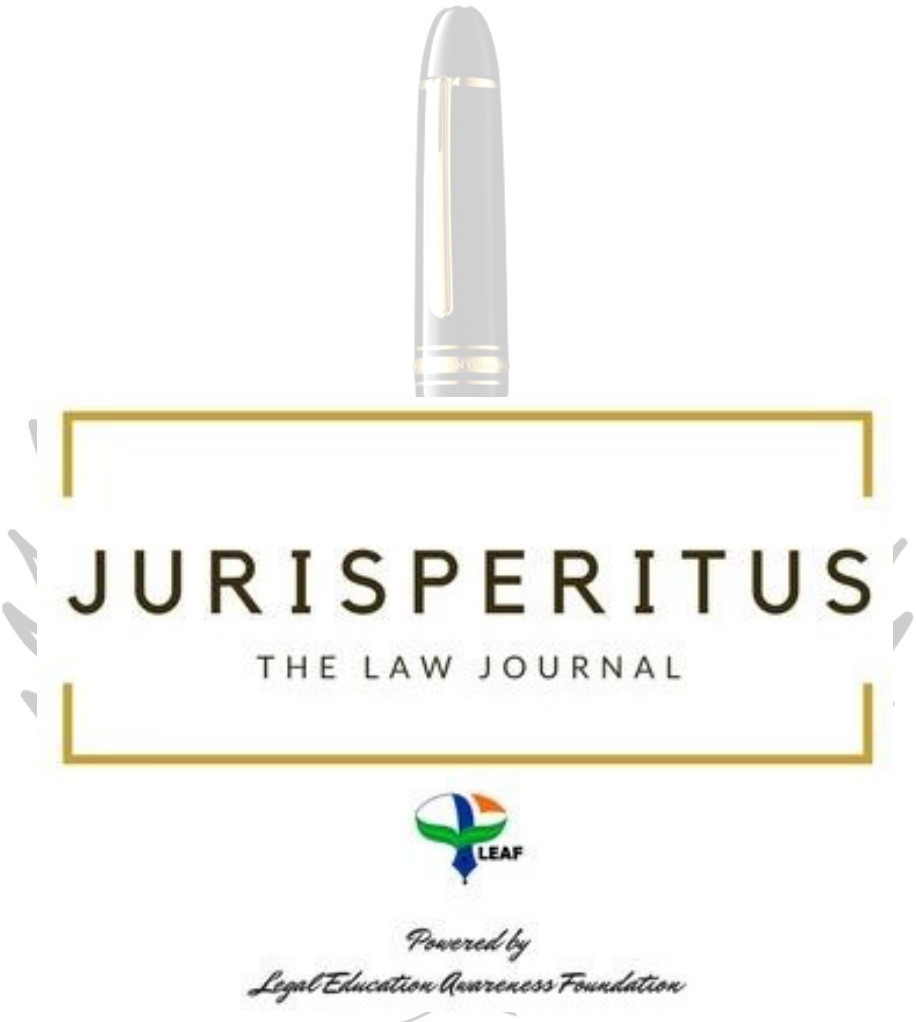

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ABOUT US

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

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

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

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

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

INDEX

VICTIM: COMPENSATION SCHEME IN INDIA: A CRITICAL STUDY

- SHIV SHANKAR

ABSTRACT

"Torture leads to the intentional infliction of severe mental or physical pain or suffering which causes the violation of the most basic rights of all humans."

- Robert Alan Silverstein

The context of *'Victims'* are *'Prima Facie'* being the most important and substantial issues of our current generation. The word itself shows that the *'Victims'* are being crushed and are being treated so *'Gruesomely'* and *'Brutally'* that they have indeed lost their identity and dignity under this massive society. The casualties of wrongdoing, and others who know about the commission of wrongdoing, are regularly required to affirm at a preliminary or at other court procedures. Complete participation and honest declaration everything being equal and victims are basic to the assurance of the blame or blamelessness of an individual blamed for carrying out wrongdoing. There are a plenty of issues in wrongdoing and criminology being talked about in the general public however victimology is one such region which needs much more consideration. The criminal equity framework predominant in our general public is structured so that much consideration is being paid to the wrongdoings and the standards of conduct of the culprit however barely any notice is being paid to the unfortunate casualties. The guilty party, the nature of the discipline granted to him for the offense submitted by him, his reorganization and restoration; has consistently been the cynosure of the criminal equity

framework. All the exertion is being placed in understanding the character and personal conduct standards of the wrongdoer and the social, political and different variables which contributed towards his criminal conduct. Barely any notice is being paid to the casualties of wrongdoing. Under this article we will look forward to the ample rights of the victims which have been provided by the statutes/ legal enforcement agencies, so that the victims shall be prevented from each sort of gross exploitation.

KEYWORDS: Victims, Criminal Equity Framework, Victimology, Exploitations, Rights of Victim.

INTRODUCTION

VICTIMS OF CRIME:

'Victims/ Unfortunate Casualties of Aggrieved' signifies people who, exclusively or aggregately, have endured hurt, including physical or mental damage, enthusiastic affliction, monetary misfortune or generous hindrance of their basic rights, through acts or oversights that are infringing upon criminal laws employable inside Member States, including those laws forbidding criminal maltreatment of power. An individual might be viewed as an injured individual, under this declaration, paying little heed to whether the culprit is distinguished, secured, arraigned or sentenced and in any case for the familial connection between the culprit and the person in question. The expression "unfortunate casualty" likewise incorporates, where suitable, the close family or dependants of the immediate injured individual and people who have endured hurt in mediating to help exploited people in trouble or to forestall victimization. The arrangements contained thus will be relevant to all, without

qualification of any sort, for example, race, shading, sex, age, language, religion, nationality, political or other supposition, social convictions or practices, property, birth or family status, ethnic or social inception, and incapacity. The study of victims and their respective sorts of issues, atrocities are being treated or effectively treated under the core domain of *'Victimology'* which is the sub-sect of the *'Criminology'*. The word *'Victim'* has been derived from the latin word*'Victimia'*.

VICTIM AND VICTIMIZATION:

The way toward turning into an injured individual or being misled is known as exploitation. Since no careful definition is accessible it very well may be just said that it is connection between the person in question and the denounced. Anyway the principal hypothesis which demonstrated exploitation was created by Wolfgang what's more, was prevalently known as the *'Victim Precipitation Theory'*which proposed the inclusion of the victims themselves into the circumstances prompting their wounds and passing's in this manner making the job of

exploited people in the crime a noticeable one disregarding the way that there may emerge a plausibility where an unfortunate casualty perhaps constrained to take an interest in the crook action. The effect of exploitation can be physical, money related, mental and soforth.

Exploitation can be ordered into four sorts specifically: *Primary, Secondary, Self, and Re-Victimization*. The following types of the specific victimization are being as follows:

- • *Primary Victimization*:

These are such victimization which witnesses the severe crimes and their after effects or the consequences which may include: *'Physical', 'Financial', 'Emotional' and 'Psychological'* effects which weakens and lowers down the confidence and the inner strength of the victims in the greater extent.

- • *Secondary Victimization*:

It includes the response of individuals and institutions to the victims, the way he/she istreated in the society, workplace, and other realms of life. It may result in the complete denial of the human rights to victims, their dignity and reputation which they earlier had having in thesociety.

- • *SelfVictimization*:

The word *'Ipso Facto'* suggests or highlights the meaning i.e. whenever the victim either through by indulging their selves into some bad company or by committing any sort of bad activities which ultimately make them caused victimized. Here no outside persons provoke or directly commits some exploited acts with the victims in order to cause the gross victimization on the part of victims.

- • *Re-Victimization*:

Repeat Victimization/ Re- Victimization may result either by staying in association with the offender for a continuous period of time or by staying close to the concentration of the potentialoffender.

HISTORICAL BACKGROUND PERTAINING TO THE VICTIM'S ORIGINATION AND GROSS VICTIMIZATION

***VICTIMS TREATED UNDER ANCIENT HINDU LAW*:**

In the early period of history, it is set up that the compensation was on remuneration to the person in question or on the other hand the spiritual and material fulfilment of the person in question, as opposed to on giving the punishment to the perpetrator. Reparation or the pay as a type of punishment is seen as perceived from antiquated time in India. In old Hindu law during *Sutra* period, granting of remuneration was treated as a royal right. The *'Law of Manu* of requires the offender to pay compensation and pay the expenses of cure in case of injuries to the sufferer and satisfaction to the owner where goods were damaged. In all cases of cutting of a limb, wounding or fetching blood the assailant shall pay the expenses of a perfect cure or in his failure both full damages and a fine of some amount. Apart from this *'Lord Vishnu'* and *'Lord Yajnavalkaya'* also suggested that whenever there having any sort of atrocities or sort of offences being committed by the State or any private person against the victim then that person has to compensate the innocentparty.

***VICTIMS UNDER MUSLIM LAW*:**

In the hour of the Greek, yet in still prior ages, where Mosaic regulation was built up among Hebrews, hints of compensation to the injured individual are evident. That agreement, in its punitive division, took unique and noticeable insight of the rights and claims of the harmed people, as against the wrongdoer. Even under the *'Muslim Law Period'* the concept of *'Reparation'* and *'Compensation'* were recognised effectively as by the *'Mosaic Code'*.

***VICTIMS UNDER MEDIEVAL PERIOD*:**

The change from vindictive reprisal to synthesis was a piece of a characteristic authentic procedure. As tribes settled down, response to damage or misfortune turned out to be less serious. Pay to the person in question served to moderate blood quarrels, which, as tribes turned out to be pretty much stable networks, as it were raised unending trouble since damage would begin interminable feud. In *'Arabia'* it was found that compensation was necessary to be provided by the wrongdoer to the victims in order to make them feel satisfied and also to maintain and preserve the social balances of Indian Society.

INTERNATIONAL POSITION PERTAINING TO THE RIGHTS OF THE VICTIMS UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR):

- The victims should be treated fairly and in a dignified manner as prescribed by the rules and guidelines of*'UDHR'*.
- The guidelines of *'UDHR'* specifically provides the victims of *having 'Right to Remedy and Reparation of Victims'* for gross violations of *'International Human RightsLaw'*.
- Under *'Article 8'* of the *'Universal Declaration of Human Rights'* the victims have to be prevented and protected for each gross victimization of their 'HumanitarianLaw'.
- Under *'Article 2'* of the *'International Covenant on Civil and Political Rights'* there shall have to be the fair treatment of victims without any exploitations beingmade.

- In instances of gross infringement of universal human rights law and genuine infringement of global helpful law establishing wrongdoings under worldwide law, States have the obligation to research and, if there is adequate proof, the obligation to submit to arraignment the individual purportedly liable for the infringement and, whenever saw as blameworthy, the obligation to rebuff her orhim.

CRIMEVICTIM'S RIGHTS RECOGNISED UNDER US LAWS/ CODE:

- The right to be reasonably protected from theaccused.
- The right to reasonable, accurate, and timely notification of any open court continuing, or any parole continuing, including the wrongdoing or of any discharge or departure of theblamed.
- The right not to be barred from any such open court continuing, except if the court, in the wake of accepting clear and persuading proof, establishes that declaration by the unfortunate casualty would be substantially changed if the injured individual heard other declaration at thatprocedure.
- The right to be sensibly heard at any open continuing in the region court including discharge, request, condemning, or any parole continuing.
- The sensible right to meet with the lawyer for the Government for thesituation.
- The right to full and reasonable compensation as being prescribed bylaw.
- The right to procedures liberated from absurddeferral.

- • The right to be treated with reasonableness and with deference for the unfortunate casualty's pride andprotection.
- • The right to be educated in a reasonable way of any supplication deal or conceded indictmentunderstanding.
- • The right to be educated regarding the rights under this area and the administrations portrayed in *Section 503(c)* of the *Victims' Rights and Restitution Act of 1990*.

CRIME VICTIM'S RIGHTS RECOGNISED UNDER UK LAWS:

- • Under the *'Victim's Code'* and the *'Witness Charter'* adopted or framed by the *UK Parliament*, suggests or highlights rules or guidelines that protects the young victim of crime as being prevented them from the *'YouthVictimization'*.
- • Under the *'United Nations Convention on the Rights of the Child'*, are having *'54 Articles'* or *'Sections'* that specifically prescribes about the different rights of the children under the age of *'18'* years, so that they shall be made prevented from the grossvictimization.
- • Under the *'Youth Justice and Criminal Evidence Act'*, *1999*, the children below the age of *'18'* years shall be effectively prevented from the gross and brutal sexual offences.

CRIME VICTIM'S RIGHTS UNDER CANADIAN LAW:

In Canada the *'Victims Bill of Rights Act'* was passed in *2015* which gives casualties of wrongdoing an increasingly powerful voice in the criminal equity framework, came into power. This enactment makes the *Canadian Victims Bill of Rights* to give clear statutory rights at the government level for casualties of wrongdoing without precedent for Canada's history. The *Canadian Victims Bill of Rights* sets up statutory rights to data, assurance, and investment and to look for compensation, and it guarantees that a grievance procedure is set up for breaks of these rights by a government office or office. Under the *Canadian Victims Bill of Rights*, when an injured individual accepts that their privileges have been broken, the unfortunate casualty first documents a protest with the suitable government division oroffice. The enactment incorporates a prerequisite for every single government division and offices that have duties under the *Canadian Victims Bill of Rights* to have inward grievance instruments open to exploited people to survey grumblings, make proposals to address any encroachment, and tell unfortunate casualties about the consequences of the audit.

LAW COMMISION'S REPORT

154TH COMMISSION'S REPORT:

- Under this report there were having plenty amount of facilitations being provided for the active protection of women and they were asfollows:
- Under *Chapter XXI,* there shall be the speedy justice system for each wrong being committed against the women at large or for other sort ofvictims.

- Under *Chapter XV,* there shall be the special provisions for the cell ofdifferent victims being affected by the evil acts of the perpetrator under the body of Victimology.

142TH COMMISSION'S REPORT:

- Under this report the provisions of concessional treatment of offenders are being mentioned who voluntary plead their guilt without any bargaining and in such case the treatment with the offenders has to be made in a calm and kind manner rather than imposing harsh punitive measures onthem.

226TH COMMISION'S REPORT:

- Under this report the inclusion of *Acid Attacks* provisions have been specifically mentioned in the *Indian Penal Code, 1860* and the provision of compensation for each victim against the brutal encounters of acid attacks committed by the hardcore perpetrators.

MALIMATH COMMITTEE'S AND JUSTICE VERMA'S COMMITTEE REPORT ON RIGHTS OF VICTIMS

- The Verma Committee report is an exhaustive archive on the issue of assault, rape, dealing of women and child, child sexual mal treatment and respect killings, particularly as far as definition, references produced using worldwide shows just as global case laws.

- ***Punishment for Rape:*** The board has not suggested capital punishment for attackers. It recommends that the discipline for assault ought to be thorough detainment or rigorous imprisonment for a long time to life. It suggests that discipline for causing demise or a tenacious vegetative state ought to be rigorous imprisonment for a term not be under 20 years, yet might be forever likewise, which will mean the remainder of the individual's life. Assault, it recommends should involve discipline of at least 20 years, which may likewise stretch out to life and assault followed by death, ought to be rebuffed with lifedetainment.
- ***Punishment for other Sexual Offences:*** The board perceived the need to control all types of sexual offenses and suggested *Voyeurism* be rebuffed/ punished with up to seven years in prison; stalking or endeavours to contact an individual over and again through any methods by as long as three years. *Acid Attacks* would be rebuffed by as long as seven years if detainment; dealing will be rebuffed with rigorous imprisonment for seven to tenyears.

Changes to the Code of Criminal Procedure: The panel observed, the way wherein the privileges of ladies can be perceived must be showed when they have full access to equity and when the standard of law can be maintained in support of them. The proposed *Criminal Law Amendment Act, 2012,* ought to be adjusted, recommends the board. Since the probability of rape on men, just as gay, transgender and transsexual assault, is a reality the arrangements must be mindful of the equivalent. A unique methodology for shielding people

with handicaps from assault, and essential strategies for access to equity for such people, the board said was an earnestneed.

Bill of Rights for women: A different Bill of Rights for ladies that entitles a lady an existence of nobility and security and will guarantee that a lady will reserve the option to have total sexual self-rule incorporating concerning her connections.

MALIMATH'S COMMITTEE REPORT

- To look at the key standards of criminal law, including the established arrangements relating to criminal law and check whether any changes or changes are required thereto.
- To analyse in the light of discoveries on major standards furthermore, parts of *Criminal Statute* with respect to whether there is a need to re-compose the Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act to get them tune with the interest of the occasions and in amicability with the desires of the individuals ofIndia.
- To make explicit suggestions on disentangling legal techniques and practices and making the conveyance of equity to the regular man nearer, quicker, uncomplicated andreasonable.
- To recommend available resources of growing such collaboration among the *Judiciary,* the Prosecution and the Police as re-establishes the certainty of the regular man in the *Criminal Justice System* by securing the

guiltless and the person in question and by rebuffing unsparingly the liable and thelawbreaker.

- To propose sound arrangement of overseeing, on proficient lines, the pendency of cases at examination and preliminary stages and making the *Police,* the *Prosecution* and the *Judiciary* responsible for delays in their separateareas.

LEGAL FRAMEWORK OF '*RIGHTS OF THE VICTIMS*'

The *'Rule of Law'*, vote based system, improvement and human rights are subject to the level of accomplishment that the administrations can accomplish on the criminal equity front. The destinations of the criminal equity are avoidance and control of wrongdoing, support of open request and harmony, insurance of the privileges of injured individual's just as people in struggle with law, discipline and restoration of those declared liable of carrying out of violations and for the most part security of life and property against wrongdoing and guiltiness. It is viewed as the essential commitment of the state under the *'Constitution of India'*. India determined its criminal equity framework from the British model. The reformatory way of thinking in India has acknowledged the ideas of anticipation of wrongdoing and treatment and recovery of crooks, which have been repeated by numerous decisions of the Supreme Court. An exploited people have no rights under the criminal equity framework, and the state attempts the full obligation to arraign and rebuff the guilty parties by regarding the unfortunate casualties as insignificant observers. The victims have scarcely

any legitimate rights to be educated, present and heard inside the criminal equity framework. The victims do not need to be told of court procedures or of the capture or arrival of the respondent, they reserve no privilege to go to the preliminary or different procedures, and they reserve no option to say something to the court at condemning or at different hearings. The following rights which are being recognised under different statutes of *'Indian Law'* are as mentioned below as:

- The victim is having a *Right to Attend the Criminal Justice Proceedings*.
- The victim reserves the *Right for Compensation*, if any offences being committed against him under both *Civil* and *Criminal Laws*.
- The victim is having the *Right to be Protected* from different sorts of harassments and exploitations.
- The victim is having the *Right to Speedy Trial* specially under the *'Rape Cases'* and under the *'POCSOACT'*.
- Under the *'Constitutional Law'* the victims reserve the *Right to be Treated Fairly*, with *Dignity* and *Respect*.
- Under the *'Civil Laws'* the victims are having the *Right to be Resituated from the Convicted Offender*.
- Under the *'Criminal Law'* the *Right to be Compensated for each wrong or any Mala fide Acts being committed by the Accused*.
- The victims having the right to be protected or protection from various things which includes in the following ways, they are:
  - The police escorts to and from court.

- Secure waiting areas separate from those of the accused and his/her family, witnesses and friends during court proceedings.
- The witness protection programs.
- The residence relocation.
- Denial of bail or imposition of specific conditions of bail release such as no contact orders for defendants found to present a danger to the community or to protect the safety of victims and witnesses.

THE ROLE OF INDIAN JUDICIARY

In the case of *Dilip S. Dahanukar*v. *Kotak Mahindra Co. Ltd. And Another*, the Hon'ble Court held that the principle behind grant of fine/ compensation as well as award of remuneration must be considered having the significant factors as a top priority. It might be repaying the individual in one manner or the other. The measure of paying the compensation if tried to be forced, accordingly, must be reasonable and not arbitrary in nature.

In the case namely[7], *R. Mohan* v. *A.K. Vijaya Kumar*, the Hon'ble Supreme Court has responded to the legal question that in cases pertaining to the default of the compensation, should Court have the power to give sentence to the wrongdoer/ accused for making a default in making out the compensation. Under *'Section 357(1) of the Cr.P.C'*, *1973*, the Court can order the accused to pay the compensation to the victim irrespective of the fact that the imposition of sentence has already been made on the accused.

In the case namely[8], *AnkushShivaji Gaikwad* v. *State of Maharashtra*, the Hon'ble Court held that the mode of redressal of the victims are being of dual nature as being recognised under the Indian Statutes, i.e. firstly under the *'Civil Laws'* the plaintiff as the victim gets the compensation and under the *'Criminal Laws'* the victim gets as the *'Compensatory Right'* under the *CrPC* along with the retributive assortment of giving the stringent punishment to the accused for his harsh and brutalacts.

CONCLUSION AND SUGGESTIONS

In spite of the fact that the criminal equity framework has changed its domain and the governing bodies and judges have been assuming a huge job in the extension of the privileges of casualties of wrongdoing in the criminal equity organization of the nation, yet the exploited people have not gotten their due concern and their privileges have not been given their due weightage. An exploited people have scarcely any lawful rights to be educated, present and heard inside the criminal equity framework. Be that as it may, sadly, exploited people do not need to be informed of court procedures or of the capture or arrival of the respondent, they reserve no privilege to go to the preliminary or different procedures, and they reserve no option to say something to the court at condemning or at different hearings. Also, injured individual help programs are basically non-existent. For the liberation of victims privileges it very well may be said that the criminal equity framework can find a way to guarantee and fortify the privileges of the people in question, for instance; the exploited people ought to be educated about the advancement of their case convenient and they ought tobe furnished with chances to be heard as and when they need to give an information. The

injured individual ought to be in excess of an observer, however not have complete authority over the arraignment of the case. The job that the injured individual plays ought to be more grounded than in the years before the victim's development, with an accentuation in condemning. The person in question and the court ought to discuss every now and again with the courts giving exploited people explicit clarifications about why a wrongdoer will be condemned uniquely in contrast to the injured individual anticipates. This can give exploited people the individual delight of being heard while adjusting the force between the person in question and the state. Exploited people ought to be heard in condemning, feel fulfilled, and be educated all through case preparing as the victims are the ones who feel the prompt harm brought about by the wrongdoing. The courts ought to likewise look for unfortunate casualty/ victim endorsement of the sentence with the objective of improving injured individual fulfilment with their contribution in the equity procedure. Looking for unfortunate casualty/ victim endorsement in condemning is a route for the framework to perceive that past the job of the state, which is generic, there is a person who has individual enthusiasm for condemning, was legitimately influenced by the wrongdoing, and needs to be heard. They ought to likewise be satisfactorily redressed and restored. The criminal equity authorities particularly the police work force ought to be given uncommon information and data on the privileges of the unfortunate casualties/ victims in the criminal equity framework. There ought to be a different reserve for exploited people's administrations and their restoration.

The whole criminal legitimate framework works fundamentally and significantly to give equity to the person in question. Giving the people in question and witnesses a voice to affirm in court unafraid, take part in the court procedures and have their privileges and interests

ensured is of most extreme significance for the authenticity of the equity conveyance framework. Besides, the present-day comprehension of equity fundamentally incorporates opennessto official courtrooms. Except if the legal framework is available to the individuals who request equity, the framework would exist just in name and not in substance.

Obviously, unfortunate casualties/ victims and witnesses would be manageable to getting to the framework and give honest declarations just if the framework ensured an assurance of their and their families, privacy, security, character and poise. Numerous a period the unfortunate casualties/ victims get shunned and accused for setback they face. It is simpler for the individuals to accuse a defenceless and broke unfortunate casualty/ victim rather to abhor the crook or the guilty party. It is the general public's frame of mind towards casualties of wrongdoing that the individuals typically accuse the person in question and do not have the compassion for them. The crook or the guilty party doesn't face such exclusion and he/she get blended in the general public with no issue. Had the law been hard on the hoodlums and dealt with the privileges of casualties of wrongdoing, the circumstance would have been vastly different. The entire criminal equity framework is wrongdoer situated.

The council, the official and even commonly the legal executive are worried about the privileges of the charged or the crook. Consequently, a solid message with respect to unfortunate casualties/ victims' privileges is not sent to the individuals by them and in this way, the general public doesn't feel the compassion toward the bothered exploited people. To take a gander at the key principles of criminal law, including the built-up courses of action relating to criminal law and check whether any progressions or changes are required thereto. To investigate in the light of disclosures on significant guidelines besides, portions of

criminal rule as for whether there is a need to re-make the Code out of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act to get them tune with the enthusiasm of the events and in congeniality with the wants of the people of India.

To make unequivocal recommendations on unravelling legitimate strategies and practices and making the transport of value to the customary man closer, snappier, uncomplicated and sensible. To prescribe accessible assets of developing such coordinated effort among the Judiciary, the Prosecution and the Police as restores the sureness of the standard man in the Criminal Justice System by verifying the guiltless and the individual being referred to and by rebuking unsparingly the obligated and the offender. To propose sound game plan of directing, on capable lines, the pendency of cases at assessment and primer stages and making the Police, the Prosecution and the Judiciary answerable for delays in their different zones.

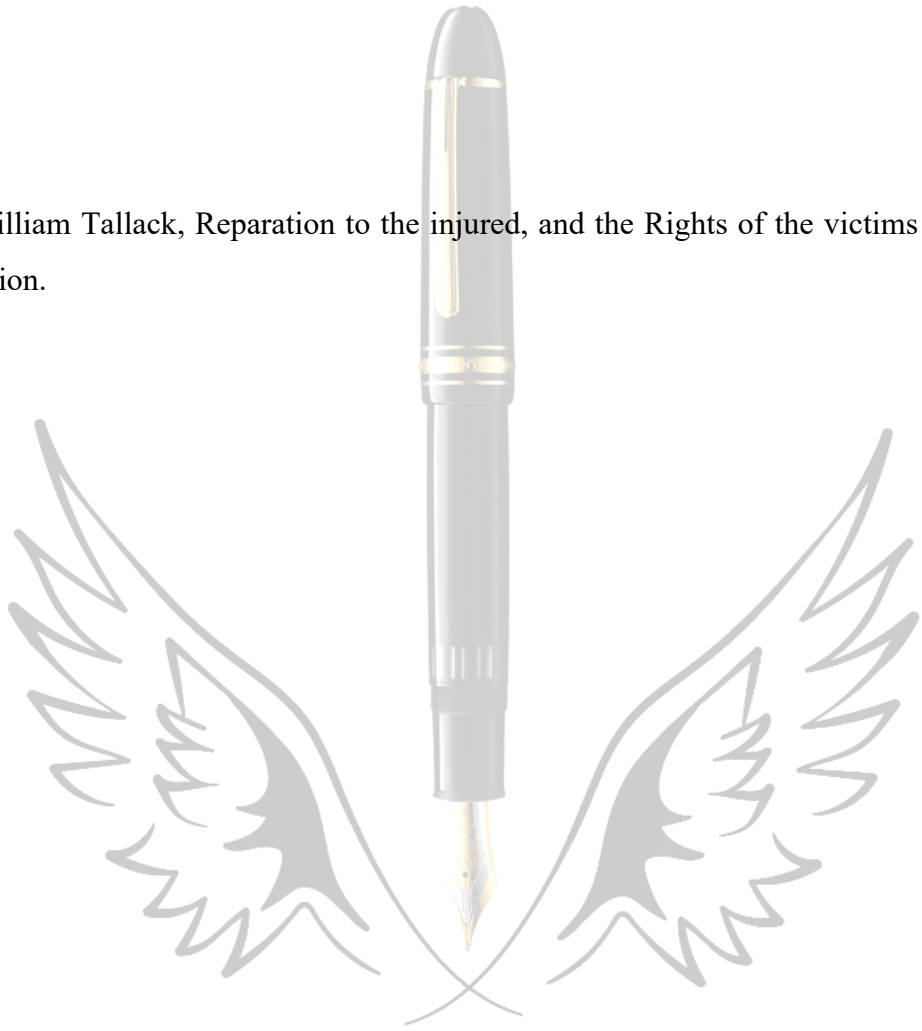
REFERENCES

- Notably used by Mendelsohn, Hentig, and Wolfgang in 1940's.

- Father of Victimology and a penal lawyer, he was born in Bucharest, Rumania, in 1900. He was the one to introduce the term, 'Victimology' and presented it as a new discipline.

- Manu, The Progenitor of the Human race and the giver of the religious laws of Manu according to Hindu Mythology.

• William Tallack, Reparation to the injured, and the Rights of the victims of crime to Compression.



A BRIEF EXPLANATION ON METHODS OF ADR IN INDIA

- MS. GAURI PRASHANT KULKARNI

ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

ADR is the procedure for settling disputes without litigation , such as arbitration , mediation or negotiation. ADR procedures are usually less costly and more expeditious . they are increasingly being utilized in disputes that would otherwise result in litigation , including high profile labor disputes , divorce actions , and personal injury claims .

One of the primary reasons parties may prefer ADR proceeding is that , unlike adversarial litigation , ADR procedures are often collaborations and allow the parties to understand each others positions .

Kinds of ADR Systems

- Arbitration
- Mediation
- Negotiation
- Conciliation

ARBITRATION

Arbitration is the most formal method used to settle any dispute . In this process the parties with disagreement transfer their dispute to a third party , who will make a judgment on their

behalf . This ruling will then be legally obligatory on the Parties . Arbitration ADR is strictly followed by Arbitration Act 1996 .

MEDIATION

According to this ADR a neutral person (the mediator) assists the parties to reach a compromise . the job of the mediator is to consult with each party and see how much common ground and interest there is between them .

NEGOTIATION

ADR process is the simplest for the negotiation . According to this process 2 people having a dispute can negotiate and come to a solution themselves .

CONCILIATION

Conciliation is Similar to mediation where neutral third party helps the parties to resolve their dispute : however the Conciliator plays a more dynamic role in the process . Conciliation is not legally binding on the parties .[1]

ADR METHODS	**Arbitration**	**Mediation**	**Conciliation**	**Negotiation**
Neutral Third	Adjudicator	Faciliator	Faciliator	Faciliator

[1] Rocketlawyer.com

party			Evaluator	
Nature of the proceeding	Legally binding	Not legally binding	Not legally binding	Not legally binding
Level of formality	Formal	Informal	Informal	Informal
Level of confidentiality	Confidentiality as determined by law	Confidentiality Based on trust	Confidentiality as determined by law	Confidentiality Based on trust

CONCLUSION

Indian Judiciary is overburdened with huge backlog of cases . Globalization has also created a great stimulation in the process of universalizing and simplifying the process of dispute resolution in different countries across the globe. Indian Judiciary has also played a substantial role in up gradation of ADR mechanism . ADR aimed at settling dispute in peaceful manner and cost effective , speedy , simple convenient to both the parties. It aims at providing justice that not only resolves dispute but also harmonizes the relation of the parties.

ROLE OF LEGAL EDUCATION IN SOCIAL DEVELOPMENT

- **DR. SUMAN MAWAR**

Legal education is the education of individuals who intend to become legal professionals or those who simply intend to use their law degree to some end either related to law (such as politics or academic) or business. It includes:

- First degrees in law, which may be studied at either undergraduate or graduate level depending on the country.
- Vocational courses which prospective lawyers are required to pass in some countries before they may enter practice.
- Applied legal education for specific branches of law such as, Business law, Human resources, and Labour laws, property laws, Family Laws, Human Rights & Legal awareness, Taxation Law and many more.
- Higher academic degrees and doctorate.

Legal education is essentially a multi-disciplined, multi-purpose education aimed at the noble goal of delivering justice for all. The provision of legal services and access to justice is the impetus for the establishment of law clinic in most developing common wealth countries. Legal education is the most significant tool for the sand delivery of justice. It, has been observed rightly that in order to ensure fair trial a sand system of the administration of justice should possess ingredients and a well-planned body of laws based on wise concept of Social Justice, a Judicial hierarchy comprising the bench and a body of lawyers inspired by higher

principles of professional conduct.[2] The only conceivable purpose for developing a disciplinary approach to legal education is to use the Social Science as a medium through which to immerse the law student in certain values which are assumed to be representative of the values of democracy.

Meaning of Legal Education

The term "Legal Education" is very difficult to define. It aives different meaning at different times and places in the light of existing circumstances of the society. Now days the Legal Education occupies a prominent place in a country where there is rule of Law. It equips students with necessary skills and equips students with necessary skills and capabilities to understand the complex process of enactment, enforcement and interpretation of law with a view to secure equitable justice to all citizens irrespective of their caste, creed, religion or Sex. "It is an entitled fact that legal education is a human science which furnishes beyond techniques, skills and competence the basic philosophies, ideologies, Critiques all addressed to the creation and maintenance of a just society".[3] Legal education is broad concept, it includes not merely the profession which is practiced in courts, but also covers law teaching, Law branches where law plays a vital role. Legal education is a skill of human Knowledge and lawyers art it deserves special attention in educational institutions Legal Education is the need of the society and country as well. It is the Legal Education that play a prominent role in promoting Social Justice.

