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ABOUT US

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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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-Drutika Upadhyay & Vaibhav Singh Parihar

INTRODUCTION

The strategic emergence of India and China, the two Asian neighbours have shifted the gravity of world politics in to Asia and turned the vision of "Asian Century" into reality. Despite multiple socio-economic engagements, both the countries stand juxtaposed on various international and regional issues. This age of mistrust and rivalry started after the emergence of Tibetan Revolution. But, for centuries, India and China shared friendly and cooperative relations. The religious and economic ties between India and China stretched back to the First Century AD, when trade and pilgrimages was flourishing through the ancient Silk Road Corridor. Various Buddhist monks travelled to China to spread the message of Buddhism whereas, hundreds of Chinese pilgrims travelled to India and studied Buddhism in Nalanda University. These ancient ties even continued to thrive during the middle, modern and colonial eras. After independence, these age-old relations developed further, when India offered its unconditional support to Chinese freedom struggle and extended its diplomatic reorganization to China. However, this ancient relationonly lasted up to the beginning of Tibetan uprising of 1959 and started shrinking after the emergence of Tibetan crisis.[1]

NUCLEAR SUPPLIER GROUP AND INDIA'S MEMBERSHIP

Nuclear Supplier Group was formed as result of India's first Nuclear Test 'Smiling Buddha' conducted in Pokharan in 1974. It is a group of nuclear supplier countries that seeks to prevent nuclear proliferation by way of controlling the export of

[1] Prof. P. Lazarus &SamrajSibaramBadatya, Fa Xian to Panchsheel: India-China Relations in the age of Friendship and Cooperation, (WORLD FOCUS), <http://www.worldfocus.in/articles/india-and-china-relations/fa-xian-to-panchsheel-india-china-relations-in-the-age-of-friendship-and-cooperation/>, accessed on 21 Nov, 2018.

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materials, equipment and technology that can be used in the manufacturing of the nuclear weapons. It was formed with an objective of averting the proliferation of nuclear weapons and to combat nuclear terrorism. India applied for NSG membership in 2016. NSG membership is important to India as it will increase India's access to state-of-the-art technology from the other members of the group. Increased access to technology and being allowed to produce nuclear weapon programs will eventually give a boost to Make in India program. While most of the members of the 48-member group backed India's membership, China opposed India's membership on the ground that India is not a signatory to the Nuclear Non-Proliferation Treaty. NPT is an international treaty, which came into force in 1970 with an objective of preventing the spread of nuclear weapons and weapons technology.[2]This has made India's entry to the NSG difficult because NSG works on the principle of consensus. However, India's stand regarding NSG is that it is not a non-proliferation but an export control mechanism. India contends that NPT membership is not an essential condition for NSG membership as in the case of France which became a member of Nuclear Suppliers Group without being a signatory to NPT. Most importantly, it can be said that India's desire to acquire NSG membership may be the perceived international status that members of NSG enjoy. This status denotes the level of advancement of the strategic technical developments of a country, that it can supply controlled items and its governance capacity to administer complex trade controls. Also, India is trying to secure a permanent seat of the United Nations Security Council where all the 5 permanents are NSG members. Thus, NSG membership will further strengthen India's claim for the permanent seat.

SOUTH CHINA SEA CONFLICT

South China Sea has often been the second Middle East because of its rich reserves of oil and natural gas. India is not directly involved in the dispute but India's involvement in South China Sea is in the 'Offensive-Defence Strategy' in the foreign policy. India has legitimate security concerns with China because any military dispute in South China Sea will have direct consequences on the Indian Ocean region. India is

[2]SreeResmi S, *Nuclear Supplier Group and India's Membership*, https://www.clearias.com/nuclear-supplier-group-nsg-and-indias-membership/ accessed on 21 Nov, 2018

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in the favour of the settlement of the dispute through bilateral means. But India's economic, maritime and strategic interests demand the freedom of passage through South China Sea. If China gains control over the South China Sea region it will directly affect the world trade practices.

From geographical perspective, South China Sea connects Indian Ocean to the East China Sea through the Strait of Malacca, one of the busiest sea lanes in the world. Up to 97 percent of India's total international trade volume is sea-borne, half of which, passes through the straits. In addition, ASEAN constitutes one of India's largest trade partners, with total trade valued at $71 billion in 2016/2017.[3] Energy is another component of India's interest in the SCS. Already importing up to 80 percent of its total oil requirements, India will likely need to secure new energy sources as domestic demand rises. The potential energy deposits in the SCS have thus drawn India's attention.[4]

Even though India is not a direct party to the dispute it is involved in the dispute for three prime reasons; to maintain maritime securities, to strengthen its close ties with ASEAN countries to fulfil its Act East policy and to counter China in the Indian Ocean region. There are certain other factors that justify India's involvement in the South China Sea dispute. China's over-growing ambitions adversely affect India's security concerns and India wants to counter China by getting involved in the dispute.

Secondly, due to the weakening of the American alliance in Asian region, US wants India to play a role in regional security issues. Thirdly, India's Act East policy require India to maintain economic and defence ties with Southeast Asian countries and this justifies India's involvement in the region as many of such countries want India to play a role in resolving the dispute.

TIBET ISSUE AND GRANTING OF POLITICAL ASYLUM TO DALAI LAMA

Granting of political asylum to Dalai Lama has been one of the most controversial issues in the history of India-China relation. Although during colonial period India respected Chinese suzerainty over Tibet, it is still seen as an 'issue' between India and

[3]Byron Chong, 'India and the South China Sea' 2018 CIMSEC <http://cimsec.org/india-south-china-sea/35520>, accessed on 22 Nov, 2018.
[4]Ibid.

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China. Taking over of Tibet by China meant transformation of Indo-Tibetan border into Sino-Tibetan border which resulted in Sino-Indian war of 1962. The Anglo-Tibetan agreement of 1904 granted military, communication, trading and certain other rights in Tibet to India and recognized China's authority over the land of Tibet. However, the Chinese occupation of Tibet in 1950 strained India's relation with China. After a series of negotiations, India, in 1954, signed an agreement with the government of China recognizing Tibet as Chinese territory. India also surrendered its right in the Tibetan region granted to India by the 1904 agreement. Apart from this, the 1954 agreement established the 'Five Principles of Peaceful Co-existence' also known as 'Panchsheel'. This was a major step taken by both the countries towards the establishment of amicable relationship between the two. However, these relations were further strained due to riots in Tibet and Dalai Lama's flight to India along with his hundreds of followers and subsequent border disputes. During 1951-1959, China initially granted full autonomy to Tibet in the matters of governance, religion, language and culture and preserving the traditional religious and administrative institutions like the institutions of the Dalai Lama and Panchen Lama within the geographical boundaries of Tibet and vesting the foreign and defence matters with the Chinese central government. Under the leadership of Dalai Lama, demand for the independence of Tibet arose in Tibet. China did not accept the demand for separation and independence as it might lead to similar demands in some other regions as well. As a result, Dalai Lama fled from Tibet to India in 1959 along with his followers and tried to seek political asylum in India. India's move of granting political asylum to Dalai Lama was not welcomed by China. Even after 55 years the issue of Tibet remains unresolved.

SINO-INDIAN WAR OF 1962 & 1987

Despite all the efforts towards a cooperative bilateral relation, the two powers of Asia witnessed a severe conflict that escalated into a war. The bone of contention between the two powers was the bordering regions of Aksai Chin and parts of the present Indian state of Arunachal Pradesh. The area known as Aksai Chin was claimed by India to be part of Kashmir, and by China to be in its province of Xinjiang or

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Sinkiang.[5] In 1961, Nehru instituted the Forward Policy, in which India tried to establish border outposts and patrols north of Chinese positions, in order to cut them off from their supply line. In the end, China retained actual control of the Aksai Chin region. Prime Minister Nehru was roundly criticized at home for his pacifism in the face of Chinese aggression, and for the lack of preparation prior to the Chinese attack.[6]At the end of 1986, India granted statehood to Arunachal Pradesh, which is an area claimed by China but administered by India. The Chinese government proceeded to protest. But the military movements in Tawang, taken in conjunction with this political action were a provocation by the Chinese. In early 1987 Beijing's tone became like that of 1962, and with the Indian Army refusing to stand down, Western diplomats predicted war. The Indian response to the Chinese build-up was Operation Falcon and involved movements across the Sino-Indian border.[7]However, External Affairs Minister ND Tiwari's arrival in Beijing in May 1987 helped lowering the tension. The first formal flag meeting to discuss the freezing of the situation since 1962, was held. Both sides reaffirmed their desire to continue the on-going talks on the border. A few months later, the Indian and Chinese troops withdrew from their positions in the Sumdorong Chu area. Finally, in 1993, the two countries signed an agreement to ensure peace along the LAC.[8]

INDIA'S BOYCOTT OF BELT AND ROAD INITIATIVE

The Belt and Road Initiative or the Silk Road Economic Belt is a development strategy proposed by Chinese President Xi Jinping in 2013 to improve the connectivity and co-operation between the Eurasian countries. It aims at reviving the old silk route. The initiative initially focuses on infrastructure, investment, education, construction materials, railways and highways, automobile, power grid, real estate and iron and steel. The Belt and Road Initiative addresses an infrastructure gap and aims

[5]HistoryPlex Staff, A Brief Description of India-China War of 1962,(STORYPLEX),<https://historyplex.com/brief-description-of-india-china-war-of1962>, accessed on 25 Nov, 2018.
[6]Kallie Szczepanski, The Sino-India War, 1962, (THOUGHTCO.),<https://www.thoughtco.com/the-sino-indian-war-1962-195804>, accessed on 25 Nov, 2018.
[7]Manmohan Yadav, 1987 Sino-Indian Stand off,(INDIAN DEFENCE), <http://indiandefence.com/threads/1987-sino-indian-standoff.11917/>, accessed on 20 Nov, 2018.
[8]Zee Media Bureau, Sino-India border tension: When Indian Army gave befitting reply to China, (ZEE NEWS),<http://zeenews.india.com/india/sino-india-border-tension-when-indian-army-gave-befitting-reply-to-china-2021447.html>, accessed on 20 Nov, 2018.

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at accelerating economic growth across the Asia Pacific region and Central and Eastern Europe. Already, some estimates list the Belt and Road Initiative as one of the largest infrastructures and investment projects in history, covering more than 68 countries, including 65% of the world's population and 40% of the global GDP as of 2017.[9] India's stand to boycott the Belt and Road Initiative has further accelerated the geo-political friction between the two nations. The MEA issued a comprehensive statement on its objections to the B&RI, which were three-fold: the corridor includes projects in land belonging to India; the projects could push smaller countries on the road into a crushing debt cycle, destroy the ecology and disrupt local communities; and China's agenda was unclear, with the implied accusation that this was more about enhancing its political influence, not just its physical networks.[10]The foremost reason of India's boycott of the initiative is the concern relating to the sovereignty and territorial integrity. The flagship project of the initiative known as the 'China-Pakistan Economic Corridor' passes through the region of Gilgit-Batlistan that India considers to be its own territory. Another reason for India's boycott of the initiative is the creation of debt in the countries where the projects have been undertaken. China's construction of the highways and ports has resulted in huge debt, high interest rates and incidents of bribing the officials. Moreover, China's unwillingness to agree to India's request for consultations on objective, nature and financing of the Belt and Road Initiative is also a factor for growing differences between India and China.

STAND OFF IN DOKLAM

The '2017 China-India Border Stand-off' or 'Doklam Stand-off' is a military border standoff between Indian armed forces and People's Liberation army of China over a Chinese construction of a road in Doklam. It is a disputed area between China and Bhutan situated near their tri-junction with India. India does not, per se, claim Doklam but supports Bhutan's claim over the disputed region. China has been claiming its authority over the region since a long time and its claim is based on the '1890 Convention of Calcutta' between China and Britain.[11] The main aim of the

[9]Charlie Campbell, *China Says It's Building the New Silk Road. Here Are Five Things to Know Ahead of a Key Summit*, Time, May 12, 2017
[10]Suhasini Haidar, *Why did India boycott China's road summit*, The Hindu, May 20,2017
[11] Calcutta Convention Relative to Sikkim and Tibet art.1, March 17, 1890.

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Convention was to limit the power of Tibet over Sikkim and to avoid any future conflict.

In 1988 and 1998 Bhutan and China entered into agreements for establishing peace and tranquillity in the region until the final settlement regarding boundary dispute takes place. But China has broken the peace agreement by constructing a road in the disputed region.

Although Doklam is not a part of the Indian territory, yet India is actively involved in the for two primary reasons. First being strong cordial relations between India and Bhutan. India and Bhutan have entered the 'Treaty of Friendship' in 1949 according to which India was to guide Bhutan on foreign and defence matters. This was later modified in 2007. Certain amendments were made in the previous treaty. According to the amended treaty, India was to respect the sovereignty of Bhutan. It made mandatory and obligatory upon Bhutan to take India's guidance on foreign policy.The treaty commits both the nations to co-operate with each other on the issues relating to the national interests and to not allow the use of their territories for activities harmful to national security and the interests of the other.

Secondly, India's perspective is to protect the Siliguri Corridor, also known as Chicken's Neck, which connects North Eastern part of the country with the rest of the India and is the only connectivity. In case China acquires control over Doklam area it will get geographical gain over India and can easily block the corridor and isolate the north-eastern region.

India being an ally of Bhutan was asked to intervene. The standoff between two powerful Asian giants lasted for more than 2 months with China threatening India of serious consequences and kept reminding of 1962 Indo-China war. To which India gave a stern reply by stating that it is ready for two and a half front war. Despite several bilateral solutions and diplomatic talks, China was not interested in disengaging its troops. However, on 28th August 2017, an official statement was released by India's Ministry of External of Affairs that both countries have agreed to withdraw their troops from the area. India withdrew its troops in afternoon followed by PLA withdrawing its troop as well as road construction machinery.

LOOK EAST POLICY

The look east policy refers the policy to look east. The objective of the look east policy is to forge social, economic and cultural relations with the countries of East Asia. More specifically, Look East Policy envisages three-pronged approach towards the countries of South-East Asia. First, to renew political contacts and understanding with ASEAN member states. Second, to achieve enhanced economic interactions including investment and trade, science and technology, tourism, etc. with the South-Eastern Asian countries, and third to strengthen defence and strategic links with these countries to achieve better understanding.[12]

It was launched in 1992 just after the end of the world war, following the collapse of the Soviet Union. India's financial crisis of 1991 coincided with the collapse of the Soviet Union which was India's valued and strategic partner. Both developments compelled India to take a fresh look at its foreign policy. It was Prime Minister P.V. Narasimha Rao's strategic vision that he quickly grasped the changed economic and strategic paradigms of international relations in the early 1900's. The world was no more divided into the cold war and South Asia and South-East Asia could no longer be treated as separate strategic threats. Prime Minister Rao took a conscious decision to plug into the dynamic South-east Asian region.[13]

As a follow-up to India's look east policy, Prime Minister Narendra Modi has made "Act East" a launch pad for his government's more focused engagement with the East Asia. Earlier, the look east policy concentrated on the Association of Southeast Asian nations and Japan, but it was realized later that India's outreach to the east could not be confined to ASEAN or Japan, nor only in the economic sphere. Unfortunately, India's Act East policy is being labelled as the old Look East wine put in a new bottle. But India must continue forging closer economic integration and greater connectivity with Southeast Asia, as that would provide ASEAN states the means to reduce their over-dependence on China. Modi may have to concentrate on India's long-neglected maritime imperatives as well as to think of India's strategic future. Further, he needs

[12] K.K. Ghai, Look East Policy, (YOUR ARTICLE LIBRARY), <http://www.yourarticlelibrary.com/essay/essay-on-indias-look-east-policy/40412>, accessed on 29 Nov, 2018.

[13] Javid Ahmad Mir, India's "Look East" Policy: Its evolution, objectives and approaches, (PEN2PRINT), <http://www.pen2print.org/2017/04/indias-look-east-policy-its-evolution.html> accessed on 29 Nov, 2018.

to concentrate on safeguarding core Indian interests backed by a more assertive and credible military/maritime power. He envisages that India must also expand its diplomatic, economic and military relations with all powers while pursuing its onward march. Thus, the Act East policy has a very strong and effective agenda that can ensure peace and progress in the entire East and also the whole world in the true spirit of *vasudhaivkutumbakam*- "the world is one family". [14]

PANCHSHEEL[15]

Panchsheel, or the Five Principles of Peaceful Co-existence, were first formally enunciated in the Agreement on Trade and Intercourse between the Tibet region of China and India signed on April 29, 1954, which stated, in its preamble, that the two Governments have resolved to enter into the present Agreement based on the following principles: -

i. Mutual respect for each other's territorial integrity and sovereignty,

ii. Mutual non-aggression,

iii. Mutual non-interference,

iv. Equality and mutual benefit, and

v. Peaceful co-existence.

The universal relevance of Panchsheel was emphasized when its tenets were incorporated in a resolution on peaceful co-existence presented by India, Yugoslavia and Sweden, and unanimously adopted on December 11, 1957, by the United Nations General Assembly. In 1961, the Conference of Non-Aligned Nations in Belgrade accepted Panchsheel as the principled core of the Non-Aligned Movement. The linkage that was established by the spread of Buddhism in China laid the historical basis for the formulation of the principles of Panchsheel by India and China.

However, in today's world, it is not enough that Panchsheel be promoted as an alternative ideology that empowers the less-developed. It should be made clear that Panchsheel is an ideology for the entire world and is as relevant to the developed

[14]Sudhanshu Tripathi, Why India is switching from a Look East to an Act East policy, (ASIA TIMES), <http://www.atimes.com/india-switching-look-east-act-east-policy> accessed on 30 Nov, 2018.
[15] Panchsheel, <http://www.mea.gov.in/Uploads/PublicationDocs/191_panchsheel.pdf> accessed on 30 Nov, 2018.

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countries of the globe as it is to the less-developed. What should be stressed today is that the principles of Panchsheel are not just empowering principles, they are also guiding principles that enshrine a certain code of behaviour.

Emphasizing on the importance of Panchsheel, the then Prime Minister A.B. Vajpayee in his speech in Beijing University on June 23, 2003 said that "One cannot wish away the fact that before good neighbours can truly fraternize with each other, they must first mend their fences. After a hiatus of a few decades, India and China embarked on this important venture a few years ago. We have made good progress. I am convinced that, with steadfast adherence to the Five principles of peaceful co-existence, with mutual sensitivity to the concerns of each other, and with respect for equality, our two countries can further accelerate this process so that we can put this difference firmly behind us."

MILITARY EXERCISE "HAND-IN-HAND"

The hand-in-hand joint training exercise is in continuation of the series of joint exercises between India and China. The first exercise in this series was held in China at Kunming in Yunnan Province in 2007. The aim of the exercise is "to develop joint operating capability, share useful experience in counter-terrorism operations and to promote friendly exchanges between the armies of India and China", according to the Indian Ministry of Defence. [16]

The most important issue between India and China is to evolve and strictly adhere to measures to prevent incidents on the LAC. And if an incident occurs, there should be measures in place to resolve it to the mutual satisfaction of both the countries. Many agreements have been signed in the past to achieve these aims. The two sides should accord the highest priority to discussing the measures that are necessary to give practical effect to the implementation of these agreements so that the occurrence of destabilizing incidents along the LAC can be minimized. [17]

[16] Franz-Stefan Gady, China and India Hold Joint Military Exercise, <https://thediplomat.com/2015/10/china-and-india-hold-joint-military-exercise/>, accessed on 5 Dec, 2018.

[17] Brig. Gurmeet Kharwal, Exercise Hand-in-Hand: Counter-terrorism Cooperation between India and China is Odd, <http://www.indiandefencereview.com/exercise-hand-in-hand-counter-terrorism-cooperation-between-india-and-china-is-odd/>, accessed on 9 Dec, 2018.

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In 2018, the two sides are set to revive the exercise that had been put on hold following the 73-day military standoff in Doklam. In 2016, India hosted the exercise. In the past, however, Hand-in-Hand was suspended for five years (2010-2014) after China refused to give visa to then Northern Army Commander Lt Gen BS Jaswal saying that Jammu and Kashmir was a disputed territory. [18]

APEC AND BRICS SUMMIT

About APEC[19]

The idea of APEC was firstly broached by former Prime Minister of Australia Bob Hawke. The founding members were Australia, Darussalam, Canada, Indonesia, Japan, Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand and the United States.

China; Hong Kong, China; and Chinese Taipei joined in 1991. Mexico and Papua New Guinea followed in 1993. Chile acceded in 1994. And in 1998, Peru, Russia and Vietnam joined taking full membership to 21. Between 1989 and 1992, APEC met as an informal senior official- and ministerial level dialogue. In 1993, former US President Bill Clinton established the practice of an annual APEC Economic Leaders' Meeting to provide greater strategic vision and direction for cooperation in the region.

How APEC Operates [20]

Asia-Pacific Economic Cooperation (APEC) operates as a cooperative, multilateral economic and trade forum. It is the only international intergovernmental grouping in the world committed to reducing barriers to trade and investment without requiring its members to enter into legally binding obligations. APEC achieves its goals by promoting dialogue and arriving at decisions on a consensual basis, giving equal weight to the views of all members. APEC Member Economies report progress

[18] India, China to resume exercises, (THE TRIBUNE), <http://www.tribuneindia.com/news/nation/india-china-to-resume-exercises/536564.html>, accessed on 9 Dec, 2018.
[19] Asia-Pacific Economic Cooperation, < https://www.apec.org/About-Us/About-APEC/History>, accessed on May 30, 2018.
[20] How APEC Operates, < https://www.apec.org/About-Us/How-APEC-Operates>, accessed on 9 Dec, 2018.

towards achieving free and open trade and investment goals through Individual Action Plans(IAPs) and Collective Action Plans(CAPs).

About Brics[21]

The acronym BRIC was first used in 2001 by Goldman Sachs in their Global Economics Paper, "The World Needs Better Economic BRICs" on the basis of econometric analyses projecting that the economies of Brazil, Russia, India and China would individually and collectively occupy far greater economic space and would be amongst the world's largest economies in the next 50 years or so.

As a formal grouping, BRIC started after the meeting of the leaders of Russia, India and China in St. Petersburg on the margins of G8 Outreach Summit in 2006. The grouping was formalized during the 1st meeting of BRIC Foreign Ministers' on the margins of UNGA in New York in September 2010. Accordingly, South Africa attended the 3rd BRICS Summit in Sanya, China on 14 April 2011.

Starting essentially with the economic issues of mutual interest, the agenda of BRICS meetings has considerably widened over the years to encompass topical global issues. BRICS cooperation has two pillars- consultation on the issue of mutual interest through meetings of Leaders as well as Ministers of Finance, S&T, Education, Agriculture, Communication, Labour, etc. and practical cooperation in a number of areas through meetings of Working Groups/Senior Officials. Regular Annual Summits as well as meetings of Leaders on the margins of G20 Summits are held.

CHO LA INCIDENT OF 1967

After the incident at Nathu La Pass, alongside the border of the Sikkim, a minor scuffle took place between the Sikh sentries of the 10 J&K Rifles and their Chinese counterparts on 30th September at Cho La, another pass on the Sikkim-Tibet border, a few kilometres north of Nathu La. It had a boulder about 30 cm in height in the centre of the narrow crest which marked the dividing line, according to the waterseed principle. During the fisticuffs, a Chinese sentry was roughed up and he lost a tunic button. This led to an intense one-day battle between Indian and Chinese troops on 1st October 1967. By the morning of 2nd October (the next day), Indian Army recaptured

[21] BRICS, < http://brics2016.gov.in/content/innerpage/about-usphp.php>, accessed on 12 Dec, 2018.

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the disputed points and the boulder that was in the root of these disputes. Since then, the border in the Sikkim sector has remained free of violence. In 1967, Sikkim was a protectorate of India and it joined the Indian Union as a state in 1975. China recognized the frontier in Sikkim sector in 2003. The last bullet fired along the China-India frontier was in the Arunachal Pradesh sector in October 1975, when border patrols from the two sides accidentally came face-to-face amid dense fog at Tuhung La and an Indian soldier was killed. This is often cited by Indian politicians and diplomats to drive home how calm the boundary with China is, say, compared to Pakistan. [22]

McMAHON LINE ISSUE

On 3rd July 1914, Tibet and India signed the Shimla Convention that gave birth to the McMahon Line separating Tibet from India in the eastern sector. Although the Convention recognized that 'Tibet forms part of Chinese territory', the then Chinese authorities did not sign the Convention as they objected specifically only to Article 9 of the said Convention that laid down the boundaries between Inner and Outer Tibet. Other than that, the Chinese Authorities made it clear that they did not object to any other Article, including that which showed the McMahon Line. [23]

India gave up its rights in the Tibet region after the signing of Panchsheel Agreement in 1954. After the conference, Nehru ordered publishing of maps of India that claimed definitive boundaries in the disputed area renamed as North East Frontier Agency. Some areas on the maps are shown on the north of the McMahon Line. In 1972, NEFA was again renamed to Arunachal Pradesh by India and China refers it as South Tibet in its maps. There have been several small clashes between the two armies since then, but it is to be noticed that the two nations did not withdraw their forces from the disputed land and there has been infrastructural development in the area amidst the peace talks going on from decades which shows little promise to get resolved.

[22] Sutirtho Patranobis, Lessons for India and China from 1967 Nathu La clash,(HINDUSTAN TIMES), <https://www.hindustantimes.com/world-news/lessons-for-india-and-china-from-1967-nathu-la-clash/story-IjZMtQb92D98pFgiCFN3ON.html>, accessed on 12 Dec, 2018.

[23]R.S.Kalha, The McMahon Line: A hundredyearson,(IDSA),<https://idsa.in/idsacomments/TheMcMahonLine_rskalha_030714>, accessed on 15 Dec, 2018.

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CONCLUSION

The trajectory of Sino-Indian relations is contingent on future economic and political developments within the two countries. Without sustained, rapid Indian economic growth, the relationship between China and India will not turn into a relationship of co-equals from the Chinese point of view. Political transition towards greater democracy in China could open possibilities for much closer cooperation.[24]The ties need constant monitoring, deft handling and judicious approach for all minor irritants which may crop up from time to time. If bilateral talks for solving boundary disputes are held and are fruitful a big stumbling block in mutual relationship will be removed. Trade and business relations will however continue to flourish between both countries.[25] Given the nature of political understanding and economic mutual interdependence, it is likely that the two countries will be able to manage their comprehensive relationship without many difficulties in the short-term or medium-term perspective. What required is more regular meetings at the highest level and creation of more institutional and structural mechanisms between the two governments. From the Indian side, there seems to be a political consensus among major political parties so far as dealing with China is concerned. Sino-Indian relation is complex. It is adversarial, not that everything is hunky-dory in the relationship between the two. There are irritants, and there are core-interests on which there is no convergence. At the end of the day, however, the convergence of interests outweighs the divergence. The relationship between the two is certainly better than what it is between China and Japan, or China and the USA., although these are dissimilar comparisons. Given the present political trust between the two countries, both New Delhi and Beijing certainly can manage their relationship well without jeopardising it.

[24]Keshav Guha, *'Sino-Indian Relations: History, Problems and Prospects'* <http://hir.harvard.edu/article/?a=10318>, accessed on 19 June 2018.
[25]Lt Col Avinash Chandra, *'Sino-Indian Relations: an Approach for 21st Century'* <http://www.indiandefencereview.com/news/sino-indian-relations-an-approach-for-21st-century-developments/> , accessed on 19 Dec 2018.

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CASE ANALYSIS: GHAZIABAD DEVELOPMENT AUTHORITY V. UNION OF INDIA

-Harsh Chandan

INTRODUCTION

Contracts are normally enforceable whether or not in a written form, although a written contract protects the rights of all the parties involved. Some contracts are legally required to be in writing to be enforceable in the eyes of law, but some of them are assumed in, and enforced by law whether or not the involved parties desire to enter into a contract.

One necessary condition for formation of a contract is the capacity of the parties to enter into it. The parties entering into a contract shall be legally capable to enter into a contract that is recognized in the eyes of law.[26]

Though the contract made in this case was in a written format and all the necessary conditions for the same had been fulfilled by both the parties entering into the contract. What happened here was that the defendant was liable for the mental agony as stated by the claimants.

The case in the project dealt with the breach of contract as entered into by the parties and the consequences thereof. The judgement by the Supreme Court was reached after going through two other decisions of the petitions filed before two considerate Authorities i.e. The MRTP commission and The Consumer Forum. The judgement finally found the development authorities to be guilty and asked them to pay the compensation to the claimants for the unreasonable delay in the transfer of the property.

[26] Definition of agreement

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RESEARCH METHODOLOGY

All the data that has been used for this project has been taken from the judgements from the requisite courts of authority, certain articles and some books were referred and hence, the sources of information used are all secondary in nature. Doctrinal method of research has been used. The project has been made keeping in mind, the decisions passed by their lordships, views of various people equipped with the requisite knowledge on the case and presented in an organised manner.

AIMS AND OBJECTIVES

This research project aims at shedding light on compensation provided in cases of mental agony in cases involving elements of a contract, in particular and its significance with reference to Law on Contracts in India. This explanation has been done by analysing the case of Ghaziabad Development Authority vs. Union of India and others and other important cases as cited by the concerned courts.

The objectives are to:

- Analyse the case of Ghaziabad Development Authority[27] vs. Union of India.
- To analyse and interpret the correctness of the judgement.
- To develop criticism, if any.

FACTS OF THE CASE

Ghaziabad Development Authority constituted under Section 4[28] of the Uttar Pradesh Urban Planning and Development Act, 1973[29] is the appellant. The Authority has from time to time promoted and advertised several schemes for allotment of developed plots for construction of apartments and/or flats for occupation by the allottees.

[27] Hereinafter referred as appellant
[28] The development authority powers defined that are given to a state development body.
[29] Reproduction of the provisions of the Uttar Pradesh Urban Planning and Development Bill, 1973, Act no. 11

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Ghaziabad Development Authority had announced a scheme for allotment of developed plots which was known as Indirapuram Scheme[30]. The Authority informed the claimants that a plot of 35 sq. metres was reserved for them, the estimated cost of which plot was Rs.420000/- payable in specified instalments. An allotment of plot was also informed. Then at one point of time the claimants were informed that due to some unavoidable reasons and the development work not having been completed there has been delay in handing over possession. Having waited for an unreasonable length of time the claimants approached the MRTP Commission[31].

Several people who had subscribed to the schemes approached different forums complaining of failure or unreasonable delay in accomplishing the schemes. Some have filed complaints before the Monopoly and Restrictive Trade Practices Commission and some have raised disputes before the Consumer Disputes Redressal Forum.[32] In two cases civil writ petitions under Article 226[33] of the Constitution were filed before the High Court seeking refund of the amount paid or deposited by the petitioners with the Authority.

In all the cases under appeal the Court or Commission or Forum concerned has found the appellant-Authority guilty of having unreasonably delaying the accomplishment of the announced scheme or guilty of failure to perform the promise held out to the claimants and therefore directed the amount paid or deposited by the respective claimants to be returned along with interest.

In the cases filed before the High Court of Allahabad there was a term in the brochure issued by the Authority that in the event of the applicant withdrawing its offer or surrendering the same no interest whatsoever would be payable to the claimants. The High Court has held such term of the brochure to be unconscionable and arbitrary and hence violative of Article 14[34] of the Constitution. The High Court has directed the

[30] Online scheme for allotment of flats in a particular area
[31] MRTP ACT, 1969
"The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 aims at preventing concentration of economic power in the hands of few business houses. The Act provides for control of monopolies, probation of monopolistic, restrictive and unfair trade practice and protection of consumer interests."
[32] The National Consumer Disputes Redressal Commission (NCDRC), India is a quasi-judicial commission in India which was set up in 1988 under the Consumer Protection Act of 1986.
[33] INDIA CONSTITUTION, Article 226
"Power of High Courts to issue certain writs"
[34] INDIAN CONTITUTION, Article 14

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amount due and payable to be refunded with interest calculated at the rate of 12 per cent per annum from the date of deposit to the date of refund.

In all the other appeals, the impugned order passed by the Commission or the Forum directs payment of the amount due and payable to the respective claimants with interest at the rate of 18 per cent per annum.

In Civil Appeal G.D.A. Vs. Brijesh Mehta[35], the MRTP Commission had held the claimants entitled to an amount of Rs.50000/- payable as compensation for mental agony suffered by the claimants for failure of the Authority to make available the plot as promised by it.[36]

ISSUES RAISED

1. What questions of law were related to the delay in transfer of property?
2. Were the owners of the property entitled to compensation on account of mental agony?
3. What was the role of Consumer protection forums and MRTP Commission in protection of rights of the aggrieved persons?

ANSWERS TO THE QUESTIONS

1. The most important question related was regarding section 73 of The Indian Contract Act.[37] There was a breach of contract and though there was a pre-mentioned clause in the terms of the contract that the development authority shall not be liable to pay any compensation whatsoever, it was held that the term was violative of article 14.[38]

"Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

[35] G.D.A. vs. Brijesh Mehta, CA No. 8316 of 1995 (overruled by MRTP commission)

[36] Supreme Court of India (https://www.sci.gov.in/jonew/judis/16318.pdf)

[37] Section 73, Indian Contract Act, 1872

"Compensation for loss or damage caused by breach of contract When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

[38] Indian Constitution, Article 14

2. The owners were not entitled to compensation on the account of mental agony because of the nature of the contract, which was an ordinary commercial transaction.
3. Both the Consumer Forum and the MRTP commission had said that there was a fault on the part of the development authorities and hence the owners of the property shall be provided with a compensation that was neither too high nor too low.

PROCEDURAL HISTORY

The case had been taken by the owners to the Consumer Form and the MRTP commission which were unanimous in their decisions, after which it had gone to the high court which pointed a term stated in the brochure of the development authority and deemed it to be void of article 14.

After all the necessary proceedings and investigations the Supreme Court dismissed all the pending pleas with any authority and said in its judgement that the development authorities were liable not for mental agony, but for the loss that was suffered by the owners/claimants due to the unreasonable delay.[39]

JUDGEMENT

The learned counsel for the respondents has invited our attention to Lucknow Development Authority vs. M.K. Gupta[40] wherein this Court has upheld the award by the Commission of compensation of Rs.10000/- for mental harassment. The basis for such award is to be found in paras 10 and 11 wherein this Court has stated inter alia - Where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When the citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for

"Equality before law, The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

[39] Supreme Court of India (https://www.sci.gov.in/jonew/judis/16318.pdf)

[40] (1994) 1 SCC 243

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capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. The Court has further directed the responsibility for the wrong done to the citizens to be fixed on the officers who were responsible for causing harassment and agony to the claimants and then recover the amount of compensation from the salary of officers found responsible.

The judgment clearly shows the liability having been fixed not within the realm of the law of contracts but under the principles of administrative law. We do not find any such case having been pleaded much less made out before the Commission. Indeed, no such finding has been arrived at by the Commission as was reached by this Court in the case of Lucknow Development Authority[41]. The award of compensation of Rs.50000/- for mental agony suffered by the claimants is held liable to be set aside. The next question is the award of interest and the rate thereof. It is true that the terms of the brochure issued by the Authority relevant to any of the cases under appeal and the correspondence between the parties do not make out an express or implied contract for payment of interest by the Authority to the claimants. Any provision contained in the Consumer Protection Act, 1986[42] the Monopolies and Restrictive Trade Practices Act, 1969[43] and U.P. Urban planning and Development Act, 1973[44] enabling the award of such interest has not been brought to our notice. The learned counsel for the claimants have placed reliance on a recent decision of this Court in Sovintorg (India) Ltd. Vs. State Bank of India, New Delhi[45] wherein in similar circumstances the National Consumer Disputes Redressal Commission directed the amount deposited by the claimants to be returned with interest at the rate of 12 per cent per annum.

This Court enhanced the rate of interest to 15 per cent per annum. To sustain the direction for payment of interest reliance was placed on behalf of the claimants on Section 34 of the CPC[46] and payment of interest at the rate at which moneys are lent

[41] Supra note 15
[42] Consumer Protection Act, 1986, No. 68, Acts of Parliament, 1986
[43] Supra note 6
[44] U.P. Urban Planning and Development Act, 1973, No. 11, Acts of Parliament, 1973
[45] (1999) 6 SCC 406
[46] Section 34 of Civil Procedure Code, 1908 confers to discretion on the Court to award interest at such rate as the Court deems reasonable from the date of the suit to the date of the decree with further reasonable interest on the aggregate sum till date of payment.

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or advanced by National Banks in relation to commercial transactions was demanded. This Court did not agree.

However, it was further observed that there was no contract between the parties regarding payment of interest on delayed deposit or on account of delay on the part of the opposite party to render the services. Interest cannot be claimed under Section 34 of the CPC as its provisions have not been specifically made applicable to the proceedings under the Act. We, however, find that the general provision of Section 34 being based upon justice, equity and good conscience would authorise the Redressal Forums and Commissions to also grant interest appropriately under the circumstance of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases. The interest can also be awarded on equitable grounds.

All the appeals related to the case stood disposed off and the refund was finally allotted at 12 percent and not at 18 percent on the agreement of all the authorities concerned[47].

CONCLUSION

As in the case of Ghaziabad Development Authority vs. Union of India, the compensation to the claimants was provided because the loss that the allotees had to bear was a direct result of the fault on the part of the Development Authorities. It was a fault on their part to delay the transfer of property to the claimants to such unreasonable time and that too without any justifiable excuse.

Though they had already mentioned in their contract as a clause that under no circumstances would they be liable to pay any compensation to the parties of the contract. The Supreme Court found this clause to be violative of Article 14, as it was a breach of equality.

The only situation under which the Development Authority wouldn't be held liable to provide compensation to the claimants would be if the claimants themselves were responsible for the loss suffered by them.

[47] Supreme Court of India (https://www.sci.gov.in/jonew/judis/16318.pdf)

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Thus, the court in every way was justified in ordering the Development Authorities to pay compensation of the original amount of the contract along with the interest of 12 percent. Though there was also a lot of discussion that had taken place regarding the amount of the interest that shall be provided to the claimants, but in the end it was ultimately decided that 12 percent from the time of entering into the contract to the time of filing the complaint would be sufficient.

The main question that lay in front of the court was relating to the section 73 of The Indian Contract Act, 1872.[48] There had been a breach of contract in the form that the development authorities had delayed the transfer of property to the claimants by unreasonable time, with no fault on the part of the claimants.

There was another question that had come up before the court which was whether the claimants were entitled to compensation on the account of the mental agony that had been suffered by the time on the ground of the delay?

The answer to this question, the court gave was that they would not be entitled to the same because of the nature of the contract, which was an ordinary commercial transaction.

However, the court did allow them compensation but not on the grounds of mental agony but to put the claimants monetarily in the same position as they would have been had not the delay happened.

[48] Supra note 12

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INVESTIGATION, INTERROGATION & COMPILATION OF EVIDENCE IN CASES RELATING TO WOMEN- A CRITICAL ANALYSIS

-Aishwarya Singh

"Nothing matters but the facts. Without them, the science of criminal investigation is nothing more than a guessing game."

-Blake Edwards

INTRODUCTION

Investigation of crime is considered as the more crucial part of the Criminal system as the whole conviction or acquittal of the offender depends on it and even a slight mistake can transpose the flow of justice. According to Section 2(h) of Code of Criminal Procedure, 1973 "investigation" includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. It can be said that Criminal investigation or investigation of CRIME means the endeavor made by an Investigating Officer (IO) to find out the truth of the information received or alleged by collection of evidences in respect of an incident of crime or allegation, to trace out the culprit and fix up his responsibilities by a legal process of elimination so that he can be successfully be brought before the JUSTICE and put behind the BAR.

Investigation of cases relating to women by the police has always been the focal point of controversies as there has always been a mistake from both the sides, i.e. The police because of their non-reluctance of registering the FIR and judging the victim

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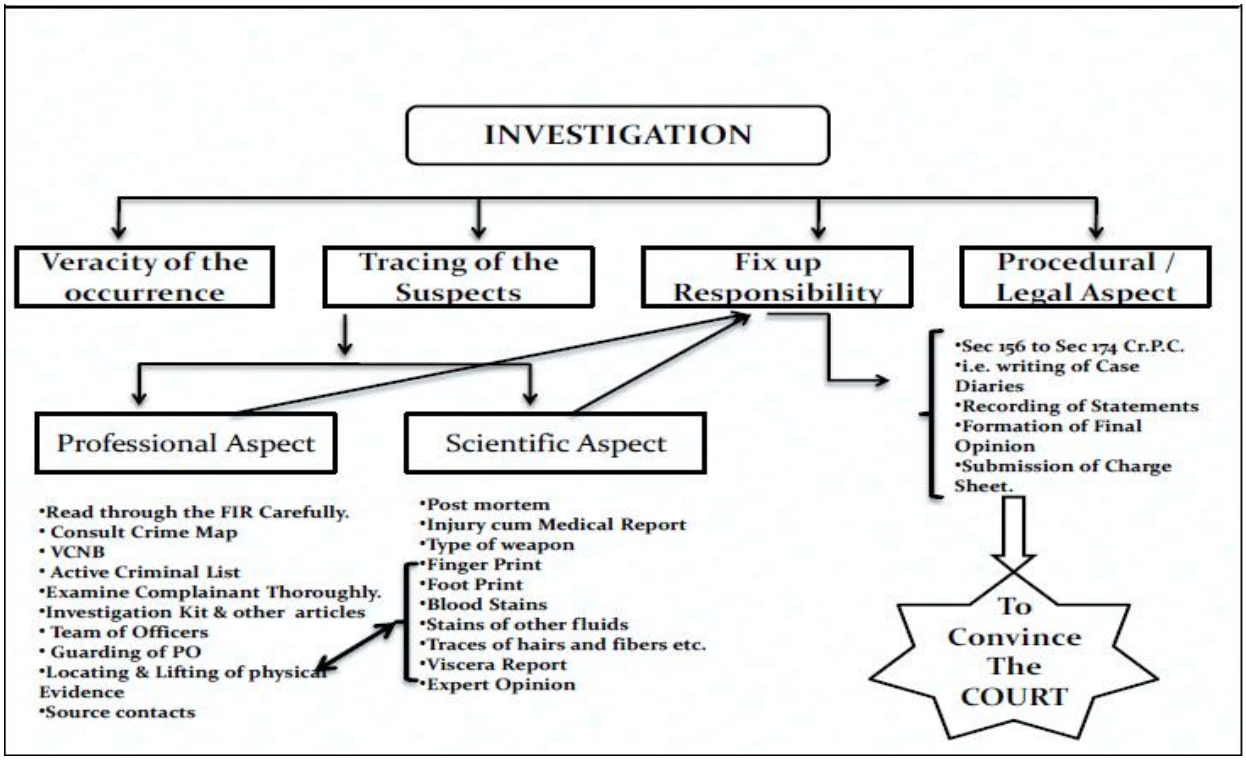
on the basis of their past records and women because of their hesitation to come forward to register FIR and recording their statements.[49]

AIMS AND OBJECTIVES OF INVESTIGATION

1. Determination of the veracity of the occurrence; i.e. to find out whether the complaint made are true or not. If true then true to what extent?
2. Tracing the suspect and discovery of exhibits / property.
3. Fixation of responsibilities of the suspects.
4. Procedural Aspects, i.e. an IO is bound to maintain certain legal formalities and procedures (As mentioned in the graphical representation).
5. And the most important thing is that the IO will have to convince the court that the investigation made by him is true in all respects and free from any doubts.[50]

PROCEDURE OF CRIMINAL INVESTIGATION



[49] Hand Book on Investigation for Sub –Inspector of Police W.B.P.
[50] Ibid

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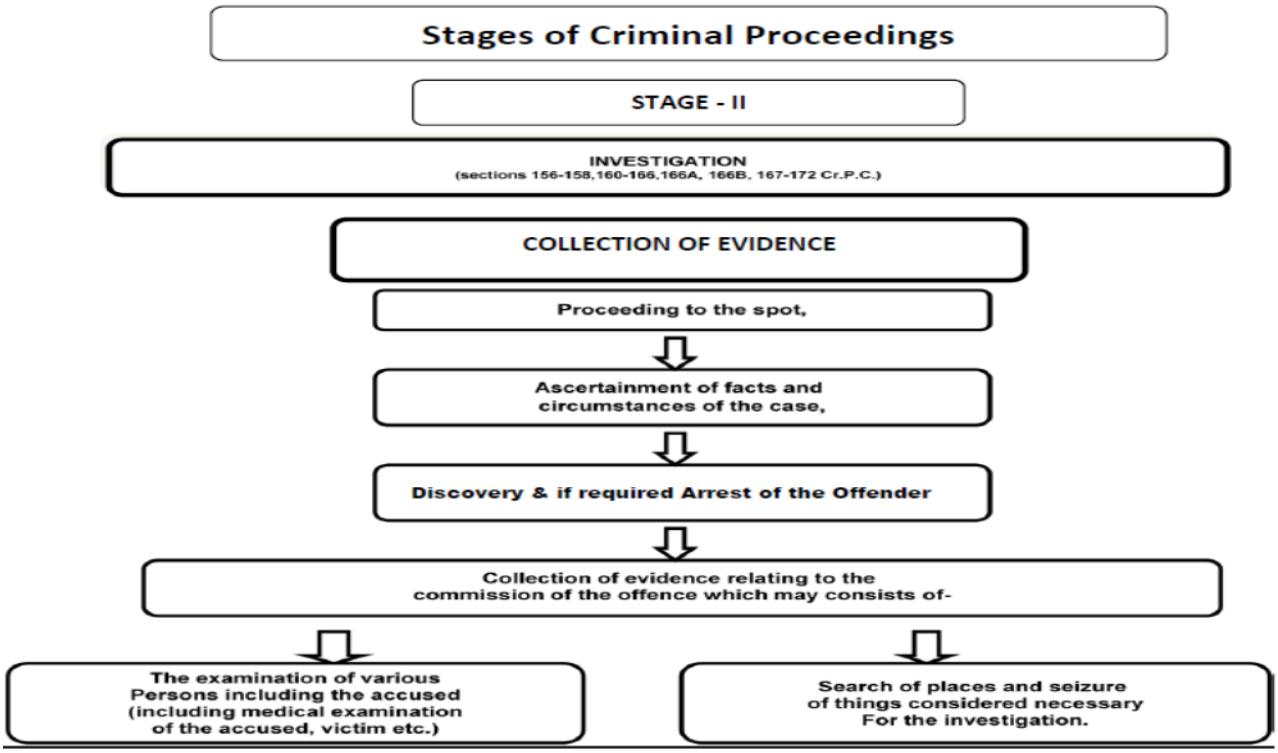
STAGES OF CRIMINAL INVESTIGATION



SCENE OF CRIME MANAGEMENT

i. Guarding, Sketching & Photography of S.O.C.

ii. Tracing, Lifting, Seizing, Packing, Labeling & forwarding of exhibits to Forensic/ Medico Legal experts through court.

EXAMINATION, INTERROGATION & RECORDING STATEMENTS

i. Sending notice u/s 160 CrPC to witnesses for examination. In this respect the recent amendments should be considered carefully.

ii. Interrogation of suspects.

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iii. Recording of statement u/s 161 CrPC by Investigating Officer followed by videography (if necessary).Arrangement for recording judicial confession of witnesses & accused by Magistrate u/s 164 CrPC.

ARREST/TI PARADE/REMAND/BAIL

i. Criminal intelligence.

ii. Arrest of accused.

iii. Detention of accused under arrest in custody followed by interrogation and to forward him to court.

iv. Arrangement for conducting Test Identification Parade.

v. Remand and detention of accused in Police custody.

vi. Interrogation, discovery of exhibits / property as shown by accused & preparing disclosure statement.

vii. Bail of accused as per procedure of CrPC.[51]

INVESTIGATION OF CASES WHERE WOMAN IS THE ACCUSED

Procedure regarding Arrest

a) According to the proviso of Section 46(1) of CRPC, 1973 and NHRC guidelines, "As far as is practicable women police officers should be associated where the person or persons being arrested are women and unless the circumstances otherwise require or unless the police officer is a female, the police officer (male police officer) shall not touch the person of the woman for making her arrest".
b) According to Section 46(4) of CRPC, 1973 and NHRC guidelines, "Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the

[51] Ibid

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Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."

c) The Hon'ble Supreme Court in the case of "*Sheela Barse vs State of Maharashtra"*[52], held that, "It is the duty of the police officer making arrest to see that arrested females are segregated from men and kept in female lock-up in the police station. In case there is no separate lock-up, women should be kept in a separate room".

d) According to section 53(2) of CRPC, 1973 and "10 Basic Human Rights Standards for Law Enforcement Officials" as prepared by Amnesty International, "Female detainees should be entitled to medical examination by a female doctor. They should

be provided with all necessary pre-natal and post-natal care and treatment. Restraints should only be used on pregnant women as a last resort and should never put the safety of a woman or foetus at risk. Women should never be restrained during labour."

Procedure regarding Search

a) According to Section 51(2) of CRPC, 1973 and NHRC Guidelines, Searches of the person arrested must be done with due respect to the dignity of the person, without force or aggression and with care for the person's right to privacy. Whenever it is necessary to cause a female to be searched, the search of women shall be made by another female with strict regard to decency.

INVESTIGATION OF CASES WHERE WOMAN IS THE COMPLAINANT OR VICTIM

a) According to the proviso of Section 157 (1)(b) of CRPC,1973 "In relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality".

[52] (AIR 1983 SC 378)

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b) According to the proviso of Section 154 (1) of CRPC, 1973 "In case of an information given by a woman relating to the commission of a cognizable offence under IPC, 1860 committed against her, such information shall be recorded, by a woman police officer or any woman officer."
c) According to Proviso of Section 160(1) of CRPC, 1973 "In case of requiring attendance of witness women should not be called to the police station or to any place other than their place of residence for questioning."

ROLE OF POLICE IN EVIDENCE COLLECTION IN CASES RELATING TO WOMEN

Sexual Assault or Rape cases

In sexual assault or rape cases where an investigating officer suspects that a sexual assault may have been facilitated with date rape drugs, sedatives or alcohol he is required to immediately determine the time frame of the incident. At a maximum a forensic examination should be conducted with a victim when the sexual assault occurred within 72-96 hours of the report otherwise the most significant exhibits the body fluids in these cases would give negative tests as these drugs have very short window period. That's why it is said that the victim shouldn't take a bath after the incident happens as there is a good chance of finding DNA samples of the accused on their bodies, which would be considered as a strong piece of evidence.

Now, there exist challenges in collecting the evidence on part of both the Police and Women.

According to the police, the biggest problem that the police face is that they cannot act without a complainant. The victim's statement and medical examination in cases of rape are the most imperative evidence in such cases. Police officials say while cases like murder or theft can be investigated suo motu; cases of sexual assault or harassment absolutely require the victim's involvement in the investigation. It boils down to evidence. In a murder case a corpse can, in itself, be proof that a crime has been committed. But in a sexual assault case, the crucial evidence cannot come from anyone else but from the victim and since, in many cases the victim is hesitant to come out and register the FIR by recording her evidence, the police cannot proceed to

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investigate the case and many cases of sexual assault or rape go unreported. Police officials say that, "What victims don't realize is that the more they delay reporting a case, the harder it becomes to prove the offence. Apart from the fact that medical and forensic evidence is lost, the delay results in minute details — some of which can be important in terms of evidence — getting lost due to being forgotten."[53]

But, on the corollary the contention of victims are that there is a problem with the attitude and mentality of the police officials. "So when a rape survivor comes forward and tries to make a complaint at the police station, they often face hostility or skepticism about what they have experienced." An investigation by India's Tehelka magazine with NDTV news channel in April 2012 found more than half the police officers interviewed had prejudices — blaming the victim's clothes or the fact that she was out at night, suggesting that she was "asking for it".

The counter argument generally made by the police officers are that, "In the police, an average constable does not meet a woman very often. He meets his colleagues who are men. They pick up accused, most are men. He take them to court, most of them are men. He brings them to jail, most are men. So a constable's interaction with a woman on a daily basis is very low." According to the recent NCRB report, women constitutes 7.28 percent of police force in India which is very less and hence, the first hurdle that the victim face is lodging of the FIR which is more grueling, humiliating and traumatic for the victim as she is judged beforehand on the basis of her past history or her clothes etc.

Now, talking about the mental or psychological support to the victims, New Delhi has Rape Crisis Intervention Centers, but outside the capital, India has no formal system in place for the medical or psychological support of victims. An over-burdened public health system where the average gynaecologist has no training in conducting medical examinations and is often reluctant to do so for fear of being embroiled in criminal cases indicates that victims get little sympathy. A 2010 Human Rights Watch report called "Dignity on Trial" cited cases where victims were made to go from one government hospital to another for medical examinations, or subjected to many

[53] Gautam S Mengle, Sexual Harassment: What the police want you to know; The Hindu (APRIL 02, 2017, 11:16 pm), https://www.thehindu.com/news/cities/mumbai/sexual-harassment-what-the-police-want-you-to-know/article17763619.ece

uncomfortable tests. Others have been forced to sit for hours in bloodied clothes, even after an examination, without being allowed to change or shower. Some were also publicly identified as "rape victims" in hospital corridors. There is often no medical care available such as treatment for injuries or infections, or to address the possibility the victim has contracted HIV/AIDS or become pregnant. In most cases, no trauma counselling is given. Lawyers defending victims also point out that even forensic examinations are also problematic. The so-called "Two finger test" - an archaic practice, banned in many countries, which involves a doctor inserting fingers into a victim's vagina to determine if she is "habituated to sex", is widely used in India, despite an order by the Director General of Health Services in 2011 to discontinue it. The test is irrelevant and unscientific, say some lawyers, adding that it amounts to the "re-rape" of the victim. The World Health Organization's guidelines for medico-legal care for sexual assault victims state that the health and welfare of the victim is "the overriding priority" — yet this is rarely followed in India.

Now, coming down to the collection, transport and storage of forensic evidence by police - a key component in rape cases — is also often poorly conducted, resulting in weak prosecutions, few convictions and lenient jail terms for convicted offenders.

According to the NCRB report, around 26 percent of rape cases tried in court in 2011 resulted in convictions. An August 2012 study of 40 rape cases tried by district courts in Delhi that resulted in acquittals, found that more than half the acquittals were due to police failure to perform adequate investigations.[54]

A core function of the police force is crime investigation. Once a crime occurs, police officers are required to record the complaint, secure the evidence, identify the culprit, frame the charges against him, and assist with his prosecution in court so that a conviction may be secured.

Crime investigation requires skills and training, time and resources, and adequate forensic capabilities and infrastructure. However, the Law Commission and the Second Administrative Reforms Commission have noted that state police officers often neglect this responsibility because they are understaffed and overburdened with

[54] Nita Bhalla, Analysis: How India's police and judiciary fail rape victims, Reuters (January 16, 2013,6:02 PM) https://in.reuters.com/article/india-delhi-gang-rape-women-safety-polic-idINDEE90F0AY20130116

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various kinds of tasks. Further, they lack the training and the expertise required to conduct professional investigations. They also have insufficient legal knowledge (on aspects like admissibility of evidence) and the forensic and cyber infrastructure available to them is both inadequate and outdated. Further, while crime investigations need to be fair and unbiased, in India they are mostly influenced by political or other extraneous considerations.

PROCEDURE WHICH THE POLICE IS REQUIRED TO FOLLOW WHILE INVESTIGATING A CASE RELATING TO WOMEN

a) According to Section 51(2) of CRPC, 1973 and NHRC Guidelines, Searches of the person arrested must be done with due respect to the dignity of the person, without force or aggression and with care for the person's right to privacy. Whenever it is necessary to cause a female to be searched, the search of women shall be made by another female with strict regard to decency.

b) The Hon'ble Supreme Court in the case of "*Sheela Barse vs State of Maharashtra"*[55], held that, "It is the duty of the police officer making arrest to see that arrested females are segregated from men and kept in female lock-up in the police station. In case there is no separate lock-up, women should be kept in a separate room".

c) According to the guidelines and protocols for Medico-legal care for survivors/victims of sexual violence issued by the Ministry of Health and Family Welfare (Government of India), the Police is required to adhere to the following rules keeping in mind the Human rights of the Rape victim: -

- Whenever a survivor reports to the police, the police must take her/him to the nearest health facility for medical examination, treatment and care. Delays related to the medical examination and treatment can jeopardize the health of the survivor.
- The police should maintain an utmost confidentiality regarding the identity of the Rape victim.

[55] (AIR 1983 SC 378)

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- The victim should be provided psycho-social care in order to recover from the mental trauma of the incident.

PROCEDURE WHICH THE POLICE IS NOT REQUIRED TO FOLLOW WHILE INVESTIGATING A CASE RELATING TO WOMEN

a) According to Proviso of Section 160(1) of CRPC, 1973 "In case of requiring attendance of witness women should not be called to the police station or to any place other than their place of residence for questioning."
b) According to Section 46(4) of CRPC, 1973 and NHRC guidelines, "Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."
c) According to the guidelines and protocols for Medico-legal care for survivors/victims of sexual violence issued by the Ministry of Health and Family Welfare (Government of India), the Police is not required:-

- The health sector has a therapeutic role and confidentiality of information and privacy in the entire course of examination and treatment must be ensured. The police should not be allowed to be present while details of the incident of sexual violence, examination, evidence collection and treatment are being sought from the survivor.
- The police cannot interfere with the duties of a health professional. They cannot take away the survivor immediately after evidence collection but must wait until treatment and care is provided.
- In the case of unaccompanied survivors brought by the police for sexual violence examination, police should not be asked to sign as witness in the medico legal form. In such situations, a senior medical officer or any health professional should sign as witness in the best interest of the survivor.

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CONCLUSION & SUGGESTIONS

The investigation of cases relating to woman has always been very crucial as it involves the conflicting dilemma on both the part of women and the police. The need of the hour requires reforms in the police system by setting up of more Investigative units in order to deal with the cases of women. In the year 2015, the Ministry of Home affairs proposed to set up 150 Investigative Units for Crime against Women (IUCAW) in the most crime prone districts of each State on a 50: 50 cost sharing basis with the States in order to augment the capacity of States in the domain of investigation of heinous crimes against women viz. rape, acid attack, dowry death and human trafficking etc. The objective of these units was to assist the local police in investigation of heinous crimes against women.[56] But still, there is a long way to go in taking more pro-active steps in minimizing the crimes against women. On the other hand, it is also expected from the women at the same time to come forward and lodge the FIR by recording their statements because in order to mitigate the crime against women in the society, it is necessary that both the wheels of the society i.e. citizens and the police should work hand-in-hand with each other.

[56] Press Information Bureau, Government of India, Ministry of Home Affairs, http://pib.nic.in/newsite/mbErel.aspx?relid=119864

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BANDHS ANYWHERE IS INJUSTICE EVERYWHERE- ARE BANDHS MOCKERY OF INDIAN DEMOCRACY?

-Deeksha Kathayat

Recently some months ago on 10th September, 2018 Bharat Bandh was organized by the Congress party and others to protest against the hike in petrol prices. I could recollect the incidents of the previous day the usual unnecessary texting which took place in my college group turned a bit political as soon as the message swayed all over the social media that Congress is organizing a bandh. Well, I thought as a law student and as an alert and responsible citizen, many will be against it but then unfortunately it turned out that everyone was for it and that confused me a lot and as I was emerged in my thoughts about the fact that how is it possible? I know for sure that I have read somewhere that bandh is illegal or not allowed in India then suddenly a message popped up and I got the answer of my previous question why is everyone in the group so happy, well the reason was there will be a holiday if this bandh becomes a huge success….my instant reaction was I texted my labour law teacher and asked her about the holiday.

But the instant reply of my teacher was NO!!! College does not support this, and you know right bandh is illegal ….. Well, I got my answer… This question led me to dig out more about the issue, and I ended up writing an article on this topic, the reason being not many are aware about the serious impact it has on our country not only economically but also socially and legally. Many are unaware about the views of the courts in this matter? What are the rights and duties of citizens? What are the penalties that might be imposed on those supporting these hooligans?

