedit and in State exrel Clark v. Adams", the plea of "Nolo Contendere" sometimes called also "Plea of Nolvut" or "Nolle Contendere" means, in its literal sense, "I do not wish to contend", and it does not origin in early English Common Law. This doctrine, is also, expressed as an implied confession, a quasi-confession of guilt, a plea of guilty, substantially though not technically a conditional plea of quality, a substitute for plea of guilty, a formal declaration that the accused will not contend, a query directed to the Court to decide on pleaguilt, a promise between the Government and the accused, and a Government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of a particular case only.

Be it noted, that raising of plea of "Nolo Contendere" is not ipso facto, a matter of right of the accused. It is within the particular discretion of the Court concerned to accept or reject such a plea. However, if the Court accepts such plea, it must do so unqualifiedly. It is, therefore, clear that if such plea is once accepted, by the Court, the accused may not be denied, his right to raise such plea. The Court cannot accept such plea having rights of the accused and determination of facts on any questions of law. Of course, the discretion of the Court, if plea is accepted, has to be exercised in light of special facts and circumstances of the given case. It is, also held at times that such discretion vested in the Court has to be used only when special considerations are present. It is, also important to mention, at this stage that in the absence of statutory provisions to the contrary, consent of a prosecutor is not required as a condition for refusing the plea of 'Nolo Contendere' by

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the Court. And the fact that the prosecutor's consent is not generally required would not tantamount to non-consideration of his version or attitude. The Court is required to consider the prosecutor's version as an important factor in influencing the Court in deciding whether such plea should be accepted or not.

Upon the acceptance of a plea of "Nolo Contendere" for the purpose of the case in which such a plea is made, it becomes an implied confession of the guilt equivalent to a plea of guilty; that is the incidence of plea. So far as a particular criminal action in which the plea is offered is concerned, rather than the same, as of a plea of guilty, of course, it is not necessary that there should be adjudication by the Court that the party whose plea is accepted as guilty, but the Court may immediately impose sentence. This proposition is very well elucidated in "United States v. Risfeld, 340 US 914". However, it may be noted a new dimension was evolved in "Lott v. United States, 367 US 421", where the Court, after stating that the plea is tantamount to an admission of a guilt for the purpose of the case, added that the plea itself, does not constitute a conviction, and hence, is not a determination of guilt. As found from some of the judicial pronouncements, it is beyond the purview of the Court once a plea of "Nolo Contendere" is needed to make in adjudication to the guilt of the accused. The plea of "Nolo Contendere", barring a few percentages of cases, has been recognised in the administration of criminal justice in many countries, including the United States, and has resulted into substantial reduction in the workload of the criminal justice system. Such a plea, it has been stated, has a success of practical aspect over the technical one. As there is no possibility of punishment or retaliation so long as the accused is free to accept or reject the prosecution offer. This is the rationale behind the US Supreme Court‘s judgment in Bordenkircher v Haynes. While accepting the constitutionality of the plea bargaining, the US Supreme Court upheld the sentence of life imprisonment to the accused, who rejected the plea guilty offer in return to 5 year imprisonment. The US apex court of course did not rule out the possibility of duress the accused might suffer to choose the lesser of two evils.

Plea bargaining was initially not favored in colonial America but it gained increasing acceptance with the rise in population by which courts became overcrowded, and trials became lengthier. The first case of US Supreme Court noticed in this regard is Brady v. United States. In this case the Supreme Court held that merely because the agreement was entered into out of fear that the trial may result in a death sentence, would not illegitimise a bargained plea of guilty. The U.S. Supreme Court has approved practices such as plea bargaining when properly conducted and controlled. By the twentieth century, guilty pleas dominated the majority of criminal cases. Almost every criminal case is now conducted by Plea bargaining and today it is often said that the American Criminal Justice would collapse if plea bargaining is removed from it. In U. S, it is a deal struck between

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prosecution and defense. It is much broader and fairness is writ large over it. Voluntariness and judicial scrutiny are two important aspects. The courts have been given a very vital role to play and it has to see that the entire thing is voluntary and the accused is given the protection of secrecy and all the parties may participate freely and no one is subjected to any coercion or duress of another. Harvard Law School Discussion paper has, recently concluded with: Higher levels of crime and a greater social emphasis on ensuring that guilty individuals are punished lead to a greater use of plea bargaining, while lower levels of crime and a greater social emphasis on ensuring that innocent individuals are not punished leads to less use of plea bargaining.

RESEARCH OF THE LAW COMMISSION:

The Law Commission of India advocated the introduction of Plea Bargaining in the 142nd, 154th and 177th reports. The 142nd Report set out in extenso the rationale and its successful functioning in USA and manner in which it should be given a statutory shape. This Report recommended that the said concept be made applicable as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Code. It was also recommended that plea bargaining can also be in respect of nature and gravity of the offences and the quantum of punishment. It was observed that the said facility should not be available to habitual offenders and to those who are accused of socio-economic offences of a grave nature and those accused of offences against women and children. The 154th report recommended dealing with huge arrears of criminal cases. This recommendation of the 154th Law Commission Report was supported and reiterated by the Law Commission in its 177th Report. The Report of the Committee on the reform of criminal justice system, 2000 under the Chairmanship of Justice (Dr) Malimath stated that the experience of United States was an evidence of plea bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice. In its report, the Malimath Committee recommended that a system of plea-bargaining be introduced into the criminal justice system of India to facilitate the earlier resolution of criminal cases and reduce the burden on the courts.

Process of Plea Bargaining: Amendment to Criminal Law The process of plea bargaining was brought in as a result of criminal law reforms introduced in 2005. Section 4 of the Amendment Act introduced Chapter XXIA to the Code having sections 265 A to 265 L which came into effect on 5th July, 2006 The CrPC Chapter XXI A, allows plea bargaining to be used in criminal cases where: 1. Plea-bargaining can be claimed only for offences that are penalized by imprisonment below seven years. 265 A 2. If the accused has been previously convicted of a similar offence by any court, then he/she will not to be entitled to plea bargaining. 3. Plea-bargaining is not available

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for offences which might affect the socio-economic conditions of the country. 4. Also, plea-bargaining is not available for an offence committed against a woman or a child below fourteen years of age 265 L. The opportunity of plea bargaining is not acceptable for accused in serious crimes such as murder, rape etc. It does not apply to serious cases wherein the punishment is death or life imprisonment or a term exceeding seven years or offences committed against a woman or a child below the age of 14 years.

Offences affecting the socio-economic condition of the country: The Government Order issued in 2006 explains emphatically that this process is not available in the offences affecting the socio economic conditions of the country. Thus there is no plea bargaining for accused, who are charged with offences under the enactments such as, Dowry Prohibition Act, 1961, the Commission of Sati Prevention Act, 1987, the Indecent Representation of Women (Prohibition) Act, 1986, the Immoral Traffic (Prevention) Act, 1956, Protection of Women from Domestic Violence Act, 2005, Provisions of Fruit Products Order, 1955 (issued under the Essential Commodities Act, 1955), the Infant Milk Substitutes, feeding Bottles and Infants Foods (Regulation of Production, supply and distribution) Act, 1992, Provisions of Meat Food Products Order, 1973 (Issued under the Essential Commodities Act, 1955), the SC and ST (Prevention of Atrocities) Act, 1989., Offences mentioned in the Protection of Civil Rights Act, 1955, Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000, the Army Act, 1950, the Air Force Act, 1950, the Navy Act, 1957, the Explosives Act, 1884 and Cinematograph Act, 1952. For the crimes under 16 laws there is no provision for plea bargaining. Where the offences are compoundable, the process of plea bargaining may not add any improvement. Because of these limitations and many charges were kept beyond scope of the process of plea bargaining, a very few sections of crimes besides petty cases like a scuffle, misappropriation of accounts, forgery, defamation, illegal threat, rash driving, food adulteration and other offences can be solved with mutual consent of both the parties using the law of plea bargaining. Though disputed the offence of causing death by negligence, mostly the accidental deaths are negotiated under this process.

CONCLUSION:

This disputed concept of Plea Bargaining is more a mechanism of convenience and mutual benefit than an issue of morality, legality or constitutionality. There is an inevitable need for a radical change in criminal justice mechanism. It may be a welcome change but only when there is possibility of swift and inexpensive resolution of cases. If the sole purpose of criminal justice system is to rehabilitate criminals into society, by making them undergo specified sentences in prison, then plea bargaining looses most of its charm. Whether it is known or not, plea bargaining

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is being practiced by the various stakeholders of crime and criminal justice system. Putting this process under judicial scrutiny opens up the possibility of fair dealings in these bargaining. In the present atmosphere plea bargaining is inevitable component of adversarial system. However, to make use of the available process and to secure the gains from these reforms, the plea bargaining process could be successfully used, for which the police, judiciary and the bar need to understand it in first place, and try to adopt. Defending Advocates should encourage the litigant to opt for the plea bargaining rather than to treat the plea bargaining as threat to their profession. It is obvious that the capacity building of police and judges should be the high priority and a pre-requisite for experimenting the plea bargaining. It can be given a chance of survival. From the experience in US it can be said that the plea bargaining remains a disputed concept and a doubtful practice. As the overloading of courts with piling up of criminal cases is threatening the foundations of the system, the plea bargaining may be accepted as one of the required measures for speeding up caseload disposition. After giving a rigorous trial to this mechanism, there should be a thorough study of its working, its impact on crime rate, conviction rate, and ultimately how the rule of law is affected.

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MIUSE OF ANTI DOWRY LAW IN INDIA BY WOMEN

- *Vaishnavi Gupta & Sourodip Nandy*

INTRODUCTION

Dowry means any valuable or any property which is given by one party to another party to the marriage or by the parents of the parties to the marriage. It is laid down in the penal provision that when a woman is harassed where such harassment is with view to coercing her to meet any unlawful demand for any property or any valuable security, shall be liable. In the ancient India the concept of dowry was sanctioned by the Manu, in those times the concept of dowry was in more prestigious form as it was associated with Brahman caste. In the ancient times the dowry was given in the form o valuable gift by the girl's father and brother so that she can be financially independent. It was also noted that the dowry was only given to the bride and not to the husband or her in-laws.

The current concept of dowry is totally connected to greed or malafide intention of the husband and also of in-laws to extract more and more money from the bride's parents. Dowry is one of the biggest social evil which is faced by our country, and should not be tolerated by any civilized social and should be eradicated by every effort. Nowadays the anti dowry laws are misused by the women, through loopholes left in the law, in order to fulfil their evil motive and these set of laws are non- compoundable offence.

NEED FOR RESEARCH

Anti dowry laws have been enforced to protect women against domestic violence that they face at home. Though a lot of scholarly work have extensively written about the need to broaden the scope of anti dowry law, there is paucity of research on the issue that these laws have some evident loopholes that need to be corrected. These loopholes enable the dowry law to be twisted to exploit innocent members of the family where no violence or ill treatment has occurred. The probable reasons are extortion by the wife, extra martial affair or the fact that they are not happy with their marriage and wish to extract some money from the family and leave them. These issues are seldom talked about and there is little or no authoritative literary works available under subject. There are no reliable public records available on the extent of misuse of anti dowry laws, let alone conclusive data.

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Hence, there is a need to obtain data and make suitable interpretation so as to fill the gaping void left by the legal fraternity. This research is very important to provide a well rounded perspective into anti dowry law.

RESEARCH METHODOLOGY

The quality and value of research depends upon the proper and particular methodology adopted for the completion of the research work. The methodology of this thesis can be described as 'doctrinal'. Doctrinal research is described as 'research into the law and legal concepts'. In that context, this project presents research into different acts, statutes and law providing analytical study on settlement of dispute outside courts through civil procedure code. Thus, this project researches the law by analysing legal decisions and legal instruments, such as statutes, and judicial decisions-making in order both to identify legal practice and legal principles and draw a conclusion.

RESEARCH QUESTION

1. What are the laws implemented for prevention of Dowry?
2. What is the extent of abuse of anti dowry law in India?
3. What changes could be brought to stop the misuse of anti dowry law in India?

LITERATURE REVIEW

Here are some research articles which I have referred.

1. "Misuse of Anti-Dowry laws – A dark side of marriage" by Soumi Chatterjee and Dr. Pankaj Dwivedi – in this paper the author has done critical analysis of the anti dowry laws and its misuses. The author has also given the effects of the misuse of dowry law in his paper.

2. "Anti Dowry laws- Use or Misuse" by Jitendra Gautam –In this article the author has talked about dowry and its pros and cons. He has talked about how women misuse dowry laws.

3. "Laws against domestic violence: underused or abused? From Manushi, A Journal about women and society", by Madhu Kishwar – In this the author has given a background of the laws which are enforced to protect women against such violence by husband or his family.

FINDINGS OF THE RESEARCH

1. What are the laws implemented for prevention of dowry?

The first and the foremost law in support of anti dowry law in India, is the Dowry Prohibition Act, 1961. Dowry is defined in section 2[173] of Dowry Prohibition Act, 1861. In case of *Arjun Dhondiba Kamble v. State of Maharashtra*[174] in this case the harassment or cruelty done by the husband does not amount to dowry. In this case the demand for property and valuables was not for the consideration of marriage, so it will not amount to the offence of dowry. So here the appellants were not guilty under section 304-B, which talks about the offences relating to dowry death but they will be guilty under section 498-A[175] of IPC. In the case of *Rajeev v Ram Kishan Jaiswal*[176] the court held in this case that the property which is given by the parents of the bride and are not in consideration to marriage will also be in connection to marriage and will be taken as dowry.

Section 3[177] of Dowry Prohibition Act, deals with the penalty for the offence of dowry. In the case of *Pandurang Shivram Kawathkar v. State of Maharashtra*[178]the court held in this case that asking for dowry before the marriage is an offence under Dowry Prohibition Act. Section 4[179] of Dowry Prohibition Act, deals with the penalty for demanding dowry. In *Bhoora Singh v State of Uttar Pradesh*[180]the court held that there was demand for dowry and hence was guilty under section 4 of Dowry Prohibition Act.

Provisions under Indian Penal Code relating to dowry offences. Section 304 B[181] deals with dowry death. In *Vemuri Venkateshwara Rao v. State of Andhra Pradesh*[182]in this case the court has laid down some guidelines which has to be fulfilled to apply section 304 B they are-

- Demand of dowry and harassment has to be done by thee accused

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[173] "dowry" means any property or valuable security given or agreed to be given either directly or indirectly—(a) by one party to a marriage to the other party to the marriage; or(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person,

[174] 1992 SCC BOM 80

[175] Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

[176] 1994 Cri LJ NOC 255 (All)

[177] If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

[178] 2001 Cr LJ 2792 (SC)

[179] If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees.

[180] 1993 Cri LJ 2636 All

[181] Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

[182] 1992 Cri. LJ. 563 A.P

- Deceased had died
- Death of the deceased must be within 7 years of marriage and unnatural circumstances

Section 498A[183] deals with the cruelty by husband and relatives. In *Bhoora v State of Uttar Pradesh*[184] in this case the husband and relatives demanded for dowry and subjected his wife to cruelty for bringing insufficient dowry and burnt her down. The court held that the appellants were guilty for the offence committed under section 498Aof IPC.

Section 113A[185] of Indian Evidence Act, deals with the evidences which has to be provided, that the act has been done, and the court shall presume that such act has been done and that person has caused dowry death. There should an evidence to proof that such act is relating to dowry, otherwise it can be misused and can be ill treated by women.

The main reason that the practice of dowry cannot be eliminated because of the psychology, personality, belief and mindset of Indians. This social problem can only be eliminated when there will be a change in the belief of the people. When people will understand that giving and taking of dowry is like selling your daughters and sons, may be from then the roots of the practice would start eliminating; and then only the practice shall get totally eliminated but that period seems to be very far off.

2. What is the extent of abuse of anti dowry law in India?

In recent years, the criminal law have undergone some changes to provide protection to women and new enactments have been made. But unfortunately the remedy is becoming worse than the disorder, which is now a well known fact as the dowry laws have failed to stop the terrible crimes for dowry or dowry deaths. The terrible nature of the laws under dowry does nothing but it helps the unlawful execution. As these laws are non compoundable and non bailable, the chances of settlement between the spouses after the process of litigation are not possible. Dowry in India is so common that almost 95% of the cases filed for anti dowry in India is based on the laws which have been proved wrong in the court of law. Considering the extension of the misuse of this law, Hon'ble Supreme Court of India has termed the abuse of these laws as "Legal Terrorism".

The unfair nature of these laws are evident from the fact that unlike other laws in India, the burden

[183] Supra 7
[184] Supra 8
[185] When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

to prove deceased lies on the accused; this means that as soon as the complaint is made, and whichever persons are named in the complaint are accused in the eyes of law.

Section 498A of the IPC, is a criminal law in which "the side of wife and wife herself can charge husband or the relatives of the husband for physical or mental cruelty".