[2] Mehta and sushma Gupta, Legal education a progression in India, 15(2000, Deep and Deep Publication Pvt. Ltd.,New Delhi India)

[3] R. Singh "Reforms in Legal Education and Legal Profession In India 1998 (b) 95, Andhra Law Pub.

The aim of Legal Education should not only to produce good lawyers but also to create cultured and law abiding persons who can serve humanity in various capacities. Such as social activist, administration Jurists. Legislation and Judges.

History of Legal Education

The formal Legal Education were introduced by the britishers after the establishment of their rule in India. "Tiberius Coruncauius was the first who publically professed Law (Public professusest) known to be both eloquent and full of Knowledge'. [4]like Socrates, he left no writings. Tip public legal instruction had the effect of creating class legally skilled non priests (Jurisprudents) a sort of consultancy. After Coruncauius death instruction gradually became more forma, with the introduction of books on law beyond the then scant official Roman legal text[5] Formal legal education in India came into existence in 1855 when the government Elphistone College, Mumbai for almost a century from 1857 to 1952 a stereotyped system of teaching compulsory subjected under a straight lecture method and three year course continued.

The concept of Legal education in India goes back to the vedic Age when it was essentially based on the concept of `Dharma' In ancient time, Law was understood as a branch of `Dharma' It is difficult to distinguish distinction between secular Law and religious ordinances in ancient India There was no record of any formal legal education at that time. Training was self acquired in matters connected with `Dharma' The King either used to

[4] https://en.wikepedia.orewike/iegal_education
[5] https://en.wikepedia.org/wikeilegal_education

dispense Justice themselves or appoint Judges and assessors to administer Justice, Net necessarily trained in Law but who were known for their Justice fair and impartial.

The first step to formal legal education in the country was taken in 1857 with the establishment of three Universities in the cities of Calcutta, Madras and Bombay, Where legal education was set as a subject for teaching. This is was in a way the beginning of the era of legal education in India.

Before 1947 there were only few schools in the country which taught law. After 1947, legal education acquired vital role, as a rule of law becomes a fundamental doctrine for the governance of the country. It became necessary that the legal education of the country should be brought in tune with the social economic and political needs fulfillment of society. Numbers of committees were setup periodically to consider and propose reforms in legal education.

After 1947 a bill was introduced in the parliament to implement the recommendation of the All India Bar Committee formed in 1953. On the basis of the recommendations of the Law-commission, on the subject o reforms of judicial administration related to the bar and to legal education. The main features of the bill were as under.

1. The establishment of an All India Bar Council and a common role of advocate, an advocate on the common role having a right to practice to any part of the country and in any court, including the Supreme Court.
2. The integration of the bar into a single class of legal practitioners known as advocate.

3. The prescription of a uniform qualification for the admission of person to be advocates.
4. The division of advocates into senior advocates and other advocate based on merit.
5. The creation of autonomous Bar Council, one for the whole of India and for each state.

The University Education Commission has setup between 1948 and 1949 and in that year the Bombay Legal Education Committee was also created to promote Legal education. The All India Bar committee made certain recommendation in 1951. In 1954, the 14th report of the Law Commissions of India discussed the status of Legal education and recognized the need for reform in the legal education system. Two-year law course continued all over the country for several years. It was only from 1958 that any universities switched over to 3 year law degree course. Simply we see that in roughly in three phases (first 1950-65 and second 1965-75 the thirdly phase 1976-88) recognition of legal education shifted to modernization of Law. A Significant Structural reforms law curriculum has been extended to three year all over the country and the many universities have of offered 10+2 plus 5 years curriculum. At that time the bulk of law colleges and universities national law school in India.

These colleges produce the bulk of certified lawyers who automatically become entitled to be enrolled as legal practitioners under the Indian Advocate Act 1961. The bulk of students pursue part-time studies in law that is either morning or evening classes for about three hours a day. Most of them are employed. Of these employed, some come to law school to improve their qualifications for in-service promotion, others come towards the eve of superannuation hoping that a law degree will assist them later during retirement. A few part-time students,

who are eligible to appear at competitive examinations under the Union Public Service Commission, State Public Service Commissions, pursue law with the expectation of an added advantage. Not all students who pursue a full-time course in law as defined by the BCI (minimum instruction of four and half-hours a day), however, give their exclusive attention to law studies. Many are preoccupied with union and state competitive examinations. However, the requirement that they should not be employed demands the curriculum to ensure that they have to strive harder. And it must also be emphasised that students who prefer full-time to part-time course (minimum three hour instruction) where such alternatives exist do include those with motivation to pursue legal studies seriously.

It may also be appropriate to mention here that any attempt to transform the landscape of legal education has .to strive both against the ideological and social realities which militate against full-time law teaching. In the interim, at the very minimum, the situation of most law colleges has to be reversed, together with the situation where law students, all over the country (pass and even excel) in law examinations without continuous class participation, conscientious library/reading habits and actively intelligent engagement with problems of law and society. As a matter of fact, the question of standard of legal education is inextricably linked with that of multiple jurisdictions over legal education planning. While the Act invests the BCI with wide ranging powers to prescribe standards for the purposes of the practice of law, the university Grants Commission (UGC) is also possessed of statutory powers to coordinate standards of higher education, including the law. In addition, university has its own autonomy in matters which vitally affect improvement of legal education, for example, the size of enrolment, the nature of examination system, policies concerning

affiliation of law colleges, the nature of planning for the department of law and its expansion, provision for library resource development, etc.[6]

This paper also highlights some of the social developments which have taken place in the country and are concerned directly with the reforms in Legal Education. There is no denying the fact that within a very short period of its existence, the National Law School of India has made a significant contribution to the existing system of legal education and legal profession by way of producing intelligent, articulate and professionally sound and competent legal professionals on the one hand and by way of training a large number of lawyers, law teachers, judges and jurists so as to enable them to meet the future opportunities and challenges likely to be thrown by the new millennium.[7]

Keeping in view the above scenario, the UGC as well as BCI have been endeavoring from time to time nationalise and improve the standards of past graduate and graduate level professional level education respectively.[8]In this connection, it may be mentioned here that the BO has recently revised the Curriculum for 3 year and 5 year Law Courses and has directed the Universities and Law Colleges throughout the country that the new curriculum be implemented from the academic year 1998-99. However, the new curriculum has worked mixed response from the various Law facilities and Legal Luminaries in the country.

[6] 'Journal of Indian Law Institution 1999.
[7] 1999 Indian Law Inst. P.-243
[8] See the report of the UGC workshop on post graduate Legal Education and the CDC Report (1996) National Law School of India University.

In this paper critically examine the Role of Legal Education in Social Development. The paper also highlight some of the other legal developments which have taken place in the country since 1983 and are concerned directly with the reforms in Social Development by the Legal Education and Legal Professional for examples. Establishment of the National Law School at Banglore in 1986. This Law school offers five years integrated B.A., LL.B. (Hons.) Course besides offering LL.M Course. An integrated curriculum encompassing knowledge of social science subjects along with the diverse legal subjects has been adopted at the Law School. Education at NLSIU is, therefore, a holistic approach MT developing the required professional skills namely analytical ability, research orientation, legal writing, argumentative capability, and the skills of decision making. After that in 1990 the curriculum development centers programme was taken up by the (UGC) in order to promote excellence in teaching at under graduate and post graduate levels very recently, a National Academy of legal studies and Research (NALSAR) has been established at Hyderabad. in another few years the Academy also aims to start the programme of continuing legal education for Judges, lawyers, Law teachers and researches time to time some minor modifications have been made by the Bar Council. For Instance, the Juvenile Justice Act and the Probation of offenders Act have been added in the title of the paper on criminal procedure: The Transfer of property ad property Law. Ceiling and other local laws have been added. In 1998 the BCI has clubbed human Rights and International Law but in growing importance of International Law in the era of globalization, this is inter-alia reflected in number of recent decisions of the Supreme Court in India in which it has been complied to refer to developments in international law. After some time ultimately drew up as independent and separate model course o 'Human

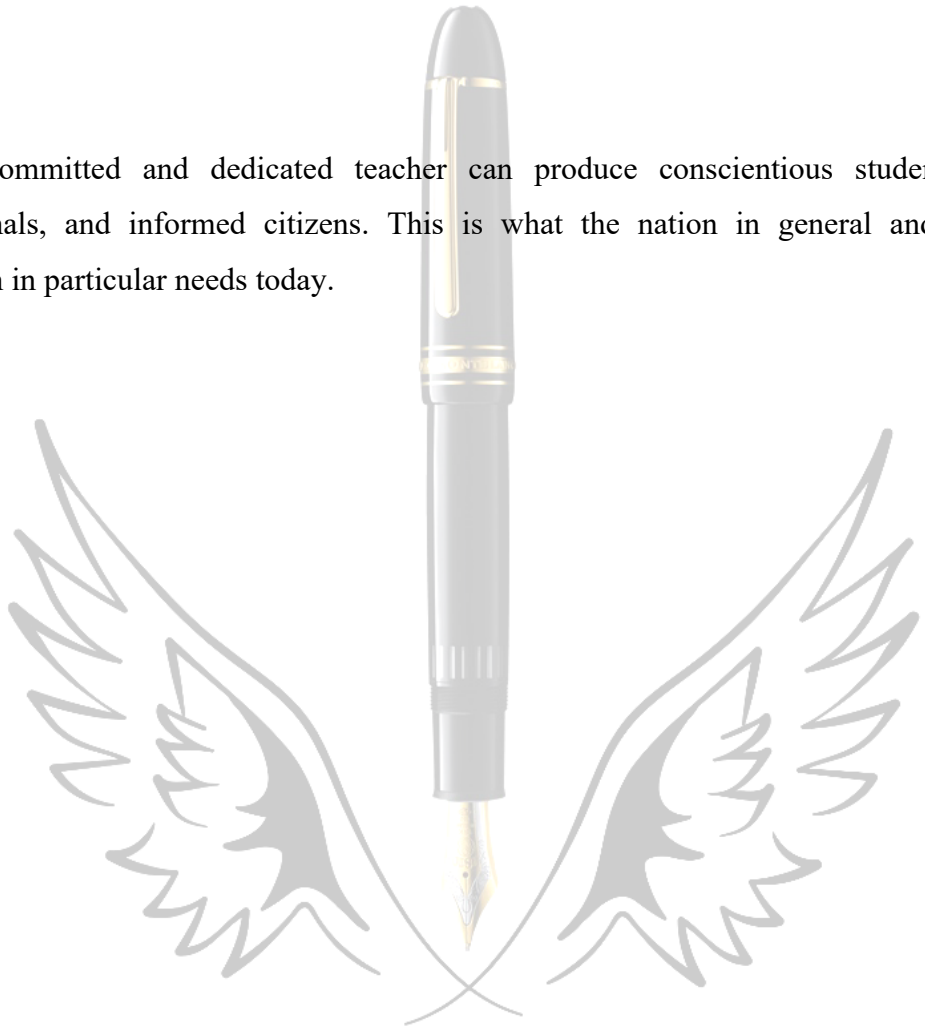
Rights Law, and `International Law'. It may be mentioned here that the consumer protection Act was enacted in the year 1986 and was implemented in 1987. The law of tasks and consumer protection are plays vital role of social development.

CONCLUSION

The legal education should be able to meet in the ever-growing minds of the society and should be thoroughly equipped to cater to complexities of the different situations. Specialization in different branches of the law is necessary. The requirement is of such a great dimension that sizeable or vast number of dedicated persons should be properly trained in different branches of law every year by providing or tendering competent. and proper legal education. This is possible only if adequate number of law colleges with proper infrastructure including expertise, law teachers and staff are established to deal with the situation in an appropriate manner. It cannot admit of doubt that of late there is a fall in the standard of legal education . The area of deficiency should be located and correctives should be affected with the co—operation of competent persons before the matter gets beyond control.

Notwithstanding anything mentioned above, one conclusion is inevitable and that is, reforms in legal education cannot wait any longer and that there can be no improvement in legal education unless we can convince the brilliant young people to accept teaching assignments in law. We need to produce a number of committed and dedicated teachers who in turn need to produce a new crop of hard working lawyers, honest judges and distinguished jurists. This is tough and certainly a challenging task. As we all know, a teacher is a nation builder and

only a committed and dedicated teacher can produce conscientious students, honest professionals, and informed citizens. This is what the nation in general and the legal profession in particular needs today.



TRANSITIONAL JUSTICE-SEARCH FOR AN APPROPRIATE MODEL

- **DR. BHAGWANA RAM BISHNOI & AMAN JAIN**

1. Introduction

In his seminal work entitled the Philosophy of History, Hegel has stated that the "*the history of the world is none other than the progress of the consciousness of freedom."* Meaning thereby that a study of World History demonstrates that as the capacity of human beings to think and make rational decisions evolves so does their thirst for freedom and their desire to brake fetters on their liberty. Such progress has led time and time again to circumstances where individuals have risen as against oppression and misrule with varied results.

Sometimes the overthrow of the oppressor has gone over smoothly and lead to a formation of stronger democratic society (e.g. the independence movement in India); sometimes one set off dictators is over-thrown only to be replaced by another (e.g. U.S.S.R- wherein the monarchy was overthrown to be replaced by an equally autocratic communist government); at other times an attempt to overthrow has led to stalemate in which the afflicted region is seized in a cycle of violence (e.g. Sierra Leone). Such regions, wherein the transition from one form government to the other is not smooth, are often afflicted with massive atrocities, migration of people, expansion of terrorism, arms production and proliferation, drugs proliferation, organised crimes, environmental damage, poverty, and lack of development and all these ill effects if unchecked are likely to spill over an effect the international community at large.

Hence, the need to study and develop a proper model of transitional justice. Transitional justice can be defined as the conception of justice associated with periods of political turmoil and is characterised by legal responses which aim to confront the wrong doings committed during the period of transition[9]. Through this project, we aim to discover whether an ideal model and/or principles can be conceived which can be applied to all societies facing transition so as to provide justice to the victims, means of reconciliation to societies divided, stronger democratic framework to national institutions; to ensure a stable, integrated and prosperous society[10].

1.1. Review of Literature

- **Ruti G. Teitel**, "*TRANSITIONAL JUSTICE GENEALOGY*," 16 Harvard Human Rights Journal 69, 69 (2003).

In this article the authors trace the development of transitional justice in three phases. The first phase being post World War II, the second phases transitional justice in post collapse of Soviet Union and the final phase being in the late twentieth century.

- **Taylor, Telford**, "*THE NUREMBERG TRIALS"* 55(4) *Columbia Law Review* 488–525 (1955).

[9] Ruti G. Teitel,*Transitional Justice Genealogy*, 16 Harvard Human Rights Journal 69, 69 (2003)

[10] Clara Sandoval Villalba, *BriefingPaper Transitional Justice: Key Concepts, Processes and Challenges*, (Institute for Democracy and Conflict Resolution, 2011) available at http://idcr.org.uk/wp-content/uploads/2010/09/07_11.pdf (last visited on January 15,2021)

In this Article the author gives an account of the Nuremberg Trials through the perspective of Justice Jackson.

- **Wright, Quincy,** "*THE LAW OF THE NUREMBERG TRIAL,"* 41(1) The American Journal of International Law 38 (1947).

The Article takes us through the Nuremberg trial- from the negotiations which established its framework to its conclusion.

- **International Centre for Transitional Justice**, "WHAT IS TRANSITIONAL JUSTICE?", available at https://www.ictj.org/about/transitional-justice.

This briefing paper focuses on transitional justice as one of the key steps in peace building that needs to be taken to secure a stable democratic future. It provides key stakeholders with an overview of transitional justice and its different components, while examining key challenges faced by those working in this area

- **Hans Kelson**, *"WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE"* 24 (2nd Printing, University of California Press, Berkeley Los Angeles, USA)

A collection of Essays by Hans Kelson given his perspective on Justice.

1.2. Statement of Problem

However, desire for justice is not the only motivation which guides us in our choice to pick a model for transition. There are other factors which influence the choice, like desire for a good stable government; the pursuit of one's own self-interest; desire to take revenge on enemy etc. but real difficulty lies in pursuit of appropriate model for transitional justice.

1.3. Hypothesis

The desire to have an ideal model of transitional justice which could be uniformly applied in times of transition across the world is understandable. Such a system would be in consonance with the principles of Rule of Law. Nevertheless, even if such an ideal model could be theoretically conceived, its practical application would be impossible.

1.4. Methodology

The Researcher has applied doctrinal research methods in preparing this research paper.

- Judgments of the various court and tribunals of different country have been consulted.
- Commentaries on the subject have also been refereed.

1.5. Objectives of Study

- To study the meaning of the concept of transitional justice and its relation to social transformation.
- To study how this concept evolved and its relevancy to the law and society.
- To study some cases and determine how this concept are applied and how became reason for transformation in society.
- To study the circumstances under which we can test our appropriate model of transitional justice.
- To study whether we can find any appropriate model of transitional justice which fits in every society and every transition.

1.6. Research Questions

1. What is the concept of transitional justice?
2. What are the various models of transitional justice?

3. Which model of transitional justice applied by the various institution throughout the world in the situation of transition?
4. Whether there can be an appropriate model of transitional justice which can be applied in every case?
5. What actions taken by the authorities in case of grave injustice?

2. Concept of Transitional Justice

In order to truly understand the meaning and scope of "transitional justice", we need to break it into its two constituents, namely transition and justice and examine each element.

"Transitional" means the process of change from one state to another. It is a relatively simple concept to understand. It may happen even in the absence of justice. Instances in which one repressive regime is change for another repressive regime do not fall within the purview of transitional justice as there is complete absence of justice in these scenarios.

The concept of "justice" on the other hand defies all attempts of definition. It is a subjective concept and different philosophers have interpreted it differently depending on their circumstances. Kelson for instance state-

"I cannot say what justice is. The absolute justice for which mankind is longing. I can only say what justice is to me. Since, science is my profession and hence, the most important thing in my life, justice to me is that social order under whose protection the search for truth can

prosper. Therefore, my justice is then justice of freedom, the justice of peace, the justice of democracy.[11]"

In the same vein, Rawls defines his conception of justice as, "the first virtue of social institution as truth is of a system of thought[12]." Hence, we see that justice is a nebulous concept that changes contours as per context.

In the concept of "transitional justice", it is very difficult to spell out the role of justice. As per the ICTJ, any system of transitional justice must consist of the following four core elements:

1. Truth Commissions: It is a fact-finding body which systematically investigate and report on the abuses which occurred prior to or during the transitional period. Such investigations help us to understand the causes of the past events and to rectify our behaviour so that the same pattern of abuse is not repeated in the future. Moreover, they help us to maintain an unbiased official record of the abuses which provides closure to the victim and lessons for future generations.
2. Criminal Prosecutions: The facts uncovered through the truth commission can be instrumental in bringing individuals responsible for perpetrating acts of violence to account.

[11] HANS KELSON, WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE 24 (2nd Printing, University of California Press, Berkeley Los Angeles, USA, 1971)

[12] JOHN RAWLS, A THEORY OF JUSTICE- REVISED EDITION 3 (Harvard University Press, USA, 1999)

3. Reparations: Truth commission help us identify not only the perpetrators but also the victims. Further the government must recognise and take steps to redress the harm suffered by them. Such reparations may have material and /or symbolic elements.
4. Institutional Reforms: The abusive institutions of state such as armed forces, police etc. need to be dismantle by appropriate means. Further, they need to be rebuilt in such a manner that further recurrence of human rights abuses are prevented[13].

Apart from the above, the author also feel that any system of transitional justice can be successful only if it is motivated by reason and not by emotions. In the time of turbulence, the mild voice of reason finds it difficult to get its voice of heard[14]. One must not fall into the trap and repeat the vices of the old regime by embarking on the path of revenge. It is good to remember "*reason wishes the decision that it gives to be just; anger wishes to have the decision which it has given seem the just decision*[15]." By punishing the wrong doer in the same manner as the wrong doer had meted out punishment to us, we put ourselves in the shoes of the wrong doer. This vicious cycle can be broken only through the devise of justice and reason.

However, desire for justice is not the only motivation which guides us in our choice to pick a model for transition. There are other factors which influence the choice, like desire for a good

[13] International Centre for Transitional Justice, WHAT IS TRANSITIONAL JUSTICE?, available at https://www.ictj.org/about/transitional-justice (last visited on January 15,2021)
[14] JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PROSPECTIVE 83 (Cambridge University Press)
[15] Seneca *as cited in* JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PROSPECTIVE 85 (Cambridge University Press)

stable government; the pursuit of one's own self-interest; desire to take revenge on enemy etc[16].

Transitional justice can be said to be guided by reason, rather than emotions, when it conforms to the basic tenet of natural justice. These tenets include impartial and fair trial which further includes opportunity of being heard, right of representation, right to appeal, right against retrospective operation of law, presumption of innocence till proven guilty, right to speedy hearing and right to due deliberations.

In administering transitional justice, it is always more prudent to punish the individual perpetrators rather than the community at large. Punishing the community fosters resentment and sows the seeds of resentment which may lead to communal strife in the future[17].

3. models of transitional justice

In order to conceptualize an ideal model of transitional justice, it is necessary that we first evaluate the various models of transitional justice already in existence. This can best be done by means of case studies where the practical application of varied model and their implication can be duly analysed. It must be borne in mind that these models are not to think of as mutually exclusive. Elements of one model may exist in another and an ideal system must have the optimum mix of all elements herein under stated.

Truth and Reconciliation Commissions- Case Study- *SOUTH AFRICA*

In 1995, truth and reconciliation commission were established in South Africa to address the abuses committed during apartheid era. It was established by Government of National Unity

[16] *Ibid*

[17] JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PROSPECTIVE 94 (Cambridge University Press)

under Promotion of National Unity and Reconciliation Act, 1995. The preamble of the 1995 Act stated that:

"SINCE the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex;

AND SINCE it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;

AND SINCE the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;

AND SINCE the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization;

AND SINCE the Constitution states that in order to advance such reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past….."

The objectives of the Commission were set out in section 3. Its main objective was to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past". It is enjoined to pursue that objective by "establishing as

complete a picture as possible of the causes, nature and extent of the gross violations of human rights" committed during the period commencing 1960 to the 1994. For this purpose, the Commission was obliged to have regard to "the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations".[18] It also is required to facilitate "the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective."[19]

The Commission was further entrusted with the duty to establish and to make known "the fate or whereabouts of victims" and of "restoring the human and civil dignity of such victims" by affording them an opportunity to relate their own accounts of the violations and by recommending "reparation measures" in respect of such violations[20] and finally to compile a comprehensive report in respect of its functions, including the recommendation of measures to prevent the violation of human rights.[21]

The Truth and Reconciliation Commission under this Act comprised of a Committee on Human Rights Violations, a Committee on Amnesty and a committee on Reparations and Rehabilitation. These committees were established for achieving the very purpose of the act.[22] Committee on Human Rights Violations was the first committee which enquiries the matters with respect to the gross violations of human rights within the allotted period, with extensive an powers to collect and receive evidence and information.[23] This Committee has

[18] Section 3(1)(a), Promotion of National Unity and Reconciliation Act, 1995.
[19] Section 3(1)(b), Promotion of National Unity and Reconciliation Act, 1995.
[20] Section 3(1)(c), Promotion of National Unity and Reconciliation Act, 1995.
[21] Section 3(1)(d), Promotion of National Unity and Reconciliation Act, 1995.
[22] Section 3(3), Promotion of National Unity and Reconciliation Act, 1995.
[23] Sections 3(3)(a), 12 and 14, Promotion of National Unity and Reconciliation Act, 1995.

the duty to refer the matter to Committee on Reparation and Rehabilitation, if it finds that a person is a victim of gross violation of the human rights.[24] Committee on Reparation and Rehabilitation was the second committee which was provided with the same powers to collect information and receive evidence for the objective to recommend the same to the President making it suitable for reparations for the victims of violations of human rights.[25] The Committee on Amnesty was the third and the most relevant committee.[26] The committee provided that it must consist of five persons chaired by the chairperson who should be a judge.[27] This Committee on Amnesty elaborate powers to consider applications for amnesty.[28] The Committee has the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence is associated with a political objective committed in the course of the conflicts of the past, in accordance with the provisions of sections 20(2) and 20(3) of the Act.[29]

Sub-section (3) of section 20 provides as follows:

"Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) The motive of the person who committed the act, omission or offence;

[24] Section 15(1), Promotion of National Unity and Reconciliation Act, 1995.
[25] Sections 3(3)(c), 23 and 25, Promotion of National Unity and Reconciliation Act, 1995.
[26] Section 3(3)(b), Promotion of National Unity and Reconciliation Act, 1995.
[27] Section 17(3), Promotion of National Unity and Reconciliation Act, 1995.
[28] Section 19, Promotion of National Unity and Reconciliation Act, 1995.
[29] Section 20(1), Promotion of National Unity and Reconciliation Act, 1995.

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued,

but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted-

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed."

After making provision for certain ancillary matters, section 20(7) provides as follows:

"(7) (a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

(b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.

(c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence."

Section 20(7) is followed by sections 20(8), 20(9) and 20(10) which deal expressly with both the formal and procedural consequences of an amnesty in the following terms:

"(8) If any person-

(a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or

(b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,

the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

(9) If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the proclamation in terms of subsection (6) shall not affect the operation of the judgment in so far as it applies to that person.

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public."

What is clear from section 20(7), read with sections 20(8), (9) and (10), is that once a person has been granted amnesty in respect of an act, omission or offence

(a) the offender can no longer be held "criminally liable" for such offence and no prosecution in respect thereof can be maintained against him or her;

(b) such an offender can also no longer be held civilly liable personally for any damages sustained by the victim and no such civil proceedings can successfully be pursued against him or her;

(c) if the wrongdoer is an employee of the state, the state is equally discharged from any civil liability in respect of any act or omission of such an employee, even if the relevant act or omission was affected during the course and within the scope of his or her employment; and
(d) other bodies, organisations or persons are also exempt from any liability for any of the acts or omissions of a wrongdoer which would ordinarily have arisen in consequence of their vicarious liability for such acts or omissions.

Soon, a case was filed before the Court of South Africa challenging the several provisions of the Act. The case *was Azanian People's Organization (AZAPO) v. President of the Republic of South Africa*[30] where the validity of the provision of amnesty were challenged according to which if once amnesty is provided someone, then that person cannot be made criminally or civilly liable. "The Court upholding the provisions related to amnesty held that in providing for amnesty for those guilty of serious offences associated with political objectives and in defining the mechanisms through which and the manner in which such amnesty may be secured by such offenders, the lawmaker, in section 20(7), has not offended any of the express or implied limitations on its powers in terms of the Constitution".

4. Analysis of the model

South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need.

[30] 1996 ZACC 16

Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.

What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is never the matter of the of the governmental organisation who is responsible for the compensation of the violation, rather as a part of the ongoing process for the establishment of the constitutional democracy and to avoid a repetition of crimes.

Even more crucially, but for a mechanism providing for amnesty, the "historic bridge" itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a democratic society based on freedom and equality. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated made a deliberate choice,

preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.

The situation in South Africa warranted to adopt a new approach As it is one thing to allow the agents of a hostile power that has occupied a foreign state to continue unpunished for gross human rights violations committed against some during the course of these conflict, and then another thing to compel such punishment in circumstances where such violations have occurred significantly as a result of conflict between different formations within the same State, with regard to the permissible political path that that State can take in relation to the institutions of the State and the parameters of its political policies, and where it becomes necessary for the society traumatized by such a conflict to rebuild itself after the cessation of such conflict.

The same sovereign area is occupied by former enemies of such a war. They must live and work in cooperation with each other, and the state in question is better to have prepared to assess the most conducive steps to promote such reconciliation and reconstruction. In view of its own unique past, its dynamics, even its inconsistencies and its emotional and institutional values, this is a complicated exercise that must be carried out by the country within such a state. In such a case, what role punishment can play in relation to past acts of crime is part of the complexity. Some aspects of this difficulty are covered by Marvin Frankel in a book:

“The call to punish human rights criminals can present complex and agonising problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode - trials of war criminals of a defeated nation - was simplicity itself as compared

to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators.

A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and the police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life. … The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathisers in the population at large. If they are treated too harshly - or if the net of punishment is cast too widely - there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.

These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of terror, similar problems will continue to arise.

Since the situations vary, the nature of the problems varies from place to place."[31]

The International has also recognized the reconcile the contradictions between justice for those who had done wrong in the war on one hand, and secondly the stabilization of the democracy on the other. For this purpose, the reconciliation cluses are not usual in the International Agreements signed after the wars between the various state.

[31] Frankel Out of the Shadows of the Night: The Struggle for International Human Rights (Delacorte Press, New York 1989) at 103-4.

"Amnesty clauses are frequently found in peace treaties and signify the will of the parties to apply the principle of tabula rasa to past offences, generally political delicts such as treason, sedition and rebellion, but also to war crimes. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders."[32]

The 1995 Act of South Africa did not grant any legally enforceable rights in lieu of those lost by claimants whom the amnesties hit. It nevertheless offers some quid pro quo for the loss and establishes the machinery for determining such alternative redress. What else it might have achieved immediately once, in the light of the painful choices described and in the exercise of the legislative judgment brought to bear on them, the basic decision had been taken to substitute the indeterminate prospect of reparations for the concrete reality of legal claims wherever those were enjoyed. For nothing more definite, detailed and efficacious could feasibly have been promised at that stage, and with no prior investigations, recommendations and decisions of the very sort for which provision is now made.

The amnesty contemplated in the 1995 act was not a blanket amnesty against criminal prosecution for all and sundry, that would be granted automatically as a uniform act of compulsory statutory amnesia. It was specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It was available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past.

[32] Bernhardt (ed) Encyclopaedia of Public International Law, (North-Holland, Amsterdam, London, New York, Tokyo 1992) Volume I at 148

Amnesty was provided for the reason that it would result in the facilitation of "reconciliation and reconstruction" by the getting up of structures making it possible to explore the discoveries of our history. The effectivity towards the justification of the amnesty with respect to the the criminal prosecution for the offences committed during the prescribed period with political objectives, is the appreciation that the truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. The need for indemnifying such wrongdoers is that they must pay for the civil claims for payment of damages. This could be done if the wrongdoer is not provided with any such incentive against his or her material or proprietary interests.

The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who endure "untold suffering and injustice "because of the gross violation of the human rights and inhumanity of apartheid that had to suffer for so long. The implication of poverty, malnutrition, homelessness, illiteracy and sustained by the institutions of apartheid was suffered from generations of children that are born and which are yet to be born. A nation that is just emerging from the war happened has neither money nor the capacity to have resources. It will take many years of strong commitment, sensitivity and labour to "reconstruct a society" so as to turn the expected legitimate dreams of new coming generations exposing them to get real life opportunities for their advancement which was denied to them by the execution of apartheid and by its relentless consequences. the reconstruction process in a manner that the must be deployed imaginatively, wisely, efficiently and equitably, to facilitate hope and confidence amongst the different and diverse

sections of the society so as to develop the latent human potential and resources of each and individual.

The election made by negotiators shall be such which favour "the reconstruction of society" involving in the process a wider concept of "reparation", this will allow the state to take into considering the competing claims on its resources but, at the same time, to have regard to the "untold suffering" of each and every individual and their families whose basic human rights had been violated. In few cases the family might be assisted by a reparation by a way of bursaries and scholarships; in other matters related to this issue the most probable reparation might take in the various forms such as occupational training and rehabilitation; other such examples on such matters could be explained as: facilitation of complex surgical interventions and medical assistance, subsidies to prevent eviction from homes. There might be a difference between the form and quality of the reparations provided to different persons who have suffered exactly the same damage and with respect to the consequence of the same an unlawful act but where one person now enjoys lucrative employment from the state and the other lives in penury.

It is therefore, too simplistic to conclude that the basis of the model could be achieved by the state when the state is to pay its formal liability, the established delicta claims of those individuals and families who have suffered loss by servants of the state during the conflicts of the past in consequence of the delicts perpetrated with political agenda. There is a permissible alternative, perhaps even a more imaginative and more fundamental route to the "reconstruction of society", which could have been followed.

Sri Lanka

Sri Lanka witnessed a civil war for 26 years which finally ended in 2009. The war resulted in widespread death, destruction and displacement. Despite the fact that the government claim that they have carried out a humanitarian rescue operation under which the policy of zero civilian casualties was followed, even then during the final years of the war, gross violations of international humanitarian law and international human right law have taken place. There is allegation on Sri Lankan government, The Liberation Tiger of Tamil Eelam and other armed Tamil groups of commission of crimes against humanity and war crimes. These crimes require an independent investigation and prosecution.