BANDH to say it in easiest language means general strike or general shutdown of almost everything. Not to be negative about it, but the word literally means disrupting all the services so that the place, state or the country where the bandh is declared should come to a halt. All the services like transport, shops, schools' colleges, offices and sometimes even medical shops are forced to shut down. When I tried to find the

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origin of this concept, I was amazed that this concept did not originate in the USA, or UK well, obviously why will such strong economies of the world will support such activities that will disrupt their nation? THE origin is still not sure but then all that can be conferred from the data available is that this is the most common phenomenon of south Asian countries that too mostly in Nepal and India.

The reason why there were frequent bandhs organized in Nepal was people wanted to show their anger for the political instability prevailing at that time but little did they know that bandh will further intensify the instability? AND in INDIA there have been series of bandhs since independence. Communities and the political parties are the ones who organize the bandhs to protest for issues like the one that recently took place that is hike in price or different communities mostly asking for reservations. Political The parties under the guise of the public welfare, they tend to destabilize the mechanism of the country so that the government can be criticized for the instability and the destabilization. The political parties and organizations that call for bandh, for the cause of public, should realize that they are, in effect, harming the public itself... And the most hilarious is when we try to tell the leaders of the parties about the demerits and the evil impacts it has, the leaders instead start giving irrelevant examples from the past that even Mahatma Gandhi organized bandhs and hartals, civil disobedience movements. Like great thinkers have said you take only that part of anything that best suits your ego and reasoning and forgets the rest. These leaders while citing Gandhi forgets the most important fact that even Gandhi withdrew his movements, strikes and hartals as soon as it got violent or was losing its purpose but then they will not understand this because if they follow that how will their ego to harm the opposition party's reputation and a dying urge of emerging as a messiah of people will be satisfied?

WELL this was about the political parties but what about the hooligans who go for the support of these bandhs. You agree or not with me, but the main reason for the success of all the bandhs and hartals is that common people are scared…they are scared what if they go for their work and the karyakarta or such goons are bashing people for not supporting the bandhs? They are scared that what if their cars, their vehicle will be smashed by those people loving karyakartas? What if they try to board the train and goons don't allow the train to move? What if they try to board buses and

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the buses are stoned and they might get injured or even killed? As a result of this people avoid going out and the bandh becomes successful.

THE CONSTITUTIONALITY OF BANDHS

The Supreme court of India have realised the evil impacts of the Bandh and have declared bandh illegal and unconstitutional. People who are afraid and who do not support such type of activities should realize that they have their set of fundamental rights and there are many laws and not to forget the most important one the Indian Penal Code which criminalizes restraint, force, intimidation during bandhs and even hartals.

Supreme court and various high courts have made it crystal clear that through various verdicts that the bandh interferes with the fundamental discretion and liberty of citizens and causes national loss in numerous ways. The fundamental rights of citizens have to be given paramount place and it cannot be observed as ignoble to the rights of an individual or some sections of the society. The main reason of the court disliking towards bandh is that they very well understand that under the guise of bandh, hartal and strike NO one has the right to cause inconvenience to other not observing or to cause apprehension of threat to life, liberty and property most importantly government or public property. Various judgments in support of banning Bandhs are as follows:-

1. Kerala high court was the first court which banned bandhs and declared it unconstitutional. In *Bharat Kumar K. Palicha and Anr. Vs. State Of Kerala AIR 1997 Ker 291*[1] the petition seek the relief of declaration of holding bandh as unconstitutional and illegal. The petition pointed out that bandhs was not only violative of Articles 19 and 21 of the Indian constitution but was also in contravention of the provisions of directive principles of state policies and fundamental duties.

It was also contended that the observers of the bundh purposefully indulge in wanton acts of vandalism like destruction of public property and transport vehicles not realizing the important fact that those public property is actually purchased or bought from public's own money. Petition contended that these illegal acts cannot be

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regarded as part of the right of any individual or group protected by Article 19(1) of the Constitution. It was also contended that the right of the political parties, if any to hold demonstration or to show protest, should not extend to preventing the public from exercising their fundamental rights of attending to their daily work and business and therefore 'bandhs' ought to be declared illegal.

2. References of other cases were also given like the petition said that in Gopalan v. State[2] that the right to move freely is a fundamental right shielded by Article 19 of the Constitution of India. And in Saghir Ahamad v. State. AIR 1954 SC 728.[3] Rupinder Singh v. Union of India. AIR 1983 SC 65[4]: and in Satwant Singh v. A.P.O. New Delhi. AIR 1967 SC 1836[5]; right to use public road was declared as fundamental right.

3. And the famous Maneka Gandhi vs Union of India. AIR 1978 SC 597[6], observed the right to locomotion as fundamental rights given by Articles 19 and 21 of the Constitution of India. The right to education has been regarded as a fundamental right which gets violated when schools are forcibly shut down during bandhs. And most importantly the Right to medical treatment is shielded by Article 21 of the Constitution and was also upheld by courts in cases like Parmanand Kulara v. Union of India7. It is true that when bandh is called there may be no apprehension of threat or violence but then I believe and it is mostly right that there is clearly a psychological threat of what will happen if you go out and not observe the bandh and as it was stated in Khurak Singh v. State of U.P., AIR 1963 SC 1295[8] not only physical prevention or intimidation, but even a psychological restriction would be a violation of the fundamental right of a citizen. As a result, the Kerala High court declared it unconstitutional and even Supreme court upheld the decision.

4. The same way in another case Communist Party of India (M) vs Bharat Kumar[9] the Supreme Court confirmed and upheld the Kerala HC Judgment. In the same year 2004 Kerala HC observed that hartal and bandh should not obstruct others' fundamental rights. A Full Bench observed whether general strike, hartal or any other name, nobody can create a ruckus or obstruct anyone

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in exercising their fundamental rights. Those who call for bandh or hartal should see that no one is prevented to use transport or to move freely. They must also give strict orders to all their supporters to not use any form of coercion or force.

5. And in 2008 the Kerala HC called for appropriate legislation to curb the ill impacts and effects of bandhs and hartals and to provide for compensation to those truly and deeply affected by bandhs. The High Court in The Proper Channel vs. Managing Director, KSRTC[10] observed that it is high time that government should step in and devise an easy process to anyone person including corporations, companies and associations to claim for any loss they might suffer due to these illegal activities. Proper legislation should be devised to create a competent authority which will look into such claims and will provide compensations to those thereby affected. Unless such actions are taken, the menace of bandh and hartal cannot be curbed.

CONCLUSION

Its high time that just how courts have showed their support to ban such activities the law makers also devise an appropriate legislation to curb the menace created by the bandh. But then to think practically I think why they will do that because most of time it is the political parties that organizes such bandhs. Now the only hope is when the citizens realise their rights and duties and rises above slumber and laziness and show patent disregard to such activities and compel by showing strong public support to ban these bandhs only then the legislature will be compelled to pass such laws under the compulsion of strong public opinion.

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EXCLUSIVE JURISDICTION CLAUSES IN COMMERCIAL CONTRACTS: AN ESSENTIAL FOR GRANT OF ANTI-SUIT INJUNCTIONS BY INDIAN COURTS?

-Dhirajkumar Totala

In international law regime one of the main aspects which are relevant for determining the forum for adjudication of disputes is territorial jurisdiction. In this article we will examine whether incorporation of exclusive jurisdiction clauses give more teeth and strength to the Indian courts to grant anti suit injunctions against a counter party who is outside the natural jurisdiction of the Indian Courts. It is also relevant to understand whether presence of exclusive jurisdiction clauses in international commercial disputes would allow the Indian Courts to apply the principles of comity of courts and recognize and enforce anti suit injunctions granted by foreign courts.

Before we understand and analyze the ramifications and impact of an exclusive jurisdiction clause in international commercial contracts, it is important to deep dive into the concept of jurisdiction and how Indian courts have treated exclusive jurisdiction clauses, especially when they take away natural jurisdiction of the Courts, which would otherwise have the jurisdiction to deal with such contractual disputes.

Section 9 of the Civil Procedure Code, 1908 ("CPC") provides that the Courts shall have jurisdiction to try all suits of civil nature except suits whose cognizance is either expressly or impliedly barred. Examples of statutes where the jurisdiction of civil courts is barred are the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which is aimed at recovery debt by Banks and other similar Statutes

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relating to revenue matters, administrative matters, disputes under the Securities and Exchange Board of India Act, 1992 etc. There are other provisions about jurisdiction of the Courts in CPC which specifically deal with jurisdiction in disputes pertaining to immovable properties and a discussion on those may not be relevant at this juncture.

Section 20 of CPC provides that subject to the limitations in the foregoing sections, every suit shall be instituted in a Court within the local limits of whose jurisdiction:

(a) *the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or*

(b) *any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or*

(c) *the cause of action, wholly or in part, arises.*

Section 20 Clause (c) is the provision which provides an opening for the parties to have exclusive jurisdiction clauses in so far as it confers jurisdiction on all courts where part cause of action has arisen and many inter-state, inter-district contracts would end up conferring territorial jurisdiction on more than one civil court on account of part cause of action having arisen in multiple jurisdictions. This paves way for the parties to include exclusive jurisdiction clauses in their contracts thereby excluding jurisdiction of other courts where the part cause of action has arisen or where the Defendant resides. Though unambiguous,[57] exclusive jurisdiction clauses fundamentally have an effect of taking away natural jurisdiction conferred on a Court, it is primarily aimed at barring a party to the contract from approaching any Courts/forums other than the contractually chosen forum. There are multiple questions that need to be taken into consideration while incorporating exclusive jurisdiction clauses. One has to be sure that such exclusive jurisdiction is not

[57] In *Maharashtra State Road Transport Corporation v Larsen & Toubro Ltd. (2005) 116 DLT 559* it was held that an exclusive jurisdiction clause will not take away jurisdiction of other courts if such clause in the contract is ambiguous.

conferred on a Court which otherwise would not have had jurisdiction (such clauses would be void ab initio and barred under law). One has to take into consideration various important aspects while drafting an exclusive jurisdiction clause, especially when the question is to be answered in relation to international commercial disputes. In international commercial disputes, the questions such as sovereignty, comity of courts, public policy of the countries of the contracting parties, conflict of laws governing the contracting parties, validity of such clauses as per domestic law of each country, treatment given to contracts when they are in restraint of legal proceedings etc. need to be considered.

Section 28 of the Indian Contract Act, 1872 provides that the agreements which are in restraint of legal proceedings are void and often the exclusive jurisdiction clauses can be seen as restraining a party from initiating legal proceedings in courts with natural jurisdiction.

The maxim "*expressio unius est exclusio alterius*" means expression of one is the exclusion of another and the same while applied effectively in domestic disputes which are spanned over multiple jurisdictions, its applicability in international law has its inherent concerns and needs to be examined from various factors set out above[58].

There are various judicial precedents which have dealt with the exclusive jurisdiction clauses in domestic disputes. It all started with *Hakam Singh v. M/s. Gammon (India) Ltd*[59] where the Hon'ble Supreme Court of India held that where two courts would have jurisdiction and the agreement is that the dispute should be tried only by one of them, the court mentioned in the agreement would have jurisdiction. It was also confirmed that such agreements conferring exclusive jurisdiction on one of these two courts are not in contravention of Section 28 of Indian Contract Act, 1872. While confirming the above, the Supreme Court not to much surprise, clarified that it is not open for parties to confer jurisdiction on a Court which otherwise does not have it.

Thereafter in *A.B.C. Laminart Pvt. Ltd and anr. Vs. A. P. Agencies, Salem*[60] the Supreme Court reiterating and relying on *Hakam Singh*[61] held that an agreement which purports to oust the jurisdiction of the Court absolutely is contrary to public

[58] Supra clause (v)
[59] (1971) 1 SCC 286
[60](1989) 2 SCC 163
[61] Supra 1 at p.

policy and hence void. But where two Courts or more have jurisdiction to try the suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts to the exclusion of the other was not contrary to public policy and such an agreement did not contravene Section 28 of the Contract Act.

The above view has been discussed and upheld in various subsequent judgments including *Balaji Coke Industry Pvt. Ltd. Vs. M/s. Maa Bhagwati Coke*[62] and *Swastik Gases Pvt. Ltd v Indian Oil Corporation Limited*.[63] In Swastik, the main question before the Court was whether a jurisdiction clause, without the use of expressions such as "only", "alone", "exclusive", "exclusive jurisdiction", could still be construed to oust the jurisdiction of all courts except the one mentioned in the contract. The Supreme Court while deciding the above question held as under:

> *"...It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference.*
>
> *The intention of the parties is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary"*

In *Punj Lloyd Ltd vs Gvk Power (Goindwal Sahib) Ltd*[64], the Delhi High Court has further clarified that where the contract specifies the jurisdiction of the court at a particular place and such court has jurisdiction to deal with the subject matter, an inference may be drawn that the parties intended to exclude all other courts.

While the above judgments bring clarity in interpretation of domestic contractual disputes having exclusive jurisdiction clauses and gives strength to the Courts conferred with jurisdiction to restrain the parties to such exclusive jurisdiction clauses

[62] (2009) 9 SCC 40; Also see judgment in Geo. Miller & Co. Ltd. Vs. United Bank of India & others [69 (1997) Delhi Law Times 616]
[63] (2013) 9 SCC 32 Also see judgment in Angile Insulations v Davy Ashmore India Ltd (1995) 4 SCC 153
[64] In O.M.P. 24/2015 dated April 21, 2015

from proceeding in any other Court/forums, the rules governing the exclusive jurisdiction clauses in international contracts will have to be dealt on different principles and platforms. Such clauses will have to take into consideration various other trans-national and trans-border factors such as comity of courts, conflict of laws and sovereignty and legal system of such country and other relevant factors set out hereinabove.

In *Emmsons International Ltd v Metal Distributors (UK)*[65] the question of interpretation of exclusive foreign jurisdiction clause in a trans-border disputes having trans-border cause of action came for consideration before the Hon'ble Delhi High Court. The Court while referring to and relying upon the concept of conflict of laws[66] held that an Indian party is deprived of his rights to proceed before Indian Courts if Foreign Court has been given exclusive jurisdiction. This position has undergone a change in subsequent judgments and the Courts have recognized that in case of international contracts, it is a common practice for the parties, to agree that any dispute arising between them shall be settled by the courts of another country even though both the parties are not resident of that country. It is this approach that has given rise to anti-suit injunctions being granted and recognized by the Courts all over the world, of course by adhering to the principles of comity of courts and sovereignty.

In the case of *Modi Entertainment Network & Anr. vs. WSG Cricket PTE Ltd.*[67], the Hon'ble Supreme Court of India had occasion to discuss the principles governing grant of anti-suit injunction on a proceedings instituted outside India and the following broad principles were enunciated:

> *(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects: -*
>
> > *(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;*

[65] (2004) Bom CR 186
[66] Dicey Morris and Collins "Conflict of Laws", (Sweet and Maxwell Publications, 15th Edition, 2017) (ISBN – 978-04-140-3502-7); Also see Chapter VII of V. C. Govindraj, "The Conflict of Laws in India"
(Oxford University Press, 1st edition, 2011) (ISBN 978-01-980-6952-2).
[67] AIR 2003 SC 1177

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(b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind;

(2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens;

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;

(4) a court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like;

(5) where parties have agreed, under a non- exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract,

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ordinarily no anti- suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;

(6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non- exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens; and

(7) the burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

Review of above judgments, provisions of law and the evolving nature of the concept of anti suit injunctions go a long way in suggesting that exclusive jurisdiction clauses have become an essential for grant or recognition of anti suit injunctions. Any Court that has not been conferred with exclusive jurisdiction should not be in a position to grant anti suit injunctions as it would set a wrong precedent and has the potential to dismantle the very principles governing jurisdictions. Therefore, it would safe to conclude that the exclusive jurisdiction clauses would confer more power to the Indian Courts in grant and recognition of anti-suit injunctions, especially when the parties have chosen the jurisdiction in contract and the contractual intent needs to be honoured.

It is a matter of time for these issues to come up for consideration of the Courts in India and deliberated upon at length in the wake of rising international trade, changing economic and political dynamics, inflow of Foreign Investments, Joint Ventures between entities located in different jurisdictions and globalization of almost every industry. Such growth is bound to give rise to disputes from such international commercial contracts.

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PREMARITAL SEX AND LIVE-IN RELATION IN THE NATURE OF MARRIAGE: A CRITICAL STUDY OF INDIAN PERSONAL LAWS

-Arjun Sahni

ABSTRACT

Premarital sex, the notion this project will focus on, means resorting to sexual activities before one is married. For the longest time, this concept has been kept hush-hush, but since the beginning of 21st century, it's starting to amass public attention. It is also known as fornication. On the other hand, a live-in relationship, the other issue, is a kind of accommodation where in an unmarried couple stays together akin to a married one, but devoid of any legal strings attached. It is also known as cohabitation. Accordingly, this research project with probe and research in the said direction and will draw the relevance of and attitude towards live-ins and premarital sex from the point of view of Indian legislative law as well as Indian Personal Law.

Keywords: Premarital Sex, Live-in Relationships, Islam, Hinduism, Court, Judgement, Islam, Hinduism

INTRODUCTION

Pre-marital sex is a very sensitive and taboo topic in the Indian context. It is rarely talked about, and has been mentioned in a few judgements, but often in a wrong or impractical way, for instance, in the ruling by Justice Mr. CS Karnan in Madras High Court. This topic is considered immoral by majority of Indians even today and many religious people believe that if a couple has premarital sex, they should be declared wedded, i.e. husband and wife. Similar sentiments exist for Live-in relationships as well.

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All the Indian Personal Laws like Hinduism, Islam and Christianity etc have varying and yet similar view with regards to it. For example, Islam gives a discerning suggestion that if a man wants to have only sex with a woman, he should enter in a Moota marriage, which is a kind of temporary marriage meant only for the pleasure and sexual gratification of the man (and/or woman). My research project will look at the matter from the point of view of different personal laws and religions prevalent in India and draw a conclusion about just how premarital sex is perceived in this country and what developments have been made in the field legally in the past decades. Besides, live-in relationship also falls along the same lines as premarital sex. It is an equally tabooed and ignored topic in the Pan Indian Subcontinent. In the latest years, it is beginning to be considered as a way of life and has been provided with certain legal presence. For example, in a recent judgement, it was ruled that a couple living in a live-in relationship cannot be said to be married, and that a child born under such circumstances is to be treated like a legitimate one.

LEGISTATIVE PROVISIONS

In live-in relationship the man and women both live together like husband and wife but without getting married legally. The Protection of Women from Domestic Violence Act 2005 provides for the protection, maintenance and right of alimony to a live-in partner, if she complains. This is a kind of relationship which does not push the classic or the traditional responsibilities of a married life on the individuals living together. The foundation of live in relationship is individual freedom. Hindu Marriage Act, 1955 or any other statute does not recognize this kind of relationships. Therefore basically our Judiciary is taking a lead in giving a definition to this kind of relationship court says that, a man and woman who live together as husband and wife for a period of long time.

A Supreme Court verdict in 2010 was available for support to the notion of live-ins: the Court had then specifically recognised a live-in relationship as one akin to a marriage in the context of the Protection of Women from Domestic Violence Act, 2005. The earliest case in which the Supreme Court of India recognized the live in relationship as a valid marriage was that of Badri Prasad vs. Deputy Director of

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Consolidation[68], in which the Court gave legal validity to the 50 years live-in relationship of a couple.

ISSUES

1. What is the view of the different personal laws and religions existing in India, vis-a-vis premarital sex relation in the nature of marriage, in today's scenario?

In 2010, the Supreme Court of India opined even that Lord Krishna and Radha lived together according to mythology. The apex court said there was no law which prohibits live-in relationships or premarital sex.

While the religion of Islam doesn't explicitly talk about premarital sex, it does talk about the consequences of it, and how it affects the child born out of wedlock. In Islam, premarital sex is known as Zina. The Quran says that, although a child born from premarital sex is innocent of the parents' crime, he/she will still suffer certain restrictions.

According to shariah law, the following applies to a child born of Zina:

- The child will be called and recognised by the name of his/her mother.
- In terms of inheritance, the child will legally inherit only from the mother.
- The child will not be a legal heir of his/her biological father and thus he/she will not be entitled to inherit from the father.
- The child and the father will have no legal obligation towards each other.

Meanwhile, in the religion of Christianity, even the most liberal churches reject the notion of premarital sex as unacceptable. In fact, for that matter, Christian girls are made to go through a ceremonial ritual in their early years, known as Christening, wherein these young women are made to take an oath pertaining to celibacy before marriage. This forced abstinence clearly exhibits the stance of Christianity curtailing fornication.

In Hinduism, it is considered a sin to have sex before marriage and compromise an unmarried woman's virginity. It is a condemned practice, as is live-in relationship, which is supposed to be detrimental to a woman's chastity.

[68] Badri Prasad vs Dy. Director of Consolidation 1978 AIR 1557, 1979 SCR (1) 1

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Hinduism draws a clear distinction between normal sexual desire and lust. While pursuit of sexual desire for procreation is considered one of the chief aims of human life, lust is considered one of the chief enemies of human life. Both men and women are urged to guard themselves against it to avoid sinful karma. The law books prescribe rules for both men and women to avoid lustful thoughts. Herein, premarital sex is considered to be a kind of lust, for it does not serve the divine purpose of procreation.

2. What is being done and can be done to raise awareness for the said issue and how the rigidity of Indian Personal Laws has decreased with regards to premarital sex?

   The earliest case in which the Supreme Court of India recognized the live in relationship as a valid marriage was that of Badri Prasad vs. Deputy Director of Consolidation[69], in which the Court gave legal validity to the 50 years live-in relationship of a couple.

   In Payal Katara v. Superintendent Nari Niketan Kandri Vihar Agra and Others[70] the Allahabad High Court ruled out that "a lady of about 21 years of age being a major, has right to go anywhere and that anyone –man and woman even without getting married can live together if they wish". Again in the case of Patel and Others, the Supreme Court has held that live-in relationship between two adults without marriage cannot be construed as an offence. In Lata Singh v State of UP & Another, the Apex Court held that live-in relationship was permissible only between unmarried major persons of heterogeneous sex.

   In the recent times, while personal laws have not begun giving the due recognition to premarital sex and live-in relationships[71], they are eventually being provided a free space in the society and are being roped in for consideration[72].

   The situation has changed in the last decade or so mainly due to the increasing influence of modern education, urbanization, television, Internet, mobile phones, and cultural influences from the West. Now the young people of today have many avenues

[69]Badri Prasad vs Dy. Director Of Consolidation 1978 AIR 1557, 1979 SCR (1) 1
[70] Payal Sharma v. Nari Niketan, 2001 (3) AWC 1778 : AIR 2001 All 254
[71] Lieutenant C.W. Campbell v. John A.G. Campbell [(1867) Law Rep. 2 HL 269]
[72] Captain De Thoren v. The Attorney-General [(1876) 1 AC 686]

to communicate through mobile phones, text messages, emails and social networks without being obvious and without being noticed by their parents. As a result, premarital sex in Hindu society is now said to be a growing problem, and more evident among the urban youth who are also most irreligious. In the rural areas, parents still have some control over their children, and segregation of sexes and traditional lifestyles can still be seen in many places. Rural children also learn more about their religion from their parents than the urban children. We have to see how, in the long run, these developments shape Hindu society.

As religious beliefs and traditional values continue to lose their hold upon people, parents have to now deal with changing attitudes of their children toward such issues as premarital sex, prostitution, adultery, and homosexuality. With rapid urbanization and with abnormally high population density in the cities where it is virtually impossible for anyone to avoid social contact or communication with the opposite sex, the youth of today are becoming more expressive in their personal choices and sexual preferences. Protected by constitutional rights and conditioned by secular education and modern worldviews, they are challenging the religious morality and social order which they hold to be outdated, irrelevant, and restrictive.

Thus, Indian society is presently vertically segregated into two major segments. On one side you have the progressives who want to throw the old order out of the window and usher in a free society which they see in the Hollywood movies or read in the western pulp fiction, and on the other you have the traditionalists who believe that they must return to those eternal values that distinguish India from the rest of the world. You can see this conflict in almost in every sphere.

CONCLUSION

Thus, from the aforementioned research questions that have been elucidated, it can be drawn that, from the get-go, all the major religions of India, i.e., Hinduism, Islam, and Christianity, are very hesitant and opposing when it comes to premarital sex and live-in relationships.

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However, for one side the past itself is a problem while the future holds a promise, and for the other the past that suppressed religions and their values is the problem and its full expression holds the promise. We have to see how such differences will eventually balance out and result in a transformative and adaptive society that retains the best of the past and the promising features of the present and move forward to continue the story of 7000 years of religionist sentiments.

There is idealistic romanticism on both sides and youthful exuberance in their aspirations to move forward into a better future by breaking free from the shackles of the past that they believe are holding them in control and slowing down their progress. Both hold the past responsible for their current problems, but view it differently.

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CAMBODIAN ANNIHILATION

-Darshit Vardaan

INTRODUCTION

Cambodia is located in the southern portion of the Indochina Peninsula in Southeast Asia. It is bordered Thailand, Laos, Vietnam, and the Gulf of Thailand. The Cambodian genocide was carried out from 1975 to 1979 under the leadership of Pol Pot exterminating nearly 1.5 to 3 million innocents. Khmer wanted to convert the country into socialist agrarian republic. This simply means that he wanted to turn the country into nation where citizens were involved only and only in agricultural activities and no other profession or business. Khmer Rouge's interception into Cambodia was not an overnight act; it had certain history which led Khmer Rouge into Cambodia. Cambodia had been constantly invaded by Thailand and Vietnam and in the colonial period, by France; and when the French colonialism collapsed America stepped in as of its part in war in Vietnam. The war brought unrest to the Cambodia, the revolution came to Cambodia in the form of Vietnamese soldiers camping in the jungles across the border to hide from French and American bombs. But later they banded around the leader- Pol Pot. It formed the basis for what would eventually be called Khmer Rouge. They started small, just a small rebel group in a distant jungle fighting against the beloved king, but everything changed when America decided to bomb Cambodia. Without even declaring war they began bombing the country. The US dropped more explosives in Cambodia than were dropped in the entirety of World War two by all the allies combined. It was meant to stop the communist guerillas but instead made more of them. Civilians were being blown out of their houses leaving no source of income. Estimated amount of killing was around 150k[73]. It sent the surviving civilians right into the arms of Khmer Rouge. And the King, with nowhere to turn for support, promoted Khmer Rouge. They promised to reinstate the throne. And this opened the floodgates for Khmer Rouge supporters. This is how Khmer

[73] https://en.wikipedia.org/wiki/Operation_Menu

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Rouge came out of the forest and replaced this military dictatorship with something far more brutal.

POL POT

Who was Pol Pot?

A Cambodian communist revolutionary and a politician who was general secretary of Communist party of Kampuchea from 1963 to 1981. He commanded the Khmer Rouge from 1963 until 1997. From 1976 to 1979, he functioned as the Prime Minister of Democratic Kampuchea. Pol Pot was educated in one of the elite schools at Cambodia. After his studies he moved to France where he joined French Communist Party, and embraced Marxism- Leninism, as it was written in the literature of Joseph Stalin and Mao Zedong. Returning to Cambodia in 1953, he joined the Marxist–Leninist Khmer Việt Minh association in its revolutionary war against King Norodom Sihanouk's freshly independent government.[74]

Pol Pot's Ideology

Pol Pot was born in Cambodia as Solath Sar. He spent some time in France and later returned to Cambodia. He then became member of French Communist Party and later joined a communist group and rise up to higher ranks and became its leader. Khmer Rouge's ideology was to bring back its 'mythic past', which means to stop the corrupting influences like foreign aids and western culture, and to restore the country to an agrarian culture. His ideologies consist of a classless society which meant absence of superiority and inferiority. There must be no elite groups and no intellects. To achieve this goal he killed several political leaders, party members, intellectuals, elite members of the society, moreover he killed the people who wore glasses because it showed the sign of eliteness and intellects. Khmer Rouge forces estimated 2 to 3 million people to Phnom Penh and other cities country side to undertake agriculture. Around 2000 people were killed in the evacuations[75]. He wanted that people must have same idea, same ideology, same lifestyle, that would avoid corruption in the developing of the nation; any deviation from this ideology would result in

[74] https://en.wikipedia.org/wiki/Pol_Pot
[75] http://www.cambodiatribunal.org/history/cambodian-history/khmer-rouge-history/

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assassination of that person. Attempting to process these ideologies were the main key factors for the Cambodian genocide.

Pot's Torture

In order to make the Cambodia a socialist agrarian republic[76] based on the principles of Maoism, Pol Pot adopted numerous approaches; humane or inhumane. His main idea was to make the country classless, for that he used killing fields. After the Vietnamese war ended the Cambodian dictatorship ended with it, they had been heavily relied on American money, support and military power to stay in power, but now US had gone, the Khmer Rouge came out of the forest and replaced the military dictatorship with something far more vicious and they wasted no time implementing their evil plans. They immediately make the city disappear into the country side, leave everything behind, give all of your belongings, all your money, food and items over to the Khmer Rouge and started walking to the countryside. They killed administrators and ex political party leaders, ambassadors because they didn't wanted any interference or opposition. They killed soldiers, they even killed teachers because of his thinking that there is no need of education, and one can survive by 'learning life lessons in a rice farm'. No one was eligible to gain knowledge or education by teachers or schools, because Pol Pot thought that even slightest bit of knowledge would make the person elite, and this was against the Pol Pot's ideology. Moreover he killed the persons wearing goggles because they would look like elite. He killed them on the spot, and turned everyone else into a countryside peasant. These changes didn't take place in weeks or days; they took hours doing all of that.

They started to turn all the schools in prisons and the work camps, like the infamous S-21 in Phnom-Penh. S-21, once a high school, was one of the most known prisons of Khmer Rouge. It is now turned into a memorial museum to the genocide. It was interrogation and torture center. The school classrooms were turned into prison cells, some designed to be highly protected and barricaded by iron bars. All the prisoners brought to S-21 were photographed. Around 16000 prisoners were brought to S-21 and only 7 survived. The prisoners brought were stripped to their underpants and then sent to the prisons if they had infants, they had to watch them get killed by having their heads smashed into a tree (around 2000 infants were killed this way). Once they

[76] https://en.wikipedia.org/wiki/Cambodian_genocide

were put in prisons they were not even allowed to move without the permission of the guards. They were beaten by guards and tortured by them, because guards were in fear that they would end up in prisons if they didn't do the same.[77] Moreover the guards and soldiers had psychological stress when carrying out the killings, because more than half of them were only youngsters.

Khmer was not only known for killing, the torture was also a big frightening factor. The previous doctors were either killed or sent to countryside to work as peasants in fields, all they were left with young child medics. Moreover they set ablaze library and medical facility. They didn't had the knowledge of western medicine as Pol Pot considered them as Capitalist's invention. Moreover he considered Cambodia a self-sufficient country so he started making young medics experiment various drugs and surgical processes themselves. Thus all the surgeries were conducted without using anesthesia.[78]

A medic who worked inside S-21 told that a 17 year old girl had her throat slit and abdomen cut before being beaten and put in the water for whole night. This was done several times before giving anesthesia.[79] In a hospital of Kampong Cham province, child doctors cut off the intestine of living non-consenting being and studied the healing process. The patient deceased after three days due to the "operation". They even cut opened the chest of patient to observe heart beating.[80] The medical experimentations executed during the Khmer Rouge regime are equivalent or in some cases even worse than those led by the Nazi regime.

In his attempts to make a utopia, he did numerous inhumane acts, from killings in killing fields to taking families apart, and many others. Moreover he adopted cheap methods of killing people, instead of using bullets, he executed people by axes, knives etc. Child trafficking was also one of the most common problems in those 4 years. The Khmer Rouge tried to destroy every proof of other types of life, such as hospitals,

[77] https://www.listland.com/top-10-facts-about-the-cambodian-genocide/
[78] "Keeping Them Alive, One Gets Nothing; Killing Them, One Loses Nothing": Prosecuting Khmer Rouge Medical Practices as Crimes against Humanity ; by Laura Vilim, Georgetown University Law Center 2012 Documentation Center of Cambodia Summer 2010 Legal Associate
[79] http://www.cambodiatribunal.org/2016/06/16/propaganda-torture-and-french-colonial-heritage-looking-into-the-methods-of-the-khmer-rouge/
[80] "Keeping Them Alive, One Gets Nothing; Killing Them, One Loses Nothing": Prosecuting Khmer Rouge Medical Practices as Crimes against Humanity ; by Laura Vilim, Georgetown University Law Center 2012 Documentation Center of Cambodia Summer 2010 Legal Associate

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factories, universities and schools, as they were considered to be redundant to the new regime's requirements. But it's impossible to create a utopia so he blamed the CIA and ex-government. He said that the both of the organizations are involved somehow, that's why his idea of an agrarian society was not succeeding. To eliminate these factors he started questioning innocent people and beating and torturing them unless and until they give up certain names, who were (according to Pol Pot) involved with the CIA and ex government. Then he killed those people.

The total killing was likely near 2,400,000.

HUMAN RIGHTS VIOLATION

- Article 1.

"All human beings are born free and equal in dignity and rights".

They are gifted with reason and self-conscience and should act towards one another in a sprit of brotherhood. Article 1 was disrupted as they were not allowed to show a little bit of affection towards any other person. Family relationships were also barred.

- Article 3.

"Everyone has the right to life, liberty and security of person."

Article 3 was violated as Cambodians who were alleged of being enemies were arrested, tortured, and then killed by the Khmer Rouge under their regime. People who were assumed to be ''enemies'' were executed.

- Article 4.

"No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

Article 4 was violated as rich people were forced out of their homes, they were brought to work zone where they were treated as slaves and lead to death by overworking.

- Article 5.

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"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 5 The Khmer Rouge basically converted Cambodia into a huge torture center, which later became a graveyard for nearly two million people, even including their own members and even some of their senior leaders.

- Article 7.

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

- Article 9.

"No one shall be subjected to arbitrary arrest, detention or exile."

Cambodians who were alleged of being enemies were arrested, tortured, and then executed by the Khmer Rouge under their regime. People who were assumed to be ''enemies'' were executed. Article 9 was violated as those who were convicted of treason were taken to a top-secret prison called S-21 where the prisoners were rarely given food, and as a result, many people died of starvation. Most prisoners deceased from the stark physical mutilation that was caused by torture. Of the about 15,000 to 30,000 prisoners, only seven prisoners survived and under the DK control, 500,000 people were murdered of whom were against the Khmer Rouge.

- Article 12.

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Article 12 was violated as everyone was stripped of their basic human rights. People were barred from going outside their work zone. The Khmer Rouge's regime barred people from gathering and discussing, if violated, they could be accused of being enemies which will lead to a punishment of arrest or execution. Family relationships were also heavily barred. People were forbidden from having even the slightest form of affection. The Khmer Rouge wanted all the people of Cambodia to obey and

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respect only them. The Khmer Rouge claimed that only people of "purity" were competent in building the revolution.

- Article 13.

"(1) everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country."

Article 13 clause 1 was violated as Khmer Regime enforced the citizens to relocate to the countryside to work in collective farms and forced labour jobs. Article 13 clause 2 was violated as people were forced to live in work zone, all their rights were taken away from them they were barred from leaving their work zones.

- Article 16.

"(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Article 16 was violated as during the time of all this, everyone was stripped of their basic human rights. People were barred from going outside their work zone. The Khmer Rouge's regime barred people from gathering and having discussions, if violated, they could be alleged of being enemies which will lead to a punishment of arrest or execution. Family relationships were also heavily banned. People were banned from showing even the slightest form of affection. The Khmer Rouge commanded all the people of Cambodia to obey and respect only them. The Khmer Rouge claimed that only people of "purity" were skilled in building the revolution.

- Article 17.

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"(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property."

Article 17 was violated as they put it into action by abolishing money, free markets, normal schooling, private property, clothing styles, religion/ religious practices, and traditional culture. They converted public schools, pagodas, churches, universities, shops, and government buildings into into prisons, stables, and reeducation facilities/camps. The Khmer Rouge banned all public and private transportation.

- Article 18.

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

- Article 19.

"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."

Article 19 was violated as people were forcefully put into work zones that is farms and were tortured, were not provided proper food and were asked to overwork, the were not permitted to show affection and violation would result in imprisonment and torture.

- Article 20.

"(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association."

Article 20 was violaed as people were forcefully put into work zones that is farms and were tortured, were not provided proper food and were asked to overwork, the were not permitted to show affection and violation would conclude in imprisonment and torture.

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- Article 21.

"(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

- Article 22.

"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

- Article 23.

"(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests. "

- Article 24.

"Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. "

- Article 25.

"(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

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and necessary 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.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. "

- Article 26.

"(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children."

- Article 27.

"(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

- Article 28.

"Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Justice And Current Situation

After the Khmer Rouge ended, the new Cambodian government was established on 15th July 1979 and passed "decree law No. 1" to prosecute Pol Pot and Leng Sary for

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their crimes. They were assigned an American defense lawyer Hope Stevens, and were tried in absentia and were convicted of genocide. Moreover the Cambodian National Assembly passed an legislation for the establishment of Tribunal for the trial of other members of Khmer Rouge in 2001.[81]

But it appears that even after spending a decade and around 300 million dollars, the UN backed tribunal has convicted only 3 accused. But because of political interference the trial is susceptible to slow pace which is in result of an awkward compromise between Cambodia and United Nations when they agreed to set up a combined international court, which formally began in 2006.

In pursuit of justice, the Cambodians has looked over to the UN assisted tribunal currently in progress in the capital city of Phnom Penh. The tribunal has penalized the head of the main Khmer Rouge torture center to life in prison. Two more high ranking officials of Khmer Rouge had been subjected to conviction for life in tribunal. After that point, the tribunal will most likely to close its doors, and the UN appointed judges and lawyers will go home.[82]

"Of the three people convicted, two were members of the highest circle of the radical Communist regime: Nuon Chea, 90, who was No. 2 in the hierarchy, and Khieu Samphan, 85, the chief of state. They were sentenced to life in prison for crimes against humanity and are undergoing a separate trial for genocide and other crimes. The third convict, Kaing Guek Eav, known as Duch, who commanded a notorious Khmer Rouge prison, was also sentenced to life in prison for crimes against humanity."[83]

"From the start, the Cambodian government had a very different idea about how many people would be tried, and their view appears to be prevailing," said Alexander Hinton, an anthropology professor at Rutgers University-Newark. "The court's legacy will be tainted and greatly diminished if it fails to try further cases."[84]

[81] https://en.wikipedia.org/wiki/Cambodian_genocide
[82] 10 https://www.independent.co.uk/news/long_reads/cambodia-genocide-khmer-rouge-survivors-haing-gnor-vannnath-a8307536.html
[83] https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html
[84] https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html

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The limited convictions are a result of quarter-century of civil war and political turmoil that passed between the collapse of the Khmer Rouge and the commencement of the trials. The small number of defendants represents the court's opinion to try senior and most responsible accused. But still Pol Pot, because of whom almost 2 million people were killed due to starvation, disease or execution goes unpunished, as he died at the age of 73 in his sleep.

CONCLUSION

It is so terrifying to observe how someone's urge to build a 'utopia' can take such wicked turns. This unsuccessful attempt to build such utopia cost almost 2 million lives. This event was so dreadful that today almost half of the population of Cambodia is under 15 years of age. But before such horrible events, Cambodia was a peace loving country. They didn't wanted any sort of evil dispensation. But they eventually got caught up in a war between countries which in turn cost around 2 million lives of people. Still Cambodians are not angry, as the citizenry doesn't hungers for punishment of responsible people but for peace. But the most embarrassing part of all is that the person responsible for all this goes unpunished.

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CASE ANALYSIS: STATE OF RAJASTHAN v. KALKI

(1981) 2 SCC 752

-Divynash Gautam & Tejaswi Kandi

APPEALLANT: State of Rajasthan

RESPONDENT: Kalki and Others

HON'BLE JUDGES: Justice A.N. Sen; Justice Baharul Islam and Justice O. Chinnappa Reddy

DECIDED ON: 15th of April, 1981

The "evidence" in lieu of any offence or dispute, is the eye and ear of a court. A proper decision in any case before a court is not possible without knowledge of true facts involved in a dispute.[85]. Evidence under the Indian law means, "all statements which the Court permits or require to be made before it by witnesses, in relation to matters of fact under enquiry. Such statements are called oral evidence, all documents produced for the inspection of Court, are called documentary evidence.[86]" Through the evidence the facts alleged by one party, and denied by the other require the Court to ascertain whose contentions are true and for that purpose, the judge has to weigh the 'evidence' available in support of or contradiction to those contentions.

[85] Raghav Prapanna Tripathi v. State of Uttar Pradesh, AIR 1963 SC 74; (1963) 1 Cr LJ 70; (1963) 3 SCR 239.
[86] All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi, AIR 2009 SC 1314: 2009 AIR SCW 2424.

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ISSUES INVOLVED

- Whether the wife of the deceased who is also the prime witness of the case would be considered as 'interested'?
- When does minor variations in the testimony do not amount to material contradictions and whether a Court can rely upon such testimony?

FACTS OF THE CASE

- The present case is an appeal on behalf of the Rajasthan State before the Hon'ble Supreme Court under Article 136 against the judgement of the Hon'ble Rajasthan High Court setting aside the conviction of two prime accused.
- This case deals with Sections 147, 148, 149 and 302 of Indian Penal Code, 1860 wherein originally by the Trial Court both of the accused were held guilty and were imprisoned for 20 years.
- In the present matter the material facts of the prosecution case are that there was a land dispute regarding an agricultural land between Nimba, (father of the deceased) Poona, on the one hand, and respondent Amara and the members of his family, on the other.
- On July 17, 1970 at about sunset the accused persons of whom respondent 1 Kalki (the wife and the prime accused) was armed with an axe and respondent 2, Amara (husband of the prime accused) with a dharia, came to the house of the deceased.
- At that time the deceased was inside his hut with his wife Mooli (Prime Witness) Amara called Poona. Poona came out followed by his wife Mooli, when he was knocked down by Amara and Rama whereupon Kalki gave him blow with the axe on the neck.
- Poona met with instantaneous death. Mooli raised an outcry when Geli, mother of the deceased who had been at some distance from the hut came running to the place of occurrence and saw the assailants leaving the place.
- Nimba lodged a report at the police station at Nana. Police registered a case. In due course the case was sent to, and tried by, the Session Judge who convicted

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and sentenced the six accused persons including the two respondents as stated above.

- Thereafter on an appeal to the High Court it set aside the Order of conviction and sentence passed by the Session Judge on the grounds that prime witness was

  highly interested witness and there were material discrepancies in her statement.
- Hence, a special petition was filed before the Hon'ble Supreme Court against the order of acquittal by the Hon'ble Rajasthan High Court.

JUDGEMENT OF THE COURT

In the judgement the Hon'ble Supreme Court was of the view that the facts of the case makes it evident that that there were no material discrepancies in the evidence of prime witness Held, prosecution established guilt of respondents beyond reasonable doubt wherein Respondent No. 1 is liable to be convicted for offence under Section 302 and respondent No. 2 is liable for offence under Section 302/34. Hence, the order of the learned High Court was set aside set and the appeal under Article 136 was allowed. The Hon'ble Supreme Court based the judgement on the following three basis –

- That the prime witness of the case although being the wife of the deceased would not be the interested party but only and most natural witness.
- That the discrepancies referred to by the High Court are minor, insignificant and natural but not material.
- That the guilt of the Respondents has been established beyond reasonable ground and therefore acquittal amounts to miscarriage of justice, hence, it was set aside.

RELEVANT RULES AND LEGISLATION

- Indian Penal Code, 1860
- Code of Criminal Procedure, 1973

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- Indian Evidence Act,1872
- The Constitution of India Act, 1950

CASES REFERRED

- Ganapathi and Ors. v. The State of Tamil Nadu and Ors, AIR 2018 SC 1635.
- Maranadu and Anr. v. State by Inspector of Police, Tamil Nadu, (2008) 16 SCC 529
- Gangabhavani vs. Rayapati Venkat Reddy and Ors., AIR 2013 SC 3681.
- Chakali Maddilety and Ors. v. State of A.P, AIR 2010 SC 3473.
- Dhari and Ors. v. State of U.P., AIR 2013 SC 308).
- Bhagaloo Lodh and Anr. v. State of U.P., AIR 2011 SC 2292.
- State of U.P. v. M.K. Anthony, (1985) 1 SCC 505.
- Kusti Mallaiah vs. The State of Andhra Pradesh, 2013 (3) AJR 818.
- Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614.
- All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi, AIR 2009 SC 1314: 2009 AIR SCW 2424.
- Raghav Prapanna Tripathi v. State of Uttar Pradesh, AIR 1963 SC 74; (1963) 1 Cr LJ 70; (1963) 3 SCR 239.
- Sachchey Lal Tiwari v. State of U.P., AIR 2004 SC 5039
- State Rep. by Inspector of Police v. Saravanan and Anr., AIR 2009 SC 152.
- Ousu Varghese v. State of Kerala (1974) 3 SCC 767.

CRITICAL ANALYSIS

A. *Whether the wife of the deceased who is also the prime witness of the case would be considered as 'interested'?*

As held in the case 'related' is not equivalent to 'interested'. A witness may be called interested only when he or she derives some benefit from the result of a litigation that is in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be interested.

Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible as held in *Ganapathi and Ors. v. The State of Tamil Nadu and Ors*.[87]

Furthermore, as held by Supreme Court in *Maranadu and Anr. v. State by Inspector of Police, Tamil Nadu*[88] relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made.

Similarly, in *Gangabhavani vs. Rayapati Venkat Reddy and Ors*[89] while dealing with a similar problem the Supreme Court held that – it is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. As mentioned above the High Court declined to rely on the evidence of Prime Witness as she is a 'highly interested' witness because 'she is the wife of the deceased'

However as per the circumstances of the case, she was the only and most natural witness. She was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. It is true that she is the wife of the deceased, but she cannot be called an 'interested' witness. She is related to the deceased and related is not equivalent to 'interested'.

A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested' as held in *Chakali Maddilety and Ors. v. State of A.P*[90]. In the instant case the Prime Witness had no interest in protecting the real culprit, and falsely implicating the Respondents.

[87] Ganapathi and Ors. v. The State of Tamil Nadu and Ors, AIR 2018 SC 1635.
[88] Maranadu and Anr. v. State by Inspector of Police, Tamil Nadu (2008) 16 SCC 529.
[89] Gangabhavani vs. Rayapati Venkat Reddy and Ors.AIR 2013 SC 3681.
[90] Chakali Maddilety and Ors. v. State of A.P, AIR 2010 SC 3473.

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In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, her deposition cannot be discarded merely on the ground of being closely related to the victim/deceased.

B. When does minor variations in the testimony do not amount to material contradictions and whether a Court can rely upon such testimony?

In the present matter the Hon'ble Supreme Court held that there were no 'material discrepancies' in her evidence. The Supreme Court was of the view that the discrepancies referred to by the High Court are minor, insignificant, natural and not 'material'.

In this case the discrepancies that were referred to were that – which accused "pressed the deceased and at which part of the body to the ground and sat on which part of the body; with regard to whether the respondent Kalki gave the axe blow to the deceased while the latter was standing or lying on the ground, and whether the blow was given from the side of the head or from the side of the legs.

Although there were some minor deviations from the original testimony but in such depositions of witnesses there are always some normal discrepancies however honest and truthful they may be.

These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like as held in *Dhari and Ors. v. State of U.P*. Whereas, material discrepancies are those which are not normal, and not expected of a normal person.[91]

In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon – *Bhagaloo Lodh and Anr. v. State of U.P.*[92]

[91] Dhari and Ors. v. State of U.P., AIR 2013 SC 308).
[92] Bhagaloo Lodh and Anr. v. State of U.P., AIR 2011 SC 2292.

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The Hon'ble High Court was also of the opinion that it cannot upheld the conviction of the Respondents because the Trial Court convicted them on the basis of single testimony, that of the Prime Witness which is also related to the deceased at the same time.

However, it has been held in catena of decisions of this Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted as held in *State of U.P. v. M.K. Anthony*.[93]

Furthermore, in *Kusti Mallaiah vs. The State of Andhra Pradesh*[94] it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact.

In *Vadivelu Thevar v. The State of Madras*[95], it has been ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.

Which the Trial Court did but the Hon'ble High Court did not. The Hon'ble High Court just focused upon the point of 'interested' party and some minor deviations from the testimony of the Prime Witness. But it however failed to take into consideration the testimony of medical examiner and the corroborating evidence produced by the prosecution which proved the guilt of the Respondents beyond reasonable ground.

CONCLUSION

The present case is a landmark case not only because it laid down certain parameters and principles with regards to the testimony of witnesses and the difference between a

[93] State of U.P. v. M.K. Anthony (1985) 1 SCC 505.
[94] Kusti Mallaiah vs. The State of Andhra Pradesh 2013 (3) AJR 818.
[95] Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614.

'related' and an 'interested' witness. But also because the Hon'ble Supreme Court for the first time investigated into the facts of the case under Article 136.

In the appeal it was contended by the Respondents that it involves only appreciation of evidence and this Court may not interfere with the findings of facts resulting from appreciation of evidence. In my opinion although it is true that in an appeal under Article 136 of the Constitution this Court very rarely interferes with the findings of facts arrived at by the High Court. But the Hon'ble Supreme Court was right in going through the facts and findings of the fact as when it appears that the findings of facts arrived at are bordering on perversity and result in miscarriage of justice, the Court shall not decline to quash such findings to prevent the miscarriage of justice. The authors completely agree with the Supreme Court's decision.

Furthermore, murders are not committed with previous notice to witnesses or soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'.[96]

Furthermore, when it comes to minor discrepancies in the testimony of a witness, while appreciating it the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.[97] And as held in *Ousu Varghese v. State of Kerala*[98], the minor

[96] Sachchey Lal Tiwari v. State of U.P., AIR 2004 SC 5039.
[97] State Rep. by Inspector of Police v. Saravanan and Anr., AIR 2009 SC 152.
[98] Ousu Varghese v. State of Kerala (1974) 3 SCC 767.

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variations in the accounts of witnesses are often the hallmark of the truth of the testimony.

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ADULTERY LAW IN INDIA

-Garima Sachdeva

Marriages have been considered as the purest bond shared by two individuals, a husband and a wife. The purpose behind the concept of marriage was to bring together two individuals who could share the love, joy and achieve their aspiration of life together. A life is beautiful to live, if lead by a companion which whom, one can share their experiences of life. The actual meaning of the marriage is companionship, fellowship, staying together in happy and sad times which is considered as god's will for the enhancement of the society. According to our Hindu culture, marriage is a platform where two individual meet and devote themselves in each other. It provides for a basis for leading and creating a family together. But, unfortunately the meaning of the marriage is not understood by the people and slowly, the importance of marriage is diminishing. The essence of marriages is vanishing with the upcoming time. The partners are not involved, do not respect each other like the earlier times. There are various instances where the marriages are ending due to several reasons such as adultery, bigamy, desertion, cruelty, lack of interest in the other partner.

India had its deep roots when it comes to its culture. Indian culture has given marriage a lot of importance and priority. In the country like India, marriages are given much more value and importance as compared to education in the country. But, the value of the marriages is decreasing day by day and several unlawful practices are being practiced while being in a marriage such as the act of adultery. It is such an act which is immoral in the eyes of society and an act which is not acceptable by the people of the society. There can be various examples which can lead to such an act such as loneliness, ignorance of the spouse on the other spouse, lack of communication, lack of interest, lack of love. But this does not result in cheating the other spouse. In the eyes of law, cheating his or her spouse is a valid ground for divorce. Therefore, there is a remedy available to the husband and wife to approach court in case the other partner is involved and caught in the act of adultery.

In India, laws are enacted and framed for the benefit and protection of the people living in the society. Similarly, Indian Penal Code was enacted with the intention to deal with all the substantial aspect of the criminal law. The code was drafted in the

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year 1860 on the recommendation of the first law commissioner of India, which was established in 1834 under the charter of 1833, under the chairmanship of Thomas Babington Macaulay. Similarly, the concept of adultery in India has been questioned a lot of times. The word adultery is a Latin word "Aduterium" which means extra marital sex which is displeasing on many grounds such matrimonial, social, moral and as well as legal ground. As according to the Hindu mythology, a soul has no gender, but over the time the essence of Indian culture is decreasing. Laws were made primarily for the protection of the people but there are certain laws which need to be taken into consideration as the intention of drafting those section doesn't fit in the current scenario. Like in the case of adultery, in India the offence of adultery is illegal and is punishable under the law, but initially the framers of the code did not make adultery an offense which could be punishable under the law. But the second law commission, after considering the subject, concluded that it was not advisable to exclude this offense from the code. Adultery figures in the penal law of many nations, and some of the most celebrated English lawyers have considered its omission from English law. The definition of adultery varies from country to country. The term "Adultery" has been defined under section 497 of Indian Penal Code provides whoever has sexual intercourse with a person who is and whom he knows or he has a reason to believe to be wife of another man, without the consent or connivance of that man[99], such sexual intercourse not amounting to rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or both.

ANALYSIS OF SECTION 497 OF INDIAN PENAL CODE

The act of adultery is with free consent and willingness of both the parties, not amounting to the offence of rape. It has been clearly stated in the section of Indian Penal code that a man would be punishable for the act of adultery and the woman would be punished if even she is an abettor in such case. This 157-year-old section is a 'gender bias section which only hold a man who is not his husband for committing the offense of adultery. The section 497 of the Indian Penal Code discriminates men, as only the men in such context are held guilty and are also liable for prosecution. In

[99] Universal, Criminal manual (2018), Haryana, Lexis Nexis publication, pg.593

such case there is a free consent of the women who is involved in voluntary sexual intercourse with another man who is not their current spouse and, in such circumstance, only the husband or any person in whose "care" a husband had left his wife can file a case against that man.[100] Section 198 of Code of criminal procedure deals with prosecution for offenses against marriage which states in section 198(1) that no court shall take cognizance of an offence punishable under chapter XX of the Indian Penal Code(45 of 1860) except upon a complaint made by some person aggrieved by the offense.

Section 198(2) of the act states that no person other than the husband of the woman shall be deemed to be aggrieved by any offense punishable under section 497 of Indian Penal Code.[101]

It has been expressly witnessed that this section of Indian Penal code, section 497 is a gender bias section where it punishes the man for the act of adultery the women is set free irrespective of her involved in the act of adultery. The Indian penal code is bended more in favor of the women as they were always a subject of victim in our country India. The laws are in favor of women in order to provide them protection and safeguard against the crime which were committed on them. Special measures or privileges are provided to women in order to provide special preservation to them, but one cannot ignore the fact that men are to be provided with certain benefits in order to keep them safeguarded.

Even a rational person would not be in favor of retention of the provisions where only a man would be held liable for an offence despite the fact that the woman was equally involved in the voluntary sexual intercourse with her free consent and her will. On the same hand, what if the woman herself had induced the man to have sexual intercourse with her with her free consent and willingness. It is highly unfair as a woman can get herself indulged with as many men she desires to and would not be held liable for committing the act of adultery. In such cases only the husband of the married woman could file a case against that other man with whom her wife was involved. If the act is not voluntary and is committed under intoxication or in sate of unconsciousness, or without consent or by the use of force or fraud, then in such a case it does not amount

[100] Amala dasarathi, "adultery laws are dusty Victorian remnants"
[101] Section 198, Universal (2018), criminal manual, LexisNexis publication pg 141

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to adultery. A mere attempt of sexual intercourse would not amount to adultery. A complete act of sexual intercourse has to commenced between them. A sexual intercourse of a man with an unmarried woman, or a widow would also not amount to the offense of adultery. The main ingredient of the offence to be termed as adultery would be in the case where there is a voluntary sexual intercourse with a married woman, not being his own wife.

For the growth of any society, the main focus should be that the citizen is treated equally and no law is biased on the basis of gender. Section 497 of Indian penal code, contravene article 14 and article 15 of the Indian constitution. As according to article 14 of the Indian constitution, it clearly stated that state shall not deny equality and shall ensure equal protection of laws within the territory of the India and in article 15, of the Indian constitution it states that a state shall not discriminate any person on the basis of religion, race, caste, sex or place of birth. But, section 497 of the hand, is discriminatory in nature which only punishes a man for the act of adultery and excuses a woman despite her complete involvement in the same act. The constitutional validity of this section has been challenged in many cases, but for the first time it was challenged inn the case of Yusuf Aziz vs states[102] the court ruled that the immunity granted to women from being prosecuted under section 497 was not discriminatory but valid under 15(3) of the constitution. It does not violate articles 14 and 15 of the constitution of India.

Section 15(3) of the constitution lays down that the sate shall have the power to make special laws for the women and children. The special measures or the privileges are provided to them in order to provide protect to them. At the time of drafting of the Indian constitution, Dr B.R Ambedkar, who was the author of the Indian constitution took constructive and much needed steps in favor of Indian women to make them socially strong.[103] This was done in order to change the status of the women in the society and witness a revolutionary change.

But unfortunately, there are certain provision of our law that needs to be amended as according to the changing scenario all over the world. If the act of adultery is committed by a husband with ay unmarried woman, the wife is not entitled to any

[102] Yusuf Aziz vs state of Bombay
[103] Article in the times of India

relief under criminal law and in cases where the adultery is committed by a married woman, other than a spouse, then only a husband can file a case against adulator in respect of his wife. It has been seen that the act of adultery is initiated because the adulterous spouse feels unloved and neglected by her husband. It is the duty of both, the husband and the wife to take efforts to make their marriage work and to maintain their love, dignity and respect each other. Therefore, the spouse intends to cheat on the current spouse because of lack of attention, love and care by their current spouse. The act of adultery leads to breaking of faith on the current spouse which leads to end of a relationship. despite the fact, that there is no legal punishment for it for the woman who was involved in the act of adultery. The section 497 of Indian penal code has been criticized where on hand the woman is treated as a property of her husband and on the other hand giving complete protection to her against the offense of adultery.

PARAMETERS ON WHICH THE SECTION IS CRITICIZED

Wife Property of Her Husband

The act, where a married woman is indulged with a man who is not her husband with the consent of her husband would not amount to adultery. Such an act, not only violates the foundation of a marriage but also the rules and norms of a society. Adultery, should not be decriminalized as it would violate the concept of marriage as people would be more involved in such acts, which would in a way effect the society. In the Indian culture, marriage has been given a lot of importance and there was no concept of divorce as well until it came with amendments in the year 2001 as divorce act,2001 with the changes in the society.

In the Vedic period, the women were treated equally as men. The concept of marriage was actually, understood and respected by the people as it was considered that it was god's act for the enhancement of the lives of the people.[104] The women, were not subjected to be the property of her husband. It was a very glorious period for the upliftment of the society, as the participation of the women were equal to that of man. She was indeed, given full freedom and a platform to express her views and opinion.

[104] 'The institution of marriage', Journal of juvenile and family law volume 4 ISSN: 2246-2101, pg. 76

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But, during the medieval period, the position of woman was lowered and they were totally deprived of basic human rights.

The woman in the post Vedic period, in those days be a daughter or a wife or a widow was under the surveillance of her father, her husband and her son.[105] They were deprived from basic needs and education which would have resulted in the growth of her. The man was given the supreme authority to control his house and as well as her wife. The woman was always considered as a subordinate and was never treated equally as man. A woman was not only ill-treated by her husband, but also by her husband's relative. She was considered as weak as compared to a man. She was not strong enough to raise her voice or revolt for her rights. She was expected to follow all the commands of her husband and had to follow them blindly without questioning them. The husband had a great control over the life of the wife. Many restrictions were imposed on her. This led to the downfall for the growth of any country.

The decisions were taken by her husband. She was not given any sort of freedom to express her thoughts and were expected to follow the commands of her husband. She was considered as an object or a commodity of her husband. As according to section 497 of Indian Penal Code, if a married woman has sexual intercourse with a man not being her husband but with the consent of her husband leads to an assumption that she is treated as a property of her husband and has no authority to take decision for herself. This not only exploits her but also lowers her dignity. A husband is not a master of a married woman. The decisions should be mutual and not such as to suppress her.