Hon'ble Supreme Court and various High Courts have seen this time and again and this made them concern over this growing danger of misuse of the provisions of dowry and cruelty laws which may cause a legal terrorism.

The Hon'ble Court in *Balbir Singh Vs. The State Of Punjab*[186] held that the amendments which were introduced to the penal code are for eliminating the social evil- Dowry, and these provisions cannot be allowed to misuse those provisions by wife or parents for reasons other than cruelty or dowry. Nowadays the wives unnecessarily torture their husband by making false implications to harass and to blackmail their husband and also his relatives. The motive behind it is just to earn money by defaming innocent person. Justice J.D Kapoor said that 'the misuse of the provisions has extend so much that it is hitting the main roots of marriage and has proved that it is unhealthy for the society at large'. In *Jasbir Kaur v State of Haryana*[187]the court held that an alienated wife can go to any extent to bind the husband's side with false allegations.

In *Kanaraj vs. State of* Punjab[188]the court observed that the realtives of the husband cannot be held guilty for the fault of the husband. To rope the relatives of the husband to the offence which they have not committed should be restrained.

In *State Vs. Srikanth*[189]the court observed that the restraining the family members who were not involved in the offence has to be lowered down. In *Mohd. Hoshan v State of A.P.*[190] the court held that when one spouse is guilty of cruelty or dowry then it depends on various factors like sensitivity and intensity of the crime and the background.

In *Savitri Devi v Ramesh Chand*[191] the court has stated that the provision made for the protection of women were with good intentions and women itself are misusing it for false implications. They are using these provisions against every person they aim to. In *Bhupinder Kaur and others vs. State of Punjab*[192] the court held that the accused have been falsely involved in the case. They were also not alleged for the demand dowry. And the allegations made were all vague. And hence they were not

[186] 1987 (1) Cr 76
[187] (1990)2 Rec Cri R 243
[188] 2000 CriLJ 2993
[189] 2002 CriLJ 3605
[190] 2002 CriLJ 4124
[191] 2003 CriLJ 2759
[192] 2003 CriLJ 3394

charged for the offence as the allegation was false. The allegation was made under section 498A of IPC. In *Sushil Kumar Sharma vs. Union of India*[193] the court held that the main object of the provision is to prevent dowry. But here in this case the complaints are not bonafide and have been filed by malafide intention. In this case the contention by the court was given that what are the measures which can be taken to prevent the abuse of anti dowry laws.

The provisions which are given for the protection of women are used by women in negative manner. It is the duty of the court to make sure that an innocent person does not suffer on any baseless or malicious allegations. In many cases there is no direct evidence is available to prove and at that time the court has to act on that given circumstantial evidence provided. In these cases the circumstantial evidences are taken into view.

3. What changes could be brought to stop the misuse of anti dowry law in India?

The provisions for dowry were made for the protection of women; as a shield, if the complaints are lodged under this provision, strict actions are taken against the accused. But the provisions have been frequently misused by many women by filing false cases, not only against their husband but also against the family of husband and even against small kids. "Section 498A of IPC is cognizable and non-bailable offence is used as a weapon rather than using it as a shield".[194] This is the simplest what a women can do to harass her husband and his relatives to get arrested under this provision.

The judges have ordered the police to not to arrest an accused directly, and will only arrest the accused after the approval of the magistrate. This rule was given by the court and will only apply to the cases whose punishments are more than 7 years.

The judgement of *Rajesh Sharma & Ors v State Of Uttar Pradesh* [195] needs to be analysed again to examine whether the court committed an error that resulted in misuse of the process of law. The court said that there is a tendency to bind all the family members under the allegations. The court said this because it was mentioned from the data of National Crime Record Bureau that there is widespread misuse of the law by women in India. The court in this case has given some safety measures to prevent misuse of law-

- Set up of family welfare committee in every districts
- Members in this committee shall be social workers and interested people of that source

[193] 2005(6) 266
[194] Arnesh Kumar v State of Bihar [2014(8)SCC 273]
[195] 2018 (10) SCC 472

- The police has to look into the consideration of the committee before making an arrest

In *Som Mittal v Government of Karnataka*[196] it was said that the appeallate court shall correct the judgement given by the lower court and not to go beyond that; mean the judgement should be limited to the fact and judgement given by the lower court.

Supreme Court observed that cases which are filed by the women under section 498A of the Indian Penal Code are not bonafide.

In the recent judgement given by the supreme court, *Nyayadhar v Union of India Ministry of Home Affairs*[197]the court held that the courts are there to protect harassed and their relatives who are not at all connected to the cruelty or dowry and are falsely alleged, by granting them anticipatory bail.

To prevent the misuse of law and to keep check on it, the prosecution agency should have been trained professionally. By appointing any specific committee will make things more complicated and can also attract corruption.

There are some grounds for disagreements between husband and wife-

- Women harass their husband to get sum of money
- Continuation of illicit relationship with her pre-marital boyfriend after the marriage or having extra marital affairs
- Trying to alienate husband and his family
- Taking away all the precious jewellery and other valuables without taking permission of her husband
- By defaming her husband and his relatives or by making false allegations against them
- Blackmailing the husband or taking large amount of money from husband

To stop the misuse of cruelty and dowry, legal action can be taken. The innocent, deceased can use legal safeguards against his wife who is misusing the law. Husband shall lodge police complaint alleging her for blackmailing, threat and false implications. Husband can also use a recording device to prove his innocence to the court and police. Husband should write a detailed statement of all the things proving his innocence to the police commissioner. Complaint should be filed proving his innocence. The police officer can also use lie detector to test the wife's allegation made towards her husband. This can be used as an evidence.

[196] (2008 (3) SCC 753)
[197] 2017 SCC SC 1648

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CONCLUSION

To restrict the social evil the anti dowry laws have been enforced by the state. These anti dowry laws are non- bailable and non- compoundable. Women use these laws as a shield to fulfil their malafide intention. They harass their husband and his family and as the laws are very harsh and strict, the police also do not verify the evidence and put them into the bars just on a complaint. Here, the fundamental rights of the husband and family also get violated, every time when wife files a complaint against husband for cruelty of demand for the dowry. The misuse of law doesn't held it to be void but some amendments has to be done to diminish this act of false allegations of cruelty and demand of dowry by their wives.

The state must also include a penal provision for such type of acts and she must be immediately imprisoned for a period of time. The main responsibility lies on the side of woman as these anti dowry laws are made for their benefits.

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MARAUDER OF DIGNITY, VIRTUE AND RESPECT: UNRAVELLING THE CONTEMPORARY FOLDS ON MANUAL SCAVENGING

- *Sonal Rawat*

ABSTRACT-

Caste continues to be the determiner of roles, rights and entitlements in modern India. It prevails to justify untouchability, rampant discrimination, gender-abuse and inhuman treatment. Manual Scavenging; a product of caste and gender-bias is a feudal-based practice, which has been prohibited with government and non-governmental intervention. However, the reality is contradictory to their intervention! Despite many efforts to eradicate this practice, the toll on the death of scavengers has been on the rise. How is this possible? This article tries to analyse whether the contemporary attempts are enough to tackle the marauder of dignity, virtue and respect. It also provides a sociological view-point on this issue, accompanied with an insight on the present implementation of the exclusive legislation i.e. 2013 Act. It strongly links the need for public discourse, with effective change in the socio-political setting.

INTRODUCTION

With the advent of modernity, civilisation, capitalism, education, political movements; there is an issue which staggers India up till now. Two legislations have exclusively dealt with this plethora of discrimination; however, we are still running around circles- constantly reaching back to the point where it all began!

What is Manual Scavenging? - Manual Scavenging is a civilised term used for cleaning gutters, septic tanks, removal of human excreta/excrement from public toilets and dry latrines- it is a source of survival for those 53,398 people, who are forced to earn their living without paying heed to their respect, virtue, dignity.[198]

This "job" has been termed as a caste-based exploitation and is prohibited by law around 25 years back.[199] Up to this date, many Manual Scavengers are employed directly or indirectly through government agencies; despite the apathic job being deemed illegal.

[198] Breaking Free: Rehabilitating Manual Scavengers - UN India, UNITED NATIONS, Available at https://in.one.un.org/page/breaking-free-rehabilitating-manual-scavengers (last visited Jul 20, 2019)
[199] Swapnil Tripathi, "*The Dignity and Rights of Manual Scavengers in India*" OHRH, 2019 https://ohrh.law.ox.ac.uk/the-dignity-and-rights-of-manual-scavengers-in-india/ (last visited Jul 18, 2019).

Every Five days, one person dies while working as a "manual scavenger". [200] In the Capital alone, there have been 17 cases of death in the last 6 months. This statement was made by Manhar Zala, Chairman of the National Commission for Safai Karamcharis. Generally, these deaths are listed as general accidents, and not given stringent consideration.

Gross violation of Dignity, virtue, self-esteem

Article 17 of the Constitution of India abolishes the continuance of the practice of Untouchability.[201] Can Manual Scavenging be coupled with untouchability? A livelihood that is deemed as deplorable and menial by many people (especially those of middle and upper castes); it should be associated with untouchability. Scavengers are shockingly, till date denied basic access to services and not allowed to enter places of worship.

Manual Scavengers are treated in an undignified manner; often termed as "Bhangi", "Harijan" and "Chamar". Bhangi is a derogatory name; which means "broken identity". In Northern India, scavengers are called as 'Bhangis' but in states down south, the term changes to Rellis, Madigas, Mehtars and more. [202]

Manual Scavengers are from caste groups, which pertain their position at the bottom of the caste-hierarchy. Manual scavenging is injustice akin to slavery, and promotes violation of their fundamental human rights. Sub-castes of Dalits (usually Balmiki or Valimki and Hela sub-caste) take up, or are forced into the vicious cycle of torture, disease and socio-economic exploitation. India is affected by the stratified- structural hierarchy that divides the society into different groups. 95 % of scavengers are Dalits, who are compelled to undertake this denigrating task under the umbrella of "traditional occupation"- even when they don't wish to. [203] One of the distinctive features of the caste system is the relationship between caste and occupation. Among the so-called scavenging castes; many of those are not even scavengers however they have to face the stigma or label of backwardness consequently. This association is referred to as indirect- manual scavenging. As BR Ambedkar rightfully critiqued Mahatma Gandhi's view-point/ideology towards scavenging and said *"For in India, a man is not a scavenger because of his work. He is a scavenger because of his birth irrespective of the question whether he does scavenging or not".* Kailash, an accountant, was hired by his village's panchayat to clean toilets as he was from the scavenging community. [204]

[200] *"Since 2017, One Manual Scavenger Has Died on the Job Every Five Days",* The Wire, 2018
[201] The Constitution of India, art 17, cl.1.
[202] B Ravichandran, *"Scavenging Profession: Between Class and Caste",* XLVI 18 EPW (2011)
[203] Safai Karamchari Andolan And Ors vs Union of India 2014(4) SC
[204] Shikha Silliman Bhattacharjee, *"Cleaning human waste: "manual scavenging", caste, and discrimination in India"* Human Rights Watch (2014) available at https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india. *PP-12.*

While we strive in protecting the dignity of women, with all these campaigns for empowerment, awareness for gender-neutrality and advocating against gender-discrimination. Manual scavenging is a gender- based occupation, with alarming rates of women being forced to balance their professional with personal lives; and juggle between cleaning excreta of dry latrines and their own-household jobs. Women are remunerated less in average to men; which showcases the pay-disparity amongst India's dirtiest profession also. Many women have reported that they have been denied regular wages, and often are compelled directly or indirectly through violence/threats to work by the local authorities. They are sometimes paid in daily rations of leftover food, grain, clothes, grazing livestock as compensation. The abuses suffered by the women, are severely harmful for their mental, reproductive and physical well-being.

The trauma of Manual Scavenging extends on to serious health risks also, as they clean human faeces and urine, that harbours variety of dangerous infections. Life-threatening diseases such as Hepatitis A, Roto-virus, meningitis,typhoid all contribute to the short-life of manual scavengers.

Manual Scavenging as a practice violates Article 1, 2(1), 23 (3) of the Universal Declaration of Human Rights (UDHR). Article 1 clearly mentions that all human beings are born free and equal in dignity, and there should be spirit of brotherhood.[205] Article 2 states that everyone is entitled to all the rights and freedom, without any kind of distinction. Manual Scavengers are not even accustomed to basic rights.

Brief outline of "Efforts" to eradicate Manual Scavenging

Protection of Civil Rights Act,1955 (untouchability- offences Act,1955) provides punishment for the practice of untouchability; and extends to punish prevention from entering any public worship places, denial of access to any public place, refusal of admission to any hospital, educational institution. Section 7 A of the said act exclusively mentions the act 'scavenging'. It clearly states 'compelling a person on the group to do any scavenging or sweeping or to remove any carcass etc' is punishable.[206] Gobichettipalayam Municipality became the first body to ban the monster of Manual Scavenging.

The Employment of Manual Scangers and Construction of Dry Latrines (Prohibition) Act, 1993- A resolution was passed to the centre (by six states), under Article 252 of the Constitution for the urgency of a law that dealt exclusively with Manual Scavenging. This Act of 1993 targeted the employment of scavengers.[207] Unfortunately, it turned out to be like a dead letter! It was riddled

[205] Universal Declaration of Human Rights 1948 adopted by United Nations.
[206] *Sec 7A*, Protection of Civil Rights Act [PCR], 1955
[207] The Employment of Manual Scangers and Construction of Dry Latrines (Prohibition) Act, 1993

with loopholes, and was only limited to those six states that passed the resolution to the centre.

The prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013- This legislation served as a successor to the 1993 law and it evidently prohibits the employment of people as "manual scavengers It also lays down the procedure for the rehabilitation of the workers- which includes alternative employment, financial assistance.

What does the act prohibit? It prohibits the employment of a manual scavenger. Secondly, it prohibits the employment of any person- who is not identified as a manual scavenger, but an individual which is involved in hazardous cleaning. What is the scope of "hazardous cleaning"? Hazardous cleaning is referred to as manual cleaning without protective gear and other safety equipment of a sewer or a septic tank.[208] Under its jurisdiction, it has also advocated forbiddance on the construction of insanitary latrines.

Local authorities have 'supreme power' (i.e. municipalities, panchayats, cantonment boards or railway authorities) - to conduct surveys to identify insanitary latrines and manual scavengers. Self-identification as a mechanism, is also given weightage under the legislation. State Governments are also administered an important role, in appointing inspectors for examination and seizing relevant records. Establishment of Central- State monitoring committees and "vigilance committees are declared as mandatory. This Act also recognised the need for a statutory body- i.e. The National Commission for Safai Karamcharis.

It has also facilitated the owners/ occupiers of an insanitary latrine to demolish or convert at his/her own cost- this provision was subjected to a few exceptions, with the state government having the ability to intervene in providing assistance for demolition.

Rehabilitation was the primary objective, that the act strived to tackle. It listed that all Manual Scavengers will be rehabilitated with one-time financial lump-sum, to support themselves and their children, also a residential plot with assistance for constructing a house. Livelihood skill training would be provided for any nominated member of the family, which will be supported by a monthly stipend. Alternative occupation would also be necessitated, with the grant-in aid of a subsidy or a concessional loan.

What went wrong? - The Act 2013, does not mention any provisions related to deaths, nor talks about compensation after their death. In 2014, the Supreme Court realised the hazards of manual cleaning of manholes, septic tanks and declared Rs 10 lakh rupees as a sum for compensating a worker's death. [209] This is not as straightforward, as the procedure becomes burdensome, with the

[208] The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013
[209] Kanthi Swaroop, *"India's manual scavengers: Ugly truths of unsanitary sanitation work an open secret, law needs better enforcement",* First post, 10 May 2019

victims losing their sole source of livelihood and self-esteem. The legislation likewise doesn't define "safety equipment", which leads to various mis-interpretations. Railways; a major offender of the Act has been exempted from the Act. It fails to recognise public authorities like the Indian Army, Police or Indian Railways as signatories.

The issue of Manual Scavenging is linked with insanitary latrines, however the gravity of the two are disparate. [210] Occasionally, manual scavenging is treated as merely a 'sanitation issue'. In reality, it is much broader than sanitation, and wrecks a citizen's elemental fundamental rights.

The municipalities have commercialised the value of human manual cleaners- treating them as an object; as they escape their liability to provide the workers safety gear, and choose to avoid compensation through outsourcing. Convictions are nil!

The present legislation should be expanded, to include other 'hazardous activities' as it is only limited to the scope of direct handling of human excreta. It should be expanded, as to provide a detailed explanation in order to tackle this 'human dignity' issue. [211]

Non- governmental Organisations and Human Rights Activists- Since the late 70s, Manual Scavenging has been resisted by activists, organizations and protestants.