President Mahinda Rajapaksa's government have been stating that an approach has to be adopted which would balance reconciliation and restorative justice with a special emphasis on restorative justice. But no efforts were made by the government in its tenure which led to the feeling among the people that they have been denied justice. Rajapaksa's government failed to prosecute those persons who were responsible for the crimes committed during the civil war. There also existed a lack of trust among different groups and also the inability of the political stakeholders to determine the steps that should be taken to genuinely address the grievances of the communities. Rajapaksa government set up an inquiry under the Lesson Learnt and Reconciliation Commission. But this Commission also failed to independently investigate the crimes that were committed during the civil war. The Government was also not cooperating with the UN human Right Council to start an independent international investigation. Without for having an understanding of nature, causes and extent of violations, for which, an independent investigation into accountability for crimes is necessary, the possibility of recurrent conflict would remain.

Analysis

Several reports have been submitted by the Office of High Commission for Human Right on Sri Lanka. Latest one being submitted on September 28, 2015. These reports were submitted in pursuance of the request made by Human Right Council to consider a comprehensive investigation should be done in matters with respect to the serious human right violation and the crimes which are related to the both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission and so as to establish the facts and circumstances of such alleged human rights violations and its abuse.

Significant facts were revealed by the committee. It observed that Sri Lanka's does not have domestic legal framework to deal with international crimes of such a magnitude, i.e., gross violation of international human right law. Sri Lanka has not acceded to several key instruments, notably the Additional Protocols to the Geneva Conventions, in particular Additional Protocol II, the International Convention on the Protection of All Persons from Enforced Disappearance and the Rome Statute of the International Criminal Court.[33] It does not have laws criminalizing enforced disappearances, war crimes, crimes against humanity or genocide. The legal framework does not provide for the individuals to be charged with different kinds of liability, in a particular command or superior responsibility.

Relying on offences in regular criminal law, such as murder would fail to recognize the gravity of the crimes committed, their international character, or to duly acknowledge the harm caused to the victims. It also constrains and undermines prosecution strategies, as it

[33] Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, A/HRC/30/61.

does not follow the chain of responsibility and prosecute those who planned, organized or gave the orders for what may be system crimes.

Effective prosecution strategies for large-scale crimes, focus on their systemic nature and their planners and organizers. The presumption behind such "system crimes" is that they are generally of such a scale that they require some degree of organization to perpetrate them. Even sophisticated legal systems – which may be well suited to deal with ordinary crimes – may lack the capacity to address system crimes and to bring effective remedy to their victims. This would be even greater in an environment where the criminal justice system remains vulnerable to interference and influence by powerful political, security and military actors.

Judicial accountability should also be accompanied by broader transitional justice measures, including truth-seeking and reparations, to ensure that the right of victims to redress is realized.

The design of any truth-seeking and accountability mechanisms must be pursued through a process of genuine, informed and participatory consultation, especially with victims and their families. New mechanisms should not be established under the Commissions of Inquiry Act, which has systematically failed to deliver results; new, purpose-specific legislation will therefore be required.

The other problem is the degree to which the State's security sector and justice system have been distorted and corrupted by decades of emergency, conflict and impunity. For years, political interference by the executive with the judiciary has become routine.

Far-reaching institutional and legal reforms are necessary as the security forces, police and intelligence services have enjoyed near total impunity and have not undergone any significant downsizing or reform since the armed conflict.

So, the Government of Sri Lanka will need to bring fundamental reforms of the security sector and justice system, which would include removing persons who are suspected of having an involvement in the violations from the offices in order to achieve a credible domestic accountability process and to achieve reconciliation.

5. Punitive Justice- Case Study- Nuremberg Trials

Mechanism

The Nuremberg Trials can be seen as the paradigm for the punitive element in relation to transitional justice. Through the Nuremberg Trials the Allied power took the conscious decision to favour the Rule of Law amongst Nations over pure victor's justice. These War Crime Tribunals were *bona fide* courts, independent of political dictation and the punishment which they meted out was contingent upon the proof of guilt of the accused[34].

The origin of the trials can be traced back to the Declaration of atrocities by Roosevelt, Churchill and Stalin, which was released at the Moscow Conference on November 1, 1943. It provided that:

At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be

[34] Taylor, Telford, *The Nuremberg Trials* 55(4) *Columbia Law Review* 488–525 (1955)

sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. ……The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies[35].

Trials in accordance with the first part were carried out in Allied Military Commission and Criminal Courts. Trials in accord with the second part of the declaration were carried out in the International Military Tribunal established as per an agreement signed in London on August 8, 1946.

Attached to this agreement was "The Charter of the International Military Tribunal." This document provided that the Tribunal was to be composed of one judge and one alternate from each of the four powers and for jurisdiction to "try and punish such persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations," committed any of the crimes defined in the charter. The Charter further authorized a committee consisting of the Chief prosecutors of each country to prepare the indictment and present the evidence on the basis of the law set forth in the charter. The tribunal assisted the Defendants to find counsel of their choice for the purpose of their defence[36].

[35] Joint Four Nation Declaration, the United States of America-United Kingdom-the Soviet Union-China, October 1943

[36] Wright, Quincy, *The Law of the Nuremberg Trial,*41(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 38 (1947)

At the conclusion of the trial 12 of the 22 Nazi defendants were sentenced to death; 7 to imprisonment for terms ranging from 10 to life and 3 defendants were acquitted.

Advantages

In the said trials National Justice was superseded by International Justice. This critical turn away from prior nationalist responses towards an international policy was thought to guarantee a rule of law. The reliance on International Prosecution rather than National trials was based on the bitter experience of the allied forces of the failure of national trials post World War I. It was patently clear that such national trials did not furnish deterrence for future wrongdoings. It was felt that International Criminal Accountability would serve this purpose better.

Another notable feature of these trials was the liberal focus on individual judgment and responsibility. Hence the realm of International Criminal Law was extended beyond the State to the Individual.

Moreover, World War II and to a certain extent these trials also helped shape International Law itself, as the dimensions for International Accountability were fixed in International Conventions concluded soon after the conclusion of the War.

The most distinctive feature of these trials is that, despite being a form of "Victor's Justice", these trials are remarkable for their adherence to the rules of law and natural justice which ensured a fair trial to those prosecuted.

Disadvantages

The Nuremberg Trials could occur due to the peculiarity of the attending circumstances. Thus, though the development of transitional justice in relation to trial of perpetrators

enunciated therein is highly commendable, it is not likely to be replicated in other circumstances. These unique conditions are unlikely to recur in the same manner. Hence this epoch in transitional justice characterised with greater international co-operation, war crime trial and sanctions ended soon after the war[37].

6. Institutional Reform- Case Study: Bosnia and Herzegovina

Mechanism

Prior to the Bosnian War (1992-95) Bosnia was melting pot of culture and races with the population mainly composed of Bosnians (43.7 %), Bosnian Serbs (31.3%), Bosnian Croats (17.3%) and numerous other minorities (such as Roma and Jews). There was great intermingling and integration between members of various communities[38].

The political turmoil following the collapse of the Soviet Republic led to a situation whereby notions of ethnic separation and division were established. These notions continued to be hardened during the course of the conflict. The conflict itself and in particular the Serbenicia Massacre (or as some refer to it as-Genocide) marked the worst Human Rights Violation on European soil post World War II. Ethnic Cleansing, through the device of mass execution and systematic rape, was recognized to be the goal of several sides in the conflict[39].

In 1994 there was a partial cessation of hostilities through the signing of the Washington Agreement. This agreement created the Federation of Bosnia and Herzegovina. The army of newly created state consisted of combatants who were earlier on opposing side namely- the

[37] Ruti G. Teitel,*Transitional Justice Genealogy*, 16 Harvard Human Rights Journal 69, 70 (2003)

[38] Massimo Moratti and Amra Sabic-El-Rayess, *Transitional Justice and DDR: The case of Bosnia and Herzegovania*, (June 2009), available at https://www.ictj.org/sites/default/files/ICTJ-DDR-Bosnia-CaseStudy-2009-English.pdf (last visited on January 15,2021)

[39] *Supra* 30

Bosniaks, Bosnian Croats and the Bosnian Serbs who disagreed with the ethnic partition of Bosnia. The war could only be brought to an end due to the intervention of NATO which carried out aerial strikes against the Serb Army.

The Military Intervention created the necessary conditions for the Dayton Peace Accord (hereinafter referred to as DPA). However, the society which emerged post the conflict was monolithic and divided along ethnic lines. Yet, the conception of Bosnia and Herzegovina as a multi-ethnic society remained the framework of negotiation. It resulted in the formation of the State in which although several of the key institution are central (e.g., Parliament, Council of Ministers, Constitutional Court and Central Bank) the Presidency is tripartite (i.e., having 3 Presidents- A Bosniak, Croat and Serb). Further the agreement divided the country into 2 ethnic identities: The Federation of Bosnia and Herzegovina and the Serb Republic.

In post war Bosnia lack of social cohesion, high corruption, low trust in governmental structure, extensive bureaucracy proved to be hindrance for growth and reintegration. Progress was only possible due to the continued international pressure which advocated a multi ethnic state as the only viable solution to Bosnian crisis.

Under pressure from the European Union, United Nations, Organization for Security and Co-operation in Europe, World Bank have played an important role in orchestrating the political process in Bosnia. Bosnia's desire to become a member of the European Union has compelled it to strengthen its State infrastructure and seek remedies for its ongoing socio-economic and political problems.

As a part and parcel of this process Bosnia has downsized its ethnic armies and tried to create a unified and moderately sized national army. To expedite the process of reintegration and

prevent a resumption of hostility the Office of the High Representative (hereinafter referred to as OHR) was given special powers (Bonn powers). Through the use of the Bonn Powers, the High Representative could impose or abrogate any kind of legislation, as well as dismiss officials for noncompliance with the provisions of the DPA. The imposition of some key legislations in 1998—such as a national flag, citizenship, passports, a common license plate system, the restoration of phone lines and mail systems and a more decisive push for the return of displaced persons and refugees—helped Bosnia move forward. Ethnic tensions were eased by restoring some fundamental freedoms and allowing people to travel freely within the country. Finally, the peace implementation process was revived. The sweeping powers given to the High Representative almost turned Bosnia and Herzegovina into an internationally administered country: while domestic authorities were formally responsible for the peace process, the OHR had the power to step in and pass any legislation on their behalf. Ten years after their introduction, the Bonn Powers are not yet being phased out, although the issue is constantly being discussed.

Advantages

These structural reforms have allowed Bosnia to come a long way since the end of the conflict. This process culminated with the signing of the Stabilization and Association Agreement with the European Union on June 16, 2008, which has irreversibly placed Bosnia on the path toward EU membership. While the political transition has stagnated, the restoration of freedom of movement, visible return of displaced persons and refugees and increasing cultural, economic and social cooperation across ethnic lines has led to a measurable improvement in the relations among the three main ethnic groups. 6 In contrast to

the immediate postwar period characterized by the collective "demonizing" of other ethnic groups, Bosnians have now begun to distinguish among individuals and their actions regardless of their ethnic affiliation.

Disadvantages

The Peace process in Bosnia has ended up giving political power to criminal leadership, as this was the only manner in which peace could be attained. In order to stabilize the peace, process the State power had to be fragmented and distributed amongst the warring sides. Further the division of the country along ethnic lines has satisfied those who wished to partition the country along ethnic lines. Several of the elected functionaries of the State have been indicted for war crimes. Moreover, under the administration of the OHM, local authorities have been stripped of their powers and Bosnia has come to resemble an internationally governed territory.

7. Choosing the appropriate model of Transitional Justice

The desire to have an ideal model of transitional justice which could be uniformly applied in times of transition across the world is understandable. Such a system would be in consonance with the principles of Rule of Law. Nevertheless, even if such an ideal model could be theoretically conceived, its practical application would be impossible.

The reason for this is simple. Each conflict situation which gives rise for a need for transitional justice is unique. There cannot be one formula which can cater to all such situations. Each transition will have to be addressed individually as per the attending circumstances.

Moreover, societies in the process of transition are characterised by the marked absence of any system of Rule of Law. In fact, one could even go so far as to say that it is the absence of Rule of Law in the first place that gives rise to such transitions[40]. To apply any pre-conceived model of transitional justice in such circumstance is not practicable.

Periods of transitions in societies are marked by turbulence. Decisions made in such circumstances are not always the result of deliberate choice but an outcome of necessity. In such circumstances it is inconceivable to think that a society in transition might choose to deliberately adopt a model of transitional justice. Such societies do not have the privilege of making decisions. Instead, they are forced to adopt the path of least harm.

Therefore, in the opinion of Researcher, it is a futile attempt to seek for an ideal model of transitional justice. However, even though there might not be a single model which may be applicable to all, there are a common series of decisions which every society in transition is confronted with. As stated earlier, the ultimate path chosen by any society, when confronted with such decisions, may not be a product of deliberate choice but an inevitable result of circumstances. Apart from such situations, in circumstances when a society does have a choice, each decision it takes must be as per a set of principles which will help it chose a path to peace, restoration and justice. The choice of model for transitional justice will be the outcome of these decisions. In making such decisions a society may be guided by the experience of other societies during their periods of transition. Its effectiveness as a vehicle of delivering justice will depend on whether or not it conforms to the principle listed out in the second chapter of this work.

[40] SPENCER ZIFCAK, GLOBALIZATION AND THE RULE OF LAW, (Spencer Zifcak, Taylor & Francis e-Library, 2005)

The first and foremost decision that a society in transition has to make is, **whether it should address the wrong-doings of the past at all?** In several instances a decision may be made not to address the wrong-doings of the past at all. In only one case, i.e., the Spanish transition of 1976-78, was this decision endogenous and consensual. In other circumstances it might be the pre-condition for the transition, as in the case of Rhodesia (now Zimbabwe). In others it might be chosen out of fear of reaction of the proponents of the previous regime who might still be in power. In the matter of the collapse of the former Soviet Union the absence of transitional justice was again not the result of choice but a result of the chaotic circumstances which attended the downfall.

Should the new regime decide to confront the past it will again have to make a series of decision as to go about the process. The most vital amongst these being that by **what method and for what purpose should it confront the past with?**

If it chooses to embark on a quest for the truth simply as a means of providing vindication, reparation and restoration to the victims of the previous regime, then perhaps the most appropriate model to pursue would be that of Truth and Reconciliation Commission (hereinafter referred to as TRCs). TRCs have a unique advantage of being both backward looking and forward looking in the matters of transitional justice. It is backward looking as it does not ignore the wrongdoings of the past but acknowledges and accepts them. It is forward looking as it chooses not to be bogged down by the past and devote pressure time and resources of the society in prosecuting former oppressors[41]. The mechanism for extracting truth in TRCs is by granting amnesty to the confessor. It thus chooses the path of peace over

[41] Truth and Reconciliation Commission of South Africa Report, Volume I, page 5

justice. TRCs may go a step further by providing restoration and rehabilitation to the victims of the previous regime on the basis of facts uncovered by them.

Apart from the above uncovering the truth also plays another important function. It helps us identify the mistakes we made in the past so that the same may not be repeated in the future. This is especially helpful in designing the institutions of justice which must function under the new regime.

Should the regime choose to embark on a path of **Retributive Justice** it will again have to make some crucial decisions. It will have to decide what constitutes wrong-doing and who are the wrong doers? Should it prosecute only the persons who issued the orders or the persons who executed them? What of the people who act as links between the people issuing the order and the people who execute them? In the interest of justice, it is imperative that should the decision be taken to prosecute the wrongdoers, such prosecution should not be aimed at person on one end of the conflict.

Once the wrongdoers have been identified the next question which will have to be addressed is what punishment or sanction should be imposed on them? It must be borne in mind that if the proposed sanctions are too harsh it may prove to be an impediment to the process of transition itself. It is not necessary that a substantive punishment entailing imprisonment, fine or forfeiture be imposed on the guilty. Barring such persons from holding public office may also serve the purpose. Even if the State institutions are not able to punish such individuals, they may be punished by extra-judicial but legal methods such as voluntary ostracism by society. In other instances, even though the State is unable to punish the individual, due to amnesty or like arrangements, they may still be tried for their crimes on foreign soil.

Similarly, in matters of **reparative justice** the new regime must decide who the victims are and what form of suffering constitutes victimhood? During periods of repression suffering may take on different forms. It may be material (loss of property); personal (violation of individuals human rights) or in some instance intangible (loss of opportunity). How can such sufferings be quantifying and if by some manner we are able to quantify such loss, how should it then be compensated?

Lastly the most crucial point a regime will have to decide upon **what should be the cut-off point in time** beyond which it will delve into for matters of retributive or distributive justice.

The determination of these questions in accordance with the principle set out in Chapter 2, should enable any society in transition to choose the appropriate model of transitional justice as per its circumstances.

8. Conclusion

The appropriate model of Transitional Justice is not one model which fits all societies in periods of transition but a model which fits the particular society in question. The determination of such model is done on the basis of the needs and attending circumstances of the society in question. However, no matter what of model a society chooses to adopt, for it to be truly a model of transitional justice as opposed to a model of just transition, it must conform to certain basic principles. In its quest for uncovering the truth, punishing wrongdoers and compensating victims it must adopt a procedure that is transparent and fair. This may only be done if the society in making its choices in guided by reasons as opposed to emotions. Adherence to just principle will aid a society in transition to evaluate clearly the

misdeeds of the past and based on its experience constitute better its State Institutions for the future.

There is no single or uniform international practice in relation to approach towards transitional justice. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

The impacts of violations of human right laws during the period of conflict and post-conflict affect individuals and communities differently. Thus, any attempts to hold perpetrators accountable for these atrocities must consider the psychological, social, economic, and cultural needs of victims in both the design and substance of the process.

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    - Being an encyclopaedia of Public International Law, the researcher referred to it to shed light on the concept of amnesty, which is of critical importance in truth and reconciliation commissions.
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    - In this book the author speaks of the difficulty in punishing alleged perpetrators of human rights abuses in situations of civil war. In such situations as the victor and the vanquished have to live together, criminal prosecution may lead to a divided society.

Reports

- Truth and Reconciliation Commission of South Africa Report, Volume I
- Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, A/HRC/30/61

This report contains the principal findings of the comprehensive investigation conducted by the Office of the United Nations High Commissioner for Human Rights into alleged serious

violations and abuses of human rights and related crimes during the armed conflict in Sri Lanka. The Office reviews human rights-related developments in the country since March 2014, in particular reforms and the steps taken towards accountability and reconciliation by the new President elected in January 2015, and the new Government elected in August 2015. The report concludes with recommendations of the High Commissioner on the way forward, including on the establishment of a hybrid special court to try war crimes and crimes against humanity allegedly committed by all parties to the armed conflict.

- **Treaties**
  - Joint Four Nation Declaration, the United States of America-United Kingdom-the Soviet Union-China, October 1943

- **Web-Resources**
  - International Centre for Transitional Justice, What is Transitional Justice?, available at https://www.ictj.org/about/transitional-justice .

- **Working Paper**
  - Massimo Moratti and Amra Sabic-El-Rayess, *Transitional Justice and DDR: The case of Bosnia and Herzegovania*, (June 2009), available at https://www.ictj.org/sites/default/files/ICTJ-DDR-Bosnia-CaseStudy-2009-English.pdf (last visited on January 10,2021)

The paper examines the Demobilization, Disarmament, and Rehabilitation process in Bosnia and Herzegovina and how the same may be used to help in the process of transitional justice.

- **Cases**

- *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* 1996 ZACC 16

In this case the constitutional validity of the Promotion of National Unity and reconciliation Act was challenged as it provided blanket amnesty to the wrongdoer from civil as well as criminal prosecution. However, the South African Constitutional Court upheld the validity of the Act.

ARBITRATION AND IPR DISPUTES

- **SHOKAT ALI KHAN**

ABSTRACT -

*The Article covers the importance of ADR in IPR disputes and then illustrates the decision of various Courts on the **applicability** of **Arbitration clauses**. In India, on the arbitrability of IP conflicts there is no blanket bar. The **essence** of the allegations posed instead dictates arbitrability. **License** deals, which are strictly contractual and can be arbitrary, would involve disputes over royalties, geographical regions, marketing and other terms. Such disputes can and should be arbitrated openly by parties in India. However, the court/assigned public administration needs to determine a conflict of **validity** and **ownership** of an IP right, in order to produce a judgement which would affect the **right** of the general public to use their land.*

INTRODUCTION

The alternative ways of settling disputes have ultimately gained enormous popularity and usefulness in trade and trade. Most of the parties concerned with the transaction today choose arbitration to solve some kind of dispute. one of the best approaches used in arbitration. In particular, arbitration operates particularly effectively in commercial and international conflicts as a quasi-judicial mechanism to counter conflict snags and an overwhelmed judiciary.

In the years from the 1940 act to the 2015 amending Act, the law of arbitration in India has been improving a lot to minimise court interference and to provide efficient and friendly regulations for better and more impartial arbitration. Although 'arbitration' is in the process, it continues to evolve and still takes root in India.

However, Indian courts' rulings on the objective arbitrability of substantive IP law have not been reported. As a viable choice in IP disputes, Arbitration and Conciliation Act 1996 does not have a proper structure/encouragement for arbitration. In theory, any right which a party may dispose of in a settlement should also be subject to arbitration, because arbitration is, as in the case of a settlement, based on a contract between a party. Owing to the compromise nature of the arbitration, any award made is only binding on the parties and does not affect third parties as such.

CASE ANALYSIS

To understand the application of the Arbitration clause, this article will delve into various case laws and see how the interpretation is done by various judgements.

In the case of GurukrupaMech Tech Pvt. Ltd. vs. State of Gujarat and Ors[42], the Hon'ble Gujarat High Court has defined the Intellectual Property as a negative right- "*The Intellectual Property Law is a negative right which means it is a right to exclude others from using the property generated by the registered owner. It is thus obvious that this law anticipates pre-emptive measures to prevent the misuse, as the property is intangible per se. Any*

[42] *(2018)4GLR3324*

reproduction intangible medium becomes susceptible to misappropriation therefore, the statutory rights ought to be protected."

In the case of McDonald's India Pvt. Ltd. and Ors. vs. Commissioner of Trade & Taxes, New Delhi and Ors.[43], the Hon'ble Delhi High Court described the Intellectual Property Rights, as under:

"The peculiarity of intangibles or incorporeal property, of the kind this Court has to deal with, i.e. intellectual property, is that unlike real property, its boundaries are unset. These rights are only real and effective to the extent they enable the owner or transferee to "keep out" from use those who are not permitted to do so. In other words, the nature of the intellectual property and the remedies provided for their enforcement, hinge upon the right to exclude others from using it…."

This allows for the IPR owner to exclude other individuals from using or using it. The IPR is thus considered accurate in the first place. In comparison to a right in person which is an interest-only secured against those persons, a right in person is a right exercisable against the world. Actions in personam relate to actions deciding the rights or interests of the parties themselves in the case, while actions in rem relate not only to themselves but to all entities who, at any point, have expressed interest in that property, to actions defining the title of property and rights of the parties.

The Hon'ble High Court of Delhi held, among others, the issue of infringement of product copyrights not to have to do with arbitration as set out in Chapter XII of the Copyright Act

[43] 2017VIIAD(Delhi)35

1957, relating to legal remedies in cases of copyright infringement, and any suit or other civil proceedings that occur in respect of Mundipharma AG vs Wockhardt Ltd.[44]

In the case of the Sound Ministry International Ltd. vs Indus Renaissance partners Entertainment Pvt[45], the High Court of Delhi on Honorable. Application made by the defendant under section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter also referred to as "Arbitration Act," f). Ltd., where a contract between the parties vide permission for use of the trademark/copyright by the 'Sound Minister,' 'The Ministry,'...

In the above case, the complainant's claim resulted from the fact that the licence agreement was terminated and the defendant was not allowed to use the marks in compliance with the terms of this licence agreement and the licence fee was not paid by the defendant. The Hon'ble Court found that the said IPR dispute should be resolved by arbitration.

The Hon'ble Supreme Court in the case of Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors.[46],held as under:

"Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

And the below-mentioned were categorised as disputes to be inherently non-arbitrable:

1. *disputes relating to rights and liabilities which give rise to or arise out of criminal offences;*

[44] (1991) ILR 1Delhi606
[45] 156(2009)DLT406
[46] *AIR2011SC 2507*

2. *matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;*
3. *guardianship matters;*
4. *insolvency and winding up matters;*
5. *testamentary matters (grant of probate, letters of administration and succession certificate); and*
6. *eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."*[47]

Interestingly, the Hon'ble Court while deciding the aforesaid case which was pertaining to the arbitrability of the dispute pertaining to the enforcement of a mortgage by sale, referred to the book *Mustill and Boyd in their 2001 Companion Volume to the 2nd Edition of commercial Arbitration*, and quoted the excerpt from the book as under:

"Many commentaries treat it as axiomatic that 'real' rights, that is rights which are valid as against the whole world, cannot be the subject of private arbitration, although some acknowledge that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not..... An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else

[47] supra

has mandated him to make such a decision, and a decision which attempted to do so would be useless."

In the case of Suresh Dhanuka vs. Sunita Mohapatra, it was observed as under:

"Accordingly, having regard to the arbitration clause, which is Condition No. 10 of the terms and conditions of the Deed of Assignment, the interim order passed on the application under Section 9 of the Arbitration and Conciliation Act, 1996, filed by the Appellant in keeping with the terms and conditions agreed upon between the parties, was justified and within the jurisdiction of the District Judge, Khurda. As we have mentioned hereinbefore, the interim order passed by the learned District Judge, Khurda, restraining the Respondent from selling her products by herself or by any other person, save and except through the Appellant, was apposite to the circumstances."[48]

In the case, there was no objection by either of the party regarding the maintainability of arbitration in the present matter, inter alia, relating to the assignment of 50 percent ownership in the trademark. Nonetheless, the approach followed by the Hon'ble Supreme Court in the said case in a way clarifies the spectrum of arbitrability of IPR disputes arising from the agreement entered between the parties.

The application of Article 8 of the Arbitration Act, of that of the respondents for referring the matter to arbitration, inter alia regarding the awarding of the balanced sum and the question of copyright infringement arising from conditions of the copyright assignment agreement which also included arbitration were permitted in the appeal against the order of the learned single Judge vide. The Hon'ble Court allowed the appeal largely on the basis that it is not

[48] *AIR2012SC 892*

possible to easily forge intricately mixed issues and defendant nos. 2 to 4 did not form part of the copyright assignment arrangement[49].

Further, the Hon'ble Court held as under in Vimi Verma vs. Sanjay Verma & Ors:

"Since there is an arbitration clause in the MoU, the petitioner has filed a Section 9 petition. There is no bar upon the trademark infringement matters being dealt with in arbitration proceedings as also in a Section 9 petition."[50]

The Hon'ble Court dismissed the section 8 application of the Arbitration Act filed by the Defendant in Steel Authority of India Ltd. v. SKS Ispat and Power Ltd. & Ors., *N*to refer the matter to arbitration, on 3 grounds:

"The rights to a trademark and remedies in connection therewith are matters in rem and by their very nature not amenable to the jurisdiction of a private forum chosen by the parties;

The disputes concerning infringement and passing off do not arise out of the contract between the parties, which contains the arbitration agreement; and

There are other parties who are arranged as party Defendants to the present suit, who are not parties to the arbitration agreement.

In Eros International Media Limited vs. Telemax Links India Pvt. Ltd. and Ors., *2016(6)BomC R321,* it was opined that,

A claim in rem is distinct from a claim for enforcement against an individual....

[49] R.K. Productions Pvt. Ltd. vs. N.K. Theatres Pvt. Ltd., *2014(1)ARBLR34(Madras).*

[50] *2013 SCC Online Del 4194*

As between two claimants to a copyright or a trade mark in either infringement or passing off action, that action and that remedy can only ever be an action in personam. It is never an action in rem....

In trade mark law it is true that the registration of a mark gives the registrant a right against the world at large.

It is possible that an opposition to such an application (before the Registrar) would be an action in rem, for it would result in either the grant or non grant of the registration, good against the world at large....

But an infringement or passing off action binds only the parties to it....

Where there are matters of commercial disputes and parties have consciously decided to refer these disputes arising from that contract to a private forum, no question arises of those disputes being non-arbitrable. Such actions are always actions in personam, one party seeking a specific particularized relief against a particular defined party, not against the world at large."[51]

The fact that no debate was held on the question of the arbitrariness of the IPR disputes in the judgement which stated that patent, copyright are generally non-arbitrable and that observation with regard to the arbitrability of the IPR dispute was made by reference to Mr O.P. Malhotra's book. In addition, the existence in that extract of the term "generally" also supports an assertion that there is no full bar in the arbitrability of IPR conflicts and that arbitrability is a matter of case-by-case consideration.

[51]Notice of Motion (L) No. 2097 of 2014 in Suit No. 673 of 2014

The Hon'ble Bombay High Court in the case of Deepak Thorat vs. Vidli Restaurant Ltd.,, opined that "*It is pertinent to note that the present arbitration reference is not an infringement or passing off action. What the Respondent seeks to enforce here is a negative covenant contained in the franchise agreement between the parties, which inter alia required the Petitioner franchisee to desist from using the mark".*[52]

Analysis of the above cases reveals that the Judges of the Supreme Court of Hon'ble and of the High Court of India have taken different views. However, the review of the cases referred to above makes clear, and it will rely on the facts of each case, that there can be no general bar on the arbitrability of the conflicts relevant to the IPR arising out of the agreement reached by the parties.There is no doubt that IPR matters which fall within the jurisdiction of the special authorities forming part of the relevant act such as the Mark Registrar, Patent and Design Controller, the Board of Appeal for intellectual property, etc., cannot be arbitrated. Cancelation of registration of trademarks, adjudication of proceedings of opposition, grant of an obligatory patent licence, cancellation of design, grant of compulsory licence for works not approved for public inspection are such a few examples

CONCLUSION

While the majority of IPR disputes arising from the contract are arbitrable, not all conflicts. It is dependent on the facts of each case whether a specific IPR dispute arising from the contract may be awarded through arbitration. There is therefore no unambiguous bar on arbitrability in IP disputes, as specified in the current situation in India. Instead, the essence of the claims presented shall be decided by arbitrability. License deals, which are strictly

[52] *Commercial Arbitration Petition (L) No. 290 of 2017, MANU/MH/1681/2017*

contractual, will be arbitrable with respect to royalties disputes, geographical location, marketing and other conditions. Such disputes can and should be arbitrated freely by parties in India. However, the Court / appointed public administration should determine the dispute of validity / possession of an IP right, for it will have a consequence of the dispute affecting the right of the general public to use their land. This stance on arbitrability guarantees the equality of rights between an inventor/author and the general public and the retention of an inventor/right author's to arbitrate contractual rights. For the successful functioning of the IP system, this balance is also desirable. It would allow inventors to find simple conflict resolution. It would also ensure a robust public domain and safeguard the public interest to protect the jurisdiction of courts in matters which affect the public's right to use proprietary and patented inventions.

AN ANALYSIS OF ESPIONAGE LAWS IN INDIA

-UJJAINI BORTHAKUR

Abstract

The age old colonial laws which were a symbol of restriction in freedom of speech has been carried forward since then through various amendments which slightly differ from the colonial act in terms of , government of present India views the act in the light of protection of governmental policies from being misused by enemy country who could utilize the information to their benefit . however although the act promises to secure government and the nation in every possible way the act on the other hand also puts limits to certain rights of the citizens who forms the vary nation , this espionage law puts a big conflict between the sovereignty and protection of government and protection of innocent victim mainly the journalists who are more pertinent towards the public interest and works in keeping in view the notion of democracy. Knowing and forming perception of various governmental policies are fundamental rights of citizen which need to be protected and valued since a nation is a culmination of its citizens.

Key words- espionage, sovereignty , fundamental right.

Introduction

Espionage is an exercise performed by the government of a country through its agent called spies to extract confidential information from a secured source well encrypted with password ,code etc , in order to gain information about political planning , military ventures and industrial trade secrets etc. Many countries have their espionage laws such as UK , China etc, it becomes more important to develop espionage laws in present scenario when most of the

countries are growing in terms of military , nuclear power, population so much that it becomes important to protect ones country and develop laws so that the criteria of their development , market strategies etc are not revealed for example in the past we could see [53] that the superpower US convicted fifty seven agents who were intra country spies and worked for china during 2008-2011 , In today's scenario the spy agencies mostly indulge in substance trafficking along with terrorist as well as governmental entities . There are various ways that the spy conduct their mission the most common in the present scenario where countries have become more technologically advance is hacking of system . spying that involve an organization or a company is called [54]industrial espionage .espionage which is often a joint effort of the government or a co-operative is rather seen in terms of military spying by an enemy country , however intra state espionage also occur when any person of a cooperative or public servant tries to disrupt the system of ones own country and help the agent in extracting crucial information . under the espionage law in India which is the officers secret act such people are punishable under [55]section 3.