Fortunately, after the emergence of British in our country India, many revolutionary changes took place. The status of woman was also improving in this period. They were granted with special privileges for the upliftment of the status of woman. Many laws were enacted which included special protection to the woman. The constitution of India has provided equal rights and opportunities for men and women but it has taken a step further and has made special provision for the woman in order to ensure enhancement of the woman in the society and in the world. Article 15 of the Indian constitution states that no one shall be discriminated on the basis of sex, religion, race, caste and place of birth. Whereas on the same hand in the very same article a

[105] Dr Rega Surya Rao, lectures on woman and law, Hyderabad, S.P Gogia, New Delhi 2011 pg. 5

provision has been mentioned which states that a state shall have the power to make special provision for the woman and children. This section signifies that special provision can be made "in favor of woman" and not against them. Article 15(1) and (3) are to be read together which implies that state can discriminate in favor of a woman against men, but it cannot discriminate in favor of men against women.[106] A series of social legislations have also been enacted from time to time for raising the status of woman. To give womanhood their proper and coordinate place, more and more education and more enlightenment among the them is required.[107] The main focus of our government has always been to encourage the woman in the society and not to oppress them or degrade them. For the upliftment of the society woman should be treated the way she was treated in the Vedic period. God never had the intention to create any difference between a man and woman. It was the people and their mind-set which lead to division in terms of gender, caste, religion. The position of woman is now changing as many are now aware of their rights and opportunities. In the urban area, we can witness a revolutionary change but sadly, the situation has not improved much for the rural areas of our country.

Discriminatory in Nature

Another reason, as to why section 497 of Indian Penal Code was castigated over and over again because of the fact that it is discriminatory in nature. The offense of adultery has been categorized under the chapter 'offense related to marriage' in the Indian Penal Code, as the offense of adultery directly effects the pure institution of marriage, which also effects the society at large. It is the responsibility of the parties i.e. the husband and the wife to take essential steps to safeguard their marriage. The section discriminates between a man and a woman on the ground that if the act of sexual intercourse is committed without the consent or connivance of the husband then it would amount to adultery, and in such case the man other than the husband would be held liable and shall be prosecuted by the husband in the court. There is no provision in the section which holds a woman liable for the act committed by her with

[106] Dr Rega Surya Rao, lectures on woman and children, Hyderabad, S.P Gogia, New Delhi 2011 pg. 29
[107] Subha Sarkar, 'Status of woman in India', shareyouressay.com

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her full consent and willingness to participate in the act not even as an abettor. The Supreme Court has also held that a woman in such act is neither a seducer nor an abettor, but mere victim. The offense of adultery is not a crime, if the husband consents for the sexual intercourse with another man. It becomes an offence in the eyes of law when there is no consent of the husband for such an act. The section does not provide any provision for the wife of man who is indulged in such sexual intercourse with a married woman of another man. The consent of such woman as nowhere mentioned in our legal system. Whether she consents for it or not, there is no provision or relief which could be sought by her in our judicial system. The section discriminates on the ground where a husband of the married woman has the option to prosecute a case against the third party for the act of adultery for which he did not had any consent, but whereas on the same hand, there is no relief mentioned for the wife of the third party, in case that third party is a married man.

The argument is generally given in favor of this definition that, the inheritance of children of marriage is altered when wife beget children from a man other than a husband. Firstly, if that is the case even if the husband consents, the inheritance will be altered and secondly, if it actually is about begetting children, a wife can also consent to extra marital relation of her husband to allow the other woman to begat a child for her and her husband. Also, in such case the consent of the woman

In the year 2017, in the case of Joseph shine v. union of India, a public interest litigation was filed by Joseph shine, challenging the constitutional validity of section 497 of the Indian penal code on the ground that it is discriminatory and violative of article 14, 15 and 21.

Any criminal law of a country is to treat its citizen equally, but the petitioner was of the view that it is biased against men, whereas it should be neutral in nature. The case was referred to constitutional bench in January this year. On 26th September 2018, the Supreme court has struck down 158-year-old section 497 of the Indian Penal Code, which criminalizes adultery as unconstitutional. The chief justice of India stated from the judgement that any provision of law affecting individual dignity and equality of woman invites wrath of constitution. It is the time to say that husband is not the master of wife. Legal supremacy of one sex over other sex is wrong. The judgment also held that section 497 is manifesty arbitrary.

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Section 497 of the Indian penal code punishes a man for having sexual intercourse with a married woman of another man. Such sexual act is exempted from punishment it is undergoes with the consent or free willingness of the husband. Also, a provision of this section, exempts a woman from punishment and she cannot be held liable even as an abettor. The judgment held that section 497 violated a woman's right to dignity, resulting in infringement of article 21 of the Indian constitution. But it has been made clear that adultery will be a ground for divorce. It was also stated that if an act of adultery leads the aggrieved spouse to end life, i.e. suicide, the adulterous partner could be prosecuted for abetment of suicide under section 306 of the Indian penal code.

The judgement has also struck down section 198(2) of the code of criminal procedure as a consequence of striking down section 497 of the Indian Penal code. The judgment was delivered by 5 judge benches by the bench of chief justice Dipak Misra and justices Rohinton Nariman, AM Khanwilkar DY Chandrachud and Indu Malhotra. The section 497 of the Indian Penal Code, (45 of 1860) has been held unconstitutional. No man can be prosecuted for committing the act of adultery. The section is no longer an offence, but it is still a valid ground on which a husband or a wife can seek divorce. Along with section 497 of Indian penal code, section 198(2), has also been quashed by the court which provided that no person other than the husband of the woman shall be deemed to be an aggrieved person under this section.

RECOMMENDATIONS AND CONCLUSION

The purpose of the courts, as observed earlier has always been to reconcile the sanity of marriage and has always taken such necessary steps that would safeguard the bond of marriage. Our Indian judiciary system does not, easily grant divorce to the couple, unless satisfied that there is no other way out. The parties are given ample amount of time to re-think about their marriage. the court provides opportunity to the married couple to re-consider their marriage. Even for a divorce by mutual consent of the parties, there is a minimum time period of six months to eighteen months which has to be fulfilled by the parties from the date of presentation of the petition before the court. If the petition is not withdrawn by the within the time, the court being satisfied that

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the facts in the petition are true and would pass the decree of divorce to the couple. The primary focus of the court is to protect the sanity of the marriage.

Section 497 of Indian Penal Code had been challenged numerous times in the court, but it has always been upheld and had been held as constitutional. It was challenged on the ground that it was discriminatory in its nature and favored woman despite their active part in the act of adultery. The section was biased as it also held men guilty of the offense of adultery. The section was challenged as it was violative of article 14 and 15 of the Indian constitution that is every person shall be treated equally and no one will be discriminated on the grounds of sex, gender, race, religion or place or birth. But on the hand, the court has also stated when they upheld the section that it was a valid section as the state can make any special provision for the protection of woman and children.

Therefore, in the recent judgement in 2018, by the former chief justice of India, Deepak Mishra, the section was decriminalized. The third party would not be held liable for the committing the act of adultery. But the court has mentioned that the relief would be available with both the husband and wife to seek divorce on the ground of adultery.

In India, the section 497 of the Indian penal code which is adultery in which a man who knows or has a reason to believe to be wife of another man has sexual intercourse without the consent and willingness of that man is decriminalized. The other man or the third party in this case would no longer be liable to be held guilty in the eyes of law. No criminal proceeding can be initiated against him. The act of adultery, therefore is legal in the country, India. But the court has provided the married couple with the remedy of seeking divorce on the ground of divorce. The former Chief justice of India stated that the section 497 is anti-woman, that in cases where the husband grants consent, a wife can be subjected to someone's else want. Such an act is against the Indian morality. A wife should not be treated as a property of his husband. A husband is not the master of the wife. Both the individuals in this relationship should be given equal status. But unfortunately, after decimalizing the act, recently in Chennai, a woman has ended her life as the husband was having an extra martial affair with someone else. The woman was told by her husband that she cannot initiate a case against him as adultery is no longer a crime in India. The

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husband would not be held liable under the criminal proceeding, but the wife could have adopted for civil proceeding against him.

The Supreme Court, in its judgement has also stated that the act of adultery, if committed still plays a vital role to seek divorce from the other spouse, if found indulged in the act of adultery. It is the responsibility of both the husband and the wife to put efforts to maintain their marriage. The act of being indulged with someone else wife or husband unlawfully is also against the morality of our culture. It depends upon an individual how they want to lead their life. The day, the thought of being loyal to one own spouse occurs the mind of each and every person, the act of cheating would disappear. The Supreme Court has delivered the judgment keeping all the norms in mind and for the welfare of the country and each individual has to honor and respect it. No one should disadvantage of the decision which is recently given by the Supreme Court. The decision of the Supreme Court is final and binding all the citizen of the country. Hence, section 497, of the Indian penal code has been struck down along with section 198(2) of the code of criminal procedure and the practice of adultery is no longer a criminal offence in the eyes of law.

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LEGAL AID

-Gunish Aggarwal

ABSTRACT

Justice is more than power, it is a virtue. In order to ensure equality of justice, it is not only sufficient that Law treats rich and poor equally, but it is also necessary that the poor must be in a position to get their rights enforced and should put up proper and adequate defence when they are sued for any liability. The right to access to justice, conceived as both means and an end to justice, is one of the most important human rights. If we fail in the approach, the Law despite its equality will be discriminatory against the poor. Legal Aid means giving out to poor 'gratis', or for nominal fees, legal advice and legal assistance in courts in civil and criminal matters. Effective Legal Aid has deemed to be one of the most important aspects of justice. The poor and illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts. Legal Aid, a basic requirement of justice and essential part of administration of justice. The subject of legal aid belongs to a much larger sphere than mere administration of justice. Through the courts. It involves the promotion of equality, social welfare and social justice. It also includes assistance in the ascertainment, assertion and enforcement of all legal rights. Without legal aid, no matter what Laws are enacted for the benefit of the poor and disadvantaged, they remain meaningless and dead words, which only adorn the shelves of Law libraries, so long as persons for whom the laws are intended, are incapable of enforcing them. It is a basic, indispensable postulate of the legal system.

Keywords: Access to Justice, Effective Legal Aid, Equality, Human Rights, Justice

INTRODUCTION

Access to legal aid is necessary in order to ensure effective availability of legal counsel, and so, the accused's right to a fair trial. Legal aid work, essentially is a state of individual lay mind, an individual professional point of view and the answer of the

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organized bar to a public demand for a means for implementing some of the basic legal principles for the way of life. Legal aid work is not only client's state of mind, but also explains professional point of view. It is an evidence of lawyer's recognition of that professional obligation not only to the individual client but to the general public. Legal aid denotes giving free legal aid services to the poor and needy who cannot manage to pay for their services of a lawyer for bearing of the case or a legal proceeding in any court, tribunal or before an authority. It is a system adopted to ensure that no one is deprived of professional advice and help because of lack of funds. The main objective is to deliver equal justice, which is made accessible to the poor, down trodden and weaker sections of the society. Legal aid is a welfare establishment by its state to the public at large who cannot meet the expenditures of legal aid. Legal aid has played an important role in safe-guarding socio-economic and cultural rights in relation to social security, housing, health and education service provision. In the nineteenth century, the continental European republic navigated for a right to counsel and right to fair trial. Going back, in west also, we find this ideal manifested in the earliest laws which directed that justice be done to rich and poor alike. It was incorporated in the Charter of Liberties of Henry II. It found its place in the great historical document, "Magna Carta." In the early twentieth century, around the world there was demand to provide legal aid services by the government. Gradually in 1940s it was taken into deliberation that state should provide aid and services to those who are underprivileged of their socio-economic and political rights. In the decade of 1950, legal aid provision was extended so with the emergence. During 1970-1980, the socio-economic rights were lawfully prescribed to each individual to guarantee that the necessities of welfare state are being effectively implemented. In 1980, private entities provided necessary welfare state, but it was mainly concerned with court cases. It is thus clear that human rights and human dignity form the basis of free legal aid.

Legal aid is a outcome of socio-economic philosophy. In almost all the developed countries and in many underdeveloped countries, there are state financed schemes of legal aid and advice to the weaker sections of the society. In the recent years, the strong move for legal aid is an outcome of the emergence of the socio-economic philosophy and welfare state and consequent struggle against poverty to ensure just human living to the people at large. The United Nations conference held in Tehran in

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1968 stressed the obligation of the state to provide legal aid to the poor. It adopted resolution to the effect that the governments should encourage the development of comprehensive legal aid system for the protection of legal aid system for the protection of human rights and fundamental freedoms and they should consider ways and means of deferring the expenses involved in this connection. It states that United Nations should also provide necessary resources to the member states in this matter. The United Nations has already impressed upon the desirability of providing legal aid expressly or by implication in the international instruments.

LEGAL AID IN INTERNATIONAL INSTRUMENTS

Article 8 of Universal Declaration of Human Rights justifies the right to legal aid.[108] Article 14(3) of the International Covenant on Civil and Political Rights guarantees full equality in determination of criminal charge against him.[109] Both, article 8 of UDHR and article 14(3) of ICCPHR justify legal aid as an essential human right.

HISTORY OF LEGAL AID IN INDIA

The movement of free legal aid to the poor can be traced back in ancient Indian society. The legal aid philosophy is known to have systematically commenced from the Vedic Age. This includes the following:

[108] Article 8 of UDHR- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by Law.
[109] Article 14(3) of ICCPR- In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- To be informed promptly and in detail in a language which he understands of the nature and cause of charge against him;
- To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- To be tried without undue delay;
- To be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it;
- To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- To have free assistance of an interpreter if he cannot understand or speak the language used in the court;
- Not to be compelled to testify against himself or to confess guilt.

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a) Vedic Period
b) Muslim Period
c) Vikramaditya period
d) British Period
e) Post-independence Period
f) Post-Constitution Period
g) 42nd Amendment of the Constitution Of India, 1976
h) Criminal Procedure Amendment Act,2005

Vedic Period

Vedas are ultimate source of knowledge for all Indians. These are the revelations of god. Some sources accept its existence some 6000 years ago whereas others agree as on 18th century B.C. Legal Aid traces can be found in the social practice and the elements of 'Dharma' itself. Rig Veda is one of the earliest four Vedas does contain such elements of legal aid. Rig Veda provides for increasing strength, including monetary assistance for extending aid and assistance to those fearing or facing the attacks.

Muslim Period

During the reign of Shahjahan and Aurangzeb, the state directed the lawyers to give advice free of charge to the poor. Such state lawyer was known as vakil-e-sarkar, who was for whole time and appointed by Chief Quazi of the province.

Vikramaditya Period

During this period, a judge of the highest court was paid five thousand silver coins and was provided with free furnished home. There was an evolved Law of Pleadings which is very similar to the present scenario. Manu, Yagnyavalk, Jaimini, Brihaspati and Narad were the eminent jurists who did adorn the legal panorama of the country in its golden age of history but the common man was not required to spend even a penny for seeking justice.

British Period

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In India, in olden days, justice was rendered very cheaply without any court fee or stamp duty. Pre-British India had practiced "constitutional monarchy" and the days of Hindu and Muslim rulers had witnessed unsophisticated methodology of dispensing justice to the poor, inexpensively and immediately. British brought with them an expensive system of administration of justice, which has made legal aid to the poor an obvious necessity.

Post-independence Period

Justice Bhagwati Committee

On 23rd March, 1949, Government of India appointed a committee under Chairmanship of Justice N.H. Bhagwati. In its report submitted on 31st October, 1949, the committee made the following recommendations:

- Administrative machinery of legal aid should be constituted at four levels. These are state level, High Court level, District level and Taluka level.
- The committee suggested two tests for determining eligibility for legal aid namely, means test and prima facie test.
- It was further proposed that no aid should be provided in trivial and trifling cases.
- There should be declaration on oath about disposable income and disposable capital.
- There must be cancellation of legal aid certificate in many cases.
  The committee recommended for Partial Legal Aid as suggested in the report of Rushcliffe committee in England. Legal Aid may be provided in all courts.

Trevor Harris Committee

The committee of West Bengal recommended a three-tier institutional structure for delivery of legal aid services. Legal Representation at state expense however was available only where an indigent accused was being tried for an offence punished with capital sentence. This was not a statutory right but made available at the discretion of the court.

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Post-Constitution Period

Indian Constitution which came into force in 1950 sets out social justice, liberty and equality of status as its main aim. The Fundamental Rights along with the Directive principles of State Policy aims to create an egalitarian social order where justice dwells in all walks of life whether it is social, economic and political. Article 14, Article 21 and Article 22 are important fundamental rights and Article 39-A of Directive Principles of State Policy are important for legal aid will be discussed later.[110]

42nd Amendment of the Constitution of India, 1976

42nd Amendment of the Constitution of India, 1976 is the most controversial and debatable piece of constitutional amendment undertaken in India since 1950. It was an omnibus measure introducing modifications in a number of provisions. The dominant thrust was to reduce the role of the courts especially the high courts, in the country's judicial and constitutional process. It sought to strengthen in various ways which in effect added to the power of the Central Government. Article 39A was inserted by this amendment.

Criminal Procedure Amendment Act, 2005

Legal Aid instrument can be used as a right in criminal proceeding. This is because of Article 39A read with Article 21. The provision has been thus used to interpret the right conferred by Section 304 of Code of Criminal Procedure.[111]

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[110] Infra

[111] Section 304 of Code of Criminal Procedure Code- Legal Aid to accused at state expense in certain cases

- Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the state.
- The High Court may, with the previous approval of the state government, make rules providing for-
    a) The mode of selecting pleaders for defence under sub- section (1);
    b) The facilities to be allowed to such pleaders by the courts;
    c) The fee payable to such pleaders by the government and generally, for carrying out the purposes of sub-section (1)
- The state government may by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the state as they apply in relation to trials before the courts of session.

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INDIAN CONSTITUTION[112]

Equal justice is one of the main cornerstones of our democratic system. The preamble of the Constitution incorporates the declaration to secure to all citizens-

> "Justice, social, economic and political;
> Liberty of thought, expression, belief, faith and worship;
> Equality of status and of opportunity and to promote among them all
> Fraternity assuring the dignity of the individual and the unity of the nation."

Securing equality is the fundamental entitlement, set out in article 14 of the Constitution.[113] Equality in the administration of justice thus forms the basis of all modern systems of jurisprudence. Equality before law, necessarily, if sought, must have an equal opportunity of access to court and opportunity of presenting cases in the court. However, the access to the courts depends upon payment of court fees and the fee of skilled lawyer. As far as person is unable to obtain access to a court of law due to poverty for defending himself against a criminal charge, justice becomes unequal and laws, which are meant for his protection, have no meaning and to the extent fail in their purpose. The court should interpret article 14 in such a way as to invoke its aid to the poor and direct the state not to deny equality to those who have no ample means of representing themselves in the court of law.

Right of personal liberty is one of the cardinal principle of the Constitution is guaranteed under the Article 21 of the Constitution.[114] The procedure should be fair and just only when it fulfils the demand of natural justice. Right to hearing is an integral part of natural justice. If right to counsel is essential to fair trial, it is equally important to see that the accused has necessary means for his defence.

[112] Supra
[113] Article 14 of the Constitution of India
Equality before Law- The state shall not deny to any person equality before the law or the equal protection of laws within the territory of India.
[114] Article 21 of the Constitution of India-
Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to the procedure established by law.

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Article 38 states that the state to secure a social order for the promotion of welfare of the people.[115] In order to ensure the welfare of people the state must embrace the steps to provide legal aid to the poor.

Directive Principles of State Policy

Article 39A provides equal justice and free legal aid.[116] Article 39A was added by Constitution 42nd Amendment Act, 1976 to ensure equal justice which has been enshrined in the Preamble and to further guarantee equality before law. Article 39A read with Article 21 has been to reinforce the right of a person involved in a criminal proceeding in a legal aid. Article 39A gives constitutional status to free legal aid services to the poor. The objective of Article 39A was explained by Supreme Court, "it is clear from the terms of Article 39A, the objective of the Constitution is to ensure social and equal justice so that legal aid has to be implemented by comprehensive schemes. Directive principles and fundamental rights have no disharmony as both are aiming at the same goal of bringing about social revolution and establishment of welfare state, which is envisaged in the Preamble. Article 39A is addressed to legislature and executive, but as far as the court of justice can indulge in judicial law making, within the ambit of the Constitution, the courts are bound by this mandate.[117]

CONCEPT OF LEGAL AID IN INDIA

Legal Aid is a constitutional prerequisite of the state and the right of citizens. Legal aid endeavours to shield that the constitutional pledge is satisfied in its latter and spirit and equal justice is made open to the weaker areas of general public. It is the obligation of the state to see that the legal framework maintains justice on the premise of equal opportunity for every one of its nationals. As mentioned earlier, the

[115] Article 38 of the Constitution of India-
a) The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
b) The state shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

[116] Article 39A of the Constitution of India- The state shall secure that the operation of legal system promotes justice, on the basis of equal opportunity and shall in particular, provide legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[117] Rajan Dwivedi v. Union of India, AIR 1983 SC 624

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Government of India made a number of regulations since 1952 to 1980 have been discussed earlier. In the year 1987, the Legal Services Authority Act was established to give a statutory acknowledgment to legal aid programmes. It was implemented on 9th November, 1995. It makes a person qualified under the act in a number of situations.[118]

CONTRIBUTIONS OF JUDICARY

In the case of Indira Nehru Gandhi v. Raj Narain[119], the court held," Rule of Law is the Basic structure of the Constitution of India. Every individual is guaranteed the rights as laid down in the constitution. No one should be condemned unheard. Equality of Justice should be given to everyone. There ought to be violation of fundamental right or prerogatives, or privileges, only then the remedy goes to the court of law. In the absence of Legal Aid trial is vitiated.

In the case of M.H. Hoskot v. State of Maharashtra[120], it was held that if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to the Supreme Court for the want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and Articles 39A of the Constitution, the power to assign the counsel for such imprisoned individual for doing complete justice. It is the state's legal responsibility to provide free legal services to the prisoner who is indigent and disabled in securing legal services, where it is required for justice.

[118] A person is qualified for assistance under the act in the following situations:
- A member of Scheduled Caste or A scheduled tribe.
- A victim of trafficking in human beings or beggar as mentioned in Article 23 of the Constitution of India.
- A woman or a child.
- A mentally ill or a disabled person.
- A person being a victim of mass disaster, ethnic violence, flood, drought, earthquake or industrial disaster.
- An industrial workman.
- In custody, in a custody of protected home or a juvenile home.
- Of psychiatric hospital or psychiatric nursing home.
- A person whose annual income is less than five thousand rupees or such higher amount as may be prescribed by state government. The limit of income can be increased or decreased by state governments. Limitation of income does not apply to persons belonging to scheduled castes, scheduled tribes, woman, children, and handicapped.

[119] AIR 1977 SC 69
[120] 1979 SCR (1) 192

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In the case of Hussainara Khatoon v. Home Secretary, State of Bihar[121], it was held that immediate release of the under trials was ordered as many of them were kept in the prison without trial or even without charge. The court held that state could not be permitted to deny the constitutional right of speedy trial to the accused on the ground that the state has no adequate financial resources to incur the necessary expenditure needed for improving administrative and judicial apparatus.

In the landmark case of Khatri v.State of Bihar[122], the Supreme Court emphasized that the state governments cannot avoid their obligation to provide free legal service to the poor, accused by pleading financial or administrative inability. A trial held without offering legal aid to an indigent accused at state cost will be vitiated and conviction will be set aside. Providing free legal service to the poor and needy is essential element to any reasonable, fair and just procedure.

In the case of Sheela Barse v. Union of India[123], failure to provide legal assistance to the poor and impoverished persons violates constitutional guarantees. Article 39A [Directive Principles of State Policy] casts a duty on the state to source the operation of legal system that promotes justice on the basis of equal opportunity. The right to legal aid is a fundamental right under Article 14 [Equality before Law] and article 21 [Right to life and personal liberty].

In the case of Ajmal Kasab v. State of Maharashtra[124], it was held that it is the duty of the magistrate before whom a person is accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defeated by legal practitioner and in case he has no means to engage a lawyer of his choice, one would be provided legal aid at the expense of the state. There is absolute obligation on the state to provide the accused with legal assistance, unless he himself refuses to such facility in a clear and unambiguous manner. The court also directed all the magistrates of the country to faithfully discharge the duty and obligation and further make it clear that any failure to fully discharge would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

[121] (1980) 1 SCC 98

[122] (1982) 1 SCC 635
[123] (1986) 3 SCC 596
[124] (2012) 9 SCC 1

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OBJECTIVE BEHIND ARTICLE 39A

Granville Austin said, "Seeking justice in the court was expensive for common man, often prohibitively so. Two reasons were the cost of the lawyer and the existence of fee system under which the litigant had to pay fee to register the case."

The Law Commission said indicating out that India was the only country under the modern system of government that prevents a person who has been deprived of his property or whose legal rights have been encroach on from seeking recompense by imposing tax on the remedy he seeks. Fee for the petitioner acting under Article 32 and Article 226 of the Constitution ought to be low, if not minimal, the commission suggested, but did not recommend stopping the practice altogether. Fee calculated according to damages sought are still charged, with the exception of the fee of two hundred and fifty rupees charged for approaching the Supreme Court under Article 32- its original jurisdiction over the fundamental rights.

The Law Commission advocated Legal Aid, so that the poor could afford a lawyer. Citing the Preamble's pledges and Article 14 assurance of Equality before Law and Equal Protection of Law, the Commission said that, "In so far as a person is unable to obtain access to a court of law for having his wrongs redressed, or for defending himself against a criminal charge, justice becomes unequal and Laws meant for [protection have no meaning. Legal Aid should be available for all not be only confined to the poor. People who are absolutely unable to pay should get it for free, for others there should be a graduated scale.

The scope of Article 39A is envisaged by Supreme Court of India in Air India Statutory Corporation v. United Labour Union[125] that Article 39Aexplains that justice is done on the basis of equal opportunity and no one is denied justice on the basis of equal opportunity and no one is denied justice by the reason of economic or other disabilities. In the case of Abdul Hassan v. Delhi Vidyut Board[126], it was emphasized that the legal system should be able to deliver expeditiously on the basis of equal

[125] AIR 1997 SC 645
[126] AIR 1999 Del 30

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opportunity and provide free Legal Aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

NALSA REGULATIONS, 2010

In the year 2010, the National Legal Services Authority of India executed NALSA Regulations in usage of mechanism under Section 29 of Legal Services Authority Act, 1987. The Regulations are applicable to the Legal Services Committee of the Supreme Court, High Court, the states, regions and Talukas. It performs a number of functions[127]

LEGAL SERVICES AUTHORITIES (AMENDMENT) ACT, 2012

In the Legal Services Authority Act, 1987 in Section 11A in sub-section 2 in clause (a), for the words "senior civil judge", the words "senior most Judical officer" has been substituted.

In section 22 of the principal act, for the words "Lok Adalat", wherever they occur, the words Lok Adalat or permanent Lok Adalat" shall be constituted.

After Chapter VI of the principal act, for the words "members of the Lok Adalat" the words "members of the Lok Adalat or the persons constituting permanent Lok Adalat" shall be substituted.

[127] NALSA functions:

- Selection of Panel- The Legal Aid services are endowed with the privilege to request applications from legal practitioners with mandatory proficient knowledge to determine the sort of cases they might be depended with. The legal practitioners should have attributes like competence, integrity, suitability and experience should be given due thought.
- Monitoring Committee- The regulations make procurement for constitution of monitoring committee and their functions. These committees are required to submit month by month report to the chairman of legal services establishment. The report should gain an autonomous evaluation of the ground in each legal case and the execution of panel lawyer and retained lawyer.
- Payment of fee- The regulations indicate the guidelines in regards to the payment of fees for panel lawyers in legal aid cases.
- Senior Advocates- The administrations of senior advocates might be profited if the Chairman of legal service institutions shapes an assessment to that impact in instances of great public significance and where genuine danger to life and liberty of applicant exists.

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In Section 27 of the principal act, in sub-section 2, after clause 1, the following clause shall be inserted namely: "other terms and conditions of appointment of the chairman and other persons under sub-section (2) of section 22B."

SOME ISSUES SURROUNDING LEGAL AID

The right to Legal Aid not always freely available and there are some restrictions and regulations that have followed while exercising this rights. In State NCT of Delhi v. Navjot Sandhu[128], the court recognised that when on a non-evidential basis a party to dispute keeps insisting that the *amicus curiae* hasn't performed its role effectively, the court should not merely disband the counsel and look for another one that pleases the party without adequately investigating into the performance of the counsel and for look for another one that pleases the party without adequately investigating into the performance of the counsel against whom the complaint has been made and the court must keep in mind that an unfavourable verdict at the trial may cause the party to claim about his counsel but this should not be entertained without proper judicial scrutiny.

AUTHORS VIEW POINTS ON LEGAL AID

We have studied above why Legal Aid is important, how it has developed, history, judgements. The Legal Aid is a basic requirement of justice and essential part of administration of justice. Legal Aid touches our legal institutions in precisely those areas where are vulnerable to attack and are being attacked. There are author's recommendations for Legal Aid.[129] I have further analysed legal aid of different countries below.

[128] (2005) 11 SCC 600

[129] Authors recommendations are:

- Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require.
- Legal Aid provision should not be limited to those who are normally classed as poor, but include a wider income group.
- Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay towards costs.
- The cost of scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities.
- The term 'poor person' should be discarded and the term 'assisted person' adopted.

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INTERNATIONAL PERSPECTIVE

Legal-Aid in British Columbia

In British Columbia, most publicly funded assistance is provided by the Legal Services society of British Columbia. This is an independent Society which is funded primarily by grants from the provincial government. The Society operates a number of regional branch offices and funds a number of independent offices throughout the province. The Legal Services Society Act was enacted in 1970. The act says[130] and is very important aspect of British Columbia.

Legal Aid in Canada

Legal Aid systems were in operation in all parts of Canada by 1982. That was the year in which Canada adopted a new constitution. This confirmed that there is a constitutional right to be represented by legal counsel. The relevant provisions of the Canadian Charter of Rights and Freedoms are[131]:

Legal Aid in America

Legal aid is different in the United States is different from civil law and criminal law. Criminal legal aid with legal representation is guaranteed to the defendants under criminal prosecution who cannot afford to hire an attorney. Civil legal aid is not guaranteed under federal law, but is provided by a variety of public interests law firms

[130] Legal Services Authority Act of 1970:

- The object of the society is to ensure that services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons and education advice and information about law are provided to the people of British Columbia.
- The society must ensure, for the purposes of sub-section (1)(a), that legal services are available for qualifying individual who meets one or more of the following conditions:
    1. Is a defendant in criminal proceedings that could lead to individual imprisonment,
    2. May be imprisoned or confined through civil proceedings,
    3. Is, or may be a party to a domestic dispute that affects the individual's physical or mental safety or health of that of the individual's children,
    4. Has a legal problem that threatens the individual's family's physical or mental safety or health, the individual's ability to feed, clothe and provide shelter for himself or herself and individual's dependants and the individual's livelihood.

[131]The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by Law as can be demonstrably justified in a free and democratic society. Everyone has a right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Everyone has the right on arrest or detention to be informed promptly of the reasons therefor and to retain and instruct counsel without delay and to be informed of that right.

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and community legal aid clinics for free of costs.[132] Also every state in U.S.A. has different laws and procedures of legal aid conflict because of private international law principles.

Legal Aid in Australia[133]

Australia has a federal system of the government of government comprising federal, state and territory jurisdictions. The Australian (Commonwealth) and the state and territory governments are each responsible for the provision of legal aid matters arising under their laws. In addition there is a network of approximately 200 independent, not for profit, Community Legal Centres. Legal aid in Australia was discussed in the case of Dietrich v. The Queen (1992). It was found that although there is no absolute right to have publicly funded counsel, in most circumstances a judge should grant any request for the adjournment or stay when an accused is unrepresented.

CONCLUSION

Inadequate or no access to the means of enforcing one's legal rights would render those rights almost meaningless. An effective legal aid system, which provides, *inter alia*, legal advice, representation and advocacy can hold governments accountable to the meeting the needs of the poor and disenfranchised. When the poor are enlightened about their rights, they are empowered and begin demanding performance from the authority. This demand drives performance and accountability. It is in keeping with viewing Law as a cognitive institution and the need for legality. Legality is largely viewed as function of demand of law. Internal process of law development should be encouraged and a self-sustained demand for legal innovation and change should come from locals. There is a need for cadre of trained legal aid service providers, rather than reliance on individual private lawyers to do legal aid work with public funds. An effective legal aid system is one which by design and implementation, is available, accessible, diverse in terms of providers and services rendered, affordable, high in quality, sustainable, adequately funded and demand oriented. It should be on a grounded comprehensive legal framework, preferable guaranteed in the constitution and legislations. On the other hand, I would like to highlight that legal aid is not only

[132] See https://en.wikipedia.org/wiki/Legal_aid_in_the_United_States, accessed on February, 2019.
[133] See https://en.wikipedia.org/wiki/Legal_aid, accessed on February, 2019.

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for providing assistance in the cases before the court of law. But also, I would like to mention that legal aid can be helpful also when the people are given advice as to what is against the law. This means that legal aid can turn out to be helpful that when it can help the states at municipal to control offences against law. Furthermore, legal aid societies selected members should act as advisors to frame laws that can ensure effective implementation of laws. Because of the conflict of laws principles, legal aid becomes time consuming when there are two separate jurisdictions.

The aim behind my research and the suggestions made by me is to analyse the importance of legal aid and how can our efforts benefit the person who needs assistance. Furthermore, if unification of laws take place then legal aid can become more effective. Moreover, if the states adopt stringent measures to check the rising number of cases before the court of law, legal aid can then act as mechanism to help each and every person in the society. Also in the technological global world legal aid can act as a powerful mechanism if administered online as well.

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IS THE MEDIA AS THE FOURTH PILLAR OF DEMOCRACY LOSING IT'S CREDIBILITY?

-Dhairya Arora & Rashi Shukla

ABSTRACT

Do you think media in today's time performing its duties as it should? Do you think media still is the fourth pillar of the democracy of which the biggest role is to be the watch dog of the government and keep a close check on the functioning of the government and its leaders? In recent times, not only in India but also worldwide leaders are increasingly bringing in their hegemony, showcasing power wantonly to become the sole authority. To that end, they try and manipulate media to meet their political ends and stay clean in the eyes of their voters.
These leaders are basically trying to use media as a tool to keep a constant focus on themselves, all the while building a stainless image. Clearly, Media is being used by the governments across the globe to meet their ends.
Now, let us see how all this propaganda set up by the government works on the common people who watch, read and follow media assuming it to the truth. People follow media for their daily updates about what is happening in and around them in their surroundings, in their country or across the globe and that is for what and where the government uses media, "to change and manipulate the perceptions of the common man." Therefore, media has become a tool in the hands of the government for its advertisement and propaganda to mislead and manipulate citizens with false and biased information rather than the fourth pillar of democracy which aims to show the truth and watch every action of the government.

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INTRODUCTION

Pandit Jawaharlal Nehru addressed at the newspapers Editor's conference dated May 4, 1950 " Whatever we may think of the virtues and the failings of the press it is obvious that it plays a very important part in our lives; it molds people's minds and thoughts and this affects the policies of the government , if not always directly.Therefore when we have to deal with any major problem , it is important that the press should- if I say so with all humanity , give it right lead."[134] Media is considered as a vital part of our democracy, it plays an important role as an informative bridge between the governing bodies and the general public. The absence of media will create chaos and a gap between our government and the public. Information such as bills, judicial decisions, parliamentary debates, amendments etc would be left unreported. What would be the significance of framing laws for the public when the public itself is unaware? The political legitimacy of institutions like media and also the business models of newspapers depend on the idea that they offer something trustworthy. Healthy distrust can be a good thing but hardened cynicism is paralyzing.

BACKGROUND

Way back in the 1870's when the country had aspirations to get freedom and had a vision to be an independent nation , there emerged many nationalists who had the urge to make the nation free. In order to attain this objective of a free nation they pounded upon different printing publications in furtherance to which there started a revolution and a firm propaganda in order to overthrow the crown. The British giving a cut throat response came up with the Vernacular Press Act. By this act, the magistrates of the districts were empowered, without the prior permission of the Government, to call upon a printer and publisher of any kind to enter into a Bond, undertaking not to publish anything which might "rouse" feelings of disaffection against the government. The Nationalists also called it a "Gagging Act". The act was removed in 1881 due the rising patriotism in the country.

[134] "Nehru on Indian Press"(1950) <https://www.sarcajc.com/nehru-on-indian-press.html> accessed on 9 September 2018

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The papers remember 1975 emergency was imposed in India by the then prime minister Indira Gandhi. The period was marked by massive media censorship, restrictions on civil rights and a forced mass sterilization campaign.But today Indian media feel a repeat of the EMERGENCY is unlikely due to a "stronger" press and a lively social media environment.

"Social media and round-the- clock news channels along with active civil society and judiciary can make it difficult for and such move to be even planned in a clandestine manner. Even if some might hanker for an iron hand at the helm, authoritarianism have limited appeal today and we are certain that it will stay that way" says Hindustan times in an editorial [135]

The Times of India echoes similar sentiments. "The media today is far more diverse than before which offers a safeguard against centripetal forces." It says.[136] Gopal Krishna Gandhi who is a grandson of Mahatma Gandhi, urges the media and civil society to encourage freedom of thought.[137] Meanwhile, veteran journalist Kuldeep Nair expresses concern over today's "conformist press"[138]

"Though the constitution has been amended to ensure that its basic structure is not tinkered with, it is still easy to subvert institutions by having loyalists in place. The media is stronger today but business houses owning them can be managed. The threat to judicial independence is all too obvious" he writes in The Tribune.

On 25th June 1975 the day emergency was imposed fundamental rights were suspended, censorship was imposed on media and prominent political leaders were arrested. Media the fourth pillar of democracy suffered immensely under emergency. The emergency was a cruel reminder for media that the government can snatch its freedom arbitrarily.[139]

ANALYSIS

[135] "India Media: Papers remember 1975 emergency"<https://www.bbc.com/news/world-asia-india-33269607> accessed on 12th September 2018
[136] "India Media: Papers remember 1975 emergency"<https://www.bbc.com/news/world-asia-india-33269607> accessed on 12th September 2018
[137] "India Media: Papers remember 1975 emergency"<https://www.bbc.com/news/world-asia-india-33269607> accessed on 12th September 2018
[138] "India Media: Papers remember 1975 emergency"<https://www.bbc.com/news/world-asia-india-33269607> accessed on 12th September 2018
[139]<https://www.indiatvnews.com/news/india/40-years-of-emergency-when-newspaper-published-poems-52026.html>accessed on 12th September,2018

The Media has four basic responsibilities as the fourth pillar of democracy.

Firstly, it should tell the truth. The main objective of the media is to provide programs and services that inform, educate, enlighten and enrich the public and help inform civil discourse essential to the Indian society. A mainstream media, which is sold out and has become a TRP war room and fish market can both legitimize the actions of the powerful and facilitate change at the collective level but can also limit and shape the behaviors of individuals which are central to wider social change. Authenticity of the news is no longer guaranteed. There are a few cases in the history of Indian Judiciary which gained attention and evolved due to the pressure exhibited by the Indian Media.

Almost three decades after the controversial Bofors Scandal, former President Shri Pranab Mukherjee has called the case a media trial that could not be proven in any Indian Court. The president said that in media it was publicized and that the controversy surrounding its acquisition was a " Media Trial ". [140]While it wasn't the first scandal to have been reported by media, it was different. "Probably its scale was defining.It was a game changer".[141]

Secondly, it should be unbiased. According to a 2012 report by Business Standard, more than a third of news channels in India are owned by politicians or political affiliates, who use their channels as " POLITICAL VEHICLES" to influence the course of local elections.[142]Although India is heralded as the promised land of journalism, with more than 80,000 print publications and close to 400 news channels—at a time when the media industry elsewhere faces shrinkage and uncertainty—recent events underscore that the huge number of outlets do not guarantee widespread independent coverage in the world's largest democracy. "The rich and powerful piss on us and the media tells us its raining."[143]

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[140] "Bofors scandal was just a media trial : President Pranab"(2015) <www.rediff.com/news/report/bofors-scandal-was-just-a-media-trial-President-Pranab/20150526.htm>

[141] "A watershed for Indian Journalism"(2012)<www.livemint.com/Politics/tzTKhEwYHJW7BjkLhF5pjJ/A-watershed-for-Indian-journalism.html>

[142] India journalism under increasing political control<https://www.huffingtonpost.com/committee-to-protect-journalists/indian-journalism-under-i_b_4556499.html>

[143] DR. Gaurav Pradhan.Blogspot

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The survey finds out the median of 75% across 38 countries say it is never acceptable for a news organization to favour one political party over others when reporting the news. A median of only 52% across the 38 nations polled say the news media in their country do a great job of reporting on political issues fairly while 44% say they do not.[144]

Thirdly, Media should not act to spread propaganda. At the time when Indian society is clearly strained along communal and caste lines, some of out TV Channels are deplorably wedging these gaps further and deeper. It is a shame on our Indian Media Industry that they are trading morals and ethics for cheap aggrandizement.

The profound standard of journalism was seen in the coverage of the appalling Kazganj Incident. On January 26th - as India geared up to celebrate the ideas of this secular democratic republic-communal violence tore apart this small town in north west Uttar Pradesh. The riot allegedly began as a minor alteration between two groups over a matter of republic day celebration and flag waving. By the time the situation was controlled one man had lost his life. Several were injured and scores of businesses, shops and the city's infrastructure had been torched and destroyed. More than two weeks later the air in UP's legislative assembly was thick with accusations.Despite a few people taken into custody there is not a single official consensus about the investigation into the riot's cause.

Our news channels, apparently, care little about official probes and findings. Indeed, in the aftermath of the incident, a clutch of India's mainstream TV Media had shockingly started airing incendiary and proactive headlines.[145] This is not just shoddy journalism but more alarmingly, also a dangerous catalyst added to India's already volatile and incensed society.

Fourthly, Moral conditioning of mass. In the name of moral policing every now and then opinion building is served. Common man is bombarded with opinion polls and heavily biased talk shows. Driven by sensationalism and TRP media house have take a corporate turn. Courtesy to the media house they have made people like Kanhiya

[144] Public globally want unbiased news coverage , but are divided on whether their news media deliver<www.pewglobal.org/2018/01/11publics-globally-want-unbiased-news-coverage-but-are-divided-on-whether-their-news-media-deliver/>
[145] Indian Media is spreading propoganda disguised as news-and its time to face up<www.youthkiawaaz.com/2018/02/propoganda-journalism/>

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Kumar and Hardik Patel an overnight celebrity. News which is TRP generating are shown in loops, while the worthy news gets neglected. We can its selective when it comes to coverage. Media houses have stooped so low that they are willing to compromise national security and secrecy. Be it broadcasting 26/11 or questioning surgical strikes to gain populism and support their vested interests they have started mud slinging on IB, Supreme court and even Army.

In the Jessica Lal murder case Sabrina Lal in an interview with Daily news and Analysis stated "The Media got us justice. The media proved to be an extremely powerful force that came to our aid. We are not influential people. We have no great contacts nor do we have great money. It was the power of media that enabled us to get justice. When all doors were shut on our faces it was the media that came to support us. The manner in which newspaper and television channels came out in our support was commendable. Had it not been for the media, people would have never known about how a family was being denied justice. It was this coverage that made the people realize the truth come out in protest and demonstration in support of us."

It may be said that the media cannot focus on every crime case-It is the job of the state after all. Yet, can it be gainsaid that choices can be revealing? Does the new media play a plutocratic role in this democratic country?[146]

RECOMMENDATIONS

Keeping in mind all the vital aspects of media as the fourth and an integral pillar of democracy following recommendation have been put forth:

1. Media should not politicize an issue- Indian media has become extremely politicized and it depicts a sense of irresponsibility. Media is considered as a fourth estate it should be neutral rather taking sides. Media should not abuse it's freedom and power by being biased, there should be a fair and free press.

2. Media should not mislead the public- In the press freedom ranking India ranks 136 out of 180 countries when it comes to freedom. In this era of technology

[146] The role of media in Jessica lal's murder case<archive.the-ipf.com/the-role-of-media-in-jessica-lal's-murder-case/>

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videos are declared and presented in front of public by mainstream media of without verification often stoking communal sentiments and leading to polarization.[147] Thus the public is losing its trust of the mainstream media and the news shown by them often create a lot of chaos and confusion among the viewers when they try to distinguish between authentic and fake news.

3. Focus on all kinds of news, not only the ones which gain TRP- Indian media is only focused on earning profits and they don't mind what or how they do it. By increasing their TRP ratings and creating hype they increase the numbers of viewers which in return generate revenues. Media portraits non issues as real issues wherein the real issues are side lined. They often try to divert the attention of people to the non-serious issues such as the terrible economic conditions, poverty unemployment etc are left untouched. Is this a responsible way for Indian media to function as its fourth pillar?[148]

CONCLUSION

Under the Constitution of India Freedom of media is a part of the freedom of speech guaranteed by article 19(1)(a) which says that All citizens should have the right to freedom of speech and expression. But this right is subject to reasonable restrictions imposed on the expression of this right for certain purposes. No Freedom can be absolute. Denial of freedom of press to citizen would necessarily undermine the power to influence public opinion and to be answerable to democracy.

In Romesh thaper vs State of Madras and Brij Bhushan vs State of Delhi the Supreme Court took it for granted the fact that the freedom of press was an essential part of the right to freedom of speech and expression. It was observed by Patanjali Shastri J in Romesh Thaper that freedom of speech and expression included prorogation of ideas and freedom was ensured by the freedom of circulation. It is clear that the right to freedom of speech and expression carries with it the right to circulate ones ideas,

[147] Media and issues of Responsibility<https://www.thehindu.com/opinion/lead/Media-and-issues-of-responsibility/article13059658.ece>
[148] Media : for the people or TRP?<http://www.ausib.org/Ausib/Media-for-the-people-or-TRP-81-Blog.html>

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opinions and other views.[149] The question of the hour is that Is the Indian Media performing it's role properly.

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- ✧ Brij Bhushan vs State of Delhi

[149] Freedom of press-Article19 (1)(a)<http://www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19(1)(a).html>

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USE OF CARBON CREDITS FOR ENVIRONMENTAL PROTECTION: UNETHICAL AND INEFFECTIVE?

-Manpreet Singh & Gunjanpreet Kaur

INTRODUCTION

In the last few years, the reason of the sky being darkened is nothing but the lasting effects of all the carbon dioxide being thrown into the atmosphere and drastically changing our climate. This continuous amalgamation of carbon dioxide in the atmosphere has contributed to Global Warming. The growing awareness about harmful levels of such Greenhouse Gases has forced the international bodies like the World Trade Organisation, government authorities and private organizations to implement systems that would help in reducing the amount of greenhouse gases like carbon dioxide in the atmosphere.

International treaties have set quotas on the amount of Green House Gases countries can produce, which in turn set quotas for businesses. Instruments like carbon credits and carbon offset were introduced in order to improve the scenario by encouraging firms to be more environment friendly in conducting their business. One carbon credit allows one tonne of carbon dioxide or a corresponding amount of other greenhouse gases to be discharged in the air. Countries that are over their quotas must buy carbon credits for excess emissions, while those below can sell their remaining credits. This exchange of credits between businesses has encouraged carbon trading globally and are known as emission trading system.

This paper focuses on cap-and-trade systems, which are argued by some to be a vital component of the attempt to prevent 'dangerous anthropogenic forcing'[150] and dangerous temperature increases.[151] Indeed, greenhouse gas emissions trading was provided for by

[150] United Nations Framework Convention on Climate Change (UNFCCC): 1992, Article 2, text available at http://www.unfccc.int.
[151] We focus on carbon dioxide emissions given their sheer volume and contribution to climate change, but we should note, of course, that carbon dioxide is not the only greenhouse gas.

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Article 17 of the Kyoto Protocol.[152] Many environmentalists supports the emission trading system as it provides a pre-specified limit on the level of emission. This allows emissions to fall over time consistent with the notion of "contraction and convergence", for instance.[153] Various other similar policies like carbon taxes have the same objective but the lacunae in such policies are that it do not provide any level of guarantee for restricting the level of emissions.

There are numerous emission trading systems for greenhouse gases which have been implemented around the world. The most notable is the EU Emissions Trading Scheme (EU ETS), which came into effect on 1 January 2005 and is now in its third phase (2013-2020).[154] Prior to the implementation of cap-and-trade systems for reducing greenhouse gas emissions, there were other kinds of environmental trading schemes. Perhaps the best known is the trading scheme for Sulphur dioxide (SO2) in the USA under Title IV of the 1990 amendments to the Clean Air Act, which has successfully reduced acid rain at low cost.[155]

As cap-and-trade systems to limit carbon dioxide pollution have actually been implemented, so too have criticisms emerged. The most aggressive criticisms of cap-and trade emerge from climate-change sceptics, who would prefer to see no government response to climate change, and who consider cap-and-trade the most likely policy to succeed in passing through the relevant legislatures. More sober criticisms include arguments that emissions trading is inherently ethically objectionable. For instance, Michael Sandel argued that:

"turning pollution into a commodity to be bought and sold removes the moral stigma that is properly associated with it...[and] may undermine the sense of shared responsibility that increased global cooperation requires".[156]

Trading within a cap-and-trade system can occur between countries (e.g. as occurs under the Kyoto Protocol), between firms (e.g. as occurs in the EU ETS), or even between individuals.

[152] Cameron Hepburn, 'Carbon trading: a review of the Kyoto mechanisms', Annual Review of Environment and Resources, 32 (2007), 375–393.
[153] Aubrey Meyer, 'Contraction and Convergence: The global solution to climate change' Schumacher Briefing 5, 2000, Foxhole, UK: Green Books Ltd.
[154] For an overview of the EU ETS see the special issue of Climate Policy, vol.6 no.1 (2006).
[155] Robert N Stavins, 'What Can We Learn from the Grand Policy Experiment? Lessons from SO2 Allowance Trading'. Journal of Economic Perspectives 12:3 (1998), 69-88.
[156] Michael Sandel 'Should we Buy the Right to Pollute?' in Public Philosophy: Essays on Morality in Politics (Cambridge: Massachusetts: Harvard University Press, 2005), 94 & 95.

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This paper examines various ethical and moral objections to emissions trading. By considering its moral virtues, it reviews and elaborates on a general taxonomy of ethical reasons for caution in the use of markets and employs this taxonomy to assess the view that carbon trading is unethical. It further examines the notion that carbon trading may lead to unjust outcomes, and reviews arguments that carbon trading has not so far been effective at reducing emissions. Policy implications are suggested in the conclusion.

A GENERAL TAXONOMY

There are various arguments against emissions trading, and we present in this section a general classification of the kinds of reasons that one might have for consideration so as to provide for different reasons one might have for rejecting emissions trading.

Our taxonomy draws on an account developed by Judith Andre in her instructive analysis of Michael Walzer's well known but rather unsystematic discussion of goods that should not be transferred for money.[157] Andre seeks to provide a more rigorous categorization of the different kinds of reasons that can be given for thinking that certain burdens or benefits should not be bought and sold.[158] On the basis of that we distinguish between five types of cases where trading a benefit or a burden, such as carbon trading, is morally problematic.

First, there are goods which 'by their nature cannot be owned'.[159] Second, there are some things that it is possible to own but which we think it would be wrong to own.[160] A third case where a trade in goods or services is problematic arises when it is impossible to alienate a good or a responsibility.[161] In addition to the first three categories, there are also cases where it is possible to alienate a good or a responsibility but we might think that it is wrong to alienate such a benefit or a burden to other people.[162] Let us turn finally to a fifth category. This fifth type of argument maintains that certain goods (or responsibilities) should not be alienated for money.[163]

[157] Michael Walzer Spheres of Justice: A Defence of Pluralism and Equality (Oxford: Basil Blackwell, 1983), 100- 103.
[158] Judith Andre 'Blocked Exchanges: A Taxonomy' in Pluralism, Justice, and Equality (Oxford: Oxford University Press, 1995) edited by David Miller and Michael Walzer, 171-196.
[159] Andre 'Blocked Exchanges', 175: cf 175-176.
[160] Andre 'Blocked Exchanges', 176: cf 176-178
[161] Andre 'Blocked Exchanges', 178-179.
[162] Andre 'Blocked Exchanges', 179-180.
[163] Andre 'Blocked Exchanges', 180-187.

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FIVE ETHICAL ARGUMENTS AGAINST EMISSIONS TRADING

Having presented this taxonomy of the kinds of objections one might make to trading in general, we now turn to examine the case against trading allowances to emit greenhouse gases.[164] Our view is quite compatible with the view that persons are under a moral obligation to reduce their emissions, not to use energy wastefully and unnecessarily and, more generally to adopt an ethic of frugality of the sort advanced by David Wiggins in his paper.[165] Let us now consider five anti-market arguments to see whether the reasons in favour of emissions trading can be outweighed.

1. Argument A: Owning what should not be owned

One argument that might be made against emissions trading is that it involves owning a kind of good that, while it is possible to own it, should not be owned.[166]Emission trading which gives a particular country, industry or an individual the right to pollute the environment by purchasing carbon credits implies that humans have property rights over nature and its resources. It might be argued that it is undesirable to treat nature as people's private property.

However, one central problem with the argument is that emissions trading does not rely on the assumption that persons own the atmosphere.[167] Emissions trading involves a right to use up some natural resource but a 'use right' is not the same as a 'property right'.[168] This can be further explained with the help of an example. Consider a lessee who, by an agreement, gets a permit to use a particular piece of land owned by the lessor. Here, he or she does not, thereby, gain a private property right in the land. Rather they have a 'use right' – a right to use that piece of land for a fixed period of time. Emissions permits can be understood in a similar way.

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[164] For an excellent discussion of arguments against markets in permits 'to pollute' see Robert Goodin 'Selling Environmental Indulgences', Kyklos 47:4 (1994 573-596. For a contrary view and response see Wilfred Beckerman and Joanna Pasek 'The Morality of Market Mechanisms to Control Pollution', World Economy 4:3 (2003), 191-207.
[165] Wiggins 'A Reasonable Frugality' this volume.
[166] For this line of reasoning see also Goodin 'Selling Environmental Indulgences', 578-579.
[167] For further discussion see Caney 'Markets, Morality and Climate Change: What, if anything, is Wrong with Emissions Trading?', New Political Economy 15:2 (2010), 204-205.
[168] Hermann E. Ott and Wolfgang Sachs 'The Ethics of International Emissions Trading' in Ethics, Equity and International Negotiations on Climate Change (Cheltenham: Edward Elgar, 2002) edited by Luiz PinguelliRosa and Mohan Munasinghe, 171.

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Though it is correct that emissions trading does not require the 'ownership rights' over the nature, the appeal to 'use rights' over the nature is not sufficient to absolve emissions trading as use rights can be morally problematic too.

Some kinds of use right are morally indefensible. This argument does not object solely or even primarily to the 'trading' of permits. Rather its concern seems to be with a system which distributes 'rights to use the atmosphere' whether or not they are tradeable. The classification of pollutants as a commodity and further trading of such carbon credits defeats the very purpose of protecting the natural environment leading to its exploitation. This explains why these kinds of use rights are morally unacceptable.

2. Argument B: Alienating responsibilities that one should perform oneself

This kind of argument is based on the principle that certain kinds of goods and should not be alienated. For instance, it is inappropriate to alienate one's civic responsibilities. Applying this kind of argument to emissions trading allows people to alienate responsibilities that it is inappropriate for them to alienate.

Emission trading creates a global inefficiency by making a country less efficient. For instance, a country despite of fulfilling its responsibility by not exceeding the prescribed emission standard will have an easy option to purchase emission credits leading to alienating of its responsibility. This alienation of responsibility will create an environment where it would lead to complete inefficiency in relation to the country purchasing the emission credits along with the country selling those credits. The former country purchasing the emission credits uses its financial resource to delegate its burden (mostly in the case of developed countries). On the other hand, the later country selling those credits will be sacrificing the growth of its own economy in order to have a financial gain by way of unused credits (mostly in the case of under developed countries).

Giving such alternative to countries will never encourage them to restrain its own emissions and not to delegate its burden to any other country to lower their own emission level. However, one can argue that even the countries purchasing such emission credits are also making a sacrifice in relation to monetary terms, but we need to understand that it is not the right kind of sacrifice which one should make. Therefore, it can be said that emission trading leads to alienating of one's responsibility.

3. Argument C: Emissions trading and the vulnerable

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The previous argument focuses on alienating what should not be alienated. However, unlike the previous argument it focuses not on the person involved in purchasing of such credits but on those who sell these credits. As discussed earlier, the system of emission trading allows trade of credits for emission of greenhouse gases which are disadvantageous to the most vulnerable countries, specifically the under developed nations.

An under developed country generally has insufficiency of funds required for its development. In order to increase their earnings, it may engage in emission trading as a method to overcome the problem of lack of funds. It may be undesirable for such nations to engage in emission trading as it may lead to countries making poor judgements about their own interests. In order to avoid any misuse of power by the government or sovereign and to promote and protect the interest of its citizen, there should be a restriction on states in relation to the selling of emission rights. Therefore, a state must be prevented to sell all of their emission rights because that would risk harming their citizens. Some emissions should be regarded as "inalienable".[169]

Such scenario comes into play only in countries which distribute the emission rights (or the proceeds of selling emissions rights) in such an egregiously unjust way that interfering with sovereignty is unwarranted.[170] Thus it might, for example, apply in a regime that reserves emissions which is necessary for a decent standard of living for its citizens.

4. Argument D: Putting a price on the natural world?

The natural world is of fundamental value and its value cannot be apprehended by monetary estimates. Emission trading involves exchange of carbon credits for money, thus, giving a monetary value to greenhouse gases. It can be argued that emission trading not only allows people to alienate their responsibilities, but it puts a monetary value on carbon dioxide (and other greenhouse gases). The approach of putting a price on natural world can be regarded as objectionable about emissions trading. This is in fact an inappropriate attitude towards the natural world, because its value simply cannot be captured in monetary terms.

5. Argument E: Does emissions trading convert what ought to be a fine into a fee?

[169] See Henry Shue 'Subsistence Emissions and Luxury Emissions', Law and Policy 15:1 (1993), 58, and Shue 'Climate' in A Companion to Environmental Philosophy (Oxford: Blackwell, 2001) edited by Dale Jamieson, 455-456

[170] On the moral limits of state sovereignty see Simon Caney Justice Beyond Borders: A Global Political Theory (Oxford: Oxford University Press, 2005), chapters 5.

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This argument rests on the basis that emitting greenhouse gases is a wrong that should be fined. On the contrary, emissions trading grants people permission to pollute beyond the prescribed limit as long as they pay a financial fee. One really needs to understand that it is not something that one should be allowed to do if one pays a fee. When talking about the negative aspects affecting the environment, one must give considerations to policies having deterrence effect. The core idea is nicely captured by Sandel in a short critique of emissions trading. Sandel writes:

"The distinction between a fine and a fee for despoiling the environment is not one we should give up too easily. Suppose there were a $100 fine for throwing a beer can into the Grand Canyon, and a wealthy hiker decided to pay $100 for the convenience. Would there be nothing wrong in his treating the fine as if it were simply an expensive dumping charge?"[171]

Sandel's answer is 'no'. It would be wrong in this case to treat the "fine" as if it were a "fee". Similarly, it would be wrong for an able-bodied person to park in a disabled car parking space with a view simply to paying the ensuing fine and treating the latter as a reasonable price to pay for the privilege.[172] Sandel then applies this kind of thinking to greenhouse gas emissions.[173] Therefore, persons should restrict themselves to a pre-specified quota and if any of them try to exceed their individual quota, then it must be considered as a crime that should be punished with a fine and not an option which they can pay for as would be the case with a fee.

CONCLUSION

Emission trading systems for greenhouse gas, while the evidence so far suggests that they have been successful in reducing emissions, they have been subject to increasing criticism by climate-change sceptics.

In this paper we provided a taxonomy of ethical objections to the such system of trade. We have examined different attempts to show that emissions trading schemes are unethical. Emissions trading schemes, so we have argued, are not committed to either 'ownership' rights or unacceptable 'use rights' over the atmosphere as a whole. Later, we argued that one

[171] Sandel 'Should we Buy the Right to Pollute?', 94.
[172] Sandel 'Should we Buy the Right to Pollute?', 95.
[173] Sandel 'Should we Buy the Right to Pollute?', 94-95. See also Goodin 'Selling Environmental Indulgences', 581-583.