"Sulabh" was founded by Bindeshwar Pathak, which focused on sanitation and scavenger-free innovations. A new concept has arisen, with construction of public and 'eco-san' toilets with laundry, urinal facilities.[212]It also supports vocational training for scavengers- Nai Disha, so that they can compete in open-job markets. 35,000 people have been employed directly, through their social reforms and waste disposal measures; also 240 towns have been reported to be scavenger-free.

Safai Karamchari Andolan is a group of activists that surfaced in 1994, by Activist Bezwada Wilson. Their activities included campaigning for the demolition of Pit latrines and the socio-legal concerns regarding manual scavenging. Bezwada Wilson, believes that the figure of employment as manual scavengers will soon be zero, however for that to be successful it should be discussed publicly. "Once people realize that its slavery, they want to stop" he said.

Jan Sahas, a group in Madhya Pradesh have freed about 20.000 women from the chains of manual scavenging, and it highlights the limiting scope of manual scavenging for women in particular.[213] It aims to abolish all kinds of exclusion including indirect forms of slavery, violence and

[210]United Nations Development Programme and UN Solution Exchange (Gender Community of Practice), SOCIAL INCLUSION OF MANUAL SCAVENGERS, A REPORT OF NATIONAL ROUND TABLE DISCUSSION (2012) pp- 7-8.
[211] Manoj R Nair, "*we-need-to-expand-the-reach-of-the-manual-scavenging"*, Hindustan times, November 5, 2018,
[212] *Sulabh International*: Social Service Organisation, Sulabh International | Social Service Organisation, Available at http://www.sulabhinternational.org/ (last visited Jul 22, 2019).
[213] "The women who refuse to do India's dirtiest job", JAN SAHAS (2019), Available at https://jansahasindia.org/the-women-who-refuse-to-do-indias-dirtiest-job/ (last visited Jul 23, 2019)

discrimination especially related to caste and gender. An example of Ranikumari Kholkar shows the initiative started by Jan Sahas; she is an epitome of power, confidence and free-will. She is a lawyer, representing other members to be aware about their rights and stand up!

The International Labour Organization (ILO) Convention No. 111 deals with discrimination in respect of employment and occupation.[214] India has ratified this, and ILO has treated Manual Scavenging as a discriminatory occupation on the basis of social origin. ILO cannot work on the complaints received by NGOs on social issues; it is only confined to employment and occupation.

Different UN Agencies have taken assorted entry points, as UNICEF has taken manual scavenging as a water and sanitation issue; whereas other agencies like WHO, UN Women, UNDP have extended its scope to gender discrimination, health, issue of rights of scheduled caste/scheduled tribe, and lastly human rights issue. [215]

Personal Accountability- not a piece of cake

The 2013 Act and its provisions direct the responsibility to the employer- however the employer is not identified in many cases. Recently, there was a report about the Delhi High Court, putting the onus on the state**. It claimed that not only the Act is being implemented in its right cause, there have been no punishments.** The Social Justice and Empowerment Minister of State, Ramdas Athawale stated that "there have been no reports from any state/union territory regarding conviction in such cases". [216] In a similar verdict, the municipal administration and water supply minister S P Velumani warned that stern action would be initiated against individuals and private contractors perpetrating manual scavenging.[217]

The district magistrate, under the jurisdiction of the Local Authorities are supposed to implement the provisions of the Act. One recommendation was to fix personal accountability on the account of breach of duty and direct violation of the law. This should be upped, as with the rise in corruption, dereliction of roles and responsibilities, personal interest- the common masses are suffering! However personal accountability is not that simple- many a times local bodies rebuff their obligation by transferring the operations/ outsourcing operations to private contractors.

In 2018, the Delhi Jal Board and other local authorities had denied their inclusion in any sphere, in the case of five dead men, who were identified as manual scavengers, and died while cleaning a

[214] UNDP, s*upra* note 14 2.5 8
[215] UNDP, *supra* note 14 2.5.2
[216] Anurag Bhaskar, *"Someone has to go to jail: Delhi HC must put onus on state for manual scavengers' death"* The Print, July 17 2019
[217] *"Use-of-manual-scavengers-will-attract-stern-action-says-min",* THE TIMES OF INDIA, July 19 2019

sewage tank.[218] The 2013 Act, as mentioned above emphasises the importance of prohibition of manual scavenging, under any local authorities' jurisdiction. All the five workers were not equipped with any safety gear, and were asphyxiated by the dangerous gases in the tank. Employees of the Delhi Jal Board have escaped prosecution, for the deaths occurring in sewage tanks, pipes.

In Rajesh & Anr vs Delhi Jal Board & Ors, 2018, it was strictly stated that there is absolute prohibition on the employment for risky cleaning of sewage pipes under section 7 of the 2013 Act. This automatically burdens the violator with strict liability irrespective of his unforeseen negligence. The court further observed that DSIIDC should have taken the necessary precautions, and any mishap would hold DSIIDC accountable on part of its lapse. [219]

How will the blame be passed on so easily, to the local authorities, municipal corporations as they intend to escape from their liability through the loopholes of the political and social system? From Administrative/civil servants to the ministry, who can we pinpoint? The law requires the 'principal employer' to be investigated, which tries to tackle the transference of liability. However, in many cases, the culprit escapes the law.

Machinery- a boon or a bane?

The Chief Minister of Delhi in association with Delhi Jal Board, has introduced 200 sewage-cleaning machines. These are specially designed to eradicate Manual Scavenging- as they are reported to be able to service many areas, where manual cleaning is preferred.

Bandicoot procured by the Indian Oil Corporation, is an intelligent apparatus which does not only clean the manhole, but removes the slit and debris. It has the astonishing capacity to extend up to 350-400 manholes per week. This will be available in South-Indian Cities namely- Coimbatore, Chennai.[220]

Tamil Nadu State municipal administration minister said "We are implementing the Prohibition of Employment as Manual Scavengers and their rehabilitation Act, 2013 strictly. The local bodies use only amphibian equipment to clean open canals with width less than 3m."

Even if one believes that Delhi, Kerala and Tamil Nadu have found their solution, what about other places? Surely, states and local authorities don't have an elixir that can produce machinery suitable for all hazardous and inhuman conditions- in all parts of India. While many arguments support

[218] Vijayta Lalwani, *"'No jurisdiction': Delhi authorities pass the buck on deaths of five workers cleaning septic tank",* Scroll.in, 2018
[219] Rajesh And Anr vs Delhi Jal Board and Ors W.P 7030 HC. 2012
[220] Mamtha Asokan "*'Bandicoot' to put an end to manual scavenging by cleaning sewers: Chennai News",* Times of India, July 15 2019

machinery and believe its power to magically eradicate manual scavenging; some areas will require manual cleaning only. "Septic tanks are designed badly. They have engineering defects which means that after a point, a machine cannot clean it." [221] This statement was made by A Narayanan, director of Change India. Many cities do not have sewerage that extends on the whole city, and this demands manual human intervention. Solid waste is shamefully dumped in open drains, which further accentuates the need for manual cleaning, as machines cannot clear.

The shift to mechanism is supported, yet we need to look at the larger picture- which requires a proper introspection of structural complications that exist hitherto.

Provision of Safety Gear- a Necessity

Availability of Safety Gear shouldn't amount to luxury, it should be treated as necessity. In a report, 82 % of the deaths are caused due to lack of structural execution- which means lack of safety equipment and denied access to necessary safety gear.

Out of the "grand budget" allocated for Swachh Bharat Abhiyan Campaign, an inadequate fraction was set aside for safety equipment for "manual scavengers" and sanitation workers. With corruption, and other evils, out of that insufficient amount also- only 100 workers would have gotten their equipment.

The Prohibition of Employment as Manual Scavengers and their rehabilitation Act 2013 protects both municipal employees and workers hired by the local authorities, private contractors or any employer. [222] Municipal agencies are expected to provide safety gear; however, this does not turn out to be the reality, as providing necessary safety equipment would increase their expenditure.[223]

Recently, the Union Housing and Urban Affairs Ministry has advised all states to set up emergency response sanitation units (ERSU). This would include workers wearing protective- safety gears. [224] The official letter recommended that the district Magistrate/ municipal commissioner would be posed as the responsible sanitation authority- that would set out the rules and regulations for the staff at ERSU. Sewer section experts would be selected and given due care, preparation - and hence would be the only people that would be permitted to enter sewers and septic tanks.

The Delhi Government is expected to provide 44 safety devices prescribed for manual cleaning of sewers and septic tank. "The list includes breathing apparatus, emergency medical oxygen

[221] Subhojit Goswami, *"Manual scavenging: A stinking legacy of suffocation and stigma"*, Down To Earth, September 11 2018, Available at https://www.downtoearth.org.in/news/waste/manual-scavenging-a-stinking-legacy-of-suffocation-and-stigma-61586 (last visited Jul 21, 2019).
[222] Act 2013, *Supra* note 13
[223] Manoj R Nair, *"we need to expand the reach of the manual scavenging law"*, Hindustan Times, 5 November 2018
[224] Special Correspondent, *"Sewer deaths: Centre calls for quick response units, The Hindu",* 16 July 2019

resuscitator kit, first aid box, gas monitors, full body suits, hand gloves, head lamps, helmets, body harness, gumboots, and safety torches, among others."

DMK MP Kanimozhi Karunanidhi stressed the need for safety gear for workers under Indian Railways. "Modernisation of the railways does not matter if the employment of manual scavengers continues. There are about 95,000 people engaged in the work through contractual employment without any safety gear," She stated, while requesting for funds. [225]

This proposed plan seems to be heading in the right direction, possible enough to convert manual scavenging into a dignified lifestyle; providing the workers their right to safety, health and liberty. It would take time, given the essence of inefficiency of the government with respect to the statistics from the implementation of the 2013 Act.

Why emphasis on rehabilitation is important?

The 2013 Act remains mainly on paper, and not by means through implementation. Rehabilitation for Manual Scavengers was introduced by the Ministry of Social Justice and Empowerment way before in 2007- through the rather vague scheme i.e. Self-Employment Scheme for Rehabilitation of Manual Scavengers (SRMC). [226]

Why are countless rehabilitation plans/ thought-provoking schemes coming out as flawed? Why aren't these named as "Holistic rehabilitation plan", or a plan which would reinstate their dignity, respect and a sense of livelihood all at once? These "carefully-devised schemes" are all about restoring their monetary aspects in life- compensation, pension, vocational training- only to earn a sense of livelihood. That's where it's wrong! Who will reinstate their fundamental rights under Article 14, 15, 17, 21 and 23 of the Constitution? Who would ensure that they would be respected and be living a dignified life?

Even if blame is posed upon the local authority, even if safety gears are given to all sanitation cleaners (manual scavengers). These workers will still work in the livelihood, trying to earn their necessities and working their way out to survive in this capitalist world. Discrimination will still persist; they will still be termed as "Bhangis" and other degrading terms. They will still symbolise filth and dirt.

The sanitation workers have to deal with people defecating in the open, which was forced upon and equalised them with bonded labourers. Basic human dignity is like a luxury for the sanitation

[225] Special Correspondent, "*Kanimozhi slams govt for employing manual scavengers in Railways",* The Hindu, 14 July 2019

workers, and they work for a meagre sum. Who would enjoy being part of this cycle of "Slavery"?

Rehabilitation Schemes are not accessible to the scavengers, due to low- level of education, lack of legal documentation (i.e. caste certificate, Aadhaar Card, Voter id card, ration card), caste-based discrimination. In Rajasthan, alternative employment was provided- dairy business; but their livelihood could not be sustained because their products could not be sold due to biases. Same situation is in southern states; where 'Madigars' are compelled to do 'odd cleaning' such as cleaning dead bodies, dead dogs, cleaning pundits' toilets.

Even coveted government sanitation jobs are not effective in eradicating Manual Scavenging, as six women scavengers have been declined jobs even though they fulfilled the requisites and eligibility criterion. While rooting for delayed justice, these women pursue their usual "jobs" i.e. taking up manual scavenging again. By facing the trauma of shattering aspirations, they are also struggling with their new found self- confidence now.

The public has to be sensitised towards, and the discourse has to be changed! There should be clear political and societal will to eradicate this type of torture- which thereby attacks the fundamental establishment of our constitution. Rehabilitation is essential for their families, and the whole community at large.

Who should be blamed? Searching for blame-worthiness

The government has recognised only 12,742 sewage workers in 13 states- reports have recently shown that this was a strong miscalculation, and many manual scavengers haven't been recorded either officially or unofficially. [227] 88 cases of death have been reported by the union government itself, which is considered to be a gross underestimation.

Even after one whole term of a cleanliness-driven government- that accounts for five long haul years; we're still reading articles, reports, essays, short-notes on this prevalent form of discrimination; that has been present long before India's Independence. Well, in that case- someone has to be blamed, finger must be pointed at someone- an entity, an organisation or merely we can blame the state. It's easy to pass on the baton, and unleashing one's liability. Have you ever paused for a moment, and thought well have I spotted a manual scavenger? Have you ever pondered upon their situation; them being targeted primarily from all kinds of ruthless discrimination?

Recently, four labourers died after being asked to clean a septic tank, by the Rohtak public health department. The workers had asked for safety gear, but as a result they were targeted with casteist

[227] The Wire, *supra* note 3

slurs.[228] Why would these workers stand up for their rights, if they are being suppressed by the common masses?

While Non- governmental Organisations are constantly protesting against the treatment of Manual Scavengers and demanding for Rehabilitation, their efforts are not turning out to be fruitful! Constraints on funds/resources and government support are making this battle against this evil one sided. Under-utilisation of resources allocated under a scheme, in-active approach by government agencies also are responsible in-effective implementation of plans, efforts by NGOs and Human Rights Activists. Politicians have worshipped the workers; however, they must realise that by doing an act such as washing their feet- is only glorifying the rampant practise.

CONCLUDING REMARKS

The death tolls are rising with every newspaper report, and much are left un-reported. The urgency for taking aid of machinery and technology, is inspired by western ideologies although the flagrant practice of manual scavenging will not be totally eradicated through this measure. On humanistic grounds, scavengers are entitled to protective gear, at the very least- it is their basic desideratum if not food and water! Awareness must be campaigned through common people. Spreading Awareness is the most influential weapon in today's media- dominated world! One might be wondering the degree of role that awareness plays in bolstering this grave issue. This issue is entrenched in the society, and is affecting the society as a whole. As citizens, we also need to be vigilant and step-up even if we come across such an activity in our neighbourhood. Rehabilitation for Manual Scavengers includes sustainable freedom, and subsequent alternative livelihood options which is not affected by the perils of bureaucratic, social and economic hiccups.

[228] "*Three labourers die while cleaning septic tank at colour factory in Uttar Pradesh's Hapur, civic issues times now",* Times Now, 20 July 2019, Available at https://www.timesnownews.com/mirror-now/civic-issues/article/three-labourers-die-while-cleaning-septic-tank-at-colour-factory-in-uttar-pradeshs-hapur/456588 (last visited Jul 23, 2019).

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THE TIE IN OF INTERNATIONAL TRADE AND AGRICULTURE WITH RIGHT TO FOOD

- *Shobhna Lochan*

ABSTRACT

The present paper tries to investigate the connection between the Agreements closed under the structure of the World Trade Organization (WTO), especially the Agreement on Agriculture, and the commitment of the Members of the WTO to regard the human ideal to sufficient sustenance to which they have submitted themselves by approving the International Covenant on Economic Social and Cultural Rights. In this paper, the effects of the evacuation of hindrances to trade in agriculture on the right to food has been analysed by the researcher at three dimensions. That is namely, macroeconomic level, microeconomic level and non-economic level. Impediments may be constituted towards development and jolt countries into enhancement structures which are not sustainable at the macroeconomic level. Transnational organizations are approbated by the configuring the global food supply chain, whose opportunity to act is expanded at the same time from the administrative apparatuses States may turn to are being restricted at a microeconomic level. Certain factors like the effect on environment and effect on health and nutrition cannot be overlooked in lieu with the economic factors. The author through the medium of this paper proposes certain approaches to accommodate trade with right to food, putting light on the disability of the global instruments to handle the absence of coordination between trade commitments and human rights obligations. The paper ends on a note wherein the countries are embraced to find the balance between trade agreements and right to food and they don't acknowledge endeavours under the WTO structure which would be inconsistent with their commitments to ensure right to food.

INTRODUCTION

The right to food[229] is perceived under Article 25(1)[230] of the Universal Declaration on Human

[229]The International covenant on economic social and cultural rights, which is a major human rights treaty adopted in 19, 1966 that includes a right to food, that body of experts, called the Committee on Economic, Social and Cultural Rights adopted a general comments, General comment number 12, that explained what the right to food was about. This general comment was published in 1999 and the committee on economic, social and cultural rights described what governments should do to discharge their obligations under the right to food.