Targets-

There are various targets of the spy/agent , and on the basis of the targets the techniques to conduct espionage differs along with the designation of the spy/agent . It is important to identify the targets of the spy since it helps us in gaining information regarding the area or subject of the spies , the targets also gives us a fair idea regarding the probability of weakness

[53] Arrillaga ,Pauline . "china's spying seeks secret US info". May 19 2011 at the Wayback machine AP, May 7th 2011

[54] A form of espionage conducted for commercial purposes instead of purely national security.

[55] Section 3 of the officer secret act include penalties for spying

of the spy country in targeted area . There are mainly four areas which the spy/agent generally target

1. Native wealth-

This form of target , includes food ,energy materials etc which is a form of natural resource of the country , agent collect information about the natural resources through sketch ,photographs or listening to testimonies of various native people and try to access the strategic production , identification and assessment of the natural resource , this type of research is done by the bureaucrats of a nation who incorporates the same or better strategy in their own models.

2. Perception/reaction of the population-

The society and the state is very closely linked in government . this target includes the mentality of the population on how they perceive and react to foreign and domestic policies. The agents in this sector are sociological researcher , journalist who study the sentiment of popular ,middle class and elite to understand the social structure of a nation.

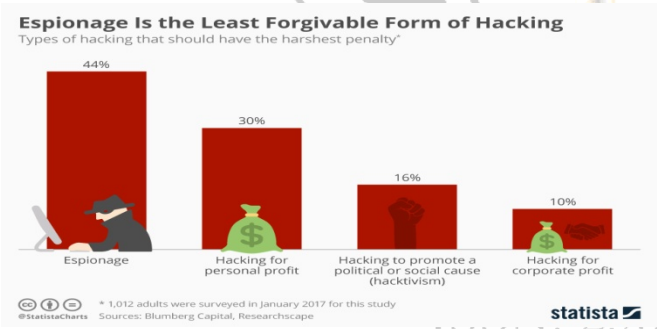
3.Defence intelligence-

It is very often seen that the strength of a country is firstly measured with the military capacity therefore knowing the military power of the enemy country ensures safeguard to the country conducting espionage. Defence intelligence includes the military strategy , strategic production of military power , information related to nuclear weapons etc the agents also search for the different assessment used for selection into defence services .the agents are generally people related to defence background.

4.Economy-

The economy determines the GDP of a country , GDP in turn gives an understanding of the economic growth of a nation , understanding the strategic economic growth of an enemy countries gives a fair idea about the steps taken to increase the economy which probably the country engaged in espionage lacks. The agents are recruited from the field of science and technology academia.

According to a study conducted by Blumberg capital ,researchscape 1012 adults were surveyed in January 2017 for this study and it was found out that 44% of people were of the view that espionage should have the most strident penalty since privacy of a country becomes most important in 21st century when recent developments are taking place Us ,China , Russia ,India etc both domestically and in international sphere , conducting espionage i.e extracting information from other countries harms the very nature of their sovereignty and security and therefore espionage is concluded as the least forgivable form of hacking. [56]



Laws related to espionage in India-

[56] https://www.statista.com

India's anti espionage law has its origin in the colonial era when the officer's secret act 1899 came into force later on it was amended in 1917 and 1923 when this act became more strict , and since then it is still in force . The main aim of the act is to deplore all such acts which clearly provide an assistancetto an enemy state which could be through codes , use of models , photograph etc by entering into a restricted area or confidential places . In some cases organization , person/entity of that restricted place or any person directly or indirectly provide help to the government of the country conducting espionage . This act of sabotage through the means of espionage may be unknowingly or knowingly but the person guilty is liable for punishment under section 5

History of officers secret act-

This act takes us back to the colonial era when chauvinist youth of India were protesting against the sovereignty of their country because of various policy measures adopted by the Britishers ,especially this act was made more stricter during the period when [57]lord Curzon was the viceroy of India . The Indian nationalist leaders during this period have organized themselves politically and the formative stage of Indian national movement began.

BACKGROUND

[58]The congress party which before 1905 was just a middle class pressure group but specially during partition of Bengal it became a nationwide mass movement .initially since 1765 Bengal ,Bihar and Orissa were part of a single province ,with time the province had grown and it became difficult for proper administration of the province therefore in 1905 Curzon

[57] A British conservative statesman who served as viceroy of india from1899 to 1905
[58] A political party formed in 28th December 1885

divided Bengal for efficient administration , however riots spread fighting for Bengal because the Hindu's of west Bengal feared that they would soon become a minority since earlier they had played a significant role in the society specially in commercial and the rural life .

[59]The Calcutta corporation act which limited Indians from self governance by increasing the number of nominated officials was also a major uprising towards the government .

CONSEQUENCES-

The acts of intolerance in the form of riots , movements such as [60]swadeshi movement ,[61]salt march etc towards the britishers were against the government policies , so in order to maintain secrecy and put a shut down on nationalist publication and prevent the allover outraging towards government the officers secret act was passed.

[62]*At a time when government officials sometimes doubled as correspondence for newspaper ,this notification prohibited them from making official documents public* .

ANALYSIS OF THE OFFICER'S SECRET ACT-

Officers secret act has in total 15 sections and its applicable to all the servants of government and to Indian citizen outside India ,this sections gives us an idea about the possible harm an

[59] The Calcutta corporation act was passed in 1899 by lord curzon
[60] This movement formally started from Town Hall Calcutta on 7th august to curb foreign goods by relying on domestic production
[61] It is also known as Salt Satyagraha , Dandi march and Dandi satyagraha which was an act of nonviolent civil disobedience.
[62] Written by V.K Singh in an article for united service institution of India

enemy country could do and at the same time this act displays the role of intra country enemies who harbor the spies or who helps them in getting the confidential information ,confidential information are assessed in the form of code , photograph models which is explained in section 3 and also contains the penalties for spying .this act further explains the meaning of[63] prohibited place in which makes it more clear the demarcated areas wherein the role of confidentiality takes action. This act contain penalties for intra state enemies who harbor spies in the section 10. Furthermore section 5 denounces it be a crime to communicate confidential particulars or wrongful information , it specially targets the journalists and opinionated people's voice.

LIMITATION OF THIS ACT-

This act gives us an paranomic view of measure of protection our government is taking by imposing the age old colonial act , however the strains of dominance , authority , lack of evidence against the victim ,degrading effect of right to information under(RTI 2005) is visible and makes the public specially the people associated with journalism make them question their rights ,and a sense of harassment prevailing under this act specially under section3 clause 2 .

In section 3 clause 1 of the act which includes penalties for spying , doesn't provide the room for innocent spying , innocent spying could be an act done with ignorance of the fact that it could be illegal or it could include an act of spying onto the contents which according to the

[63] Section2 (8) of Officer's secret act

victim was not secret.[64]Madhuri Gupta ,who was at the service in the Indian high commission in Islamabad had passed certain confidential information to ISI , due to which she was given the penalty for three years in jail

The clause 2of section 3 the act doesn't make it necessary for the convicted person to be guilty ,she/he can be convicted from mere circumstances and conduct or character which is against protection in respect of conviction for offences . this therefore depicts the draconian power of government who can convicted anyone by mere circumstances ,it therefore creates a fear amongst the citizens since the act gives government an upper hand in the whole scenario . the misuse of this clause happens mostly when the government is corrupted , malicious or goes against the very notion of constitution in such case the clause gives more authority to government .

Furthermore section 5 of this act is seen as a target to limit the voice of journalists and opinionated individual , it also doesn't specify that content which is said to be secret which gives an upper hand to the government to decide its meaning .In the Delhi high court judgement in the case involving [65]Santanu Saikia , it was alleged that Santanu Saikia has published content of a cabinet on divestment policy later on although he was discharged in 1999 he was again harassed by a three year house probe to know how the secret document has been leaked. Saikia was released on the ideals that were laid in the judgement of Sama Alana Abdulla vs State of Gujrat.

[64] Madhuri Gupta vs. state AIR 2010 ,case no 58/2010

In the landmark case of Iftikar gilani ,an eminent journalist of the Kashmir times was took into custody in 2002 and was convicted for releasing a secret code , however later he was released on the ground that the secret was not official one.

According to section 15 if person a person who is a company is convicted everyone who at the time of offence was responsible to the company is liable for punishment . although the functioning of a company depends on a bunch of people working together so somewhere this section seems to be apt one but the act of secrecy ad confidentiality might not be aware to some people of the company responsible at the time of offence. This once again is violation of individual right to freedom since it creates a fear among the employees for offence not committed by them yet they end up being guilty.

V.K Singh penned downed his ideas in the article named as "troubled Legacy" in which he says " the official secret act 1923 is one of the most draconian laws still in force in India. A legacy of British raj , it had often resulted in grave miscarriage that have blotted the record book of the judiciary and sullied our reputation among democratic nations''.

India is a democratic nation , democracy is parallel to transperancy which is vividly stated in the right to information act, The officer's secret act limits the scope of right to information [66]article 19 which is one of the fundamental right of citizens , this freedom to acquire details on role play of the state actors in governing the state gives people a power to hold the

[66] Article 19- right to freedom

government and restrict it from becoming a dictator which is the main aim of a democratic nation.

The whistleblower twist-

Whistleblowing is the act of revealing illegal conduct within an institution/organization by a employee or any stakeholder. The whistleblower act first came into light during the case of [67]Samuel shaw and Richard Marven who were tortured in british prisons by commanding officer Esek Hopkins , this led the two naval officer to report against their commanding officer however this action of the naval officer were criticized and they were suspended permanently from US navy this later on led the US congress pass a whistleblower resolution , which was the first whistleblower act in the world .

After two hundred years India adopted this act which is known as the [68]whistleblower protection act 2014 which gives protection to the whistleblower in the form of disclosing their identity so that the position of informant is safe and secure , however it has been seen in various instances where the act is seemed to be partial towards two entities 'informants' , ' leakers'/ 'betrayer. It can be seen widely in the case when the Hindu newspaper was alleged for publishing information regarding the Rafale deal which was brought under officer secret

[67] They were officers of us navy
[68] It is an act to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or willful misuse of power.

act section 3 although it published the contents keeping in view public interest and keeping the interest of democratic ideals .

Present status of the whistleblower act-

The 2014 whistleblower protection act was tabled before the parliament for an amendment in the act keeping in view national security concerns however the consent of rajya sabha in passing the bill was absent hence the bill was dismissed , the main aim behind the dissolution was that the subsisting law was considered to protect the citizens and also the RTI activists.

Analysis of Right to information act keeping in view Officers secret act1923 –

Both the acts that is right to information act and officer's secret act have a preeminent effect on one another , one act appeals to guarantee information on the other hand the other act put restrictions on certain secret information which is of utmost importance to the government . In the present scenario both these acts contradict each other which makes the concept of 'secrecy' being questioned that whether it be protected or published ? , However according to [69]section 22 of right to information act it has a dominance over the officer's secret act 1923 which states that its provisions are effective against OSA or any other laws , But the later law have a eminent significance in the former act according to [70]section 8 (2) which allows to protect certain interests if the well being of general public in divulgence counterbalance.

[69] Section 22 of the RTI act expressly provides that the provision of the RTI act shall have effect notwithstanding anything inconsistent therewith contained in the official secret act or any other law

[70] Section 8 (2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), **a public authority may allow access to information**, if public interest in disclosure outweighs the harm to the protected interests.

Conclusion-

The officer secret act has both advantages and disadvantages , there is a need for amendment of this act into a flexible National security act which is unambiguous and leaves little scope for vagueness . However there are various recommendation made for the amendment of this act , keeping this unambiguous nature of OSA in view the law commission was the first official entity to make an observation into the act in 1971, in 2006 the second administrative reform recommendations were to revoke the age old act since it stand in conflict with transparency ideal of democracy , in 2015 too the government had set up a committee to look into provision of OSA in relation to RTI . These recommendation should be taken into account so that the notion of democracy is integrated along with national securities.

PERSONALITY: A JURISPRUDENTIAL ANALYSIS

- **AJAY PAL SINGH**

"Person is the subject or bearer of right."

- **Friedrich Carl von Savigny**[71]

ABSTRACT

'Personality 'is a very vague and wide term and it has a variety of meanings (including both Natural and Artificial Persons). It is derived from Latin word 'persona' which means a mask. In the ancient times, masks were worn by actors while playing different roles in a drama. Historically the term has evolved with evidence of its use in Roman law and Greek law. In the modern era the term 'person' has been used in a sense of a living person capable of having rights and duties. In the philosophical and moral sense, the term has been used to mean the rational quality of human being. It is thus, the Rational substratum of a human being. In Law it has a wider meaning. It means not only Human Beings but includes certain associations as well. Thus, Law personifies certain real objects and entities and treats them as a legal person. Thus, in the simplest form, personality implies conferring of rights and duties. In conclusion, the convenient attribution of rights and duties to various persons through the conception of legal personality is an example of the growth of a complex modern legal framework.

KEYWORDS: Personality, Person, Personifies, Rights, Duties, Natural Persons, Artificial Persons.

[71] Visa A.J. Kurki, A Short History of the Right-Holding Person, University Press, (Jul.16, 2021, 11:32 AM), https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198844037.001.0001/oso-9780198844037-chapter-2.

INTRODUCTION

'Personality 'is a very vague and wide term and it has a variety of meanings. It is derived from Latin word *'persona'* which means a mask. In the ancient times, masks were worn by actors while playing different roles in a drama.[72] Historically the term has evolved with evidence of its use in Roman law and Greek law. In Roman law, the term had a specialized meaning, and it was synonymous with the term 'Caput' which meant status. Under Greek law, Animals and Trees were tried in court for causing harm or death to a human. The term Personality, is different from Humanity as it is much wider than the latter concept. The conception of Persons is associated with Personality. It can be said on the basis of this practice that in the past there were 'Persons' who were subjected to Duties even though they did not possess Rights. Similar provisions existed under early English law, as there were some instances where an animals or trees or inanimate objects had been tried under Court of Law. In the modern era the term 'person' has been used in a sense of a living person capable of having rights and duties. In the philosophical and moral sense, the term has been used to mean the rational quality of human being. It is thus, the Rational substratum of a human being. In Law it has a wider meaning. It means not only Human Beings but includes certain associations as well. Thus, Law personifies certain real objects and entities and treats them as a legal person.[73]

DEFINITION OF 'PERSON'

[72] Dr. Ajaymeet Singh, Simplified Approach to Jurisprudence, Pg.184, (2nd Edition).
[73] Manish Ranjan, Meaning and Kinds of Persons, Legal Services India, (Jul.16, 2021, 12:06 PM), http://www.legalservicesindia.com/article/2316/Meaning-and-Kind-of-Person.html.

Different Jurists have given varying interpretations of the term Person. Thus, no single acceptable and all-inclusive definition of the term Person is available. According to John Salmond, *"Person means any being whom the Law regards as being capable of having legal rights and being bound by legal duties. Any being that is so capable, is a person, irrespective of the fact whether he is a human being or a non-living entity."*[74] Thus, human beings, body of persons or a corporation or other legal entity that is recognized by law as the subject of rights and duties. Salmond further explains that the extension of the conception of personality beyond the class of human beings is one of the most noteworthy achievements of the legal imagination. Thus, according to Savigny, *"Person is the subject or bearer of right."* But Holland has criticised this definition on the ground that persons are not subject to rights alone but they also have duties. He says that the rights not only reside in, but are also available against persons. Hans Kelsen rejected the definition of personality as an entity which has rights and duties. He also rejected the distinction between human beings as natural persons and juristic persons. He says the totality of rights and duties is the personality; there is no entity distinct from them. However, Kelsen's views have been criticised for the reason that in law natural person is different from legal persons, who are also capable of having rights and duties and thus constitute a distinct entity.[75]

CLASSIFICATION OF PERSONS: NATURAL AND ARTIFICIAL PERSONS

The term "natural person" refers to a living human being, with certain rights and duties under the law. According to Holland, a natural person is *"Such a human being as is regarded by the law as capable of rights and duties."* The primary Characteristics of a Natural Person are that

[74] Singh, *supra* note 3.
[75] Ranjan, *supra* note 4.

a natural person is human being; a real and living person in blood and flesh, natural person possesses the power of thought and choice and such a person Lives for a limited period, meaning that he will die at some point in life.[76] However, not all Human beings possess full-fledged legal personality. For instance, Article 326 of the Constitution of India, disqualifies a person to be a voter at Parliament and State Assembly on the grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice. Thus, the prisoners serving their sentence, enjoy a restricted legal personality. They do not have right to vote, as their imprisonment operates as a civil death. They can only exercise their franchise, after they complete their sentence. Similarly, the Lunatics and Minors do not have the capacity to enter into a Contract under Sections 11-12 of the Indian Contract Act, 1872 or the right to vote under Article 326 of the Constitution of India.[77]

LEGAL PERSONALITY AND LEGAL PERSON

Legal Personality is an artificial creation of law. It is the attribute through which Law confers personality on certain entities known as Artificial, Juristic or Legal Persons. According to Salmond, "By creating an artificial person, Law personifies a non-living entity." Legal persons are real or imaginary beings to whom personality is attributed by law by way of fiction where it does not exist in fact. Examples include a Company, Society and Non-Governmental Organisation etc. There are two essentials of a legal person namely *corpus* and the *animus*. The *corpus* in the body into which the law infuses the *animus*, will or intention of a fictitious personality. The *animus* is the personality or the will of the person. Thus, there is

[76] Natural Person, Legal Dictionary, (Jul.16, 2021, 12:16 PM), https://legaldictionary.net/natural-person/.
[77] Singh, *supra* note 3.

a double fiction in a juristic person. By one fiction, the juristic person is created and made an entity and by the second fiction, it is clothed with the will of a living being.

DIFFERENCES BETWEEN NATURAL AND LEGAL PERSON

There are major differences between Natural Person and Legal Person. A natural person is a Human Being and is a real and living person. He is also a legal person and accordingly performs their functions He has characteristics of the power of thought, speech and choice. Whereas, Unborn persons, dead individuals and animals are not considered as natural persons. Finally, Natural person can live for a limited period i.e., he cannot ordinary live beyond the normal human life span. On the other hand, Legal person is an imaginary being whom the law regards as capable of rights or duties. Legal persons are also termed "Fictitious", "Juristic" or "Artificial". Further, law treats Idiots, Dead Men, Unborn Persons, Companies and Idols, etc. are treated as legal persons. The Legal persons perform their functions through Natural persons only. There are different varieties of Legal persons, viz. Corporations, Companies, Universities, President, Societies, Municipalities, Gram panchayats, etc. Legal person can live more than ordinary human life span. For instance, the office of the "President of the United States of America" is a Corporation Sole, as in spite of being created three hundred years ago, it exists till date.[78]

LEGAL STATUS OF AN UNBORN PERSON

Legal personality is attributed to an unborn child for certain purposes. If he/she is born alive, he/she will have a legal status. Though law normally takes cognizance of living human beings yet the law makes an exception in case of an infant *en ventre sa mere* (Child in

[78] Ranjan, *supra* note 4.

mother's womb).[79] Under English Law, a child in the womb of the mother is treated as in existence and property can be vested in its name. Article 906 of the French Civil Code permits the transfer of property in favour of an unborn person. But, according to Mohammedan Law a gift to a person not in existence is void. Under Section 13 of the Transfer of Property Act, 1882 Property can be transferred for the benefit of an unborn person by way of trust. Similarly, Section 114 of the Indian Succession Act, 1925 provides for the creation of prior interest before the unborn person may be made the owner of property – corporeal or incorporeal, but no property will be deemed to be vested in the unborn person until and unless it is born alive. Under Sections 313, 315 and 316 of the Indian Penal Code, the infliction of pre-natal injury on a child, which is capable of being born alive and which prevents it from being so, could amount to an offence of child destruction. Section 416 of the Criminal Procedure Code provides that if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may if it thinks fit, commute the sentence to imprisonment for life.[80]

LEGAL STATUS OF A DEAD INDIVIDUAL

A Dead Man is not a Legal individual. Salmond was of the view that as soon as a man dies he ceases to have a legal personality. Dead men do not remain as bearers of rights and duties, as it is said that they have laid down their rights and duties with their death. Thus, with death personality comes to an end. Yet, law to some extent, recognises and takes account of the desires or intentions of a deceased person. The criminal law provides that any allegation against a deceased person, if it harms the reputation of that person if living and is intended to

[79] Legal Personality, LawNN, (Jul.16, 2021, 12:10 PM), https://www.lawnn.com/legal-personality/.
[80] Singh, *supra*, 185.

hurt the feelings of his family or other near relatives, shall be offence of defamation under Sections 499 and 500 of the Indian Penal Code. Further, Law secures a decent burial to all dead men. Section 297 of Indian Penal Code provides punishment for committing crime which amounts to causing indignity to any human corpse. The Supreme Court in the case of *Ashray Adhikar Abhiyan v. Union of India*[81] has held that even a homeless person when found dead on the road, has a right of a decent burial or cremation as per his religious faith. The Law carries out the wishes of the deceased, as a Will made by him regarding the disposal of his property is used for distribution of his/her property. This is done to protect the interest of those who are living and who would get the benefit under the will. The distribution is subject to the condition of a proper Will under the Indian Succession Act, 1925.[82] A dying declaration of the deceased is admissible in evidence under Section 32 of the Indian Evidence Act, 1872. Under the Copyright Act, 1957, the Copyright of an author in his literary or artistic work is protected during his lifetime and 60 years after his death.[83]

LEGAL STATUS OF ANIMALS

Till the end of the 20th Century, Law did not recognise animals as persons. Salmond regarded them as mere objects of legal rights and duties but never subjects of them. Thus, animals were regarded as not capable of having rights and duties and hence they were not legal persons. If an animal was killed or hurt, it was regarded to be an offense against its owner, and not the animal *per se.* However, in ancient times animals were regarded as having legal rights and being bound by legal duties. Under the ancient Jewish Code if an ox wounded a

[81] Ashray Adhikar Abhiyan v. Union of India, AIR 2002 SC 554.
[82] Ibid.
[83] Singh, *supra*, 186.

man or woman with its horn resulting in his or her death, then the Ox was to be stoned and its flesh was not to be eaten.[84] There are many examples in ancient Hebrew Codes where Cocks, Bulls, Dogs and even the trunks of Trees which had fallen on Human Beings were tried for homicide.[85] There are similar instances of such cases in India as well. In number of cases, it has been found that, animals were sued in courts in ancient India. In India, under the modern era, Law protects the Rights of Animals in the several ways for instance, animals cannot be harmed except for self-defense. Further Cruelty to animals is punishable under the Prevention of Cruelty to Animals Act, 1960. The Indian Trusts Act, 1882 allows for the creation of a charitable trust for the maintenance of Stray Cattle, Broken Horses and other animals. Such a trust is created with a view to promote public welfare and advancement of religion. The Delhi High Court, in *People for Animals v. Mohammad Mohazzim and Another*[86] held that Birds have a fundamental right to live with Dignity, and they cannot be subject to cruelty. They have a right to fly and not to be caged. Recently in a Landmark decision, in the case of *Karnail Singh v. State of Haryana*,[87] the Punjab and Haryana High Court opined, that the entire animal kingdom, including avian and aquatic species, are legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All citizens throughout Haryana were declared to be persons in *loco parentis* (human face for the welfare/protection of animals).

LEGAL STATUS AND RELIGION

[84] Ranjan, *supra* note 4.
[85] LawNN, *supra* note 10.
[86] People for Animals v. Mohammad Mohazzim and Another, 2015 SCC Online Del. 9508.
[87] Karnail Singh and Others v. State of Haryana, AIR 2019 P&H HC.

It has been judicially held that Idols are to be considered as judicial persons with a distinct and separate legal personality. Thus, an Idol can hold property in its own name. Similar to a minor, it has a guardian which is the priest or the Pujari who is required to look after the interests of an Idol. An Idol kept at home is not regarded as a Judicial Person.[88] In *P. N. Mullick v. P. K. Mullick*,[89] the Privy Council held that an Idol is a legal person and has the right to have its location duly respected. Further, a disinterested next friend can represent it in Litigation. The view was upheld by the Supreme Court in *Yogendra Nath Naskar v. Commissioner of Income Tax*[90], it was held that if an idol can hold the property, it must pay taxes. The same can be done through its manager (Shebait). These further cements its (Idol) status as a separate judicial entity. In the case of Legal Status of Mosques, the various judicial proceedings and opinions have given opposing views. For instance, the Lahore High Court in *Maula Bux v. Hafizuddin*,[91] held that a Mosque is a Legal Person capable of suing and being sued in its own name. This view has been held to be incorrect by the Privy Council. However, the Privy Council subsequently, allowed an appeal from a Mosque, in the case of *Jumma Masjid Mercara v. Kodimaniandra Deviah*[92], and thus impliedly held that a Mosque is a Legal Person.[93] The Supreme Court in *Shriomani Gurudwara Prabandhak Committee, Amritsar v. Somnath Dass* held that The Guru Granth Sahib (the central holy religious scripture of Sikhism) is a Legal Person. But it shall be considered a Legal person only when

[88] Nature of Personality, Toppr, (Jul.16, 2021, 1:00 PM), https://www.toppr.com/guides/legal-aptitude/jurisprudence/persons-nature-of-personality/.
[89] P. N. Mullick v. P. K. Mullick, (1925) 52 IA 245.
[90] Yogendra Nath Naskar v. Commissioner of Income Tax, (1969) 3 SCR 742.
[91] Maula Bux v. Hafizuddin, AIR 1925 Lahore 372.
[92] Jumma Masjid Mercara v. Kodimaniandra Deviah, AIR 1962 SC 847.
[93] Ibid.

it is installed in a Gurudwara. The Court further held, the Text is a Legal person, and thus different from other religious texts.

LEGAL STATUS OF HOLY RIVERS

In New Zealand, the Whanganui River Claims Settlement Act, 2017 enacted by the Parliament of New Zealand, conferred legal personality on the Whanganui River.[94] On March 20, 2017, the Uttarakhand High Court, in the case of *Mohammed Salim v. State of Uttarakhand and others*[95], expressed the utmost expediency to give legal status to rivers Ganga and Yamuna as a living person/legal entity in accordance with Articles 48A and 51A(g) of the Constitution. The Court held the Director of Namami Gange, Chief Secretary of Uttarakhand and the Advocate-General of the State as persons in *loco parentis* to protect, conserve and preserve the rivers and their tributaries. This decision gained wide popularity across the world as India became the second in the world after New Zealand to declare river as a living entity. But despite the popular approval of the verdict, the Supreme Court, in a subsequent Special Leave Petition filed by the Government of Uttarakhand, stayed the order of the High Court.[96]

CORPORATE PERSONALITY

Corporate Personality is the creation of law. Legal personality of Corporation is recognized both under English and Indian law. A Corporation is an artificial person enjoying the capacity to have Rights and Duties and hold property. The individuals forming the *corpus* of

[94] Whanganui River Bill, New Zealand Parliament, (Jul.16, 2021, 1:00 PM), https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/.
[95] Mohammed Salim v. State of Uttarakhand and others, AIR 2017 UK HC decided on 20th March 2017.
[96] Singh, *supra* ,190.

corporation are called its members. The juristic personality of corporations pre-supposes the existence of three conditions i.e., There must be a group or body of human beings associated for a certain purpose, there must be organs through which the corporation functions, and the corporation is attributed will by legal fiction. A corporation is distinct from its individual members.[97] Corporations are classified into two categories:

CORPORATION AGGREGATE

It is an association of human beings united for the purpose of forwarding their certain interest. For example, a Limited Liability Company. Such a company is formed by a number of persons who as shareholders of the company contribute or promise to contribute to the capital of the company for the furtherance of a common object. Their liability is limited to the extent of their share-holding in the company. A limited liability company is thus formed by the personification of the shareholders. The principle of separate corporate personality of a company was recognized in the case of *Saloman v. A Saloman & Co. Ltd.*[98] Under the Indian law, Corporation Aggregates includes all those bodies or associations which are incorporated under a statute of the Parliament or State Legislature. Thus, all the trading and non-trading associations which are incorporated under the relevant statute such the State Trading Corporation, Municipal Corporation, Roadways Corporation, the Public Companies, State Bank of India, the Life Insurance Corporation, Universities, Panchayats and Corporative Societies come under this category.

CORPORATION SOLE

[97] Singh, *supra*, 191.
[98] Salomon v. A Salomon & Co Ltd [1896] UKHL 1.

It is a legal person whose office is personified by law. In other words, a single person, who is in exercise of some office or function, deals in legal capacity and has legal rights and duties. A corporation sole is perpetual. Examples include the office of President of India, the Governors of States, Attorney General of India, Comptroller and Auditor General of India, the Crown in U.K. etc. Generally, Corporation Sole are the holders of a public office which are recognized by law as a corporation. A Corporation Sole is an illustration of double capacity. The object of a corporation sole is similar to that of a Corporation Aggregate. In it a single person holding a public office holds the office in a series of succession, meaning thereby that with his death, his property, right and liabilities etc., do not extinguish but they are vested in the person who succeeds him. Thus on the death of a Corporation Sole, his natural personality is destroyed, but legal personality continues to be represented by the successive person. Consequently, the death of a Corporation Sole does not adversely affect the interests of the public in general.[99]

LEGAL STATUS OF KARTA

The Karta is the manager of Hindu Undivided Family (HUF) and has wide powers by way of controlling the affairs of the HUF. The Karta enjoys his position in the HUF by operation of law without any agreement and consent of other members of HUF. He stands in a fiduciary relationship with other members, but he is not accountable to anyone. The position of Karta is similar to that of Corporation Sole.[100]

[99]Aarsha, Corporate Personality, Legal Services India, (Jul.16, 2021, 2:17 PM) http://www.legalservicesindia.com/article/173/Corporate-Personality.html.

[100] Singh, *supra*, 193.

LEGAL STATUS OF CONSTITUTIONAL/GOVERNMENTAL AND OTHER ENTITIES.

The Union of India and various States in India enjoy Corporate Personality by virtue of Article 300 of the Constitution. Therefore, the both the Union of India, and the States can sue and can be sued in their own name.[101] Whereas, The RBI has a corporate existence because it is an incorporated body having an independent existence under the Reserve Bank of India Act, 1934.[102] Further, the Societies registered under Societies Registration Act, 1860 have been held to be legal persons. Similarly, Registered trade unions are considered as juristic persons under the Trade Unions Act, 1926.[103]

CONCLUSION: The analysis of Personality, in the field of Jurisprudence makes it adequately clear that Law attributes legal personality to certain non-living entities such as companies, institutions etc. which helps in determining their rights and duties. Clothed with legal personality, these non-living personalities can for instance, use and dispose of property in their own names. At the same time, presently the continuous of existence of Natural persons is not denied by Law. Thus, Legal personality has been provided to Unborn Persons, Dead Individuals, Idols, Mosques, Holy Texts and Rivers. At the same time the provision of Corporate Personality has allowed Corporations to have their own separate Legal entity. Thus, only an incorporated body can sue or be sued and an unincorporated body cannot sue or be sued in its own name. Various judicial decisions have expanded upon the concept of Personality. There is a difference of opinion amongst various Jurists as to the theories of

[101] Ibid.
[102] Ibid.
[103] Aarsha, *supra* note 28.

Legal and Corporate Personality. Thus, while Salmond is of the opinion that personality is conferred for some limited purpose only, others Jurists such as Maitland have regarded organised groups as having all the characteristics of a natural person. Similarly, Kelsen through his analytical approach to legal personality has concluded that there is no divergence between natural persons and legal persons for the purposes of law. Thus, in the simplest form, personality implies conferring of rights and duties. In conclusion, the convenient attribution of rights and duties to various persons through the conception of legal personality is an example of the growth of a complex modern legal framework.

CRITICAL ANALYSIS OF INDIA'S NUCLEAR DOCTRINE

- THARA ELIZABETH THOMAS

Abstract

India's ascend as a thermonuclear power has always played a huge role in stabilizing the power balance between the five nuclear nations and the rest of the world. In May 1998, soon after India refused to be part of the Non-Proliferation Treaty (which was considered discriminatory towards the non-nuclear powers and legitimized the monopoly of atomic weapons), a series of nuclear tests were conducted at Pokhran, Rajasthan. This led to the formulation and adoption of the one page-long India's Nuclear Doctrine, in January 2003, which was based on the Draft Nuclear Doctrine (National Security Advisory Board, 1999). The paper gives a brief overview of the evolution of the doctrine. The doctrine is based on the principles of No First Use and Credible Minimum Deterrence, whose adequacy has been called into question by many Indian strategists in the wake of new developments such as Pakistan's Tactical Nuclear Weapon (TNW). The paper examines the ambiguity of the doctrine to analyze its effectiveness. The paper also attempts to answer, whether the doctrine requires revision or updates based on the current political landscape..

Keywords: nuclear, doctrine, ambiguity, deterrence, strategy

Evolution of India's Nuclear Doctrine

The late 1940s witnessed the beginning of the thermonuclear program of India under the guidance of Homi J. Bhabha. Jawaharlal Nehru urged world leaders against the usage of

nuclear weapons and championed comprehensive nuclear disarmament. But alas, it was in vain as the nuclear arsenal kept rising.