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may restrict emissions trading in order to protect the vulnerable. Further we draw our attention to the issues pertaining to whether who should possess the legal rights to emit greenhouse gases and how one can best ensure that the permits should reach the people entitled to them. And finally, we have argued that emissions trading schemes do not elide the distinction between a 'fee' and 'fine'.

The first critical issue is the effect of emissions trading schemes on the distribution of wealth. This takes us to our conclusion which is that emission trading system are likely to hit poorer households harder than richer households. Such schemes, henceforth, has a greater impact on the poor relative to the rich in terms of economic inequality.

We conclude that emissions trading remains a valuable policy tool when compared to other such policies like carbon taxes. Carbon taxes have some advantages over cap-and-trade,[174] but in other ways are worse, in a way that they provide no guarantee of environmental outcomes. Indeed, carbon taxes are unlikely to achieve reductions in emissions at the necessary rate to provide a just outcome for future generations. Also, direct regulation is inferior to an emission trading system or a carbon tax because it increases costs of compliance, increases wastage and reduces liberty of individuals and companies to adapt to a low-carbon economy. There can be an implementation of stringent measures, such as cancellation of licenses of those industries, organisations, etc. who are continuously exceeding the prescribes emission level and are completely dependent on such emission trading system. We might see emission trading systems as efficient instruments in the short run, but in the long run we need a different alternative wherein we can adapt ourselves in a healthy and sustainable environment keeping in mind the interests of future generations and creation of mass awareness on the issue through widespread education is required, to provide our future generations the better cleaner environment.

[174] Cameron Hepburn, 'Regulation by prices, quantities or both: A review of instrument choice', Oxford Review of Economic Policy 22:2 (2006), 226-247

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AN ANALYSIS OF THE MINISTERIAL CONFERENCE HELD IN THE WTO SYSTEM

-Naasha F. Anklesaria

INTRODUCTION

Trade has been an imperative and indispensable part of human life and livelihood from time immemorial. Many global relations have been created by the advent of trade and have also been subject to the negative resounding effects of trade. In fact, the expedition of the British to India, which ultimately lead to colonialization for over a century, began with the intention to trade. As time advanced, it was seen that it is imperative that trade be regularized. Benefit to an economy from the profits derived from trading were found to effect developed, developing and least developing countries alike.[175] For this purpose, a number agreements, conventions and treaties came about. After the World War II, The Bretton Woods Convention was held in New Hampshire, wherein three institutions were sought to be formulated, being the International Monetary Fund, The World Bank and The International Trade Organisation. However, since this document never did get ratified by the US Congress, the ITO never did get established. What started off as an accidental or rather incidental formulation of the General Agreements of Trade and Tariffs, 1947[176] which was supposed to be a temporary agreement, lead to be in existence till 1995 when the Marrakesh Agreement was formed, establishing the World Trade Organisation.[177] On April 15, 1994, representatives of the governments of the industrialized world found themselves gathered in Marrakesh (Morocco) to sign the Final Act embodying the results of the Uruguay Round multilateral trade negotiations. Launched by the Punta del Este declaration of September 20, 1986, these "most

[175] Peter Van den Bossche and Werner Zdouc, "The Law and Policy of the World Trade Organisation" 3 Cambridge University Press 30
[176] "WTO | The History of Multilateral Trading System" (*WTO | Trade Statistics - World Trade Statistical Review 2017*) <https://www.wto.org/english/thewto_e/history_e/history_e.htm> accessed September 20, 2018
[177] Vestron and Roberto Perrelli., "The WTO Impact on International Trade Disputes: An Event History Analysis." (2006) 88 The Review of Economics and Statistics 614 <www.jstor.org/stable/40043023.> accessed September 20, 2018

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complex negotiations in world history"' had been going on during more than seven years within the framework of the General Agreement on Tariffs and Trade (GATT). The negotiating partners eventually decided to create a World Trade Organization (WTO), taking the place of GATT as an institutional framework for the conduct of their trade relations with regard to all matters agreed upon in the Uruguay Round. The intention was to have the WTO-Agreement ratified in most of the participating countries so as to allow them enter into force on January 1, 1995 or as early as possible thereafter.[178] For the realisation of the economic benefits of trade, a well-developed structure was needed to be in place, the ideology represented in the structuring and composition of the WTO. The structure of the WTO is simple and well-drawn out. At present, the WTO standing bodies and ad hoc bodies, who along with the members and observes, strive to carry out the functions of the WTO. At the apex, is the Ministerial Conference which as per Article IV of the Agreement[179], which would agree to meet once in two years. It is also capable of taking decisions in matters of Multi-Lateral Trade Agreements. It is composed of minister-level representatives from all members and has decision making powers on all matters under any of the multi-lateral WTO agreements.[180] The decisions of this body are binding upon its members. The ministerial conference is a platform wherein through political and diplomatic relations, through economic trade, advancement of the country's economy can be advanced. The Ministerial Conference works by way of mandatory meetings that are to be held. This paper seeks to analyse the working of the Ministerial Conference and will also analyse the various conferences held to date.

MINISTERIAL CONFERENCE

Agreements with relation to trade are a way by which countries come together, in order to satisfy a certain purpose. Thus, theories of trade agreements must identify a reason why negotiating governments can gain from the agreement. This involves identifying a 'problem' that would arise absent an agreement, when governments make no cooperative trade-policy choices. The purpose of the agreement can then be viewed as providing a 'solution' to the problem, and the negotiating governments may share in the associated benefits. It is not just

[178] Colum, "WTO-Agreement" (1995) 1 European Law Journal 338
[179] Agreement Establishing the World Trade Organisation 1995
[180] Rules and Procedure for the Ministerial Conference(WT/L/161) 1996

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confirming the existence of a problem that is important: a clear understanding of the problem and its structure can also provide important guidance for the design of an institution that can most effectively aid governments in their efforts to find a solution.[181] These trade agreements can be understood to be one of the most important methods of regulating and conducting trade. The WTO was established to develop or further trade. It was thus naturally important, that the WTO itself have a formalised structure with clear definitive functions so as to regulate it's working. Article II of the Marrakech Agreement that established the WTO charges the organization with providing a common institutional framework for the conduct of trade relations among its members in matters to which agreements and associated legal obligations apply. Four annexes to the WTO define the substantive rights and obligations of members. Annex 1 has three parts: Annex 1A, Multilateral Agreements on Trade in Goods, which contains the GATT 1994 (the GATT 1947 as amended by a large number of understandings and supplementary agreements negotiated in the Uruguay Round); Annex 1B, which contains the GATS; and Annex 1C, the TRIPS agreement. Annex 2 contains the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)—the WTO's common dispute settlement mechanism. Annex 3 contains the Trade Policy Review Mechanism (TPRM)[182], an instrument for surveillance of members' trade policies. Finally, Annex 4, Plurilateral Trade Agreements, consists of Tokyo Round codes that were not materialized in the Uruguay Round and that therefore bind only their signatories.[183] To state that the Ministerial Conference of the WTO is the apex body of the system, would be an inclusive definition and will be set forth to be analysed in this paper. The Ministerial Conference is the topmost decision making body of the WTO. According to Article IV [184], the conference should comprise of all the members of the WTO. Initially, as per Article X1 of the agreement[185], the contracting parties of the GATT, 1947 would obtain original membership in the WTO. This meant, that the first ministerial conference held in Singapore, in December 1996, witnessed a collaboration of 128 Members. Yugoslavia however, was the only country that did not become a member by original membership in the WTO. At present, the WTO has a membership of 159 countries, and 24 countries are contesting for membership. The Ministerial Conference and the functions of it are embedded in the

[181] "WORLD TRADE ORGANIZATION" (*WTO | Trade Statistics - World Trade Statistical Review 2017*) <https://www.wto.org/english/news_e/archive_e/minis_arc_e.htm> accessed September 20, 2018
[182] Agreement on Trade-Related Aspects of Intellectual Property Rights 1995
[183] Lee GE, "The Basic Principles of WTO" (2005) 9 Journal of international area studies 171
[184] Ibid., 4
[185] Ibid., 5

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Agreement Establishing the WTO itself. (Hereinafter, referred to WTO Agreement) The Ministerial Conference is set up to carry forward the functions of the WTO. The stipulated meeting of the members every two years, ensures that the organizations intention and objectives are enhanced by active participation of its ministers. This was a welcome deviant from GATT, wherein a decade would pass between ministerial meetings.

ADMINISTRATIVE FUNCTIONS OF THE MINISTERIAL CONFERENCE

The Ministerial Conference plays a multitude of roles. One such role is that of a 'regulator' or an 'administrator' under which comes governance and regulation of the various other bodies in the structure of the WTO. The Ministerial Conference is granted with the task of 'interpretation' of the various WTO agreements as well. [186]Under the purview of the ministerial conference, comes the General Council[187] that shall meet as and when it may seem appropriate. The General Council is to carry out all those functions as stipulated in the WTO Agreement. In fact, in the time lag between the meetings of the Ministerial Conference, the General Council is free to carry out the functions of the Ministerial conference. The Ministerial Conference is free to decide on any such aspect with relation to Multilateral Trade Agreements as well.[188] It can, in the furtherance of the institutionalisation and regulation of trade, formulate a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration[189] that are to carry out functions and activities as stipulated in the agreement of their formulation and/or any Multilateral Trade Agreement and/or any other such function as decided by the General Council. In furtherance to the Ministerial Conference as the apex body of the WTO, it is this conference that can appoint a Director General heading the 'Secretariat' of the WTO, well defining the role and scope of such a position.[190] Going beyond the scope of appointments and regulations, even the administration and applicability of agreements to members or rather, the non-applicability of agreements to certain multi-lateral trade agreements is taken by the Ministerial Conference by way of reviewing such an application of non-applicability

[186] Agreement Establishing the World Trade Organisation 1995., a IX (2)
[187] Agreement Establishing the World Trade Organisation 1995., a IV (2)
[188] Agreement Establishing the World Trade Organisation 1995., a 3(2),4(1)
[189] Agreement Establishing the World Trade Organisation 1995., a 4(7)
[190] Agreement Establishing the World Trade Organisation 1995., a VI

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by reviewing the terms of accession.[191]It is needless to say, that such a role is to be of an international nature. It is not a purely administrative function that the Ministerial Conference pays. However, it is one of its primary features, the other being its indispensability in the Decision Making Process.

DECISION MAKING FUNCTION OF THE MINISTERIAL CONFERENCE

The Ministerial Conference, takes an active role in the Decision Making Process in the WTO[192], a role so important, that it may even waive an obligation of a member if it is in pursuance of a three-forth majority. Any such decision made though, shall have sound reasoning and a basis for the waiver accompanied with the date as to when this waiver shall terminate. These waivers are generally granted for a period of one year upon the existence of exceptional circumstances. Any such extension of the period of waiver beyond a years' time shall be met with scrutiny by the Ministerial Conference and a justification thereby for an extension if granted.[193] This puts forth, the flexibility of the Ministerial Conference to not only formulate rules and regulations but to also decide on matters relating to waivers, amendments and so on. Thus, executing administrative as well as decision making functions. Another such matter, wherein the Ministerial Conference acts as the supreme body is in relation to Amendments. The main idea behind the WTO is the regulation of trade. The world or the global market is seemingly prone to economic downfalls and lifts, due to which it is not surprising for there to have been a provision in place for the amendment of the agreements of the WTO. The application for such an amendment is to be made by the applicant to the Ministerial Conference.[194] A decision by consensus is taken upon the presentation of the proposed amendment being tabled formally. If such a decision is not made, it shall be decided by two thirds majority if such a proposal shall be put forth or not. However, the ministerial conference can decide for a period which is longer than the provided for period of ninety days. If there exists a scenario wherein any one such member does not accept the proposed amendment and it is at the decision of the Ministerial Conference whether to allow such participation from a member or not. The member countries that have accepted these proposals, have to deposit such acceptance by way of an

[191] Agreement Establishing the World Trade Organisation 1995., a XIII
[192] Agreement Establishing the World Trade Organisation 1995., a IX
[193] Agreement Establishing the World Trade Organisation 1995., a IX (4)
[194] Agreement Establishing the World Trade Organisation 1995., a X (1)

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'instrument of acceptance' with the Ministerial Conference. [195] These clauses however, are not applicable to those agreements listed under Article X (2), unless by complete acceptance. The addition or deletion of an agreement under Annex 4 of the Agreement of the WTO, would also require a formally tabled request to the Ministerial Conference. The WTO is an active organisation which embodies participation from the ministers of various countries. Thus, it is a member based institution that enjoys its progress through the active involvement of its members. [196] Membership as stated earlier can be obtained through original membership or by accession. The decisions relating to accession of a member, is also made by the Ministerial Conference. Therefore, it is clear with the above analysis that the Ministerial Conference has been vested with certain inherent powers namesly,1) adopting authoritative interpretations of WTO agreements[197], 2) granting waivers[198] 3) adopting amendments[199] 4) making decisions on accession[200] 5) appointing director general,[201]6) adopting staff regulations.[202]

ANALYSIS OF THE MEETINGS OF THE MINISTERIAL CONFERENCES HELD

Pursuant to the WTO Agreement[203], it has been held that the ministerial conference is to be held every two years[204] in order to frequently empower the countries with the benefits of a regularized platform of international trade and ensure that ample opportunity is given to do so.[205] The first Ministerial Conference was held in Singapore in 1996[206], the next in Geneva (1998)[207], the third in Seattle (1999)[208] where there was no declaration that was adopted, the fourth in Doha (2001)[209] the next in Cancun (2003) where though a ministerial declaration

[195] Agreement Establishing the World Trade Organisation 1995., a X (7)
[196] Robert Hawse, "Multilateralism and Diversity: Rethinking the Structure of WTO Agreements." (2009) 103 Proceedings of the Annual Meeting (American Society of International Law 427
[197] Agreement Establishing the World Trade Organisation 1995., a IX (2)
[198] Agreement Establishing the World Trade Organisation 1995., a 1X (3)
[199] Agreement Establishing the World Trade Organisation 1995., a X
[200] Agreement Establishing the World Trade Organisation 1995., a XII
[201] Agreement Establishing the World Trade Organisation 1995., a VI (2)
[202] Agreement Establishing the World Trade Organisation 1995., a VI (3)
[203] Ibid.,4
[204] Ibid.,13
[205] Ibid., 1
[206] Singapore Ministerial Declaration WT/MIN (96)/DEC,1996 and WT/MIN (96)/16 1996.
[207] Geneva Ministerial Declaration WT/MIN/ (98)/DEC/1, 1998, and WT/MIN/ (98)/DEC/2, 1998
[208] Seattle Ministerial WT/MIN/ (99)/JAN/1 1999, and WT/MIN/ (99)/JAN/2, 1999
[209] Doha Ministerial Statement WT/MIN/ (01)/DEC/1, 2001, WT/MIN/ (01)/DEC/2, 2001, WT/MIN/ (01)/15, 2001, WT/MIN/ (01)/16, 2001 and WT/MIN/ (01)/17, 2001

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was not adopted, a ministerial statement was declared. [210] The next conference was held in Hong Kong (2005)[211] after which came the conferences in Geneva in 2009 and in 2011, wherein no declarations were adopted but the Chair did give a concluding statement in the latter.[212] The Bali conference (2013)[213] and the Nairobi rounds (2015)[214]both witnessed declarations being adopted. The latest conference, i.e. The eleventh ministerial conference was held in Buenos Aires (2017)[215], the next conference is to be held in the year 2019, in Kazakhstan[216]. As seen, it is not every two years that the Ministerial conference has held its meetings. In fact, in 2007, there was no meeting of the Ministerial Conference due to the lack of progress in the Doha Rounds.[217] This section of the paper seeks to analyse the ministerial conferences so held each year.

THE MINISTERIAL CONFERENCE IN SINGAPORE, 1996

The culmination of a series of meetings finally led to the Ministerial Conference held in Singapore in the year 2001[218]. This was the first of its kind after the formulation of the WTO agreement.[219] It is imperative to note, that these conferences were held at different periods of time, and thus the present day scenario of the global market is a culmination of these adoptions and due deliberations. The first conference was naturally met with slight speculation from the 128 countries that attended it. Since it was a first of its kind, the issues discussed were primarily those keeping in mind the futuristic activities of the WTO whilst ensuring that the adverse effects that these developments might have on developing or under developing nations are kept to the minimum.[220] Pursuant to the first conference, several member countries put forth their suggestions as to what should be discussed in the meeting agenda, though not all were entertained, consensus was formulated on several topics of discussion. The main theme of the panel discussions whilst the creation of the WTO was

[210] Cancun Ministerial Conference WT/MIN (03)/20, 2003
[211] Hong Kong Ministerial Declaration/MIN (05)/DEC, 2005
[212] Geneva Ministerial Statement WT/MIN (11)/11, 2011
[213] Bali Ministerial Declaration WT/MIN (13)/DEC,2013
[214] Nairobi Ministerial Declaration WT/MIN (15)/DEC, 2015
[215] Buenos Aries Ministerial Statement WT/MIN (17)/64, 2017
[216] "WORLD TRADE ORGANIZATION" (*WTO | Trade Statistics - World Trade Statistical Review 2017*) <https://www.wto.org/english/news_e/news18_e/minis_26jul18_e.htm> accessed September 10, 2018
[217] Ibid.,31
[218] Ibid.,32
[219] Ibid.,4
[220] Dhar, Biswajit, "Hijacking of WTO Ministerial Conference" (1997) 32 Economic and Political Weekly 152

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"trade and environment" pursuant to the Tuna/Dolphin case brought forward in the GATT, 1991. This however was not a subject of discussion during this round of the conference, the declaration having merely one paragraph on this subject matter.[221] However, one of the main achievements was the establishment of a fully developed 'Information Technology Agreement'[222] which would prove to contribute towards the basic idea for several legislations in the world in the time to come. Another agreement formed was on the free trade of pharmaceuticals which was welcomed by the member countries. Labour and issues related to this were made part of the discussion, a few members wanting a clause in related to this incorporated in the agreement itself. However, the decision was taken that such a matter would be left to the working and knowledge of the ILO, though not completely taking it out of the agenda of the WTO. In fact, in the Seattle conference in 1999,[223] it was brought up again.[224] At the formulation of the WTO, as is the case even today, there is a mix of developed, developing and least developing countries. The WTO aims at putting forward the interests of all these entities whilst harmonising them in order to further world trade. This was seen to be done by the adoption of the Plan of Action for Least Developed Countries. This plan was set up to allow members to adopt positive measures, lower tariffs and enhancing trading measures. Though this policy went against the principle incorporated in Article I of GATT,[225] it was welcomed by member countries and would be applicable only to those countries that are recognised as Least Developed Countries by the United Nations.[226] The plan was to include cooperative and training measures with other multi-lateral agencies of the UN. The issue of textiles and agriculture though presented were not a topic of main discussions during the course of the conference. The Agreement on Textiles and Clothing was sought to be committed and adhered to. The Textiles Monitoring Body was to remain a quasi-judicial body, maintain its transparency by providing a rationale to its findings. A special recognition was also made to the importance of regional trade agreements in the declaration. It was stated that these agreements helped to ensure a renewed commitment of member countries to increase domestic trade, thereby contributing towards the trade economy by and large, in this regard, clarifications were sought. Light was thrown upon the importance

[221] Richard Tarasofsky, "Singapore Ministerial Conference" (1997) 27 Environmental Policy and Law 107
[222] T. Sholeh Johnson, "The WTO Sets the Stage in Singapore: First Ministerial Conference" (1997) 6 Currents: Int'l Trade L.J. 27, 31
[223] Ibid.,34
[224] Sope Williams, "The WTO and Labour Rights Revisited" (2002) 14 Sri Lanka J. Int'l L. 135, 164
[225] The General Agreement on Tariffs and Trade 1948
[226] Hoekman, Bernard, et al. "Eliminating Excessive Tariffs on Exports of Least Developed Countries." (2002) 16 The World Bank Economic Review. 22

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and working of the various working committees formed for various purposes. A working committee was constituted to look into matters of investment and competition.[227] Therefore it can be concluded that though this was the first ministerial conference, it was a hugely successful one. Member countries were speculative about the progress of such a conference as it was the first of its kind. Through hurdles such as lack of consensus of subject matters to pen down in the agenda meetings, to overcoming politics and conflicts between members themselves, all in all, this conference proved to be a great start to the conferences to come. The unsolved issues however that remained came to be known as the "Singapore Issues" which would be addressed further.[228]

THE GENEVA MINISTERIAL CONFERENCE, 1998

The second ministerial conference was held in Geneva in 1998. The WTO, a new organisation in theory, was met with a mixture of emotions throughout the world. Some developing and under developing countries believed it to be an organisation to promote free trade run by the so called capitalist nations in order to peruse their hidden agendas of an easier trading platform. Several organisations protested against the working of the WTO. The forerunner in this cause was seen to be the People's Global Action which was an ad hoc group of cumulative organisations that organized a riot in May, 1998 whilst the WTO's Ministerial Conference was to be held. The PGA seeks alternatives to the dominant system based on decentralisation and self-organisation at local, national and international levels.[229] However, due to what can be said to be the relentless efforts of the members, the conference still took place. Thus it was natural that the issue of civil society participation was discussed at the Ministerial Conference. U.S. President Bill Clinton proposed that the WTO establish a consultative forum where business, labour, environmental, and consumer groups could provide "regular and continuous input" to help guide further evolution of the WTO.[230] This conference presided over by 132 member countries now, also was memorable as it celebrated

[227] "WORLD TRADE ORGANIZATION" (*WTO | Trade Statistics - World Trade Statistical Review 2017*) <https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> accessed September 22, 2018
[228] Christoph Schwew,"The WTO and Recent Developments in World Trade"(2008) 3 Acta Societatis Martensis 188
[229] Yash Tandom, "The WTO: A Southern NGO Perspective" (1998) Bridges Law Review 2
[230] Lin Zhengling, "An Analysis of the Role NGOs in the WTO"(2004) 3 Chinese J. Int'l L. 485

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the 50th anniversary of the multi-lateral trading system. The Declaration that was passed pave the way to prepare for a more significant method to promote and protect the essence of liberalization whilst taking into account the needs and concerns raised by the countries that wanted to adhere to the protectionist principle. The northern countries were experiencing liberalization at an increasing rate and this disparity was sought to be evened out so as to promote harmonious development. With the process of liberalization came about greater competition and a growing rate of social and job insecurity accompanied by environmental concerns. This lead to public resistance as noted above, of the WTO. [231]Therefore, subject matters such as investment, competition policy, government procurement and electronic commerce were placed on the agenda of the meeting. With a view to generate acceptance of the WTO s policies and extend benefits to the least developing countries, the declaration so adopted contained the addressing of serious concerns regarding marginalization and issues relating to job generation and trade liberalization were further adopted. The declaration on Electronic Commerce barring members from introducing tariffs on e-commerce was also adopted keeping in mind the rapid advancement of technology. the US and Cairns Group of exporting countries were targeting reduction in tariffs, an increase in tariff rate quotas, the elimination of export subsidies, the tightening of rules on domestic support, more disciplines on state trading enterprises, and a reaffirmation by Member countries of the Sanitary and Phytosanitary Agreement. This was recognised and soft spots were identified in the declaration. This declaration also sought to confirm to the next ministerial conference, the outcomes and working of the conference and to showcase that the decisions were put to good use. [232]

THE SEATTLE MINISTERIAL CONFERENCE, 1999

"The Battle of Seattle may acquire the same instructive value for future diplomats as Pearl Harbour has for military officers."[233] This statement exuberates the Seattle Ministerial Conference in its essence. After the riots faced by the previous ministerial conference, the Seattle conference was met by with renewed hopes of a peaceful adaption of the WTO's

[231] Gregory Shaffer "The Challenges of WTO Law: Strategies for Developing Country Adaptation," (2006) 5 World Trade Rev. 198
[232] Ibid.,32
[233] Gary Clyde Hufbaur, "World Trade After Seattle: Implications for the United States" (1999) 99 International Economics Policy Briefs

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functions and objectives in its declaration. However, there were two major issues that the round faced. These issues were two fold. The first was the decision to start a new round such as the Uruguay round or if the negotiations are to be confined to the so called 'built-in' agendas of agriculture and services mandated at the last Ministerial. Secondly, the agenda of the meeting was under great dispute. The meeting was unable to resolve the disputes and thus ended with no declaration being adopted by the 137 members. No formal documentation was recorded and no date for the next ministerial conference was stipulated. There were several factors which can be attributed to this occurrence. The political environment at the time, was not conducive to this new found economy that the WTO sought to offer. The disparities of the development of countries along with political unrest and resistance of the social groups that was seen in the Geneva Conference, cropped its way into the differential opinions of the member countries as well. In fact, the Director General of the WTO assumed office a few months before this ministerial conference due to prolonged debate. Due to this sudden change, the new Director General, Mr Moore did not have the sufficient time to assert the requisite leadership that such a conference demands. The trade relations between the European Union and the United States of America were seemingly strained over agriculture. Canada went on to put forth the idea of a new instrument to conduct trade in this regard.[234] Africa was improperly represented with just nineteen of the forty-two countries being represented in Geneva.[235] Thus, the political unrest of sorts accompanied with a lack of assertive leadership, and a feeling of disappointment of countries not having their issues recognised, played a prominent role in the failure of this conference.[236]

THE DOHA ROUND OF THE MINISTERIAL CONFERENCE, 2001

After the debacle that was the Seattle Conference, the Doha Round was supposed met with renewed hope. However, as history has it, this again proved to be an unsuccessful round as it remained unfinished. The Doha Round was the ninth round since the Second World War and the first since the WTO inherited the multilateral trading system in 1995.[237] Its aim was to

[234] Edward Alden, "Canada lists priorities for WTO Seattle talks,"(1999) Financial Times
[235] Patrick F. J. Macory, "Developing Countries and the WTO," (1999) Washington, D.C, International Law Institute 6.
[236] Bernal, Richard L. "SLEEPLESS IN SEATTLE: THE WTO MINISTERIAL OF NOVEMBER 1999." (1999) 48 Social and Economic Studies 84
[237] 'WTO | Doha Round: What Are They Negotiating?' (*Wto.org*, 2002) <https://www.wto.org/english/tratop_e/dda_e/update_e.htm> accessed 21 September 2018.

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achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covered about 20 areas of trade. The Round is also known semi-officially as the 'Doha Development Agenda' as a fundamental objective is to improve the trading prospects of developing countries.[238] However, the unfinished nature of the DDA proved to be one that lead to mistrust in the workings of the WTO. At the end of this round, two declarations were adopted, the main declaration contained the subject matter and objectives of negotiations that are either to be deliberated upon immediately or the near future. The second, permitted members to override corporate patents during public health emergencies and particular subjects that needed immediate attention.[239] The Doha round culminated in the wake of the 9/11 calamity[240] one, which shook the world at large. Leaders were at a disagreement as to what to include in the meeting's agenda and the goals so set forth were good on theory, but practically almost never applied in the years to come. Much of this can also be attributed to the economic slump that the US had faced which automatically had negative resounding effects over the world economy at large. The disappointment of the Doha round further enhanced the scepticism of the working of the WTO in the years to come as the Singapore issues were still unaddressed. It is thus a common reference which these rounds are referred to by as the 'Unfinished Doha Rounds' However, there was little appreciation given to the Ministerial declaration adopting trade liberalization and a declaration being seen to have been made despite the 9/11 incident.

THE CANCUN MINISTERIAL CONFERENCE

The Cancun Ministerial Conference in 2003, entertained some major changes in the trading system. The emergence of the G-21, which is a group of developing countries, led by Brazil, India, South Arica, emerged. This group resisted the imposition of a system of reformation in trade related to agriculture and also resisted any imposition of the EU's attempt to include multilateral investment. This group of developing countries, brought with them a new sense of change in the political landscape of the WTO. The dominant questions in this meeting were those of agricultural policies of the US and EU, investment and intellectual property

[238] 'WTO | The Doha Round' (*Wto.org*, 2002) <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 22 September 2018.
[239] Sanjoy Bagchi, 'What Happened At Doha?' (2002) 36 Economic and Political Weekly.
[240] Susan C. Schwab "After Doha: Why the Negotiations Are Doomed and What We Should Do About It"(2011) 90 Foreign Affairs

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rights. The agricultural policies of EU and US are contrary to the policy of free trade and run counterproductive to that of liberalization, as they diminish the access of developing countries to access the markets of the developed countries. The developing countries were in a way threatened to comply unless they adhere to the terms of the Singapore Issues as set forth by the developed countries. Therefore, the developed countries would only substantiate their reforms if the developing countries were to comply with new rules of investment and government procurement. (Singapore Issues) The same issue was found to be present in the modifications proposed to the Intellectual Property Rights scheme, and an acceptance of these schemes by developing countries would be contrary to the essence of free trade. The global pharmaceutical industry was perhaps the most developed in terms of a global IP law, after the offing's of the AIDS epidemic that hit the world. The textile industry suffered a great setback as some developing countries were almost ousted from participation due to the high quota and tariff barriers. Thus, though the Cancun Conference did not see any sought after conclusion by way of an adopted declaration, it saw the emergence of a powerful voice force of the developing countries which seemingly was adopted as a development of sort. The WTO faced a challenge of harmonising the needs of the developing and developed countries. The Cancun Ministerial thus, culminated with a looming sense of disparities, awaiting to be resolved.

THE HONG KONG MINISTERIAL CONFERENCE (2005)

The sixth ministerial conference held in Hong Kong was attended by 149 countries. The Hong Kong Ministerial was an integral ne for the survival of the DDA after no consensus obtained in Cancun. Thus, the declaration adopted in this round was sort of an interim measure. Deadlines for the elimination of agricultural export subsidies (2013) and cotton export subsidies (2006), and also mandates that duty and quota-free access for at least 97% of products originating from the least developed countries (LDCs) be provided by 2008, were just some of the measures in the declaration.[241] However, it put on hold issues of implementation and questions of special and differential treatment (S&D). The review of which was postponed. However, what the Hong Kong did witness is a furtherance of the Doha Rounds and a renewed commitment to prepone them. However, as policy strategies were not in complete agreement, there were disparities relating to the developing and

[241] Ibid., 37

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developed countries and there were no concrete steps made to bridge this gap. Considering a minimum period required to convert any agreed formula (modalities) into individual commitments [242]as well as the negotiation deadline of the Doha Round (the end of 2006) derived from the expiration date of the Bush Administration's fast track authority in mid-2007,[243] WTO Members would need to diligently hold a series of negotiations, including possible "mini-ministerial," in order to achieve tangible results.

THE GENEVA CONFERENCES OF 2009 AND 2011

The ministerial conferences are generally to be held every two years, however, these conferences held in 2009 and 2011 respectively, were after a period of four years. The focus of the conference was to depart from the 'Doha round negotiations' and focus on the general working and efficacy of the World Trade Organisation. The 153 member countries were not disallowed from participation on the Doha round topics but were advised to put forth their suggestions towards the theme of the topic which was "The WTO, the Multilateral Trading system and the Current Global Economic Environment".[244] The main agenda therefore was the overview of the activities of the WTO and the action that is to be taken for the furtherance of the same. Due to the time gap and the avoidance of the same, a date for the 8th Ministerial Conference was also decided as part of the agenda. One of the main ideas behind this conference was to strengthen the image of the WTO which had, due to the unsuccessful Doha rounds, seemed to weaken in the world. An undertaking of the political review and a transparent discussion of the same was done in this conference. This helped in keeping the WTO up to date and in sync with the happenings of the world.[245] No declaration resulted in this conference, but it cannot be said to be ineffective as this conference was mainly done as a step towards reviewing the WTO, which it was successful in. The 8th Ministerial conference in 2011 was also held in Geneva. The world at this point in time was seen to be going through a slump almost as bad as what was experienced after the Second World War. Developed countries were the worst effected due to turbulence and instability, rising unemployment and

[242] 'WTO | 2005 News Items - Trade Negotiations Committee - 13 October 2005' (*Wto.org*, 2012) <http://www.wto.org/english/news_e/news05_e/tnc_13oct05_e.htm> accessed 1 October 2018.
[243] Financial Times, 'Waning Expectations: Agreement On Trade Remains Remote As Time Trickles Away' (2005).
[244] 'Notes From The WTO 7Th Ministerial Conference', , *7th Ministerial Conference* (AIPPI 2009).
[245] H.E. Mr. Andrés Velasco, "Closing Statement "(Ministerial Conference)

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disappearing development gains and developing countries were a little better off better off, but still not in a satisfactory position.[246] Parallel to the Working Sessions aimed at providing an interactive forum for Ministers, giving them a platform for discussion under three broad themes: "Importance of the Multilateral Trading System and the WTO", "Trade and Development" and "Doha Development Agenda".[247] This conference witnessed the accessions of Russia, Samoa, Vanuatu and Montenegro. This conference also however did not witness any adoption of a declaration.

THE BALI CONFERENCE, 2013

The preparation for the Bali Round of Negotiations was met with a renewed gust on by its members, eager to break from the Doha rounds as well as ensure, that the meeting agenda is not too ambitious that it fails to address the needs of the 21st century. Trade facilitation, agriculture and a comprehensive institutional framework for LCD's were part of the main focus areas of this conference. Perhaps trade facilitation is one of the areas wherein agreements are mutually reached upon rather easily as compared to agriculture.[248] The LCD's however aimed to take a fuller advantage of the duty-free quota arrangement as agreed upon in the Hong Kong Ministerial Conference in 2005, also seeking to keep in mind the issues faced by the Cotton-4 countries (Benin, Burkina Faso, Chad and Mali) arising from the subsidies granted by the advanced countries to their producers. The conference was seemingly successful wherein the WTO saw the accession of Yamen as its member. The ministers adopted the "Bali Package", a series of decisions aimed at streamlining trade, allowing developing countries more options for providing food security, boosting least-developed countries' trade and helping development more generally. Further, several newer decisions were also adopted. The Bali Conference also sought to adopt reaffirmation and renewed spirit to complete the unfinished Doha Round, wherein the 159 members took to peruse the same. This was much needed as they were still unfinished and this lead to severe criticism of the working of the WTO. One of the most acclaimed measures adopted in this conference was to allow countries to provide subsidy on staple food crops. This would in turn

[246] "MINISTERIAL CONFERENCE Eighth Session "rep
[247] "WORLD TRADE ORGANIZATION" (*WTO | Trade Statistics - World Trade Statistical Review 2017*) <https://www.wto.org/english/thewto_e/minist_e/min11_e/min11_e.htm> accessed September 30, 2018
[248] Fukunaga Y, Riady J and Sauve P, *The Road to Bali: ERIA Perspectives on the WTO Ministerial and Asian Integration* (Economic Research Institute for ASEAN and East Asia 2013)

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have an effect directly upon the food security concerns which cropped up in the world. This draft proposed an interim measure that would allow the fixing of a 'Minimum Support Price, (MSP) to provide food grains and sell staple grains at a subsidised rate to the poor. It also envisages to store food grains for a situation of contingency.[249] This plan was a move to incorporate the growing disparity of food security in the international view point (This was a crucial demand put forth by India). At this point, a critical evaluation would show that the WTO was working towards the active involvement of the developed and least developed country and provided an effective platform to do so. This conference witnessed the successful adoption of a multilateral agreement and was seemingly successful.

THE NAIROBI ROUND OF THE MINISTERIAL CONFERENCE, 2015

The Nairobi Conference was seen to be uber successful due to the adoption of the 'Nairobi Package' which lead to the adoption of six ministerial decisions relating to agriculture, cotton and issues related to least-developed countries (LDCs) in the form of a Trade Facilitation Agreement (TFA). Further, a commitment was enforced to do away with export subsidies relating to farm products. Decisions were also made regarding preferential treatment for least developed countries (LDCs) in the area of services.[250] Further it saw the reaffirmation of the 'Bali Package' on protection rendered to farmers by renewing the decision on public stockholding. This conference saw different contentions put forth by the developed and developing countries. The former wanted to get rid of the Doha Round and peruse a new round, whereas the latter wanted to complete the Doha Round of negotiations. Cotton Exports were to be completely phased out for developed countries whereas developing countries were given time till 2017. The LDCs were given a quota free market access in order to trade with and access the markets of the developed countries. Further, a more developed view on what was to consist of a product made in a LDC was given, calling upon a preference granting to consider the allowance 75 percent materials of non-originating materials of the final value of the product. Documentation and procedural requirements were decided upon to be eased.

[249] Josh J, "9th WTO Ministerial Conference Concluded at Bali, Indonesia" (*Jagranjosh.com*December 7, 2013) <https://www.jagranjosh.com/current-affairs/9th-wto-ministerial-conference-concluded-at-bali-indonesia-1386395766-1> accessed 2018

[250] "World Trade Organization's 10th Ministerial Conference in Nairobi" (*World Bank*) <http://www.worldbank.org/en/news/feature/2016/01/07/world-trade-organizations-10th-ministerial-conference-in-nairobi> accessed September 30, 2018

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Further, as stated earlier, measures were made also in the field of services to ensure the active involvement of these countries. Negotiations were also made by fifty-three countries on the Information Technology Agreement, which accounts for a majority of trade in these products by both developing and developed countries. Approximately, 65 percent of tariff lines on 201 products which were agreed upon will be eliminated by 2016. The remaining were planned to be phased out over stages over the next years, rendering almost most of the products, duty free.

THE BUNEOS ARIES MINISTERIAL CONFERENCE

After the resounding success of the previous conferences, the 11th Ministerial Conference (MC11) was met with great expectation which were not kept up to. The MC 11 ended in a stalemate wherein no consensus on the matters on its mandate were met by the 164 member countries. Fisheries and the E Commerce industries were the main topics of contention accompanied with food security. Fishing subsides on IUU (irregular, unregulated, unreported) were committed upon. Further, till 2019 no imposition of custom duties was to be imposed in this regard. Various other decisions regarding the lack of impositions for two years in the electronic transmission arena and commitment to ensue negotiations further were also made. However, unfortunately, the lack of consensus and a strong imposition from the superpowers of US and EU rendered this ministerial conference to end without a proper consensus. This was unexpected after the adoption of the Bali and Nairobi packages and lead to a sense of dissatisfaction of its members.

CONCLUSION

This paper has endeavoured to analyse the concept of a Ministerial Conference in the WTO system. On an analysis of the preamble and the text dealing with the functions (Art3) of the Agreement[251], it can be safely said that the WTO performs administrative functions. The Ministerial Conferences thus held are in pursuant to making sure that the WTO is a member inclusive body, and the members partake in the process of trade regulation. As seen above, a

[251] Ibid.,5

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close evaluation of the working of the WTO with regard to these conferences has brought to light the efforts of this organisation to serve as a platform for the countries of the world to develop their global trading regime. Perhaps, tracing the evolution of trade has shown its importance and the resounding effects that it has on the world at large. Trade has therefore, conclusively been an activity that can make or break a nation. Effective trading structures lead to a greater scope of development whilst making sure that the world is integrated and bound. In fact, after the setting up of the WTO system, which gives importance to diplomatic relations, it is often seen that countries agree to a middle path thus maintaining and in more cases than one, strengthening their diplomatic relations as well. The WTO, though criticized on various instances such as the incomplete Doha Round, the lack of public participation as accused by various NGO's and a general doubt on its efficacy, has proved to be a strong agency and facilitator of trade. The present status of the WTO is shaky due to the US President's mandate to investigate into the working of this organisation with a threat to withdraw as its member if found otherwise. However, it can be concluded that the WTO is a member bound organisation that is embedded with the active participation of the members. Many a time a lack of consensus of a member leads to a fallacy in a policy adoption. It thus is suggested that political agenda and personal mandate of the members take a backseat whilst the ministerial conference is held. Stronger steps should be taken to make sure that members of the developing countries and least developing countries are able to access the markets of the developed countries whilst ensuring that the developed countries benefit out of this scheme. Thus, a strong effort towards strengthening the basic structure of the WTO system to suit the present day scheme is suggested.

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CHILD SEXUAL VICTIMISATION: A STUDY OF LEGAL FRAMEWORK AND RECENT TRENDS IN INDIA

-Mohita Yadav & Hitesh Yadav

ABSTRACT

The term Child Sexual Victimisation or Child Sexual Abuse (CSA) includes a range of activities like "intercourse, attempted intercourse, oral-genital contact, fondling of genitals directly or through clothing, exhibitionism or exposing children to adult sexual activity or pornography and the use of the child for prostitution or pornography. To be considered CSA these acts have to be committed by a person responsible for the care of a child or related to the child. If a stranger commits these acts, it would be considered as sexual assault.

The prevalence of CSA is high in India as well as throughout the world. Studies indicate that 25 to 50 percent of children around the world suffer from physical abuse and that around 20 per cent of girls and 5 to 10 per cent of boys experience sexual abuse. The highest prevalence rate of CSA geographically was found in South Africa (34.4%), Europe showed the lowest prevalence rate (9.2%) and America and Asia had prevalence rates in between 10.1 per cent to 23.9 per cent. Recently, CSA came more in focus in India due to the case of a 10-year-old rape victim from Chandigarh who was forced to give birth by the Apex Court of India. Though children have been declared as a national asset by the Apex Court in Sheela Barse & Another v. Union of India, AIR 1986 SC 1773, therefore it is the duty of the state to look after the child with a view to ensure full development of its personality, but around 40 percent of these children are in the need of care and protection. India has taken large footsteps in addressing issues like child education, health and development. However, child protection still remains largely unaddressed. In every hour, two children are sexually abused in some part of India. Most of them are under the age of 16 years. As per the National Crime Records Bureau reports 2016, in between 2014 and 2016, the number of crimes against

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children under the Protection of Children from Sexual Offences Act went up from 8,904 to 36,022.

The study is an attempt to shed light on the subject in India with the help of Legislative Provisions. This paper is intended to understand the magnitude and issues related to child sexual abuse in India.

Keywords: Child Sexual Abuse, Exhibitionism, Pornography, Prostitution.

INTRODUCTION

The Convention on the Rights of the Child states, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.[252] The Juvenile Justice (Care and Protection of Children) Act of 2000 defines a child as "a person who has not completed eighteenth year of age,[253] and a person is deemed to have reached "majority" on completion of 18 years under the Indian Majority Act of 1875.[254]

As defined by the World Health Organisation, child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include but is not limited to:

- The inducement or coercion of a child to engage in any unlawful activity
- The exploitative use of a child in prostitution or other unlawful sexual practices
- The exploitative use of children in pornographic performances and materials

[252] Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N.GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 1. India ratified the CRC in 1992.
[253] Juvenile Justice (Care and Protection of Children) Act, Ministry of Law and Justice, Government of India, No. 56 of 2000, http://wcd.nic.in/childprot/jjact2000.pdf (last visited on Oct. 14, 2018), art. 2(k).
[254] Indian Majority Act, No. 9 of 1875, http://www.vakilno1.com/bareacts/Laws/The-Indian-Majority-Act-1875.htm (last visited on Oct. 14, 2018).

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The WHO estimates that 150 million girls and 73 million boys under 18 have experienced forced sexual intercourse or other forms of sexual violence involving physical contact, though this is certainly an underestimate. Much of this sexual violence is inflicted by family members or other people residing in or visiting a child's family home or people normally trusted by children and often responsible for their care. A review of epidemiological surveys from 21 countries, mainly high- and middle- income countries, found that at least 7% of females (ranging up to 36%) and 3% of males (ranging up to 29%) reported sexual victimization during their childhood. According to these studies, between 14% and 56% of the sexual abuse of girls, and up to 25% of the sexual abuse of boys, was perpetrated by relatives or step parents. In many places, adults were outspoken about the risk of sexual violence their children faced at school or at play in the community, but rarely did adults speak of children's risk of sexual abuse within the home and family context. The shame, secrecy and denial associated with familial sexual violence against children foster a pervasive culture of silence, where children cannot speak about sexual violence in the home, and where adults do not know what to do or say if they suspect someone they know is sexually abusing a child.

CHILD SEXUAL VICTIMISATION IN INDIA

As per National Crime Bureau Records 2016 in total 36,022 cases were reported under Protection of Children from Sexual Offences Act, 2012. Maximum number of cases under crime against children from sexual offences were reported in Uttar Pradesh (4,954), Maharashtra (4,815) and Madhya Pradesh (4,717). City wise comparison revealed that the maximum cases of crime against children from sexual offences were reported in Delhi (1,374 cases) and Mumbai (979 cases). What happens after a child has been sexually abused is critical, not only to his or her recovery but also to the protection of other children, since if the perpetrator is never identified or allowed to remain free, the abuse might well be repeated. Children need the assistance of trusted adults to protect them from sexual abuse, but the response of adults to these cases is often completely inadequate.

A 2012 case in New Delhi demonstrates how dangerous this approach can be. Nandan Prasad Shah was convicted and received a life sentence after he abducted, bound, and raped a six-

year-old girl who was a member of his extended family.[255] During the trial it emerged that Shah had previously attempted to rape another female member of the family and had also attacked a different girl. In neither instance did the family take any action against him. Presiding Judge Kamini Lau said that the family actually had tried instead to protect the accused and to impede the trial:

Having come to know that a person in the family was a sexual maniac who spared none, was it not necessary for the other members of the family, particularly the male members, to have checked him and to have taken suitable action against him?... It is ironical that rather on the contrary, their attempt was to assist the accused by trying to prevent the material witnesses ... from deposing in the Court.[256]

Another recent court case provides a wrenching example of a family member failing to respond properly to an incident of child sexual abuse. In July 2011 a female resident of a slum in New Delhi briefly left her six-month-old granddaughter in the care of her neighbour, Sonu Lalman. According to the statement she later made in court, she next saw the baby after about 15 minutes, in tears, and bleeding from her vagina. She then went to confront the attacker:

I asked him what had happened to the child ... Sonu fell on my feet and sought forgiveness as he had committed a wrong. When Sonu repeatedly asked me for forgiveness, thinking that the child was a female and it would affect her future, I did not raise any alarm and kept quiet.[257]

Drone Foundation case in Haryana

Sita, 12, is a girl living with HIV, whose parents were too poor to look after her. She was placed in a small children's residential facility close to New Delhi, in Haryana's Gurgaon district, which was supposed to provide her with specialized medical care and schooling.

[255] State v. Nandan Prasad Shah, Tis Hazari Courts, New Delhi, January 24, 2012. Judgment on file with Human Rights Watch.
[256] State v. Nandan Prasad Shah, Tis Hazari Courts, New Delhi, January 24, 2012. Judgment on file with Human Rights Watch.
[257] State v. Sonu Lalman, Tis Hazari Courts, New Delhi, February 2, 2012. Judgment on file with Human Rights Watch

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According to its website, the goal of the Drone Foundation was to provide children like Sita with "happiness in life.[258]

The facility, which housed only 14 children, was run by Sunita Gupta and her 42-year-old son, Ankur Gupta. The children were taught to refer to them as "Aunty" and "Papa" to create a family atmosphere. According to Sita, Ankur Gupta, who is also living with HIV, was anything but a father figure to her. She told a counsellor after she left the facility that he used to rape her. She also said that when she told other people about the abuse, they would slap her. The abuse at the Drone Foundation came to light in January 2012 after an employee of the facility telephoned Childline, a toll-free helpline for children in distress. Within hours, the facility was raided and the children rescued. The police arrested Gupta and his mother, who asserted they had committed no wrongdoing and had been framed by a disgruntled ex-employee.[259] Their trial is underway.

Also consider the case of Apna Ghar, a residential care facility for orphans and other vulnerable children in the northern Indian town of Rohtak in Haryana state. Conditions were so dire that at dawn on May 7, 2012, three teenage residents sneaked out through the front door after one of the girls stole the key to the door, along with 500 rupees, from the purse of the facility's director. It was all they needed to make their escape to New Delhi. The girls promised the friends they left behind that they were going to return with help. That help came two days later, when members of the National Commission for the Protection of Child Rights (NCPCR) visited the facility to investigate the girls' allegations of abuse. The head of the team later described the scene they encountered there as "insane, unbelievable." Girls of all ages told them they had been made to have sex with strangers for money, that the son-in-law of the director had molested them, that they had been stripped naked, and beaten on their vaginas. Others said that staff had tied them up and suspended them from ceiling fans as punishment. "They made us do such disgusting things," one said. "I felt so dirty that even the water I drank afterwards tasted like it had been contaminated. What is most shocking about the abuse is that it happened in a well-respected facility that was regularly inspected by

[258] Drone Foundation, http://www.dronefoundation.org/index.html (last visited on Oct. 15, 2018)
[259] Times of India, *HIV+ man arrested for child sexual abuse*, (Jan 20, 2012), http://articles.timesofindia.indiatimes.com/2012-01-20/delhi/30646794_1_sexual-abuse-hiv-man-minor-girls (last visited on Oct 19, 2018).

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government officials. Its director, Jaswanti Devi, had recently been named Haryana state's "woman role model of the year." Her charity ran 12 government-funded welfare projects.

Failure of Justice System in addressing the problem

The police have a crucial role to play in combating child sexual abuse because they should be the first point of contact for anyone wishing to report a case. The sensitivities required for this role are recognized by the Juvenile Justice (Care and Protection of Children) Act of 2000, which obliges every police station to have a specially trained "child welfare officer" and every district and city to have "special juvenile police units." Their job is to "coordinate and upgrade the police treatment of juveniles and children.[260] Victims of child sexual abuse and their families face the prospect of a judicial process that can drag on for years. Court proceedings in India generally are a long and trying ordeal. In child sexual abuse cases, where the burdens of testifying repeatedly and over long periods of time fall on already traumatized children as well as parents, the complainants end up feeling battered by the process, in some cases leading them to withdraw their complaints as well. Special "child courts," as envisaged by the new Protection of Children from Sexual Offenses Act, should make a big difference.

The sexual abuse of children left in the care of institutions is disturbingly common. In the first half of 2012, the Times of India newspaper reported cases in eight institutions in different parts of the country. Three of them were in Haryana, with others in New Delhi, Karnataka, Goa, West Bengal and Uttar Pradesh. Alleged abusers were members of staff, older children and outsiders, including, it is alleged that in one case, it was a policemen.

Set up by the government in December 2012 in the wake of the Delhi attack, a committee, headed by Justice J.S. Verma, made several recommendations to address sexual assault and expressed particular concern over the plight of children in residential care institutions.[261]

[260] Juvenile Justice Act, art. 63.
[261] J. S. Verma, Leila Seth and Gopal Subramanium, *Report of the Committee on Amendments to Criminal Law*, (Jan.23,2013),http://ibnlive.in.com/news/full-text-justice-js-verma-committee-report-on-amendments tocriminal-law/317383-53.html, p. 202. (last visited on Oct 4, 2018)

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Justice Verma said at a press conference after submitting his report to the union home ministry that "The condition of juvenile homes in the country is pathetic."[262]

Legal Framework and various provisions in India

There are various rights guaranteed to children under the Constitution of India as fundamental rights and as Directive Principles of State Policy (DPSP) such as Article 21A- Right to free and compulsory elementary education for all children in the 6-14 year age group. Article 23-Prohibition of traffic in human beings and forced labour. Article 24- Right to be protected from any hazardous employment till the age of 14 years. Article 39 (DPSP)- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

The atrocious gang rape of a student in New Delhi on 16th December, 2012 followed by massive public protests lead to the appointment of Justice Verma Committee to make recommendations in criminal law so as to provide stringent laws to deal with cases of sexual assault against women. The committee expressed particular concern over the plight of children in residential care institutions. This was subsequently followed by the passing of the Criminal Law Amendment Act, 2013 which made amendments to the provisions of rape in IPC.

Before the enactment of the POCSO Act, the following provisions of the Indian Penal Code (IPC) could be invoked in cases of child sexual abuse:

- 293-Sale, hire, distribution or circulation of obscene objects of literature to people below 20 years of age. Punishment- jail up to 3 years or fine up to Rs2000 or both. Jail up to 7 years or fine up to Rs5000 on subsequent conviction.
- 323- Voluntarily causing hurt. Up to 1 years imprisonment

[262] Indo-Asian News Service, *No lower age limit for juvenile delinquents: Justice Verma*,(Jan.23,2013), http://news.webindia123.com/news/Articles/India/20130123/2143129.html (last visited on Oct 4, 2018).

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- 324- Voluntarily causing hurt by dangerous weapons or means. Any substance which is dangerous to the human body to inhale, swallow or receive into the blood by any means. Imprisonment for up to 3 years or fine or both.
- 325- Causing grievous hurt. Up to 7 years.
- 354- Assault or criminal force to women with intent to outrage her modesty. Punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The following provisions to section 354 of IPC were added by the Criminal Law Amendment Act, 2013.

- 354A- Sexual harassment and punishment for sexual harassment
- 354B- Assault or use of criminal force to women with intent to disrobe
- 354C- Voyeurism

Section 375 and 376 were also amended by the Criminal Law Amendment Act, 2013.

- 375- A man is said to commit rape if he penetrates, inserts, manipulates with the penis, any body part, or any object into the vagina, mouth, urethra or anus of a woman and applies his mouth to the vagina, mouth , urethra or anus of a woman under the following circumstances- 1. Against her will. 2. without her consent. 3. with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. 4.With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. 5.With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. 6. With or without her consent, when she is under eighteen years of age (Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] 7. When she is unable to communicate consent.

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- 376 (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

376 (2) - Special circumstances

376A- Injury which causes the death or persistent vegetative state

376B- By husband upon his wife during separation

376C- By a person in authority

376D- Gang rape

376E- Repeat offenders

- 377- Unnatural offences.— 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. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
- 326- Causing grievous hurt by dangerous weapons. Up to imprisonment for life.
- 326A and 326B (Added by the Criminal Law Amendment Act, 2013) - Voluntarily causing grievous hurt by use of acid or disfiguring any part of the body.
- 452- House-trespass after preparation for hurt, assault or wrongful restraint. Punishment up to 7 years.
- 458- Lurking house-trespass or house-breaking by night after preparation for hurt, assault, or wrongful restraint. Punishment up to 14 years.
- 503- Criminal intimidation
- 506- Punishment for criminal intimidation.—Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.—And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or 1[imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a

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woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

- 509- Word, gesture or act intended to insult the modesty of a woman or exhibiting any object that intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both. (Amended in 2013 as "term which may extend to 3 years, and also with fine")
- 511- Attempt to rape. Half the punishment awarded for rape.

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

The Act provides for the establishment of Child Welfare Committees and special juvenile police units. It also establishes rules for monitoring children's residential care facilities. The Juvenile Justice (Care and Protection of Children) Act, 2000 provides for the establishment of CWC in every district in India. CWC are quasi-judicial bodies which overlook the government's welfare and police officers and inspect children's residential care facilities. However, CWC officials are appointed by state government which often leads to lack of transparency in the work carried by it. While 83% members have training in child rights, only 44% have received training in Juvenile Justice System and child protection.[263]

There was a need for the enactment of a separate legislation to protect children from sexual offences because before POCSO most of the sexual offences were covered under Indian Penal Code, 1860. But IPC does not provide for all types of sexual offences against children and it is a general legislation which does not distinguish between adult and child victims. The provisions of IPC also do not treat child sexual abuse as a gender neutral crime and only men were regarded as the perpetrators. There were also no specific provisions for non-penetrative sexual assault which could only be dealt with under Section 354 of the IPC. Hence Protection of Children from Sexual Offences Act (POCSO) was passed by the Parliament of India in 2012 to deal with the heinous crimes of sexual exploitation and sexual abuse of children.

[263]Childline India Foundation, *"Everywhere Child Project"* (2011) http://childlineindia.org.in/pdf/The-Everywhere-Child-Protect-Project.pdf (last visited on Oct 11,2018).

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Section 2(d) of the Act defines "child" as 'any person below the age of 18 years'. According to this Act Child Sexual Abuse includes a variety of sexual offences such as:-

- Penetrative sexual assault (Section 3) – A person is said to commit penetrative sexual assault if he penetrates his penis to any extent into the urethra, anus, vagina or mouth of the child or makes the child to do so with him or any other person. It also includes penetration by any object or part of the body (not being the penis). Provision is also provided for sodomy.
- Aggravated penetrative sexual assault (Section 5)- Whoever being a police officer, member of the armed or security forces, public servant, staff and management of a remand home, etc. (a person in a position of trust or authority) Commits penetrative sexual assault on a child, is said to commit aggravated penetrative sexual assault.
- Sexual assault (Section 7)- "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."
- Aggravated sexual assault (Section 9)- This section includes commission of sexual assault by police officers, members of armed or security forces, (person in a position of trust and authority) etc. It provides provision for incest, taking advantage of a child's physical or mental disability, inflicting the child with HIV or any other life threatening disease, causing mental illness or physically incapacitating the child to perform regular tasks, temporarily or permanently.
- Sexual harassment (Section 11) - It involves uttering a word or sound, or making any gesture with sexual intent. It also includes exhibiting any part of the body to the child or making the child exhibit any part of his body with sexual intent. The offence of enticing a child for pornographic purposes or showing such media to the child.
- Use of child for pornographic purposes (Section 13) - It includes representing the sexual organs of a child or using the child for real or simulated sexual acts and indecent or obscene representation of the child.

Thus the Act recognises cases of non-penetrative sexual assault and also is gender neutral, that is male, female and children can be the perpetrators.

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The POCSO Act also provides that no reports in any media shall disclose the identity of the child until the special courts permits the disclosure if it is in the best interests of the child. The media cannot make any comments on the child which is not authentic and which may lead to lowering the reputation or invading the privacy of the child. This provision helps in ensuring that the media does not unnecessarily harass and re-victimise the child.

Section 24 of the Act provides for requisites in recording the statement of the child. The child's statement shall be recorded in its residence or any place where the child is comfortable, as far as practicable by a woman police officer who is not in uniform and it should be ensured that the child does not come in contact with the accused in any way. This is an effective measure to help children as well as parents to come forward in reporting cases of child sexual abuse. The medical examination of the child shall be conducted by a woman doctor, in the presence of the parent or any other person on whom the child has trust and confidence.

For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act. Section 33 of the Act provides the powers and procedures of the Special Court. The special court shall not permit character assassination of the child, it may permit frequent intervals as per the child's convenience and also allow a family member or a person in whom the child has trust or confidence to be present during the course of the trial. The court shall also not call the child repeatedly to testify in the court. These provisions help in ensuring a child friendly atmosphere and also help in reducing the traumatic experience of the child during the course of the trial.

Section 35 of the Act provides that "(1)The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence." This helps in speedy trial and disposal of cases and encourages reporting of cases of child sexual abuse as previously many cases went unreported due to the lengthy and cumbersome judicial process. In many cases, the abused child would be a married adult by the time the case came up before the court for trial.

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The main drawback of the POCSO Act is that it criminalises consensual sexual activities between teenage adolescents below 18 years of age from the previous age of 16 years. Section 20 of the Act says that all persons should mandatorily report a case of child sexual abuse if they are aware of it, notwithstanding which they will be sentenced to imprisonment for 6 months or fine or both. Section 29 of the Act says that in certain offences under the Act (Section 3, 5, 7 and 9), there will be presumption of guilt on part of the accused unless the contrary is proved in the court. This principle goes against the principle of 'presumption of innocence' in the Indian legal system. The Act also does not provide explicit provisions for medical examination of the victim and proper care, protection and rehabilitation the abused child. According to Section 44 of POCSO, the National Commission for the Protection of Child Rights (NCPCR) which has been established under the Commission for Protection of Child Rights Act, 2005 is responsible for monitoring the implementation of the provisions of POCSO. The Commission's mandate is "to ensure that all Laws, Policies, Programmes and Administrative Mechanisms are in consonance with the Child Rights perspective as is enshrined in the Constitution of India and also the UN Convention on the Rights of the Child.[264] The NCPCR also proposes new laws, analyses existing laws and can also initiate investigations in suspected cases where children's rights are involved. It is a quasi-judicial body and can follow up cases referred by individuals who feel that their complaints are not being properly addressed by the police and government officials. The POCSO is a comprehensive Act and is a progressive step taken by the parliament of India to deal with Child sexual Abuse in India. However, certain flaws in the Act need amendment and it is essential to ensure the proper implementation of this Act. For this purpose, the NCPCR which is entrusted with its implementation should be provided with more resources and manpower to carry on its functions effectively. It is also necessary to ensure that its officials and the officials of the CWC are trained in child protection laws and are backed by effective investigation units. Police and the doctors examining the victim must also be trained in sensitisation programmes to deal with the abused child so that the child is not re-victimised by the hostile attitude of doctors and police officials. It must be ensured that all state governments and union territories establish their own CWC in every district and state commission for protection of child rights in furtherance of the objectives of the Act. Steps

[264] Government of India, National Commission For Protection Of Child Rights, 2007. http://ncpcr.gov.in/index1.php?lang=1&level=1&&sublinkid=5&lid=600 (last visited on Oct. 10, 2018).