[230]RIGHT TO ADEQUATE STANDARD OF LIVING-(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary

Rights[231] and under Article 11[232] of the International Covenant on Economic, Social and Cultural Rights[233]. Under these instruments, countries must look into existing access to sufficient sustenance, by keeping away from embracing measures which may bring about avoiding such access; they should secure the privilege to nourishment by receiving measures guaranteeing that ventures or people don't deny people of their access to satisfactory sustenance; at long last, they should satisfy the right to food, by professional effectively reinforcing individuals' entrance to and usage of assets and intends to guarantee their occupation. Likewise, 'at whatever point an individual or gathering can't, for reasons outside their ability to control, to appreciate the privilege to satisfactory nourishment by the methods available to them, Countries have the duty to satisfy (give) that privilege directly'. But just in the most remarkable conditions is the privilege to sufficient sustenance about the privilege to be sustained. It is principally about the privilege to nourish oneself in nobility, either by creating sustenance, or by picking up wages adequate to secure nourishment on the business sectors. The way to deal with global exchange dependent on the privilege to sustenance presents three explicit urban areas that oblige us to receive a progressively perplexing comprehension of the connection between the privilege to nourishment and exchange horticultural wares. To start with, such a methodology moves the point of view from total qualities – from the advantages of exchange for the nation all in all – to the effects of exchange on the most helpless and nourishment unreliable. Much the same as increments underway in any one nation are not adequate to battle hunger if, in that nation, a gathering of the populace does not have the acquiring capacity to purchase the sustenance which is accessible on the markets, the extension of volumes of exchanged merchandise isn't a response to hunger on the off chance that it leads, not to destitution decrease and diminishing imbalances, but rather to the further underestimation of the individuals who are not profiting from exchange and, rather, might be made

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social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

[231] The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations.

[232] 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.....2(a)To improve methods of production, conservation and distribution of food.....by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

[233] The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees economic, social and cultural human rights. Together with the International Covenant on Civil and Political Rights (ICCPR), it enacts in a binding framework the rights set forth in the Universal Declaration of Human Rights in 1948.

increasingly powerless in terms of professional career advancement. Second, the adoption of a human rights system to global exchange likewise prompts underscore the elements of cooperation and responsibility in the transaction and execution of exchange understandings. Third, the system dependent on the privilege to satisfactory nourishment contemplates, not just the need to guarantee an adequate admission of calories for every person, yet in addition the accessibility and right to food, i.e., containing the required micronutrients for the physical and mental advancement of the individual, and socially worthy. These measurements – the distributive effects, cooperation, and ampleness of foodstuffs accessible – are commonly missing from discourses about the effect of exchange on sustenance security. This report tries to bring them back in.

RESEARCH QUESTIONS

Question 1:

What are the challenges faced with respect to the accomplishment to the right of sufficient food?

Question 2:

How did the liberalisation of trade in agriculture affect the notion of right to food on different economic levels?

Question 3:

How can this phenomenon of trade be accommodated with the whole of right to food?

RESEARCH OBJECTIVES

1. To interpret the challenges faced with respect to the accomplishment of the right to food.
2. To understand that how free trade will affect right to food on both the microeconomic level and macroeconomic level.
3. To see whether the non economic level is equally affected if the trade is liberalised for the right to food.
4. To analyse unless adequately regulated and carefully sequenced, increased liberalization will benefit some but may marginalize many.

HYPOTHESIS

The sole contention of this paper is not to criticise any kind of views of any learned scholar. The only motive is to understand that has the right to food been implemented properly and if there are any loopholes in the whole of this right to food so is the World Trade Organisation alone responsible.

RESEARCH METHODOLOGY

The researchers have utilized only qualitative data collection tool. The researchers will adopt a doctrinal mode of research for this paper. the facts and laws relevant to this topic shall be acquired through different books and journals. The author has mainly depended on these laws, arguments by different scholars and analysis of this together to arrive at conclusions. Apart from these, the other sources of data collection are different articles of authentic journals and official charters of the organisations of United Nations regarding this topic.

RIGHT TO FOOD WITH WORLD TRADE ORGANISATION: WHAT DO THE LEARNEDS HAVE TO SAY?[234]

Olivier De Schutter, UN Special Rapporteur on the very right to food, contended as of late that an equivalent or more prominent reason for yearning is the issue of access to nourishment: such a large number of individuals are too poor to even think about buying the base measure of sustenance they have to counteract hunger. Regardless of whether nourishment supply is adequate, there will be hungry individuals except if arrangement producers address the issue of access to sustenance and make changes in pay dispersion and exchange strategies that are expected to guarantee that the human ideal to satisfactory sustenance is acknowledged by and by. An emphasis exclusively on expanding the supply of nourishment could prompt strategy decisions that aggravate hunger. The standard origination of nourishment weakness is that the total population is developing at a rate that exceeds propels in sustenance generation. Environmental change, lessening rural profitability development, and contending interest for nourishment as a wellspring of bio-vitality are altogether referred to as causes. Be that as it may, this ordinary view, while not wrong, is deficient and misses a huge reason for food insecurity. The hungry are ordinarily poor and debilitated, coming up short on the buying capacity to acquire sustenance notwithstanding amid times of generally excess. Most of the one billion hungry individuals on the planet are nourishment makers, for example, arrive less workers or little homestead holders. However they stay hungry on the grounds that they have neither adequate land to create enough sustenance for their family units nor adequate pay to buy

[234] The Right to Food and the WTO. (2009). Retrieved from https://carnegieendowment.org/2009/04/08/right-to-food-and-wto-event-1315

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nourishment to make up the shortfall.

Among the elements that add to this condition of hungry farmers is the agricultural trade framework, which empowers a supply of minimal effort nourishment on worldwide markets. He contended that exchange advancement compels the strategy space of governments to respond to hunger while it extends the extent of activity of the private part. He said this can be especially noteworthy in concentrated markets, which portray some agrarian subsectors. In spite of the fact that the present WTO round of transactions is named the "advancement round," changed exchange would not naturally profit creating nations or their little holder agriculturists, who are uncompetitive on world markets because of little plots of land, restricted innovation and feeble access to credit. To give them an opportunity to wind up focused, De Schutter encouraged that creating nations ought to be permitted to shield their agrarian areas from low-valued import floods, for instance through an uncommon protect component that would enable them to bring duties up even with expansive world value swings. This would likewise enable helpless nations to dodge unreasonable dependence on universal markets for nourishment, which he noted can be untrustworthy. Indeed, even those creating nations that can effectively spend significant time in farming in a more changed worldwide economy may find that this draws assets from youngster assembling and administrations areas, which may offer more noteworthy esteem, included and bring down value unpredictability than the agrarian segment. De Schutter closed by belligerence that when nourishment is seen as an essential human appropriate, as perceived under universal law, exchange assentions can be drawn closer in a decent manner, with a definitive objective being not an expansion in generally exchange volumes but rather a lot of approaches that upgrade the welfare of the most defenceless, including little scale agriculturists and the hungry.

Steven Schonberger of the World Bank contended for an increasingly positive appraisal of the worldwide agrarian exchanging framework, indicating simultaneous declines in world poverty and increments in world trade over the past half decade. He noticed that even nourishment makers are frequently net sustenance customers, acquiring sustenance for three to a half year a year after they have depleted their own harvests. Progression offers the hungry imported sustenance at lower costs than would be the situation with higher duties, he noted. Further, he addressed whether adaptability to utilize levies and other outskirt measures to secure ranchers would be utilized to profit the most nourishment shaky. Governments must choose which ventures to shield when utilizing exchange constraining approaches, a procedure which can be caught by elites. An administration which overlooks the poor in its household approach choices might be probably not going to support them while instituting exchange arrangements.

Gawain Kripke of Oxfam noted favorably that Professor De Schutter had titled his discussion

"From Malthus to Sen" and related himself with Amartya Sen's view that hunger is an aftereffect of debilitation as opposed to deficiency. He recommended that approaches should be assessed by whether they enable needy individuals to all the more likely state their entitlement to sustenance. He at that point swung to a discourse of up and coming chances to illuminate and impact the nourishment strategy of the new Obama organization in the US. Initially, he noticed that an exertion by President Obama to pick up exchange arranging specialist from Congress could open a discourse on the privilege to sustenance in US exchange procedure. Second, Kripke indicated the "Appetite Roadmap," an organized push by a few NGOs to progress more noteworthy and increasingly thorough US association in worldwide nourishment security issues. At long last, he communicated trust that the continuous discussions about improvement help change would result in more prominent union between organizations that are included with sustenance security and a grasp of the nourishment rights approach by all contributors.

RESEARCH QUESTION NO.1:

WHAT ARE THE CHALLENGES FACED WITH RESPECT TO THE ACCOMPLISHMENT TO THE RIGHT OF SUFFICIENT FOOD?

So as to distinguish which control of international trade is most helpful for the acknowledgment of the human ideal to satisfactory sustenance, we have to see obviously the idea of the dangers the privilege to nourishment is at present confronting. These dangers fall under two classes. In the first place, there emerges the inquiry whether, later on, agriculture will have the capacity to feed the planet, and whether every nation will have the capacity to sustain its populace, through a blend of nearby creation and nourishment imports. Populace development, joined with the change to more protein-rich eating regimens of developing nations which are prevailing in their battle against destitution, too an expanded challenge for the utilization of farmland between generation of yields for nourishment and for fuel, increment the weight on the supply side of the worldwide condition. Secondly, the assumption that exchange allows the effective exchange of sustenance supplies from surplus to deficits regions neglects to consider the wide contrasts in obtaining intensity of various areas, and the way that appetite and ailing health are by and large not the after effect of the absence of nourishment accessibility, yet rather of the failure for the poorest sections of the populace to approach sustenance at a reasonable cost. Under a speculative completely changed exchange routine, without exchange costs, nourishment items would stream not from surplus to deficiency areas, but rather from locales where sustenance is delivered at the most aggressive costs to districts where there is a dissolvable interest, i.e., where the acquiring intensity of the populaces is adequate, in contrast with different markets, including the residential markets of the source nation. It should

not shock anyone accordingly if certain nations are net exporters of food; while in the meantime have a huge section of their populace which is ravenous. Also, among the net-nourishment bringing in nations, an overwhelming reliance on sustenance imports may not be an issue for a few, since their incomes from fares are to a great extent adequate to make this arrangement supportable; conversely, for different nations, whose exchange balance is negative or relatively negative, being net merchants may not be economical. The most squeezing test we are confronting today – is one of openness of sustenance for poor people and the underestimated. Exchanging more sustenance won't encourage them on the off chance that they are avoided from generation and have no way to purchase the nourishment which touches base on the business sectors; and delivering more nourishment won't help them in obtaining sustenance if their livelihoods remain excessively low. The enquiry is whether the venture on which the WTO structure was manufactured – continuously bringing down the obstructions to exchange, regardless of whether as duties or non-tax boundaries – adds to these targets, or whether it might make them progressively hard to accomplish – and if the last mentioned, which measures can be taken to divert global exchange a bearing which is increasingly helpful for the acknowledgment of the privilege to sufficient nourishment. It is this inquiry that the paper addresses. The author shares the conviction of many that the present routine is extremely mutilated for industrialized nations, and that it ought to be repaired earnestly. Be that as it may, we initially can't abstain from making the more crucial inquiry of whether more exchange is an attractive goal, or whether the impetuses it makes for states to put into a fare situated model of agrarian advancement accomplish more harm than they achieve benefits.[235]

RESEARCH QUESTION 2:

HOW DID THE LIBERALISATION OF TRADE IN AGRICULTURE AFFECT THE NOTION OF RIGHT TO FOOD ON DIFFERENT ECONOMIC LEVELS?

The effects of the expulsion of hindrances to exchange farming on the privilege to nourishment are analyzed at three dimensions. At the full scale financial dimension, exchange advancement may establish an obstruction to broadening and bolt nations into improvement designs which are not reasonable; and it might build the weakness of nations because of their reliance on global exchange, in the meantime.

(1.) Shaking the circumstance of agricultural makers in certain developing nations.

(2.)At the miniaturized scale financial dimension, exchange progression adds to reshaping the worldwide nourishment store network in a way which favours transnational organizations, whose

[235] Schutter, O. D. (2009). International Trade in Agriculture and the Right to Food; Retrieved December 28, 2018, from https://library.fes.de/pdf-files/bueros/genf/06819.pdf.

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opportunity to act is widened at indistinguishable minute from the administrative apparatuses States may depend on are being constrained.

(3)In any case, the financial effects are not the only thing that is important. Global exchange agricultural products additionally impact affects nature, and on nourishment and health, which countries can't ignore.

In the international division of labour, trade liberalisation urges every nation to practice into the generation in which it has a similar favourable position. The guarantee of exchange progression is that by making motivating forces for makers from various States to have some expertise in the items or administrations in which they have a near preferred standpoint, it will profit all the exchanging accomplices, since it will prompt effectiveness gains inside every nation and to expand by and large dimensions of world generation. Augmentations of the established 'static' hypothesis of relative preferred standpoint recommend that financial development and neediness easing may result. There are various issues with this view. To start with, the standard hypothesis depends on suppositions that might be faulty. It expects that there exists in the States concerned a private area without a moment's delay adequately powerful and adequately adaptable to follow up on value signals from the market. It likewise surmises that monetary development will result in destitution easing through a 'stream down' impact. The possibility of specialization of nations through worldwide exchange is dangerous for different reasons, when it is advanced as a solution material all through all nations and for all parts. In spite of the fact that obviously nations are compelled in what they may create by regular factors, these approach decisions are conclusive, in horticulture as in different areas, in characterizing the situation of a nation in the universal division of work. Because of previous history, while industrialized nations have possessed the capacity to fabricate a near preferred standpoint in made items or in administrations, most creating nations, especially the minimum created nations, have been consigned to the generation of crude materials, especially horticultural wares.

In the microeconomic dimension, the Impact on the Shape of the Global Food Supply Chain and the increment of the farming sector is with the end goal that like expanded cross-outskirt exchange agrarian items infers that, as the creation of nourishment is re-orientated towards serving the outside business sectors as opposed to the residential markets, the job of transnational companies – product dealers, sustenance processors, and worldwide retailers – increments. These enterprises serve a basic capacity in connecting makers, especially from creating nations, to business sectors, especially to the high-esteem markets of industrialized nations. Since these partnerships have exercises in various nations and can pick the nation from which they source, they might be difficult to control, especially as respects their purchasing approaches. This comprises a wellspring of

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reliance for the agriculturists who supply them. What's more, it empowers the division of the cultivating area, progressively isolated between one fragment which approaches high-esteem markets and, as result, to the best innovations, inputs, credit, and political influence, and another portion which is left to serve just the low-esteem, local markets, and is nearly ignored and underestimated.

In the Non-Economic Impacts of Trade Liberalization, dependence on international trade to accomplish sustenance security can't disregard its effect on nature and on nourishment. Up to this point, these components were generally disregarded in dialogs on universal exchange. They are by and by critical. As reviewed above, environmental change establishes the absolute most essential danger to the future capacity of the planet to sustain its populace: any measure which adds to advance a dangerous atmospheric deviation ought to be thusly maintained a strategic distance from. What's more, the right to food can't be with an adequate every day of calories admission: it is a privilege to sufficient nourishment, which necessitates that the eating routine in general contains a blend of supplements for physical and mental development, improvement and upkeep, and physical movement, requiring from States that they keep up, adjust or reinforce dietary decent variety and fitting utilization and sustaining designs.

RESEARCH QUESTION NO.3:

HOW CAN THIS PHENOMENON OF TRADE BE ACCOMMODATED WITH THE WHOLE OF RIGHT TO FOOD?