After the People's Republic of China conducted nuclear tests in 1964, the five nuclear powers (UK, USSR, US, France, and China) who are also the permanent members of the UN Security Council, tried to impose the Nuclear Non- Proliferation Treaty, here forth referred to as NPT, 1968 on the rest of the world.

The NPT was signed and ratified in 1970. Upon signing the treaty, a country agrees to give up any present or plans to enter into a thermonuclear nuclear arms race in return for access to peaceful uses of nuclear energy. India along with Pakistan, Israel, North Korea, and South Sudan refused to sign the NPT. This is because India vehemently opposed any international treaties that took away nuclear powers from certain countries while legitimizing the monopoly of the five nuclear-weapon powers. Another reason for not signing the NPT is because India saw China's thermonuclear threshold as a threat that could tip the conflict between China and India in the favor of the former.

In 1974, amidst the ongoing negotiations on NPT and economic aid provided by the US and Canada, India in defiance of the international community conducted a peaceful atomic test codenamed Smiling Buddha. It was during the tenure of Prime Minister Indira Gandhi who claimed it was not a weapon but a symbol of advancement. Later, in May 1998, India conducted a series of nuclear explosions named Pokhran II which legitimized India's position as the first nuclear-powered country without signing the Non-Proliferation Treaty. The plutonium used in this test was made using a CIRUS reactor which was imported from Canada and the heavy water imported from the US. In retaliation, heavy criticism was drawn

from Canada, China, and Pakistan; the US and Japan imposed sanctions on India. It took a lot of years to gain back that trust and prove to the rest of the world that India is a responsible country and its thermonuclear arsenal was just for protecting the boundaries of the country and not to misuse the power by encroaching into another country. The India-US nuclear deal signed in 2008, after nearly 30 years of US-imposed sanctions and removal of 40-year-old sanctions on uranium import by the Liberal government in Canada is proof of a change in attitude towards India.

India's Nuclear Doctrine is based on the Draft Nuclear Doctrine which was released by the semi-official National Security Advisory Board (NSAB) in August 1999. The official doctrine deviated from DND which includes suggesting that India could potentially retaliate using atomic weapons in the case of a major chemical and biological weapons attack and India's retaliation to the adversary's nuke attack would be massive. Ex-National Security Advisor, Shivashankar Menon's said in a 2010 speech that India's doctrine is only indicative of no first use against non-nuclear powers which implies that NFU does not apply to. His remarks have faced heavy criticism since but no similar stance was reiterated subsequently.

In March 2012, the Institute of Peace and Conflict Studies in New Delhi, an independent think tank of public policy, assembled a non-official task force of strategic analysts. This committee produced an alternate nuclear doctrine that kept true to the core themes of the official doctrine except for preference of the term "punitive" over "massive" concerning retaliation.

Key Features of the Indian Nuclear Doctrine

1. No first use: The foundation of India's nuclear strategy is the doctrine of no first use (NFU). It refers to a pledge or a policy undertaken by a nuclear power against the usage of nukes as retaliation unless it is attacked using nukes by an adversary in the first place. Earlier, the concept of NFU was applied for CBW. According to this policy, nuclear warheads will be only used as retaliation against any attack on Indian territory or Indian forces stationed anywhere. India will use sufficient retaliatory weapons capability if deterrence failed. India will not take the first strike but punitive retaliation will be taken as a response.

2. Establishment and sustainment of a credible minimum deterrent: Credible Minimum Deterrence (CMD) is the other pillar on which India's nuclear policy is based. In nuclear strategy, minimal deterrence entails that the nuclear facilities of the State should seem adequate to the opposing party such that potential attackers would calculate that the initial nuclear attack would be exorbitant. According to Lieber & Press (2006), in terms of pure minimal deterrence, the only purpose of nuclear warheads is to deter an adversary in possession of a nuclear arsenal by making the cost of the first strike unacceptably high. A minimal deterrence doctrine is, almost by definition, one of no-first-use with constrained but assured second-strike capability; it focuses on minimal deterrence over mutually assured destruction (MAD).

3. Threat of massive retaliation: Massive retaliation or massive response is a nuclear strategy in which a state pledges to retaliate to a first strike using a force that is disproportionate to the size of the attack. The objective is to deter another state from making an initial attack. For such a strategy to work, the threat of retaliation must be made public knowledge to all possible aggressors. The aggressor should be under the impression that the

defending State can carry out second-strike capability in the event of an attack. The aggressor has to also believe that the State with a massive retaliation policy will use retaliatory weapons including nuclear weapons on a massive scale.

This policy works along the same line as mutually assured destruction (MAD), with the important caveat being that even a minor conventional attack on State could result in all-out nuclear retaliation. In the scenario wherein, India is subjected to any conventional military attack or nuclear attack by an enemy, the country's retaliation to a first strike will be massive with an intention to inflict unacceptable damage that would make the first strike unjustifiable.

4. Nuclear warheads would not be used against states that are not in possession of nuclear weapons. This also excludes nations that are not aligned with any nuclear power.

5. Nuclear Command Authority: The decision on whether to retaliate with nuclear warfare against an enemy, lies with the nuclear command authority which comprises of elected representatives of the state. In other words, the Indian bureaucracy does not have any authority or say while taking decisions on thermonuclear retaliation. Absolute control and power to release nuclear weapons would be with the highest political entity of the country i.e., Prime Minister of India, or the designated successor(s). The present head of NCA is Prime Minister Narendra Modi.

6. India may retaliate using nuclear bombs if there is a threat of both conventional military conflict and weapons of mass destruction against Indian territory or Indian security forces. This includes any chemical and biological attack.

7. India strives for non-discriminatory comprehensive nuclear disarmament to create a nuclear-free world. India's commitment to no-first-use of nuclear weapons means that

endeavors shall be made to prompt other States in possession of nuclear weapons to join an international treaty banning first use.

Discussion on No First Use

Undoubtedly, the most controversial facet of the nuclear doctrine is India's NFU pledge. Ever since the adoption of the policy was made public knowledge, it has been crucified as reductant by Indian strategists and retired military officials. According to Menon (2009), NFU is "not so much a strategic choice, but a cultural one". Lt. Gen. B. S. Nagal (Retd.), the former commander in chief questioned the efficacy of NFU policy. Kanwal highlighted that it would be immoral for the leaders in India to make a decision that is perilous to the population.

Indian critics often criticize the policy as it is seen to restrict the capital's options in a conflict with Pakistan. This is because, unlike China, Pakistan has blatantly refused to adopt the pledge of NFU, and has indicated in several instances that they would launch a nuclear attack if deemed necessary. Pakistan's leaning for a pre-emptive nuclear strike has given placed them in a superior position and has had a significant influence on India's ability to retaliate. This was pretty evident after the 2001 and 2008 terror attacks where India could only respond with a relatively subdued response. In India, the NFU policy has been called into question for the reason that it opens up Pakistan to a better position both in a strategic and military sense to take initiative. At the same time, the policy puts India in a weaker position, without the ability to be proactive. Pakistan's ability to prevent conventional conflict with India due to its threat of a pre-emptive strike is the main reason why no first use has been a topic of debate.

However, Sartaj Aziz, Pakistan's national security advisor, defended pre-emptive action for being completely deterrent. He argued that if there hadn't been a first use policy there would have been another war between India and Pakistan after the terror attacks in 2001 and 2008. Hence, the adoption of the first use policy by Pakistan was justifiable. .

On the other hand, major analysts in India contend it would reinforce deterrence if Pakistan had to worry whether their actions might incentivize India to use nukes first. Some extremists argue that India should take the next step and expand its armory to one that's capable of nuclear pre-emption. Then Pakistan's nuclear forces could be taken out way before the initial strike, so India need not worry about second-strike capability.

A study by the University of Colorado Boulder and Rutgers University paints a scary picture of a hypothetical war between India and Pakistan in the relative future. A nuclear war between India and Pakistan could potentially kill 50-125 million people in less than a week. This the more than the death toll six years of World War II combined. This is excluding the effect the war would have on the environment and the climate. The results would be catastrophic.

Recently, Rajnath Singh, India's Defence Minister Singh signaled towards India moving away from no-first-use. This statement would have been seen harmless in any ordinary circumstances. But with the BJP election manifesto pledging to study and revise India's nuclear doctrine to be harmonious with changing geostatic realities, all bets are off. Although the manifesto does not stipulate the revisions that would be made, the easiest assumption to make is the removal of NFU policy, even though unprovoked reversal seems

highly unlikely. The recent terror attack in Pulwama has reinvigorated the debate on NFU and has given enough reasons for reversals.

There is no question that the removal of NFU might affect the nuclear stability present currently among South Asian countries. The sweeping diplomatic victories like the lifting of sanctions, membership in the Wassenaar Agreement and the Missile Technology Control Regime, and multilateral trade of fissile material, might go down the drain if India opts for first use. There will also be other international repercussions as the pristine image of India carefully cultivated by Indian diplomats and officials as a rational nuclear state, which does not make foolhardy decisions, will be doubted. The main reason why this image was bolstered was to be seen separate from Pakistan, as a more responsible player in the nuclear scene, and also to be treated as a significant diplomatic member far beyond South Asia. This was also the main argument while actively pursuing full membership in the Nuclear Suppliers Group.

Singh's word, in the present domestic scene, is especially worrisome. Predictably, some chief draftsman of the doctrine raised the alarm. Shyam Saran, India's former national security advisor, warned that India's reputation as a reliable and responsible nuclear state would be damaged if NFU is withdrawn. Ex-President Trump's insistence on mediating the Kashmir issue suggested renewed fear of nuclear stand-off in the subcontinent.

The increased hostility to NFU policy is due to Pakistan's increasing inclinations towards the development of tactical nuclear weapons, the incredulity of India's deterrent capability, and lastly, India's alacrity to retaliate massively if provoked. With the constant threat of Pakistan’s TNWs looming over India, there is indeed a question of the credibility of NFU and

whether it's time to revisit it to strengthen India's strategic position. But there is no doubt that removal of the same would be a move that would tilt the axis of geopolitics.

Debate on Credible Minimum Deterrence

Credible minimum deterrence is the other crucial facet of the doctrine and it refers to the number of arms required to successfully deter any adversary. According to Buzan, "deterrence as a concept purport to stop an unwanted action by the adversary before they occur and encompasses both denial and the possibility of retaliation".

Whether the conventional wisdom that introduction of a complex concept such as deterrence into nuclear warfare would stabilize the crisis is still a question up for debate. The essence of nuclear deterrence is convincing the enemy that the eventual benefits from an undesirable action defeat the unholy purpose sought by them. In short, the risk outweighs the benefits. To convince the adversary of the same, it requires an in-depth knowledge of the adversary's motive, decision-making process, abilities, and objectives. At the same time, the country has to keep in mind one's capability to make good on the threat that is made and the ability to convince the adversary of the consequence of their action.

India's nuclear doctrine specifies the requirements for credible minimum deterrence which includes sufficient and survivable nuclear forces that would be operationally prepared at all times. This deterrence capability should be effectively communicated to all adversaries. There should also be an effective early warning capability with a potent intelligence agency.

India's thermonuclear arsenal has to be of a certain size and nature so that it would be able to endure plausible degradation in the preliminary strike, due to its commitment towards NFU,

as well as retaining the capability of inflicting massive and unacceptable damage. Keeping with the objectives of CMD, India's nuclear forces are triad in nature, i.e., aircraft, mobile land-based missiles, and sea-based assets. Survivability of the retaliatory nuclear forces must be ensured through a balancing of deceptive, mobile, reductant, and dispersive capability of the force.

For the nuclear deterrent to remain credible, the nuclear forces have to be in an operational capacity at all times so that they can promptly shift from "peacetime deployment" to "fully employable forces". These forces should also have the proficiency to retaliate efficiently even if there is considerable degradation due to enemy assault. "Effective intelligence and early warning capabilities" play a significant role in deterrence as not just the means to counter-attack an adversary but also for retaliation.

"Robust Command and Control System" is also important for maintaining credibility. In India, Nuclear Command Authority was established for this exact purpose. It constituted of the Political Council and the Executive Council. The Executive Council, chaired by the National Security Advisor, gives their official opinion on whether a counter-strike is necessary to the Political council, while the Political Council, chaired by the Prime Minister, has the authority to launch attacks. The adversary must be made aware of not just the deterrence capability but also the willingness to use it if the situation calls for it. In simple terms, India should be able to communicate to all parties its capabilities.

In Indian strategic analysis, there are competing schools of thought when it comes to nuclear deterrence. While the nuclear rejectionist advocates non-proliferation nuclear weapons based on deterrence, pragmatists (moderates) and maximalists (expansionist) disagree on the

number of nuclear weapons necessary to maintain peace. Moderates like K Subrahmanyam and Gen.K.Sundarji is mainly concerned with balancing India's nuclear capacity with a smaller arsenal.

According to K. Subrahmanyam, “the essence of deterrence” is an efficient “command and control chain from the political level to the implementing level” at the same time survive “under the worst conditions of decapitation attack”. Subrahmanyam is also of the opinion that importance should not be given to the ratio of damage inflicted but rather on the amount of suffering that the adversary calculates that the states can endure. This extreme endurance to onslaught is only possible granted India’s military forces are survivable. Therefore, India has to focus more on its second-strike capability, after possible degradation to its forces, before focusing on senselessly increasing the number of weapons.

Expansionists like Karnad are deterrence pessimists, who believe the concept requires all-around attention, and to achieve real deterrence the state has to give more priority to acquiring a larger arsenal of thermonuclear weapons. He argued that when NSAB inserted the concept of CMD into the DND, it was the concept was ambiguous deliberately to facilitate the development of its nuclear arsenal. But since then, India has lost its vision. He claims that the inclusion of minimum to characterize deterrence to be "a real military liability". Subrahmanyam supported leaving an option for enlargement for nuclear weapons, should a need arise. But as all expansionists, Karnad argued that a large nuclear force would be a strategical position for India."

Moderates fear that in the wake of political ineptitude and absentmindedness of India's political leadership in military tactics, India will develop a much larger armory, making a

minimalist approach towards nuclear deterrence no longer a viable option. However, Ambassador Satish Chandra believes that to maintain the credibility of its threat of massive retaliation, India has to acquire an arsenal that would meet its threat perceptions, and therefore it is better to leave the question of size and quantity of armory not fixed and up for question. Moreover, Lt. Gen. B. S. Nagal also supported the idea of India keeping CMD vague which doesn't limit India's extend of retaliation. CMD is only achieved when the destruction caused to the adversary's society is to an extreme where recovery seems like an impossibility. CMD requires the capability to convince the enemy that a conflict with India will render its economy "regressed", the military dissipated and the political leadership crumbled.

In this rapidly changing political landscape, it is very evident that there is a need for re-examining the notion of deterrence in the context of nuclear warfare so that vagueness surrounding it can be cleared. It should be unambiguous as to how far must India go to prove the credibility of its threat of retaliation with devastating consequences against any undesirable action taken by an adversary. There is also the question of whether there is a real need for a larger nuclear arsenal as the maximalists suggest, or whether we should focus less on quantity and quality of the nuclear warheads and lay stress on maintaining counter strike ability which is the view canvased by the pragmatist.

Other Ambiguities

According to India's nuclear doctrine, the quintessential aim of possession of thermonuclear weapons is deterrence. The term used in the doctrine to represent an adversary is "state" or

"entity" where the notion of entity denotes "non-state actors" or more plainly violent non-state actors like "terrorists" and "militant guerrilla forces". It has become a cause of dread among intelligence circles that these elements might acquire the knowledge and technology to develop nuclear weaponry. In that scenario, can India assault these entities; like for instance, Afghanistan based outfits like Taleban and Al Qaeda or the Pakistan based mujahideen groups like Jaish-e-Mohammed (JeM), Hizbul Mujahideen, Jammu, and Kashmir Liberation Front (JKLF), Lakshar-e-Taiba (LeT), and Harkat-ul-Mujahideen, if Nuclear Command Authority finds it to be a credible threat. As it is open to interpretation, it leaves room for exploitation. The question remains whether these weapons could be used to suppress those forces who supports the autonomy for the people in the Kashmir if links could be found between them and terrorist like Jaish-e-Mohammed.

Terrorist groups pose a significant threat as they are free from any obligation from following international mandates unlike powers established by law. Since they often cannot be defined territorially, it is difficult to retaliate appropriately and those not liable can get involved in the crossfire. Pakistan also poses a two-fold threat as firstly their security measures, as history shows, is inadequate (and also shown only very minimal interest) when it comes to controlling terrorist groups, and secondly, their military and security establishments have always been under the scanner realizing the likelihood of passing on critical know-how and technology behind nuclear weaponry to proxy actors who have an agenda of their own.

Another interesting fact is that India's nuclear policy only promises NFU to states that do not possess nuclear weapons and are not aligned with nuclear powers. This raises the question of

whether India could potentially use its nuclear weapons against countries like Japan and Germany due to their bilateral treaty or NATO-aligned security cover from the United States.

Conclusion

Withdrawal of the NFU policy has its repercussions. To start with, taking away such a policy would affect India's position as a sensible and responsible nuclear nation. It will also go against what India has pledged to fulfill which is comprehensive nuclear disarmament. Moreover, it will disturb the tactical yet fragile power balance that exists in the subcontinent. But it is evident that NFU has led India to a strategic paralysis up to some extent and has fallen short in achieving the goals intended. It has even reached a position where the credibility of the nuclear arsenal has been called into question. Therefore, a periodic review of the doctrine can do no harm as all doctrines require one, and considering how fast India's diplomatic environment is changing, it's inevitable to revisit India's stance on most strategic matters. But, if India's elected representatives feel that there is indeed a need for reviewing the doctrine, they should be cognizant of what the consequences would be for South Asia's strategic stability. They should keep abreast of the cost of making any changes, whether significant or not so that it does not result in setbacks. It is highly unlikely that the political leadership of this country would completely revise the doctrine without caution. But after years of vigorous and passionate debate, there is a hope that doctrine will go through a well-needed review which in turn would fortify the doctrine.

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AN ANALYSIS OF LEGISLATIVE RELATION BETWEEN CENTER AND STATES

- **SHUBHANGI BARANWAL**

Abstract:

The Constitution of India imagines a plainly characterized division of power between Union Government and State Governments besides in certain predefined conditions which is identified in our Constitution of India. The Union government and the administrations of the states practice power inside their individual cutoff points. The division of power visualized by the Constitution of India is encapsulated in an intricate plan under which the authoritative, managerial and monetary forces of the Union government and the state governments are specified in detail in *PART XI-RELATIONS BETWEEN THE UNION AND THE STATES (Article 245-263)* and this paper is essentially centered around the examination of distribution of Legislative power between the Union and States referenced under *CHAPTER 1-LEGISLATIVE RELATIONS (Articles 245-255).* A Characterized feature of the appropriation of power, the Indian bureaucratic design typifies, is that, every one of the residuary powers are gotten to the Union Government. The Constitution of India unequivocally vests in the Parliament the selective option to administer as to any matter notwithstanding counted top of the Union List, which isn't specified in the State List or the Concurrent List

Key Words- Center State Relations, Legislative power, Residuary power, Concurrent list etc.

I. INTRODUCTION

Dr. B.R. Ambedkar once said that the basic principle of the federations is that the legislative and executive authority is divided between the centre and the states not by any law to be established by the centre, but by the constitution itself. In no way does the member state rely on the centre for their legislative or executive authority. The states and the centre are the same in this matter. The above statement makes it very clear that the Constitution of India establishes a federal framework as the basic structure of the government of the country. It is from the Constitution, which separates all competences-legislative, executive and financial-that union and states derive their power. As a result, the states do not delegate to the Union but are autonomous within their spheres as provided for in the Constitution

The use of the word "*Union*" in the Constitution of India was deliberate. Regarding this Dr. B.R. Ambedkar observed that "*the drafting committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the states to join in a federation and that the federation not being the result of an agreement, no state has the right to secede from it. The Federation is a union because it is indestructible.....*" It is also worth remembering that the provinces which became states under the federation were mere administrative units and no sovereign entities. No doubt, under the Constitution of India the states enjoy supremacy within their spheres, subject to the limits and conditions imposed by the Constitution. The territories of the states, however, are the territories of the union of India over which the union laws operate. There is a single citizenship for the whole country[104].

[104] Maheshwari, B.L., *op.cit.*, pp.114-115.

The Centre-State relations are regulated by the provisions of Indian Constitution and State Constitution, where it persists. The mode of their formation and the pre-federal status of their constituent units largely determine this relationship[105]. The circumstance in which India adopted the federal mode was unique. The princely states played a significant role in the emergence of the Indian federation. These states had never constituted a compact or continuous mass during British rule but had been scattered all over the country. They had also differed widely in terms of size and population. Besides, there had been wide variations in the privileges and status enjoyed by the princes.

1.1 STATEMENT OF PROBLEM

This Seminar paper is essentially centered on the examination of distribution of Legislative power between the Union and States mentioned under *CHAPTER 1-LEGISLATIVE RELATIONS (Articles 245-255) of PART XI* of our Indian Constitution.

1.2 HYPOTHESIS

The Constitution of India envisages a well defined division of legislative powers between the Union government and the state government in accordance with which the Union government is vested with powers to legislate on subjects of national importance and the State government is vested with the powers to legislate on the subjects of local and provincial interests. Besides the exclusive legislative powers that the Union and the State legislatures are given, concurrent powers of legislation are given to both the Union Government and the State Governments over a number of other subjects. The scheme of distribution of powers is

[105] *Ibid.,* p.126

embodied in Part XI of the constitution together with the Seventh Schedule of the Constitution of India.

1.3 OBJECTIVE

1. To study the legislative relation between centre and state.
2. To critically analyze the distribution of power between centre and state in the form of union list, state list and concurrent list.
3. To study the theory of theory of territorial nexus.
4. To understand the parliament power to legislate on the state matter subjects.

1.4 RESEARCH METHODOLOGY

This research is a doctrinal research. The main source of information is secondary in nature. The study is not empirical in nature. Cases decided by the Courts, books, scholarly articles, magazines and newspaper articles are relied upon to develop and examine the judicial approach with regard to the distribution of Legislative power between the Union and States - LEGISLATIVE RELATIONS (Articles 245-255) of the Indian Constitution.

II. CENTRE-STATE LEGISLATIVE RELATIONS

The Constitution of India establishes a dual constitutional authority with a simple separation of powers, each of which is sovereign within its domain. The Indian federation is not the result, and Indian units cannot leave the union, as a consequence of an arrangement between independent units. There are also extensive provisions in the constitution to govern the various dimensions of relations between the centre and the states. Central-state relations are separated by the following:

1. The Legislative relations;
2. The Administrative relations;
3. Financial relations.

But this Research Paper will cover the relationship between legislature and centre-state.

LEGISLATIVE RELATIONS

The legislative ties between the centre and state are governed by Articles 245 to 255 of Part XI of the Constitution The constitution of India makes two-fold distribution of legislative powers –

(1) With respect to territory

(2) With respect to subject-matter

1) TERRITORIAL JURISDCTION

ARTICLE 245 (1) – Subjects to the provisions of this constitution, Parliament may make laws for the whole or any part of the territory of India, and the State Legislature may make laws for the whole or any part of the state.

Concerning the territory, Article 245(1) requires a State Legislature to make law for the entire or any part of the State to which it belongs, subject to the dispositions of this constitution. Unless the boundaries of the state itself are broadened by an act of the Parliament, a State legislature can not broaden territorial jurisdiction in any circumstance. On the other hand, Parliament has the right to legislate "on all or part of India's territory, which does not only include the States but also Indian Union territory." It also has the strength of extra-territorial laws that no state legislature has. This means that the laws made by Parliament would apply

not only to individuals and territory but also to Indian subjects living anywhere in the world. However, there are other limitations on Parliament's territorial competence. However, certain unique clauses of the constitution are subject to the plenary territorial competence of Parliament. These are the following:

1. The President can make regulations that are equivalent to the laws of Parliament, some territories of the Union, such as the Andaman and Lakshadweep Region, and these regulations may revoke or amend a law adopted by Parliament on the said territories (Article 240).
2. Notifications can be issued by the governor (Para 5 of Schedule 5(3) of the Indian Constitution) that prevent or change the application of the Acts of Parliament to any programmed area of government.
3. Para 12(1)(6) of schedule VI says that, by public notification, the Governor of Assam may, subject to such exceptions or adjustments as may be stated in the notification, direct that any other act of Parliament shall not apply to the autonomous region or district of the state of Assam or apply to that region or section.

In the case of *A.H. Wadia v. CIT*[106],

the court held that if there is an appropriate relation or link between the State and the object, i.e. subject matter of legislation, the State legislature cannot make extraterritorial law (objects can not be located physically within territorial limits of the State).

In the case of *Wallace Bros, v. CIT*[107],

[106] A.H. Wadia v. Income Tax Commissioner, Bombay, AIR 1949 F.C. 18
[107] (1948) 50 BOMLR 482

A licensed business in England was a partner in an Indian venture. Indian revenue tax authorities were aiming to tax the company's entire income. The Court affirmed that the derivation for a year of the substantial part of its revenue from British India has given a corporation sufficiently territorial relation to justify that it is regarded domestically in India for all purposes of income taxation.

Hence, the above particular requirements have been adopted since the areas mentioned in the question are outdated and may cause difficulties or other injurious effects if they are implemented indiscriminately.

POWERS OF PARLIAMENT

• Article 245 makes it clear that a law passed by the parliament shall not be deemed to be invalid on the ground that it has extra-territorial application.

• Suppose parliament passes an Act to the effect that if a person domiciled in the territory of India marries wheresoever's while his former wife is alive and has not been divorced by a competent court, he shall be guilty of the offence of bigamy and shall be liable to punishment for seven years.

THEORY OF TERRITORIAL NEXUS

• The state legislature may make laws for the whole or any part of the State. This means that state laws would be void if it has extra-territorial operation i.e., takes effect outside the state.

• However, there is one exception to this general rule. A state law of extra-territorial operation will be valid of there is sufficient nexus between the object and the state. This

theory also applied in the case of *Tata Iron & Steel Co. v. State of Bombay*[108] , apex court applies this theory to Sale- Tax Laws.

• *State of Bombay v. RMDC* [109]–

The Bombay state levied a tax on lotteries and prize competitions. The tax was extended to a newspaper printed and published in Bangalore but had wide circulation in Bombay. The respondent conducted the prize competitions through this paper. The court held that there existed a sufficient territorial nexus to enable the Bombay State to tax the newspaper. If there is sufficient nexus between the person sought to be charged and the state seeking to tax him, the taxing statute would be upheld.

2) SUBJECT MATTER

A federal structure demands that the centre and States share their forces. The nature of the distribution is different in every region, depending on the local and political context. For instance, in America, sovereign states did not like the absolute central government subordination. Therefore, although maintaining the remainder, they believed in confiding subjects of popular interest to the central government. Australia was pursuing just one set of forces in the United States. There are double listings in Canada, leaving the residue in the centre by the federal and provincial governments. The Canadians were mindful of the tragic circumstances that resulted in the Civil War of 1891 in the United States of America. We knew the vulnerabilities of the centre. And it was a good core that they wanted. The Canadian

[108] AIR 1958 SC 452
[109] State of Bombay v. R.M.D.C., AIR1957 SC 699

regime chose a strong centre as a result of the Indian Constitution-Makers. However, they have added one more list- a concurrent list.

III. THE EXTENT OF LAWS MADE BY PARLIAMENT AND BY THE LEGISLATURES OF STATES

It's a legislative method of the Union to control over states. So far as the subjects of law are concerned, the Constitution uses the Government of India Act of 1935 as its basis and subdivides authority into three lists between the Union and the States. These are:

(i)The Union list,

(ii) the State list, and

(iii) the Concurrent list.

There are 98 subjects on the Union List, over which the Union has exclusive authority. The topics on the Union list, for example, security and foreign relations, are of national significance, etc. There are 59 topics in the State List over which countries have exclusive jurisdiction. The concerns listed on a State list, such as public order, police and public safety, are of local or national importance. The Concurrent List contains 52 subjects like criminal and civil cases, marriage and divorce, economic and special planning unions, money, media, magazines, employment, management of the population and preparation of the families, etc. and both the Union and States can enact laws on this list but the federal rule prevails over state law in the case of a dispute between the law of the Central and the State law.

• Conflict between Union and State list – Union list will prevail.

• Conflict between Union and Concurrent list – Union List

• Conflict between Concurrent list and state list – Concurrent List

The purpose of the constitutional inclusion of the list was to ensure continuity in key legal principles across the country. Legislatures both in the parliament and in the State may make laws on matters mentioned above, but a preliminary and ultimate right of the centre is to legislate on established matters. In the event of a conflict between the law of the State and the law of the Union on a subject in the Concurrent List, the law of the Parliament shall prevail.

IV. RESIDUARY POWERS OF LEGISLATION

The Constitution also confers on the Union Parliament residual powers (subjects not mentioned on any of the three lists). Article 248 notes that, concerning anything that is not listed in any of the three lists, the Parliament has the exclusive authority to make legislation. It represents the constitutionalist inclinations to a strong core. Another unique feature of the residual powers is that the final judgment on whether or not a particular matter falls within the residual powers of the court. In comparison to the convention of other federations around the world, residual powers have been granted to the Union, where the residual powers are assigned to the States. In the case of a dispute, however, it is up to the court to determine whether a particular issue falls under the residual power or not. The Parliament is therefore allowed to enact any legislation on any issue not mentioned in List II or III. This authority shall include the authority to legislate, which does not include a tax on either of them (the Governor-General, and not a federal legislature which exercised these powers, must be observed until independence).

Entry 97 of List I also provides for the exclusive powers of Parliament to make laws on all subjects not mentioned in List II or III. The remaining powers of legislation shall be solely delegated to the Union Parliament under Article 248 and Entry 97 List I. The spectrum of

residual powers, however, is limited as all the topics included in all three lists and residual powers come under, or not, the Court's view of a case. The reasoning for this power is that it allows the House to legislate on any issue that has avoided the House's oversight and on the subject that currently can not be recognized. It requires Parliament, therefore, to enact legislation on topics that have taken society forward. The constitutional framers intended, however, that the use of residual powers should be the final and not the first step.

In the case of *Kartar Singh v. State of Punjab110* and *UOI v. H.S. Dhillon's case111,* the court held that parliament may combine its power with the residual power under Article 248 under entry into the Union List or Competition List.

Also in the case of UOI v. H.S. Dhillon, it was held that Gift Tax Act, Inquiry Act Commissions, etc. are valid under the parliamentary residuary power.

In the case of *State of A. P. v. National Thermal Power Corpn. Ltd112.* the Supreme court held that unless an entry does not state an exclusion from the area of legislation that is evident at the time of obvious reading, the absence of exclusion can not be read, if a particular clause in the Constitution that forbids such legislation is valid, as allowing the legislative power not expressly excluded from it.

V. PARLIAMENT'S POWER TO LEGISLATE ON STATE SUBJECTS

[110] 1961 AIR 1787, 1962 SCR (2) 395
[111] 1972 AIR 1061, 1972 SCR (2) 33
[112] Appeal (civil) 3112 of 1990

Though in normal times the distribution of powers must be strictly maintained and neither the state nor the centre can encroach upon the sphere allotted to the other by the constitution, yet in certain exceptional circumstances the above system of distribution is either suspended or the powers of the Parliament are extended over the subjects mentioned in the State list. The exceptional circumstances are –

(a) Power of parliament to legislate in the national interest.(Art.249)

Several Articles of the Indian Constitution defined the parliament's predominance in the legislative area. Article 249 provided that, where Rajya Sabha has declared, by a resolution approved by not less than two-thirds of the members present and voting, that it is required or reasonable, in the national interest for Parliament to lay down laws in respect of any matter mentioned in the State List referred to in the resolution, it becomes lawful for Parliament to lay down laws for the whole or any part of the proceedings. For the time in question, such a resolution was in place not for more than one year. However, the Rajya Sabha could extend the term of such a resolution for a further duration of one year from the date on which it would otherwise have ceased to operate. The law of Parliament, which Parliament should have been responsible for passing such a resolution by Rajya Sabha, ceased to have any effect on the expiry of a term of six months after the date on which the resolution ceased to be in force, except in the case of things done or omitted to be done before the expiry of that time. This provision allowed the Rajya Sabha, representing the States, to place any matter of local significance but national interest in the concurrent list. The Rajya Sabha can do so at any moment, whether emergency or not.

(b) During a proclamation of emergency

Article 250 notes that in the case of a declaration of emergency, Parliament shall have the power to make law on any item on the State List. This legislation shall extend in the case of a national emergency (Article 352) and every State in compliance with the Order of the President (Article 356) or the event of a financial emergency (Article 360). Under this time, the laws of the State or States shall remain inoperative to the degree that they are contrary to the law of the centre (Art. 251). Thus, the Parliament as a whole will legislate on the subjects specified in the State List while the National Emergency Declaration is in effect. However, the laws enacted by the Parliament according to this clause shall cease to affect the expiration of a period of six months after the termination of the Proclamation, except in the case of items done or omitted to be done before the expiration of that time.