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should also be taken to ensure the registration of all residential child care facilities, their adherence to adequate standards and regular checks on them.

Thus India does have laws, legislations and schemes in place to deal with the human rights problem of child sexual abuse but what is necessary is to ensure the proper implementation of these laws.

Why cases of child sexual abuse mostly end in acquittal?[265]

In 2014, the conviction rate in POCSO cases was 16.33 per cent, while 2015 saw a conviction rate of 19.65 per cent. An analysis of POCSO judgments of the six courts in the capital — Saket, Dwarka, Rohini, Patiala House, Tis Hazari and Karkardooma — in the last six months found that the conviction rate was below 20 per cent.

In a majority of cases that ended in acquittals, the judgments noted that the "prosecution had failed to prove its case" A report by the National Law School Bangalore, which analysed 667 judgments between 2013 and 2015, shed light on this phenomenon. It stated that alleged victims turned hostile in "67.5% cases, and testified against the accused in only 26.7% cases".

In a 2016 case from Swaroop Nagar, for instance, the accused was charged with allegedly trying to rape his step-daughter. It was alleged that the accused, who was drunk at the time, tore the girl's clothes and stopped only when her mother intervened.

But in her deposition in the Rohini court, the girl said: "In 2016, the accused started drinking heavily and used to quarrel with my mother about trivial issues, and beat me, my mother and sisters. Fed up with his behaviour, they wanted to teach him a lesson and lodged a complaint."

The POCSO Act was enacted in 2012 to protect children from sexual assault, harassment and pornography. The Act also mandated setting up of special courts, where such cases can be tried expeditiously. Every stage of the judicial process was intended to be child-friendly — something that hasn't exactly happened. While most courts have a 'vulnerable witness deposition room', from where victims interact with judges or prosecutors, the process is

[265]https://indianexpress.com/article/cities/delhi/pocso-a-case-study-delhi-high-court-child-sexual-abuse-cases-4912888/

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lengthy and tedious. The Delhi Commission for Women (DCW), which offers counselling as well as legal help to victims, often plays a crucial role in POCSO cases.

In Delhi, every district has one POCSO court. For instance, if the northwest district has 1,100 cases, it is nearly impossible for the judge to dispose them quickly — deposition of the victim alone takes three-four hours. The rationalisation of work should be considered by the High Court, which should set a benchmark that judges deal with only, let's say, 250-300 cases. There should be a committee to look for the most vulnerable — places from where most cases are coming. Accordingly, there should be awareness, education, and policing. Many POCSO cases are from JJ clusters and resettlement colonies, so there is a need for multi-pronged strategies. For mentally disabled victims, the value of forensics increases — reports of which are often delayed. Such children are a minority, but DNA testing is significant in deciding the case. Moreover, the method used for DNA testing is outdated. International conventions and agreements which can be invoked to deal with cases of child sexual abuse and to which India is a signatory, are:

1) Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10th December, 1948 which promotes the following rights of children-

Article 1-All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 3 -Everyone has the right to life, liberty and security of person.

Article 5 -No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 22 -Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

2) Convention on the Rights of the Child- This convention provides for the basic rights of survival, development, protection and participation rights to children. The specific articles invoked in cases of child sexual abuse are:

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Article 6- Right to life, survival and development; Article 4 – Governments have a responsibility to take all available measures (assessing social, legal, health and educational systems) to make sure children's rights are respected, protected and fulfilled. This may involve changing existing laws or creating new ones; Article 16- Right to privacy; Article 34- Governments should protect children from all forms of sexual exploitation and abuse.

3) International Covenant on Civil and Political Rights- Article 6 states that every human being has an inherent right to life which should be protected by law. Article 17 – no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. Article 24 – Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

4) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

5) International covenant on economic, social and cultural rights

CONCLUSION

The dynamics of child sexual abuse differ from those of adult sexual abuse. In particular, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behaviour. While great awareness has been raised about sexual violence against women in India, much less is known about the problem of sexual abuse of children. Studies suggest that more than 7,200 children, including infants, are raped every year; experts believe that many more cases go unreported. CSA is an extensive problem and even the lowest prevalence includes a huge number of victims. Two main issues have been identified that makes it difficult to estimate exactly how many children are victims of CSA. Firstly, the way abuse is defined plays an important role. Secondly, the cases reported by the official organizations usually underrate the number of victims as many cases never get reported to them. The prevalence of CSA is alarming; hence, stringent measures should be taken for its prevention and control.

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Children are often sexually abused by people known to them: relatives, neighbours, teachers and other school staff, and personnel in residential care facilities for orphans and other at-risk children. Fear of social stigma or lack of faith in institutions prevents many people from even reporting child sexual abuse. By enacting the Protection of Children from Sexual Offenses Act in 2012, the government of India has taken a significant step in acknowledging and attempting to address the rampant sexual abuse of the country's children.

The strong associations between sexual abuse and mental health indicate the need for treatment of these conditions to be widely available for children.

Child's safety should always come first. The family and community as the base units of child protection are crucial, and there is an urgent need to build community capacity to protect children, rather than rely on health or legal services. Advocacy on good parenting and awareness-raising on child protection should be taken up by paediatric associations across nations and involve national leaders and opinion leaders in the community.

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RESERVATION SYSTEM IN INDIA: SECURING EQUALITY AMONGST CITIZENS

-Ms. Nur Tandon & Mr. Manak Goel

"Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life."

- *Dr. B. R. Ambedkar*

INTRODUCTION

Reservation system is a method in which certain percentage of seats is being reserved in government jobs, educational institutions for the underprivileged section of the society. This initiative was taken by founding father Dr. B. R. Ambedkar who was also first law and justice minister of independent India. This was system adopted to uplift the Dalits and other weaker section of the society who was treated untouchables, so no one liked to talk to them or teach them or give jobs to them beside of the fact that how much qualified one is. The only work which they were engaged in was to clean toilets, clean garbage etc. because of the caste system in India. But after India's independence reservation was introduced through the efforts of Dr. B.R. Ambedkar and other founding members. Weaker section of society now has been given more opportunity then they were privilege off before this time period. Articles 14, 15, 16, 17, 18, 19, 21, 30, 39-A,45,46, 330-342 of the Indian Constitution[266] were introduced to protect the interest of the underprivileged persons namely Schedule Caste, Schedule Tribes, Other Backward Classes, minority class, etc. Also, Central Educational Institutions (Reservation in Admission) Act 2006, Scheduled Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989, Protection of Civil Rights Act, 1955 and many acts

[266] INDIAN CONST. art. 14-19, 21, 30, 39-A, 45-46, 330-342.

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were introduced which has helping in securing equality amongst the citizens. Furthermore, landmark cases such as Indra Sahwney Case[267], Balaji Case[268], Champakam Dorairajan Case[269] and amendments like 18A of SCs and STs Act, 124th amendment are perfect examples of steps taken by the judiciary and legislative in safeguarding equal rights to every Indian.

HISTORY

Pre- Independence Period

Reservation in India has its roots from pre independent era when many princely states started reserving seats for Backward Classes in services and education to eradicate poverty and giving equal rights to every person. In 1902, Kohalpur's Maharaja namely Chatrapati Sahuji introduced 50% of reservation for Backward Classes to bring prosperity by eradicating poverty in Maharashtra. He also appealed to remove untouchability in the state.[270] Later on, Britishers also introduced some of act to uplift the minority group like Muslims etc. in the society though their main motivate behind this was just to enforce their policy named as Divide and Rule. Their main object was to create a feeling in the minds of Muslim that they are minor then Hindu which will create a dreadful feeling in the minds of Muslim and which help Britishers in taking the most advantages from India as people of different communities will be busy in their own fights or making them look powerful and will thought the India's Independence which was only possible due to unity among the citizens[271]. Various acts like Indian Councils Act, 1909, Government of India Act, 1919, etc. Indian Councils Act, 1909 was also known as Morley-Minto Reforms. This act gave Muslim community which was a minority a reservation in the legislative council. Earlier there were three categories namely - general, special and chamber of commerce, but now a new community was added namely Muslims[272]. Government of India Act gave reservation to backward classes who were not able to vote as they were not able to pay taxes and many other rights from which there were

[267]AIR 1993 SC 477
[268] AIR 1963 SC 649
[269] AIR 1951 SC 226
[270]Reservation in India, Wikipedia (12 February, 2019, at 11:28 (UTC)), https://en.wikipedia.org/wiki/Reservation_in_India.
[271]Rajesh Punia, Reservation-Changing Aspect in Modern Times, Legal Service India http://www.legalserviceindia.com/articles/resmod.htm.
[272]Indian Council Act (1909).

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deprived off.[273] Many princely states like Madras etc. also started giving reservation to backward classes.

Post-Independence Period

After India's Independence due to the efforts of Dr. B. R. Ambedkar, who was one of the founder of Constitution of India reservation was secured to the weaker section of India. The Constitution treats all persons equally and thereby prohibits any discrimination against any person due to race, caste, sex etc. Article 15 of the constitution prohibits any kind of discrimination and its Clause 4 specially states that special provision should be made for educationally and socially backward classes.[274] Article 16 specially deals with equality in government jobs and its Clause 4 gives the state right to make reservations for the underprivileged section in government jobs. Article 17 abolishes untouchability and many more Article 14, 21, 30, 39-A, 45, 46, 330-342 of the Indian Constitution removes any kind of discrimination against weaker section of the society and helps in upliftment of these section of the society. This will help in upliftment of the weaker section of the society. In 1979 Mandal Commission was formed to verify the count of Backward Classes, so that a percentage should be reserved and after the finding the percentage reserved was increased from 27% to 49%.[275] Also, acts like Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989, Central Educational Institutions (Reservation in Admission) Act 2006, Scheduled caste and many more acts were introduced.

LEGAL ASPECT

Our law makers have abundant the citizens with lots of articles and acts which has helped in giving a helping hand in protecting the rights of Weaker Section of India. The principle of equality is meaningful only if all the citizens enjoy equal rights and makes special reservation for those who unable to enjoy these rights, so that they are not deprived with any of rights. Some of the rights are mentioned below:

[273] Govt. of India (1919).
[274] INDIAN CONST. art. 15.
[275] Sujay_Ilnu, Reservation & principle of equality, Legal Service India, http://www.legalservicesindia.com/article/479/Reservation-&-principle-of-equality.html.

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Constitutional Rights

Article 15

This article prohibits any type of discrimination on the bases of caste, race, sex, religion or place of birth and its clauses deal with these things except for the clause 4 of this article which specially deals with reserving seats in educational institution whether they are aided or unaided by the Central Government for the suppressed and depressed sections. This clause was added in 1951 after the 1st amendment in the Constitution of India as result of State of Madras vs. Champakam Dorairajan. Further, in 2006 when 93th Amendment was made in the Indian Constitution one more clause was added clause 5 which gives State power to make special provision for safeguarding the backward classes in the society and in 2019 after 124th Amendment another clause has been added which provides 10% reservation in higher education to economically weaker section in the general category too.[276]

Article 16

This article describes that every person should get equal status at the workplace irrespective of its sex, caste, color, etc. Main articles which deal with reservation are Clause 3 which gives a parliament a right to make reservation on the basis of the resident in public employment with the State or Union Territory. This is an exception to Clause 2 of the article. Clause 4 empowers the state to make reservation in public employment for post for backward classes of the society and after 77th Amendment, clause 4A was included which states that State has power to make provision for reserving the seat in the government offices for SCs and STs, if the State thinks it is adequate to do so. Further, clause 4B which was added in 81st Amendment ends 50% limit for STs, SCs and OBCs with are not filled due to lack of eligible candidates. In 2019 through 124th Amendment a new clause is added which states that 10% of seats should be reserved for backward classes whose total family income is below 6 lakhs rupees and every category is included in it.[277]

[276] INDIAN CONST. art. 15.
[277] INDIAN CONST. art. 16.

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Article 17

It deals with abolition of untouchability which was prevailing in India. It is considered as an offence under law. Though untouchability is neither defined in the act nor in the Indian Constitution, but in normal sense it's a practice of depriving basic civil rights to backward classes of the society.[278] As per Mysore High Court this is described as practice as it had developed historically.[279]

Article 30

It states that no person or State can discriminate any minor based upon his/her language or religious to administer or establish an educational institution. The State should not hesitate in granting aid to the property own or administer by minor. After the 45th amendment in the constitution now, while making necessary law relating to this property may fix an amount or determine any such which does not violates rights guaranteed under this clause.[280]

Article 39A

This article of the Indian Constitution deals with legal aid which is being provided to economically backward classes to give equal justice to every person in India. This was earlier a Directive Principle of State, but now it is included in Article 21 of the Indian Constitution and is now treated as a Fundamental Right. As per this article poor and backward classes who are not able to afford a lawyer are provided lawyer from the State. The crucial words are to provide free legal aid "by suitable legislation or by schemes."[281]

Article 46

This article states that the state should protect and promote educational and economical interest of the depressed section of the society by taking special care of them. This article particularly deals with Scheduled Castes (SC) and Scheduled Tribes (ST). Its aim is to create equality in society by giving special care to the depressed section, but goes give a person right to get promotion on the basis of Article 16 read with Article 46 neglecting the eligible

[278] INDIAN CONST. art. 17.
[279] Devarajjah vs Padmanna, AIR 1958 Mys 84.
[280] INDIAN CONST. art. 30.
[281] INDIAN CONST. art. 39A.

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employees.[282] Earlier, in this section SC of Hinduism and some of Sikhism were included in the list. In 1956 all SC practicing Sikhism were included and later on, in the year 1990 SC practicing Buddhism were also included.[283] In 2007, Central Educational Institutions (Reservation in Admission) Act was established to promote this article.

Article 330-342

These sections deal with reservation related to Scheduled Castes (SC), Scheduled Tribes (ST) and Anglo-Indians. These are included in Part 16 of the Indian Constitution. Article 330 to 333 deals with reservation of seats in Legislative and State Assemblies respectively for Scheduled Tribes, Scheduled Castes and Anglo Indians. Article 332 was later in 1987 amended and Scheduled Tribes of Mizoram, Meghalaya, Nagaland and Arunachal Pradesh were included. Article 334 deals with conditions relating to ceasement or continuity of reserved seats. Article 335 of the Indian Constitution provides that in appointment of SCs and STs for the posts and services, if any SCs and STs complains anything regarding its rights, etc then that complain should taken into consideration and with consistency. Further, Article 336 and 337 deals with special provisions relating to Anglo-Indian community, whereas, Article 338 to 340 deals with the provisions relating to appointment and formation and functioning of National Commission for Scheduled Castes and Scheduled Tribes. Lastly, Article 341 and 342 defines Scheduled Castes and Scheduled Tribes.[284]

LATEST AMENDMENT RELATING TO RESERVATION (124TH AMENDMENT)

An amendment was being bought in the Constitution of India in January 2019, which is the 124th amendment. The amendment basically concentrates on the Article 15 & 16 of Indian Constitution, regarding reservation rights and criteria. The bill was passed by both the houses and interestingly no one opposed it except 3 members.

The rule laid down under this law is about specifying the criteria upto which reservation should to given to a person or who is eligible to get reservation in India. The method prescribed under this law is to calculate the annual income of the person's family which must be below 6 lakhs and this needs to be verified by the income tax department. Also, the earlier

[282] INDIAN CONST. art. 46.
[283] Lingam Praneeth, Reservation System in India, Caste System in India, http://hscaste.blogspot.com/p/blog-page.html?m=1
[284] INDIAN CONST. art. 330- 342.

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given reservations are not cancelled nor challenged, but it has been enhanced further, so as to avoid the misuse of law and legal proceedings, which will result in non corrupt departments.

Whereas, there is one more additional amendment regarding reservation of posts in the departments which must not exceed 10% (Article 16) and same is in the educational institution also (Article 15) and it has been made clear in the amendment under Article 15 that states are being given enough authority and power to create better opportunities for the economically weaker sections of the country.[285]

VARIOUS ACTS

1. The Protection of Civil Rights Act, 1955

This act was enacted as Untouchability (Offences) Act in 1955 which was later amended in 1976, in order to make this act more effective in abolition of untouchability and was named as Protection of Civil Rights Act. Under Section 3 of punishment for stopping a person from going to any religious place is defined.[286] Further, Section 4 and 5 deals with the punishment for stopping a person treated as untouchable to enter any social place like restaurants, hospitals, etc.[287] Section 6 and 7 deals with punishment for trading of goods and services and other offences related to untouchability.[288] Further, penalties, jurisdiction of civil court and other offences are defined. The punishment defined in this act is imprisonment for a period not less than one month and not more than six months and also fine which can be extend to five hundred rupees.

2. Scheduled Castes and Schedule Tribes (Prevention Of Atrocities) Act, 1989

The act is commonly known as Prevention of Atrocities Act or Atrocities Act. Its main objective was to give freedom and let these community live in society with dignity and self-esteem and without fear or violence or suppression from the dominant castes. The act was

[285] Aditya AK, 124th Constitutional Amendment Bill: Who can avail 10% reservation?, Bar and Bench (January 8 2019), https://barandbench.com/124th-constitutional-amendment-bill-who-can-avail-10-reservation/.
[286] The Protection of Civil Rights Act § 3 (1955).
[287] The Protection of Civil Rights Act § 4-5 (1955).
[288] The Protection of Civil Rights Act § 6-7 (1955).

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implemented by the Parliament after repeated complaints being received by the Police Officials all over the country due to unawareness of legal prospectus provided for them under Indian Constitution. Also, the concept of untouchability in the society was prevailing and followed by the number of societies. Furthermore, going more deep into the act there are a total of 23 Sections are being given to protect these communities from all atrocities faced by them. To safeguard the provisions of Section 18, a Section 18A has been inserted to clarify that before any filing or registration of FIR no police officer is required to take prior permissions of any of the authority to arrest that person against whom any complaint or accusations are being made as well as no procedure is required to arrest that person against whom such accusations are being made either under Section 438 of the Code of Criminal Procedure or under this Act against the case registered under this Act.[289]

3. CENTRAL EDUCATIONAL INSTITUTIONS (RESERVATION IN ADMISSION) ACT, 2006

The act was enacted on 2006 and came into force on 3 January 2007. The basic aim of this act is to establish a reservation based system in the educational institutes which are aided or maintained by the Central Government. Scheduled Castes (SC), Scheduled Tribes (ST) and other backward classes (OBCs) are given reservation under this act in the educational institutions. Section 3 of this act defines the percentage of reservation to be provided to SC, ST, and OBCs. It also states that seats reserved including SC, ST and OBCs shall not be more than fifty percent. This category was setup after the amendment in 2012.[290] Further, Section 4 states that in some educational institutions like institutions of excellence, minority educational institution, post-doctoral level course, etc, no reservation is given to any backward classes.[291] Section 5 deals with increasing of seats in these institutions for special reasons[292] and Section 6 enforced the above-mentioned section from calendar year 2008.[293]

[289] Scheduled Castes and Scheduled Tribes (Prevention Atrocities) Act § 18A (1986).
[290] Central Educational Institutions (Reservation in Admission) § 3 (2016).
[291] Central Educational Institutions (Reservation in Admission) § 4 (2016).
[292] Central Educational Institutions (Reservation in Admission) § 5 (2016).
[293] Central Educational Institutions (Reservation in Admission) § 6 (2016).

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JUDICIAL ASPECT

1. Indra sawhney vs. Union of India and others [Mandal Commission Case][294]

The case is regarding reservation system in Indian Constitution. It was filed as no proper guidelines were laid down in context to provide or categorize a community or society or persons as backward. Furthermore, the case basically focuses on the discrimination being going on in the States or any other department on the basis of caste, sex, religion, etc. The present petitions were being filed under Article 32 of the Indian Constitution challenging the validity of Articles 15(4), 16(1), 16(2), 16(4), 340 of the Indian Constitution. After filing of these petitions a committee was being created by the order of Apex Court so as to get a detailed report of the societal discriminations and look into the matter very seriously as the matter was to affect a number of communities.

The report was duly submitted by the committee in the Apex Court, the case was referred to a larger bench so as to understand the consequences and finally the matter was resolved by a constitution bench of 13 Judges. The court found it relevant to point out that there have been no guidelines for the reservations in institutions or departments as well as for the reserved communities or societies. Also, the report has shown a positive effect towards the discrimination done in the nation; hence the court decided that there needs to be specific rules and regulations to govern these reservations. One of the most important guideline in this case was that the reservation need not cross the limit of 50% in any area and all those who have converted their religions are not allowed to any of the reservation under Constitution of India. If in case any complaint regarding discrimination is received by legal department of the Government appropriate and necessary actions may be taken against that person.

A brilliant clause was included while passing this judgment that the creamy layer of all citizens in these reserve categories must be removed from all reservation on the basis of their wealth and property. Also, in this only case the Hon'ble Supreme Court overruled its own judgment in the case of Devadasan's that the carry forward rule is only valid if it does not result in breach of 50% rule.

2. M. R. Balaji and others vs. State of Mysore[295]

[294] AIR 1993 SC 477.
[295] AIR 1963 SC 649.

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The brief facts of this case are that the petitions were being filed by the aggrieved persons, in order to get relieved against the impugned order passed by the respondents regarding reservation of seats in the educational institutions for the SC and ST i.e., 15% and 3% respectively. The order passed by the state on the 26th July 1958, was that all the communities, except the Brahmin community, fell within the definition of educationally and socially Backward Classes and Scheduled Castes and Tribes, and provided for the said communities reservation of 75% of seats in educational institutions in the 50% reserved seats allotted or specified by the Central Government. The order passed by the State Government in regard to the reservation was that only those persons whose numbers are below required criteria are considered to be backward and given reservation, the power exercised by the State Government is under Article 15(4) of the Indian Constitution against which the petitioners filed a petition in the Apex Court regarding the infringement of reservation rights and also to issue a writ of mandamus against the state and respective respondents that they are infringing the Fundamental Rights of the Citizens which are being provided under Part III of the Constitution of India.

The petitions filed were allowed by the Apex Court under Article 32 of the Constitution of India on the grounds that the order passed by the State as well as Hon'ble High Court were violating the basic principle of Fundamental Rights available with the citizens of India in their impugned order. After hearing the matter before the DV bench comprising of 7 Judges, it was held that the orders passed till now are quashed and hence a new committee is to be formed into the matter and needs to submit it reports within a period of 3-5 months after passing this order and after submitting the report it was found that the petitioners were entitled for a seat according to the order passed by the State, but they are not given on the grounds that the petitioners are not of backward class, as they have forged their documents whereas the report revealed that the documents shown by the petitioners are true and made by the government authorities. The court further held that the report is enough to give relevance and explain of each and everything and we are of opinion that the Central Government must pass relevant orders to control the situation and establish educational standards once again in the society and Central Government is guided to keep a check on all the activities going on in a State.

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3. The State of Madras vs. Smt. Champakam Dorairajan[296]

This petition was filed against the order passed by the State Government regarding reservation of Educational Seats for backward classes in Engineering and Medical Colleges in the state. The order so passed was for the purpose of helping backward classes to grow more. Also, the procedure followed by the State at the time of admission was on the basis of caste system. The main backlog of the order was its implementation, as six petitioners in this case were of reserved categories, but were not given seats under the order so passed. Later, the order was challenged in the court by the other petitioners, the situation of these petitioners were completely overlooked by the High Court of Madras and upheld the order passed by the State.

The present petition was filed to check the validity of the order passed by the State as well as High Court, on the merits of the case the petition was allowed in this case. Furthermore, the Central Government was ordered to form a committee and submits its report regarding education system in the State within a period of six months. After submission of report, it was found out that the order passed was to give undue advantages to certain communities. The facts and submissions of the commission was recorded in the court and judgment was passed, in which it was clearly stated that the State Government can make changes in reservation of seats in educational institutions after seeking permission from the Central Government but only to the extent that other rules and regulations are not affected. However, all the State Governments are being given the authority to decide on certain number of seats which are being allotted to the State by the Central Government. Further, in addition to this the Central Government is requested to look into the matters of reservations and take appropriate decisions in maintaining educational standards in the whole nation for the betterment of society.

CONCLUSION

Reservation System was great initiative taken by our law makers for creating equality in society by treating every person equal with the help of various articles like article 14, 15, 16, 17, etc and sections in various acts like Section 4-7 of Protection of Civil Rights, 23 sections of Scheduled Castes And Schedule Tribes (Prevention Of Atrocities) Act etc. Furthermore,

[296] AIR 1951 SC 226.

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there are various judgments which have helped in securing equal rights to every citizen by uplifting the depressed section which has helped them in enjoying equal rights as that of upper castes. Reservation system though is criticized by some person due to its misuse, but judiciary through many landmark cases like Indra Sahwney case, Balaji case and other cases have stopped these kinds of misuse. Not only Judiciary but also Legislation is making new amendments in the Constitution of India like the latest amendment namely; 124th Amendment has ensure 10% of reservation for economically backward classes whose family income is below 6 lakhs rupees and State can also make any policy for the upliftment of depressed and suppressed section in the society.

Judge Lauterpacht of the International Court of Justice once said describing equality "*The claims of equality before the law is in substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all liberties*." Reservation is one such tool to achieve equality in the country.

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LGBT RIGHTS: IN THE DARK AGE OF REASON

-Shilpi Sinha & Surbhit Awasthi

INTRODUCTION

LGBT is the code word for Lesbian, Gay, Bisexual, and Transgender. Initially, this community was called Gay Community, But it was not sufficient to include the ones who are different from normal human beings altogether in the gay community as it refers only to men.[297] So, the abbreviation LGBT was introduced in the mid-1980s,

These people have different sexual orientation than a normal person where sexual orientation generally includes sexual fantasies, sexual attraction, sexual behaviour0, social and lifestyle preferences and self-identification.[298] The term "Gay" traditionally was used to refer to the people attracted to people of the same gender and be in a relationship with same gender people, But the lesbians, trans genders, and bisexuals are not included in the gay community.[299] A lesbian generally refers to women who are sexually attracted to women only, They are like gay people only but only men are included in gay whereas only such women are called lesbians.[300] They are not at all attracted to opposite genders and A bisexual person is one who is sexual, romantically and emotionally attracted to both the sexes, They are not only attracted to one but finds a connection in both the genders.[301] Transgender is an umbrella term used to portray those whose gender identity 'differs from that usually associated with their birth sex and Not everyone whose appearance or behaviour is gender-atypical will identify as a transgender person.[302] Many transgender people live part-time or full-time in another gender. Transgender people can identify as transsexual, transvestite or another gender identity.[303]

[297] Ananya Das,Analysis of LGBT rights in India, National University of Study and Research in Law, Ranchi, Jharkhand.
[298] Ibid
[299] Supra Note 1.
[300] Supra Note 1.
[301]https://www.ijernd.com/manuscripts/v1i2/V1I2-1140.pdf
[302] Ibid.
[303] Supra Note 5.

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The LGBT face innumerable difficulties in the society where the only accepted orientation is heterosexuality and homosexuality is regarded as abnormal, Abuse is their daily routine and faced by them almost every day.[304] They are more likely to experience intolerance, discrimination, harassment, and threat of violence due to their sexual orientation than those that identify themselves as heterosexual and It is mainly due to homophobia.[305] They face inequality and violence at every place around the world, They face torture from people who mock at them and make them realize that they are different from others. It's just because of who they are and how they look.[306]

ARGUMENTS FROM THE OPPOSITE SIDE

The people who do not support same sex relationships and are not ready to accept or recognise their rights often give very vague arguments. Some of them are:-

1. Homosexual couples using 'in vitro fertilization' (IVF) or surrogate mothers for procreation of children and deliberately create a class of children who will live apart from their mother or father.

2. If same-sex civil marriage becomes common, most same-sex couples with children would be lesbian couples. This would mean that we would have yet more children beingraised apart from fathers. Among other things, we know that fathers excel in reducing anti-social behaviour and delinquency in boys and sexual activity in girls.

3. If homosexual civil marriage is legalized, households deny children their mother. Among other things, mothers excel in providing children with emotional security and in physical and emotional cues of infants. Obviously, they also give their daughters unique counsel as they confront the physical, emotional, and social challenges associated with puberty.

4. Judith Stacey-- a sociologist and an advocate for same-sex civil marriage--reviewed the literature on child outcomes and found the following: "lesbian parenting may free daughters and sons from a broad but uneven range of traditional gender prescriptions. "Her conclusions

[304] Supra Note 1.
[305] https://www.abc.net.au/news/2017-09-01/what-does-human-rights-law-say-about-marriage-and-equality/8856552
[306] Ibid.

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based on studies show that sons of lesbians are less masculine and that daughters of lesbians are more masculine.

5. One of the biggest threats that same-sex "marriage" poses to marriage is that it would probably undercut the norm of sexual fidelity in marriage. In the first edition of his booking defence of same-sex marriage, Virtually Normal, homosexual commentator wrote: "There is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman." Of course, this line of thinking--were it incorporated into marriage and telegraphed to the public in

sitcoms, magazines, and other mass media--would do enormous harm to the norm of sexual fidelity in marriage.

6. Same-sex "marriage" would further isolate marriage from its procreative purpose. Traditionally, marriage and procreation have been tightly connected to one another. Indeed, from a sociological perspective, the primary purpose that marriage serves is to secure a mother and father for each child who is born into a society. Now, however, many Westerners see marriage in primarily emotional terms. Among other things, the danger with this mentality is that it fosters an anti-nativist mind-set that fuels population decline, which in turn puts tremendous social, political, and economic strains on the larger society. Same-sex marriage would only further undercut the procreative norm long associated with marriage.

7. Same-sex "marriage" would further diminish the expectation of paternal commitment. Marriages thrive when spouses specialize in gender-typical roles. If same-sex civil marriage is institutionalized, our society would take yet another step down the road of de-gendering marriage. There would be more use of gender-neutral language like “partners" and--more importantly--more social and cultural pressures to neuter our thinking and our behaviours in marriage.

INTERNATIONAL STAND

A total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognise partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt

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children.[307] Even the United Kingdom now outlaws discrimination in employment, education, social protection and housing on the ground of sexual orientation. Marriage between same-sex couples have been also been recognised in England and Wales.[308]In July 2005, Spain[309] and Canada[310] became respectively the third and the fourth country in the world, after the Netherlands[311] and Belgium[312], to legalize same-sex marriages countrywide. After them, Argentina, Iceland, Norway, Portugal, South Africa[313], and Sweden followed. In the U.S. and Mexico, where these matters are not decided by the federal government, some states changed their legislation to allow same-sex marriage.[314] Further countries like France and Germany opened the way to the registration of homosexual unions in the context of registered cohabiting partnerships.[315]

On the other hand, Same-sex sexual activity is a crime in 72 countries, and can get you a death sentence in eight countries, including Iran, Saudi Arabia, Sudan and Yemen. And even where these restrictive laws are not actually enforced, their very existence reinforces prejudice against LGBTI people, leaving them feeling like they have no protection against harassment, blackmail and violence.[316]

WHY ARE LGBT RIGHTS NECESSARY?

1. Everyone should be able to feel proud of who they are and who they love- We all have the right to express ourselves freely. Article 19 of the Universal Declaration of Human

[307] Benjamin J. Sadock et al., Kaplan and Sadock's Comprehensive Textbook of Psychiatry (9 th ed., 2009), at pp. 2060-89. Navtej Singh Johar and Ors. vs. Union of India (UOI) and Ors. (06.09.2018 - SC) : MANU/SC/0947/2018
[308]Navtej Singh Johar v. UOI
[309] Ley 13 of 1 July 2005; Tribunal Constitutional de 2012 Espana, decision no. 198/2012, ˜ 6 November 2012
[310] Civil Marriage Act, S.C. 2005, c. 33; Reference re Same-Sex Court about the proposed Marriage, [2004] 3 S.C.R. 698 (Can.).
[311] Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex, Stb. 2001,
[312]Loiowrant le marriage a des ` personnes de meme sexe
[313] Minister of Home Affairs v. Fourie responded to by the 2006 (1) SA 524 (CC) (S. Afr.); Act 17 of 2006 (S. laws, but no amendment of Afr.) (no amendment to marriage laws Marriage Act 1961 or Recognition of Customary Marriages Act 1998)
[314]https://iussp.org/sites/default/files/event_call_for_papers/IUSSP_Cortina_Laplante_Fostik_Castro-Martin.pdf
[315]https://iussp.org/sites/default/files/event_call_for_papers/IUSSP_Cortina_Laplante_Fostik_Castro-Martin.pdf
[316]https://www.amnesty.org/en/what-we-do/discrimination/lgbt-rights/

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Rights (which set out for the first time the rights we're all entitled to) protects everyone's right to express themselves freely.[317]

2. Bringing an end to homophobia and transphobia will save lives- Anti-LGBTI harassment puts LGBTI identifying people at a heightened risk of physical and psychological harm. Everyone has the right to life, freedom and safety.[318]

3. By embracing LGBTI people and understanding their identities, we can learn how to remove many of the limitations imposed by gender stereotypes- These stereotypes are damaging across society, defining and limiting how people are expected to live their live and Removing them sets everyone free to achieve their full potential, without discriminatory social constraints.[319]

4. LGBTI people, especially transgender and gender non-conforming people, are often at risk of economic and social exclusion- Fighting for laws that are more inclusive of people of regardless of their sexual orientation and gender identity will allow them access to their rights to health, education, housing and employment.[320]

NAVTEJ SINGH JOHAR V. UOI: CASE SUMMARY AND OUTCOME

The Supreme Court of India unanimously held that Section 377 of the Indian Penal Code, 1860, which criminalized 'carnal intercourse against the order of nature', was unconstitutional in so far as it criminalized consensual sexual conduct between adults of the same sex; The petition, filed by dancer Navtej Singh Johar, challenged Section 377 of the Penal Code on the ground that it violated the constitutional rights to privacy, freedom of expression, equality, human dignity and protection from discrimination.[321] The Court reasoned that discrimination on the basis of sexual orientation was violative of the right to equality, that criminalizing consensual sex between adults in private was violative of the right to privacy, that sexual orientation forms an inherent part of self-identity and denying the

[317] Supra Note 17.
[318] Supra Note 18.
[319] https://www.theguardian.com/world/lgbt-rights
[320] Ibid.
[321] https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/

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same would be violative of the right to life, and that fundamental rights cannot be denied on the ground that they only affect a minuscule section of the population.[322]

Facts

The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860 (Section 377) insofar as it applied to the consensual sexual conduct of adults of the same sex in private; Section 377 was titled 'Unnatural Offences' and stated 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 a fine."

The issue in the case originated in 2009 when the Delhi High Court, in the case of *Naz Foundation v. Govt. of N.C.T. of Delhi*, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex.[323] In 2014, a two-judge bench of the Supreme Court, in the case of *Suresh Kumar Koushal v. Naz Foundation*, overturned the Delhi HC decision and granted Section 377 "the stamp of approval" When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge bench of the Supreme Court opined that a larger bench must answer the issues raised. As a result, a five-judge bench heard the matter.[324]

The Petitioner in the present case, Navtej Singh Johar, a dancer who identified as part of the LGBT community, filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed by Art. 21 of the Constitution of India, Furthermore, he sought a declaration that Section 377 was unconstitutional.[325] The Petitioner also argued that Section 377 was violative of Art. 14 of the Constitution (Right to Equality Before the Law) because it was vague in the sense that it did not define "carnal intercourse against the order of nature". And that There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex.[326] Among other things, the Petitioner further argued that (i) Section 377 was violative of Art. 15 of the Constitution (Protection from Discrimination) since it discriminated on the basis of the sex of a person's sexual partner, (ii)

[322] Ibid.
[323] Supra Note 25.
[324] http://altlawforum.org/wp-content/uploads/2018/09/RightToLove_PDFVersion-1.pdf
[325] Ibid.
[326] Supra Note 28.

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Section 377 had a "chilling effect" on Article 19 (Freedom of Expression) since it denied the right to express one's sexual identity through speech and choice of romantic/sexual partner, and (iii) Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of "a certain choice or manner of living.[327]

The Respondent in the case was the Union of India. Along with the Petitioner and Respondent, certain non-governmental organizations, religious bodies and other representative bodies also filed applications to intervene in the case.

The Union of India submitted that it left the question of the constitutional validity of Section 377 (as it applied to consenting adults of the same sex) to the "wisdom of the Court". Some interveners argued against the Petitioner, submitting that the right to privacy was not unbridled, that such acts were derogatory to the "constitutional concept of dignity", that such acts would increase the prevalence of HIV/AIDS in society, and that declaring Section 377 unconstitutional would be detrimental to the institution of marriage and that it may violate Art. 25 of the Constitution (Freedom of Conscience and Propagation of Religion).[328]

Decision Overview

The five-judge bench of the Indian Supreme Court (Court) unanimously held that Section 377 of the Indian Penal Code, 1860 (Section 377), insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional, With this, the Court overruled its decision in *Suresh Koushal v. Naz Foundation* that had upheld the constitutionality of Section 377.[329]

The Court relied upon its decision in *National Legal Services Authority v. Union of India* to reiterate that gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity, The Court also relied upon its decision in *K.S. Puttaswamy v. Union of India* and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights.[330] It held that Section 377 amounts to an unreasonable restriction on the right to freedom to expression since consensual carnal intercourse in private "does not in any way harm public decency or morality" and if it continues to be on the statute books, it would cause a chilling

[327] Supra Note 25.
[328] https://www.gwilr.org/wordpress/wp-content/uploads/2017/09/IRL-Vol-49.4_Oscar-Roos-Anista-Mackay.pdf
[329] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[330] Ibid.

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effect that would "violate the privacy right under Art. 19(1)(a).[331]The Court affirmed that that intimacy between consenting adults of the same sex is beyond the legitimate interests of the state and sodomy laws violate the right to equality under Art. 14 and Art. 15 of the Constitution by targeting a segment of the population for their sexual orientation, Further, the Court also relied upon its decisions in *Shafin Jahan v. Asokan K.M.*and *Shakti Vahini v. Union of India* to reaffirm that an adult's right to choose a life partner of his/her choiceis a facet of individual liberty.[332]

J. Chandrachud in his opinion recognized that though Section 377 was facially neutral, its effect was to efface identities of the LGBT community; He stated that, if Section 377 continues to prevail, the LGBT community will be marginalized from health services and the prevalence of HIV will exacerbate.[333]He stated that not only must the law not discriminate against same-sex relationships, it must take positive steps to achieve equal protection and to grant the community equal citizenship in all its manifestations.[334]

CONCLUSION

People around the world face violence and inequality—and sometimes torture, even execution—because of who they love, how they look, or who they are; Sexual orientation and gender identity are integral aspects of our selves and should never lead to discrimination or abuse. [335]

LGBTI advocates have overcome enormous challenges and risks to their own personal safety to call out abuses of the human rights of LGBTI people, and force changes to laws that discriminate against them.[336] From the introduction of the concept of Pride and global recognition days like the International Day against Homophobia, Transphobia and Biphobia .LGBTI people are forging alliances and promoting pride in who they are worldwide. The collective efforts of activist organisations around the world has paid real dividends. Today, at least 43 countries recognise homophobic crimes as a type of hate crime. Its time to change this status worldwide and recognise the rights of each individual.

[331]Navtej Singh Johar v. UOI.
[332] Ibid.
[333] Supra Note 25.
[334] Supra Note 25.
[335]https://www.hrw.org/topic/lgbt-rights
[336] Ibid

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CYBER CRIMES: UNDERSTANDING THE VEXING WEB OF THE WORLD WIDE WEB

-Prerna Deep

ABSTRACT

With new modes of correspondence, business and societal exercises, development of modern and myriad of cybercrimes are unavoidable. Computers with the guide of the Internet have today turned into the most prevailing vehicle of correspondence, data, commerce, and stimulation. This paper covers the understanding of cybercrimes with reference to domestic legal framework and international position. The paper also delves into impacts and effects of the cybercrimes. This paper also examines types of offenders and types of crimes. Expanding utilization of computer and data innovation has left every single circle of private existence of a person in the general population space which is now and again mishandled by the lawbreakers for their own increases. Lastly, it diverts the reader to the suggestions and conclusion keeping the above context in mind.

INTRODUCTION

Cybercrime is a conventional term that alludes to every criminal action done utilizing the mode of computers, the Internet, cyberspace, and the overall web.[337] The computer may have been utilized in the commission of a crime, or it might be the objective. Net crime is a criminal misuse of the Internet.

The expression "cyberspace" signifies the circle where the correspondence takes place by means of the web. At the end of the day, it is a world made by the web. Cyberspace can be characterized as pursues: *"a global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the Internet,*

[337] Moore, R., Cyber crime: Investigating High-Technology Computer Crime, Cleveland, Mississippi: Anderson Publishing (2005).

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telecommunications networks, computer systems, and embedded processors and controllers."[338]

Cybercrime profoundly encroaches upon each circle of a person's life. The dissemination and expansion of the medium have had a gigantic effect in the manner in which individuals accumulate information and convey. Noteworthy accomplishments in the Information Technology division is extremely a matter of pride for the worldwide networks and India however the related issue that is causing genuine concern is the quick rise in cybercrimes. As the new universe of web extends its approach it additionally has left the general public powerless against an out and out a new arrangement of crimes.

PECULIAR CHARACTERISTICS OF CYBER CRIME

Cybercrimes forces the absence of appreciation for jurisdictional limits, receptiveness to investment, the potential for secrecy of individuals from the virtual network, and its evident monetary proficiency which further makes leaps in successfully controlling the equivalent. Some of the peculiar features of cybercrime might be distinguished as under:

a. The anonymity of the System Used

A system client/surfer can without much of a stretch cover his/her personality. This not just makes the undertaking of distinguishing PC crimes and PC crooks progressively troublesome however it additionally confounds the assignment of accumulation of proof and its resulting confirmation at the trail. Loss of proof is a normal problem as the removed information is routinely decimated.

b. Altered nature of the crime

The crimes perpetrated in the physical world are not the same as the crimes carried out in the virtual space. The laws pertaining to conventional crime are not appropriate to cyber-crimes. For instance, challenges will emerge in the arraignment of people for the robbery of information since customary law/Indian Penal Code, 1860 requires confirmation of removing

[338]"Cybercrime." *The University of Alabama*, Department of Criminal Justice.

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of stolen property. It is beyond the realm of imagination to expect to give evidence of removing information if a robbery is committed through the web. Also, ideas of trespass and breaking in don't fit into the cyber world in light of the fact that there is no physical section into the PC and along these lines no criminal trespass can be perpetrated in cyberspace according to the definition under Indian Penal Code, 1860.

c. **No defined boundaries of cybercrimes**

Cyber-crimes are not constrained in national limits. These crimes might be carried out in numerous locales simultaneously. Abusive, malevolent, obscene material whenever posted on a site is available across the globe. It winds up troublesome to research and indict such offenses because of unavailable purview. It is said that a cybercriminal is here, there, anyplace, all over the place yet no defined place. In this manner, due to growing cyberspace, the regional limits are evaporating. The idea of the regional locale as visualized under Section 16 of the Civil Procedure Code, 1908 and Section 2 of the Indian Penal Code, 1860 is getting to be Irrelevant.

d. Simpler to store recovers exchange and erases information

Electronic information utilized in cyber-crimes is less expensive to create, less demanding to store, transmit and inevitably erase rapidly. For instance, a record containing slanderous or pornography material can be effectively and rapidly sent to any number of people simply sitting in a chamber with a tick of mouse. The entrance is less demanding too along these lines. In these conditions assignment of law, implementation turns out to be troublesome.

TYPES OF CYBER CRIMES

The Thirteenth United Nations Congress on the Prevention of Crime and Treatment of Offender[339] tended to the issues of crimes identified with computer systems, partitioned cybercrime into two classifications and characterized it as:

a. Cybercrime in a restricted sense (Computer crime) is illicit conduct coordinated by methods for electronic activities that objectives the security of computer frameworks and the information handled by them.

[339] *Report of the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice*. United Nations, 2015,

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b. Cybercrime in a more extensive sense (Computer related crime) is unlawful conduct perpetrated by methods for, or in connection to, a PC framework or system, including such crimes as illicit belonging and offering or conveying information by methods for a PC framework or system.

TYPES OF CYBER CRIMINALS

Some general categories of Cyber-criminals are referenced as beneath.

- Crackers: These people are resolved to making misfortune fulfill some reserved thought processes or only for the sake of entertainment. Numerous PC infection makers and wholesalers fall into this classification.
- Hackers: These people investigate others' PC frameworks for instruction, to clear something up, or to contend with their companions. They might endeavor to gain the utilization of an all the more dominant PC, gain regard from individual programmers, assemble notoriety, or addition acknowledgment as a specialist without formal training.
- Pranksters: These people execute traps on others. They, by and large, don't expect specific or durable damage.
- Career lawbreakers: These people procure part or the majority of their pay from crime, in spite of the fact that they Malcontents, addicts, and nonsensical and awkward individuals.
- Cyber psychological militants: There are numerous types of cyber fear based on oppression. Here and there it's a somewhat shrewd programmer breaking into a government site; different occasions it's only a gathering of similarly invested Internet clients who crash a site by flooding it with traffic. Regardless of how innocuous it might appear, it is as yet unlawful to those dependent on medications, liquor, rivalry, or consideration from others, to the criminally careless.
- Cyber bulls: Cyber tormenting is any badgering that happens by means of the Internet. Awful discussion posts, verbally abusing in talk rooms, posting counterfeit profiles on sites, and mean or savage email messages are all methods for cyber harassing.

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- Salami aggressors: Those assaults are utilized for the commission of money-related crimes. The key here is to make the change so irrelevant that in a solitary case it would go totally unnoticed for example a bank representative embeds a program into bank's servers, which deducts a little sum from the record of each client.

IMPACT OF CYBER CRIMES

Data fraud

Turning into the casualty of cybercrime can have long-lasting impacts on your life. One basic system con artists utilize is phishing, sending false messages indicating to originate from a bank or other money-related establishment asking for individual data. On the off chance that you hand over this data, it can enable the criminal to get to your bank and acknowledge accounts, just as open new records and annihilate your FICO score. This kind of harm can take months or even a very long time to fix, so ensuring your own data online is an essential ability to learn.

Security Costs

Digital culprits likewise center their assaults on organizations, both extensive and little. Programmers may endeavor to assume control organization servers to take data or utilize the machines for their very own motivations, expecting organizations to contract staff and refresh programming to keep interlopers out. As per EWeek, an overview of vast organizations found a normal consumption of $8.9 million every year on digital security, with 100 percent of firms reviewed detailing no less than one malware episode in the previous a year and 71 percent revealing the commandeering of organization PCs by pariahs.

Money related Losses

The generally financial misfortunes from digital wrongdoing can be huge. As purchasers get shrewd to customary roads of assault, digital culprits have grown new methods including cell phones and interpersonal organizations to keep their illegal additions streaming.

Cyber Theft

The digital wrongdoing of theft has effects affected the stimulation, music and programming ventures. Cases of harms are difficult to assess and significantly harder to check, with evaluations going generally from many millions to several billions of dollars for each year.

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Accordingly, copyright holders have campaigned for stricter laws against protected innovation burglary, bringing about laws like the Digital Millennium Copyright Act. These laws permit copyright holders to target record sharers and sue them for expansive entireties of cash to check the money related harm of their exercises on the web

Digital Bullying

Digital tormenting is a negative impact of online correspondence between youth. Casualties of digital harassing regularly experience gossipy tidbits and untruths spread on online informal communities. Menaces may post improper or humiliating photos of their exploited people. Another part of digital tormenting includes utilizing mean instant messages as a provocation. The National Crime Prevention Council expresses that digital harassing is an issue for practically 50% of American teenagers. In some outrageous cases, teenagers have accepted their very own lives as a consequence of digital tormenting.

EFFECT OF CYBER CRIME OVER BUSINESS

As indicated by the FBI and the Department of Justice, digital wrongdoing is on the ascent among American organizations, and it is costing them sincerely. Digital wrongdoing incorporates a bunch of naughty criminal practices intended to break an organization's PC security. The motivation behind the electronic break and enter can be to take the money related data of the business or its clients, to refuse assistance to the organization site or to introduce an infection that screens an organization's online movement later on.

Wrongdoing as an Evil Factor of Society

Notwithstanding crimeless society is fantasy, wrongdoing is a ubiquitous wonder, and it is a non-distinguishable piece of social presence. It should remember that the social worry for high wrongdoing rate isn't a direct result of its temperament, however, because of potential aggravation it causes to the general public. Moreover, a few people are casualties of wrongdoing in an increasingly explicit sense. The victims of wrongdoing may lose their esteem. Security, harmony, cash, and property are maybe essential qualities since they add as per the general inclination of numerous desires.

LEGAL PROTECTION IN INDIA

a. Traditional Laws

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So as to augment the extent of the pertinence of the arrangements of the Indian Penal Code in order to incorporate inside it offenses including electronic records, another Section 29A was embedded after Section 29, which peruses as pursues:

"29A: Electronic Record: The words "electronic record" shall have the meaning assigned to them in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000. The term "electronic record" as defined in Section 2(1) (t) of the Information Technology Act, 2000 means "data record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro-fiche".

Because of this change, every one of the offenses identified with archives additionally incorporates offenses identified with electronic records which are submitted through the web or cyberspace.

b. Cyber Laws

- Section 67A of the Information Technology Act, 2000 identifies with a part of cyberstalking crime. This section was included after the amendment in 2008. It expresses that if stalker endeavors to distribute any *"sexually explicit"* material in electronic structure i.e., through messages, messages or via web-based networking media then he will be liable of an offense under Section 67A of IT Act and will be rebuffed as needs are.
- Section 67B of Information Technology Act, 2000 is a recently embedded section. This section is recently introduced by Amendment Act 2008. The section centers on when a stalker targets children beneath the age of 18 years and distributes material in which youngsters are occupied with sexual exercises so as to threaten the kids.
- Section 66E of Information Technology Act, 2000 and Section 354C of Indian Penal Code manages *"voyeurism."* Section 66E peruses as pursues:

"Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished."[340]

[340] Information Technology Act, 2000, No. 21, Act of Parliament, 2000.

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INDIAN POSITION IN CYBER JURISDICTION

The primary issue of territorial purview has not been successfully tended to in Information Technology Act, 2000 or Information Technology Amendment Act, 2008. The different areas in which the matter of ward has been referenced are Sections 46, 48, 57 and 61 where the mediation process and the re-appraising system is referenced. Another area is section 80 that clarifies the intensity of the police to enter and lead hunt of an open spot in connection of digital wrongdoing and so forth. The digital violations are the wrongdoings that are submitted with the assistance of PCs and on the off chance that somebody hacks the mail record of an individual sitting in another state or nation, it will be hard to decide P.S. of which will take the comprehension of the offense. Many Police officers attempt to abstain from conceding objections of the injured individual in such cases because of the issue of Jurisdiction. Since the cybercrimes are not bound by as far as possible, there is a need to clear the issue of purview as what all are the important contemplations to be seen in such circumstances. Regulations are to be made regarding the cybercrimes which State will have the specialist to manage the instances of cybercrime.

The answer to the issue can be the removal course of action between the two individual nations. A removal plan is a course of action where the criminal is ousted to the nation where he has perpetrated the wrongdoing on the off chance that where such game plan exists between the two concerned nations. In this manner, in the event of digital stalking additionally, if there is a course of action between the nation to which the injured individual has a place and the nation to which the stalker has a place at that point there will be no such issue of authorization.

The fundamental issue emerges when laws of one nation are in a struggle with the laws of another nation. A circumstance may emerge where the lead of stalker might be punished in one nation however may not be viewed as wrongdoing in another nation. This is known as Jurisdictional Issue. In such cases, the issue of implementation additionally emerges. In such a circumstance, there is a need for participation between both nations. This is the place removal strategies come into the picture.

In India, the Information Technology Act gives the extraterritorial locale by the excellence of Section 75. This section clarifies that whether an offense is submitted outside or in India, the guilty party will be administered by the arrangements of Information Technology Act

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regardless of the reality whether he is a resident of India or not. Given such an offense identifies with the PC frameworks or system that is arranged in India. Hence, the arrangement given by Indian laws to the issue of implementation is constrained.

GLOBAL POSITION

The Convention on Cybercrime is the first global treaty looking to address cybercrime and Internet crimes by orchestrating national laws, enhancing analytical procedures and expanding collaboration among countries.[341] It was drawn up by the Council of Europe in Strasbourg with the dynamic support of the states like Canada, Japan, and the USA. The Convention and its Explanatory Report were embraced by the Committee of Ministers of the Council of Europe at its 109th Session on eighth November 2001. It was opened for a mark in Budapest, on 23rd November 2001 and it went into power on first July 2004.[342] As of 2 September 2006, 15 states had marked, confirmed and agreed to the convention; while a further 28 states had marked the same yet not sanctioned it.[343] On 1 March 2006, the Additional Protocol to the Convention on cybercrime came into power. Those States that have confirmed the convention were required to condemn the spread of supremacist and xenophobic material through computer frameworks, just as of bigot and xenophobic-propelled dangers and abuse.[344]

The Convention on cybercrime (a committee of Europe) is the main worldwide treaty on crimes perpetrated through the Internet and other PC systems, managing especially with encroachments of copyright, PC related extortion, pornography, and infringement of system security. It additionally contains a progression of forces and methodology, for example, the pursuit of PC systems and capture attempt. Its primary target, set out in the introduction, is to seek after a typical criminal strategy went for the assurance of society against cybercrime, particularly by receiving proper enactment and encouraging universal co-task. The accompanying offenses are characterized by the Convention: unlawful access, illicit capture attempt, information impedance, framework obstruction, abuse of gadgets, PC related

[341] Convention on Cybercrime, Budapest, 23 November 2001 on the website of the Council of Europe.

[342] Staff-The COE International Convention on Cybercrime before Its Entry into Force, UNESCO.ORG, January - March 2004.

[343] List of signatories and ratifications of the treaty, website of the Council of Europe.

[344] Frequently asked questions and answers Council of Europe Convention on Cybercrime by the United States Department of Justice.

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fabrication and related extortion, offenses identified with sex entertainment and offenses identified with copyright and neighboring rights. It additionally sets out such procedural law issues as assisted protection of putting away information, sped up conservation and halfway revelation of traffic information, creation request, pursuit, and seizure of PC information, constant accumulation of traffic information, and block attempt of substance information. In addition to this, the Convention contains an arrangement on a particular kind of trans outskirt access to put away PC information which does not need common support (with assent or where freely accessible) and accommodates the setting up of an all day, every day organize for guaranteeing expedient help among the Signatory Parties.

PREVENTION

1. Guard your information

Introduce a thorough security suite for every one of your gadgets and consistently refresh security patches.

2. Consider cell phones as scaled-down PCs

Versatile is the quickest developing focus for cybercriminals. Ensure your cell phones or tablets require security codes and avoid potential risk to guarantee your gadgets are secured against robbery, misfortune, and cybercrime.

3. Be careful in the cloud

You may have heard individuals discussing the Cloud. "The Cloud" is a system of servers that gives online support or empowering you to store, offer and access data. You might be as of now utilizing it on the off chance that you Instagram or Dropbox. It is extremely simple to utilize yet it likewise can open up different roads for digital offenders. Be cautious about who approaches your records, and utilize an answer with implicit security, if conceivable.

4. Spare delicate exchanges for secure associations

Take care with sharing individual data through the Internet, except if it is a safe association. Free or unbound Wi-Fi systems can make it simple for cheats to listen stealthily on your movement. Abstain from doing any touchy exchanges like managing an account or shopping while associated with these systems.

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When entering individual data into a site, ensure that the URL begins with "https://". The "s" means "secure" and implies that any data went into the site is encoded so that no one else can get to it.

RECOMMENDATIONS

Cyber jurisdiction is still in the beginning phase of improvement in law and a great deal should be done quickly here. Because of complex increment in monetary and different exercises in the cyber world, now and again illicit in nature, affecting pretty much every nation in reality, cyber jurisdictional issues should be dealt with in national laws just as consistency in laws should be achieved in such cases, and all the more essentially, not let the cyber culprits go unpunished because of expanding escape clauses in existing laws or because of nonappearance of laws by and large covering such issues both at the national just as universal dimensions. Because of deficiencies in national laws, regularly sensitive legitimate circumstances emerge in jurisdictional issues identified with the Internet and the national laws are discovered needs. Ordinarily, case law has appeared for individual ward a Court necessitates that a respondent must give more than simple openness to a Website or some kind of communication ought to have been there. Though, the Web maker or information supplier needs to agree to the law of the State client is found and ends up the subject of the client's state purview and law.

CONCLUSION

The cyber world is so tremendous, it covers nations and mainland’s, empowers one to contact the other within no time. With every one of the advantages it offers, the digital world represents certain dangers also. To control and combat with cyberspace offenses the police alone cannot have a significant effect. Awareness with respect to these digital laws must be made. Private and Non-Governmental Organizations must assume a functioning job in imparting this message to the majority. In addition, the legal executive will likewise need to assume a proactive job in settling cyber trails. A huge part of the legal system itself is most likely uninformed of digital laws and their suggestions. They should themselves consider the laws cautiously and viably uphold them. Co-appointment among the associations, police, and judiciary will make some effect and limit the wrongdoing rate.

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LOCAL SELF-GOVERNMENT AND VILLAGE PANCHAYAT IN INDIA

-Vivek Raj & Shivam Shukla

ABSTRACT

Local self-government, to borrow a phrase from Sydney Webb, is "as old as the hills". This can be exact for India than any other country of the world. There is sufficient evidence to establish the fact that the institution of local self-government is almost pre-historic, and the conception of local self-government is indigenous to the Indian soil. Panchayat have been the backbone of the Indian villages since the beginning of the recorded history. Panchayati Raj is a system of governance in which Gram Panchayats are the basic units of administration. Panchayati Raj Institutions (PRIs) have been involved in the programme implementation and they constitute the core of decentralized development of planning and its implementation. Panchayati Raj Institutions aim at translating the Gandhian dream of village self-governance (Gram Swaraj) and to become an effective tool of rural development and reconstruction. Since 1959, almost all rural development departments have been executing their programmes through PRIs. With the implementation of State Acts under the spirit of the 73rd Constitutional Amendment a clearcut role of Panchayati Raj institutions in rural development has been envisaged. Government of India and the different State Governments are now increasingly seeking the assistance of the Panchayati Raj Institutions in the implementation of various schemes as well as poverty alleviation programmes. This paper aims to highlight the system of Panchayati Raj system, role of Panchayati Raj institutions in the implementation of the government schemes for poverty alleviation and rural development, various government schemes, etc.

Keywords: backbone, effective governance, implementation, institutions, reconstruction.

INTRODUCTION

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The concept of Local Self- Government emerges from man's basic urge for liberty, the power to make decisions and to uplift the society as per the needs of the respective communities. Local Self- Governments are those bodies that look after the administration of an area or a small community such as a village, a town or a city. Local government is government at the village and district level. Local government is about government closest to the common people. Local government is about government that involves the day-to-day life and problems of ordinary citizens. Local government believes that local knowledge and local interest are essential ingredients for democratic decision making. They are also necessary for efficient and people-friendly administration. The advantage of local government is that it is so near the people. It is convenient for the people to approach the local government for solving their problems both quickly and with minimum cost[345]. Democracy is about meaningful participation. It is also about accountability. Strong and vibrant local governments ensure both active participation and purposeful accountability. It is necessary that in a democracy, tasks, which can be performed locally, should be left in the hands of the local people and their representatives. Common people are more familiar with their local government than with the government at the State or national level[346]. They are also more concerned with what local government does or has failed to do as it has a direct bearing and impact on Is it possible that we only had governments at the local level and a coordinating body at the national level? I think Mahatma Gandhi advocated some ideas along these lines. Strengthening local government is like strengthening democratic processes. According to V.V. Rao, Local Government is "that part of the government which deals mainly with local affairs, administered by authorities subordinate to the state government but elected independently of the state authority by the qualified residents"[347]. In simple language it may be said that a Local Government is a statutory authority in a specified local area having the power to raise revenue through taxes for the performance of local services like sanitation, education, water supply, etc. There are certain characteristics on which the system of Local Government is based. Some of its important characteristics are:[348]

[345] S.K.Dey, "Faith in Panchayati Raj", Kurukshetra, Vol.9, pp.4-16.
[346] K.S.V.Raman, "Will Panchayati Raj Come"? Kurukshetra, October 1962, p.46.
[347] Ursula K.Hicks, Development from Below, Clarandan Press, Oxford, 1961- p.487.
[348] Sivalings Prasad, Panchayats and Developments, Life and Light Publishers, New Delhi, 1980.