States ought not to acknowledge endeavours under the WTO system without guaranteeing that these duties are completely good with their commitment to regard the privilege to sustenance. This necessitates they survey the effect on the right to food of these commitments. It additionally necessitates that any responsibilities they set aside a few minutes, and rethought consequently, since the effects of exchange progression on the capacity of States to regard the privilege to sustenance might be hard to anticipate ahead of time, and may end up noticeable simply following various long periods of execution. Effect evaluations are a valuable apparatus so as to enable a State to comprehend the ramifications of the assentions it goes into. They have an amazing democratizing impact, since they ought to give a chance to common society to take part in the assessment of exchange policies, and permit national parliaments and common society associations to depend on their outcomes in their discourse with governments. To the degree that affect evaluations depend on the regulating necessities of the human ideal to sufficient sustenance, and the comparing pointers, they can reinforce the arranging position of governments in exchange arrangements, especially since the reference to one side to nourishment is to a commitment forced

on all States under global law, which they can't overlook with regards to exchange transactions. However, essential however as they seem to be, affect appraisals stay responsive – or protective – in nature: they are devices to quantify the outcomes of the choices which are taken, yet they don't show, in and without anyone else, which exchange approaches ought to be executed so as to facilitate the acknowledgment of the privilege to sustenance. Instruments ought to be set up to take into consideration the reception of such arrangements, in expansion to – and not as a substitute for – an ordinary checking of the effect of exchange assentions and their usage on the privilege to nourishment. Ideal to nourishment affect evaluations and the reception of national methodologies for the acknowledgment of the privilege to sustenance are apparatuses which should bolster arbitrators in guaranteeing that they won't embrace positions at global dimension which, at national dimension, would block the acknowledgment of the privilege to nourishment for all. Furthermore in any case, it is basic that national parliaments and common society are given chances to screen the positions received by governments in exchange transactions. They ought not be exhibited, at the simple last phase of the arrangement procedure – when understanding has been come to – , with a lot of responsibilities made by the Executive from which, at that organize, it will be politically extremely difficult to withdraw from. States ought to stay away from over the top dependence on universal exchange the quest for sustenance security. 'Over the top' in this setting ought to be comprehended as a circumstance in which, because of parity of instalments challenges or the absence of adequate incomes from fares in different divisions, being subject to the universal markets to bolster their populace does not speak to a reasonable alternative for States, in a setting of expanded value unpredictability and in which, most likely, the long haul drift towards declining costs of horticultural items is arriving at an end. The momentary enthusiasm of States in getting from universal markets the nourishment which they can't create locally at lower costs ought not to lead them to forfeit their long haul enthusiasm for building their ability to deliver the sustenance they have to meet their utilization needs. Notwithstanding its undeniable expenses on the slightest aggressive makers or on certain defenceless portions of the populace, the development of worldwide exchange horticultural items may have shrouded costs for the earth and for human wellbeing and nourishment ; it might result in the littlest makers being offered costs so low for their harvests that their incomes will scarcely be adequate to bolster themselves and their families ; and it might discourage the wages of rural specialists, because of expanded universal challenge.

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CONCLUSION

It is proverbial, as a matter of first importance, which they ought to guarantee that their endeavours under the WTO structure are completely perfect with their commitment to regard, secure and satisfy the privilege to sustenance. This necessitates they perform straightforward, autonomous and participatory Human Rights Impact Assessments, before the finish of exchange understandings. It additionally necessitates that they characterize their situations in exchange arrangements as per national techniques for the usage of the privilege to sustenance. Enhanced straightforwardness and support in the transaction of exchange understandings ought to likewise guarantee that each State will pick equitably regardless of whether it can go for broke of winding up progressively dependent on the universal markets to accomplish nourishment security. This paper has tried recognizing the reasons why States ought to dodge unnecessary reliance on global exchange the quest for nourishment security, and why they ought to rather manufacture their ability to create the sustenance expected to address utilization issues, with an accentuation on little scale agriculturists. It has additionally given contentions for keeping up the important adaptabilities and instruments, similar to supply the executives' plans, to protect household markets from the unpredictability of costs on worldwide markets. On the whole, States ought to investigate methods for constraining the instability of costs on the universal markets of wares, especially for tropical items, oilseeds, sugar and cotton, for example through product adjustment assentions. For poor nations, neither nourishment help nor the buy of sustenance products on the global markets are a substitute for reinforcing their capacity to bolster their populace by a vigorous agrarian division serving the residential market: albeit modest sustenance has been accessible from worldwide markets and in spite of the fact that costs have been declining for a long time, this pattern is presently finding some conclusion, and the unpredictability of costs will be more prominent later on, especially as the after-effects of the merger between the nourishment and the vitality markets. Exchange progression prompts reinforce the situation of transnational enterprises in the worldwide supply chains without forcing on them comparing commitments. It is the obligation of States to enough control private performing artists over which they may practice an impact, in release of their commitment to ensure the privilege to nourishment. They ought to likewise investigate approaches to reorient exchange towards items and methods of generation which better regard nature and don't prompt infringement of the privilege to nourishment.

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THE FUTURE OF ARBITRATION IN INDIA AND THE ESTABLISHMENT OF ARBITRATION CENTRES

- *Vatsala Chauhan*

INTRODUCTION

Arbitration has gained momentum not only all over the world, but also to a great extent in India. Today, most International Commercial Contracts consist of arbitration clauses as arbitration is seen as being a creature that owes its existence to the will of the parties alone.[236]

One of the reasons why parties prefer arbitration over other forms of dispute resolution is because it has certain advantages like neutrality, speedy resolution of dispute, choice of arbitral panel, etc.[237]

The principle of Party Autonomy, which allows for greater control to the parties over the arbitration process, has increasingly found recognition in India. Indian courts have consistently reduced court interference in arbitral proceedings. This has paved the way for international commercial arbitration to become the preferred dispute resolution mechanism.

According to the Arbitration and Conciliation Act, 1996, which is the prevailing arbitration law in India, International Commercial Arbitration comes into existence by the virtue of the legal relationship being considered as commercial under any existing law in force in India. "This relationship may be contractual or otherwise and at least one party:

- is an individual who is a national of, or habitually resident in any country other than India; or
- a body corporate which is incorporated in any country other than India; or
- an association or a body of individuals whose central management and control is exercised in any country other than India; or
- the Government of a foreign country."[238]

[236] Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34.
[237] New Age Arbitration – The Future of Dispute Resolution in India, NDA, available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/180824_A_New-age-Arbitration-The-Future-of-Dispute-Resolution-in-India.pdf.

[238] The Arbitration and Conciliation Act, 1996.

International Commercial Arbitration, or ICA, is a phenomenon which was not well known in India prior to 1990. It only assumed importance after the year 1991, when the Indian economy was opened to the world. As investors from other countries started making investments in India and signing agreements with their counterparts, the preferred arbitration over litigation as a choice resolving disputes at places outside of India. [239]

Prior to 1996, when the Indian Arbitration and Conciliation Act was introduced, there was no concrete law dealing with arbitration in India, whether International or Domestic. Due to this very reason, most foreign investors preferred to have the seat of arbitration *outside* India as the law was more exhaustive there.

INTRODUCTION OF THE ARBITRATION AND CONCILIATION ACT, 1996

In the year 1991, the Indian economy was opened up to investors all over the world. This led to an influx of investors rushing to trade in the newly opened Indian market. A great number of agreements were entered into by the investors and their Indian counterparts, however, a majority of them had an arbitration clause which allowed for arbitration *outside* of India.

The primary cause of the seat of arbitration being outside of India in the majority of agreements between investors and traders, was the inadequacy of Indian Law with regards to arbitration. The courts in India had excessive jurisdiction over the arbitrations that were conducted and were notoriously famous for the delay that was present in disposing off cases.

Apart from the above reasons, there was also no existing framework dealing exhaustively with arbitration in India. Therefore, in the year 1995, the Government of India introduced a bill on arbitration in the Parliament. This Bill came to be passed into the Arbitration and Conciliation Act, 1996 which now helps parties to resolve disputes through Arbitration.

This Act, among several other things, sought to:

- comprehensively cover International Commercial arbitration, conciliation as also domestic arbitration;
- minimize the supervisory role of the courts in the arbitral process;
- provide for the enforcement of every final arbitral award in the same manner as if it was a decree of a Court."[240]

[239] https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/

[240] The Indian Arbitration and Conciliation Act, 1996.

THE FUTURE OF ARBITRATION IN INDIA

Arbitration disputes in India have been rampant, with commercial disputes being arbitrated with increasing frequency. With the increase in preference for arbitration and the general decreasing preference towards litigation, India is all set to become a global arbitration hub in the near future.

This has been reiterated in practice with Prime Minister Narendra Modi making the intention of the government with regards to arbitration clear through his valedictory speech at the Niti Aayog conference on 'National Initiative towards Strengthening Arbitration and Enforcement in India.' The same was also reiterated by the Union minister of Law and Justice at an international forum – the BRICS summit in 2016.

Another major step towards achieving the goal of becoming an arbitration hub was made when the New Delhi International Arbitration Centre (NDIAC) Bill, 2018 was introduced in Lok Sabha and conferring the status of 'institution of national importance'.

The question which now arises is whether opening of arbitration centres is sufficient to transform India into a global arbitration hub or are further changes needed? According to me, it is important to maintain a balance between both. While it is important to establish arbitration centres at all major cities in India, it is also important to upgrade the existing arbitration framework. The law should be stable, however, it should not be still.

Since the recent judgement of the Supreme Court in the case of **Bar Council of India v. A.K. Balaji**[241] on the issue of entry into and practice of foreign lawyers and law firms in India, and the establishment of initiatives like the Mumbai Centre for International Arbitration and the introduction of the NDIAC Bill, it is important to keep into perspective and analyse the likelihood of India's success as the "seat of arbitration", the law governing the arbitration and India as a preferred venue for conducting arbitration proceedings administered by Indian arbitral institutions.

Even though the Supreme Court ruled in favour of the "fly-in, fly-out" principle, it added the stipulation that the visit must be "casual" and must not amount to "practice" and the same will be determined on a case by case basis. The Court further ruled that foreign lawyers had "no absolute right" to conduct international commercial arbitration proceedings.[242]

This, in my opinion, will act as a hindrance to the escalation of India as a global arbitration hub as

[241] Bar Council of India v. A.K. Balaji, Civil Appeal Nos. 7875-7879 of 2015.
[242] Bar Council of India v. A.K. Balaji, Civil Appeal Nos. 7875-7879 of 2015.

this decision has limited the scope of practice of foreign lawyers, an essential in International Commercial Arbitration practice.

ESTABLISHMENT OF ARBITRATION CENTRES IN INDIA

The establishment of arbitration centres in India is indeed of great importance if India is to become a global arbitration hub. This can be either done by establishing a primary arbitration centre at one location in India and then further establishing subsidiary centres in various locations in India. This will not only allow for a uniform set of institutional rules, but will also allow for greater flexibility to parties to hold arbitration sessions according to their convenience.

India is a fast growing economy and requires a reliable stable dispute resolution process in order to be able to attract foreign investment. As Indian Courts face extreme backlog, commercial players in India, as well as abroad, have developed a strong preference to resolve disputes via arbitration. This can only be done through the establishment of Arbitration centres at par with the other global arbitration hubs.

With the establishment of the Mumbai International Arbitration Centre and the introduction of the New Delhi International Arbitration Centre (NDIAC) Bill, 2018, India is on the track to present and compete with other jurisdictions like London, Paris, Geneva, Singapore and New York as a global arbitration hub. Even though India is one of the original signatories to the New York Convention, arbitration in India lagged in keeping up with the international best practices. However, the last five years have been a significant positive change in approach. Courts and legislators have made considerable changes with a view to bringing Indian arbitration law in line with the International best practices.[243] Apart from the establishment of arbitration centres, I feel it is necessary to establish arbitration bars – which would allow the availability and accessibility to people at large, of practitioners with knowledge and experience in the field of arbitration.

CONCLUSION

India is a fast growing economy which requires a stable arbitration law in order to become a global arbitration hub. In order to achieve this target, it is important to maintain a balance between keeping the arbitration law updated and establishing arbitration centres capable of resolving and handling commercial disputes efficiently. With Courts and legislators taking a pro-arbitration approach, and the Amendment Act in place, the adoption of best practices is vital in the near future.

[243] International Commercial Arbitration – Law and Recent Developments in India, NDA, available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf

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JURISPRUDENTIAL ANALYSIS OF CONTEMPORARY ISSUE – TERRORISM

- *Tanvi Gupta*

WHAT IS TERRORISM?

Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations, resolutions and universal "sectoral" treaties relating to specific aspects of it define certain acts and core elements.

In 1994, the general assembly's declaration on measures to eliminate international terrorism, set out in its resolution 49/60, stated that terrorism includes "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes" and that such acts "are in any circumstances unjustifiable, racial, ethic, religious or other nature that may be invoked to justify them." Later, the Security Council, in its resolution 1566 of 2004, referred to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to or to abstain from doing any act."

The General Assembly is currently working towards the adoption of a comprehensive convention against terrorism, which would complement the existing sectoral anti-terrorism conventions. Its draft article 2 contains a definition of terrorism that includes "unlawfully and intentionally" causing, attempting or threatening to cause: "(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

(c) Damage to property, places, facilities, or systems… resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."The draft article further defines as an offence participating as an accomplice, organizing or directing others, or contributing to the commission of such offences by a group of persons acting with a common purpose. While Member States have agreed on many provisions of the draft comprehensive convention, diverging views on whether or not national liberation movements

should be excluded from its scope of application have impeded consensus on the adoption of the full text. Many States define terrorism in national law in ways that draw to differing degrees on these elements.

The problem of the definition of terrorism is related to the following facts:

(i) The notion of terrorism is complicated and terrorist acts may be part of insurgency and subversion,

(ii) The mass media have contributed to the confusion about the meaning of terrorism by often using the term terrorism in a rather superficial manner, by shifting the political discourse from 'issues' to 'episodes', transforming politics into entertainment and moving from opinion- making to stimulation through pictures,

(iii) Terrorism is a phenomenon, which appears under different guises,

(iv) States can use the term 'terrorism' arbitrarily in order to be in agreement with their national propaganda and foreign policy goals.

WHAT ARE HUMAN RIGHTS?

1. The nature of human rights

Human rights are universal values and legal guarantees that protect individuals and groups against actions and omissions primarily by State agents that interfere with fundamental freedoms, entitlements and human dignity. The full spectrum of human rights involves respect for, and protection and fulfillment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal—in other words, they belong inherently to all human beings—and are interdependent and indivisible.[244]

2. International human rights law

International human rights law is reflected in a number of core international human rights treaties and in customary international law. These treaties include in particular the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. Other core universal human rights treaties are the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or

[244] See, for example, the Charter of the United Nations, Art. 55 (c), the Universal Declaration of Human Rights, art. 2, and the Vienna Declaration and Plan of Action

Punishment and its Optional Protocol; the Convention on the Rights of the Child and its two Optional Protocols; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The most recent are the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol, which were all adopted in December 2006. There is a growing body of subject-specific treaties and protocols as well as various regional treaties on the protection of human rights and fundamental freedoms.

International human rights law is not limited to the enumeration of rights within treaties, but also includes rights and freedoms that have become part of customary international law, which means that they bind all States even if they are not party to a particular treaty. Many of the rights set out in the Universal Declaration of Human Rights are widely regarded to hold this character.

Some rights are recognized as having a special status as norms of jus cogens (peremptory norms of customary international law), which means that there are no circumstances whatsoever in which derogation from them is permissible. The prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, and the right to self-determination are widely recognized as peremptory norms, as reflected in the International Law Commission's articles on state responsibility.

3. The nature of States' obligations under international human rights law

Human rights law obliges States, primarily, to do certain things and prevents them from doing others. States have a duty to respect, protect and fulfil human rights. Respect for human rights primarily involves not interfering with their enjoyment. Protection is focused on taking positive steps to ensure that others do not interfere with the enjoyment of rights. The fulfilment of human rights requires States to adopt appropriate measures, including legislative, judicial, administrative or educative measures, in order to fulfil their legal obligations. A State party may be found responsible for interference by private persons or entities in the enjoyment of human rights if it has failed to exercise due diligence in protecting against such acts. For example, under the International Covenant on Civil and Political Rights, State parties have an obligation to take positive measures to ensure that private persons or entities do no inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. Human rights law also places a responsibility on States

to provide effective remedies in the event of violations.[245]

THE IMPACT OF TERRORISM ON HUMAN RIGHTS

Terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict. Terrorism has a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity. Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threatens social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights.

Notably the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council have recognized the destructive impact of terrorism on human rights and security at the highest level of the United Nations.[246] Specifically, Member States have set out that terrorism:

- Threatens the dignity and security of human beings everywhere, endangers or takes innocent lives, creates an environment that destroys the freedom from fear of the people, jeopardizes fundamental freedoms, and aims at the destruction of human rights;
- Has an adverse effect on the establishment of the rule of law, undermines pluralistic civil society, aims at the destruction of the democratic bases of society, and destabilizes legitimately constituted Governments;
- Has links with transnational organized crime, drug trafficking, money-laundering and trafficking in arms, as well as illegal transfers of nuclear, chemical and biological materials, and is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, hostage-taking and robbery;
- Has adverse consequences for the economic and social development of States, jeopardizes friendly relations among States, and has a pernicious impact on relations of cooperation among

[245] See Human Rights Committee, general comment N° 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

[246] See, in particular, Security Council resolutions 1373 (2001) and 1377 (2001); General Assembly resolutions 48/122, 49/185, 50/186, 52/133, 56/160 and 58/174, as well as its Declaration on Measures to Eliminate International Terrorism (resolution 49/60); Commission on Human Rights resolutions 2001/37 and 2004/44, Human Rights Council resolution 6/28 and its recent resolution on the protection of human rights and fundamental freedoms while countering terrorism (28 March 2008).

States, including cooperation for development; and

- Threatens the territorial integrity and security of States, constitutes a grave violation of the purpose and principles of the United Nations, is a threat to international peace and security, and must be suppressed as an essential element for the maintenance of international peace and security. International and regional human rights law makes clear that States have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. This stems from the general duty of States to protect individuals under their jurisdiction against interference in the enjoyment of human rights. More specifically, this duty is recognized as part of States' obligations to ensure respect for the right to life and the right to security.