(c) Parliament's power to legislate with the consent of the state (Art. 252)

Article 252 provides for regulation by invitation. If the Legislatures of two or more States adopt a resolution and order the centre to make a law on a specific item of the State Register, it shall be legal for the Parliament to make a law. In the first place, such law shall apply to the States which have made such a request, unless any other State may subsequently follow it by passing such a resolution. Third, such laws can only be amended or repealed by Parliament. The parliament may also make laws about a State subject if two or more states' legislatures agree that a parliament is allowed to make laws concerning any issue mentioned in the State List concerning that Matter. Subsequently, any act passed by the Parliament shall extend to those States and to any other State which has passed such a resolution. Parliament also has the power to amend or revoke any act of this kind.

(d) Parliament's power to legislate for giving effect to treaties and international agreements. (Art. 253)

To implement treaties or international conventions, Parliament shall have the power to legislate concerning any subject. In other words, even about a state issue, the usual distribution of powers does not preclude Parliament from passing legislation to satisfy its foreign obligations or through such legislation (Article 253). The Parliament may pass any Treaty, international agreement or convention, with any other country or state, or any decision taken during an international conference, association or other entity, within the whole and any part of the territory of India. Any law enacted by this Parliament shall not, in that it covers the subject listed in the list of States, be invalidated.

e) Under Proclamation of President's Rule (Art. 356)

By Article 356 and Article 357 of the Indian Constitution, the prevalence of Parliament was further defined. Article 356 stipulated that if the President was satisfied that there existed a situation in which the government of the State can not be enforced according to the provisions of the Constitution, he may declare exercisable by or under the competence of the Parliament the powers of the Legislature of that State. Parliament must delegate the legislative power to the President, as provided for in Article 357. The President may also allow the Parliament to exercise the powers of the State legislature during the Declaration of the Rule of the President as a result of the collapse of constitutional machinery in the State. Nevertheless, all such regulations passed by Parliament cease functioning six months after the declaration of the rule of the President is over.

VI. CONCLUSION

The Constitution authorizes the centre in the following ways to have control over the state legislature:

1. The Governor can withhold for President's consideration those forms of bills approved by the State legislature. The President has an absolute veto on them.
2. In the State legislature, even with the prior approval of the President as imposing limitations on free trade and commerce can bill are made on such matters enumerated in the State list.
3. It is necessary for the President for the States to withhold the bills of funds and other budgetary measures approved during national crises by the State legislature.

As a result, it is very clear from the scheme of allocation of legislative powers between the Union and the States that framers have bestowed more authority on the Parliament than against the States. The States do not have sole authority over the topics given to the States by the Constitution and therefore rendering the States, to that degree, subordinate to the Centre. The centralization pattern is contradictory with the fundamental values but, rather than adopting conventional provisions of a federal constitution, the legislative system is more concerned with country unity. All these provisions of the constitution are therefore justified as they offer clarification and eradicate the confusion between the powers of the centre and state. Unless this theory of legislative supremacy were to be removed, there would be a risk of two similarly dominant pieces of government giving rise to a dispute, agitation, confrontation, and confusion as a result of competing legislation. These provisions guarantee

that there is an overarching regulatory framework and that there is continuity in the basic laws.

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IS SECTION 124-A A THREAT TO INDIA?

- AGRATA JAIN

What is Sedition?

[113]Section 124A of the IPC, which deals with sedition, states, Whoever, words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

Sedition is not a bailable offense. Depending on the crime, the penalty may range from imprisonment up to three years to a life sentence and fine.

Is Law of Sedition in contrary to Freedom of Speech and Expression?

In 1961, the Punjab High Court ruled that sedition was unconstitutional because it violated Article 19's right to freedom of speech. Allahabad High Court then followed suit, and the case was referred to the Supreme Court. [114]The Apex Court ultimately upheld Section 124A's

[113] INDIAN PENAL CODE.SECTION. 124A

[114] Kedar Nath Singh vs State Of Bihar (1962 AIR 955, 1962)

constitutional validity in the case of Kedar Nath v. State of Bihar. There is more to sedition than criticizing the government and voicing dissatisfaction with its functioning. An act can be considered sedition if it instigates violence and is committed with the intention of disrupting the public peace or law.

[115]Article 19 of the Indian Constitution ensures freedom of speech and expression (a). It is an indisputable fundamental right.However, under Article 19(2), it is subject to some restrictions in the interests of India's sovereignty and integrity, security, neighbourly relations with other states, civil order, decorum, or morals, or in connection with contempt of court, defamation, or encouragement to commit an offence .

Individuals have a fundamental right to freedom and expression under Article 19(1)(a), which is limited in the interest of public order under Article 19(2) when it comes to sedition. In India, however, a recent trend shows that individuals are being charged with sedition under the IPC on grounds other than those limited to public order concerns. This provision should be declared illegal due to the ambiguity of its practical applicability.

[116]In Shreya Singhal v. Union of India, the Court held that a certain degree of proximity was required between the remark and the possibility for public disorder, regardless of the degree of contempt and abuse. This is a positive step forward in terms of sedition laws because it narrows the ambit of sedition. In this instance, the Court emphasized the importance of

[115] INDIA CONSTI. Art.19.
[116] Shreya Singhal vs Union of India ((2013 12 S.C.C. 73)

conducting a substantive and procedural study of the limiting statute in order to evaluate its reasonableness.

The continuation of such a clause hampers freedom of speech and expression, which is a supposedly fundamental right guaranteed by Article 19(1)(a) of the Constitution. India must evolve and change its sedition laws in order to keep up with societal changes. Furthermore, because sedition encompasses such a large range of activities, each conduct should be regulated by its own set of rules, instead of one broad offence with such harsh penalties.

Does a Democracy like India need a sedition law-

[117]The Supreme Court recently stated " Sedition provision section 124A of IPC is a colonial era which was used to silence dissent or protest against British and was used against Mahatma Gandhi and Balgangadhar Tilak. Does the government want to retain it after 75 years of independence?

Any criticism or comment on public actions, however strongly formulated, should be made clear by the explanations appendered to the main body of the section and would be compatible with the fundamental right to freedom of speech. The law only acts to prevent such actions in the interest of public order when the words, written or spoken ones, etc., have the malignant inclination or purpose of creating public disorder or disorder of law and order.

[117] The Hindu , https://www.thehindu.com/news/national/sedition-law-supreme-court-sends-strong-message-to-government/article35348364.ece

In our view, this section strikes the right balance between individual basic rights and the public order interest."

As a result, the legislation makes it abundantly clear that harsh criticism of the government is permissible as long as it does not promote violence or cause public disruption.

Incitement to violence or actual violence must be a direct result of the allegedly "seditious" remark. The allegation of sedition is not permitted in any other circumstance, particularly when people are expressing their democratic right to peacefully protest or simply criticizing the government's policies or acts.

[118]Governments have defended the need for the sedition law by claiming that it is necessary to "combat" terrorists, rebels, and secessionists. However, there are several other laws in place to address these issues. The journalism community has frequently suggested that courts issue regulations for making an arrest and filing cases under sedition law and other punitive laws like the Unlawful Activities Prevention Act.

Another benefit to the government filing sedition complaints is that, regardless as to whether subsequent prosecution is warranted, the legal procedure itself serves as a deterrent to criticism. [119]The criminal justice system grinds down the defendent, despite of innocence, is basically forced to defend himself and run around from court to police station for acquittal of his name, pointed out in the EPW editorial (2016).

[118] Liang, L. and Narrain, S., 2017. Protest and the Right to Freedom of Speech and Expression. Journal of Public Affairs and Changes, 1(1 Winter).

[119] The epw ,https://www.epw.in/journal/2019/32/book-reviews/sedition-cross-examined.html

Since Section 124-A can cover a wide range of issues, the government can use it to target anyone questioning their authority, whether it's JNU students, activists like Hardik Patel and Binayak Sen, authors like Arundhati Roy, cartoonists like Aseem Trivedi, or residents in Tamil Nadu protesting the Kudankulam Nuclear Power Plant. Cases like these highlight how this provision has been abused. In addition to slogans or statements, the law also makes it absolutely clear that violence must be threatened in order to be effective. In a sedition case, however, the whole trial procedure is the penalty – and most importantly, the deterrent against further protests.

Recent misuse of Section 124A-

[120]Historically, there have been a number of sedition cases against Muslims and Kashmiris in particular. Under strain from some Political party members or supporters, police filed a sedition case against 67 Kashmiri students at Meerut's Swami Vivekanand Subharti University (SVSU) in March 2014 for applauding Pakistan's victory in a cricket match. Ten schoolboys were charged with sedition in Uttar Pradesh's Kushinagar District in November 2014 after wearing Pakistani cricket team T-shirts during a Muharram procession

Before, many people called for prosecuting people such as Arundhati Roy and Prashant Bhushan under the charge of sedition for supporting plebiscites in Kashmir.

On 26 January 2021, six senior journalists, Rajdeep Sardesai, Mrinal Pande, Anant Nath, Paresh Nath, Zafar Agha and Vinod Jose — and Shashi Tharoor, Parliament member from

[120] ANAND, V.E., 2017. Freedom of Speech and Expression: A Study on Sedition Law and the Need to Prevent Its Misuse. *M*edia Watch, 8(1), pp.7-18.

the Congress Party, who "were deliberately posting tweets and circulating fake news." regarding the death of a farmer who died during the farmer's protest. Accusations including promoting hostility, acts that are adversely affecting maintaining harmony between religions, statements that encourage violence or ill-will, and sedition was included for the FIRs against them.While the Supreme Court has stopped entertaining these FIRs, in recent years cases filed have tremendously increased against journalists and political activists or opposition. A new Article 14 database indicates that between 2014 and 2020 the number of cases filed annually increases by 28 percent comparatively to 2010-2014.

[121]According to the Apex Court in many prior cases that language and words can be considered sedition only if they are specifically used to incite crowds into violence while observing the alleged sedition charge against students at Jawaharlal Nehru University, the Central University of Gujarat Teachers' Association in 2016 .

[122]In February 2021, a tweet by Greta Thunberg, a young climate activist, backing the ongoing farmer protest in Delhi, placed Disha Ravi, a young climate activist in India, in police custody. On February 13, the Delhi Police apprehended Disha from her Bengaluru home, suspecting her of compiling and disseminating a "toolkit" (a Google document with campaign information) to aid the movement. The Delhi Police's cyber unit has filed charges of sedition, criminal conspiracy, and incitement to enmity against the toolkit's "creators." The officials said they discovered a "conspiracy" by a coordinated international network to

[121] Anand, U., 2021. Disagreeing with govt is not sedition, says SC.
[122] Indian Express ,https://indianexpress.com/article/cities/delhi/delhi-high-court-disha-ravi-case-centre-response-7319778/

"instigate" farmer protests, including the violence in Delhi on Republic Day. According to the authorities, it was founded by the Poetic Justice Foundation, a pro-Khalistani organisation based in Canada, and it had a proper "action plan" for a virtual strike, as well as physical rallies outside Indian embassies and local government buildings. They claimed that two other activists, Shantanu Muluk and lawyer Nikita Jacob, were also involved in the plot. After ten days, Disha was released on bail.

The state has lodged sedition charges against Sharjeel Imam, a PhD student at JNU, and 50 students from Mumbai's Tata Institute of Social Sciences for shouting slogans in favor of Sharjeel, as well as a teacher and a woman whose 6-year-old child engaged in a school play against CAA-NRC-NPR. Each of these cases is a heinous depiction of an authoritarian regime suffocating opposition under the guise of sedition.

Interpretation of Section 124A-

The term "disaffection" is being used in the part of the Indian Penal Code that defines sedition. The word employed is broad enough to encompass any citizen's activity, which is in direct opposition to the legislation's stated goal. It goes against the Constitution's principles. This ambiguity allows police unrestricted authority to arrest anyone or everyone who said something that displeased the government and the prominent people in the room. The provision contains a lot of interpretative remarks, and the Supreme Court's decisions have not been able to limit the police's arbitrary actions under this section.

[123]In its reading of Section 124A, the Supreme Court explicitly states that it must be used against the state, not the government. A person has the right to criticise the BJP, the Congress, Mamata Banerjee, or the Communist parties. That cannot be considered as sedition in any manner. But when an individual begins to criticise India's constitutional state,he is in risk of being charged with sedition, and even then, the Supreme Court expressly states that there must be a direct incitement to violence. So, sedition is a very precise and serious offence, and it is state terrorism when it is used to silence and intimidate ordinary citizens who are raising a grievance.

Is Section 124A Outdated -

India is still following a British law, which was interpreted by the British in 1942. In an interesting twist, the British repealed the Sedition Act in 1967 and confirmed in 2009 that sedition didn't even in their common law. [124]While dealing with the case against 124A in 1950, after we had adopted the current Constitution, a bench of the Punjab & Haryana High Court, led by CJ Eric Westson and Jusutice Khosla, noted that the "law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has occurred" as India had become a sovereign democratic state.

[123] The Print, https://theprint.in/theprint-essential/criticism-of-govt-not-sedition-what-kedar-nath-ruling-that-sc-quoted-in-vinod-dua-case-says/671381/

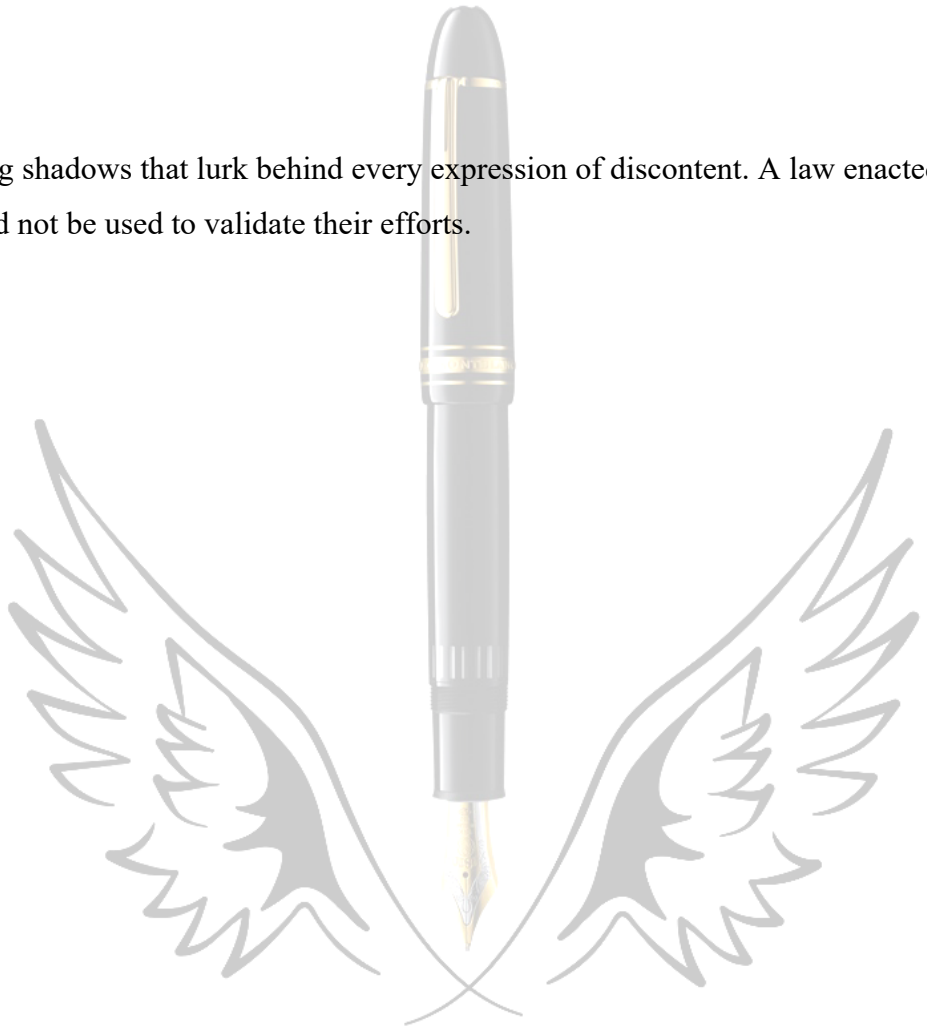
[124] Tara Singh Gopi Chand vs The State (1951 CriLJ 449)

As a result, it declared this section to be "void." By modifying the Indian Constitution to include the phrase "public order" in the exemption to freedom of speech, our legislature rendered this judgement obsolete. As a consequence, we have been operating under British law since 1942, with the British interpretation supplied in 1942.We don't need this vaguely phrased law of sedition being wielded at the whim of an unaccountable police establishment in this day and age. Both citizen freedom and state security are crucial, but public disorder cannot be confused with an intent to bring down the government or compromise state security, resulting in charges of sedition. We cannot expect pro-citizen laws on personal liberty because of our country's political culture. As a result, the judiciary's approach to dealing with these legislation needs to evolve.

Conclusion-

Gandhi described the sedition legislation as the "prince among the political provisions of the Indian Penal Code designed to restrict the citizen's liberty," and that "some of India's most beloved patriots have been condemned under it." "As a result, I consider it a privilege to be prosecuted under that section," he said. Dissenters and critics are still suffering under the weight of a government that will not accept their efforts to create a more perfect society a century later.The legislation was used to oppress those fighting for their freedom – the right to speak one's opinion and control one's own future – back then, as it is now. A democratic state should battle with its full strength to protect such liberties, and not go out of its way to undermine them. Authoritarian governments spend their days attempting to eliminate the

threatening shadows that lurk behind every expression of discontent. A law enacted 150 years ago should not be used to validate their efforts.



PERCEPTION OF SOCIETY ON PROSTITUTION: CASE STUDY OF LEGALIZATION ON PROSTITUTION IN INDIA

- AKRITI KANODIA

Introduction

The Indian society comprises of a large variety of people with an equally large amount of culture that has been passed down through the centuries. One of the oldest professions in the country, that has been through every phase of India's dynamic history is Prostitution or sex work can be prominently seen in Hindu mythology also. In these mythologies, the sex workers are referred to as apsaras who live in the lavish palace which belonged to the King of the Gods, Indra. Later in the pre-colonial period, there was a prevalent practice amongst the Hindu community where the female child was given up to show their devotion towards their god. This practice was called the Devadasi system. As the name suggests, Devadasi means being devoted to god and they are considered to belong to the god and were not required to marry any mortal being.

The women who were Devadasis were sexually liberated and excelled in various art forms like classical dance and music. Soon a system of exploitation and suppression followed this Devadasi system. It began during the colonialism period where the British started forcing their social restrictions and norms on the Indian society. They modified the fundamentals of sexual liberation, art and culture of devotions, femininity and bhakti, etc. along with diminishing feudalism. By the end of colonialism, the devadasis were being mistreated and mishandled by the temple priests; they were being sexually exploited and faced poverty. This led to the state of prostitution that is known today. There are around 10 million sex workers

in the country, out of which 30% are children. The business of prostitution earns about Rs. 40,000 crores annually2. It is a very large business which gets sidelined and hated.

In the last decade, there has been a surge of a movement called Feminism where people are fighting for equality for women. Many changes have been made because of this movement and people are working towards a better community for all. This movement has also led to talk about the treatment of women who are subjected to sexual violence and abuse. Activists and NGOs are fighting for justice on the behalf of these victims. People are becoming understanding and getting to know more about prostitutes while some parts of society still view them in the negative light. Perception of the society has a lot of power; for any big action to take place the society's views have to be considered. For legalisation of prostitution to happen or programmes and initiatives to be taken to protect the prostitutes, one must understand the society's views on them. It is also vital to understand the new generation's views on this large industry.

Role of prostitution in the Indian Society

Prostitution is an unfortunate by-product of the treatment received by people below poverty, lower caste, or women that were deemed impure by the society. They are not treated with respect and are seen as a commodity and not as a human being.

Poverty is the biggest cause of prostitution. India has a patriarchal society because of which women found it very hard to be financially independent as she was not privy to education, liberty and any skill training. Thus, at the time when Mughal empire was declining, and the situation was deteriorating a lot, women turned to prostitution began earning through this

profession.

Sometimes it was not a personal decision. The restrictive, orthodox Indian society would see the women as an object and would subject them to sexual exploitation. Often the women of the lower classes were mistreated and left to rot because of the caste system which gave the higher-class people the feeling of being entitled. Some other causes for prostitution to be the way it is are:

1. Abduction- 35% of the people involved in prostitution is because of them being abducted from their home place and then sold off.
2. Devadasi System- The system that had degraded long ago and has become an inhuman system that has religious sanctioning is the cause of 20% of the women involved in prostitution. Every year thousands of young girls are offered away to show devotion which results in them being accessible to urban prostitution.
3. Rape- Girls who get raped are not only shunned away from their own homes but are also subjected to similar incidents again and again. Being helpless and having no scope of justice, they turn towards brothels and become helpless prostitutes. Rape is the cause of 6% of the prostitution.
4. Children of Women in Prostitution- With a lack of help or programmes that could help the children to have an alternative future, 98% of the children of the women in prostitution too end up as prostitutes whether they want to or not.
5. Social Factors- As mentioned before, women were viewed as commodity or an object which is why society would view girls as pure and impure person. No one would want to marry an impure girl (girl who has had sexual experiences) and shun her from this

community. The impure girl would turn to prostitutions to have financial stability. This is not only for young girls; widows too had the same fate.[125]

As mentioned earlier, prostitution is a system that has been present for a very long time. It has a large role in the society which is often ignored or shamed by the people. It is caused by inequality and it deepens inequality. Society views it as a poor and desperate person getting money for sex while some say prostitution is better than a bad marriage but these people are all a third party and do not know how prostitution is as a prostitute. "I have not been treated well throughout my life. I cannot live with others of my age; I cannot breathe the same air. I chose my profession, and I am paying for it." A quote of a prostitute highlights that even a person who chooses this profession cannot live with dignity[126].

Most of the time, sex-work does not lead to money for the women involved as the money is collected by the brothel managers and the traffickers. They minimal amount to the women and thus their situation remains the same[127].

Legalisation of Prostitution

Many countries have either declared prostitution to be legal or tolerate it unlike how India ignores their existence. The reasons many countries have legalised it are-

[125] Dr. Tulsing Sonwani, Prostitution in Indian Society: Issues, Trends and Rehabilitation (Last visited 19 December 2020) <https://www.ugc.ac.in/mrp/paper/MRP-MAJOR-SOCI-2013-25158-PAPER.pdf>

[126] Youth ki Awaaz, The Big Debate: Should Prostitution Be Legalized In India, Youth ki Awaaz, (Last visited 7 January 2021) <https://www.youthkiawaaz.com/2009/12/the-big-debate-should-prostitution-be-legalized-in-india/>

[127] Lise Mckean, Society accepts prostitution as inevitable instead of recognizing it as an absence of choice', Scroll.in (Last visited 6 January 2021) <https://scroll.in/article/807130/society-accepts-prostitution-as-inevitable-instead-of-recognising-it-as-an-absence-of-choice>

1. Protection of minors- An estimated value of 10 million children is involved in sex-work worldwide and 625000 children in India alone are involved in the system of prostitution. Countries that have legalised it are able to regulate it and employ strict measures to remove minors from the profession and confirm their safety.
2. Can regularly conduct medical check-ups- Medical check-ups is a necessity as it helps to prevent the spread of sexually transmitted diseases (STDs) of both the workers and the buyers. The check-ups also include provisions of birth control and good medical facilities for the women who work as sex workers. This allows growth of the people and benefits the standard of living of the country overall. In Singapore particularly, every customer is provided with a condom and facility to shower.
3. Reduction of rapes and sexual assaults- with a legal profession available, people have an easier way to satisfy their sexual needs. Legalisation of it also allows the brothels to open in secure and safe places with proper security to prevent abuse of the women working. It will also assist in eliminating forced prostitution by the entire system being under legal control, it will allow law upholders to site a situation of forced prostitution and prevent it from happening.
4. No health-related issues- Compared to drugs and alcohols that are prohibited for use because of the downsides they have to the health of a person, prostitution is natural and does not have any serious threat to the person.

Benefits like taxation and increase in the revenue of the country is also some of the reasons why prostitution was legalised in countries like Thailand. Overall protection of the people who are put on the path of sex-work becomes easier. As a country is about its people, it is its

duty to ensure a safe place to live because one thing can be assumed that an industry like prostitution, that is as old as history itself, is not going to stop but it can be helped and protected from harm.[128]

Prostitution is not regulated and PITA does not recognise male prostitutes. Prostitution is also not recognised under labour laws and thus it is not only unregulated it is also uncontrolled and very unsafe and this is not counting the human right violations and human trafficking that undergoes to get people to work.

Before a demand for legalisation from the government, there needs to be the demand for policies and considerations that can support the people in the industry and can give them the respect as well as the financial help they deserve. It is all the more necessary now as after the pandemic they have suffered a lot, financially, as there has been no work for them. Durbar Mahila Samanwaya Committee that works in spreading basic necessities were representing 65000 sex workers and providing them food, and sanitary napkins. They work from Sonagachi, which is located in Kolkata, that is the largest red-light district in Asia. They mentioned to Deutsche Welle that the government only provides help to the workers that have a ration card. In reality, less than 50% of the sex-workers own a ration card and many are not even documented[129]. They don't get the daily ration and with no work, they do not

[128] Yashi Verma, Legalization of Prostitution in India, Legal Service India, (Last visited 6 January 2021) <http://www.legalserviceindia.com/legal/article-3392-legalization-of-prostitution-in-india.html#:~:text=This%20act%20was%20passed%20in,a%20sexual%20act%20in%20public.>

[129] DW Asia, Sex workers in India find new ways to earn amid coronavirus pandemic, Deutsche Welle, (last visited 6 January 2021)

earn enough to support themselves and their family. Acknowledging their existence, providing security and financial considerations are some of the methods that can be the first steps taken.

Empirical Analysis

Views of the Youth on Prostitution

Prostitution is a sensitive matter that is viewed by everyone differently so to understand what the youth thinks about prostitution there was a survey conducted regarding what the people individually thought about prostitution and how it should be perceived or treated in the society. The majority of the respondents were of the ages 15-20 with 49% of the answers submitted by them, followed by 40% of the answers by the age group 25-30. The survey was answered by 100 people.

The survey was divided into two parts. The first part being the concept of prostitution and the second part being the legalisation of prostitution.

One of the first questions that were asked was if they thought the community has prostitution or not. The responses are tabulated below based on the region of India they are from.

Does your community have prostitution?

Area where they are from	Yes, prostitution exists in the community	No, prostitution does not exist in the community	I don't know

<https://www.dw.com/en/sex-workers-in-india-find-new-ways-to-earn-amid-coronavirus-pandemic/a-54526927>

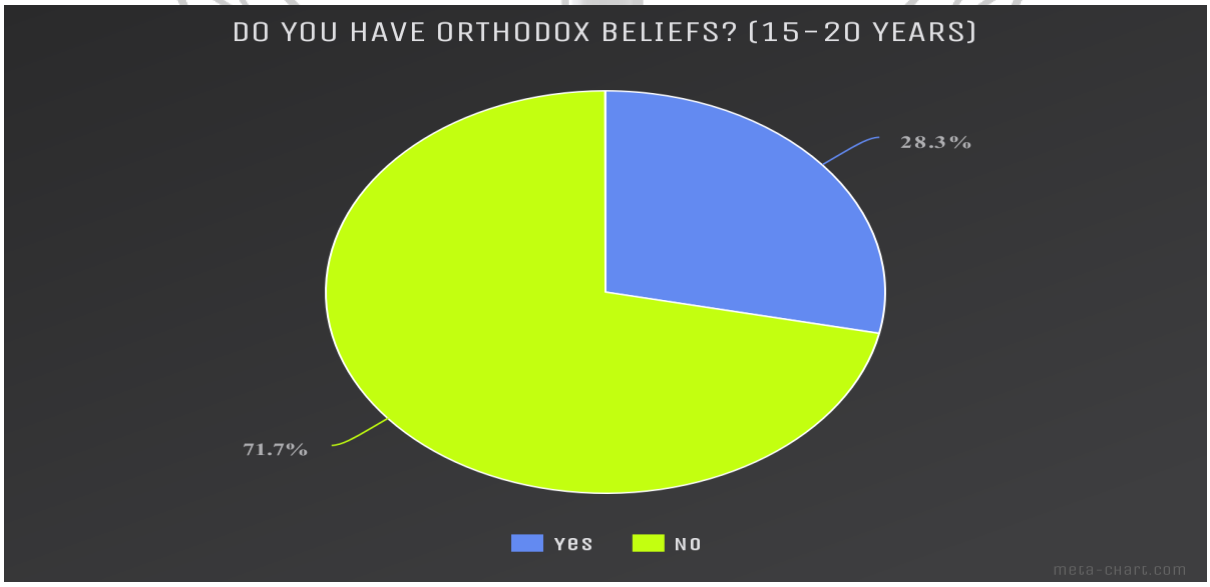
North, metropolitan	7	2	1
North, Urban	9	3	1
North, Rural	1	0	0
South, Metro	1	0	0
South, Urban	3	1	4
South, Rural	3	0	0
East, Metro	9	0	3
East, Urban	6	1	0
East, Rural	2	0	1
West, Metro	9	2	2
West, Urban	5	3	4
West, Rural	4	0	4
Center, Metro	2	0	0
Center, Urban	0	1	4
Center, Rural	2	0	0
Total	63	13	24

The majority of the respondents do believe that their community has prostitution while a small portion thinks against. There is also a fair share of people who do not know about its presence in their community.

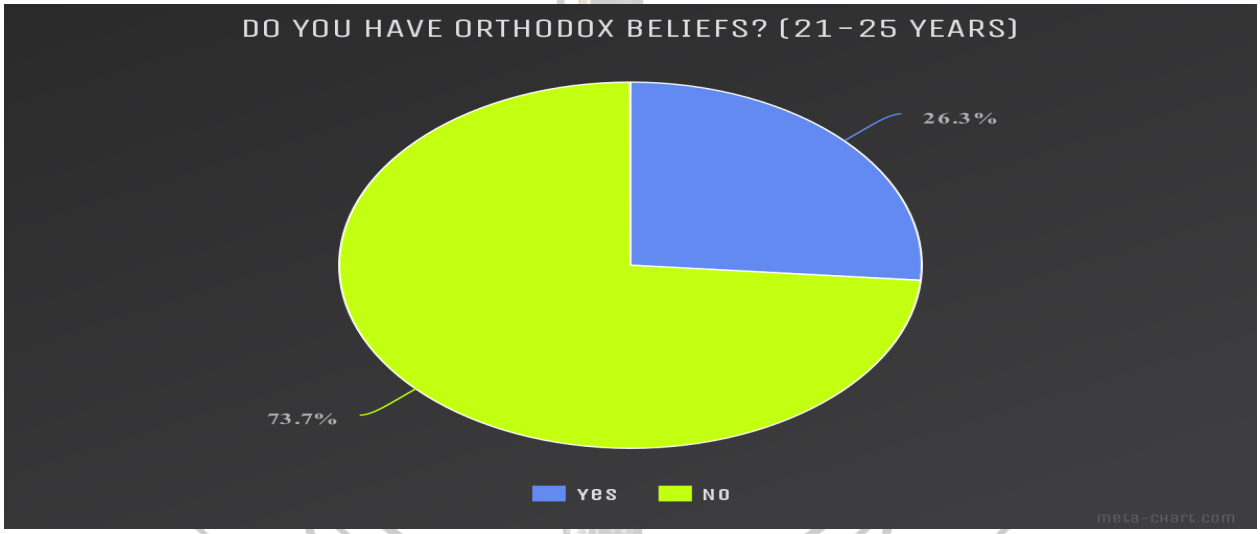
To understand the mindset and thinking of a person, the survey also asked the age of the person and if they believe that they have orthodox beliefs about prostitution. Orthodox beliefs means that the person has more traditional approach to the matters as compared to modern. There seemed to be a corelation between the ages and their approach. Given below are pie charts that illustrate the answer according to the age groups. The number of respondents from the 15-20 years old was 51, 21-25 years old was 12 and 26-30 was 37.

Do you think you have orthodox beliefs about prostitution?