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- Local Area
- Local Authority
- Civic Amenities for Local Inhabitants: Local Autonomy
- Local Accountability
- Local Finance
- Local Participation
- Local Leadership
- Local Development

EVOLUTION OF PANCHAYATI RAJ

On 15 August 1947, India got an opportunity of redeeming the pledges made to the people during the long-drawn freedom movement. Among the first tasks that India had to assume was the formulation and execution of the first five year plan in the fifties. Post-Independence, the first major development programme launched in India was Community Development Programme in 1952. Core philosophy was overall development Programme in 1952. This programme was formulated to provide an administrative framework through which the government might reach to the district, tehsil / taluka and village level. All the districts of the country were divided into "Development Blocks" and a "Block Development Officer (BDO)" was made in charge of each block[349]. Below the BDO were appointed the workers called Village Level Workers (VLW) who were responsible to keep in touch with 10-12 villages. So, a nationwide structure was started to be created.

Balwant Rai Mehta Committee Report

Thousands of BDOs and VLW's were trained for the job of carrying out array of government programmes and make it possible to reach the government to villages. Top authority was "Community Development Organization" and a Community Development Research Center was created with best academic brains of the country at that time[350]. But this programme could not deliver the results. The programme became an overburden on the Government. In 1957, the Balvant Rai Mehta Committee was appointed to study the Community Development Programmes and National Extension Services Programme especially from the point of view of assessing the extent of people's participation and to recommend the creation

[349] Panchadass Mukherjee, Indian Constitutional Government, Calcutta: Spink and Co., 1915, Vol.1, p.731.
[350] Balwant rai Mehta, Panchayati Raj and Democracy, Kurukshetra, October, T964,~p.ST.

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of the institutions through which such participation can be achieved[351]. Following were the landmark recommendations of the Balwant Rai Mehta Committee:

- Panchayati Raj Institutions should be composed of elected representatives and should enjoy enough autonomy and freedom[352].
- The Balwant Rai Mehta committee recommended a 3-tier Panchayati Raj System which includes

  Zila Parishad at the District Level

  Panchayat Samiti at the Block/ Tehsil/ Taluka Level

  Gram Panchayat at the Village Level

Ashok Mehta Committee, 1977 Report

One of the major issues in context with the PRIs was that it got dominated by the privileged section of the village society. In December 1977, the Janta Government appointed a 13 member committee which was headed by Mr. Ashok Mehta.

The committee was appointed for following:

- What are the causes responsible for poor performance of the PRIs?
- What measures should be taken to improve performance of the PRIs?

The Ashok Mehta committee submitted its report in 1978 and made more than 130 recommendations. The essence of Ashok Mehta Committee recommendations is as follows:

- 3-tier should be replaced by the 2-tier system. His upper tier would be the Zila Parishad at the district level and lower tier should be the Mandal Panchayat, which should be a Panchayat of group of villages covering a population of 15000 to 20000[353].
- Zila Parishad should be the executive body and made responsible for planning at the district level. The Zila Parishad members should be elected as well as nominated.
- The MLA and MPs of the area should have the status of Ex-officio chairmen of the Zila Parishads. Development functions should be transferred to the Zila Parishad and

[351] 0.P.Srivastava , Municipal Government and Administration in India, Allahabad, Chugh Publications, 1980,p.11.
[352] Balwant rai Mehta, Panchayati Raj and Democracy, Kurukshetra, October, T964, p.222.
[353] Report of the Indian Constitutional Reforms, 1918, p.i27.

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all development staff should work under its control and supervision. Thus, we see that the Ashok Mehta Committee recommended abolishing the middle trier i.e. Blocks as unit of administration[354].

- The committee recommended that there should be regular audit at the district level and a committee of legislatures should check whether the funds allotted for the vulnerable social and economic groups are actually spent on them[355]. One more important recommendation of this committee was that there should be Nyaya Panchayats as separate bodies from that of development Panchayats. Committee noted that the bureaucracy was also responsible for the decline for particularly two reasons[356]:

THREE TIER PANCHAYATIRAJ SYSTEM

1. Village Panchayat

In the structure of the Panchayati Raj, the Village Panchayat is the lowest unit. There is a Panchayat for each village or a group of villages in case the population of these villages happens to be too small. The Panchayat chiefly consists of representatives elected by the people of the village only the persons who are registered as voters and do not hold any office of profit under the government are eligible for election to the Panchayat. The persons convicted by the court for criminal offences are disqualified from election of the Panchayat. The Gram Panchayat must present its budget, accounts of the previous year and annual administrative report before the Gram Sabha. Furthermore, it has to secure the latter's approval of the village production plan, proposals for taxation and development programmes before they are enforced by the Panchayat[357]. The Panchayat Secretary and the Village Level Worker are the two officers at the Panchayat level to assist the Sarpanch in administration. The Panchayat Secretary assists the Panchayat in recording decisions, keeping minutes, preparing budget estimates and reports, and does other sundry jobs like preparing notices,

[354] N.R. Inamadar,. Functioning of Village Panchayats, Popular Prakashan, New Delhi, 1970.
[355] B. S. Bhargava, Panchayati Raj System and Political Parties, Ashish Publishing House, New Delhi, 1979, p. 322.
[356] R.L.Khanna, Panchayati Raj in India> the English book shop, Chandigarh/ 1956.
[357] H. Rai and S. P. Singh, Panchayati Raj and Citizensi The Myth of Participatory Democracy, Indian Journal of Public Administration, Vol., XXI, No.3, July-September, 1975.

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explaining circulars, organising Gram Sabha meetings etc[358]. The Village Level Worker now called Village Development Officer assists the Panchayat in drawing up agricultural production plans, helps farmers in securing loans for agriculture, arranges the supply of inputs like seeds and fertilizers, and educates farmers about modern agricultural practices. He serves as the principal link between the Panchayat and the Panchayat Samiti

2. Panchayat Samiti

The Panchayat Samiti is the second on join tier of the Panchayati Raj. The Balwant Rai Mehta Committee report has envisaged the Samiti as a single representative and vigorous democratic institution to take charge of all aspects of development in rural areas. The Samiti, according to the Committee, offers "an area large enough for functions which the Village Panchayat cannot perform and yet small enough to attract the interest and services of residents[359]." Usually a Panchayat Samiti consists of 20 to 60 villages depending on area and population. The average population under a Samiti is about 80,000 but the range is from 35,000 to 1, 00,000. The Panchayat Samiti generally consists of- (1) about twenty members elected by and from the Panchs of all the Panchayats falling in the block area; (2) two women members and one member each from the Scheduled Castes and Scheduled Tribes to be co-opted, provided they do not get adequate representation otherwise; (3) two local persons possessing experience of public life and administration, which may be beneficial for the rural development; (4) representatives of the Co-operatives working within the jurisdiction of the block; (5) one representative elected by and from the members of each small municipality lying within the geographical limits of a block; (6) the members of the State and Union legislatures representing the area are to be taken as associate members[360].

The President of the Panchayat Samiti is the Pradhan, who is elected by an electoral college consist of all members of the Panchayat Samiti and all the Panchs of the Gram Panchayat falling within the areas. Besides the Pradhan, the Up-pradhan is also elected. The Pradhan convenes and presides over the Panchayat Samiti meetings. He guides the Panchayats in making plans and carrying out production programmes.

[358] S. Dasgupta., (1969), The concept of Panchayat and their Institutional implications, Asia Publishing House, Bombay.
[359] Dubey S. N (1972) Organisational Analysis ofPanchayat Raj Institutions in India, The Indian Journal of Public Administration, Vol-XVIII, No-2, April June, 1972.
[360] Sudesh Kumar Sharma, Panchayati Raj in India, Trimurti Publications, New Delhi, 1976.

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3. Zila Parishad

Zila Parishad stands at the apex of the three-tier structure of the Panchayati Raj system. Generally, the Zila Parishad consists of representatives of the Panchayat Samiti; all the members of the State Legislature and the Parliament representing a part or whole of the district; all district level officers of the Medical, Public Health, Public Works, Engineering, Agriculture, Veterinary, Education and other development departments[361]. There is also a provision for special representation of women, members of Scheduled Castes and Scheduled Tribes provided they are not adequately represented in the normal course. The Collector is also a member of the Zila Parishad. The Chairman of the Zila Parishad is elected from among its members. There is a Chief Executive Officer in the Zila Parishad. He is deputed to the Zila Parishad by the State Government. There are subject matter specialists or officers at the district level in all the states for various development programmes.

JUDICIAL POWER

It decides minor & criminal cases within its areas. Now the villagers need not go to the Tahasil or the District headquarters to set their disputes decided. In criminal sphere the Panchayat can hear cases involving mischief, assault, theft of property etc. on payment of prescribed fee. These fees are of a nominal nature. They can hear civil cases of the value of Rs. 200/-. They can impose a fine up to Rs. 200/-. One thing is to be noted that the lawyers cannot appear before the Panchayats[362]. Both the parties are to appear before the Panchayat to plead their case. In criminal cases the Panchayat can only impose a fine and it cannot sentence anybody to imprisonment. It can impose a fine up to Rs. 25 openly those who defy its orders.[xvi] Normally the decision of the Panchayat is final but an appeal can be made to the Court of District Magistrate with its prior sanction.

[361] V. Venkanta Rao and Niru Hazarika, "Democratic Decentralisation, Theory and Practice", Indian Journal of Public Administration, Vol.XXIV, No.3, July-Sept., 1978.
[362] B.Hooja, "Panchayati Raj Verses Decentralisation of Administration", Indian Journal of Public Administration, Vol.XXIV, No.3, July-Sept.,1978.

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FUNCTIONS OF PANCHAYATI RAJ

The structure of Panchayati Raj is designed in such a way that the 73rd Constitution Amendment Act gives certain powers and functions to the three-tier structure of the Panchayati Raj[363]. The idea is to decentralise the power of rural administration to the elected representatives. The Act enables the elected representatives to take their own decisions within the framework of Act. Some of the important functions of the Panchayati Raj are enumerated below: Agricultural development and irrigation facilities; Land reforms; Eradication of poverty; Dairy farming, poultry, piggery and fish rearing; Rural housing; Safe drinking water; Social forestry, fodder and fuel; Primary education, adult education and informal training; Roads and buildings; Markets and fairs; Child and women development; Welfare of weaker sections, scheduled castes and scheduled tribes.

73RD AND 74TH CONSTITUTIONAL AMENDMENTS

73rd and 74th Constitutional Amendments were passed by Parliament in December, 1992. Through these amendments local self-governance was introduced in rural and urban India. The Acts came into force as the Constitution (73rd Amendment) Act, 1992 on April 24, 1993 and the Constitution (74th Amendment) Act, 1992 on June 1, 1993. These amendments added two new parts to the Constitution, namely, 73rd Amendment added Part IX titled "The Panchayats" and 74th Amendment added Part IXA titled "The Municipalities"[364]. The Local bodies– 'Panchayats' and 'Municipalities' came under Part IX and IXA of the Constitution after 43 years of India becoming a republic. Salient Features of the 73rd and 74th Constitution Amendment Acts, Panchayats and Municipalities will be "institutions of self-government"[365].

Basic units of democratic system-Gram Sabhas (villages) and Ward Committees (Municipalities) comprising all the adult members registered as voters. Three-tier system of panchayats at village, intermediate block/taluk/mandal and district levels except in States with population is below 20 lakhs (Article 243B). Seats at all levels to be filled by direct elections [Article 243C (2)]. Seats reserved for Scheduled Castes (SCs) and Scheduled Tribes (STs) and chairpersons of the Panchayats at all levels also shall be reserved for SCs and STs

[363] S.Bhatnagar, Rural Local Government in India, Life and Light Publishers, New Delhi, 1978.
[364] R. Harish, "Panchayats: Are They a Field to Experiments"? Kurukshetra, Vol.XXXIV, No.6, April, 1986.
[365] R. Harish, "Panchayats: Are They a Field to Experiments"? Kurukshetra, Vol.XXXIV, No.6, April, 1986.

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in proportion to their population. One-third of the total number of seats to be reserved for women. One third of the seats reserved for SCs and STs also reserved for women. One-third offices of chairpersons at all levels reserved for women (Article 243D). Uniform five year term and elections to constitute new bodies to be completed before the expiry of the term. In the event of dissolution, elections compulsorily within six months (Article 243E)[366]. Independent Election Commission in each State for superintendence, direction and control of the electoral rolls (Article 243K). Panchayats to prepare plans for economic development and social justice in respect of subjects as devolved by law to the various levels of Panchayats including the subjects as illustrated in Eleventh Schedule (Article 243G)[367]. 74th Amendment provides for a District Planning Committee to consolidate the plans prepared by Panchayats and Municipalities (Article 243ZD)[368]. Funds: Budgetary allocation from State Governments, share of revenue of certain taxes, collection and retention of the revenue it raises, Central Government programmes and grants, Union Finance Commission grants (Article 243H). Establish a Finance Commission in each State to determine the principles on the basis of which adequate financial resources would be ensured for panchayats and municipalities (Article 243I).

CASES

Union of India v. Rakesh Kumar[369] - A three judges bench of the SC consisting of C.J.I. K.G. Balakrishnan, J .Sathasivam and J J. M. Panchal held that the proviso to section 4 (g) of provisions of the Panchayats (Extension to Scheduled area)Act ,1996 containing exception to the norm of 'Propositional representation", and the exceptional treatment incorporated in Jharkhand Panchayat Raj Act 2001 [sec 21(B),40(B),55(B)] providing 100% reservation in favour of scheduled tribes for chairman's position in panchayats located in scheduled area in Jharkhand is constitutionally permissible since art 243M(4)(B)[370]. Expressly empowers parliament to provide for 'exceptions and modifications' in the application of part IX to scheduled areas.

[366] S.N.Mishra, New Horizons in Rural Development Administration, Mittal PublicaFion, New Delhi, 1989.
[367] Ibid., p.225.
[368] Supra., p.224.
[369] CIVIL APPEAL NO. 3938 OF 2017.
[370] K. D. Gangrade, "Revamping Panchayati Raj Institutions", Yojana, Vol. XXXIV, No.8, 14 & 15 august 15, 2017.

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Indira Sawhney v. Union of India[371] *and M.R. Balaji v. State of Mysore*[372] - It is applicable only to reservations enabled by art 16(4). Therefore, the aggregate reservation amounting to 80% in scheduled areas is not unconstitutional on the ground of unreasonable restriction on the rights of political participation of persons belonging to general category[373]. The exercise of electoral franchise is an essential component of a liberal democracy. Such right does not have the status of fundamental rights and are instead legal rights which are controlled through legislative means. There is no inherent right to contest election since there are explicit legislative control over it.

CONCLUSION

The term 'Panchayati Raj' is relatively new, having originated during the British administration. 'Raj' literally means governance or government. Mahatma Gandhi advocated Panchayati Raj, a decentralized form of Government where each village is responsible for its own affairs, as the foundation of India's political system. His term for such a vision was "Gram Swaraj" or Village Self-governance. It was adopted by state governments during the 1950s and 60s as laws were passed to establish Panchayats in various states. It also found backing in the Indian Constitution, with the 73rd amendment in 1992 to accommodate the idea. The Amendment Act of 1992 contains provision for devolution of powers and responsibilities to the panchayats to both for preparation of plans for economic development and social justice and for implementation in relation to twenty-nine subjects listed in the eleventh schedule of the constitution.

[371] AIR 1993 SC 477, 1992 Supp 2 SCR 454.
[372] 1963 AIR 649, 1962 SCR Supl. (1) 439.
[373] B.S.Bhargava, Panchayati Raj System and Political Parties, Ashish Publishing House, New Delhi, 1979.

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SIMULTANEOUS ELECTION

-Apurva Singh

ABSTRACT

The country of India is in an enduring election mode, which hinders the progress and development of the nation. Simultaneous Election can help in solving the said issue. This manuscript involves the meaning and explanation of the issue along with its historical background. It also mentions the timeline of events in respect to this issue.

Furthermore, it also includes the mechanism of the foreign countries which follow this system of election and the positive effects it has on the nation. The positive as well as the negative aspects of the same are also mentioned.

It also takes note of the necessary constitutional provisions along with the required amendments that have to be brought in the constitution for its successful implementation.

INTRODUCTION

India is the largest democracy in the world. In order to maintain this status, it conducts elections for the States as well as the Centre so that people, by casting their vote, can choose the government according to their wishes and needs.

However, the elections take place for the Centre as well as the State almost every year. As the practice has been to conduct the elections for State and Centre on different levels, it is seen that throughout the tenure of one government, due to the election of one or the other State, the core functions and purposes for which a government is made come to a halt. Conducting elections puts a halt on the development activities of the country such as policy making and decision making for the development of the country. This problem can only be solved, if the concept of “simultaneous elections” is introduced in India. Through this concept, the procedure for election for both, the Centre and the State, can be carried out within one year, at the maximum, as the elections for both the levels will be held on the same day/month/period.

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ABOUT THE ISSUE

In common parlance, the term "simultaneous election' means holding elections for the State Assemblies and the Centre at the same time or within the same time frame. In practical situation, elections have to be conducted almost every year, for either the Centre or the State.

The term "simultaneous election" has not been defined anywhere but in the discussion paper on "Analysis of Simultaneous Election: the "What", "Why", and "How"" prepared by Niti Aayog, as follows: "Accordingly, for the purposes of this note, the term "Simultaneous Elections" is defined as structuring the Indian election cycle in a manner that elections to Lok Sabha and State Assemblies are synchronized together... simultaneous elections do not mean that voting across the country for Lok Sabha and State Asssemblies needs to happen on a single day. This can be conducted in a phase-wise manner as per the existing practice provided voters in a particular consistency vote for both State Assembly and the Lok Sabha the same day."[374] For example, the 16th Lok Sabha Election was held between April – May 2014. Later, the State Legislative Assemblies election started taking place, as follows:

States	Time
Haryana	October 2014
Maharashtra	October 2014
Jammu and Kashmir	December 2014
Delhi	February 2015
Bihar	November 2015
Kerala, Assam, Puducherry, Tamil Nadu, West Bengal	May 2016
Goa	May 2017
Gujarat	December 2017
Meghalaya, Nagaland, Tripura	March 2018
Karnataka	May 2018

As it can be seen from the abovementioned table which mentions only a few States, the elections take place every year, leaving no time for policy making and real development of the nation, which are the core functions of a government of a country.

[374] ANALYSIS OF SIMULTANEOUS ELECTIONS : THE "WHAT", "WHY" AND "HOW" A Discussion Paper, Para 2.8, Page 4.
http://niti.gov.in/writereaddata/files/document_publication/Note%20on%20Simultaneous%20Elections.pdf

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HISTORICAL BACKGROUND AND EVENTS

After the independence, first Indian general election of India was held in 1951-52 which elected the first Lok Sabha by way of simultaneous election. The said practice was continued for three more subsequent Elections being held in the years of 1957, 1962 and 1967.

However, in 1968 and 1969, due to the premature dissolution of some Legislative Assemblies, the system of simultaneous election got distorted. Furthermore, the next year, the Lok Sabha itself got prematurely dissolved.

Later, the idea of simultaneous election after getting distorted, again came up in the first Annual Report of the Election Commission of India published in the year 1983. It was re-introduced in 1999 by the Law Commission of India in its 170th Report. Law Commission gave its opinions and views, and asked the government to consider the idea of holding of simultaneous election in Lok Sabha and Assembly polls.

However, no serious attention was given to this issue, until 2012, when L K Advani, after getting the assent on the then Prime Minister, Mr. Manmohan Singh and the then President, Mr. Pranab Mukherjee floated the idea of holding simultaneous votes.

Later on, the Election Commission of India gave its opinions and suggestions on this issue stating that a few amendments can be introduced in the Constitution such as ‘no confidence motion’ can be followed by ‘confidence motion’, the term of the Lok Sabha to commence and end at the same time, and the like.

In 2015, the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice gave its 79th Report on “Feasibility of holding simultaneous elections to the house of people and state legislative assemblies.” It was stated in the report that doing the needed would save expenditure on elections and government deficit, stop policy paralysis due to imposition of model code of conduct during frequent polls. This report concluded that “such a reform was important for India if it is to compete with other nations in developmental agenda on real time basis as a robust, democratic country.” The Prime Minister, Mr. Narendra Modi termed it as “crucial” in an interview, to conduct simultaneous election. He, at present, wants to, at least conduct a debate on the issue so that the officials and the people of India get aware of the issue.

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Moreover, the then President of India, Mr. Pranab Mukherjee too made strong pitch for the same.

The President of India, Mr. Ram Nath Kovind has also expressed his thoughts on the said issue and has called for a "sustained debate" on holding simultaneous polls for Lok Sabha and the State Assemblies. He also gave importance to the consensus that has to be arrived at by all the parties.

This issue has gained a lot of political attention and has compelled the govt. to begin developing ways and schemes to introduce and implement it.

FOREIGN COUNTRIES FOLLOWING SIMULTANEOUS ELECTIONS

India has been inspired to conduct simultaneous elections, by other countries like Brazil, South Africa, Belgium, Argentina, Canada, the United States, and most importantly, the European economic powerhouse Sweden. The Prime Minister after procuring evidences from these countries in favour of simultaneous election and after assessing the advantages and disadvantages of the system which are prevalent in those countries, has taken an initiative towards this issue. Out of all the countries, Sweden is the major inspiration for the Prime Minister behind this desire to have simultaneous election.

Sweden

In Sweden, the elections to county councils and general elections occur simultaneously on the second Sunday in September. The Municipal assemblies election also take place on the same day. The system of "simultaneous elections" was introduced in 1970, which was one of the major changes. The term for the govt. is of 4 years. The last elections were held on 14th September, 2014 and the forthcoming would be on the 9th September, 2018.

POSITIVE ASPECT

The following are some of the important advantages of simultaneous election:

1. Focus on development and public interest – Efficient governance
2. Conducting elections simultaneously would lead to a better development of the nation. The policymakers i.e. the government instead of focusing on the election and

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increase their vote banks, would invest its efforts and time in making policies and encouraging the growth of the nation which are the core functions of a government. It will be more responsive to the needs of the citizens.

The Niti Aayog by highlighting the adverse effects it has, states as follows: "Out of all these, the impact of frequent elections on governance and policy making is perhaps the most significant. Frequent elections force Governments and political parties to remain in perpetual "campaigning" mode thereby impacting the focus of policy making. Short-sighted populist and "politically safe" measures are accorded higher priority over "difficult" structural reforms which may more beneficial to the public from a longer term perspective. This leads to sub-optimal governance and adversely impacts the design and delivery of public policies and developmental measures."[375]

3. Less expenditure and saving of time

   In holding one election, various stakeholders incur huge expenditures. Every year, the Central as well as the State Government and the political parties bear expenditures on account of conduct, control and supervision of elections. Simultaneous election would help in the reduction of the abovementioned. Also, for a proper implementation, there needs to be a well drafted scheme for promotions, procedure etc. which would then not be repeated for two tiers of election, thereby saving time.

4. Security – human resource intensive

   Election is a process which is human resource intensive. The Election Commission of India takes help of a significant number of polling officials as well as armed forces to ensure smooth, peaceful and impartial polls[376], which disrupts the jobs of the security personnel. Conducting election at once would free the crucial manpower which is often deployed for prolonged periods on election duties.[377]

5. Disruption to normal life and imposition of MCC

[375] ANALYSIS OF SIMULTANEOUS ELECTIONS: THE "WHAT", "WHY" AND "HOW" A Discussion Paper by Niti Aayog, Para 6.5.
[376] ANALYSIS OF SIMULTANEOUS ELECTIONS: THE "WHAT", "WHY" AND "HOW" A Discussion Paper by Niti Aayog, Para 3.23.
[377] Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 79th Report on "Feasibility of holding simultaneous elections to the house of people and state legislative assemblies", Para 6.5 http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Personnel,%20PublicGrievances,%20Law%20and%20Justice/79.pdf

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In holding elections, life of the general public is disrupted because of the rallies and speeches conducted by the political leaders, the traffic caused and the security placed there. Holding of political rallies disrupts road traffic and also leads to noise pollution. If simultaneous elections are held, this period of disruption would be limited to a certain pre-determined period of time.[378] While holding elections, the Moral Code of Conduct is imposed, which restricts the economic activities, thereby causing great damage to the economy of the nation. The imposition of MCC puts on hold the entire development programme and activities of the Union and State Governments in the poll bound State.

6. Caste Religion conflicts

   Niti Aayog has stated that holding frequent elections perpetuate caste, religion and communal issues across the country. In a recent article published in Bloomberg Quint, Dr. S. Y. Quarishi (former Chief Election Commissioner) noted that "…elections are polarising events which have accentuated casteism, communalism, corruption and crony capitalism. If the country is perpetually on election mode, there is no respite from these evils. Holding simultaneous elections would certainly help in this context".[379]

7. Other

   It promotes unity of the country, brings stability to the government. It also brings better synchronization between MPs and MLAs and reduces duplicity of work.

NECESSARY CONSTITUTIONAL PROVISIONS

The Constitutional provisions which elucidate upon the duration, sessions and dissolution of the Houses of Parliament and the State Legislatures, emergency provisions and the anti-defection law are Article 83, 85, 172, 174, 356 and the 10th Schedule.

The abovementioned Articles can be divided into 3 sub-heads for the convenience of the paper.

[378] Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 79th Report on "Feasibility of holding simultaneous elections to the house of people and state legislative assemblies", Para 6.4
[379] ANALYSIS OF SIMULTANEOUS ELECTIONS: THE "WHAT", "WHY" AND "HOW" A Discussion Paper by Niti Aayog, Para 3.27

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A. Term of Houses of Parliament
B. Pre-mature dissolution of the Houses of Parliament
C. Basic structure doctrine

A. Term of Houses of Parliament

The cause of concern for conducting simultaneous election is that the Articles in this regard give unfettered power to the President to dismiss the elected government of the State anytime and dissolve the State Legislative Assembly. The President can also put the State Legislative Assembly under suspended animation for certain period.

Electoral cycle of 2014

As stated above, the election for the Lok Sabha were held in April 2014 and the elections for other constituencies were held in different times of the year. The period in which elections were held for the previous term, has been mentioned in the following table.

States	Period
Chhattisgarh, Madhya Pradesh, Mizoram, Rajasthan	December, 2013
Lok Sabha	May 2014
Andhra Pradesh, Arunachal Pradesh, Odisha, Sikkim, Telangana	May, 2014
Haryana, Maharashtra	October 2014
Jammu and Kashmir, Jharkhand	December 2014
Delhi	February 2015
Bihar	November 2015
Kerala, Assam, Puducherry, Tamil Nadu, West Bengal	May 2016
Manipur, Punjab, Uttar Pradesh, Uttarakhand	March, 2017
Goa	May 2017
Gujarat, Himachal Pradesh	December 2017
Meghalaya, Nagaland, Tripura	March 2018
Karnataka	May 2018

A major change in the electoral process is needed. The elections of Andhra Pradesh, Arunachal Pradesh, Odisha, Sikkim and Telangana already coincide with the elections of Lok Sabha. Therefore, other constituencies need consideration.

Extension/Curtailment – Need for an Amendment

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- To achieve the goal of "One Nation, One Election", the term of the Assemblies either needs to be curtailed or extended for the first time. Without the extension/curtailment of the term of the Centre or State Govt., synchronization cannot be made possible. However, the curtailment and extension of the term should not prejudice the interest of the people of that State and the State Assembly. The extension/curtailment has to be construed harmoniously with the interest and the rights of the political parties.
- Therefore, a systematized scheme of the synchronization of the elections needs to be laid down because this change will serve as a major electoral reform which will affect the rights of a lot of people and the working/term of the government.

B. Premature dissolution and fresh election – A Solution

If the duration of a House under Article 83 and 172, is curtailed by prematurely dissolving the existing Lok Sabha, there will arise a need to formulate a new Lok Sabha, for which elections would have to be held. However, Section 14 of the Representation of Peoples Act states that general elections shall be held to constitute the House. It means that in the case of the expiration of the duration of the existing House, elections can take place six months in advance and not earlier than that. To put it differently, an outer limit of six months has been fixed by the Parliament from the date of the expiration of the duration of the existing House[380].

Two-phases approach

In order to come up with a practical solution, the Department related Parliamentary Standing Committee in its 79th Report, after extensive analysis and stakeholder consultations, has devised an alternative method of holding simultaneous election. The Committee has recommended that this shall be done in two-phases. It states as follows:

> "The Committee has envisaged holding of elections of some Legislative Assemblies at midterm of Lok Sabha and remaining with the end of tenure of Lok Sabha. Similarly, the second phase of elections can be held in 2019 along with the General Elections to Lok Sabha."[381]

[380] Anand Mohan vs. Union of India (UOI) and Ors. (11.12.1984 - ALLHC)
[381] Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 79th Report on "Feasibility of holding simultaneous elections to the house of people and state legislative assemblies" Para 17.2.

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It has devised a Two-Phase Approach for conducting simultaneous elections. Therefore, in the next electoral cycle, phase 1 is recommended to start from the time when Lok Sabha will hold its election i.e. April-May 2019. Phase 2, as suggested by the Standing Committee can start at the mid-term of the Lok Sabha i.e. October-November 2021. Going according to this Two-Phase Approach, terms of some of the State Assemblies need to be extended while some of them need to be curtailed.

Furthermore, the Election Commission can notify the elections to Lok Sabha and State Legislative Assemblies 6 months prior to the end of their natural terms. This provision may be used to hold elections without extension of terms of some Assemblies.[382]

The government think tank, Niti Aayog in its discussion paper on "Analysis of Simultaneous Election: the "What", "Why", and "How"", has, through a table, explained the structure of the elections to be held for the term of 2019-2024 for every State. The Table is as follows:

S. No.	State Assembly/ Lok Sabha	Election before	Next Election before	Synchronization phase	
				Phase 1: Jun-19	Phase 2- Dec-21
				April – May 2019	Oct – Nov 2021
1.	Andhra Pradesh	Jun-19		No change	
2.	Arunachal Pradesh	Jun-19		No change	
3.	Assam	Jun-21			Extend 6 months
4.	Bihar	Nov-20			Extend 13 months
5.	Chhatisgarh	Jan-19		Extend 5 months	
6.	Goa	Mar-17	Mar-22		Curtail 3 months
7.	Gujarat	Jan-18	Jan-23		Curtail 13 months
8.	Haryana	Nov-19		Curtail 5 months	
9.	Himachal Pradesh	Jan-18	Jan-23		Curtail 13 months
10.	Jammu and Kashmir	Mar-21			Extend 9 months
11.	Jharkhand	Jan-20		Curtail 7 months	
12.	Karnataka	May-18	May-23	Extend 12 months	
13.	Kerala	Jun-21			Extend 6 months
14.	Madhya Pradesh	Jan-19		Extend 5 months	

[382] Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 79th Report on "Feasibility of holding simultaneous elections to the house of people and state legislative assemblies"

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15.	Maharashtra	Nov-19		Curtail 5 months	
16.	Manipur	Mar-17			Curtail 3 months
17.	Meghalaya	Mar-18			Curtail 15 months
18.	Mizoram	Dec-18		Extend 6 months	
19.	Nagaland	Mar-18	Mar-23		Curtail 15 months
20.	Orissa	Jun-19		No change	
21.	Punjab	Mar-17	Mar-22		Curtail 3 months
22.	Rajasthan	Jan-19		Extend 5 months	
23.	Sikkim	May-19		No change	
24.	Tamil Nadu	Jun-21			Extend 6 months
25.	Telangana	Jun-19		No change	
26.	Tripura	Mar-18	Mar-23		Curtail 15 months
27.	Uttarakhand	Mar-17	Mar-22		Curtail 3 months
28.	Uttar Pradesh	May-17	May-22		Curtail 5 months
29.	West Bengal	Jun-21			Extend 6 months
30.	NCT of Delhi	Feb-20		Curtail 8 months	
31.	Puducherry	Jun-21			Extend 6 months
32.	Lok Sabha	Jun-19		No change	

Source: NITI Aayog Analysis

The abovementioned Table explains the steps that need to be taken in order to implement the Two-Phase Approach to hold simultaneous election. It majorly includes and addresses all the States. It is devised in the Table that in Phase 1, elections to 14 States should be held and in Phase 2, elections to 16 States shall be held.

The Table showcases two extreme cases, where the term is to be extended by 12 months and where the term is to be curtailed by 12 months. The term in Kerala has to be extended by 12 months and the term in Bihar, Gujarat, Himachal Pradesh, Tripura, Nagaland, have to be curtailed by 12 months. This is highly unjustifiable. However, to achieve such a drastic and impactful change in the Government of a country and the electoral reforms, a major step needs to be taken. Moreover, this change is only limited to a one-time arrangement. After 2024, the electoral cycle, will be set and the elections will be done in two phases, simultaneously.

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New Lok Sabha/State Assembly for the remainder of the term

Another way of dealing with this problem can be by introducing a law which lays down that the new Lok Sabha/State Assembly so constituted shall be in operation only till the remainder of the previous Lok Sabha/state assembly. This new LS/SA shall not be elected for a fresh term of five years.[383]

The dissolution of the House of People before a term of five years and limiting it to the remainder of the previous Lok Sabha, would help in setting up an election cycle which can lead to the synchronizing of the elections. This can be done by the President of India under Article 85 of the Indian Constitution.

Dissolution to be followed by fresh election

In the cases of *Ajit Sharma v. Union of India*[384] and *U.N.R. Rao v. Smt. Indira Gandhi*[385],, the Court observed that upon premature dissolution of the House, the Election is, undoubtedly, desired expeditiously[386]. Therefore, the dissolution of the House is necessarily followed by a general election of the House. Merely because the Lok Sabha has been dissolved is no reason why the country should be without a Government. The President will be fully within his powers to dissolve the House under Article 85 of the Constitution.

Furthermore, in the case of *State of Rajasthan v. Union of India*[387], a seven-judge constitution bench of the Supreme Court, headed by the Chief Justice M. H. Beg unanimously held that dissolution and fresh election can be done if it is in interest of political stability. The judgment is quoted as follows:

> "Although the Constitution itself does not lay down specifically when the power of dissolution should be exercised...It is possible for the Union Government, in the exercise of its residuary executive power, to consider it a fit subject for the issue of an appropriate direction when it considers that the political situation in the country is

[383] http://lawcommissionofindia.nic.in/SE-Summary.pdf
[384] Ajit Sharma and Anr. vs. Union of India (UOI) and Ors., 2006 (3) BLJR 2183.
[385] U.N.R. Rao v. Smt. Indira Gandhi, AIR 1972 SC 1002.
[386] Ajit Sharma and Anr. vs. Union of India (UOI) and Ors., 2006 (3) BLJR 2183.
[387] State of Rajasthan and Others, Petitioners vs. Union of India and others, Respondents, AIR(Nag) 1977, SC 1361(1440)

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> such that a fresh election is necessary in the interest of political stability... It is not for courts to formulate, and much less, to enforce a convention to regulate the exercise of such an executive power may be. That is a matter entirely within the executive field of operations ...."

Hence, the President is fully within his powers to order the dissolution of the House to bring political stability in the country, and political stability is one of the key characteristics of simultaneous election.

C. Pre-mature dissolution of the House – An Impediment

Another major barrier in implementing the scheme of simultaneous election is the power which has been given to the President and the Governor to prematurely dissolve the House of People and the Legislative Assembly, respectively. This power, as abovementioned be a boon as well as a bane for the country. If premature dissolution is carried out by the President or the Governor, it calls for an immediate action to form a government, which, if done, would disrupt the cycle of the elections which take place simultaneously.

Dissolution under the Constitution of India has to be for lawful purposes. It cannot be resorted to for good governance or cleansing of politics.[388] The purpose of dissolution has to be for a definite purpose and a legitimate reason.

Article 356 – Emergency provisions

Under Article 356, the President can proclaim emergency and assume all the functions of the Government. The President can also prematurely dissolve the government if he wishes so on three conditions which have been enlisted in the constitution.[389] Article 352 provides for proclamation of Emergency on the President's satisfaction that grave Emergency exists whereby the Government of India or any part of the territory is threatened by war, external aggression, armed rebellion etc.

<u>Problem for simultaneous election due to Emergency provisions</u>

[388] Rameshwar Prasad v. Union of India, AIR 2006 SC 980.

[389] (I) Art. 355 - breakdown of law and order - To protect every State against external aggression or internal disturbances and to ensure that the government of the State is carried on in accordance with the Constitution.; (II)Art. 356 - when the constitutional machinery in the State fails; and (III)Art. 365 - when any State fails to comply with or give effect to any directions given in the exercise of the executive power of the Union.

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The cause of concern for simultaneous election is that this Article gives unfettered power to the President to dismiss the elected government of the State and dissolve the State Legislative Assembly.

This serves as an impediment in the implementation of simultaneous election because fresh elections will need to be held if the President dismisses the elected government. Holding fresh elections would disrupt the electoral cycle which was running simultaneously. Therefore, there is a need for an amendment in this Article with respect to the problem that it poses.

Therefore, this Article is one of the most powerful Articles of the Indian Constitution and holds much importance.

Usage of this Article

The sole purpose to use this Article is to handle the situation in case no constitutional machinery is in operation. It has been used more than a hundred times, as reported by Sarkaria Commission in its report on Centre-State Relations, 1988. Also, it has been misused several times. The Sarkaria Commission found 13 cases where the Govt. enjoyed the support of the State Legislature and 15 cases where the alternative to form another govt. was not even taken under consideration before the imposition of President's Rule, which led to premature dissolution of the government. Therefore, that Commission recommended various measures to prevent the misuse of President's Rule.

There have been several cases of proclamation of President's Rule in States under Article 356 in the past, pre-mature dissolution of State Assemblies has been made significantly stringent in the light of Anti-Defection Act 1985 and the judgement by the Constitutional Bench of Supreme Court of India in *S.R. Bommai v. Union of India*[390].

The Supreme Court laid down certain guidelines in this case to prevent the misuse of the said Article like the President shall exercise the power of dissolution only after the Proclamation is approved by both Houses of Parliament, and if there is improper use of this Article, the Court will provide remedy etc. It was also held that the Proclamation under Article 356(1) is not immune from judicial review.

[390] S. R. Bommai v. Union of India, AIR 1994 SC 1918

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Therefore, it is concluded that the President's rule can be applied in the case of premature dissolution, which would help in the implementation of simultaneous election. However, the power under 356 has to be used very carefully and after examining all the circumstances.

No-Confidence Motion

Pre-mature dissolution can also be done by introducing a no-confidence motion. A No-confidence motion means a motion raised by the members of opposition of the House contending that they do not pose any confidence in the government. When the members contend that the person in authority is not capable of performing the functions and carrying out the responsibilities of the government.

No-confidence motion is another impediment in the path of simultaneous election. If a no-confidence motion is passed then it calls for an immediate general election. the fresh election would then disrupt the cycle of election and hence, disturbing the simultaneous election.

Rule 198 of the Lok Sabha Rules mentions the procedure as to the no-confidence motion. It provides for the steps that need to be followed to raise a motion of no confidence.

It has been suggested by the Election Commission of India that any no-confidence motion should include a further 'confidence motion'.[391] It has stated that in the case of Legislative Assembly also, in the event of "no-confidence motion", it should be mandatory to simultaneously move a 'confidence motion' for formation of an alternative government.[392]

The Law Commission of India in its 170th Report on Reform of Electoral Laws (1999), has also suggested on the lines of German Constitution, a successive motion of posing confidence in alternative government. It states that this will eliminate the need for mid-term election and endure stability of government.

Hung House Situation

[391] In order to avoid premature dissolution, it may be provided that any 'no-confidence motion' moved against the government in office should also necessarily include a further 'confidence motion' in favour of a government to be headed by a named individual as the future Prime Minister and voting should take place for the two motions together." Report by Parliamentary Standing Committee. Para 7.0.

[392] This will, in normal course, eliminate cases of premature dissolution of Assemblies. If for any unavoidable reason, any existing Legislative Assembly has to be dissolved prematurely, there should be a provision for the Governor to carry out the administration of the State, on the aid and advice of his Council of Ministers to be appointed by him, or for the imposition of the President's Rule, till period of expiry of term. Para 7.0

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Stalemate House/Hung House is another hurdle which needs to be overcome in implementing the system of simultaneous election. Hung house refers to the situation where no government can be formed because the House cannot form a majority.

In the case of *H. S. Jain v. Union of India*[393], the concept was emphasized upon and defined as:

> "The concept of hung-Parliament as known in common parlance is when no political party returns in majority after general elections as electors do not choose to send a single party with absolute majority."

This situation of absence of any government can be made good by acquiring the support of members from other parties. However, the members of other parties cannot give up their membership of their political party or vote or abstain from voting, contrary to the wishes of the party to which he belongs. If he does so, he will be disqualified from the membership of that political party under Paragraph 2(1) of the 10th Schedule.[394]

The Tenth Schedule was added to the Constitution of India by 52nd Amendment in the year 1985. It is popularly known as Anti Defection Law, 1985. As mentioned in this schedule, disqualification of a member takes place when that member voluntarily gives up his membership of a political party or at the point of defiance of the whip issued to him.

This schedule has been in question quite a few times. The primary contention against this Schedule was that it is violative of the parliamentary democracy and the freedom of speech and expression under Article 19, Article 105 and Article 194[395]. It is contended in various cases that the members of the Parliament need to be expressive and exercise their freedom of speech to conduct better debates and solutions in the parliament. However, Anti-defection Law is against this.

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[393] H. S. Jain v. Union of India, (1997) 1 UPLBEC 594

[394] The provisions of this schedule provide for disqualification of member of Parliament of a State Legislature in two situations, which are as follows:

(i) If he voluntarily gives up his membership of political party on whose ticket he was membership of political party on whose ticket he was elected; and

(ii) If he votes or abstains from voting, without prior permission of the party, in such House contrary to any direction issued by the political party on whose ticket he has been elected and such voting or abstention has not been condoned by such political party within 15 days from the date of voting of abstention.

[395] Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and ors., (2007) 3 SCC 184, Kuldip Nayar v. Union of India, AIR 2006 SC 3127 , Kihoto Hollohan v. Zachillhu and ors.,1992 SCR (1) 686 , Mian Bashir Ahmad v. State of Jammu and Kashmir, AIR 1981 J K 28 .

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Scope of Para 2(1)(b)

Ever since this Schedule was added to the Constitution in its 52nd Amendment, its journey has not been easy. Multiple cases were filed claiming its provisions to be unconstitutional.

The above mentioned contention was raised in the High Court of Punjab and Haryana in the case of *Prakash Badal and ors. v. Union of India and ors.*[396] , which was the first case to challenge the provisions of Tenth Schedule. In this case, the constitutional validity of Para 2(1)(b) of Tenth Schedule was challenged as, they contended, it violates the constitutional privilege granted under Article 105 of the Constitution. However, the Court dismissed the contention and held that this right under Article 105 is not an absolute right[397].

The scope of this Paragraph has been extended to an individual member as well. The Supreme Court clarified this stance in *Jagjit Singh v State of Haryana*[398] as follows:

> "Where a sole member of a political party in an Assembly joins another political party, he cannot get protection of paragraph 3 of Tenth Schedule of the Constitution and will be disqualified from being member under paragraph 2 of the Tenth Schedule of the Constitution."

The said provision also extends to the situation where a member has been expelled by his own party and then joins the other party. This question came up for consideration in the case of *G.Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly*[399]. The Court held that if a member has been expelled, he would still be a member of that party and would only be disqualified under Tenth Schedule if he joins any other party.[400]

As can be seen from the foregoing discussion, this Paragraph 2(1)(b) has been interpreted very widely and has wide horizons. However, this paragraph is a major hurdle which needs to

[396] Prakash Badal v. Union of India, AIR (1987) P&H 263

[397] The Court observed - "So far as the right of a member under Article 105 is concerned, it is not an absolute one and has been made subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of Parliament. The framers of the Constitution, therefore, never intended to confer any absolute right of freedom of speech on a member of the Parliament and the same can be regulated or curtailed by making any constitutional provision, such as the 52nd Amendment. The provisions of Para 2(b) cannot, therefore, be termed as violative of the provisions of Article 105 of the Constitution.(Para 28)."

[398] *Jagjit Singh v State of Haryana*, AIR 2007 SC 590

[399] G.Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly (1996) 2 SCC 353

[400] "Once a member is expelled, he is treated as an 'unattached' member in the house. However, he continues to be a member of the old party as per the Tenth Schedule. So if he joins a new party after being expelled, he can be said to have voluntarily given up membership of his old party**."**

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be overcome for the successful implementation of the system of simultaneous election. It does not allow the member to follow his wishes and support the party which he wants to and also been condemned by people.

Para 2 – Discourages healthy debate

Paragraph 2(1)(b) does not allow the members to express them freely which does not lead to a good debate in the Parliament/State Legislature. In institutions like these, a healthy debate and discussion shall take place because here, the law of the land and relevant policies are framed, which shall include all the aspects of the society as well as an individual's wants. This shall be a platform where exchange of ideas takes place freely, as guaranteed by Article 105 and 194 of the Constitution. However, due to the rigour of Tenth Schedule, these privileges cannot be performed freely. Also, due to judicial intervention, it has been declared that these articles are not absolute.

Legislators find it unnecessary to raise their individual opinion especially when it is against the party's stance, as they will be bound to vote according to the whip of the party when it comes to the stage of voting. If the Government intends to ensure that the bill is passed, all it has to do is convince leaders of parties instead of legislators. The recent Taxation Laws(Second Amendment) Bill,2016 was passed in the Lok Sabha within an hour of its introduction. It is also disheartening to know that legislators who are opposed to a particular bill and have expressed concerns regarding implications of certain bills, are forced to obey the direction of the party. The harsh reality is that the party high command and Whip which have no constitutional recognition binds legislators to vote in a particular way. A legislator is also unable to express dissent and protest within the party as it may lead to expulsion and yet be forced to follow Whips issued in order to avoid disqualification.[401]

A few Committees' recommendations

A few committees were formed to analyse the provisions of this Schedule. The Dinesh Goswami Committee on Electoral Reform, 1990 recommended that the application of anti-defection law must be limited to the context of confidence motions and financial bills. It suggested that the provisions should be limited to only the following situations:

[401] CRITICAL ANALYSIS OF ANTI-DEFECTION LAW IN INDIA WITH REGARD TO PARLIAMENTARY DISSENT Rahul Machaiah, the World Journal on Juristic Policy, May, 2017, ISSN: 2394-5044

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(a) When a member voluntarily gives up the membership of his political party;
(b) When a member abstains from voting, or votes contrary to the party whip in a motion of vote of confidence or motion of no-confidence.

The Dinesh Goswami Committee and the 170th Law Commission Report on 'Reform of Electoral Law', 1999 suggested that the Party Whip shall not be issued in any case barring the case where the survival of the Government is in danger.

Manish Tiwari, the legislator of Congress has also introduced a private member's bill in 2010 to bring some amendments in anti-defection law. He stated that the law should restrict itself to the disqualification of members who violate the whip only in matters which pertain to the confidence motions, money bills, adjournment motions and financial matters.

The National Commission to Review the Working of the Constitution headed by Justice Venkatachalaiah in its report in 2002 suggested that defectors must be barred from holding public office and ministerial positions for the remaining term so as to prevent switching political parties with the intention of occupying ministerial positions and public office.

This law is not the right remedy to deal with the purpose that it intends to deal with i.e. corruption in voting by legislators. The proper remedy instead of disqualification would be to punish those legislators for corruption and take away their right to immunity from criminal prosecution when they indulge in such practices. However, this should not affect their fair choice of supporting any party. If any member, without any political pressure and guided only by his own wishes wants to support other political party, he may be allowed to do so.

An exception must be carved out so that a member asking for support from the members of other political parties to form the Government is able to secure the same.

Hence, carving out an exception to this rule would serve the best interest as it would firstly, make it easier to implement the scheme of simultaneous election and secondly, overcome the abovementioned problems which have arisen since its inception.

LEGAL PROVISIONS - REPRESENTATION OF PEOPLE ACT, 1950 AND THE REPRESENTATION OF THE PEOPLE ACT, 1951

To facilitate the conduct of elections by the Election Commission of India, the Parliament has enacted the Representation of People Act, 1950 and Representation of People Act, 1951 and

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the Rules framed thereunder, viz., Registration of Electors Rules, 1960 and Conduct of Election Rules, 1961.[402]

This Act includes various rules and regulations and the procedure of conducting elections in the country. It provides the statutory basis for the election Commission of India to conduct elections in the country. It prescribes the qualifications for being elected as a Member of Parliament or a State Legislature Member and disqualification on conviction. It also contains the method of counting of votes, publication of results etc.

In *Shankar Nana Saheb Karpe* v. *Returning Officer of Roha Sudhagad Constituency & Anr.*,[403]the Bombay High Court observed that the whole object of the Constituent Assembly in enacting Part XV of the Constitution and that of the Parliament in putting on the statute book, the Representation of the People Act, 1951, was to set up a machinery whereby elections would take place, as far as possible, within the time-schedule laid down and without interference or interruption by proceedings in a court of law.[404]

Section 14 and 15 of the Act provide that a notification by the Election Commission can be issued to the Lok Sabha as well as the State Legislative Assemblies, six months prior to the end of normal terms of these Houses.

Therefore, the abovementioned sections pose a difficulty in the implementation of the system of simultaneous election. There is a need for an amendment in the abovementioned sections. The provisions of the sections can be amended according to the electoral cycle that will be in operation when simultaneous elections will be held.

Moreover, the provision of this Act, as it is, could be used to hold elections without extension of term of some Assemblies, in which the tenure of the Assembly has to be extended. The provisions of this Act have to be amended in line with the provisions of the Constitution so that there arises no conflict as such.

Report by the Law Commission of India

The Law Commission of India released its draft report on Simultaneous Elections on August 30, 2018. The Commission noted that simultaneous elections cannot be held within the

[402] ANALYSIS OF SIMULTANEOUS ELECTIONS: THE "WHAT", "WHY" AND "HOW" A Discussion Paper.
http://niti.gov.in/writereaddata/files/document_publication/Note%20on%20Simultaneous%20Elections.pdf
[403] AIR 1952 Bom 277.
[404]Ibid.

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existing framework of the Constitution. It recommended all the above-mentioned solutions to the hurdles provided for in the manuscript.

CONCLUSION

Simultaneous election can be a boost for the nation. After the independence, it did serve as a tool of growth when it was in operation for 4 years. It has various benefits as mentioned in this report, which will promote the development and encourage the growth of India. It will lead to better synchronization.

However, it will be very difficult to implement the same. Many major amendments as well as the formulation of new rules will be needed for this. The amendments to be brought are not easy to formulate. However, if this rule is applied in India, it will serve the public interest in the best possible manner.

The Law Commission of India has put it ideally in its 170th Report on Reform of Electoral Laws (1999) that:

> "This cycle of elections every year, and in the out of season, should be put an end to. We must go back to the situation where the elections to Lok Sabha and all the Legislative Assemblies are held at once. It is true that we cannot conceive or provide for all the situations and eventualities that may arise whether on account of the use of Article 356 or for other reasons, yet the holding of a separate election to a Legislative Assembly should be an exception and not the rule. The rule ought to be one election once in five years for Lok Sabha and all the Legislative Assemblies".[405]

[405] 170th Report on Reform of Electoral Laws (1999), Law commission, Para 7.2.1.1

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CASE ANALYSIS: RAM PERSHAD v. THE COMMISSIONER OF INCOME TAX, NEW DELHI, (1972) 2 SCC 696

-Arihant Sagar Jain

The case of Ram Pershad v. The Commissioner of Income Tax, New Delhi is a landmark judgment of the Hon'ble Supreme Court of India with regard to certain nuances pertaining to the concept of salaries under income tax law. This judgment explored the scope and various constituents of salary as a source of income chargeable to income tax. The judgment also analyzed certain tests for determining the employment of an assessee for further calculating his salary for computation of income tax. The judgment was pronounced by a Full Bench of the Supreme Court comprising of the Hon'ble Mr. Justice K.S. Hegde, the Hon'ble Mr. Justice P. Jaganmohan Reddy and the Hon'ble Mr. Justice H.R. Khanna, on 24th August, 1972.

FACTS

- The Assessee and his wife owned a large number of shares in a private limited company which was engaged in the business of running hotels.

- As per Article 109 of the Articles of Association of the said company, the Assessee became the first Managing Director of the company, on terms conditions agreed to and embodied in an agreement dated 20th November, 1955, entered into between himself and the company. Under the said agreement, the Assessee was to receive a remuneration of Rs. 2,000/- per month, a fixed sum of Rs. 500/- per month as car allowance, 10 per cent of gross profits of the company, and further, he and his wife were also entitled to free boarding and lodging on behalf of the company, in a hotel.

- For the company's Accounting Year ending on 30th September, 1955 (Assessment Year 1956-57), the commission payable to the Assessee worked out to the amount of Rs. 53,913/-. But the Assessee gave up his claim to this commission amount soon after the

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company's accounts were finalized, but before the same were passed by the general meeting of the shareholders of the company. The reason for this was that the company could not have made any net profits if this commission was paid by it to the Assessee.

- Subsequently, the Income Tax Department taxed the Assessee on the sum of Rs. 53,913/- giving the reasoning that there is no provision in the Indian Income Tax Act, 1922 for foregoing the amount of salary, once it has accrued to the Assessee, and thus, exempting such amount.

- The Assessee claimed that the amount given up by him was not liable to be included in his total income because the amount had not accrued to him at all, at any rate, in the accounting year ended 31st March, 1956, and that even assuming that it had accrued in the account year ended 31st March, 1956, it is not taxable under Section 7 or Section 10 of the Indian Income Tax Act, 1922.

- The Income Tax Officer, the Appellate Assistant Commissioner, the Income Tax Tribunal and on a reference under Section 66(1) of the Indian Income Tax Act, 1922, the High Court, all held that the 10 per cent commission on gross profits amounting to Rs. 53,913/- was taxable as 'salary' under Section 7 of the Act and that the income had accrued to the Assessee during the previous year (i.e., 1955-56; Assessment Year 1956-57)

- The questions of law which were referred to the High Court under Section 66(1) of the Act were as follows:
    - Whether the sum of Rs. 53,913/- was a revenue receipt of the Assessee of the previous year?
    - Whether the amount is chargeable under Section 7 or Section 10 of the Indian Income Tax Act, 1922?
    - If the amount is chargeable under Section 10, is the Assessee entitled to a deduction of Rs. 53,913/- under Section 10(1) or Section 10(2)?

  The High Court answered the first question in the affirmative and in favour of the Department, and on the second question it was of the view that the amount payable as

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commission was chargeable under Section 7 as salary and not under Section 10 of the Act. On this view, it did not think it necessary to answer the third question.

- In response to this, the Assessee filed a Civil Appeal (No. 1946/1948) before the Supreme Court. Hence, this case.

- When the matter came up earlier on 9th November, 1971, the Court considered it necessary to call for a further statement of the case from the Tribunal on the third question on the basis of the materials before it and having regard to the decision of its own previously decided case of Morvi Industries Ltd. v. CIT[406]. The Tribunal in its supplementary statement of case has answered the question against the assessee and in favour of the Department in holding that the assessee is not entitled to a deduction of the sum of Rs 53,913 either under Section 10(1) or Section 10(2) of the Indian Income Tax Act, 1922.

ISSUES

The following issues involving different questions of law were analyzed and decided by the Apex Court in this case:

- Whether Salary under Section 7 of the Indian Income Tax Act, 1922 also includes commission?
- Whether a relationship of master and servant is required to be established between the company and the assessee in order to constitute salary? If yes, then what is the test required in order to establish the same? How is it different for the test of establishing a relationship of Principal and Agent?
- Whether a Managing Director of a company acts in the capacity of an employee or a director?
- Whether the sum of Rs. 53,913/- was a revenue receipt, whether it was chargeable under Section 7 or Secion 10 of the Indian Income Tax Act, 1922?

LEGAL PROVISIONS

[406] Morvi Industries Ltd. v. CIT, AIR 1971 SC 2396

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The following legal provisions of the Indian Income Tax Act, 1922, were deliberated upon by the Supreme Court in this case:

- Section 7 - Salaries (Corresponding to Chapter IV Part A of the Income Tax Act, 1961)

  "*(1) The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages any annuity, pension or gratuity, and any fees, commissions, perquisites or profits received by him in lieu of, or in addition to, any salary or wages, which are paid by or on behalf of Government, a local authority, a company, or any other public body or association, or by or on behalf of any private employer:*

  Provided that the tax shall not be payable in respect of any sum deducted under the authority of Government from the salary of any individual for the purpose of securing to him a deferred annuity or of making provision for his wife or children, provided that the sum so deducted shall not exceed one-sixth of the salary.

  (2) Any income which-would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by Government or by a local authority established by the Governor General in Council."

- Section 10(1) - Business (Corresponding to Chapter IV Part D of the Income Tax Act, 1961)

  "*The tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him.*"

ARGUMENTS OF THE APPELLANT

The major points of contention raised by the Appellant (assessee) stemmed from a common point of argument.

On behalf of the assessee, it was contended that in order to assess the income as salary it must be held that there was a relationship of master and servant between the company and the assessee. For such a relationship to exist, it must be shown that the employee must be subject to the supervision and control of the employer in respect of the work that the employee has to do. Where, however, there is no such supervision or control it will be a relationship of

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principal and agent or an independent contractor. Applying these tests, it was submitted that the appointment of the assessee as a Managing Director was not that of a servant but as an agent of the company and accordingly the commission payable to him amounted to income from business and not salary. In support of this contention, reference was also made to *Halsbury's Laws of England*, Bowstead on Agency and treatises on Company Law by Palmer, Gower, Penington and Buckley.

The Appellant also relied upon the decision of Qamar Shaffi Tyabji v. Commissioner of E.P.T., Hyderabad[407]. That was a case which turned upon the nature of the contract entered into between the industrial trust fund and the assessee which in turn was governed by the agreements between the company and the trustees. Under the latter agreements, the trustees were given general conduct and management of the business and affairs of the mills and were entitled to appoint employees and delegate to other persons all or any of the powers, etc., under the agreement subject to the approval of the Board of Directors. By separate agreements made at the same time the trustees were also appointed selling agents of the mills and by two supplemental agreements they were given power to delegate all or any of their powers to other persons on such terms and conditions as they may think fit subject to the approval of the Board of Directors of the company. The trustees appointed the assessee under these terms as their delegate. In those circumstances, it was held that the Appellant was neither a servant nor a mere sub-agent. He was an agent of the principal for such part of the business of the agency as was entrusted to him inasmuch as the trustees as agents had express authority to name another person to act for the principal in the business of the agency and they named the appellant with the approval of the Board of Directors.

Also in the case of Lakshminarayan Ram Gopal v. Government of Hyderabad[408], the Court held that the assessee under the managing agency agreement, having regard to certain indicia discernible from that agreement was an agency. These were:

(*1*) The power to assign the agreement and the rights of the appellant thereunder;

(*2*) The right to continue in employment as the agents of the company for a period of 30 years until the appellants of their own will resign;

[407] Qamar Shaffi Tyabji v. Commissioner of E.P.T., Hyderabad, (1960) 3 SCR 546
[408] Lakshminarayan Ram Gopal v. Government of Hyderabad, (1955) 1 SCR 393

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(*3*) The remuneration by way of commission of 2½% of the amount of sale proceeds of the produce of the company; and

(*4*) The power of sub-delegation of functions given to the agent under Article 118.