JURISPRUDENTIAL ANALYSIS OF TERRORISM THROUGH INTERNATIONAL CONVENTIONS

The major terrorism conventions drafted within the framework of the UN and ratified by many states are the following:[247]

- Convention on Offences and certain Other Acts Committed on Board Aircraft (Tokyo Convention, 1963): safety of aviation.
- Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention, 1970): applies to aircraft hijackings.
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention, 1971): applies to acts of aviation sabotage, such as bombings aboard aircraft in flight.
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973): protects senior government officials and diplomats.
- Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention,1979): combats unlawful taking and use of nuclear material.
- International Convention against the Taking of Hostages (Hostages Convention, 1979).
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988): extend the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation.
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988): applies to terrorist activities on ships.

[247] See A. Cassese, 'The International Community's 'Legal' Response to Terrorism', International and Comparative Law Quarterly 38, 1989

- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988): applies to terrorist activities on fixed offshore platforms.
- Convention on the Marking of Plastic Explosives for the Purpose of Identification (1991): provides for chemical marking to facilitate detection of plastic explosives, e.g. to combat aircraft sabotage.
- International Convention for the Suppression of Terrorist Bombing (1997): expands the legal framework for international co-operation in the investigation, prosecution and extradition of persons who engage in terrorist bombings.

The main characteristics of these conventions are the following:

1. The internationalization of terrorist crimes, in the sense that the crimes mentioned in these conventions is international ones. In other words, according to these conventions, there exists a legal duty to deliver up or to bring to court-*aut dedere aut judicare*. The *raison d' être* of the maxim is that an offender should not escape punishment, regardless of whether he is brought to court on the spot or extradited. According to the principle of *aut dedere aut judicare*, it is necessary to ensure the criminal prosecution of every criminal either by the state wherein he has been found or by the state asking for his extradition. Apart from the classical jurisdiction that is provided by national legislation and the conventions signed by the state in whose territory a crime has taken place, jurisdiction is often recognised in case of crimes perpetrated by citizens of the given state in foreign territories and crimes against citizens of the given state outside its territory. Moreover, jurisdiction is often recognised for the prosecution of those responsible for crimes against the national security and national interests of a given state. However, both national legislation and international law rarely[248] recognise jurisdiction for the prosecution of foreigners whose crimes have been perpetrated abroad against foreign citizens or foreign interests. Finally, it is important to mention that the internationalization of crimes on the basis of the above-mentioned conventions is important because customary international law makes no provisions for the extradition of criminals; extradition is based on positive law (international conventions). Anti-terrorist conventions themselves do not constitute the ultimate foundation of extradition, but they are placed within a broader framework of bilateral and multilateral conventions for extradition signed by states.
2. The expansion of the states' jurisdiction in favour of the state wherein a crime has been

[248] Piracy is the only striking exception.

perpetrated,[249] the state of which a criminal is a citizen[250] and the state of which a criminal with no citizenship is a permanent resident.[251]

3. All these conventions require contracting states to punish the crimes that the conventions mention by introducing appropriate national legislation.
4. All these conventions require contracting states to assist each other in connection with criminal proceedings brought under a given convention or protocol.

On the other hand, the above-mentioned anti-terrorist conventions are characterised by two weaknesses. First, they do not provide a definition of terrorism. Second, even though those supporting 'automatic' extradition in case of the crimes mentioned in the conventions (i.e. terrorist crimes) argue that terrorist crimes should be clearly differentiated from political offences, this was not achieved except in case of the 1997 International Convention for the Suppression of Terrorist Bombing.

CONCLUSION

International approval of a common definition of terrorism could substantially facilitate the anti-terrorist struggle. Terrorism should de differentiated from war crimes or crimes against humanity and from common murder. The essence of war crimes is numbers afflicted, whereas, with the exception of relatively few incidents, the numbers of people killed in terrorist activities are often small. Also, terrorist activities differ from common murder in their psychological impact since terrorists aim at creating a climate of fear in which they expect to realise their goals. A functional definition of terrorism should include the following elements:

- The existence of non-combatant casualties or the indiscriminate use of violence,
- The purpose is to create a public danger or a state of terror,
- The ultimate goal is to influence an audience and serve ideological, social, philosophical or other ends,
- Those actively committing the criminal offences are non-state or state-sponsored groups or agents.

[249] See, for instance, the 1971 Montreal Convention.
[250] See, for instance, the 1979 Hostages Convention.
[251] See for instance the 1997 International Convention for the Suppression of Terrorist Bombing.

The states of the world should comply with the principle *aut dedere aut judicare*, so that terrorists would have no opportunity to remain unpunished for their crimes and crime would not be vindicated as a means to any political end. In fact, according to the Declaration on Measures to Eliminate International Terrorism adopted by the UN General Assembly in Resolution 49/60 of 9 December 1994: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them." The establishment of a permanent International Criminal Court of Justice could play a very important role in the anti-terrorist struggle. It would apply the law of the state within whose territories the unlawful action has taken place and it would be optional, i.e. states would be able to use it instead of their national courts, and, if for one reason or another, they do not wish or they cannot[252] extradite a person accused of terrorism. Additionally, it would be well to bring terrorist crimes before an international criminal court instead of a national court, thereby avoiding political tension between states. A general anti-terrorist convention would not eliminate the problems related to terrorism, no matter how successful it may be. The legal solution is never likely to eliminate terrorism, which by its very nature disdains the rules of the international game. The most energetic response to terrorism is to strike back hard.[253] However, at least at the legal level, a general anti-terrorist convention could help the international community get rid of a bunch of destructive conceptual controversies and no terrorist activity could remain unpunishable.

[252] In 1887, the Swiss authorities sought to extradite a Mr Wilson, a British national in Britain, to stand trial and be punished for a crime committed in Switzerland. The Queen's Bench Division found in Article 3 of the 1874 Extradition Treaty between Switzerland and the UK, "No Swiss shall be delivered up by Switzerland to the United Kingdom and no subject of the United Kingdom shall be delivered up by the Government thereof to Switzerland." Mr Wilson was non-extraditable. Moreover, punished in England was impossible since no English court had jurisdiction to try Wilson for an offence committed abroad. Thus, he escaped punishment altogether.

[253] For instance, in April 1986, the United States launched raids on Libya in retaliation for terrorism and, in October 1986, the United Kingdom led its European partners in taking limited diplomatic measures against Syria because of its complicity in an attempt to destroy an El Al aeroplane in flight.

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SEDITION

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INTRODUCTION AND PROBLEMS

Sedition laws are a piece of bigger system of colonial laws that are now used liberally by both the central and state governments to control and limit free speech, the specificity of these laws lie in the language of "disaffection" and severity of the punishment associated with them. Sedition laws were used to curb dissent in England, but it was in the colonies that they expected their most draconian and archaic form, maintaining supreme force despite rising patriotism in the colonies including India. Targets of these laws included renowned nationalists like Bal Gangadhar Tilak, Mahatma Gandhi and Annie Besant. It is sardonic that these laws have survived the demise of colonial rule and continue to rendezvous media personnel, human rights activists, political dissenters and public intellectuals across the country. This project is an effort at bringing together various arguments for the repealing of these laws.

SCOPE AND OBJECTIVE

Project aims at discussing what is actually meant by sedition, to know the origin of sedition and history of sedition in India and to analyse the problems in India due to Sedition laws. And to see the Kedarnath case and present definition of sedition.

The objective is to learn about the present law on sedition and to analyse the recent judgements. To look for loopholes in the present scenario, pinpoint them and suggest any reforms (if possible).

RESEARCH METHODOLOGY

The type of research methodology followed in the project is descriptive and analytical and the method for citation being used is the Blue Book 19th Edition.

PROBABLE OUTCOME

With an approach of an analytical and descriptive research the project will be able to highlight the pros and cons of the sedition as law along with the loopholes in the present scenario along with suggestions to the existing provisions.

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INRODUCTION:

The recent outbreak in instances of conjuring sedition laws against human rights activists, journalists and public intellectuals in the country have praised imperative issues on the archaic and undemocratic nature of these laws, which were introduced by the British colonial government. The Bilaspur High Court's decision to dismiss the bail application filed by Dr. Binayak Sen despite far reaching public criticism of the trial court decision to prosecute him on charges of sedition has raised grave questions about the validity of these laws in a modern constitutional democracy. While sedition laws are a piece of bigger system of colonial laws that are now used liberally by both the central and state governments to control and limit free speech, the specificity of these laws lie in the language of „disaffection" and severity of the punishment associated with them. Sedition laws were used to curb dissent in England, but it was in the colonies that they expected their most draconian and archaic form, maintaining supreme force despite rising patriotism in the colonies including India. Targets of these laws included renowned nationalists like Bal Gangadhar Tilak, Mahatma Gandhi and Annie Besant. It is sardonic that these laws have survived the demise of colonial rule and continue to rendezvous media personnel, human rights activists, political dissenters and public intellectuals across the country. In this project, we attempt to make a case for scrapping the provision for sedition in the IPC and any other laws making seditious acts an offence. In Part II, we examine the judicial application of the law of sedition in India since the colonial era to highlight their vagueness and the non-uniform way in which it has been applied. In Part III, we discuss the findings of the court in kedar Nath v. State of Bihar[254] ('Kedar Nath'), which upheld the constitutional validity of §124A, and demonstrate that the law has evolved considerably since then. In Part IV, we analyse two specific aspects of the offence of sedition: the nature of the 'government established by law' and the effect of the shift to a democratic form of government post independence. In Part V, we undertake an analysis of all sedition cases that have come before the high courts and the Supreme Court of India between 2000 and 2015. We will draw from the English experience with the crime of sedition, explaining why it should find no place in a modern democracy. Finally, in Part VI, we provide some concluding remarks to our discussion. This project is an effort at bringing together various arguments for the repealing of these laws.

[254] Kedar Nath v. State of Bihar, AIR 1962 SC 955.

PREVALENT PROVISIONS IN INDIA:

INDIAN PENAL CODE, 1860- Section 124 A, of Indian Penal Code as it stands today, deals with Sedition and carries with it a maximum punishment of life imprisonment.[255]

CRIMINAL PROCEDURE CODE (CrPC), 1973- The CrPC contains section 95 which gives the government the right to forfeit material punishable under section 124A on stating grounds. The section requires two conditions to be fulfilled, (i) that the material is punishable under the mentioned sections (ii) the government gives grounds for its opinion to forfeit the material.[256]

PREVENTION OF SEDITIOUS MEETINGS ACT, 1911- The Seditious Meetings Act, which was enacted by the British a century ago to control dissent by criminalizing seditious meetings, continues to be on our statute books. Section 5 of the Act empowers a District Magistrate or Commissioner of Police to prohibit a public meeting in a proclaimed area if, in his/her opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity. Considering this legislation was specifically enacted to curb meetings being held by nationalists and those opposed to the British, the continuation of this archaic legislation is completely unnecessary and undemocratic.[257]

UNLAWFUL ACTIVITIES (PREVENTION) ACT (UAPA), 1967- Supporting claims of secession, questioning territorial integrity and causing or intending to cause disaffection against India fall within the ambit of „unlawful activity" (Section 2(o) UAPA). Section 13 punishes unlawful activity with imprisonment extending to seven years and a fine.[258]

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[255] "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added or with fine. Explanation 1. - The expression "disaffection" includes disloyalty and all feelings of enmity. Explanation 2. - Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3. - Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

[256] Section 95 reads: "Power to declare certain publications forfeited and to issue search-warrants for the same.-(1) Where- (a) any newspaper, or book, or (b) any document, wherever printed, appears to the State Government to contain any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 153B or Section 292 or Section 293 or Section 295-A of the Indian Penal Code, the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever j 57 found in India and any Magistrate may by warrant authorize any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any book or other document may be or may be reasonably suspected to be."

[257] Section 13 reads: "Punishment for unlawful activities.-(1) Whoever- (a) takes part in or commits, or (b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine."

[258] Section 2(o) reads: ""unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible

THE ORIGIN OF SEDITION LAW:

In the 13th century, the rulers in England viewed the printing press as a threat to their sovereignty.[259] The widespread use of the printing press thus prompted a series of measures to control the press and the dissemination of information in the latter half of the century.[260] These measures may broadly be categorised as the collection of acts concerning Scandalum Magnatum and the offence of Treason. While the former addressed the act of speaking ill of the King, the latter was a more direct offence "against the person or government of the King".[261]

The first category of offences, classified as acts concerning Scandalum Magnatum, were a series of statutes enacted in 1275 and later.[262] These created a statutory offence of defamation, which made it illegal to concoct or disseminate 'false news' (either written or spoken) about the king or the magnates of the realm.[263] However, its application was limited to the extent that the information had to necessarily be a representation of facts as the truth.[264] Thus, truth was a valid defence to the act.[265]

The second category of offences was that of treason, subsequently interpreted as constructive treason. Essentially, treason was an offence against the State.[266] It was understood that all the subjects of the rulers owed a duty of loyalty to the king.[267] Thus, if any person committed an act detrimental to the interests of the rulers, they would be guilty of the offence of treason. Initially, the offence required that an overt act be committed to qualify as treason.[268] However, by the 14th century, the scope of the offence was expanded through legislation and judicial pronouncements to include even speech in its ambit.[269] This modified offence was known as constructive reason.

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representations or otherwise),- (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India;"

[259] William T. Mayton, Seditious Libel and a Lost Guarantee of a Freedom of expression, 84 coLum. L. Rev. 92 (1984).

[260] Ibid, 94

[261] Ibid

[262] Id, 669

[263] id

[264] id

[265] id

[266] Mayton, supra note 16.

[267] matHeW HaLe & geoRge WiLson tHomas, tHe HistoRy of tHe PLeas of tHe cRoWn, Vol. 1 59 (1st edn., 1800) ("[A]s the subject hath his protection from the King and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the King").

[268] Mayton, supra note 16, 105.

[269] Id.

Despite the existence of the aforementioned categories of offences, the rulers faced many hurdles in curbing the expression of undesirable opinions about them. While the 'expression of fact' and truth acted as defences to the offence of Scandalum Magnatum, the offence of treason also had various safeguards. Only common law courts had jurisdiction over the offence.[270] Further, it necessitated a procedure wherein one would have to secure an indictment for the accused before they faced a trial by the jury.[271] Initially, the overt act requirement also acted as a complication while trying to secure convictions. However, with the expansion in the scope of the crime to include speech, this defence became unavailable. To overcome these procedural and substantive difficulties, the offence of seditious libel was literally invented in the court of the Star Chamber.[272]

The offence of seditious libel was first devised in the Star Chamber decision in de Libellis Famosis.[273] In this case, the defendants had confessed to ridiculing some clergymen of high status. While drawing from the common law private offence of libel, the court eschewed the requirements thereof. Instead, it condemned the criticism of public officials and the government and stressed that any criticism directed at them would inculcate disrespect for public authority.[274] Since the goal of this new offence was to cultivate respect for the government in power, truth was not considered a defence.[275] It also evaded the various safeguards of the offences of Treason and Scandium Magnum that it was modelled on. This judgment cited no precedent, as there was none. Previously, 'libels' were purely private actions for damages.

Henceforth, the offence of seditious libel was used as a ruthless tool for the curbing of any speech detrimental to the government.[276] Over the course of many cases, it came to mean slander or libel upon the reputations and/or actions, public or private, of public officials, magistrates and prelates, which sought to divide and alienate "the present governors" from "the sound and well affected part

[270] Id. 122
[271] Id, 125
[272] Id. (These courts were akin to administrative tribunals in the service of the Crown. Its members were often part of the King's council and would serve at the King's pleasure. This court was not subject to the same procedural rigours as the common law courts. Its proceedings were inquisitorial in nature and were intended to secure efficacious prosecutions for various offences).

[274] Id.
[275] Id.
[276] One such infamous case is Fourde's case (1604). Anticipating that an injunction that would be passed against him in the Court of Chancery would bring ruin upon his family, Fourde petitioned the King to stay the injunction. King James I sent a message to the Lord Chancellor asking him to stay the injunction. Fourde then presented a second petition before the King suggesting "that the question now was whether the commandment of the king or the order of the Chancellor should take effect". He was charged with sedition before the Court of Star Chamber for "sowing sedition between the King and his Peers." He was sentenced to undergo every sentence that the Court of Star Chamber was empowered to give: placards proclaiming his slander of magistrates and justice, riding with his face to the horse's tail, the pillory, loss of his ears, a fine of £1100 and perpetual imprisonment. One of the judges, Thomas Cecil, second Lord Burghley pronounced: "Let all men hereby take heede how they complayne in words againste any magistrate, for they are gods..."

of the subjects".[277] If the speech published was true, the offence was only aggravated as it was considered more likely to cause a breach of the peace.[278]

By the 18th century, the crime of seditious libel was viewed as a harsh and unjust law that was used by the ruling classes to trample any criticism of the Crown.[279] However, given its utility, it was seen as a convenient tool in the hands of the rulers. Thus, when a penal code was being drafted for colonial India, where the rulers had the task of suppressing opposition, it was only obvious that seditious libel would be imported into the territory of India.