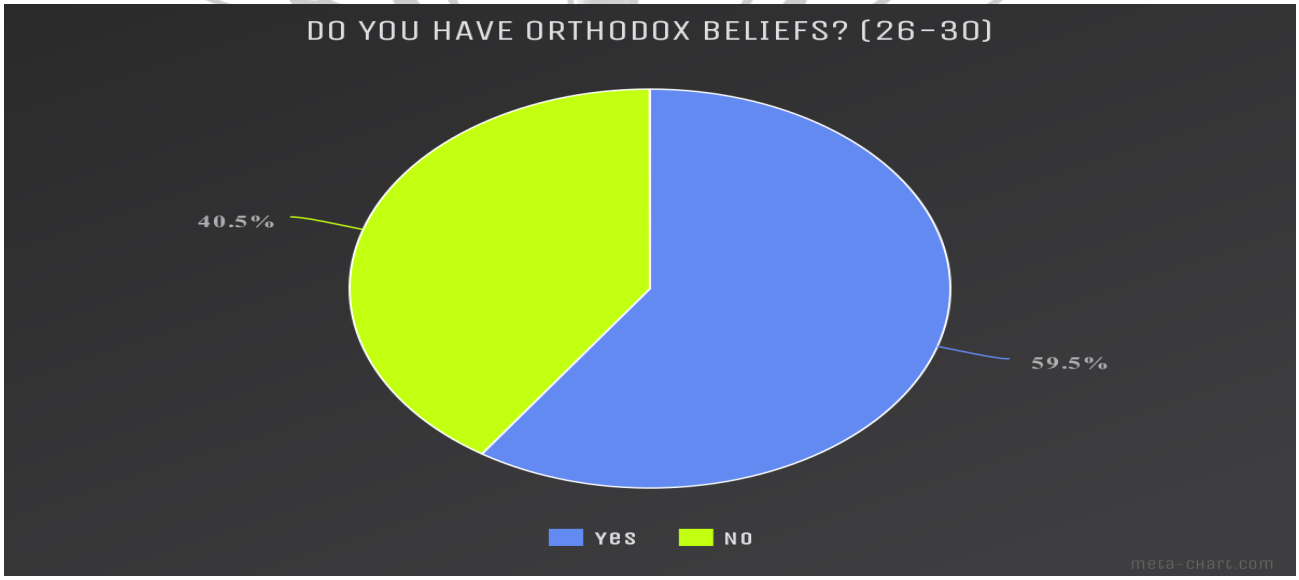
15-20 years old



21-25 years old



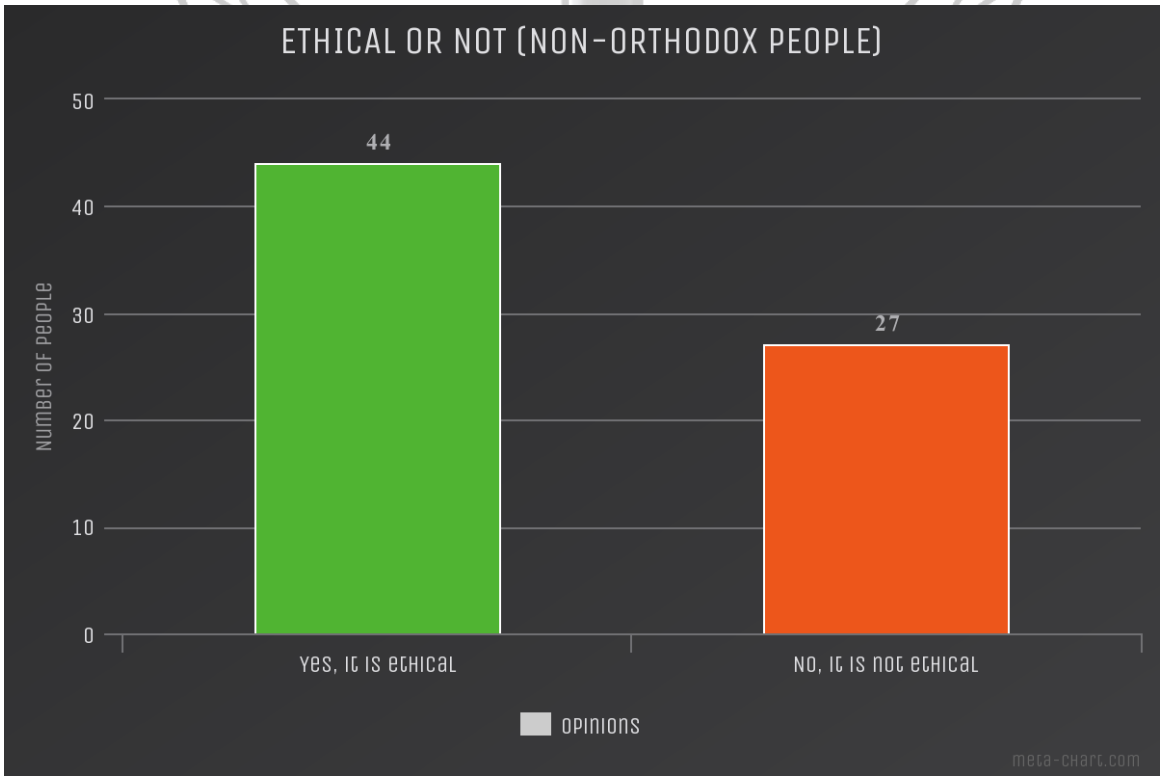
26-30 years old



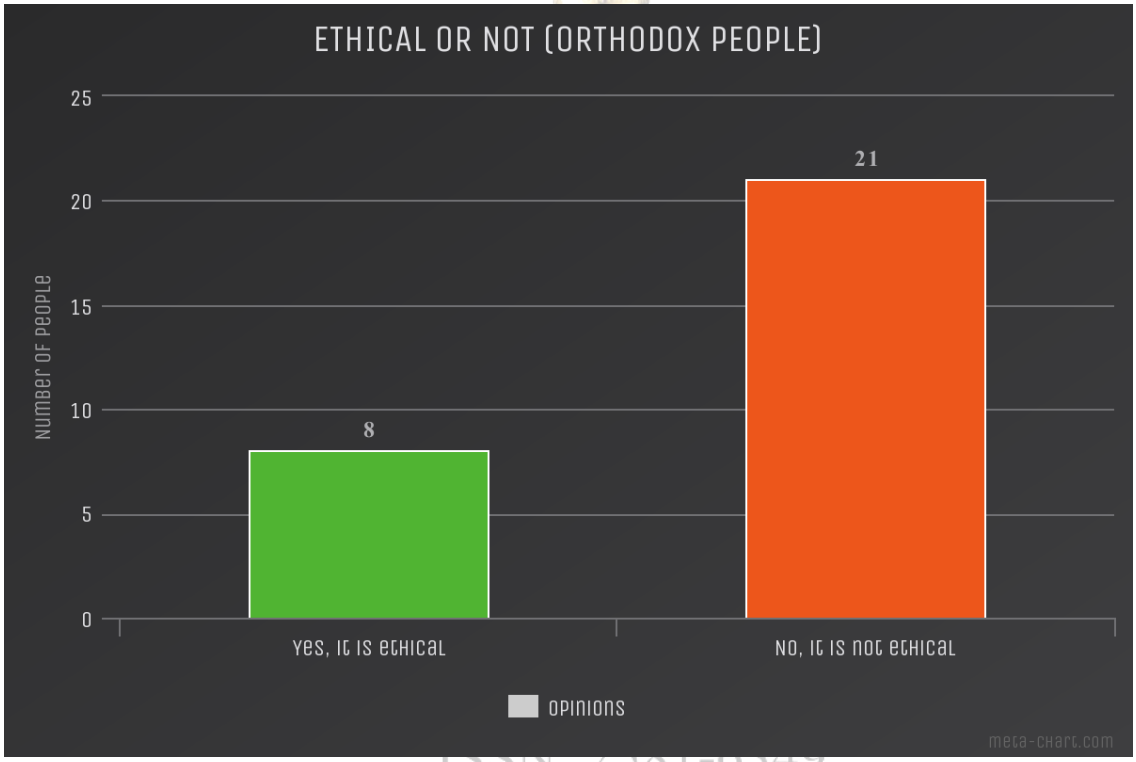
From the above data it can be seen that majority of the people in the age groups of 15-20 and 21-25 do not believe themselves to have an orthodox view on matters of prostitution while people from the age group 26-30 do believe that they have an orthodox view.

Going further into this, the next question that was asked was whether they felt that the concept is ethical or not. Based on their earlier responses the next chart shows how people who said that they didn't have orthodox opinions replied to the question "Do you think prostitution is ethical?"

Do you think prostitution is ethical?



A little over half the number of people who believe they did not have orthodox beliefs about prostitution also said that they think prostitution as an activity is unethical. The following graph illustrates the response to the same question by the people who believe that they have orthodox opinion regarding the matter.



The chart indicates that lesser than half the number of people who felt that they have orthodox beliefs regarding prostitution think that prostitution is ethical while a majority thinks not.

These graphs show that how the concept of ethical is different regarding this sensitive topic.

While some people can distance themselves with the vulgarity and painful nature of this concept and answer purely based on the ethics they believe in, some intertwine the factors and choose to answer. The opinions of orthodox belief in itself is subjective because of which the answers to the questions seem conflicting for some. People with unorthodox opinions can find prostitution unethical as they feel that the activity in no circumstance should be sold for money even though the activity in itself is of no problem while on the other hand people with orthodox views might feel the exact opposite.

Whether the people know if their own community has prostitution or not, most of them if not all, do know the concept and its role in the society. Based on this concept there were some questions that involved the responders to talk about what they think the society thinks about prostitution and what they themselves think.

What do you think Indian Society thinks about Prostitution?

Family Income (Per annum)	It is a bad or sinful activity	It is a Taboo	Society pretends to be ignorant of it	The people are as good as untouchables	The sex worker is immoral	It is a good thing
15 Lakh or more	16	7	4	10	5	1
5 Lakh to 15 Lakh	7	10	4	11	4	1
Below 5 Lakh	4	5	4	4	2	4

In the above table it can be seen that most of the people believe that the society views prostitution in negative light. The reasons can be conservative nature of the people, their religious views and for some people it can be the fear of STDs[130].

The following question asked them for their view on this matter.

What do you think about Prostitution?

Family Income (Per annum)	I don't care or think about it	It is an unfortunate job	It is an acceptable thing like any other job	It is a contract and a choice	It is disgusting and should not exist
15 Lakh or more	8	11	4	4	8
5 Lakh to 15 Lakh	9	5	10	7	9
Below 5 Lakh	4	4	4	3	11

From the above table one can see that people whose income falls above 15 lakhs either don't care about it or haven't thought about it enough to have an opinion or think it is an unfortunate thing. This can be because most of the people who are involved in prostitution

[130] Prostitution. In: ed. *Social Problems.* University of Minnesota.

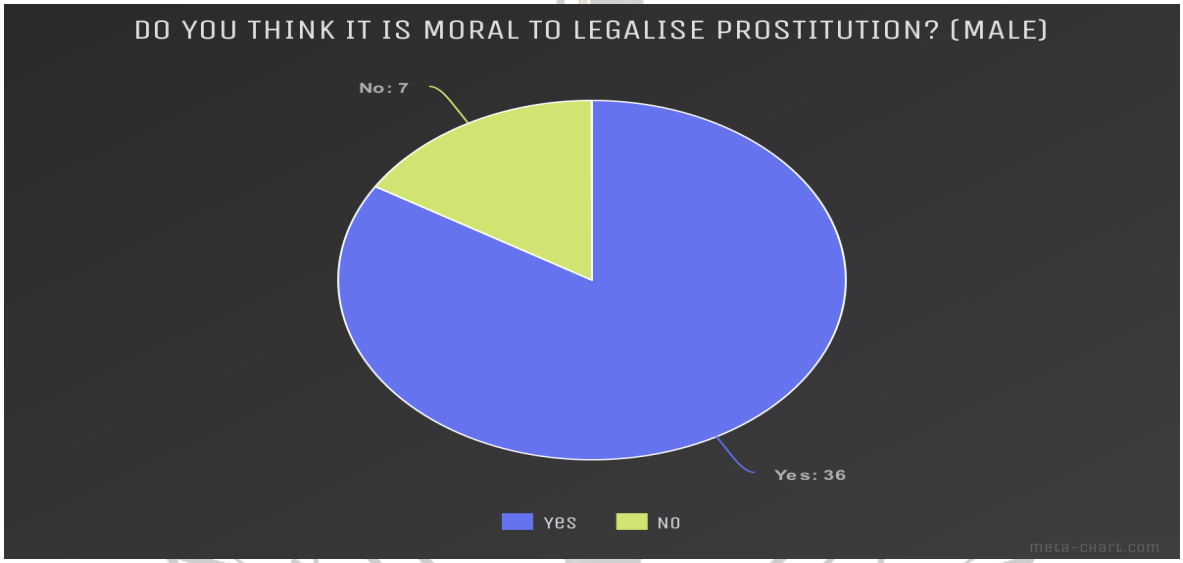
are part of it because of not having much resources. Brothels are also found in the slum sides of the community[131].

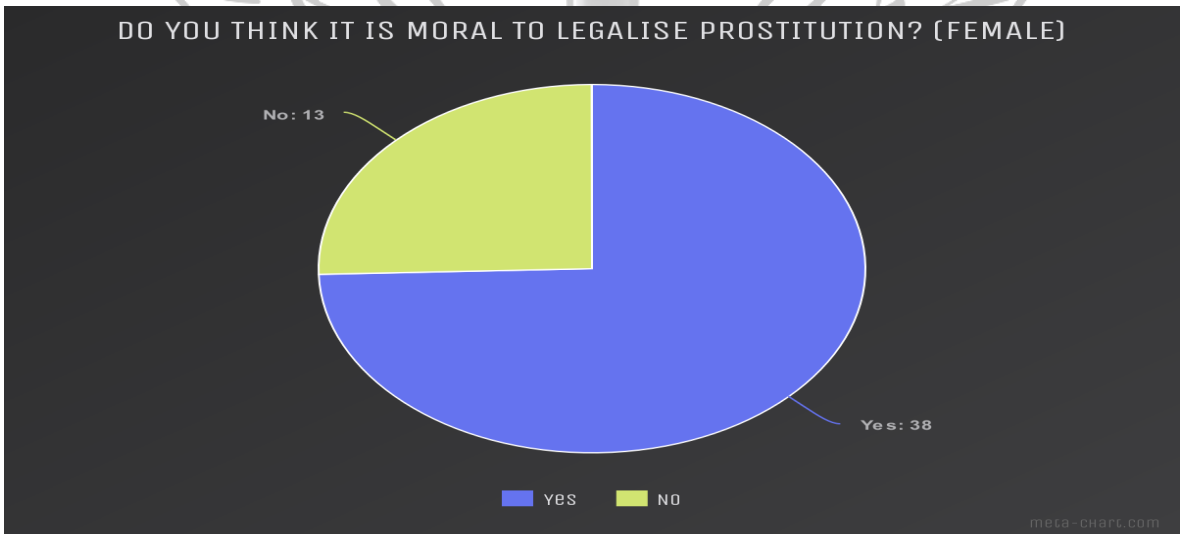
The one question where all the 100 people responded exactly the same was the question of the treatment that is received by the prostitutes. People who have orthodox opinions, unorthodox opinions or of any background, all responded that prostitutes are mistreated. Everyone agreed on the fact that no matter how the person was introduced to the system of sex-work, they all were treated poorly which showed that the system was in a tardy state and they all believed that something ought to be done.

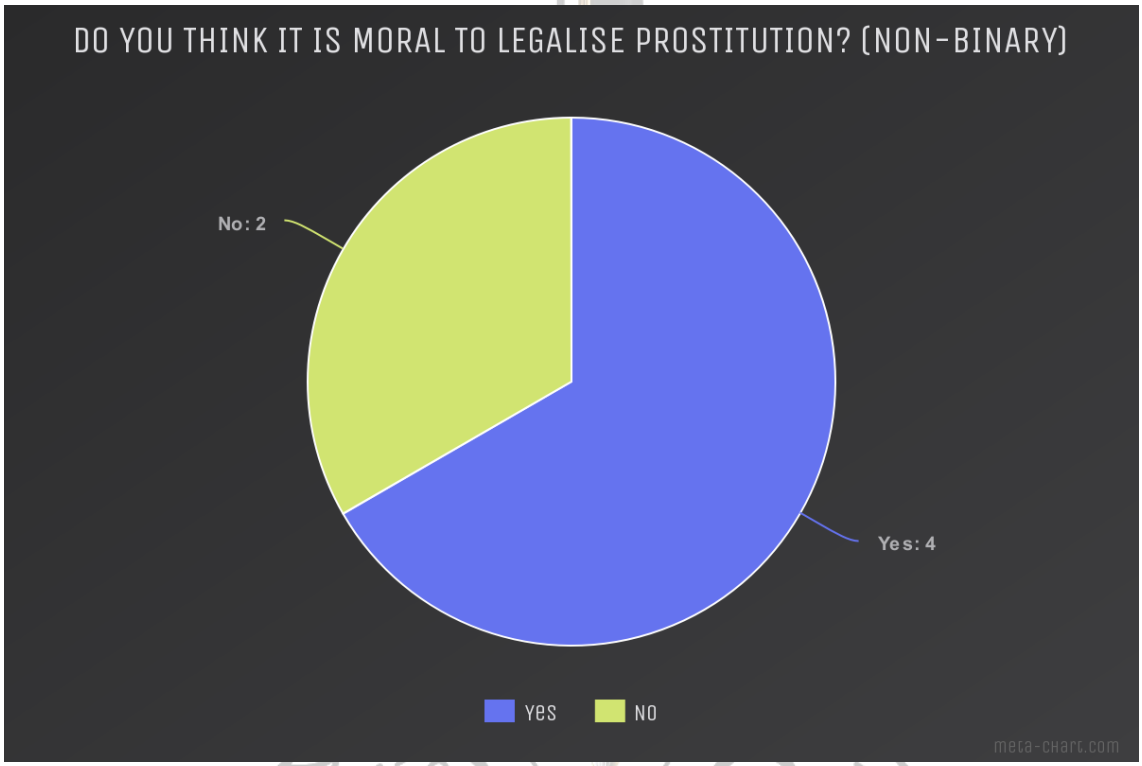
The next part of the survey was regarding the legalization of prostitution.

Do you think it is moral to legalize prostitution?

[131] All India Network of Sex Workers, Network of Sex Work Projects, (last visited 6 January 2021) <https://www.nswp.org/featured/all-india-network-sex-workers-ainsw>


DO YOU THINK IT IS MORAL TO LEGALISE PROSTITUTION? (MALE)
No: 7
Yes: 36
YES
NO
meta-chart.com

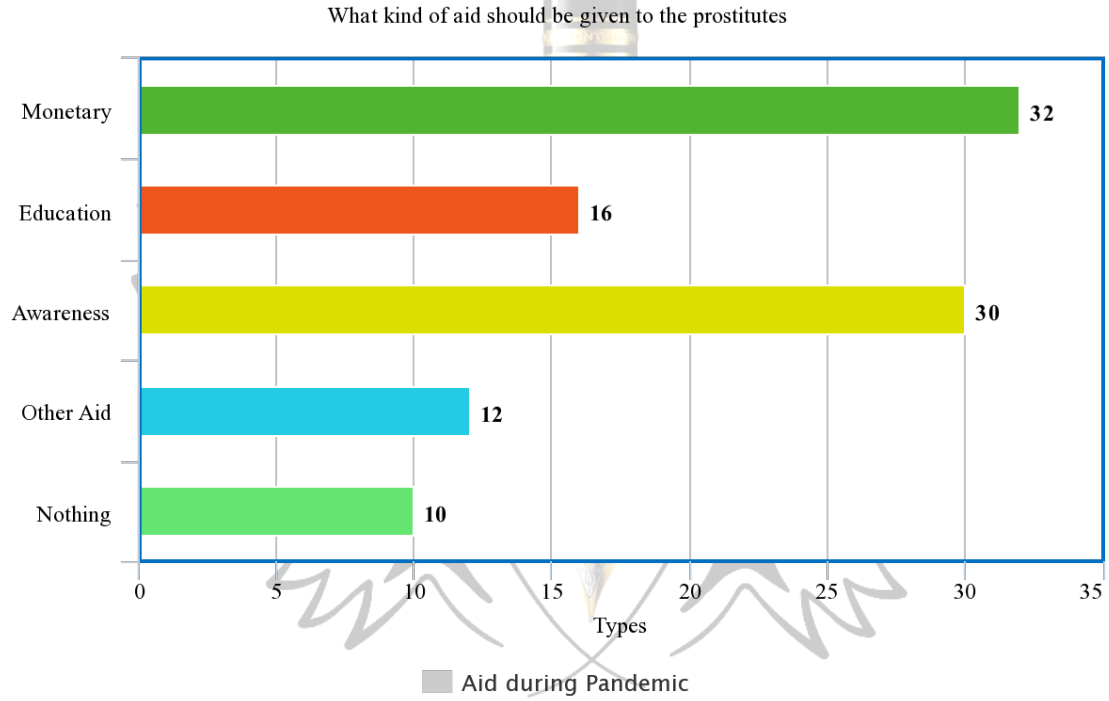

DO YOU THINK IT IS MORAL TO LEGALISE PROSTITUTION? (FEMALE)
No: 13
Yes: 38
YES
NO
meta-chart.com



In the above charts it can be seen that a majority of the people think that legalizing prostitution is moral. They believe that it does not go against their own beliefs. Many also said that the state of people who work as sex workers is so bad that it is not the question of morality but of being humane. Some even questioned the need for it to be morale. Their argument bordered around the point that in a country that has many types of people, cultures and beliefs, everyone has a different idea of morals and ethics which is why taking an action

based on morality is a dead end. Society is comprised of various people each who have a different opinion[132].

What kind of aid should be provided to prostitutes in the short term?



In the Y-axis the options are-

1. Monetary- Any aid or help that is of financial or monetary nature. This included concessions, subsidies and low interest rate loans. There was a large number of people

[132] Youth ki Awaaz, The Big Debate: Should Prostitution Be Legalized In India, Youth ki Awaaz, (last visited 6 January 2021) <https://www.youthkiawaaz.com/2009/12/the-big-debate-should-prostitution-be-legalized-in-india/>

who felt monetary help was necessary as the common understanding of the impact of pandemic was loss of jobs, livelihood and decrease in the income of many people[133]. This impact may have caused people to be led into the monetary direction of problems and sort that out initially.

2. Education- Education of the prostitutes or Training of the women was also suggested by many. There reason being that if these women were trained for other jobs and work that were not as dependent on contact as prostitution then they can fend for themselves and earn money to support themselves and their family.
3. Awareness- A large number of people also suggested that there should be awareness campaigns organized for the sex-workers to inform them about safety during intercourse that could prevent them from STDs and being abused. Awareness regarding policies that are in place for people below the poverty line will also help the people without ration cards to secure help.
4. Other Aid- Any of the aids that did not fall in the above categories.
5. No Aid- Some people felt that they should not get any help. They were few in number but their reason was that providing financial aid will increase the number of human trafficking or other such criminal activities.

The last question of the survey was about the kind of backlash that can be expected from the country if prostitution is legalized. Around 90% of the answers were related to protest and boycott while some mentioned that there can be violent protests involving burning, beating

[133] Arun Kumar, The Pandemic and Lockdown throws up more challenges in measuring employment and work, The Wire, (last visited 7 January 2021) <https://thewire.in/economy/covid-19-lockdown-employment-job-loss-work-india>

and other abuse. About 2% said that it could lead to bad mouthing of the government and the people who supported them in legalizing through media. Only one person believed that there would be no backlash but there is a possibility of human trafficking to increase. Overall, none of the people answering the questions thought that India is ready for a step like this.

Conclusion

Prostitution is an overlooked sector of the country and are treated in an inhumane manner. Children are born into prostitution and have no means to come out of it. Gradually organizations are being formed that work in helping sex workers and giving them necessary help to live well. With the laws being vague, prostitutes are in a shaky ground which can only be handled if the government steps in and provides aid. Many countries like New Zeeland, Belgium and Canada amongst other, that have legalized it have been able to regulate it and decrease the number of women that are forced into this profession.

Studying the data from the survey it is very clear that most of the people are in an agreement that the country needs to take steps in supporting the vulnerable sector of sex workers but also feel that India is not ready for a step like that as many of the citizens of the country are against this class and find it unethical and a sin. The first step to legalizing prostitution should be understanding the perception of the society and working on raising awareness based on that. It shows how important society is in situations like this and the power it holds.

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A STUDY OF CRIMINOLOGY IN HUMAN TRAFFICKING PARTICULARLY WOMEN AND CHILDREN: A CRITICAL APPROACH

- DR. KABITA CHAKRABORTY

Abstract

Human trafficking can be well said as modern form of slavery in which persons are being exploited on and off, taken away from their home or abode by different means, may be by fraud or false marriage or abduction or coercion etc. Presently one of the most important challenges that the countries are facing, is the problem of cross-border trafficking of women particularly minor girls for commercial sexual exploitation. There are a number of countries involved in the process of trafficking as a country of origin, as a country of transit and as a country of victim's destination, by and large most of the countries of the world are affected by this process. This is increasing day by day and a number of people especially women and children are getting victimized into the trap of human trafficking. It is a grave violation of human rights. It has threatened the basic dignity of women, besides exploiting them reprehensively, it destroyed them physically, psychologically as well as socio-economically Under the criminal justice framework there is highlighting on the 'three P's' – prosecution of traffickers, protection of victims and prevention of trafficking. But however, there is less

concern about the protection of victim and more importance is given with the prosecution of culprits under the criminal justice approach. Nevertheless with the technological revolution and communication development, there has been quite awareness in the international as well as national legal instruments to combat immoral trafficking of human beings particularly women and children. The main substantive law in India that deals with the problem of trafficking is the Immoral Traffic (Prevention) Act of 1956 which is based on the 1949 Convention for the Suppression of the Traffic in person and of the Exploitation of the Prostitution.

Keywords: Human trafficking, violence, criminal justice, immoral trafficking, prosecuting, protecting, preventing, human rights.

1. Introduction : Concept of Human Trafficking

As a result of gender inequalities throughout the world, woman has been made a commodity, particularly economically deprived women and children of poor countries. The economic crisis has made them vulnerable to organized transnational traffickers as more or more children specially girls and women are to look for work to support themselves or their families. Human trafficking can otherwise be said as an umbrella for exploitation of men, women and children for various illegal commercial purposes which may be for fake marriages or prostitution or trading of organs or begging, and so on. Presently in the twenty first century, trafficking exists in its most extreme form, apart from first two i.e trading of illegal arms, drug trading, human trafficking is the third largest criminal industry in the

world. Every year it is estimated that around 7000 to 4.0 million people are trafficked for the slave trade.

From the point of criminology, human trafficking is the criminal behavior which violates human rights and breaks criminal law, and poverty, deceit, distraction, unemployment, lure of job, migration, inequity and corruption are the major causes of human trafficking. Moreover there are a number of issues involving in the process of trafficking for example violation of rights, impact on public health etc. which make a complex interference with the criminal justice system. As there are a number of countries involved in the process of trafficking some may be as country of origin, some as country of transit and also some countries are used as the victim's destination; by and large most of the countries of the world are affected by this process. This is increasing day by day and a number of people especially women and children are getting victimized into the trap of human trafficking. Therefore human trafficking can otherwise be said as industry, organized by a strong mafia gang and there is transaction of crores of rupees. Therefore it can be observed that such an organized activities are very difficult to stop.

From times immemorial human trafficking has existed in various forms in almost all parts of the world. In India, it has been prevalent either in the form of bonded labour system where the slave offered his slave in exchange for cash, or in the form of 'Debdasi', a customary form of modern prostitution. Similarly, one another form of slavery was found in African sub-continent where whites exploited the Negros or Blacks as slave servants and so on. So it can be rightly said that human trafficking is a modern form of slavery. There is great diversity in trafficking system where an organized gang are being involved in different

phases of the trafficking procedure. Due to this diversity sometimes it is very difficult to judge or identify the real culprit. Besides this challenge, criminal law approach confronting various other challenges. For example, very often unless and until exploitation begins, it is very difficult to track trafficking at the initial stage.

2. Magnitude of the problem:

Human trafficking, especially women and children has become a grave issue around the globe today including India. It is a crime against humanity that affects sense of well-being of human beings. It is the most serious organized crime of the world, transcending cultures, geography and time. In other words human trafficking is a gross commercialization of innocent human beings by organized criminals where selling and buying of human beings are done like goods for the purposes of reproductive slavery, commercial sexual exploitation, forced labor and therefore it is rightly said as a modern-day form of slavery. It has been estimated that out of the total number of persons affected by human trafficking, 80% are women and 50% are children who are affected by human trafficking in India. Annually, 20 billion rupees are turned over through human trafficking .

Acc0rding to NCRB (National Crime Records Bureau) latest data, human trafficking cases are very high in 2019 in comparison to 2017 and 2018, the 5,788 cases registered in 2018 and 5,900 cases in 2017. Also there is a drop in conviction rates of trafficking cases from 29.4% in 2018 to 22% in 2019. Delhi in this regard is far increasing where a total of 608 cases were registered in 2019 and it is reported as the second most cases of trafficking among the states and Union territories. Another aspect of Delhi was that among all the states and union territories, it was the only place where human trafficking is also taken place with the aim of

'removal of organs' and it should be mentioned here that 4 such cases are reported. Rajasthan is the another example where we find maximum number of trafficking cases are minor trafficking, out of total 653 cases, 636 pertained to boys and the remaining 17 to girls. In Maharashtra out of 986 registered cases 95 pertained to minor and the remaining 936 pertained to victims above 18 years of age it is to be reported by the investigation of various police departments, the main cause of human trafficking was sexual exploitation in prostitution form and highest such cases are 946. It is followed by Telengana at 322 and Andhra Pradesh at 316. It is also reported that there are other major causes of human trafficking for example, in Assam the highest human trafficking cases are for forced marriage, for which most cases were registered in Assam and Manipur recording highest cases of domestic servitude , Bihar saw the highest category of forced labour cases.[134]

So far cross-border trafficking is concerned, it is said that in Indian brothels Nepali girls are precious and in great demand. It is estimated that 1 lakh or more girls from Nepal have come to India and are living in different brothels of India. It is said that 5-7 thousand young nepali girls are trafficked in India every year, particularly alone from Sindhapalchok district of Nepal a thousand of young girls have been trafficked to Indian brothels. Reports available from different sources including UNICEF and SAARC, inform that every month 120 to 150 Bangladeshi women and children become victim of cross border trafficking. India, in regard

[134] https://www.news18.com/news/india/human-trafficking-hit-three-year-high-in-2019-as-maha-tops-list-of-cases-followed-by-delhi-shows-ncrb-data-2944085.html

to immoral trafficking of women and children is either receiving country or a sending country or transit country.[135]

West Bengal being a neighboring state with Nepal and Bangladesh has a high crime rate and the number of trafficking of women and children is increasing day by day. In the last 10 years it is estimated 2 lakh women have been trafficked including girls as young as 9 years from Bangladesh. Estimated 1 lakh Nepali girls under 16 years of age are to be found in Indian brothels. About 5000 to 7000 girls are trafficked each year from Nepal.[136] In Nepal, Bangladesh and India, the problem of trafficking in women and children has the high priority issue in the anti-trafficking movement which has become the national and regional agendas of all the key stakeholders as well as creating increased awareness on trafficking at all levels .

3. Criminal Justice approach to combat Human Trafficking particularly Women and Children: International and National Perspectives

Initially there is much more concerned with the prosecution of the culprits than with the protection of the victim in the criminal justice approach and the framework of the criminal justice system mainly focusing on three levels P's' - prosecution, protection, and prevention – prosecution of human traffickers, protecti0on of trafficked persons, and prevention of human trafficking. Now approach to criminal law jurisprudence to trafficking has shifted slightly to a victim-centered which is likely to be 'three R's'- rescue, rehabilitation, and reintegration. This 3R model has focussed on the welfare and protection of the victims as per the

[135] Sinha Indrani, 'Trafficking on women and children, 1997 Jonaki, Vol.1, Sep.p-7
[136] Report of ILO and ESCAP, 1999, Trafficking of women and Children in South Asia, p-2

international mandate with a view to rehabilitate as well as reintegrate them into the main stream of the society with special emphasis on psychological, legal, medical, and social assistance.

Due to technological revolution and communication development human trafficking is assuming more and more internationally concerned topic for discussion. The topic on Human trafficking are covered by almost all international human rights instruments in their mandate. The Charter of Fundamental Rights of the European Union under article 5 prohibited trafficking in human beings for slavery and forced labour. Again the Convention on the Elimination of all Forms of Discrimination against Women in its article 6 it is explicitly stated that States Parties 'shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women' . Further, we find specific provisions of human trafficking in the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Convention on the Rights of the Child of 1989. There is also providing more elaborate regulation of the criminal conduct of human trafficking in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000.