All these circumstances went to establish that the appellants were the agents of the company and not merely the servants remunerated by wages or salary.

ARGUMENTS OF THE RESPONDENTS

It was contended by the Respondents that a person who is engaged to manage a business may be a servant or an agent according to the nature of his service and the authority of his employment. Generally, it may be possible to say that the greater the amount of direct control over the person employed, the stronger the conclusion in favour of his being a servant. Similarly, the greater the degree of independence the greater the possibility of the services rendered being in the nature of principal and agent. It is not possible to lay down any precise rule of law to distinguish one kind of employment from the other. The nature of the particular business and the nature of the duties of the employee will require to be considered in each case in order to arrive at a conclusion as to whether the person employed is a servant or an agent. The test of supervisory work and authority is not universal in its application and does not determine in every case, having regard to the nature of employment, that the employee is a servant.

Though an agent as such is not a servant, a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant. It is again true that a director of a company is not a servant but an agent inasmuch as the company cannot act in its own person but has only to act through directors who qua the company have the relationship of an agent to its principal. A Managing Director may have a dual capacity. He may both be a Director as well as employee. It is therefore evident that in the capacity of a Managing Director he may be regarded as having not only the capacity as persona of a director but also has the persona of an employee, as an agent depending upon the nature of his work and the terms of his employment. Where he is so employed, the relationship between him as the Managing Director and the Company may be similar to a person who is employed as a servant or an agent for the term “employed” is facile enough to cover any of these relationships. The nature of his employment may be determined by the articles of association of a company and/or the agreement if any, under which a contractual

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relationship between the Director and the company has been brought about, whereunder the Director is constituted an employee of the company, if such be the case, his remuneration will be assessable as salary under Section 7. In other words, whether or not a Managing Director is a servant of the company apart from his being a Director can only be determined by the article of association and the terms of his employment. This view was also expressed by the Scottish Court of Session in the case of Anderson v. James Sutherland (Peterhead) Limited[409], where Lord Normand stated that "*…the managing director has two functions and two capacities. Qua Managing Director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of opinion that it is a contract of service and not a contract for service.*"

Further, in CIT v. Armstrong Smith[410], Stone, C.J., and Kania, J., had held that under the terms of an agreement the Managing Director was a servant of the company. There they had to consider a case where the articles of association of the company provided that the assessee was to be the Chairman and Managing Director of the Company until he resigned office or died or ceased to hold at least one share in the capital of the company; that all the other directors were to be under his control and were bound to conform to his directions in regard to the company's business; that his remuneration was to be voted by the company at its annual general meeting and that the sum received by him for managing the company's business which arose from out of the contractual relationship with the company provided by the articles for performing the services of managing the company's business. In these circumstances it was held that the remuneration was taxable under Section 7 and not under Section 12 of the Act. Stone, C.J., observed that:

> "*We have been referred to quite a large number of English cases the effect of which, I think, be summarised by saying that a director of a company as such is not a servant of the company and that the fees he receives are by way of gratuity, but that does not prevent a director or a managing director from entering into a contractual relationship with the company, so that, quite apart from his office of director he becomes entitled to remuneration as an employee of the company. Further that relationship may be created either by a service agreement or by the articles themselves. Now, in this case there is no question of any service agreement outside*

[409] Anderson v. James Sutherland (Peterhead) Limited, [1941 SC 203 at 218]
[410] CIT v. Armstrong Smith, [15 ITR 606]

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the articles and, therefore, the relationship between the company and the assessee, Mr Smith, depends upon the articles."

This decision was also referred and followed by the Madras High Court in the case of CIT v. Negi Reddy[411], where the Court was considering the case of a Managing Director of a film company who was also the Managing Director of another film company on similar terms and remuneration, namely, that he was to get a monthly remuneration of Rs 500 and in addition a commission on net profits. The question there was, whether the remuneration received by him as Managing Director from these two companies was income from business assessable under Section 10 of the Act.

JUDGMENT

The judgment of the case was propounded on 24th August, 1972 by P. Jaganmohan Reddy, J. The first adjudication that the Court made in this case was to hold that Section 7 of the Indian Income Tax Act, 1922 also includes within its scope commission received by the assessee, while also holding that commission amounts to a revenue receipt. Therefore the amount of Rs. 53,913/- was chargeable to income tax, as it had accrued to the assesssee.[412]

Next, the Court held that in order to assess an income as 'salary', it must be established that there was a relationship of master and servant between the company and the assessee. For ascertaining whether the assessee is a servant or an agent, a rough and ready test is that whether the under the terms of employment, the employer exercises a supervisory control in respect of the work entrusted to the assessee. A servant acts under the direct control and supervision of the principal, though he is bound to exercise his authority in accordance with all lawful instructions and orders which may be given to him from time to time by his principal.[413]

Further, it was held that a Managing Director of a company may have a dual capacity, i.e., he may be both a Director as well as an employee. In this capacity, he may be regarded as

[411] CIT v. Negi Reddy, [51 ITR 178 (Mad)]
[412] Para 4, Ram Pershad v. The Commissioner of Income Tax, New Delhi, (1972) 2 SCC 696
[413] Paras 5 & 6, Ibid

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having not only the persona of a Director but also has the persona of an employee, or an agent, depending upon the terms and conditions of his employment.[414]

With regard to the facts and circumstances of the case, the Court decided the prevalent question of law by holding that whether a Managing Director, apart from being a Director of the company, is a servant of the company or not, can only be determined by the Articles of Association of the company and the terms of his employment.

The following observations of the Court will highlight the decision of this case:

"The real question in this case is one of construction of the articles of association and the relevant agreement which was entered into between the company and the assessee. If the company is itself carrying on the business and the assessee is employed to manage its affairs in terms of its articles and the agreement, he could be dismissed or his employment can be terminated by the company if his work is not satisfactory, it could hardly be said that he is not a servant of the company. Article 109 of the articles of association before its amendment and relevant for the period which we are considering provided that he shall be the Managing Director of the company for 20 years on terms and conditions embodied in the agreement. Article 136 states that subject to the aforesaid agreement, the general management of the business of the company shall be in the hands of the Managing Director of the company who shall have power and authority on behalf of the company to do the several things specified therein which are usually necessary and desirable for the management of the affairs of the company. Article 137 provides that the receipts signed by the Managing Director or on his behalf for any moneys or goods or property received in the usual course of business of the company shall be effectual discharge on behalf of and against the company for moneys, funds, etc. It further provides that the Managing Director shall also have power to sign cheques on behalf of the company. Under Article 138 he is authorized to sub-delegate all or any of the powers. Article 139 enjoins that notwithstanding anything contained in those articles the Managing Director is expressly allowed generally to work for and contract with the company and specifically to do the work of agent to and Manager of and also to do any other work for the company upon such terms and conditions and on such remuneration as may from time to time be agreed upon between him and the Directors of the Company. Article 140 specifies powers in addition to the powers conferred on him as the Managing Director. Under Article 141 the Managing Director shall have charge and custody of all the

[414] Para 7, Ibid

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property, books of account, papers, documents and effects belonging to the said company wheresoever situate. Article 142 provides that the Managing Director shall work for the executions of the decisions that may be arrived at by the Board from time to time and shall be empowered to do all that may be necessary in the execution of the decisions of the management of the company and shall do all things usual, necessary or desirable in the management of the affairs of the company or carrying out its object."[415]

"A perusal of the articles and terms and conditions of the agreement definitely indicates that the assessee was appointed to manage the business of the company in terms of the articles of association and within the powers prescribed therein. Reference may particularly be made to Articles 139 and 142 to indicate the nature of the control imposed by the company upon the Managing Director. The very fact that apart from his being a Managing Director he is given the liberty to work for the company as an agent is indicative of his employment as a Managing Director not being that of an agent. These terms are inconsistent with the plea that he is an agent of the company and not a servant. The control which the company exercises over the assessee need not necessarily be one which tells him what to do from day to day. That would be a too narrow view of the test to determine the character of the employment. The powers of the assessee have to be exercised within the terms and limitations prescribed thereunder and subject to the control and supervision of the Directors which in our view is indicative of his being employed as a servant of the company."[416]

With these views, the Supreme Court ultimately held that the remuneration in the form of commission of Rs. 53,913/- payable to the assessee amounted to his salary and thus was chargeable under Section 7 of the Indian Income Tax Act, 1922. With this, the Court dismissed the appeal of the Appellant.[417]

ANALYSIS

The case of Ram Pershad v. The Commissioner of Income Tax, New Delhi has become a landmark precedent and has evolved into a concise and apt commentary on the subject of salaries in direct taxation laws.

[415] Para 13, Ibid
[416] Para 14, Ibid
[417] Para 15, Ibid

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Salaries are one of the 5 heads or classes of income that are chargeable to income tax as per the Income Tax Act, 1961, the other four being the following:

- Income from House Property;
- Profits and Gains of Business or Profession;
- Capital Gains; and
- Income from other sources.

Salary in common parlance means any amount paid by an employer to his employees in lieu of services rendered by them. However the Income Tax Act, 1961, defines the term "salary" to include the following monetary as well as non-monetary payments:

- Wages;
- Annuity or pension;
- Any Gratuity;
- Any fees, commission, perquisite or profits in lieu of or in addition to any salary or wages;
- Any Advance of Salary;
- Leave Encashment;
- Employers contribution to provident fund in excess of 12% of Salary; or
- The contribution by the central government or any other employer in the previous year to the account of an employee under a pension scheme under Section 80CCD.[418]

The practice of determining the type of remuneration is key in assessing and computing the total taxable income of the assessee. The need for implementing the master and servant relationship test and the test of supervision over the activities of the assessee, which have been dealt with in detail in this judgment, is to determine whether the income received by the assessee falls under the correct head of income. This is important because each of the 5 heads of income have their own separate criteria and rules of computation, having different types exempted income, have different types of deductions, and most importantly, have different rates of taxation.

Among the various deliberations and the observations on the same, delivered by the Supreme Court in this case, in my opinion, the observations on the test of supervision and control have

[418] Section 17(1), Income Tax Act, 1961, Acts of Parliament, No. 43 of 1961

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the maximum intricacies. This test is an important tool for determining whether the master and servant relationship exists between the company and the assessee or not.

Therefore, it would be noteworthy to mention the comments of the Apex Court., in the case of Piyare Lal Adishwar Lal v. CIT [419]. It was stated that "It is difficult to lay down any one test to distinguish the relationship of master and servant from that of an employer and independent contractor. In many cases the test laid down is that in the case of master and servant, the master can order or require what is to be done and how it is to be done but in the case of an independent contractor an employer can only say what is to be done but not what it shall be done. But this test also does not apply to all cases, e.g. in the case of ship's master, a chauffeur or a reporter of a newspaper.... In certain cases it has been laid down that the indicia of a contract of service are: (a) the master's power of selection of the servant; (b) the payment of wages or other remunerations; (c) the master's right to control the method of doing the work; and (d) the master's right to suspension or dismissal."

My conclusion for this analysis is that this judgment highlighted the objectivity and meticulousness of the Supreme Court in dealing with issues involving such technical questions of law, thereby ensuring that due and proper justice was carried out through its decision.

[419] Piyare Lal Adishwar Lal v. CIT, (1960) 3 SCR 669

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IMMANUEL KANT: THE THEORY OF SELF-DETERMINATION

-Deepika Singh

ABSTRACT

The present study intended to analyse upon the work of Immanuel Kant with special focus on his theory of self-determination and its relevance in today's time. It inspects his idea of moral law and his concept of self. Can a choice based upon my inclinations be called "my" choice? Am "I" as a rational being same as "you" as a rational being if we both shed our inclinations? Can freedom and morality be possible if all of our physical actions are caused by prior events? A systematic probe in to these questions has been made in the study. It further examines his moral philosophy, notion of categorical imperatives, the formulation of maxims and subsequent tests to determine how they would function in the perturbed social world. Finally, the theory has been examined in the light of significant statutes and judgments in contemporary times to test its application.

BACKGROUND

To understand Kant's ideas and philosophy, let us consider the historical and intellectual context in which they were written. Kant wrote the Critique toward the end of the Enlightenment, which was then in a state of crisis. The 18th century is often called the "Age of Reason" or the "Age of Enlightenment" as this century was decisively shaped by the systematic efforts of the Enlightenment in the Western world, a philosophical, cultural, and political movement that tried to institute the rule of Reason in all areas of life. Reason was to replace blind faith and superstition in religion, autocratic and arbitrary rule in administration and government, brute force and devious cunning in politics, the dead weight of tradition in social institutions and culture, and primitive instincts or uncontrolled feelings in personal relations and ethics.

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The Enlightenment aimed at a future for humanity that is characterized by scientific rationality, self-critical awareness, ever improving technology, democracy, religious tolerance (including the freedom to not believe in any gods at all), universal peace, and the continuing improvement of people's lives both in terms of physical comfort and intellectual sophistication.

Important philosophical impulses for this movement came from the writings of René Descartes and John Locke, thinkers of the 17th century. The practical application and further development of these impulses was largely due to the toils of a group of French intellectuals, however, a group generally known as les philosophes ("the philosophers"). Among them were such illustrious authors as Voltaire, Diderot, and Rousseau.

The over-all ideal and goal of the Enlightenment was rational self-determination. On a personal level it was the idea that every individual had the right to determine for him or herself how to live and what to live for; a person's own reason and conscience was the ultimate arbiter of right and wrong. On a social and political level it was the idea of democratic self-government: the citizens of an enlightened society do not feel that they need a monarch or some other father figure to do their thinking and governing for them.

It was Kant who formulated the often-quoted definition of the philosophy that gave the century its name. His 1784 essay "What is Enlightenment?" starts out with the programmatic declaration:

Enlightenment is man's release from his self-incurred tutelage. Tutelage is man's inability to make use of his understanding without direction from another. Self-incurred is this tutelage when its cause lies not in lack of reason but in lack of resolution and courage to use it without direction from another. Sapere aude! Have courage to use your own reason! --that is the motto of enlightenment.[420]

[420] JORN K. BRAMANN: EDUCATING RITA AND OTHER PHILOSOPHICAL MOVIES (Nightsun Books, 2009)

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KANTIAN CONCEPTION OF SELF

To ascribe any moral worth to an action, Kant believed, its conformity with the moral law is not enough. The action should have been done for the sake of the moral law itself.[421] The moral law, therefore, was required to not only be of the highest standards in its content, but also of such a nature that it could have a universal application. In order to discover such moral law he found it necessary to work out a pure moral philosophy.

In Kantian philosophy my 'self' is not just a bundle of 'inclinations' that I have. My inclination is to enhance my pleasure and diminish my pain. But my self, in Kantian philosophy, has greater capacity and a bigger role to perform. It is not that the self does not seek pleasure, but the self is much more than a hedonistic entity in Kantian philosophy. In its pleasure enhancing pursuits, self does not act freely. To work out a complete moral philosophy Kant explains self as capable of freedom.

It is because of my inclinations that I come to choose what I choose for my pleasure. But there is something in my self that feels that I ought not to have chosen so (in some cases at least). Kant believes that when I choose to satisfy my senses (i.e. to make myself more happy or to increase my pleasure), I am not making a free choice. The idea is that since 'I' have not chosen my inclinations, any choice based upon my inclinations cannot be 'my' choice. An act based upon inclinations does not have any moral worth. The moral worth can come only if I act for the sake of duty.

In Kant's philosophy 'I', the self, exists in two worlds. One is a sensible world and the other is an intelligible world. In the sensible world, I am controlled by the inclinations that are bestowed upon me. When I am merely operating in this world I am controlled by my predispositions and I make choices according to my inclinations. Since I have not chosen my inclinations, any choice made by me due to my inclinations is not a free choice in this world.

In the intelligible world, the self is not the same as it is in the sensible world, where it is controlled by its senses (inclinations). In the intelligible world I am a different me; I am not guided by my predisposed nature or inclinations. In this world, free from my inclinations, I am capable of making free choice. It is in this world that I choose the 'law' that would govern

[421] IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS, 389 (Allen W. Wood ed., Yale University Press 2002)

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me in my sensible world. And that law will become a standard of judgment to determine the moral worth of my actions.

The power that makes a person know that he inhabits two worlds different from each other is: 'reason'. The reason distinguishes him from all other things. He has therefore two points of view from which he can regard himself and from which he can know laws governing the employment of his powers and consequently governing all his actions. He inhabits both the worlds at the same time. In the intelligible world, a person shall choose his laws that Kant calls *categorical imperatives*. And the necessity to act out of reverence for such law without depending on the result expected from it is what constitutes duty. A reverence for such law and my duty to follow that law is because I am the author of that law myself.

In Kant's line of thinking the 'I' as a rational being is the same as 'you' as a rational being. Thus, the distinction between you and I vanish when we apply pure practical reason and make laws for us in the intelligible world. The distinction between you and I is due to our inclinations in the sensible world, and when you and I shed our inclinations, we are the same. Since we are the same in the intelligible world that we inhabit we choose the same law in that world. Thus, the law that we make for ourselves becomes not just categorical but also universal.

It is obvious that Kantian self is not just a unifying entity that is engaged in the task of recording the experiences and making sense of life as not just a series of unconnected events, but as a continued and a coherent story. His self is much more than that. His self is capable of freedom. And as a free self, it chooses the laws that bind him and that give moral worth to his actions if they are done as a matter of duty toward such laws.

The categorical imperative has three different formulations. First formulation (The Formula of Universal Law): "Act only on that maxim through which you can at the same time will that it should become a universal law [of nature]."

Procedure for determining whether a proposed action violates the Formulation:

1. Formulate the maxim.
2. Generalize the maxim into a law of nature.
3. Figure out the perturbed social world (PSW), that is, what the world would be like if this law of nature were added to existing laws of nature and things had a chance to reach equilibrium.

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He gives two tests to use after formulating-

1. Contradiction in Conception Test- Could I rationally act on my maxim in the PSW?
2. Contradiction in the Will Test- Could I rationally choose the PSW as one in which I would be a member?

The Kantian evaluation rule is this: we must be able to answer yes to *both* questions for the maxim to be acceptable. This moral philosophy sets very high standards for an individual to follow. It creates 'duties to oneself'.[422] If I follow my inclinations, in Kantian philosophy, I am not just an un-free person but I am also (possibly) acting contrary to the essential ends of humanity. As I am one of the bearers of humanity, in following my inclinations I am acting contrary to the essential ends of my self. The connection seems to be that without rule-restriction of inclination-satisfaction, we cannot achieve the ends of humanity, that is, the fullest employment of our humanity-defining power, our rational autonomy.

MORAL PHILOSOPHY

Kant's understanding of moral freedom and of moral principles has been central to discussions of morality from his time forward. His moral philosophy is a philosophy of freedom. Without human freedom, moral appraisal and moral responsibility would be impossible. Kant believes that if a person could not act otherwise, then his or her act can have no moral worth. Further, he believes that every human being is endowed with a conscience that makes him or her aware that the moral law has authority over them. Kant calls this a "fact of reason" and he regards it as the basis for a belief in human freedom. However, Kant also believes that the entire natural world is subject to a strict Newtonian principle of causality, implying that all of our physical actions are caused by prior events, not by our free wills. How, then, can freedom and morality be possible?

In simplified terms, Kant's answer to this problem is that although humans are subject to causality in the *phenomenal* (the thing as it appears) realm, we are free in the *noumenal* (the thing-in-itself) realm. To make sense of this answer, it is necessary to understand Kant's distinction between theoretical and practical reason. *The Critique of Pure Reason* gives an

[422] See LARA DENIS, KANT ON THE WRONGFULNESS OF "UNNATURAL" SEX, 16 HISTORY OF PHILOSOPHY QUARTERLY 225-248, 228(Apr.1999) ("The perfect duties that Kant says we have to ourselves as animal and moral beings are duties to avoid suicide, sexual self-debasement, and excessive use of food and drink").

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account of theoretical reason and its limits. Theoretical reason can understand the natural world through the categories of the understanding. Practical reason addresses questions of how the world ought to be and tells us our duty. It also leads humans to a concept of an ideal world, which it becomes our aim to create. However, the proper functioning of practical reason requires the existence of certain conditions, such as God, immortality of the soul, and, most importantly, free will. Because none of these is contained within the categories of the understanding, theoretical reason can know nothing about them. However, argues Kant, because theoretical reason is also incapable of disproving their existence, we are justified in accepting their existence practically. As he puts it in the preface to the second edition of the Critique of Pure Reason, Kant "*had to deny knowledge in order to make room for faith*."

ETHICS AND LAW

Kant developed the metaphysical method still further and held that ethics and law are not one and the same thing. According to him, ethics relates to man's spontaneous acts while law deals with all those acts to which a man can be compelled. Ethics thus deals with the inner life of the individual; law on the other hand, regulates his external conducts. He emphatically pointed out that an organized society should not exercise compulsion to make man virtuous, but compulsion should be exercised only to regulate his external conduct. In his view, "*Law is the sum total of the conditions under which the personal wishes of man can be reconciled with the personal wishes of another man in accordance with a general law of freedom*".

Kant, in his "Critique of Pure Reason" tried to draw a distinction between form and matter. He observed that "*the impressions of our senses are the matter of human experience which are brought into order and shaped by human mind. Emotions become perceptions through the forms of space and time, perceptions became experience through the categories or understanding such as substance and causality, quality and quantity the judgment of experience are linked with each other by general principles*". Human mind does not necessarily follow the necessity as it has a free will. According to him, the freedom of man to act according to his will and the ethical postulates are mutually co-relative because no ethical postulate is possible without man's freedom of self-determination. Kant calls substance of ethical postulate as *"categorical imperative"* which is the basis of his moral and legal theory.

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DOCTRINE OF CATEGORICAL IMPERATIVE/ CONCEPT OF THE MORAL LAW

According to Kant, ethics is *a priori*, meaning that our moral duty is determined independently of empirical considerations. Kant's ethics can therefore be contrasted with ethical views such as utilitarianism that hold that the morality of acts is derived from their consequences. In the *Groundwork of the Metaphysics of Morals*, Kant outlines his fundamental ethical principle, which he calls the "categorical imperative" which has been discussed above. The moral principle is "imperative" because it commands, and it is "categorical" because it does so unconditionally, that is, irrespective of the particular inclinations and circumstances of the actor. This moral principle is given by reason and states that we may act only in such a way that the maxim of our action, i.e. the principle governing our action, could be willed as universal law. For example, one is forbidden to act on the maxim "lie whenever it provides an advantage" because such a maxim would destroy trust among humans, and with it the possibility of gaining any advantage from lying. Those who act on non-universalizable maxims are caught in a kind of practical contradiction. In another formulation of the categorical imperative, Kant specifies that we must always respect the humanity in ourselves and others by treating humans always as ends in themselves, and never merely as a means.

In Kant's opinion, moral law is a categorical imperative. There is no law or authority over it. A duty is always a duty, and duty is obligatory. It should be done anyway. Moral laws are universal. They originate only in the real essence of the doer. Their basis is the very moral nature of man. Other objects are good in a limited way because their importance is only in special circumstances but good will is good regardless of the circumstance in view of its propriety being independent of the result. Good will is the ultimate good and good will is rational will.

Thus, acts in harmony with the moral law are good in themselves. Actions done with desires and feelings are immoral, it being of no consequence that the desires are pure and the feelings the highest. Moral quality is an integral quality. It is Kant's dictum to do your duty, be the result what is will. Moral laws are not qualified by experience. They are not relative to circumstances. In his opinion, if it is a moral duty to tell the truth then every person should tell the truth in every circumstance. In the Mahabharat war, the lie perpetrated by Yudhisthira and conveyed to Dronacharya would have been an extremely immoral act in his opinion.

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Moral laws cannot be violated in any circumstances whatsoever. But he distinguished morality from law and contended that morality is a matter of internal motives of the individual whereas legality is a matter of action in conformity with an external standard set by the law. Thus, his legal theory is basically modelled on what the law ought to be. Kant deduced the definition of law from his categorized imperative and observed, "law is the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive law of freedom"[423]. Thus, Kant considered "compulsion" as an element of law and a right is nothing but a power to compel. He believed that equality is an implied condition of freedom and the right to property is an expression of personality of man.

Freedom, for Kant, is thus not the "freedom" to follow one's inclinations. Instead, freedom implies morality, and morality implies freedom. To act on one's inclinations or desires, even if one desires the morally correct act, is to be determined by the causal forces of nature, and therefore to be unfree or "heteronomous." To act morally is to act "autonomously," meaning to act according to the law that one gives oneself. It is not sufficient only to perform the acts required by morality; it is also necessary to act intentionally in accord with one's moral duty.

MORAL JUDGMENT IS AN UNQUALIFIED JUDGMENT

Kant had absolute faith in the value of ethics. Moral laws are the orders of reason while other laws are inspired by the desires. Laws inspired merely by desires are no more than *hypothetical imperatives*. They are dependent upon external result and circumstances. Law of a sensual life contradicts the rational laws. External goal can only be hypothetical imperative. For example, earning wealth cannot be an unqualified command because it depends upon the situation, need and ability of the individuals. But on the contrary, moral laws being rational laws, are categorical imperatives. They have no scope for any exceptions and they must be satisfied in all circumstances. Therefore they are categorical imperatives.

Other laws are based on experience. Moral law is "a-priori". They are related not to "what" but to "ought". They are axiological and not factual.

[423] IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT, 46 (William Hastie, 1796)

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Kant pointed out that law, to be acceptable to people in general should have within it an element of justness. According to him legislation could be effective only when it represents the united will of the people. He upheld freedom of speech as a prerequisite of a good government.

As regards the function of the state, Kant asserted that it should confine itself to maintenance of law and order and administration of justice. The citizens should have the freedom of criticizing the government but they should never seek to resist it. He believed in the universal world order and equality and freedom of states. However, he stated that, the international law to be effective, must have an international authority superior to the member states.

JURISPRUDENCE

Immanuel Kant belongs to the Philosophical or Ethical School of Jurisprudence. According to the exponents of this school, legal philosophy must be based on ethical values so as to motivate people for an upright living. Since the science of ethics deals with the principles of morality which moulds man's conduct enabling him to distinguish between right and wrong and respect the rights of order in order to maintain social harmony. The purpose of law is to maintain justice and order in society and legal restrictions can be justified only if they promote the freedom of individuals in society. The ethical view of jurisprudence expounds the principle of law as it is "ought to be". It is neither concerned with the historical past nor with the analytical present, but with the future of law as it "ought to be".

The main features of the ethical jurisprudence may briefly be stated as follow:

1) The concept of justice has a philosophical or ethical content and law and justice are closely inter-related concepts. Law is a means to attain the ends of justice. Thus law is only an instrument towards the fulfilment of the objective of justice.
2) The ethical view of jurisprudence concerns itself with the manner in which the law fulfils its purpose of attainment of justice.
3) The study of difference between the spheres of law and justice.
4) The ethical significance of legal conceptions.

The ethical or philosophical view considers law as the means by which individual's will is harmonized with the general will of the community. The proximate object of jurisprudence is

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to secure liberty to the individual for the attainment of human perfection. Thus, liberty is one of the essential prerequisites for the perfection of the human personality. It is in this sense that philosophical jurisprudence became the common ground of moral and legal philosophy, and of ethics and jurisprudence.

Hugo Grotius, Kant, Hegel and Schelling are considered as the main exponents of the ethical or philosophical jurisprudence.

MANIFESTATION IN CONTEMPORARY TIMES

A healthy moral standard is essential for the humanity to strive for perfection. The moral standard of an institution will determine its value system and influence its priorities. Any institution with an authentic moral system will transmit a healthy culture of values promoting human welfare and transformation.

Ethics, also described as moral philosophy, is a system of moral principles which is concerned with what is good for individuals and society. Law is a system of rules and guidelines which are enforced through social institutions to govern behaviour.

In general, laws are made based on moral values of a particular society. They describe the basic behaviour of human beings. In other words, laws represent the minimum standards of human behaviours, that is, ethical behaviour. Besides, both laws and ethics are systems which maintain a set of moral values and prevent people from violating them. They both provide people guidelines of what may do or what may not do in certain situations. They exist for the purpose of making people benefit from being members of a well-regulated society.

Kantian Ethics and philosophy can be seen in many of today's laws:

Pornography- The Information Technology Act, 2000 defines pornography as an offence. Section 67 of the Act makes publishing of information which is obscene in electronic form punishable with imprisonment for upto five years and fine.

Prostitution- The Immoral Trafficking Prevention Act, 1956, the main statute dealing with sex-work in India, does not criminalize prostitution or prostitutes per se, but it punishes acts by third parties facilitating prostitution like brothel keeping, living off earnings and procuring, even where sex-work is not coerced. Section 5 makes procuring, inducing or

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taking a person for the sake of prostitution punishable. Section 372 and 373 of the Indian Penal Code criminalises selling and buying of minors for purposes of prostitution, etc. Hence, though prostitution is not an offence, organised prostitution (brothels, prostitution rings, pimping, etc.) is illegal.

Bestiality, Homosexuality- Section 377 criminalises unnatural offences and states that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished. Based on his ethics of duties to oneself, Kant, in equally strong terms, condemns bestiality, homosexuality, and masturbation. He finds all this unnatural.

Adultery - Section 497 of the IPC states that whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man is guilty of the offence of adultery.

In the landmark case of *Queen v. Dudly & Stephens*[424], three seamen and a boy were cast away in the storm on the high seas in an open boat. They had no food and drinking water in the boat. In order to save themselves from certain deaths as many days had passed without food, they killed the boy. The jury returned a special verdict. CJ Colerige observed: "Was it more necessary to kill him than one of the grown up men? The answer must be No…." The bench of five judges held, no man has a right to take another's life to save his own.

International Humanitarian Laws, is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. They lay certain moral standards as ingredient of law.

In India, Supreme Court has also laid that in case of conflict of fundamental rights of two individuals, the decision is to be made on the basis of morals. In *Mr. X v. Hospital Z*[425], the appellant's blood sample was detected HIV (+). When due to disclosure, it was acknowledged by 'A', fiancée of appellant and the proposed marriage of the appellant was called off. The appellant sued the hospital authorities for damages on account of violation of appellant's right to privacy as well as doctor's duty to maintain confidentiality. The Apex Court held that "where there is a clash between two fundamental rights, as in the instant case, namely the appellant's right to privacy as a part of right to life and A's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of the court,

[424] (1884) 14 QBD 273 DC
[425] (1998) 8 SCC 296

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for the reason that moral consideration cannot be kept at bay and the judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day".

The Fundamental Duties are defined as the moral obligations of all citizens to help promote a spirit of patriotism and to uphold the unity of India. These duties, set out in Part IV–A of the Constitution, concern individuals and the nation.

In *Society for Un-aided Private Schools of Rajasthan v. Union of India and Anr*[426] upheld the constitutionality of the Right to Education Act and held that Article 19(6) permitted the State to impose reasonable restrictions on the right to carry on an occupation, trade or business under Article 19(1)(g) and that the 25% reservation obligation on private unaided schools was a reasonable restriction.

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 makes it a legal obligation for children and heirs to provide maintenance to senior citizens and parents, by monthly allowances. However, there are many distinctions between ethics and laws. The fact that something is legal doesn't make it ethical and all ethics are not turned into law.

Firstly, ethics comes from people's awareness of what is right and what is wrong while laws are written and approved by governments. It means that ethics may vary from people to people because different people may have different opinions on a certain issue, but laws describe clearly what is illegal no matter how people arguing. To some extent, ethics is not well defined but laws are defined and precise. Kant's assertion that the moral philosophy of everyone shall be the same after applying pure practical reason is impossible in practicality as human beings cannot completely shed their inclinations which are based on their senses and experiences. The morality depends upon the conscience or will of the individual. An act moral for me may be immoral for you and morals mould the character of an individual. Further, an action can be illegal, but morally right. Similarly, an action that is legal can be morally wrong. Moreover, some laws have nothing to do with ethics, like cars should go on the left side of roads. Lastly, ethics emphasizes more on positive aspects while laws are more concerned with negative actions.

A few examples where ethics and law differ:

[426] (2012) 6 SCC 1

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Obscenity - the Apex court through a number of its judgements has stated that obscenity means "*the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive*"[427] and "*varies from country to country depending on the standards of morals of contemporary society.*"[428] This verdict of the Supreme Court states that it also depends upon the morals, which differs from person to person or society to society and according to me, by this verdict, court has accepted the view, that morals and law are two different things in contemporary society.

In *K.A. Abbas v. Union of India*[429], the Court held that sex and obscenity are not always synonymous and it was wrong to classify sex as essentially obscene or even indecent or immoral. Further, in *Bobby Art International v. Om Pal Singh Hoon*[430]regarding the depiction of the rape scene in the film Bandit Queen, the Court held that the object was not to arouse prurient feelings but revulsion for the perpetrators. In determining, whether an act is obscene, regard should be given to recent times or modern scenario of that place.

In Indian Society, morals say that inter-caste marriages or love marriages should not take place but when two individuals, with their will and consent want to marry, it is an independent state and everyone has right to choose his life partner according to his/her will. The law allows for it and has even provided for inter-religion marriages by way of The Special Marriage Act, 1954.

Live-in Relationships - The law provides that when two major individuals with their free consent decide to live together, they can do so. Even though it may be considered as an infringement of moral standards by majority of the Indian Society, there is no intervention by law in this regard. On the contrary, the Apex Court has held that live-in relationships are now an acceptable norm in society. It has been awarded legal status and all rights such as property, against domestic abuse, etc. have been conferred on this relationship which a married couple would get.

In *D. Velusamy v D. Patchaiammal*[431], after examining the evidences, Apex Court came to the conclusion that women who has a living in relationship with a man can claim for maintenance under section 20 (1) (d) of The Protection of Women from Domestic Violence

[427] Ranjit D. Udeshi v. State of Maharashtra AIR 1965 SC 881 at p.885.
[428] Chandrakant Kalyandas Kakodkar v. State of Maharashtra (1969) 2 SCC 687 at p. 693
[429] (1970) 2 SCC 780
[430] (1996) 4 SCC 1
[431] (2010) 10 SCC 469

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Act, 2005. The subordinate court was declined to grant maintenance as the lady was not legally wedded wife. They said "*Indian society is changing, and this change has been reflected and recognized by Parliament by enacting The Protection of Women from Domestic Violence Act, 2005*".

Marriage- The best example of a moral conflict between individuals can be taken of marriage in Hindus and Muslims. In Hindus, only one marriage is considered as sacred and bigamy is a sin and in Muslims, they are allowed to marry four women at one point of time. Law is concerned with the society collectively and so different personal laws have been made to cater to the moral philosophy of each. While Bigamy is an offence under Section 494 of the IPC, it does not apply to Muslim men as their Sharia Law allows for four marriages at any point of time.

Euthanasia- Euthanasia is also a debatable issue which can be contextualized in terms of morality and law. When a person is in a permanent vegetative state (PVS), should withholding or withdrawal of life sustaining therapies be permissible? The argument comes from the world is that, it is against the moral principle to make the person died but considering the above situations, where a person has no expectation of a healthy human life, he should be given right to die. According to Kant, there is no grey area; there is only black and white. However, issues such as these represent a very morally ambiguous plane. The very phrase which comes to my mind is, if law ensures right to life, should it also provide for right to die? Can taking the life of a person ever be moral even if it seems so?

In a recent case, *Aruna Shanbaug v. Union of India and others*[432], Supreme Court permitted the euthanasia after the completion of 37 years by the lady on the bed. The petition was presented by one NGO working in the concerned field. Needs are changing rapidly so as morals. Therefore, law and morality are separable and due to the rapid growth of the society, morals cannot stand static.

The controversy of Section 377 of IPC, 1860 can be taken as example in which Delhi High Court permitted the gay marriage, on the other hand, section 377 talks about homosexuality and lays down that "carnal intercourse against the order of nature with any man, women or animal" shall be punishable. As this offence is unnatural, therefore, immoral and socially insufferable and thereby imposes liability on the person. Though, it was immoral (for many)

[432] (2011) 4 SCC 454

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but the court permitted for the same in that case. In *Naz Foundation v Government of NCT of Delhi*[433], it was held "Consensual sex amongst adults is legal, which includes even gay sex and sex among the same sexes". It was a historic decision by court of law which has not been given since 1950s and ultra-virus to the Constitution. Even though it was later overruled, now, changing moral values are visible after the decision of the court.

The discourse on whether sexual intercourse under the promise of marriage is rape is another moral issue. Section 376 says that sex is rape if it is without the woman's consent. Section 90 says that consent obtained via "misconception of fact" is not really consent. Based on these two provisions, some high courts and lower courts have held that sex based on a false promise of marriage is rape. However, the Apex Court has held that a promise of future marriage is not really a "misconception of fact", and the man is allowed to change his mind later. Hence, consensual sex on promise of marriage is not rape. However, if Kant's theory is used for determination, such an act would be viewed as immoral.

In *Smt. Sarla v. Mahendra Kumar*[434], the Rajasthan High Court, awarding maintenance to a wife who was leading an adulterous life, held, "*It is not unnatural that when a husband leaves his newly wedded wife alone and himself goes away at a distant place to earn his livelihood, a lady who is suffering sexual deprivation may develop intimacy as well as illicit relations with a stranger.*" When it is a crime for men to commit adultery, under section 497 of IPC, 1860 as well as civil wrong, which can be remedied by way of divorce, the court itself reiterated that a lady can develop illicit relation with a stranger if suffering from sexual deprivation. Kantian ethics state moral laws are not relative to circumstances but the court itself has given its assent to adultery in such a situation.

Morality is thus subjective and differs in persons, societies, civilizations and time. For instance, some people might consider widow remarriage immoral. Similarly, honour killing is illegal but certain people believe it to be moral. Same applies for animal sacrifices. The concept of Slavery is abhorrent to nearly every form of ethics, and nearly every civilization. Yet for centuries, even millenia, it was common, and justified by any means necessary.

Hence, law is not about morality or ethics. Even though it may have its roots in them, law is actually about enforceable controls learned from experience.

[433] 2009 (160) DLT 27
[434] 1984 RLW 172

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CONCLUSION

Kant was one of the first philosophers to think about the very process of thinking. He is the primary proponent in history of what is called deontological ethics. Deontology is the study of duty. On Kant's view, the sole feature that gives an action moral worth is not the outcome that is achieved by the action, but the motive that is behind the action. Kant's ideas, which helped transform Western thought, sensibility and art, are as relevant today as they were in his time.

His conception of self holds true in most of the laws we see today. As the root of laws exists in ethics and the inherent righteousness present in man, "reason" and morality as the causal elements of law stand true.

However, his ethical theory is too formalistic and abstract, which ultimately made it difficult to deal with choices made in practical life. In our day to day life, we encounter highly complex situations where making the right ethical choice is an extremely difficult task. Kant's theory demands that ethical choices can be made independent of the situations and contexts where we encounter them. Choices are right or wrong a priori.

Further, that which motivates a person to seek a rationally-grounded basis of morality is a non-rational desire/incentive. Reason alone cannot motivate to action; reason is employed by desire/the will. One cannot consciously determine what one wishes. Imagining an action is not the cause of an action.

Concluding, it is submitted that, at the heart of Kant's moral philosophy is a conception of reason whose reach in practical affairs goes well beyond that which we have yet conceived. Even so Kant's argument that although theoretical and practical philosophy proceed from separate and irreducible starting points, reflecting judgment unifies them into a single, teleological worldview that assigns preeminent value to human autonomy stands true.

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CROSS - BORDER INSOLVENCY REGIME IN INDIA

- ***Fateh Singh Khurana***

ABSTRACT

"Historically, insolvency law was very much *intra-jurisdiction* focused, drafted at a time when most businesses and commercial transactions, operated within their own borders. *Globalisation* and increased cross-border trade has changed the fabric of business, with most business relationships having multiple links crossing borders and it is in this context that the implications of insolvency need to be put to the test, giving those affected, effective and timely legal recourse in a stream-lined and logical process."

INTRODUCTION

The Banking Law Reforms Committee acquiesced in its report in 2015 that cross- border insolvency has no legal framework stipulated in India until now. The Ministry of Corporate Affairs, on June 20, 2018 issued a public notice inviting comments and suggestions on the draft Chapter on Cross- border Insolvency under the Insolvency & Bankruptcy Code, 2016 [hereinafter the "Code"], which is based on the UNCITRAL Model Law.[435]

On account of these recent developments, this Paper seeks to address the basic facets of cross-border insolvency, the change in the dynamics of such facets when the insolvent entity has substantial assets overseas, the determination of centre of main interests in such a scenario and the proceedings that may follow thereof."

WHAT DOES INSOLVENCY COMPRISE OF?

[435] Public Notice dated 20.06.2018, *available at* http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf

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Insolvency, in the simplest meaning of the term, is the inability to pay the financial debt owed by an entity. In case of a corporate entity having transnational operations, insolvency may be initiated by following the instances:

(i) When the Parent Company having Foreign Subsidiaries undergoes insolvency
(ii) When a Company having no subsidiaries or a Parent Company, or one or more of its Domestic Subsidiaries having substantial assets and liabilities overseas undergo insolvency
(iii) When one or more of the Foreign Subsidiaries of a Parent Company undergo insolvency
(iv) When one or more joint ventures of one or more Foreign Subsidiaries of a Parent Company undergo insolvency

The issues stemming out of these situations are complexly interrelated and codependent in nature. For instance, there might be a possibility when the contingent liability of a Parent Company might be determined in the case of an entity undergoing insolvency, and which is a joint venture between its foreign subsidiary and a foreign company. It has then to be taken into account as to where and in what ratio is the default of the entity located, determinable by the assessment of where the entity has a substantial share of its overall assets and liabilities."

WHAT HAPPENS WHERE AN INSOLVENT ENTITY HAS SUBSTANTIAL ASSETS OVERSEAS?

"In the instance of an insolvent entity having its substantial share of assets outside the jurisdiction where it is incorporated, the consequent nature of its liabilities change drastically.

Further, there can be two forms in which an entity may have assets overseas:

(a) *Directly,* when the entity itself has the ownership of the assets situated overseas;
(b) *Indirectly,* when the entity has a foreign subsidiary which has the ownership of the assets situated overseas

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Treatment of assets situated overseas in the former case comes out quite naturally. There are three situations in which an Indian Company might face impact on its assets under cross border insolvency:[436]

1) When a foreign creditor wishes to initiate or be a part of insolvency proceedings against the Indian company
2) When the creditors of an Indian Company wish to access the assets of the Indian Company which are located overseas
3) When insolvency proceedings are going against the debtor in more than one jurisdiction

In the instance of an Indian parent company undergoing insolvency proceedings under the Code, the Foreign creditors may apply to the Adjudicating Authority for either the initiation of insolvency proceedings against the Indian entity or for being a part of the ongoing proceedings, in the exact manner as the domestic creditors, with the same rights. The Code, by virtue of including "person resident outside India" in the definition of persons,[437] materialises this neutrality towards the residence of the creditors of a Corporate Debtor.

However, the Code had fallen short in addressing the other two situations, wherein there is neither a provision for automatic attachment of assets situated overseas nor for parallel simultaneous proceedings against the corporate debtor in more than one jurisdiction, and thus, there has to be made a request regarding the same in the appropriate forum of the concerned jurisdiction. The United Kingdom, for instance, although does not recognise India as one of the "relevant countries" under the provisions of Section 426 of the Insolvency Act of 1986[438], though, provides the insolvency professional the right to approach the UK Courts to either request recognition of insolvency proceedings under which he/she has been appointed, so as to ensure that assets located in the UK become a part of the Indian insolvency proceedings, or be a part of the British insolvency proceedings.

However, the said arrangement does not prove to be an assuring tool for the cooperation and coordination between the two insolvency regimes, for two reasons; firstly, the entire practice

[436] Aparna Ravi, *Filling in the Gaps in the Isolvency and Bankruptcy Code- Cross Border Insolvency*, IndiaCorpLaw, https://indiacorplaw.in/2016/05/filling-in-gaps-in-insolvency-and.html
[437] Sec. 3(23)(g), Insolvency & Bankruptcy Code, 2016
[438] Sec. 426, Insolvency Act 1986 stipulates an obligation on part of the British Courts to assist the foreign representatives from relevant countries in the insolvency proceedings involving attachment of assets situated in their jurisdiction.

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is not regularised owing to India having not adopted the UNCITRAL Model Law, thus making the decision of attachment of assets susceptible to the discretion of the Court, and second, being a corollary to the first reason, is such discretion bearing the potential to hamper the Indian proceedings by way of the most prominent tool of ring fencing, the *Gibbs Rule*, wherein it was held that a party to a contract made and performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country.[439] The Gibbs Rule allows a UK Creditor to be a part of the insolvency proceedings initiated against the entity in its home as well as drag it in British Courts under separate, parallel proceedings for realisation of its debt. Further, there is no remedy for a foreign creditor to initiate such proceedings against the entity when it has no assets situated overseas.[440]

The Code tries to provide for such lacuna by way of enabling the Adjudicating Authority to send a Letter of Request to an appropriate Court of the country with which a bilateral treaty has been entered into under Section 234, for recognition of proceedings,[441]Thus, cross border relationship with UK being one of the many lopsided arrangements owing to the lack of a sound law in India, goes on to show the dire need of adoption of the UNCITRAL Model Law.

In the latter case of indirect ownership of assets, any subsidiary of the Parent Company stands as a separate legal entity. Thus, in the event of a Parent Company undergoing insolvency, the foreign subsidiary does not face insolvency suo motu, rather the ownership of shares in such subsidiary becomes susceptible to a shift, depending on the consequence of the insolvency proceedings. The said subsidiary will face the actions against it as a different entity in the same fashion as enunciated above."

WHERE DOES THE CENTRE OF MAIN INTERESTS LIE?

The Centre of Main Interests [hereinafter referred to as "COMI"] is not defined under the model law. COMI essentially implies the seat of a corporate entity's major stakes, whether in terms of assets, control, debts or significant operations. COMI is determined by factors, both

[439] *Gibbs & Sons v. Societe Industrielle Des Metaux*, [1890] 2 QBD 399.
[440] Aditya Swarup, *Foreign Creditors and Insolvency Proceedings in India*, Bar & Bench, *available at* https://barandbench.com/foreign-creditors-insolvency-proceedings-india/
[441]

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objective and ascertainable by third parties, especially creditors and potential creditors.[442] This concept is not recognised in the Code. However, in light of the Model Law being adopted soon, it should be noted that the command and control test is the commonly applied test to determine COMI of an entity.[443]Order and law needed so vitiates the process.

Under the UNCITRAL Model law, in case of the COMI of a company, there is a presumption in favour of place of its registered office which normally corresponds to the head office of the company.[444] The presumption that the place of the registered office is also the COMI has been included for speed and convenience of proof where there is no serious controversy.[445] In effect, the registered office, or the place of incorporation serves as a proof of evidence for the existence of operations of a corporate entity and is used as a proxy in absence of any other factor to determine the COMI. The registered office, however, does not otherwise have special evidentiary value and does not shift the the burden of proof away from the foreign representatives seeking recognition as a main proceeding.[446] The court may also take take into account the location of the debtor's headquarters; the location of those who actually manage the debtor which could possibly be the headquarters of a holding company; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and the jurisdiction whose law would apply to most disputes.[447] In order to rebut the presumption of COMI under Article 16 of the Model Law, one would be required to prove the involvement of agents or servants acting for the company to not be limited to commercial activities, but to be those sort of functions that one would expect the head office to discharge.[448] The courts have also held that the COMI would be situated where inquiries and negotiations involving third parties were dealt with and upon where demands for payment and invoices from third parties would be addressed.[449] The various possibilities of the COMI having been determined in a jurisdiction other than the registered office as presumed, it is pertinent to note the importance of such determination.

[442] In *re Stanford International Bank*, 2010 Bus LR 1270 [at ¶ 56].
[443] Ian F. Fletcher, Insolvency in private international Law, Second Edition, 2005 at p. 390.
[444] Article 16(3) Model law; see also Virgos, Miguel, and Schmit, Etienne. (1996) Report on the Convention on Insolvency Proceedings, EU Council Document 6500/96 DRS 8 (CFC)
[445] H.R. Rep. No.31, 109th Congress, 1st Session, at para 114.
[446] In *Re Tri-Continental Exchange Ltd* 349 B.R. 627 (2006) at p. 635.
[447] In re S*phinX, Ltd.*, 371 B.R. 10 (S.D.N.Y.2007)
[448] *Mackellar v Griffin*, [2014] EWHC 2644 (Ch).
[449] In *Re Northsea Base Investment Ltd*, [2015] EWHC 121 (Ch)

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The initiation of proceedings against an Indian corporate entity when the COMI lies in India itself makes such proceedings "*foreign main proceedings*"[450] (in terms of the UNCITRAL Model Law) for a foreign creditor. This implies that in the instance of the COMI being in India, the provisions of the Code would take immediate effect and the foreign representative will be able to secure his interests. Recognition as a main proceeding will result in automatic relief such as stay/ moratorium on domestic proceedings in relation to the debtor, and allow the foreign representative greater powers in handling the assets of the debtor, and domestic proceedings will be thereon treated as ancillary proceedings.[451]

As discussed, however, in the case of the COMI of an Indian debtor falling outside India, foreign main proceedings shall ensue in that jurisdiction, and the Code, having no extra-territorial effect as of now, shall cease to apply. Such reliefs as provided under foreign main proceedings by play of the Code, shall be at the discretion of the domestic Court. A considerable perspective is that, in such a situation, a foreign creditor would then be faced with heightened risks of ring- fencing in the favour of the creditors of that particular jurisdiction where the COMI is situated, leading to a potential detriment of his interests.

Under Indian laws, each company is a separate legal entity and is ordinarily a limited liability organisation. Thus, insolvency proceedings of each company are conducted separately, and assets and liabilities of group companies are generally not combined for distribution purposes (except in certain exceptional cases where courts lift the corporate veil)."

WHERE SHOULD THE PROCEEDINGS BE BROUGHT?

"The final piece that needs to be solved finally is as to where should the proceedings be brought. Having discussed the impact of the current legal framework, the effect of substantial assets of a debtor being located overseas and the scenarios and the impact of the COMI of the debtor lying when in India or abroad, sometimes the COMI being determined from the very factor as to where the substantial assets lie, the interplay of these factors paint an uncertain picture for a foreign or domestic creditor against the default of the Indian debtor when either majority of the assets, which would have otherwise been instrumental in realising the

[450] Article 2(b), UNCITRAL Model Insolvency Law, 1997
[451] Ministry of Corporate Affairs, Public Notice inviting Suggestions for Draft Chapter on Cross Border Insolvency *available at http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf; see also* Chapter III, UNCITRAL Model Insolvency Law, 1997

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interests, or the COMI lie outside India. Utter disregard in the past three decades to the cross border facet of insolvency renders the newly acting Code as a toothless tiger outside its territory.

A creditor can be completely assured of the security of his interests only when the assets or the COMI of the Indian debtor lie in one of the 46 countries that have adopted the UNCITRAL Model Law, and do not make reciprocity a prerequisite. However, in a case otherwise, the interests of the stakeholders, including those of the debtors depend on the substantive and procedural rules of the concerned jurisdiction.

ADOPTION OF THE MODEL LAW: THE WAY FORWARD

The Ministry of Corporate Affairs of the Government of India issued a notice putting forward a Draft Chapter on cross border insolvency, assessing the erstwhile legal framework of the economy and the benefits of adoption of the Model Law, alongside inviting suggestions for changes to the Draft Chapter to equip the Code in the best manner for dealing with cross-border issues of the insolvent entities.[452] India is finally ready to tackle the adoption of the UNCITRAL Model Law, but the issues that remain unresolved are manifold:

(a) Where Section 18(1)(f)(i) enables Interim Resolution Professional to take control over the assets situated in a foreign country, over which the corporate debtor has ownership rights, the Draft Chapter fails to lay down the procedure for taking over such assets.

(b) Further, where there is a provision for the effects and further actions after the recognition of a foreign main proceedings,[453] but there has not been made any provision to deal with the recognition of a foreign non- main proceeding. The principle of treating a subsidiary as a separate legal entity needs to be synthesised where necessary with the concept of an establishment of a corporate entity under the Model Law.

(c) There has been an unnecessary repetition made in the Draft Chapter regarding the rights of the Foreign Creditors being the same as that of the domestic creditors, which may lead to confusion.

[452] Ibid.
[453] Supra 19 at Section 18, Draft Part Z.

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In addition, clarification is needed towards the role of a foreign representative and the interference with the powers of a domestic resolution professional in exercise of his duties."

CONCLUSION

Having been devoid of a sound coordination framework for the transnational activities and mishaps of a corporate entity, and relying on the Code of Civil Procedure for execution of and aid from foreign decrees for almost seven decades, the Indian economy sought hope in the makeshift procedure for entertaining recognition of foreign proceedings by way of bilateral treaties, as introduced by the Insolvency and Bankruptcy Code, 2016. But having been admitted as merely ad- hoc mechanism to deal with the lack of any framework and further failing as a pragmatic ad-hoc mechanism too, the adoption of the Model Insolvency Law by UNCITRAL was inevitable and necessary. However, the challenge that lies with the legislators is the synthesis of the age old Indian territorial system of insolvency with the Universalist concepts advocated by the Model Law. Singapore has proven to be a shining example of a smooth transition from Territorialism to "Modified Universalism", and given the surprisingly positive sentiments and supportive aid being provided to the Code by the Indian economy, efforts toward such synthesis, with cautious consideration towards all the stakeholders involved, shall not go unproductive or counter-productive."

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SIMULTANEOUS ELECTIONS IN INDIA WHETHER FEASIBLE?

-Malavika Jayakumar

INTRODUCTION

The Constitution under Article 324 provides that the power of superintendence, direction and control of elections to Parliament, State Legislature, the office of President of India and the office of Vice-President of India shall be vested in the election commission. India witnesses frequent elections. It can be said that there is no year where elections doesn't take place if we include the election of the local bodies.

Simultaneous elections is a proposal by the prime minister and endorsed by the president to hold the elections of Lok Sabha and the state legislative elections on the same dates. In a few interviews, the Prime Minister has indicated towards having a simultaneous election for the country although the control over the free and fair election over the country lies wholly with the Election Commission. Prime Minister Narendra Modi in his interview said that Simultaneous Elections would be possible only if all the political parties come together in favour of it since no party can alone bring in force simultaneous elections. Also, he mentioned about the huge loss of Financial and Human Resources due to frequent elections. Holding simultaneous elections is not merely about elections; it is about stable governance. Such a sensitive and far-reaching reform requires unanimous support from all political parties. Parliamentary Committee reports have proposed implementable roadmaps for simultaneous elections.

Further, if we look at the disadvantages of the introduction of the Simultaneous Elections into our system it is quite evident that it would not be feasible nor desirable to bring into force such a system. On of the most important aspects is that if we implement the Simultaneous Elections, it would mean to curtail the power of the Legislature to unseat the government due to last of majority before the tenure comes to an end. Such a change would need an amendment to the Constitution for the same. Further such an amendment would mean an amendment to the basic structure of the Constitution which is not permitted.

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Thus, in my opinion, Simultaneous Elections is not desirable for India at this moment. India is not yet ready for such a system. Yes, it is definite that there are advantages to such a change but the disadvantages attached to it is in a much bigger scale.

WHY SIMULTANEOUS ELECTIONS?

India has witnessed simultaneous elections on four occasions. The very first simultaneous elections were held in India in 1951. But due to various reasons the assemblies were dissolved before time and thus this practice was challenged. Further simultaneous elections were held in 1957 in 76% of the states and in 1962 and 1967 with 67% of the states. Although this system was disrupted in the 1972 elections and not a single state held elections with the National Election. Thus, it is a tried and tested system and it was widely rejected by the Nation itself.

The Standing Committee on Personnel, Public Grievances, Law and Justice headed by Chairperson Dr. E.M. Sudarsana Natchiappan submitted its report on the Feasibility of Holding Simultaneous Elections to House of People (Lok Sabha) and State Legislative Assemblies on December17, 2015. The Committee noted that the holding of simultaneous elections to Lok Sabha and state assemblies would reduce: (i) the massive expenditure that is currently incurred for the conduct of separate elections; (ii) the policy paralysis that results from the imposition of the Model Code of Conduct during election time; and (iii) impact on delivery of essential services and (iv) burden on crucial manpower that is deployed during election time.

Another important point of consideration is that the tenure of the Lok Sabha and the State Legislature is 5 years “unless dissolved earlier”. Thus, the present duration of the Lok Sabha may differ from the duration of the State Legislatures. The current Lok Sabha is the 16th Lok Sabha of India. There have been seven instances where the Lok Sabha has to be dissolved prior to the competition of its tenure due to failure of the coalition government. Also, the State Legislature can be dissolver prior to its competition of the tenure by the imposition of the President’s Rule upon the recommendation of the Governor. In such circumstances the institution of simultaneous elections might create a hurdle in the smooth functioning of the elections.

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As rightly said by former Chief Election Commissioner Mr. S.Y. Quraishi, "Elections have unfortunately become the root cause of corruption. When we are in constant election mode, we are also in permanent corruption mode. When crores are spent in elections, crores have to be collected by hook or by crook. The way out is to cut the role played by money in elections, and this can come about only through a ceiling on political party expenditure. The other aspect is the state funding of elections. Besides, elections have become too divisive. Communal riots and caste disturbances are deliberately created around election time to ensure polarisation of communities for electoral gains".

ADVANTAGES OF SIMULTANEOUS ELECTIONS

- Reduction in the massive expenditure. One of the most important features in implementing the simultaneous elections which even the Prime Minister stressed on was that a lot of money would be saved if we hold elections at once, and not every six months. Holding and election costs crores of rupees to the Government or the Public Exchequer. A Parliamentary Committee has estimated the cost for the 2014 Lok Sabha and all states and UT elections to be Rs. 4,500 crores. Thus, if elections are held simultaneously, there would be a significant saving in the financial front.
- Its impact of the delivery of development work. It is true that a lot of efforts are put by the political parties towards preparation for the elections. Due to the constant elections of some or the other state which happens back to back, a lot of time is invested for the election work which was originally to be for the delivery of essential services. The political parties, including the ruling party at the Centre and the State(s), tend to invest their time and energy more on the elections, to ensure the win of their respective party(ies) than on the governance. If the elections are to be held simultaneously, this could be reduced and the resultant would be that the MLAs and MPs would have a minimum of 4 years devoted solely for the performance of their duties.
- Burden on Crucial man power. A huge amount of man power is deployed for the work during each election. It is a burden on the people so employed as most of them remain unemployed for the rest of the year. An illustration can be given of the 14th Lok Sabha Elections. The elections were held along with State Assembly Elections in Odisha, Andhra Pradesh, Sikkim and 27 Arunachal Pradesh. The Elections were

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spread over nine phases, and 1077 in situ companies and 1349 mobile companies of Central Armed Police Force (CAPF) were deployed.[454]

- Reduction of corruption. Simultaneous elections can also be a means to curb corruption and build a more conducive socio-economic ecosystem. Simultaneous funding, will help curb poll expenses, and may reduce policy logjams as multiple states keep going to polls each year. The huge amount of expenses that is made over elections can be reduced and can be used for the betterment of the people. Most often, election expenses become a good method to divert the black money acquired by the political parties. Thus, simultaneous elections might also, though not in a very huge scale, help in curbing black money.
- Better utilization of security forces. It is true that enormous amount of police force is required during elections. Hundreds of Central Police Force along with the State Police Force is deployed of the election duty. Which means that they are diverted from their original duty to be put for the election Duty. If Simultaneous Elections are held for the Lok Sabha and the State Legislature, the Police Force is freed up for their original duty.

Free and fair elections are integral to democracy. Continuity, consistency and governance are also integral to democracy. And democracy, also implies good governance. To achieve this, elections are held. But if the means (elections) become the goal, this will not serve democracy well. Holding simultaneous elections will ensure consistency, continuity and governance, and elections then will only be the means to achieve this and not an end in themselves.