VICTIMS OF SEDITION UNDER BRITISH RULE:

JOGENDRA CHANDRA BOSE- The trial of Jogendra Chandra Bose took place in the year of 1891. Bose, the editor of the newspaper, Bangobasi, wrote an article criticising „Age of Consent Bill" for posing a danger to religion and for its coercive association with Indians. His article also remarked on the negative financial impact of British colonialism. Bose was prosecuted and accused of surpassing the limits of criticism, and inciting religious feelings. The judge rejected thedefence"s argument that there was no mention of rebellion in his article.Be that as it may, the proceedings against Bose were dropped after he tended an apology.

BAL GANGADHAR TILAK- In the case of Q.E. v. Bal Gangadhar Tilak[280] , the government claimed that some of his speeches that addressed to Shivaji killing Afzal Khan had instigated the murder of the much berated Plague Commissioner Rand and another British officer, Lieutenant Ayherst,the next week. The two officers were killed asthey were coming back from a supper gathering at Government House, Pune,in the wake of praising the Diamond Jubilee of Queen Victoria's rule. Tilak was convicted of the charge of sedition.In spite of, a spirited defence from Mohammad Ali Jinnah, who was amongst the most prominent faces of the Bombay bar, the judges convicted Tilak and sentenced him to a six years rigorous detainment with transportation.

ANNIE BESANT- Another famous decision was ofAnnie Besant v. Advocate General of Madras[281]. The case dealt with Section 4(1) of the Indian Press Act, 1910, that was encircled like Section 124A. The relevant provision stated that any press used for printing or publishing newspapers, books or other documents containing words, signs or other visible representations that tended to incite scorn or hatred to His Majesty"s government...or any class of subjects (either

[277] Roger B. Manning, The Origins of the Doctrine of Sedition, 12(2) aLBion 99 (Summer 1980).
[278] Id.
[279] Id, 675
[280] ILR 22 Bom 12.
[281] (1919) 46 IA 176.

directly or indirectly, by way ofsuggestion, inference, metaphor, etc.) would be liable to have its deposit forfeited. In this case, an attack was levelled against the English administration. The Privy Council followed the earlier interpretation of Justice Strachey and seized the deposit of Annie Besant‟s printing press.

MAHATMA GANDHI- Gandhi was charged, alongside Shankerlal Banker, the proprietor of Young India, for three articles published in the weekly. The trial, which wasgone to by the most prominent political figures of that time,was taken after nearly by the whole country. The trial was presided over by Judge Strangman. In a dazzling statement which additionally highlights the fact that the sedition offence is that it is most appropriate to a colonial regime based upon strict control overany conceivable feedback of the regime, Gandhi remarked on the law that was used to try him and demanded that the judge to give him the maximum punishment possible through the following words: "Section 124 A under which I am happily charged is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law. If one has no affection for a person, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite to violence. But the section under which Mr. Banker and I are charged is one under which mere promotion of disaffection is a crime. I have studied some of the cases tried under it, and I know that some of the most loved of India's patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that section. I have endeavoured to give in their briefest outline the reasons for my disaffection".[282]Judge Strangman expressed his failure to not hold him guilty of sedition under the law, and sentenced him to six years imprisonment.

DEVELOPMENTS IN LAW POST-INDEPENDENCE:

After India attained independence in 1947, the offence of sedition continued to remain in operation under §124A of the IPC.[283] Even though sedition was expressly excluded by the Constituent Assembly as a ground for the limitation of the right to freedom of speech and expression, this right was still being curbed under the guise of this provision of the IPC. On three significant occasions,

[282] Op. cit. A.G. Noorani at 236.

[283] The Indian Penal Code, 1860, §124A. ("Sedition.— Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. Explanation 1 – The expression" disaffection" includes disloyalty and all feelings of enmity. Explanation 2 – Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3 – Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section").

the constitutionality of this provision was challenged in the courts. These cases shaped the subsequent discourse in the law of sedition.

Following the decision in Niharendu Majumdar, §124A was struck down as unconstitutional in Romesh Thappar v. State of Madras,[284] Ram Nandan v. State,[285] and Tara Singh v. State[286](‘Tara Singh’). In Tara Singh, the East Punjab High Court relied on the principle that a restriction on a fundamental right shall fail in toto if the language restricting such a right is wide enough to cover instances falling both within and outside the limits of constitutionally permissible legislative action affecting such a right.[287]

During the debates surrounding the first amendment to the Constitution, the then Prime Minister Jawaharlal Nehru was subjected to severe criticism by members of the opposition for the rampant curbs that were being placed on the freedom of speech and expression under his regime.[288]This criticism, accompanied by the rulings of the courts in the aforementioned judgments holding §124A to be unconstitutional, compelled Nehru to suggest an amendment to the Constitution.[289]

Thus, through the first amendment to the Constitution, the additional grounds of ‘public order’ and ‘relations with friendly states’ were added to the Article 19(2) list of permissible restrictions on the freedom of speech and expression guaranteed under Article 19(1)(a).[290] Further, the word ‘reasonable’ was added before ‘restrictions’ to limit the possibility of misuse by the government.[291] In the parliamentary debates, Nehru stated that the intent behind the amendment was not the validation of laws like sedition. He described §124A as ‘objectionable and obnoxious’[292] and opined that it did not deserve a place in the scheme of the IPC.

RELATIONSHIP BETWEEN SEDITION AND ARTICLE 19(1)(a):

In defining sedition in the case of Niharendu Dutt Majumdar v. The King Emperor[293], the Federal Court had held that violent words by themselves did not make a written document or words seditious in nature and that in order to constitute sedition, “the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or

[284] Romesh Thappar v. State of Madras, AIR 1950 SC 124.
[285] Ram Nandan v. State, AIR 1959 All 101.
[286] Tara Singh v. State, AIR 1951 SC 441.
[287] Id.

[293] AIR 1942 FC 22

tendency." Conversely, the Privy Council, in the King Emperor v. Sadashiv Narayan Bhalerao[294], overruled that decision and ardently confirmed the view expressed in Tilak‟s case to the effect that "the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small." Thus, according to the Privy Council, incitement to violence was not a necessary element of the offence of the sedition.

After the independence, the thought of having a Fundamental Right of freedom of speech appeared to be rather conflicting with the offence of sedition and that serving as a restriction on speech as it did via the Privy Council interpretation in Sadashiv. Thus, in the final draft of the Constitution it was observed that the restrictions to the right under 19(1)(a) did not contain sedition within them. Jawaharlal Nehru was aware of the problems posed by the sedition laws to independent India. In the debates encompassing the First Amendment to the Indian Constitution, Nehru went under severe flak from opposition leaders for conceding the right to free speech and expression. Stung by two court decisions in 1949 that upheld the right to freedom of speech of expressions from the far left and the far right of the political range, Nehru asked his Cabinet to amend Article 19(1)(a) of the Indian Constitution. The two cases that impelled Nehru to do this were theRomesh Thapar v. Union of India[295], case, in which the Madras government, in the wake of announcing the Communist party illegal, banned the left inclining magazine Crossroadsas it was forcefully disparaging of the Nehru government. The court held that banning a publication on the grounds of its threat to public safety or public order was not sustained by the constitutional scheme because the exceptions to 19(1)(a) were much moreparticular and needed to involve a peril to the security of the state. The second case was related to an order passed by the Chief Commissioner, Delhi asking Organiser, the RSS mouthpiece, to present all communal matter and material related to Pakistan to scrutiny. Nehru‟s government decided to amend the Constitution byintroducing the words „public order‟ and „relations with friendly states‟ in the Article 19(2) and the word „reasonable‟ before „restrictions‟, which was intended to give a protection against abuse by the legislature. In the case of Ram Nandan v. State[296],the constitutional validity of section 124A of the IPC was challenged in an Allahabad High Court case that involveda test to a conviction and punishment of three years imprisonment of one Ram Nandan, for anincendiary discourse given in 1954. The court overturned Ram Nandan‟s conviction and declared section 124A to be unconstitutional.Nonetheless, this decision was overruled in 1962 by the Supreme Court inKedar

[294] (1947) L.R. 74 I.A. 89.
[295] AIR 1950 SC 124
[296] AIR 1959 All 101

Nath Singh v. State of Bihar[297], which declared the sedition law constitutional. The Court, while upholding the constitutionality of the judgement differentiated between "persons for the time being engaged in carrying on the administration" and "the Government established by law". The hon"bleSupreme Court distinguished clearly between disloyaltiesto the Government and remarked upon the measures ofgovernment without inciting public disorder by acts of violence.Thus, the Supreme Court upheld the constitutionality of the sedition law, also in the meantime curtailed its meaning and limited its application to acts involving intention or tendency to create destruction, or disorder of law and order, or incitement to violence. The Supreme Court read down that the offence of sedition in consequenceto remove speech which could be exciting disaffection against the government but which did not have the tendency to create a disorder or disturbance from within the ambit of the provision. The judges perceived that if the sedition law were to be given a more extensive and wider interpretation, it would not survive the test of constitutionality.

KEDAR NATH AND THE MODERN DEFINITON OF SEDITION:

As stated earlier, the decision of the Supreme Court in Kedar Nath laid down the interpretation of the law of sedition as it is understood today. In this decision, five appeals to the Apex Court were clubbed together to decide the issue of the constitutionality of §124A of the IPC in light of Article 19(1)(a) of the Constitution. In the Court's interpretation the incitement to violence was considered an essential ingredient of the offence of sedition.[298] Here, the court followed the interpretation given by the Federal Court in Niharendu Majumdar. Thus, the crime of sedition was established as a crime against public tranquillity[299] as opposed to a political crime affecting the very basis of the State.

The Court looked at the pre-legislative history and the opposition in the Constituent Assembly debates around Article 19 of the Constitution. Here, it noted that sedition had specifically been excluded as a valid ground to limit the freedom of speech and expression even though it was included in the draft Constitution.[300] This was indicative of a legislative intent that sedition not be considered a valid exception to this freedom.[301]

As a consequence, sedition could only fall within the purview of constitutional validity if it could

[297] 1962 AIR 955.
[298] See PiLLai, supra note 13, 482.
[299] See Rex v. Aldred, (1909) 22 Cox CC 1.
[300] Kedar Nath v. State of Bihar, AIR 1962 SC 955, ¶30; See also Romesh Thappar v. Madras, AIR 1950 SC 124 (per Sastri, J.: "Deletion of the word 'sedition' from draft Art. 13(2), therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security or tend to overthrow the State." Further, the court also observed that the Irish formula of "undermining the public order or the authority of the State" as a standard to impose limits on the freedom of speech and expression had not found favour with the drafters of the Constitution).
[301] Kedar Nath v. Union of India, AIR 1962 SC 955, ¶29.

be read into any of the six grounds listed in Article 19(2) of the Constitution.[302] Out of the six grounds in Article 19(2), the Court considered the 'security of the state' as a possible ground to support the constitutionality of §124A of the IPC.[303] The Court made use of the principle that when more than one interpretation may be given to a legal provision, it must uphold that interpretation which makes the provision constitutional.[304] Any interpretation that makes a provision ultra vires the Constitution must be rejected. Thus, even though a plain reading of the section does not suggest such a requirement, it was held to be mandatory that any seditious act must be accompanied by an attempt to incite violence and disorder.[305]

However, the fact that the aforementioned Irish formula of "undermining the public order or the authority of the State" that been rejected by the members of the Constituent Assembly was ignored by the Court. This was despite making a reference to this fact earlier in the judgment. The reasoning of the Court was that since sedition laws would be used to maintain public order, and the maintenance of public order would in turn be in the interests of the security of the state, these laws could be justified in the interests of the latter.[306]

RECENT CASES OF SEDITION IN INDIA:

1. Manoj Shinde Editor, Surat Saamna, Aug 2006 Surat, Gujarat - For using "abusive words" against CM Narendra Modi in a Monday editorial alleging administrative failure in tackling the flood situation in Surat.
2. Binayak Sen Doctor & Human Rights Activist, May 2007 Raipur, Chhattisgarh- For allegedly Maoist leadership through courier messages. Sen had criticised the Chhattisgarh government‟s support to the vigilante. He was sentenced to life imprisonment by the court.
3. Kahturam Sunani Journalist, OTV, May 2007 Sinapali, Orissa- Filing a report that Pahariya tribals were consuming „soft‟ dolomite stones in Nuapada district due to acute hunger.
4. Gautam Mehta Photographer, Gujarat Samachar, June 2008 Ahmedabad, Gujarat-For photographs and articles stating alleged links between the Ahmedabad Police Commissioner and the underworld.
5. Lenin Kumar Editor, Nishan, Dec 2008 Bhubhaneshwar, Orissa - For publishing a special booklet on the Kandhamal riots named „Dharmanare Kandhamalre Raktonadhi‟ (Kandhamal‟s rivers of blood).
6. Laxman Choudhury Journalist, Sambadh, Sept 2009 Gajapati District, Orissa- For allegedly

possessing Maoist literature. Chaudhury had been writing about the participation of local police in unlawful and illegal drug trafficking.

7. Kirori Singh Bainsla, Gujjar Community leader, June 2008 Bayana, Rajasthan- For leading an agitation demanding ST status for Gujjars.
8. V. Gopalaswamy, Politician, MDMK, Dec 2009 Chennai, Tamil Nadu- Remarks allegedly against India‟s sovereignty at a book launch function. E. Rati Rao, Resident Editor, Varthapatra,Feb 2010 Mysore, Karnataka-Article in Varthapatra claiming encounter deaths in Karnataka.
9. Piyush Sethia, Environmentalist and Organic Farmer, Jan 2010 Salem, Tamil NaduPamphlet distributed during protest against Chhattisgarh government‟s support for Salwa Judum.
10. Niranjan Mahapatra, Avinash Kulkarni, Bharat Pawar, others Trade Union Leaders and Social Activists Mar 2010 – June 2010- Gujarat Police allege links with CPI (Maoist).
11. Arundhati Roy, Shuddabrata Sengupta, S.A.R. Geelani, Varavara Rao&othersWriters, political activists, and media theorists ,Nov 2010 Delhi- Private complaint alleging that they made anti-India speeches titled “Azadi- The only Way” at a seminar in Kashmir.
12. Noor Muhammed BhatLecturer, Gandhi Memorial College, Srinagar, Dec 2010 Srinagar-For setting a question paper for students ofEnglish literature on the topic of,,Whether stone pelters were the real heroes?
13. Sudhir Dhawale Dalit Rights Activist and Free Lance Journalist, Jan 2011 Wardha, Maharashtra- Police allege links with CPI (Maoist) party.
14. Aseem Trivedi, Cartoonist,September 8, 2012, Mumbai- He was arrested after a complaint that his cartoons mocked the Indian constitution and national emblem
15. . The most recent case of Meerut University suspending 60 students for cheering in favour of Pakistan in a cricket match between India and Pakistan. These students were also charged under sedition but later the charges were dropped.

PROBLEMS ARISING DUE TO SEDITION LAW IN INDIA:

The most difficult problem arising due to sedition law in in India is the wide interpretation and vague definition of sedition given in the provisions. Also the punishment for sedition under section 124A IPC is an astonishing one with the punishment being entirely disproportional to the nature of the charges. This disparity becomes clear when one looks at the scheme of the Indian Penal Code. This offence has been included in the section on “Offences against the state” as disparate to offences like „unlawful assembly‟ and „rioting‟ that are included in “Offences against Public

Tranquillity". This disparity becomes vivid when one compares the maximum punishment for these offences.

COMPARITIVE ANALYSIS OF SEDITION LAWS IN INTERNATIONAL SCENARIO:

UNITED KINGDOM- The Criminal Libel Act and the common law offences of seditious libel and criminal defamation were to be repealed, according to the Law Commission in the UK. In abolishing the crime of sedition, the primary consideration was that the language in which the offence was framed was archaic and did not reflect the values of present day constitutional democracies. Further, although the prosecutions were few and far between, even the sporadic uses of the law had a "chilling effect" on free speech.

NEW ZEALAND-The offence of sedition in New Zealand closely mirrors the understanding of sedition in England. There are jurisdictions where the offence of sedition exists on the statute books. However, here a] the provisions have been narrowly construed by the courts and b] prosecutions almost never occur and the law has become obsolete.

UNITED STATES OF AMERICA- In the United States, the Sedition Act was enacted in 1798, in a bid to protect the nation from „spies" or „traitors". However the courts have generally afforded wide protection to political speech, excepting where it results in immediate lawless action.

AUSTRALIA- Seditious words, participation in a seditious conspiracy and publishing seditious statements were of colonial origin and common law offences, which still remain in the criminal codes of several states. The law was mostly used to censor "undesirable" publishing and as in the case of U.S. and in India, was used to target the Communist Party of Australia. In 2001, the Law and Justice Legislation Amendment Act, 2001, repealed and substituted section 24C to effect the removal of the references in paragraphs 24C (a)(c) i.e. to approving or undertaking to engage in a seditious enterprise and conspiring with any person to carry out a seditious enterprise and advising, counselling, or attempting to secure the carrying out of a seditious enterprise.

International law gives utmost importance to the doctrines of free speech and expression and also guarantees the enforcement of rights which is evident in several international instruments such as Article 19[307] of Universal Declaration of Human Rights, 1948 (UDHR), Article 19 of the International Covenant on Civil and Political Rights, 1966 (ICCPR)[308], Article 10 of the European

[307] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
[308] Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore

Convention on Human Rights Act, 2003 (ECHR)[309], Article 9 of the African Charter on Human and Peoples‟ Rights, 1979 (ACHR)[310], and Article 13 of the American Convention on Human Rights, 1978[311], which is also known as the pact of San Jose.

Criminalising sedition has obviously met with disfavour among modern constitutional democracies. The current status of the laws in the jurisdictions surveyed above reveals that:

(1) in some cases, sedition laws have been repealed without replacement, (2) prosecutions for sedition are few and far between to the point where the law is almost a dead letter, (3) even in cases where the law remains on the statute books, the punishment involves either a fine or minor levels of imprisonment whereas the death penalty is almost never imposed (even in countries where it is still legal for the state to execute its citizens), (4) even in cases where the law remains on the statute books, there are ongoing efforts to repeal the same.

Restrictions on the freedom of expression can be justified if they are provided by law or if they are in pursuance of a legitimate aim in international treaties such as the protection of national security, public order, public health or morals. There needs to be a necessity to restrict the right in the form of a pressing social need and there needs to be a strict scrutiny regarding the justification of the restriction. What needs to be seen is not just the necessity of the law that seeks to restrict the freedom but also the individual measures taken by the State. When a law restricts freedom of expression by reference to national security or public order imperatives, and that law is couched in general terms, specific justification needs to be provided by the State in compliance with Article 19 of the ICCPR. While international instruments can only be enforced in a country if the country has ratified it, they still have an overbearing significance and influence law-making. As a member of

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be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.

[309] 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. … 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[310] Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."

[311] Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or 51 b. the protection of national security, public order, or public health or morals . . . 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

the United Nations General Assembly, India has ratified the UDHR and ICCPR and, therefore, has enforcement value in the country. In India, while the offence of sedition is per se not in violation of international standards, any restriction on the freedom of speech and expression needs to be justified as recognised by international covenants and treaties.

SUGGESTIONS:

The use of sedition laws to intimidate and harass various media personnel, human rights activists, political activists, artists, and public intellectuals despite Supreme Court rulings of narrowing down its application, indicates that the very existence of sedition laws in the statute books is a threat to democratic values. I recommend the following changes to bring this aspect of Indian laws in tune with most modern democratic frameworks including the United Kingdom, USA, and New Zealand:

- Repeal Section 124A of the Indian Penal Code, 1860. Amend Section 95 of the Code of Criminal Procedure, 1973, accordingly remove references to section 124A.
- Repeal the Prevention of Seditious Meetings Act, 1911.
- Amend Section 2(o) (iii) of the Unlawful Activities (Prevention) Act, 1967 to remove references to „disaffection.

CONCLUSION:

'Sedition' is an offence consolidated into the Indian Penal Code (IPC) which the government had discovered to silence or discipline critics. This nineteenth century law, enacted to quiet the Indian people by the colonial rulers, has been retained by the democratic government in free India. Not only that, it has been used more often by free India's governments than the colonial government did during the 77 years of its presence in the Penal Code. A colonial legacy like sedition law, which presumes popular affection for the state as a natural condition and expects citizens not to show any contempt, enmity, hatred or hostility towards the government established by law, does not have a place in a modern democratic state like India. The case for repealing the law of sedition in India is rooted in its impact on the ability of citizens to freely express themselves as well as to constructively criticise or express dissent against their government. The existence of sedition laws in India's statute books and the resulting criminalization of disaffection towards the state and government is unacceptable in a democratic society. These laws are clearly colonial remnants with their origin in extremely repressive measures used by the colonial government against nationalists fighting for Indian independence. Therefore I conclude that sedition law is in direct infringement of fundamental right guaranteed under article 19(1)(a) of

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Indian Constitution and should be repealed. The Supreme Court, being the protector of the fundamental rights of the citizens should step in now to declare Section 124A unconstitutional as India of the 21st century does not require a law used by the colonial government to suppress India's voice.

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ENVIRONMENT EFFECTS AND LOSS OF BIO DIVERSITY

- *Siddharth Singh & Sukhmani Kaur Singh*

INTRODUCTION

Earth was so beautiful at its initial stage and it was full of natural resources but as time passed, due to the growing population of India, it started facing major environmental problem and to control this problem there are several laws implemented like Environment Protection Act 1986, which is effective, but are not effectively enforceable, for example, Supreme Court passed the judgment to ban smoking in public places1 which is not working efficiently, in our opinion government should appoint some officers to regulate this law. There are even more environmental problems arising and to tackle them, in our opinion the old laws should be amended to work effectively. If we go back to look in our constitution there were no specific provision for healthy environment. The lacuna, has however been set off by judicial activism, there are several judgments of Supreme Court and High Court, where the courts have directed the fundamental right to healthy environment under Arts 14, 19, 21 and 32 of the constitution of India, in a landmark judgment of Kerala High Court a question arose as to whether right to get clean water and unpolluted air are attributes of Right to Life guaranteed by Article 21, the court held that, "The right to sweet water, and the right to free air, are attributes of the right to life, for, these are the basic elements which sustain life itself"2. Due to increase in population the process of development has also increased due to which the ecological balance has been disturbed the whole idea of sustainable development is not achieving the target. The term sustainable development was used first time during the Tokyo Declaration and received an enormous response during Stockholm Declaration of 1972 this concept was discussed in world commission and Brundtland report in 1982 and 1987 respectively. In June 1972 United Nation Conference on the Human environment took place in Stockholm where India participated, to take appropriate steps for the protection and improvement of human environment, where it was considered necessary to implement and take actions relating to protection and improvement of environment and the prevention of hazards to human beings, plants, property and other living creatures. It empowers the central government to take appropriate steps to tackle various environmental problems.

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BIODIVERSITY

Biodiversity can be referred as the sum of total plants, animals, fungi and microorganisms on earth. Biodiversity, manifest as the functioning of ecosystems, provides a variety of ecological services to society.

The objectives enshrined in the United Nation Convention on Biological diversity (CBD) held in 1992 gave birth to "The Biological Diversity Act 2002" in India.

The main object of the Act is conservation of biological resources and to use them in a sustainable manner. For implementation of the objects of the Act, the National Biodiversity Authority (NBA) was established in Chennai. The NBA is a statutory body that performs facilitative, regulatory and advisory functions for the government on Biodiversity related issues. In our opinion these Authorities should inspect and work on regular basis and should develop more efficient way to conserve biological diversity they should replace the old policies with new innovative policies in a period of time.

Loss of Biodiversity

As humans have overexploited the earth's resources, notably altered the environment, modified the territories and exploited the species has directly affected our biodiversity. There are several issues for loss of biodiversity but mainly the issues which we will discuss are:

1) Oceanic acidification and Biodiversity
2) Access and benefit sharing in Biodiversity

OCEANIC ACIDIFICATION AND BIODIVERSITY

Essentially, about 30 to 40 percent, of CO2 that's produced by human activity gets dissolved in the ocean. The rest stays in the atmosphere, or it's incorporated into living things in some form or another, usually as plant material or bodies of other producers. The added CO2 in the ocean causes an increase in acidity. Acidity is measured by pH value.

The CO2 breaks down, we have a chemical reaction, where the CO2 plus the water leads to carbonic acid. When you have the carbonic acid in the water, each carbonic acid molecule can release one of its hydrogen ions to make bicarbonate. Ocean acidification results from an increased concentration of hydrogen ions and a reduction in carbonate ions due to the absorption of increased amounts of CO2. Clams, mussels, crabs, corals, and other sea life rely on carbonate ions to grow their shells and thrive.

As the population of the world is increasing at a faster rate, so is the CO2 in the atmosphere by

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burning fossil fuels and changing land-use practices. Not only this, human activities and in particular agricultural activities contribute to the emission into the atmosphere of large quantities of nitrogen compounds. When these nitrogenous compounds dissolve in the ocean, they also have acidifying properties and contribute to the global acidification of the oceans. This human created environmental problem is now referred as "global warming's evil twin"3.

Broadly speaking, combating ocean acidification requires reducing CO2 emissions and improving the health of the oceans. The main goal of any policy addressing ocean acidification must be to reduce increases in atmospheric CO2 emissions and limit future levels of CO2. In order to combat ocean acidification, it needs to be taken into account when designing conservation strategies and should therefore be addressed in national, regional and international marine ecosystem and fisheries management policies and practices. Various policies are as:-

US POLICY - ENDANGERED SPECIES ACT

The Endangered Species Act (ESA) is often described as one of the most powerful Environmental statutes in the United States because under the ESA, once a species is listed as threatened or endangered, "take" of the species is strictly prohibited4. The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. It is administered by the U.S. Fish and Wildlife Service (Service) and the Commerce Department's National Marine Fisheries Service (NMFS).

1980 Convention on the Conservation of Antarctic Marine Living Resources

Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) was held in the year 1980. In 1982, the Convention came into force. The objective of CCAMLR is "the conservation of Antarctic marine living resources" which includes "the populations of fin fish, mollusks, crustaceans and all other species of living organisms." The treaty was originally established in response to concern about an increase in Southern Ocean catches of krill, a shell-forming organism at the base of the food chain in the Southern Ocean. The Convention creates two institutions to implement it: the Commission and the Scientific Committee5. The Scientific Committee measures the effects of proposed changes in the methods or levels of harvesting and proposed conservation measures and then the Commission acts on the Scientific Committee's recommendations at an annual meeting in addressing formulation of harvesting qualities and methods, and the designation of protected species.

Convention on Biological Diversity

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The Convention on Biological Diversity directs member states to implement conservation plans for biodiversity and to designate protected areas to support biodiversity6. Broadly interpreted then, the Convention obligates member states to establish protected marine areas and to take steps to shelter these areas from the impacts of climate change. The definition of biological diversity to be considered under the convention includes "marine and other aquatic ecosystems and the ecological complexes of which they are a part." There are marine protected areas created under this convention that help with the overall health of marine ecosystems.

INTERNATIONAL MARINE PROTECTION – LAW OF THE SEA CONVENTION

The 1982 UN Convention on the Law of the Sea (UNCLOS) has been ratified by 152 countries. It provides a general obligation to protect and preserve the marine environment, and a broad directive that states should take all measures necessary to prevent, reduce and control pollution of the marine environment from any source. In fact, it goes so far as to say that "states shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere. Even, the UN General Assembly is responsible for undertaking an annual review of the implementation of UNCLOS.

CLIMATE CHANGE

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) has potential to be adapted to abate acidification of the oceans8. "Climate change" is defined by the convention as changes attributable to human activity that alters composition of the atmosphere, and does not directly encompass ocean acidification. Additionally, the UNFCCC is concerned with greenhouse gases, which includes CO2, but it is only concerned with the warming potential of CO2, not the acidification effect of it. The overall goal of UNFCCC and other similar or related agreements is to stabilize greenhouse gas levels in the atmosphere to protect against human interference with the climate system, and the pH level of the oceans do not play a role in this goal. In 1997, the Kyoto Protocol to the UNFCCC was passed. The Kyoto Protocol sets actual quantitative emissions targets for six greenhouse gases, of which one is CO29. Ocean acidification is beginning to be addressed internationally through climate change negotiations. In 2009 Climate Change Summit in Copenhagen, an entire 11-day conference was devoted to the health of oceans10. While the main focus was on the effect of climate change, concern over ocean acidification, especially from scientists from around the world, was brought to the table on multiple occasions. Despite the time was devoted to the discussion of ocean acidification, no policy was adopted or adapted that would

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directly address the acidification of the oceans. However, there was a consensus that funding to research and increased research was needed around the world, and ocean acidification was not completely ignored. Negotiations aimed at reducing greenhouse gas emissions need to take ocean acidification into account.

ACCESS AND BENEFIT SHARING IN BIODIVERSITY

Agriculture in the 21st century faces multiple challenges. It needs to produce more food to feed a growing population and more feedstock for a potentially huge bio-energy market, with a smaller rural labor force. It needs to contribute to overall development in many agriculture dependent developing countries. It needs to adopt more efficient and sustainable production methods in the face of reduced resources and increased environmental pressures. In other words, the world needs to produce more food, using fewer resources, in a more challenging environment and in a context of globalization, rapid urbanization, growing inequities and insecure land tenure14. Numerous public policies, on all jurisdictional and institutional levels, were implemented to address public problems arising from the utilization of Genetic Resources (GR). Among these policies, the Convention on Biological diversity (CBD) aims to regulate the uses of biodiversity. One of the objectives of this treaty is the implementation of an Access and Benefit Sharing (ABS) mechanism. In other words, through the CBD, the international community wanted to establish a global regime regulating the access to GR which are used to perform scientific researches so as to enable the fair sharing of the benefits that may arise from those research activities.

THE RECENT TREND OF INDIA TOWARDS CBD:

India became a signatory to CBD and enacted the Biodiversity Act 2002, with three main objectives:

1. Conservation of Biological Diversity
2. Sustainable use of its components
3. Equitable sharing of benefits arising out of the use of biological resources

For the effective implementation of the Act, a three-tier system was established with a National Biodiversity Authority (NBA) at the Centre, State Biodiversity Boards at each of the Indian states and local-level Biodiversity Management Committees functioning with both municipalities and panchayats. Further, India adopted Nagoya Protocol (2014) on Access to Genetic Resources and

the Fair and Equitable Sharing of Benefits, not only this India adopted National Biodiversity Action Plan 2008, in consultation with various stakeholders and by taking cognizance of legislative and policy framework is a dynamic matrix for mainstreaming biodiversity concerns in the country. CBD basic Strategic Plan was for Biodiversity 2011-2020. NBA main functions include regulating activities, advising the Government of India on biodiversity matters, grant for access to biodiversity and associated knowledge and to take necessary measures to protect the biological diversity of the country. The main functions of the State Biodiversity Boards are to regulate requests for utilization of biological resources by Indian nationals and to assist the State Government in notifying of areas of biodiversity importance as Biodiversity Heritage Sites and framing rules for their management and conservation. At the local level, Biodiversity Management Committees perform the function of documenting People's Biodiversity Registers and implement biodiversity conservation programs. Moreover, to ensure the fair and equitable sharing of benefit arising out of the use of genetic resources, India has taken significant legislative measures and also integrated these principles in various policies and programs.

CONCLUSION

There were no specific provisions for the pollution free environment in the Constitution of India, but due to the judicial activism the lacuna has been set out by the court by passing several Judgments related to the environmental problems given by the Supreme Court and High Court by which the pollution free environment has become the fundamental right of the citizens of India. There are several cases related to the environment where the courts have entertained PIL, one of the most important being M.C Mehta V Union Of India20 in which the oleum gas leak took place in an industry situated in Delhi due to which a lawyer died after inhaling noxious gas. Having notice of the incident, Advocate M.C Mehta filed the case by way of PIL in which the court directed the industry to adhere guidelines to carry on its operation. There has been considerable exploitation of earth resources which is rapidly affecting biological diversity, like increase in oceanic acidification which is causing harm to the aquatic ecosystem, for which U.S Policy, International Biological Diversity Protection etc, has been introduced and the main objective of such policy is to recover and protect the endangered species related to aquatic ecosystem. Not only oceanic acidification but also problem of climate change is increasing due to which concentration level of Greenhouse gases has increased by which glaciers are melting and water level of oceans is also increasing which is a serious threat to human race for which there are agreements between nations to stabilize Greenhouse gases. Further, the idea of Access sharing and benefit was introduced in Convention on Biological Diversity (CBD).The CBD aims to regulate the uses of

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biodiversity. One of the objectives of this treaty is the implementation of an Access and Benefit Sharing (ABS) mechanism. In other words, through the CBD, the international community wanted to establish a global regime regulating the access to GR which are used to perform scientific researches so as to enable the fair sharing of the benefits that may arise from those research activities.

In our opinion, the best way to control, inspect and aware the environmental problem is by way of PIL. The courts are even given the power to entertain PIL (Public Interest Litigation) in which it is not necessary that the affected party should only file the case if the crime is injurious or affecting the society as a general, then any member of the society can file a PIL in the court. Even, the courts have played an active role in entertaining a small letter in the form of petition.

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