DISADVANTAGES OF SIMULTANEOUS ELECTIONS

- Spirit of Decentralisation. Centralisation would be a big issue if the Simultaneous Elections are brought into force. It is widely observed that many of the voters are not aware of the difference in the Central and State issues. As per the three lists mentioned in the seventh Schedule of the Constitution, there is a bifurcation of issues that only the Union can handle or only the State can handle. IDFC Institute made a

[454] 79th Report of Parliamentary Standing Committee on "Feasibility of holding simultaneous elections to the House of the People (Lok Sabha) and State Legislative Assemblies"

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report upon the data from four Lok Sabha elections which stated that "on average, there is a 77% chance that the Indian voter will vote for the same party for both the state and Centre when elections are held simultaneously". Thus, in such a scenario it would be difficult for the smaller parties to contest election without the massive money and muscle power which the bigger parties possess.

- Reach of the Constitution. The Constitution is a clear deterrent against this practice and for right measure. Article 83(2) at the Centre and Article 172 for the state provides these words "unless dissolved sooner". These words hold great importance as this means that the Lok Sabha or the State Legislature may be dissolved prior to the completion of their tenure due to various reasons. they can be dissolved earlier on the recommendation of the Prime Minister/Chief Minister, or they can be extended during Emergency for up to 6 months, or they can be ended earlier if the Government of the day does not enjoy the support of the party members/coalition it is a part of, through a no-confidence motion or a state legislature can be dissolved on the report of the Governor under Article 356 which makes a state come under President's rule.
- EVMs and VVPATs. It is an estimate that in case simultaneous elections are to be taken place, a rough total of nearly 12 lakh additional electronic voting machines (EVMs) and an equal number voter-verifiable paper audit trail (VVPAT) machines will be required. Similarly, in case of simultaneous elections, two separate sets of EVMs and VVPATs will have to be set up in two separate places or compartments for the Lok Sabha election and the State Legislature. There are more that 10 Lakh polling stations throughout the country. Thus, if we go about by the system of separate compartments then the estimated EVMs and VVPAT machines would be a large number. Another hurdle here is that the EVM and VVPAT machines have a life span guarantee of about 15 years. Which means, in case the elections are held only once in every 5 years, one EVM or VVPAT machine would only be used a maximum of 3 times only. Compared to the cost of these machines, changing the machines every 3rd use would be a huge financial burden upon the government.

  Chief Election Commissioner (CEC) Om Prakash Rawat in one of his interviews said "We cannot put the cart before the horse. Logistical issues are subservient to the legal framework. Unless the legal framework is in place, we do not have to talk about anything else, because the legal framework will take a lot of time. Making constitutional amendments to (changing) the law the process will take time"

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- Spirit of federalism. Simultaneous elections are clearly against the provisions of Constitution and the Federal system. The Constitution of India provides for a federal structure to the Government of India, declaring it to be a "Union of States" under the first Schedule of the Constitution. The legislative powers are categorised under a Union List, a State List and a Concurrent List, representing, respectively, the powers conferred upon the Union government, those conferred upon the State governments and powers shared among both, the Union and the State government. Now, considering a situation where the Union Government loses its majority within a few days from the elections, say the case of the Atal Bihari Vajpayee government who lost the majority within 13 days in power. In such cases it would not be feasible to hold elections in all the States all over again.
- Reduces accountability of the political leaders. It is true that elections keep the political parties and the political leaders on their toes. Continues elections is equivalent to keeping a check over the work of the parties and the leaders. In case of simultaneous elections, once the elections are done, they general public might see their leaders again only post the five-year span when the next election is due. This might create a lethargic attitude among the parties as there does not arise any situation where the party's work shall be assessed. As per the current system, with elections happening every year the political parties are kept in check and they are always at work which increases the credibility as the government and they tend to work better in such a system.

Mr. Suhas Palshikar, the co-director of the Lokniti programme at Centre for the Study of Developing Societies and chief editor of Studies in Indian Politics mentioned that "If we enforce the system of simultaneous elections, we would need to curtail the legislature's power to unseat a government. It would be mandatory to have a 'constructive vote of no-confidence'. This means that no opposition party would be able to table a no-confidence motion unless it has the capacity to also simultaneously form a new government. The fundamental instrument of the no-confidence motion would thus be effectively taken away. Instead, the life of the legislature would depend on the cycle of a fixed term."

The Commission[455] has also sounded a note of caution and said that this should be done only after taking all stakeholders into confidence. "Any law that is not acceptable to the masses is

[455] Parliamentary Standing Committee on "Feasibility of holding

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not capable of being implemented. Hence, a move towards holding simultaneous elections will have to be made after building a political and public consensus,"

CONCLUSION

From 1951-1967, general elections to the Lok Sabha and all the State Legislative Assemblies were held simultaneously; However, this practice got disrupted after 1967, due to premature dissolution of some of the Legislative Assemblies in 1968 and 1969 and the Lok Sabha in 1970. Now, to hold Simultaneous Elections in the elections to come would means to amend the recent provisions of law relating to elections to provide for the required framework for the implementation of the Simultaneous Elections. A number of changes are attached to the implementation of simultaneous elections such as Amendment to the relevant provisions of the Constitution, amendments in the provisions of terms of the Lok Sabha or the State Legislative Assemblies; the consensus of all the parties to the new system; ratification by the States to these Constitutional amendments etc.

Further, it has been contended by large number of persons /associations that the whole exercise of changing the law for holding the simultaneous elections is a colourable exercise of power as it is with the mala fide object to change the form of Government. Simultaneous Elections if not implemented properly would even prove itself to be detriment to the Democratic set up of the Nation.

Also, Constitutional Amendments to such a large extend might be to the detriment to the set-up of India. Major amendments would be in the field of-

Article 83 of the Constitution of India which provides for the tenure of both Houses of the Parliament (Lok Sabha and Rajya Sabha). Article 83(2) of the Constitution provides for a term of five years for Lok Sabha, from the date of its first sitting unless dissolved earlier.

Similar provisions under Article 172 (1) of the Constitution provides for five-year tenure for State Legislative Assembly from the date of its first sitting.

Further, Article 83 (2) of the Constitution of India provides that when a proclamation of emergency is in operation, the term of the House may be extended for a period not exceeding

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one year at a time by Parliament by law and not extending in any case beyond a period of six months after the Proclamation has ceased to operate. Similar provision also exists for State Legislative Assembly under the proviso to Article 172 (1) of the Constitution.

The Representation of People Act 1951, which provides for various modalities of conducting elections in the country, also will have to be amended. These might be very difficult considering the present situation of the country and might even be again the interest of the Nation.

Further, the Political Consensus that is required to bring such a system into force is also quite difficult to achieve since there being various political parties in various states. The Centre will also have to make some states agree to curtail the terms of their houses while others to extend theirs; which is a difficult task as no government would be ready to reduce their tenure of even to hamper with their fixed tenure in any way.

There have been many undemocratic events put forward in the name of electoral reforms and simultaneous elections are one of them. In my opinion the current system is doing fine and a reform in this sector would only complicate the existing conditions. There are many Parliamentary Countries in the world that function smoothly despite there being regularly occurring elections. Rather than debating upon entirely changing the election system which doesn't even guarantee a assured success, alternatives should be explored to reduce election-related expenses like state funding of elections, decriminalisation of politics, bringing in transparency in political funding by linking Aadhar card to the Election Identity card which has still not been done etc.

Lastly, any law that is not acceptable to the masses is not capable of being implemented. Hence, a move towards holding simultaneous elections will have to be made after building a political and public consensus.

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THE TRADITION OF FAITH OR GENDER EQUALITY: ISSUE OF SABRIMALA TEMPLE

-Samriddhi Pathak

SUMMARY OF THE ESSAY

"Today's modern era is like a kaleidoscope[456]*. Every instant a change takes place in the contents. New harmonies, new clashes, a new combination of every sort. People are marked with a difference of opinion. These differences of frequency in their opinion sometimes harmonize and sometimes clashes with each other."*

The author of this essay wish to help shed light onto both sides of the issue to facilitate the understanding of the battle that has been going on for nearly decades. Kerala is a state which is blessed with rich and carefully preserved natural beauty and traditions.

Traditions have been created by humans to help each other live the best possible lives in the given situation or time periods. However, it is important to note that customs and traditions have been evolved to adapt to the changing of Indian lifestyles. India boasts of a plethora of such changed traditions for which the public has usually shown support.

The recently retouches issue of the Sabarimala temple has sparked discussion over the very controversial and oft-avoided topic of religious reforms and socially/traditionally accepted inequality/double standards.

INTRODUCTION

The controversial verdict of Sabarimala temple that has been creating uproars finally came to an end in a 4:1 verdict, the Supreme Court lifted ban with respect to the entry of women in the temple of Brahmachari nastik "Ayappa". This decision caught everyone's attention, few

[456] Henry Ward Beecher

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opened arms to this decision considering to be a benchmark for social change against the patriarchal society while others raised an eyebrow because the deity of the temple has sworn celibacy and is averse of an idea of even looking at a woman. It is believed by the traditionalist that a woman's entry into the temple will outrage the divinity which will result in a catastrophic situation. It is due to this reason a lot of people associates the flood in Kerala with the entry of women into the temple.

Massive protests have been taking place since after this decision in order to show their outrage and lack of trust for the decision of Sabarimala temple. It is quite ironical too as Kerala being land of literate can also be called the land of gender equality and one of the very few exceptions where woman are considered as an equal par with man. However, every perfect scenario has a hole in it and this hole is widening to become a deep depression which is harmful to an egalitarian society.

The verdict is set on the pedestal that such a decision will turn a new leaf in the life of women who are struggling predominantly from the past for their rights and justice against men. God is not only for selected men but it is for all who believes and have faith in him. Religion is everyone's right and no person can be denied of religion whether a man or a woman, arbitrary law should be put to an end. It can be used as important instruments of social change. Recently a priest in Hyderabad carried a Dalit man on his shoulder in order to convey the message that the inner sanctum of the temple has nothing to do with people entering in them. This whole incident caught a lot of media attention and after the profusion of hue and cry it was gradually accepted. A similar situation can take place if a woman is being allowed inside the temple.

A very important question that can be raised is- the fast turnout of the traditional belief that has been followed from years can be changed with one verdict of the Supreme Court? What is the impact when modernization is enforced on traditionalist? Whether the consequence of the verdict will be affirmative or not? The matter has not only created a religious fault line but also a political twist. A clear dissatisfaction and trifle can be seen people while the state government is enforcing the verdict given by the Supreme Court.

HISTORICAL BACKGROUND OF THE CASE

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The thread of Sabarimala temple is quite intricate and tangled with numerous theories given by different historians. Sabarimala is a temple of great antiquity dedicated to Lord Ayappa who avers to be a deity depicting a hyper-masculine god born out of two male deities Shiva and Mohini, where Mohini is Vishnu in a female form Ayyappa is thus additionally referred to as Hariharaputra, "the son of Vishnu [Hari] and Shiva [Hara]." However another theory comes into the light is that Ayappa was a pre-Aryan divinity, a god who carried the culture of Aryan and spread it all over India. Later his cult-like numerous others – would be absorbed into the Aryan pantheon, and, if that assumption is true, the story of Shiva-Vishnu parentage would have to be compelled to be a later addition. The worship of the God of Sabarimala, Sashta, is an integral part of the history of South India. He is worshipped as the deity of knowledge, as a teacher, as a guide, and as a ruler. His temple situated inside the dense forests of Periyar served as a pilgrimage spot for thousands of devotees for hundreds of years. Sabarimala temple is open only during the specific period that is, on the Malayalam month that is 17th November to 26th December, for the first five months of Malayalam calendar and also during the time of Makar Sankranti viz. approximately from January 1 to mid of January of each year.

The temple is situated in mountainous terrain in the dense forest. Women were restricted from an entry inside the temple because it was believed that wolves surround the forest and could smell blood from a far distance hence allowing menstruating women to enter into temple can jeopardize her life as well as the life of the others.

THE LEGAL BACKGROUND OF THE CASE

The division bench of Kerala in S.Mahendran case came in favor with the decision of banning entry of women belonging age group of 10 to 50 years in Sabarimala temple. It was observed by the court that the restrictions imposed on women aged more than 10 and less than 50 from trekking the holy hills of Sabarimala is in accordance with the usage prevalent that has been going on for ages. Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the ages of 10 to 50 years. Later Kerala High Court in the similar case S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram, and others concerned with the came with the same conclusion as decided earlier in the divisional bench case. In

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2006 three-Judge Bench in Indian Young Lawyers Association and others v. State of Kerala and others again raised the same issue that was raised in S.Mahendran case came up with the issue that such custom is violative of Art 25 of the Indian Constitution. In 11th January 2016, a two bench judge questioned banning entry of women in the temple. A political twist took place where a political party like the United Democratic Front came in favor of the entry of women. On July 2017 after the efforts of LDF government and massive protests the case was referred to five benches, divisional judge. The bench on 1 August, 2018 in the ration of 4:1 in which only one female judge Indu Malhotra dissented came of conclusion that the ban was unjustified in nature as it violates the constitutional rights of these women and declared that rules custom of barring women is violative of Art 25 (Clause 1) and Rule 3(b) of Kerala Hindu Places of Worship. Till now after the judgment, only 2 women have managed to reach the Sabarimala temple.

THE ARGUMENT IN FAVOR OF THE VERDICT OF SUPREME COURT

1) Violates the concept of temple

The relation between devotee and God is a transcendental one that cannot be circumscribed by boundaries of gender. A creator is equal to all and doesn't differentiate between their creations it is only men who hide behind the scene and takes the support of convention which is not prescribed by the god. Biological and physiological factor should not be brought as an obstacle in the way to practice and profess one's religion. Any rule that differentiate between men and women is not only inexcusable, indefensible, unjust but also never passes the spectrum of constitutionality. It is the universal truth that faith and religion never counter each other but religious customs and practices are sometimes found to be perpetuating patriarchy thereby nullifying the basic tenets of faith and of gender quality and rights. Religious dogmas and incongruities should not be contended just because it is going on for years.

2) Gender Equality: whether it is violative of constitutional rights.

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Article 14 of the Constitution of India prescribes for equality before the law or equal protection for all within the territory of India. In the judgment of Shayara Bano v Union of India and others, it is observed that the exclusionary practices are manifestly arbitrarily as it is purely based upon physiological factors and therefore it does not satisfies the test of reasonable classification under Art14 of the Constitution.

Art15 (1) of the constitution which amounts to discriminate on the basis of sex as the physiological feature of menstruation is exclusive to female alone. In the case of Anuj Garaj and others v Hotel Association of India and others and Charu Khurana and others v Union of India and others[457] it is adjudicated that gender discrimination of any kind is not supported by our constitution.

The ambit of Art 17 is vast and includes untouchability based on social factors and menstrual cycle is included under the sphere of this Art. Art 17 is operative in central legislation in the form of protection of the Civil Right Act, 1955. The judgment given by Hon'ble judge of High Court is that it is not in consonance with the provision of 1955 Act.

Referring to the case of National legal service authority v Union of India and others and Justice K.S. Puttaswamy and another v Union of India and others a conclusion can be drawn that the exclusion of women from entering into temple is violative of Art 21 of the constitution as it impacts the ovulating and menstruating women to have a normal social day to day thus violating their Art 21 of the Constitution

The practice of not allowing women to enter into temple violates Article 25 of the constitution as they have a right to enter into the temple which is dedicated to the general public. It is referred that Section 4 of the Kerala place of Public Worship Act,1955 read with Rule 3(b) under this section that disentitles certain classification upon certain categories of people from entering any place of public worship and this include women who, by custom or by usage, are not allowed to enter a place of public worship. It is submitted that Rule 3(b) is ultra vires and this act violates Article 14,15,17,21 and 25 of the Indian Constitution as it prohibits entry of women moreover Rule 3(b) is not protected under Art 26 of the constitution as the devotees are Hindu and don't constitute a different religious denomination.

[457] **www.supremecourtofindia.nic.in**

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3) Discrimination on Physiological Basis

Despite being applauded as a temple that is open to every religion and to every caste, it has restricted a large segment of the population for no fault of their own. *Creator has created women and menstruation is a part of his creation, by calling menstruation to be impure, one is disrespecting the god himself. Menstruation is as natural as the beating of a heart or filtering by kidney. Moreover, without menstruation, the entire race of human being can be wiped out so one should know that it is, in fact, a blessing in disguise. Even goddess used to menstruate which is evident from the temple of Kamakhya Devi nested upon Nischal Hill in West of Guwahati Assam so can the conventional people have guts to call the goddess to be unpure*? *Does that make them any lesser?*

4) Celibacy as an Argument

The claim that the entry of women into the temple's premises interferes with the vows of celibacy to be upheld by the devotees of Ayappam are entirely irrational since mere sight of women cannot affect one's celibacy if one had taken an oath of it. Every "Tapasya" requires strong will and determination moreover the purpose of the temple is not to an oath of celibacy but taking blessings of Lord Ayappa. Maintaining celibacy depends upon person to person who wants to practice it.

5) An international point of view

India is a party of Convention on Elimination of all forms of Discrimination against Women (CEDAW) and is abided by the guidelines set by CEDAW. It is the obligation of a state to set aside the taboos which are socially and morally unjust in nature. In the judgment of Vishaka and others v State of Rajasthan and others, it was cited if an International convention is followed then domestic laws are declared to be inconsistent.

ARGUMENTS AGAINST THE VERDICT OF SUPREME COURT

1) Violative of nature of the temple

Devote believes that Hindu lord Ayappa is an avowed bachelor who has taken an oath of celibacy. The restriction on entry of woman is from age 10-50 is reasonable so as to protect

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the integrity and honesty of Lord Ayappa. Lord Ayappa a nastik Brahmachari is averse of the idea of even looking at a woman in order to respect his ideology and practice women are not allowed inside the temple. The decision is not to lower the worth of woman but to uphold spiritual discipline related to this particular pilgrimage and is clearly intended to keep the mind of pilgrims away from distraction related to sex as the dominant objective of pilgrimage. In fact, there are many temples which have their own historical significance because of which man is not allowed to enter in it like Attukal Temple, Chakkulathukavu Temple, Santoshi Maa 'Vrat temple, Bhagati Maa temple etc it is because each deity has their own story and significance. In fact, in the ritual of devprasanamthat which was conducted in the past, it 's revealed that deity himself does not want young women to enter the infusion of divine power.

2) Health perspective

Women are not entirely barred from entry but the woman of an age group of 10-50 having menstrual cycle are restricted because due that time women are physically weak and emotionally vulnerable. Sabarimala temple is situated on hilly and remote place hence they have to walk around temple more than their capability which can eventually weaken them. There is also a 41 days vratham rules which cannot be fulfilled with the menstrual cycle and hence the restriction is a reasonable one. Women cannot fulfill the test of essential practice laid down in case of Commissioner of Police and others v Acharya Jagadishwarananda Avadhuta and another. It is also important to notice that religious, as well as traditional custom, consider menstrual cycle as a period when women are affected by several discomforts and hence observation of intense spiritual discipline of 41days is not possible.

3) **Gender Equality: whether it is violative of the constitutional rights?**

The restriction in Sabarimala temple is based on the ground that the temple belongs to a nastik Brahmchari it is argued that the deity entails that he see no woman in front of him. In order to be a Brahmachari, it requires rigorous devotion for years 'Tapasya'(devotion) if he sees a woman at that time than he tapasya can be 'bhanga'(disrupted). A Brahmachari needs to practice celibacy and remain chaste for the rest of his life. Although Article-14 of Constitution of India talks about Right to Equality this right is not absolute and should pass

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the test of Reasonable Classification which can be determined by studying the background of the conflict.

Article 25 talks about Freedom of religion in India which should not affect public order, morality and health however by allowing woman to enter this temple of celibate deity which is situated in remote area all the order is disturbed including health of women .Moreover Article 15(2) nowhere mentions the entry of into temple but includes only access to shops, public restaurants, hotels and palaces of public entertainment, wells, tanks, bathing Ghats, roads, and places of public resort etc. Further in case of Sri Venkatraman Devaru v State of Mysore and others has cited to submit that religious denomination cannot completely exclude or prohibit any section for all time but they can restrict the entry of a particular class or section in certain rituals and that is valid under rule of law. If the denomination right is such that in order to give effect to them would substantially reduce the right conferred then Article 25(2)(b) then of course, on our constitution that Art 25(2)(b) prevails over Art 26(b).

4) Women and Dalits: a different situation

Although women have been oppressed by the patriarchal society they were nowhere treated as untouchables it was more of a 'varna'(social classes in Brahminical books) division rather than gender division. From the historical incidents, it is evident that gender was never a reason for untouchability but it was because of casteism.gender was never a basis of untouchability and thereby it is wrong to associate it with untouchability untouchables it was more of a 'varna' division rather than gender division. From the historical incidents, it is evident that gender was never a reason for untouchability but it was because of casteism.gender was never a basis of untouchability and thereby it is wrong to associate it with untouchability.

AUTHOR'S OPINION

The Author of this essay would like to quote the lines of Deepak Mishra that -*the dualism persists in religion by glorifying and venerating women as a symbol of goddess, on one hand, and banning her from the entry of temple on another hand*. Historically women have been subjected to various harmful practices in the name of custom and traditions. Surely customs and traditions play a tremendously important role in shaping society but detrimental practices

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which are harmful to society should be discarded with time. Customs and traditions should mold themselves according to the lifestyle of people as *stagnant water is bound to get stale*.

The custom of non-entry of women was not practiced before but brought to light from the last sixty years only. The times back then is not the same as the times of at present and it must be taken into account that change is the demand of nature. While several of the more damaging and brutal customs have been removed from our lives, many other harmful ones remain ingrained in our cultures. This may lead to the acceptance of the inequality doctrine that the country is trying it's best to remove from itself.

Restricting women from entry into temple gives the message that male hegemony triumphs over women that has been going on for years. Being restricted from being able to worship in their own, is offensive to the faith of the women who wish to enter the temple. It may even be comparable to the practice of untouchability that has rightfully been considered cruel and dehumanizing to people it was practiced against. Giving women the freedom to worship, to visit their desired place of worship and to worship in the way their faith demands is a step the country must take toward making India a truly equal and safe place for each and every one of its citizens and finally be able to honor our constitution to the fullest of our abilities.

The decision of the honorable Supreme Court is a symbolic attempt of social change to convey the message that India is ready to set aside rudimentary traditions and orthodox customs into a liberal and a progressive India which does not discriminate between male and female when it comes to practicing their rights.

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LETHAL AUTONOMOUS WEAPONS AND MEANINGFUL HUMAN CONTROL

-Anirudh Murali

ABSTRACT

Lethal Autonomous Weapons Systems pose to revolutionize warfare on a grand scale. The principle that "robots should not be designed solely or primarily to kill or harm humans" is clearly an admirable one that enables public and professional trust. Autonomous weapons systems (AWS) are emerging as key technologies of future warfare. So far, academic debate concentrates on the legal-ethical implications of AWS but these do not capture how AWS may shape norms through defining diverging standards of appropriateness in practice. The crux of this article intends to provide a pre-ontological understanding of AI and how it functions through a comparison of the human mind and the programming of an AI. There have been efforts underway to program the Laws of War into an AI, but the computation concerns itself with conclusive results, and ethics are not conclusive to a single result. The absorption of knowledge by a thing – animal, person or robot, and the exploitation of that knowledge directly concerns itself with existential philosophy, for which Heidegger provides a sublime discourse. Descartes' dualism principle serves to essentially discredit AI developments but efforts despite this are underway to develop such weaponry. Preceding this, the accountability and liability of actions are concerned with the personality of the AI,

INTRODUCTION AND MOTIVATION

This paper intends to promote an understanding of what autonomy is, and the use of artificial intelligence in combat. The use of Autonomous Weapons Systems is in an undefined and area in law, yet there do exists weapons systems that are semi-autonomous therefore this paper operates under the assumption that these have the ability to identify and attack targets through sensory equipment. In a situation like war it is imperative for the exercise of discretion by the military commander of the belligerent party so that there is no violation of the rules of war.

The ethical considerations of having a machine carry out the decision that's best carried out by a human person will be evaluated using the jurisprudential concept of personality through philosophers namely Heidegger and Descartes. The subject of IHL are humans waging war on other humans and does not regulate machines, which implies that only humans are capable of carrying out decisions of aggression. The exercise of control over the use of weapons in general, and, concomitant responsibility and accountability for consequences are fundamental to the governance of the use of force and to the protection of the human person.

Fully autonomous weapons systems have not yet been deployed and used. Multiple parties to the Convention on Certain Conventional Weapons, including China, Israel, Russia, the United Kingdom and the United States, may be developing capacities that would enable greater combat autonomy for machines. No state is likely to argue in favour of the release of AWS without any form of human control. A variety of policy responses have been put forward including a ban on "killer robots", a moratorium however, this is a policy of wait-and-see. This policy may not be the best of approaches as the entire scenario has not been thoroughly considered, and many States are still seeking to understand the relevant issues in order to engage constructively in this emerging area.

Artificial intelligence is the future for all humankind and it comes with colossal opportunities but also threats that are difficult to predict.[458] There have recently been growing calls for the potential risks and impacts of LARs to be considered and addressed in an anticipatory and pre-emptive manner. For example, in October 2010, A United Nations human rights investigator recommended in a report to the United Nations that "[t]he international community urgently needs to address the legal, political, ethical and moral implications of the development of lethal robotic technologies." [459]

As with any technology that revolutionizes the use of lethal force, little may be known about the potential risks of the technology before it is developed, which makes formulating an appropriate response difficult; but afterwards the availability of its systems and the power of vested interests may preclude efforts at appropriate control.[460]It is incontrovertible that the

[458] 'Whoever leads in AI will rule the world': Putin to Russian children on Knowledge Day, RT INTERNATIONAL, https://www.rt.com/news/401731-ai-rule-world-putin/ (last visited Sep 26, 2018).
[459] Patrick Worsnip , 'U.N. Official Calls for Study of Ethics, Legality of Unmanned Weapons', WASHINGTON POST, Oct. 24, 2010http://www.washingtonpost.com/wp-dyn/content/article/2010/10/24/AR2010102400035.html?noredirect=on. Last visited Sep 26, 2018
[460] Richard Worthington, *The Social Control of Technology. By David Collingridge. (New York: St. Martin's Press, 1980, 200.)*, 76 American Political Science Review, 134–135 (1982).

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law of armed conflict cannot apply to autonomous weapon systems. To determine the overall lawfulness of a weapon system, the two distinct aspects of the law that need to be analyzed are weapons law and targeting law.[461] The first verifies that the weapon itself is lawful. The second determines whether the use of the weapons during hostilities might be prohibited in some manner under the law of armed conflict. A weapon must satisfy both aspects before it may be lawfully used on a battlefield. The nature of the weapon has not been dissected completely and due to the adaptablity of the machine its functionality changes. When the weapon itself is put under review at the initial stage, it is being reviewed for its current functions and uses at the time. This is subject to change and evolve over a period of time with battlefield experience and changes the nature of the weapon which makes the initial review a dead letter.

MACHINE AUTONOMY AND ARTIFICIAL INTELLIGENCE

Robots are often described as machines that are built upon the sense-think-act paradigm: they have sensors that give them a degree of situational awareness; processors or artificial intelligence that "decides" how to respond to a given stimulus; and effectors that carry out those "decisions".[462] The measure of autonomy that processors give to robots should be seen as a continuum with significant human involvement on one side, as with UCAVs where there is "a human in the loop", and full autonomy on the other, as with LARs where human beings are "out of the loop". "Autonomous" needs to be distinguished from "automatic" or "automated." Automatic systems, such as household appliances, operate within a structured and predictable environment. Autonomous systems can function in an open environment, under unstructured and dynamic circumstances. As such their actions (like those of humans) may ultimately be unpredictable, especially in situations as chaotic as armed conflict, and even more so when they interact with other autonomous systems.[463]

[461] Michael N. Schmitt, Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics, *Harvard National Security Journal Feature,* 15 *(2013);* Targeting law is often also referred to as the rules that apply to the conduct of hostilities.
[462] P. W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY (The Emirates Center for Strategic Studies and Research) (2010) p. 203.
[463] For a number of experts, the term 'autonomous weapon systems' is actually a misnomer. Stensson and Jansson argue for instance that the concept of 'autonomy' is maladaptive as it implies, philosophically, qualities that technologies cannot have. For them, machines, by definition, cannot be autonomous. Stensson, P. and Jansson, A., 'Autonomous technology: source of confusion: a model for explanation and prediction of conceptual shifts', 57, *Ergonomics*, 421, 455–70 (2014). The concept of autonomous systems has also caused

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In order for a weapon to be autonomous, it is obvious that it requires a high level of artificial intelligence to function and carry out its objectives. The ICRC has proposed that "autonomous weapon systems" is an umbrella term encompassing any weapon system that has autonomy in the critical functions of selecting and attacking targets.

"Any weapon system with autonomy in its critical functions. That is, a weapon system that can select (i.e. search for or detect, identify, track, select) and attack (i.e. use force against, neutralize, damage or destroy) targets without human intervention."[464]

The purpose of this working definition was to promote better understanding of the issue and to help frame related discussions. The advantage of such a broad definition is that it enables consideration to be given to existing weapons systems with autonomy in their critical functions. This could facilitate the process of determining the boundaries of what is acceptable under IHL and the dictates of public conscience. *"Drone"* refers to a machine subject to an *"external form of control."*, and thus may not be autonomous.[465]

Artificial Intelligence operations are defined as *"The automation of activities that we associate with human thinking, activities such as decision making and problem solving, learning"* (Bellman 1978), and *"The exciting new effort to make computers think…machines with minds in the full literal sense"* or *"The study of mental faculties through the use of computational models"* (Charniak and McDermott, 1985).[466]

Furthermore it is *"a field of study, that seeks to explain and emulate intelligent behavior in terms of computational processes"* (Schalkoff, 1990). *"The branch of computer science that is concerned with the automation of intelligent behavior"* (Luger and Stubblefield, 1993). These definitions can be organized into four categories that are: Systems that think like

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complex and contentious debate regarding the level at which a system may be deemed truly autonomous. In a report dated 2012 the US Department of Defense's Defense Science Board concluded that defining levels of autonomy was a waste of time and money, and tended to reinforce fears of unbounded autonomy. The report noted that discussion of levels of autonomy 'deflects focus from the fact that all autonomous systems are joint human-machine cognitive systems … all systems are supervised by humans to some degree … There are no fully autonomous weapons systems as there are no fully autonomous sailors, airmen, or marines'. US Department of Defense (DOD), Defense Science Board, *Task Force Report: Role of Autonomy in DoD Systems* (DOD: Washington, DC, 2012), 23-24.

[464] ICRC, Views of the ICRC on autonomous weapon systems, paper submitted to the Convention on Certain Conventional Weapons Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), 11 April 2016, Accessed on 14-05-2018, https://www.icrc.org/en/document/views-icrc-autonomous-weapon-system.

[465] Richard Whittle, *Predator: Secret Origins of the Drone Revolution* (New York: Henry Holt and Company, 2014) 310-11

[466] STUART J RUSSELL AND PETER NORVIG, ARTIFICIAL INTELLIGENCE, A MODERN APPROACH, 26-28 (Prentice Hall, Englewood Cliffs, New Jersey 2016),

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humans; Systems that think rationally; Systems that act like humans; Systems that act rationally. Norvig and Russell also state that there is a twofold approach to the functionality of AI where one concerns the thought process and the reasoning and the other that concerns the behavior in terms of human performance. Human performance is used as a standard of intelligence, or rationality. [467]

ETHICAL DECISION MAKING IN AI

The Turing Test proposed by Alan Turing (1950)[468], was designed to give an operational definition of intelligence. In brief, he proposed that a computer being interrogated by a human via a teletyping machine, among other humans who are interacting with it too. The machine passes the test if the judge cannot differentiate between a human and computer. The Turing Test pre-supposes that a physical simulation of a person is unnecessary for intelligence. Heidegger's views contradict this presupposition which will be discussed further below The test, as Turing designed it, is carried out as a sort of imitation game. Another test, is the Chinese Room Test,[469] has been designed by Searle. In this test, there is a person who doesn't know Chinese sitting inside a room isolated from another person who knows Chinese. The latter attempts to communicate. The former is given a list of Chinese characters and an instruction manual explaining the rules according to which strings of characters may be formed. He lacks the information that concerns the nature or the ontology of these characters. He has the manual, along with sufficient paper, pencils, erasers, and filing cabinets. outside the room, and consults a library of books to formulate an answer. His job is to receive messages and translate them without any real understanding of the language. Essentially, this man does nothing more than follow the rules given in an instruction book (the program). It does not understand the meaning of the questions given to it nor its own answers, and thus cannot be said to be thinking. The fact is that the person inside has no understanding of Chinese but manages to communicate with the person outside in Chinese without issues. Applying this dynamic in the Turing Test, the machine may have huge database containing questions and answers. When an interrogator questions the machine, it is locating the question, derives the answer and then gives the output. Searle says, *"the computer is not*

[467] RUSSELL et al., supra note 9.
[468] Turing, A. M. *Computing machinery and intelligence,* LIX, *Mind Mind* 49, 433-460, (1950).
[469] Searle, J. R., *Minds, brains, and programs*, 3 Behavioral and Brain Sciences, 418, 417-424. 1980

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merely a tool in the study of the mind, rather the appropriately programmed computer really is a mind in the sense that computers given the right programs can be literally said to understand and have other cognitive states" [470]

Since *"it is not conceivable,"* Descartes says, that a machine *"should produce different arrangements of words so as to give an appropriately meaningful answer to whatever is said in its presence, as even the dullest of men can do"*[471], whatever *has* such ability evidently thinks. Turing embodies this conversation criterion in a would-be experimental test of machine intelligence; in effect, a "blind" interview. Not knowing which is which, a human interviewer addresses questions, on the one hand, to a computer, and, on the other, to a human being. The appreciation Descartes had for the powers of mechanism was colored by his acquaintance with the marvelous clockwork automata of his day. He could see very clearly and distinctly, no doubt, the limitations of that technology. No number of gears would permit an automaton to respond grace fully and rationally. Perhaps Hobbes or Leibniz would have been less confident of this point, but surely none of them would have bothered wondering about the a priori limits on a million tiny gears spinning millions of times a second. That was simply not a thinkable thought for them.

Ronald Arkin and his team (Arkin, 2009; Arkin et al., 2009)[472] have proposed the concept of an "ethical governor," which enforces and effectively controls the robots in its ethical use of lethal force on the battlefield it is presently of little influence on the philosophical discussion, has been cited quite a number of times to justify the use of LAWS. It alludes to Watt's mechanical governor for steam engines, to which it alludes. There is a fundamental flaw that has not been taken into considerations, that is the clash of interests of the designer and the operator. There is a suggestion that ethics control is a matter of correcting divergences related to behaviour from a "reference ethical action" by a negative feedback loop. which does not consider the integral role of conscience and dissent in morality, and it is based on a fundamental confusion of the properties of laws, rules of just war, terms of engagement, and moral rules. These implementations involve a temporary regulation of ethical issues on the battlefield, which is removed from public scrutiny and democratic control. Considering these

[470] SEARLE, supra note 12 at 417.
[471] Descartes, René. 1637. Discourse on the Method. Trans. John Cottingham, Robert Stoothoff and Dugald Murdoch. In *The philosophical writings of Descartes*, Vol. I, 109-151. New York: Cambridge University Press
[472] Arkin, R et al,. *Governing Lethal Behaviour in Autonomous Robots: An Ethical Governor for Constraining Lethal Action in an Autonomous System,* Tech. Report No. GIT-GVU-09-02, GVU Center, Georgia Institute of Technology (2009).

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issues, the concept of an ethical governor as favoured and already implemented by the military research community can be shown to be both misleading and dangerous, and to not address the moral problems it is supposed to solve.

The central issue to this section is the successful distinction between combatants and civilians, and this is a technical issue. The governor is supposed to be "capable of restricting lethal action of an autonomous system in a manner consistent with the Laws of War and Rules of Engagement… The governor "is a transformer/suppressor of system-generated lethal action to ensure that it constitutes an ethically permissible action, either nonlethal or obligated ethical lethal force" (Arkin et al., 2009, 1).

It is essentially a constraint driven system that runs on predicate and deontic logic. It tries to evaluate an action, which has in a previous step been proposed by the tactics-evaluating sub-components of the machine, by satisfying various sets of constraints, such as $C_{forbidden}$, $C_{obligate}$ and so on. Every constraint is a data structure which has a type (e.g. "prohibition"), an origin ("laws of war"), and a logical form ("Target Discriminated AND Target Within Proximity Of Cultural Landmark") among other fields. Among other aims, the ethical governor is supposed to ensure the proportionality of a military response. Interestingly, the "acceptable" level of collateral damage is defined solely as a function of the military necessity of an action: Table

Firstly, there exists a conflict in the interests of the designer and the operator of the machine. The designer's aim is to implement a device which will limit the actions of a robot to ethically permissible actions (the limitation here is that the latter set can't be clearly defined at all). The commander of the robot has predefined set of mission objectives and he has to achieve maximum operational efficiency and complete the objective successfully. The operator has an incentive where he may want to override the constraints for a better result or to secure the lives of his troops. Not all objectives can be achieved with minimum inefficiency while observing the laws of war, the rules of engagement, and, on top of those, a set of moral constraints. Thus, permissible collateral damage is defined as a function of military necessity alone. But in real-life situations, optimization problems are vastly more complex. For example, how do you teach a machine to algorithmically maximise fairness or to overcome racial and gender biases in its training data? A machine cannot be taught what is fair unless the designers of the AI system have a precise conception of what fairness is. With an increase in the military value of the target, the governor may be overridden to that extent restricted by the collateral damage value and thus makes the moniker 'the governor' a

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misnomer. It possess more of a recommendatory power as it can be overridden at any time should military "necessity" suggest that this would be opportune.

The original steam governor is an application of a negative feedback controller. The speed of the engine's revolutions) directly drives the controlling mechanism (the upwards movement of the heavy spheres), which in turn directly controls the opening of the steam valve. This is an analog feedback. In this case, such feedback controllers would operate digitally. Scalar values and variables inside the system will be represented and this delivers control commands which will influence the variable. The system operates in a loop, reading the value being monitored, compare it to the desired value and identifying the range of deviation. Supposing the value is more than the required range, the variable's value is reduced and vice versa. In both cases the strength of the corrective action would be proportional to the magnitude of the deviation. Negative feedback controllers restrict the value of the controlled variable to a small range around some desired target value, hence the moniker 'negative'. The effect of the corrective action must be predictable and it must be expressible as a decrease of the measured deviation. The morality is objectively being measured, and represented by values in a system. The ideal of what is morally right, and the extent of its divergence from what is morally wrong is naïve moral objectivism. Morality is not something that is objectively coded in the form of values and numerals. Here the claim is that every possible action can be assigned a scalar value based on morality, and can actually be measured. Assuming this to be true, comparing this with objectivist claims about the scientific truth, the concomitant claim would be that we can in theory, identify and collect all truths and untruths on how nature works, through an algorithmic sequence. Here the concept of the background will enter, but will be discussed a little later in the paper. Note here, that according to mathematics, in principle all problems have one optimal solution, the perfect answer. But ethics and morality in its ontological sense being subjective, needs to be mathematically and comprehensively solved, with one single answer. This is an absurd claim. Coming back and applying this in the domain of morality, we will find that there exist singular solutions to moral issues and dilemmas, all alternative paths of action being deviations from the one value which the system attempts to achieve. Moral problems in fact are not structured to be solved from an objectivist view. Bringing in actual cases of moral dilemmas like the Speluncean

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Explorers[473], or a Dudley v. Stevens[474] type of scenario, and in the context of this paper, lethal action against a soldier, it can be observed that there are multiple approaches which can all be used and justified. None of these solutions have a point of reference to optimize the solution, and concluding this, the principle that this feedback regulator needing a target value is not sound and the regulation process becomes ineffective.

LEGAL IMPLICATIONS OF USING LAWS

Some argue that robots could never meet the requirements of international humanitarian law (IHL) or international human rights law (IHRL), and that, even if they could, as a matter of principle robots should not be granted the power to decide who should live and die. These critics call for a blanket ban on their development, production and use.[475] To others, such technological advances – if kept within proper bounds – represent legitimate military advances, which could in some respects even help to make armed conflict more humane and save lives on all sides.[476] According to this argument, to reject this technology altogether could amount to not properly protecting life.

International Humanitarian Law (IHL), regulates the manner in which armed conflict is carried out. The crux of IHL namely the distinction, proportionality and legal review will be relevant to the paper.

Firstly, with respect to distinction robots do not possess adequate sensory or vision processing systems for separating combatants from civilians, particularly in insurgent warfare, or for recognising wounded or surrendering combatants. Another problem for the

[473] Lon L. Fuller's The Case of the Speluncean Explorers [FN1] is a classic in jurisprudence. Set in the Supreme Court of Newgarth in the year 4300 the case presents five judicial opinions which clash with each other and produce for the reader an exhilarating excursion into fundamental theories of law and the state and the role of courts vis-i-vis legislatures and executives. Though the issues articulated by Professor Fuller in 1949 are timeless, the past thirty years in jurisprudential scholarship have produced at least one major new vantage point—the "rights thesis" as advanced by Professor Dworkin and others. [FN2] Simply stated, the rights thesis holds that there is a "right" answer, and only one right answer, in every case. The litigants have a "right" to that and finally—to add one more shade of meaning to the comprehensive term "right"— the answer thus arrived at is dictated by general requirements of justice. Since justice is a branch of morality, the "right" answer is not only correct but also right in a moral sense.

[474] R v Dudley and Stephens 14 QBD 273 DC, (1884)

[475] Bonnie Docherty, Losing Humanity, The Case against Killer Robots, HUMAN RIGHTS WATCH (2015), http://www.hrw.org/reports/2012/11/19/losing-humanity-0 (last visited Sep 15, 2018). Human Rights Watch, *Losing Humanity: The Case Against Killer Robots* (2012), available from http://www.hrw.org/reports/2012/11/19/losing-humanity-0.

[476] *Id.*

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Principle of Distinction is that we do not have an adequate definition of a civilian that we can translate into computer code. We cannot get one from the Laws of War that could provide a machine with the necessary information. The 1949 Geneva Convention requires the use of common sense while the 1977 Additional Protocol I essentially defines a civilian in the negative sense as someone who is not a combatant.[477]

Moreover, the discrimination between combatant and civilian targets is not just a visual classification. Even if machines had adequate sensing mechanisms to detect the difference between civilians and uniform-wearing military, they would still be missing battlefield awareness or common-sense reasoning to assist in discrimination decisions. In the ICRC's guidelines for what constitutes "direct participation in hostilities", an individual can only be considered to be a combatant in an armed conflict, three requirements must be satisfied:

(1) threshold of harm[478]

(2) direct causation and

(3) belligerent nexus.[479]

It's not possible to conclude whether a machine could ever attain a level of identifying discrimination with adequate common sense reasoning and battlefield awareness, as exercised by a human.[480] Research evidence and results have are not elaborate enough to suggest that it could be computationally intractable. It will not be tractable in the foreseeable future, at least.

Concerning the proportionality principle, Robots do not have the level of situational awareness required to make proportionality decisions. Arkin has proposed a system of objective proportionality,[481] However, this is a utilitarian approach to the problem. There is

[477] Article 50(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter Additional Protocol I).
[478] Asaro (2012 Asaro, P. (2012). On banning autonomous weapon systems: Human rights, automation, and the dehumanization of lethal decision-making. International Review of the Red Cross, 94, 687–709. (Special Issue on New Technologies and Warfare). doi: 10.1017/S1816383112000768[Crossref], [Web of Science ®], [Google Scholar]).
[479] Melzer, N. (2015) The principle of distinction between civilians and combatants. In: Clapham, A. and Gaeta, P. (eds.) *The Oxford Handbook of International Law in Armed Conflict.* Oxford University Press: Oxford. ISBN 9780199559695
[480] See Sharkey (2008Sharkey, N. (2008). Grounds for discrimination: autonomous Robot weapons. RUSI Defence Systems, 11(2), 86–89.
[481] (Arkin, 2009Arkin, R. C. (2009). Governing lethal behavior in autonomous robots. Boca Raton, FL: Chapman&Hall.[Crossref], [Google Scholar]).

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already software called 'Bugsplat' used by the US military for this purpose[482]. The problem is that it can only ease collateral impact. For example, if the decision to use a munitions near a local building with 200 civilians was evaluated, the software would propose an offensive that would only kill 50 civilians

The actual point of concern is making the decision about kinetic force, or lethal force. The balance between civilian losses and assumed military advantage is in a vague area. The list of questions is endless. It is a subjective and qualitative decision that only a human can exercise, and make a decision about the proportionality. It is imperative that such decisions are made by responsible, accountable human commanders who can weigh the options based on experience and situational awareness.

War is art and not science, as it's dynamic exists in a completely different area, which is not evaluatable by mathematical and logical algorithms. An Air Force pilot with extensive experience with both traditional and drone airstrikes from Kosovo to Afghanistan, told *Discover* magazine, "If I were going to speak to the robotics and artificial intelligence people, I would ask, "How will they build software to scratch that gut instinct or sixth sense? Combat is not black-and-white"

In other words, the principles require human judgement and reasoning to interpret them in context. As Asaro[483] put it,

"While these ... are in some sense 'rules' they are quite unlike the rules of chess in that they require a great deal of interpretative judgement in order to be applied appropriately. Moreover, the context in which the rules are being applied, and the nature and quality of the available information regarding its significance, might vary widely from day-to-day, even in the same conflict, or even in the same day."

With respect to Article 36 of Additional Protocol I which concerns the legal review of all new weapons, means and methods of warfare in order to determine whether their employment is prohibited by international law,[484] the requirement originates in Article 35 which states that

[482] https://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=3199469
[483] (2012Asaro, P. (2012). On banning autonomous weapon systems: Human rights, automation, and the dehumanization of lethal decision-making. International Review of the Red Cross, 94, 687–709. (Special Issue on New Technologies and Warfare). doi: 10.1017/S1816383112000768[Crossref], [Web of Science ®], [Google Scholar])
[484] Heyns, C. (2013). *Report of the special rapporteur on extrajudicial summary or arbitrary executions*. Human Rights Council Twenty-third Session.

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the right of states to choose means and methods of warfare is not unlimited. Autonomous weapon systems, like every weapons system, should be subject to such a legal review.

However, Article 36 reviews are national procedures without any kind of international oversight. There are no established standards as to how they are conducted. The Committee of the Red Cross (ICRC) provides guidelines for legal reviews but notes that Article 36 does not specify how a determination of the legality of weapons, means and methods of warfare to be carried out.

Even though such reviews are obligatory under international law, the vast majority of states do not have a weapons review procedure. Out of the 174 state party to Additional Protocol 1, only 12–15 states are known to have any weapons review mechanisms in place.[485] Out of these only a few would have the technical capability to make a start on weapons reviews for AWS.

A major problem for reviewing AWS is in being able to guarantee their predictability. There are currently no formal methods available to determine the behaviour of an autonomous system. It is still very difficult to formally verify anything but fairly simple programs and autonomous systems are still beyond the abilities of computer science; add learning algorithms and it get orders of magnitude more difficult. So the only option is for the legal review to examine the empirical evidence provided by the manufacturer and intended end-user, and if necessary conduct tests and evaluations to assess the weapon's performance and the possible risks associated with its use. But as weapons become increasingly autonomous, this task becomes increasingly difficult. In warfare there are an extremely large (perhaps infinite) number of unanticipated circumstances that can occur and we do not even know how to develop any kind of representative sample to test against. And so this technology is developed to begin with for use in very limited circumstances and then proliferates so that it is used by many nations, how can we ever expect to keep control of it.

Some lawyers have argued that AWS will not be used if they do not comply with international law. But since so few states carry out weapons reviews, and fewer have the technology for any kind of meaningful empirical testing how can we ensure compliance. It is a blinkered view to imagine that only a few western hi-tech nations will have access to these weapons when we are already seeing developments spreading.

[485] Vincent Boulanin, Implementing Article 36 weapons reviews in the light of increasing autonomy in weapon systems, SIPRI Insights on Peace and Security, No. 2015/1_November 2015.

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Others argue that at some point in the future they may be able to comply with IHL. However, they are talking about an IHL compliant technology that no one knows how to create. There is nothing wrong with technological ambitions or a general research agenda in civilian domains, but there is less room for such conjecture when discussing the automation of the technologies of violence. For example, robot soccer is seen as a great research challenge and a chance to test robotics technology within a real world application. The ultimate aim is to develop a team of autonomous humanoid robots that will beat human world champions by 2050. No one knows if this will work, but the challenge enables the development of new methods of robot control and sensing that can be applied elsewhere.[486] Thus, success in the ultimate aim is not vital to reap the technological benefits. If the enterprise fails, we may invent a different kind of sport for humans and robots to play together (and still keep the old sport specifically for humans) with new rules of engagement to give robots an equal chance of victory.

CONCLUSION

The foregoing arguments relating to the limitations of the technology for compliance with international law, the moral arguments and problems for international security have led the nation states at the CCW at the UN to push towards detailed discussion on the meaningful human control of weapons systems. In the words of International Committee for the Red Cross, "for legal, ethical or military-operational reasons, human control over weapon systems and the use of force must be retained".

It is now up to the high contracting parties to the CCW to decide what exactly they mean by human control. It is thus important that the EPSRC principle 1 becomes: *A robot should never be delegated with the decision to apply violent force to a human*.

[486] For a fuller discussion, see Datteri and Tamburrini (2013Datteri, E., & Tamburrini, G. (2013). Robotic weapons and democratic decision-making. In E. Hilgendorf & J.-P. Guenther (eds.), Robotik und Gesetzegebung (pp. 211–229). Baden-Baden: Nomos Verlagsgesellshaft.[Crossref], [Google Scholar]).

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BOOK REVIEW

Christopher Carlsson & Jerzy Sarnecki, An Introduction to Life-Course Criminology, Sage Publications, London, 2016, 172 pages, ISBN: 978-1-44627-590-0, price: £24.99 (₹ 2088.61)

- ***Nilanjan Chakraborty***

The author in this book has skillfully delineated that Life-Course Criminology is now an integral part of Criminology as a whole. Indeed, although the main ideas of the field are as old as criminology itself (probably older), it did rise to fame very quickly. Life course criminology is concerned with individuals as they move through time and place, and how criminal offending changes or continues with these movements. The author clearly stated that the relationship between crime and age is as old as criminology itself, but its modern relevance was mainly established in the 1970s. Carlsson and Sarnecki offer a genuinely necessary commitment to the constrained reading material accessible regarding the matter of life-course criminology. A fundamental read for college understudies undertaking a criminal profession or formative module.

In the first chapter, the author briefly introduced the topic and questions of life course criminology, provided a history of the research field, and outlined the structure of the book. He is of opinion that antisocial behavior shows impressive continuity over age, but its prevalence changes dramatically with age. In other words, in any given population, the number of active offenders (prevalence) decreases with age. While reading the book, I got acquainted with quite a number of new theoretical concepts like life-course, trajectory, and transition, while others were of a more technical nature such as frequency, escalation, de-escalation, and duration, with respect to criminal offences. In this chapter, the historical nature of time and place has been explained briefly. Basically, the author wanted to put emphasis on the analysis of the time and place of the offence because he believes that everything has to occur somewhere, and sometimes, and where and when something happens is important for understanding that very ‘something’.

The author also explained the linking of human lives, i.e. how an act of one person affects the mentality of other people, and how the companions or the surroundings of a person determine the origination of the criminal mentality in that very person. Thus, human lives are linked together and, affecting one another and the resulting trajectories and transitions of their lives.

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In the next chapter, the author attempted to unpack the field of crime and the life-course in greater detail. He raised certain important questions surrounding the heart of the criminal enterprise, such as: why do people engage in rule breaking behavior? How can we explain the empirical finding that most do so only a few times and then quit, while a few continue much longer? He believes that life-course criminology should be understood not as a separate field but rather as a development and extension of criminology's traditional and theoretical locus. This extension mainly consists of systematically paying attention to the importance and meaning of the process of aging, the different stages individuals go through, and the contingencies of these stages with regards to crime and deviance.

Subsequently, in the later part of the volume I got to know about various criminological theories such as developmental psychological theory and life-course sociological theory which are among the most influential theories within the discipline. The author also explains the importance of self-control. Every offence is done by an offender for the pursuit of pleasure or avoidance of pain, so here a sound sense of self-control is primarily needed to resist the self-interested persuasion of pleasure.

The fourth chapter discusses methodologies of research on life-course criminology. He says that conducting researches on longitudinal and life course criminology is a hectic work because it often takes a lot of time (and sometimes include several generations of researchers), tends to be very expensive, and is methodologically quite complicated. Both the quantitative and qualitative methods of research have been mentioned in this volume. The author has made a fantastic distinction between various other methods of researching in respect to life-course criminology. This volume mentioned a number of dominant researchers and their view on the techniques and the methodologies of life-course research including a segment on a fusion of qualitative and quantitative data written by very well-known life-course criminologists Sampson and Laub.

Moreover, in the later part of the chapter he makes us move through the different stages of the criminal career. Here is a good place to remind the reader that while these chapters are written to stand for themselves, they are also more than the sum of the parts, i.e. to get a sense of the sequentiality of crime and the life course - how each stage is contingent on the one that precedes it and unfolds towards and into the future - it may be beneficial to read them in sequence. Here in this chapter, the author critically explained the concept of risk and risk factors. He began by defining risk factors and outlining the dynamics risk and the

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criminal career. Finally, he turned to the heart of the enterprise of risk factor studies, namely, the possibility of making predictions of future criminal offending.

The author discusses the onset or beginning of any criminal or antisocial behavior. Here the author fantastically points out that how onset is now an integral part of the conceptual framework of criminal career research and life-course criminology. Together with concepts such as persistence and desistance, it frames the criminal career of any given offender. i.e. onset captures the initiation and the beginning of the career, persistence accounts for the continuity of the criminal behavior once onset has occurred, and desistance accounts for the change in offending toward cessation and the end of the career. By these chapters, the author introduced, reviewed the research on and discussed these fundamental concepts on life course criminology.

The follwing chapter unpacks the theme of persistence in crime. Here the authors once again discuss that the criminal behavior ends after attending an age. The criminal career begins with onset. For many offenders, it ends soon thereafter: for any given group, the prevalence in crime peaks during the teenage years when criminal offending is very common, and then it dramatically decreases. Between ages 20 and 29, the vast majority of offenders desist from crime and move into a conventional, adult life (*Farington, 2003*). Only a small portion of all offenders develop a persistent criminal career. These offenders, while they constitute somewhere between 5 and 10% of any given offender sample, will be responsible for around 50% of all crimes committed by that population and the major part of all serious offenses. In other words, following onset, they continue to commit many and serious crimes and over a relatively long period of time.

The authors then came to another side of the coin in the Eight chapter of the volume which deals with the understanding of the concept of desistance from crime. In this volume, he explained many new concepts and his understanding upon those concepts. The term criminal desistance means, quite simply, that an individual who has previously engaged in crime, cease to do so. Once again, however, as we have seen when it comes to onset and persistence - two concepts that, in theory, look pretty nice and simple - desistance as a concept comes with a set of complications, contradictions, and choices that need to be made by the empirical researcher who considers using it.

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As I have noticed, this book has to a large extent been looking back at the field of life-course criminology, i.e. how did it rise to fame? What central ideas, studies, methods, and theories make up the field? What are the implications of life-course criminology? But in the final chapter, i.e. Ninth chapter, he did something that any experienced life-course criminology know is a very delicate thing, i.e. he attempted at glancing into what might happen in the future. He basically concentrated upon the future of life-course criminology, the need for new life-course studies of crime, the study of criminal transmissions, forms of crimes and types of offenders and study of life-course criminology beyond crime.

So, after coming to the end of the book, I have such a clear vision about this new concept or branch of criminology that it has kindled inside me the urge to explore and study more about this topic. *'An Introduction to Life-course Criminology*' is an entrancing book and it offers decent bits of knowledge into this alternative methodology. This book is valuable for any individual who needs to find applications of narratives in data gathering. Carlsson and Sarnecki's *An Introduction to Life Course Criminology* catches the energy of the life course point of view inside criminology, a focal point and set of distractions that have turned out to be progressively vital to the field. This enthusiastic volume won't just give different researchers and understudies a full energy about key ideas and chronicled roots, however, open a window on what is in question hypothetically.

But on the other hand, the volume somewhere failed to answer certain questions, like - Is crime the product of neuro-psychological dispositions interacting with an unforgiving environment or is it the result of interactional processes of social control. Also, the book failed to answer that whether human nature relatively static, or is it dynamic? And Do people, in fact, exercise their human agency when influencing their future pathways. So, likewise, there are various others debates regarding this topic, and other related questions (indeed, not even the two authors of this book are in full agreement). So, at this point, I just strongly recommend you read this book and seek out your answers and, possibly, form new questions.

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THE CONCEPT OF RESTITUTION AND UNJUST ENRICHMENT

- ***Vediccaa Ramdanee***

As simple as it seems, the concept or rather concepts of unjust enrichment have been way too baffling. There are a plethora of interpretations, explanations, case comments, etc..

The leading authority on restitution and unjust enrichment 'Goff and Jones' , currently in their 9th Edition have further elucidated the idea mentioning Lionel Smith who stated in his case that " there is never any normative basis for a claim against an indirect recipient, in the absence of a direct nexus of transfer." This contention however did not seem convincing to them as opposed to the courts' "at the expense of" inquiry approach. The learned authors, Lord Goff of Chievely and Gareth Jones in the book " The Law of Restitution" (3rd Edition), 1986 have given the following 3 interpretations of unjust enrichment :

1. The defendant has been enriched by the receipt of a benefit.
2. The defendant has been so enriched by the 'plaintiff's expense.'
3. That it would be unjust to allow him to retain the benefit.

These principles are closely interrelated.

The aforementioned non acceptance by Goff and Jones of the case submitted by Lionel Smith is backed by their account of the same.

We can consider it as a 4th interpretation of unjust enrichment. Their account is with respect to what 'the nexus' could consist of. They argue what is required is a "but for" causal connection between the claimant's loss and the recipient's gain, "and a transfer of value can be found even where D gains and C suffers a subtraction from his wealth as a consequence of two separate events or transactions that are themselves joined by a 'but for' causal connection". This causal connection has been examined by Goff and Jones in 4 situations :

1. The discharge of another's debt.
2. Contracts for provision of services.
3. Sequential transfers.
4. Interceptive subtractions.

This would in their view bestow on the defendant, a benefit traceable from the claimant's assets, thereby establishing an indirect link through the value in the defendant's hands that once belonged to the claimant, hence satisfying the "at the expense of" requirement, either because the monies could be traced into the pocket of the defendant or because there is a direct 'in personam' transfer between the parties.

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The case of Peel v. Peel[487] is of great significance to shed considerable light on the matter.

Restoration of something or recovery to lie, something must have been received and retained by the defendant whether goods, services or money. It follows that without a benefit which has 'enriched' the defendant and which can be restored to the donor in specie or by money, no recovery lies for unjust enrichment.

Though there are traditional categories in which cases may fall, however in their absence, these categories turn mainly on the circumstances giving rise to the conferral of the benefit, which in turn affects the absence of a juristic reason for permitting the defendant to retain the benefit.

Thus when we talk about 'incontrovertible benefit' doctrine, it falls short of proof of a "demonstrable financial benefit" , in turn rendering it uncertain and speculative. The ideals presented by Goff and Jones have been affirmed as well in the Indian case of 'Mafatlal Industries Ltd. v. Union of India'.[488]

On the other hand the second aspect of interpretations of unjust enrichment as aforementioned has been considered by Professor Peter Birks in his book 'Introduction to the Law of Restitution' elaborately.

It is the major theme of Birke's work that the Law of Restitution ambiguously as a phrase conceals 2 meanings.

His theory is also called the theory of 'Interceptive subtraction'. It assumes that there must have been something to be subtracted from. This would require the claimant to assert a definitive claim to the assets which found their way into the recipient's hands and the requirement of certainty of the claimant otherwise receiving the wealth in question is critical. It also requires for its application that the person claiming restitution should have suffered a "loss or injury".

The concept of unjust enrichment is still evolving. Different nations have different approaches towards it. The Canadian concept recognizes enrichment without an impoverishment of the plaintiff. Similarly, in New Zealand, parties must be able to point to a particular factor giving rise to unconscionability.

[487] 1992] 3 SCR 762
[488] JT 1996 11 SC 283