Some of the international instruments dealing with the problem of trafficking in general and cross-border trafficking in particular[137] are as follows-

- International Agreement for suppression of white slave traffic, 18th May 1904
- 1910 International Convention for suppression of white slave traffic

[137] Dr. H.O. Agarwal, 'International Law and Human Rights, 2000, Central Law publication, Malcolm N Shaw, 'International Law', 1998, 4th Edi, Cambridge University Press, Awasthi Kataria, 'Law relating to Protection of Human Rights', Orient publication

- 1921 International Convention for suppression of the traffic of the women and children 1
- 1926 Slavery Convention.
- 1930 International Labour Organisation Forced Labour Convention.
- 1933 International Convention for suppression of traffic in women of full age.
- 1949 Convention for the suppression of trafficking in persons and the exploitation of prostitution.
- 1966 International Covenant on civil and political rights.
- 1966 International Covenant on economic social and cultural rights.
- 1979 Convention of the elimination of all forms of discrimination against women (CEDAW), New York.
- 1984 United Nations Convention against torture and other cruel inhuman or degrading treatment or punishment.
- 1990 Convention on protection of rights of migrant workers.
- 1995 World Conference on women, Beijing, China.
- 2000 UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children.
- 2001 Second World Congress against commercial sexual exploitation of children.
- 2002 SAARC Convention on prevention and combating trafficking in women and children for prostitution.
- 2002 UN Convention against transnational organized crime.

Thus from the aforesaid international instruments it is revealed that International community has expressed its grave concern to combat evils of trafficking of women and children and to fight against these organized transnational crime .

So far national laws are concerned our Constitution provides many provisions for the protection of the women and children. Article 15 prohibits any discrimination on the grounds of religion race caste or place of birth whereas Article 15(3) empowers the state to make special provision for women and children. More particularly, Article 23 of Indian constitution prohibits traffic in human beings and forced labour. One important case Raj Bahadur Vs. Legal Remembracer [138] the Calcutta High Court vey explicitly defined human trafficking that it is selling and buying men and women like goods and it includes Immoral traffic in women and children for immoral and other purposes. Again under the mandate of part IV of Indian constitution under Article 39(e) and 39(f) men and women and tender age of children are not abused and the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. There should not be moral and material abandonment of the youth and the childhood should be protected from exploitation and state should follow some policies. Under part IVA of the Constitution under Article 51A one of the important fundamental duties, is that every citizen of India shall renounce practices derogatory to the dignity of women.

The Immoral traffic (Prevention) Act 1956 which was previously known as Suppression of Immoral Traffic in Women and Girls Act is the main substantive law in India that deals with the problem of human trafficking. By the influence of 1949 Convention for the Suppression

[138] AIR 1953 CAL522

of the Traffic in person and of the Exploitation of the prostitution this Act is constructed. This Act deals with the various offences relating to human trafficking for examples offences for keeping or allowing premises to be used as a brothel, offences for living on the earnings of prostitution, offences for procuring, inducing or taking person for the sake of prostitution, detaining a person in premises where prostitution is carried on, prostitution in or in the vicinity of the public places, seducing or soliciting for purpose of prostitution etc. But one of the defects of this act is that it does not cover the cross border offences. In comparison to the previous year there is an increase of registered cases in the current year under this Act as the reports say. Nearly three fourth cases were reported from the state of Tamilnadu which also reported the highest crime rate of 11.2 as compared to the 0.9 National average rate.[139]

Apart from these there are several Indian Penal Code provisions for example sections 366, 366A, 366 B, section 367, section 372 and section 373 are concerned with the trafficking.

Other Important National legislations are The foreigners Act, 1946, The extradition Act, 1962, The immigration Act, 1983, The information technology Act, 2000, The Juvenile Justice care and Protection Act,, The Criminal Procedure Code Indian Evidence Act, Child marriage restraint Act and The Transplantation of Human Organs Act 1994 .

4. Role of different organs in implementing the trafficking laws:

4.1 Role of the police, the law enforcement agency

[139] Nair P.M Action Research on Trafficking in Women and Children in India, NHC publication, 2004, p-36

Role of police, which is the important organ of the state machinery is very significant part in preventing as well as controlling the crime of human trafficking. It also takes important part in rescueing the victims and they supposed to play a great role to the rehabilitation and repatriation of them. But it is pertinent to say that there is lack of training of the police official regarding the controlling of human trafficking, it is confined to very few police officials. Apart from that there are other difficulties which should be properly focused as per the opinion of the police officials, such as lack of adequate manpower to enforce the law, lack of notified police officers who can investigate these crimes, lack of women police officials, lack of legal awareness and modern principles in law enforcement, mainly among the officials of the grass root level, lack of training on issues of women rights and child rights and the implementation of the same, infrastructural shortcomings in police station, lack of proper guidance, assistance and involvement from senior formations in the police, non-cooperation of the public in carrying out prevention, rescue and rehabilitation of the victims and arrest of the criminals etc.[140]

4.2 Role of the Judiciary

As per the recent publication of the UN, Judiciary is the most important sector which needs to be emphasized on gender issues and violation of rights of as a result of human trafficking. From the analysis of the judgement of criminal cases relating to human trafficking it is

[140]A Report on Child Trafficking in India, prepared by Terres Des Hommes (Germany), India, Programme, pub, reprint, 2001, p-36

observed that judges approach is protectionist rather than a substantial.[141] As a result of commitments from various constitutional provisions as well as from different international instruments several legislations on immoral trafficking are enacted. Offences under the ITP Act 1956 can be tried by a Judicial Magistrate and others by a Session Judge. Under Article 32 the Supreme Court and tunder Article 226 the High Courts of the States have powers of appeal, review and original jurisdiction. Writ petitions and public interest litigations can also be entertained by the Supreme Court and the High Courts. Here mentioning some of the remarkable cases decided by the Judiciary. In Vishal Jeet vs. Union of India and others [142] a multidimensional criminological study and investigation into the matter relating to the causes and effects of the 'flesh market' and 'flesh trade' had been demanded by the apex court. Rescue repatriation and rehabilitation of 487 minor girls were done by the judicial intervention in Public at large vs. State of Maharashtra and others [143]. As a consequent of the High Court order prompt care of and attention to the rescued persons were made by setting up of an Advisory Committee and networking of various departments of the government, and repatriation of the persons trafficked from various states in India as well as neighbouring countries. To ensure the interests of the rescued girls High Court of Bombay[144] gave several directions to the government agencies in the instant case. One of the important directions given by the court that all rescued girls should be medically examined for assessing their age

[141]Combating Human Trafficking in Asia : A Resource Guide to International and Regional Legal Instrument, Political Commitments and Recommended Practices, publication by Economic and social Council for Asia and the Pacific, United Nations, New York, 2003, p-39
[142] Vishal Jeet vs. Union of India and others, 1990, 3 SCC 3182
[143] Public at large vs. State of Maharashtra and others 1997 (4) Bom CP171
[144] Ibid.,

and checking whether they were suffering from any diseases. There must be proper methodology of counseling and aftercare treatment in detail. In a Public Interest Litigation the Calcutta High directed prosecution of traffickers in the trial court and rehabilitation of victims through Socio- Legal Aid Research and Training Centre, a NGO, specifically those trafficked from Bangladesh. As a consequent of this order few girls who were languishing in Shelter Home at Liluah, were repatriated in Bangladesh. But however the trial procedure of the trial court and judgements by them are not satisfactory. Again so far cross border trafficking is concerned most of the cross-border victims are detained under Foreigners Act and it is also observed that most of the offenders of these trafficking cases have been acquitted due to lack of witnesses to support the investigation. For instance there was a case of trafficking where several minor girls have been trafficked from Nepal to different parts of India and the accused was charge sheeted by the police under section 342 IPC and sections 3, 4, 5, 6 of ITP Act. In this case even though the traffickers were proved to be involved in international trafficking but ultimately the trial court acquitted the accused as because all the witnesses after examining by the prosecution turned to become hostile.

4.3 **Role of the Government Agencies**

By the direction of the apex court and various High Courts the government of India has taken some initiatives for various policies, programs etc. National action plan has also been drawn up for combating trafficking, rescue and rehabilitation of victims etc. Though after the Convention of SAARC on Preventing and Combating Trafficking in Women and Children

for Prostitution, which was signed at the Kathmandu Summit in January 2002, the process of ratification has not yet been completed.

The National Commission for Women has forwarded specific suggestion and recommendation on the changes of the existing laws i.e. ITP Act, which is supposed to be taken into account. As per as the trafficking laws are concerned the government has an important role to play. The main government Agencies are like National Commission for Women, the department of women and children development etc. which are continuously trying to control this problem.

4.4 **Role of the BSF**

As Indo-Nepal border and Indo-Bangladesh border are porous border, so the Border Security Force has an important role in controlling human trafficking particularly in the prevention and repatriation of the cross broader victims.

4.5 Role of the High Commission

In case of a victim, who is a national of a foreign State the repatriation is officially done by the High Commission of that state situated in India.

4.6 Role of International Agencies

Various UN Agencies and organs like UNIFEM, UNICEF, ILO, UNDP, UNODC among others, have been active in anti-trafficking. ILO for a long time addressed child trafficking and aims to eradicate it. UNICEF has focused mainly raising awareness about the problem

tries to provide economic support to the families, trying to improve access to and quality of education. UNODC pays special attention to combat transnational organized crime, corruption and illicit trafficking in human beings. Apart from those there are other agencies who are working in this field for quite a sometime.

4.7 **Role of the INTERPOL**

To strengthen network between national and international law enforcement authorities as well as to identify and establish this, Interpol has been used.

From the above analysis, it can be revealed that the goals of Immoral Traffic (Prevention) Act as expected, has not been achieved.

5. Conclusions and Suggessions:

Human trafficking, rightly said as modern day slavery is more than a legal or criminal justice issue. As there are various stages in the process of trafficking, a no of peoples and numerous stakeholders are involved in its various stages. Again being a transnational crime, huge money runs often from one continent to another, profits passing through large syndicates to small loosely organized local goons. Further it was found that there has been different repercussions for the state, individual and community as regards to human trafficking. So to combat human trafficking unilinear approach is not sufficient rather multidimensional approach is the right way. This approach could target its perpetrators, protect the victims and address its root causes by involving all the stakeholders especially the families and the community, where from the vulnerability originates and must end at the same.

To combat with the problem of human trafficking there are several steps to be taken by various state organs. The laws has to be very much adequate as well as implementation process should be very much strong and implementation agency in the government has to increase economic opportunities for potential victims and improved infrastructure facilities to provide minimum services needed to the victims of trafficking. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. The model of implementation of ITP Act shall be prevention, prosecution and protection.

So far prevention is concerned it must be focused and oriented to all the relevant issues and thus all the policies, programmes and strategies relating to prevention of trafficking must be unique. Therefore prevention of trafficking needs to be focused multi-level firstly address to the source areas, then to the demand areas, next the transit points and as well as trafficking routes. Strategies in all these areas have to be oriented to the characteristics of the situation and the target groups. The best method of preventing trafficking is by integrating it with cross prosecution and protection. Next process is the prosecution which also includes a number of tasks like the traffickers to be identified and bringing them to book, confiscation of the illegal assets seized as a result of trafficking, compensation must be given by the traffickers for the damages and ensuring that they do not cause any further harm. Therefore protection of the victims of human trafficking includes all the steps starting from the redressal of the victim's grievances and violations of rights that may be tangible or intangible, which ultimately would led to the survival of the victim and rehabilitation and

reintegration them into the main stream of the society. Thus, prosecution and protection contribute to prevention. But issues of prosecution and protection only have come up after trafficking process has taken place and also prevention of trafficking has taken place, which remains in the bottom line.

For proper implementation of the trafficking laws following steps are suggested

- To review the existing legal framework at National and international level
- To minimize trafficking and violence particularly against women and children
- To organize a comprehensive, cross-sectoral and integrated procedures at national as well as local level, assessment of progress with set goals and time frame for implementation of prevention and elimination of human trafficking and violence against women up to the target point.
- To amend relevant laws to prevent trafficking and violence against women taking into account the problem of cross border trafficking also
- To stand in National social and economic policies and programmes to safeguard women vulnerable to human trafficking and violence
- To raise gender sensitive awareness through public information relating to the nature and degree of Human Rights violations as experienced by the victims of human trafficking particularly women and children.

Last but not the least eradication of child trafficking is impossible by making legislation only if the law of punishment for child trafficking is written in the law books only and if it is not implemented properly then it is to be treated as a meaningless legislation. Where poverty is the root cause of child trafficking, a better approach shall be made for eradication of poverty

among children. The causes of prostitution among the children said have to be seriously studied and by removing the causes, a better result can be obtained in the eradication of child trafficking. Proper source and means of maintenance of children shall have to be given to the children so that they are not compelled to go to this dirty business. Beautiful girls ranging from the age group 12 to 18 are involved in this profession mainly due to poverty. So poverty should be removed as a first step by giving them different kinds of jobs so that they do not become engaged in the flesh trade. How child trafficking is going on and how it can be eradicated proper research work is to be done in this regard. Compulsory women education is to be implemented in India so that exploited child may get a job. The Immoral Traffic (Prevention) Act 1956 is the most ineffective legislation in India. Seminar in the Law School should be organized, suggestion from the judges, juris,t academicians, police officers, criminologists, sociologists shall be welcome to make the Immoral traffic legislation much more fruitful and also other legislation regarding the child trafficking become much more fruitful so that the real offenders who are exploiting the children shall be punished.

If poverty is not eradicated, no suitable arrangement of work for providing the children is done, the unfortunate children shall be compelled to be involved in the business of flesh trade. So first of all poverty should be eradicated. At least the neglected children should be provided with some jobs for maintaining their livelihood. At the same time how AIDS can create disaster and makes life miserable, tormenting painful and meaningless that should also be brought to the knowledge of all poverty striken girls between the age group 12 to 18 so they may not be willing to be involved in the flesh trade. A very severe legislation is to be

enacted to indulge, manage, organize such types of crimes, such as pimps, touts etc. for their punishments.

LEGALISING SPORTS BETTING – PLAYING THE ODDS

- **SUDHANGAN. S & VIKASHINI. S**

ABSTRACT

"Life is a Gamble"

India is a vast country where a sport is celebrated like a religion and people name players the gods! In a country like this, there is no comprehensive legislation for the regulation of sports and the gambling laws are archaic. Sports betting is allowed in very few non athletic and non-human sporting events.

It doesn't mean that there is no betting in the athletic sports. India is indeed one of the places where illegal betting thrives the most and there is no provision about online betting (except for few states that specifically bans online betting) in the gambling laws of India- A Legal loophole it is!

Why cannot India **Legalise Sports Betting** and generate huge revenues for the state and employment for the people? Why has India legalised horse race and not other sports? Why some states of India have casinos and better adopted gambling laws and not the others? Why India hasn't legalised sports betting to curb the black money and hawala network in the society?

This article "Legalising Sports Betting- Playing the odds" discusses about sports betting, the gambling laws in India, the thriving illegal betting, the need to legalise sports betting and its benefits. Moreover, this article includes the comparative analyses of the gambling laws of

other countries and addresses the possible disadvantage of legalising this activity with a solution.

INTRODUCTION

"What is life if not a gamble?" -F.E. Higgins. Sports in India is as old as Vedas are. We have references in the Vedic literature and Indus valley civilisation for the same. In fact, Gambling has a long history from the Palaeolithic period. China has had history of widespread gambling houses since the first millennium BC. On the other hand, Sports betting or gambling in India is highly restricted except for casinos, lotteries and horse racing. This led to a steadily growing black economy that is the illegal betting. According to Doha-based International Centre for Sports Security, the illegal betting market in India is worth $150 billion, which includes $200 million bet on every one day international played by the Indian cricket team. Officials estimate that everyday transactions worth ₹12-15 crore on illegal bets is made in Delhi[145].

A major question arises here, what is the need to legalise sports betting? Legalising will not only help curtail a source of black money but also can be huge source of revenue (Casinos in Goa contributed 411 crores to the state revenue in 2019[146]). Moreover, regulated gambling and gambling sector can regulate large scale employment opportunities. There is much more to it which are discussed in the later part of this article.

[145] Soumya Pillai, 2020. 29 June, 'What's the legal status of gambling regulations in India in 2021?', Hindustan Times, Business.

[146] Press Trust of India, Goa, 'Goa earned Rs 411 cr revenue from casinos in FY 19: CM', Aug 07 2019, https://www.deccanherald.com/national/west/goa-earned-rs-411-cr-revenue-from-casinos-in-fy-19-cm-752711.html

This is obviously an age-old debate that is whether betting must be made legal or not, but the evident fact is that Indians love to gamble. This article briefs about the sports betting, legal stand, need to legalise, loop holes in the gambling laws, benefits of regulated gambling and gives suggestions to clear of the undesirable outcomes of legalisation of sports gambling/betting and indeed we can hit a home run.

SPORTS BETTING / GAMBLING IN SPORTS

Gambling/betting is when one wagers money or valuable thing (also known as "stakes", that is, what he is staking) on an uncertain event depending on his prediction in desire to obtain benefits (monetary and material goods). We can see the history of gambling since the Palaeolithic age. As mentioned earlier, China had gambling houses in the first millennium BC. Dominoes (precursors of Pai Gow) and lotto games have appeared in China as early as the 10th century[147]. Playing Cards and gambling appeared in China and Japan in 9th and 14th century respectively[148]. Poker is derived from the Persian game As-Nas, and has its history from 17th century[149]. "The Ridotto" was the very first casino and it was started in 1638 in Venice[150]. Now Gambling is a major international commercial activity.

Sports betting is where one predicts a sports activity and places a wager on the prediction. Sports betting extends to both athletic (football, cricket, baseball) and non-athletic events (reality show contests). It also extends to both human and non-human contests (horse racing,

[147] Schwartz, David (2013). Roll The Bones: The History Of Gambling. Winchester Books. ISBN 978-0-615-84778-8.
[148] *Murdoch, James (1926). A History of Japan*
[149] Wilkins, Sally (2002). Sports and Games of Medieval Cultures.
[150] Thomassen, Bjorn (2014) Liminality and the Modern: Living through the In-Between.

greyhound racing). The bettors do it both legally and illegally which is discussed in the later part of the article.

Moreover, we must not deny the religious views. As in Hindu poems like Mahabharata speaks of popularity of gambling back in the time. However, Islam considers gambling as a sin and Kautilya's Artashastra recommends control of betting. Christianity says that as long as betting and bettors are reasonable there is no impediments to it.

BETTING AND GAMBLING LAWS IN INDIA

The primary legislative document on gambling is The Public Gambling Act of 1867. This age-old central law makes operating a gambling house, assisting the operation of a gambling house, visiting a gambling house, financing gambling and being in possession of gambling devices a crime. It also explicitly states "nothing in this Act shall apply to games of mere skill wherever played" that means in absence of any other law, wagering on games of skill is considered legal. In 2000, Section 2 item B of The Information Technology Act instructed Internet Service Providers and Website Hosts to block access to websites and content "relating or encouraging money laundering or gambling".

Nowadays the question of whether gambling is considered legal or not is determined by ascertaining whether the game is predominantly one of skill or chance. It also depends on the particular state in concern. This is because the Seventh Schedule of the Constitution of India made Gambling a state subject and hence every state government has the option of either enacting the Central Public Gaming Act,1967(outdated) or to legislate their own gambling laws as per their discretion. Till date, many Indian states have made laws against gambling and few states have banned online betting, while 13 states have legalized lottery, and two

states that is Goa and Sikkim have legalized certain other forms of gambling. Goa has allowed sixteen land-based casinos and several offshore casinos to operate legally. In the 2018-19 financial year, the Goa government collected Rs 411 crore from offshore and land-based casinos. With a rate of 28%, casinos stand at the highest level of tax brackets. In 2018, the Goa government also set up an application fee of $32.000 for both land-based and offshore casino while the license for both have also been increased[151]. All of these show that substantial revenue can be earned from these sources and thus can be very helpful for a quicker getaway from the economic crisis caused by the coronavirus pandemic Similarly, Sikkim has legalised internet gambling. While the push for legal gambling in India is strongly felt, ironically the present laws seems more concerned with scaring Indian players not to gamble.

In the landmark case of **Dr. KR Lakshmanan v. State of Tamil Nadu[152]**, a three-judge bench of the supreme court explicitly ruled that horse racing is a game of skill and not chance. Hence Horse racing become one among the few sports that revel in complete approval from the authorities while others like cricket don't share the same distinction in the eyes of Indian lawmakers. There are various sports like poker, fantasy sports, blackjack, cricket, and rummy which deserve a similar ruling based on their preponderance to skill than luck.

Cricket gambling laws in India

[151] Legal Status of Online Gambling in the State of Goa (2020), Legal Bites- Law and beyond, https://www.legalbites.in/legal-status-of-online-gambling-goa

[152] Dr.K.R. Lakshmanan vs State of Tamil Nadu And Anr on 12 January,1996, 1996 AIR 1153,1996 SCC (2) 226

It was the 2013 match-fixing scandal in IPL that initiated the appointment of the Lodha commission by the Supreme Court to look into the matter of legalization of cricket betting. In June 2018, the law commission submitted a recommendation to the government favouring the legalization of betting in India under stringent supervision and control. The Commission inferred and also suggested that since it's almost impossible to completely ban cricket betting in India; legalising and regulating cricket betting and gambling under stringent laws is the most appropriate course of action.

The law commission also suggested that as per Articles 249 or 252 of the constitution, the government has the power to formulate laws for regulating gambling. Even Mr. Haroon Lorgat, the former CEO of the International Cricket Council (ICC), felt that making cricket betting sites legal was the best way to prevent corruption and match-fixing in the sport and also had urged Indian officials to do the same.

THE LEGALLY ILLEGAL WAY

As mentioned earlier betting is illegal in India. Now there is a big loophole in here! What is that? We can find no law that is making online betting an illegal activity. Online Gambling is neither legal nor illegal. Hence it is not prosecutable in any state except the state of Maharashtra (& Tamil Nadu has recently banned online betting including Rummy and cricket related analyser gambling like the Dream11, My 11 Circle etc). Few Indians love to gamble and offshore betting companies are using this, thus becoming a two-way road. The Indian Premier League is the hotspot now. Some Indian websites have linked with the offshore betting companies. Say for example "indiabet.com" is one such Indian website which do not take in bets but connects us with the online book makers.

It's not just the matches but you can also bet on every aspect and outcome of a match. In cricket one can bet on the possibilities of a batsman hitting a century, runs a bowler likely to concede, number of wickets the bowler is likely to haul, runs the team might score etc.

Is it legal to bet from India using an international bookmaker? Well it is not clearly defined by the law but Indian bookmakers are clearly illegal. No provision in Indian Law bans an individual from placing bets online.

ILLEGAL BETTING IN INDIA

"PROBLEM IS THAT gamblers will always gamble, irrespective of its legality or illegality,"

With only few sports like horse racing being legally permissible in India, those interested in betting on other sports have gone underground, with illegal bookies managing affairs. Bookies or bookmakers are those who accept bets on behalf of people on the outcome of sports contests. As is inevitable, the hawala system has also become part of these channels and money laundering has also become an inevitable outcome.

The illegal betting market in India is worth $150 billion (Rs 9.9 lakh crore) a year consisting of which cricket has an 80% share.[153] Accordingly, the ban on sports betting has led to a burgeoning black economy.

CRICKET

The 80% share means betting in cricket given its huge popularity in India, has inhabited — and thrived — in a world of secrecy. Cricket has a wide scope of betting that is bets are

[153] Hindustan times Dt Jan 06,2016: "With $200 million on every ODI match, illegal betting thrives in India".

placed on almost every aspect of the game and not just the ultimate rest of the match. From the toss, to how a particular player will fare, the outcome of a specific delivery, to the odds on a batsman scoring a hundred, there's a wide range of options to bet on.

Online betting mechanism is slightly more sophisticated through which one can be in India and place bets in betting houses in other countries where it is legal. It works on the fact that, there is no specific law in India that bans an individual (customer) from placing an online bet with a bookmaker based outside India. Hence bookies use foreign betting websites to place their bets and make some money. You (bettors) have to just pass on your information and there are people (bookies) to place your bets as you fancy. The Indian Premier League (IPL) tops their list of having offshore betting, thereby allowing Indians to place online bets.

HOW BOOKIES WORK?

A few days before any series begin, bookies residing in metropolitan cities like Mumbai, Delhi, Kolkata, Jaipur, etc., move to small towns such as Ratnagiri, Nashik, Bhavnagar, Jamnagar, etc. There they purchase new sim cards, buy new ledgers and open new accounts in the names of their patrons. Bookies use up to 50 frequently changed cell phones to connect with bettors. Moreover around 10-15 phones are kept on hold to get in touch with the rich patrons. Once the betting is over the settlement is done in 30 minutes after the match through hawala route.

Over the years, these actions of the bookies have become customary before every important cricket series.

Their shift to obscure places and the other tactics is aimed at a singular purpose — escape the attention of law enforcement agencies. Bookies are scared at the risk of seizure of equipment and cash, penalty and jail term varying from two months to three years.

Also, this relocation and deception makes it difficult for the police men to nab them. Moreover, if an Indian resident decides to place bets on a website hosted outside the country where online betting is permitted, it would be difficult to hold him guilty of online gambling. This has become a huge business running into tens of thousands of crores that is totally underground, and sucking money out of the Indian economy. This is why there has to be an enactment of specific internet gambling law in India.

MATCH FIXING

Such high amount of money in circulation has eventually cultivated the cunning idea of having control over the activity on which the bet is placed on and the benefits from being able to control the outcome. Thus, this initiates the idea of match fixing. Once a player has agreed to do something against the act on which he is bet on, and a record has been obtained by the mafia that he has indulged in such an activity, he is likely going to be blackmailed for the rest of his life! As it is easy money, many players may feel the temptation. These players are used to access other players and it finally reaches a point where the whole system falters.

EXAMPLES

There have been various instances of such a scenario.

- In a clash of the titans in the semi-final of the world Cup 2011, India played Pakistan, it was predicted that Pakistan would lose by the margin of over 20. As said India own

by 29 runs, this was said to be a predetermined verdict. It was the English journalist and cricket tipster ED Hawkins in the Bookie Gambler Fixer Spy, who unravelled the nexus between bookies and players that has tainted the game. But at the same time The ICC rejected the fixing claiming it to be a fake news. But with the 2010 news nailing three Pakistani cricketers for fixing and the former IPL commissioner Lalit Modi claimed to be threatened for refusing to fix IPL matches, the credibility of the game appears to be in danger.

- Another instance in which a three-member panel headed by chairman RN Lodha was appointed by the Supreme Court to investigate the IPL match-fixing scandal of 2013. It was also asked to suggest ways to improve the functioning of the Board of Control for Cricket in India (BCCI), the game's powerful governing body.

There are record of various hawala cases too.

- The investigations into the Karnataka Premier League (KPL) betting and match-fixing cases had exposed various hawala transactions. The probe further revealed that involvement of internationally betting and bookies in Dubai were making hawala transactions. It was also found out that the cricketers who played the 2019 KPL tournament were also involved in match-fixing.

This altogether proves that the betting syndicate has become masters of ingenuity in evading law. We cannot ignore the fact that many families are rendered bankrupt, and many people are behind bars owing to these practices.

The only solution one can think off to control illegal cricket betting is to legalise and regulate it. By seeking to bring this "industry" from outside the purview of the law, into the legal system, we aim to attract the right kind of sponsors, thereby taking it out of the clutches of the current controllers, i.e. the underworld. And ensure that it is better controlled and regulated to put in place measures that protect citizens from financial ruin.

LEGALISING SPORTS BETTING – THE NEED & BENEFITS

As mentioned earlier the debate to legalise betting and gambling dates back to age of myths and epics in India. Religious views and ancient texts favours legalising and at some parts it views against it. We must not only take religious consideration into account but also take the ban of various religious and social evils like Sati. Right now, sports betting is illegal in India. After the 276th report of the Law Commission of India (LCI), the winds have appeared to change, that is, the legalisation of betting. The report has suggested that betting should be legalised with regulations. The federation of Indian Chambers of Commerce and Industry (FICCI) stated that legalising sports betting will help the government earn huge revenue. According to FICCI, legalisation of sports betting will earn a revenue of Rs 3 lakh crores by regulating the illegal betting activities. Moreover, we must note that the Law Commission of India took up this study after the *Board of Control for Cricket vs Cricket Association of Bihar & Ors* on 18th July, 2016. In this case, The Apex Court had observed

"…the recommendation made by the committee that betting should be legalised by law, involves the enactment of a law which is a matter that may be examined by Law Commission

and the government for such action as it may consider necessary in the facts and circumstances of the case[154]."

"Sunlight is said to be the best of disinfectants; electric light the most efficient policeman…". It means that legalising the activity will make it harder to fix matches. Match fixing is one major issue we are facing right now that spoils the spirit of sports and people who watch it. As discussed earlier underground and illegal betting clearly paves way for fixing games. The more the stakes on one side, matches are fixed making the side lose. We have seen several instances in this regard. But the strange thing is that match fixing has not been listed in any law and the only way we can see that is in the reports of CBI on the match fixing allegations. Match fixing is cheating/deceiving the state and public. So, it comes under s.415 of the Indian Penal Code and definition is interpreted from s.24 "Dishonestly".

When betting becomes legal, underground bookmakers and players are not in the play. The overall commercial activity is open, everybody knows where the money has been placed and everyone knows the odds. The hawala do not have any work here and all the bet money is taxable! How does this reduce match fixing? Can u predict if a bowler can bowl 3 no balls in the same over and drop a catch? It can happen if a match is fixed (spot fixing). If something unusual or extraordinary event happens and the betting house has all the profits, the betting house can be investigated if it was legal and- the bettors are much safe here. Moreover, these open bets make it less likely to fix matches. A legal betting house would never want to get involved in match fixing controversies because their credibility and faith could be lost here.

[154] Board of control for cricket vs cricket association of Bihar, Civil appeal no.4235 of 2014

Larger the betting houses and bets placed, larger is the tax revenue for the state. It is more like getting certified liquor and cannabis rather than finding black market for this. According to various sources, the illegal betting industry is worth around 9.6 lakh crores where the most comes from the religion like celebrated cricket. What if all this was legal? Imagine the employment opportunities it could create!

Apart from the revenue, legalising betting can also create employment. Say for instance gambling industry created employment opportunities to 100000 people in UK. The regulated gambling industry in US hires around 2.5 lakh people. The casinos in Goa has employed around 8000 people.

In fact, it would curb black money as mentioned earlier, that is, the illegal betting and hawala. Strong syndicates use the underground and unaccounted money from the illegal gambling in terror financing. Thus, legalising sports betting can indeed reduce the funds going to the terror agencies across globe.

HOW THE WORLD DOES IT?

Seeing the benefits, Sports betting is actually permitted in many countries around the globe. If the recommendations of Law Commission of India were adopted, India would be following the countries where sports betting is legal.

The United Kingdom has one of the largest betting industries and it was legalised in 1961. They don't just invite bets on sports but also on elections, the royal family, referendums, existence of alien life etc. Britons spend around $19 billion on gambling.

In the United States of America, the states can formulate their own laws in betting. Earlier in 1992 betting was banned across US except for the four states which had already passed laws to allow betting. This ban was revoked recently.

Betting is allowed in Australia since 1810, that is, on racing. In 1980 Australia allowed betting all sports and now betting is allowed online and also in betting houses.

Mexico legalised betting in 2004 owing to massive football fan. The bets are accepted in Mexican peso and American dollars.

South Africa legalised sports betting in 1994. This led to massive employment opportunities in SA.

In 1960 sports betting was legalise in Ghana. This has created huge employment for an African nation

In Nigeria the gamble circulation is over $4 billion annually. The activity was legalised in 2005.

In Argentina the activity is legal with serious and severe limitations. Another South American country Brazil legalised sports betting in 2018. One interesting spot around the globe is New Zealand. In New Zealand sports betting is both legal and regulated. Retail betting houses are regulated by New Zealand Gambling Commission. In Peru sports betting is legal for almost 25 years and online betting had appeared 10 years ago. In fact, in Russia sports betting is legal and regulated. In Philippines, sports betting is lucrative but not simple. If you are a tourist visiting a region called Cagayan, you can bet but on the other hand, the locals are banned from doing this. However, the country has various sportsbook around.

THE POSSIBLE DETRIMENTAL OUTCOME OF LEGALISING SPORTS BETTING While playing the odds, we must note the possible undesirable outcomes of legalising sports betting. The major problem is that, this betting would definitely attract people from lower sections of the society. They would try their luck and might end up in losing their hard-earned money. This might become an addiction and legalising betting might lure non bettors into this. This is the problem we might face but it is solvable if we do it right.

HOW TO DO IT RIGHT?

Well the Law Commission of India (LCI) proposed the best way to do it right. The primary problem is the above listed one. To solve that as LCI suggested, there must be a check on the transactions that an individual can make in a specific period of time. Moreover, the total stakes must also be kept under check. It can be done by linking the transactions, stakes and betting id to PAN and Aadhar of the individual. By doing this, we can set up a stake limit for each person according to his income and credentials. The income from betting must be made taxable.

Restrictions must be placed on youngsters below 18 years to refrain from gambling and those who are below poverty line. This ensures that people from lower section of the society are not affected.

Personal suggestions are that when legalising sports betting, it can be regulated into gambling for different class of people depending on their income so that people play in their pool. Moreover, a part of revenue must be utilized by government to fuel other sports in India. Thus, it would also ensure development of sports in India.

CONCLUSION

"Gambling is inherent in human nature"- Edmund Burke

Yes, it is! Debates need an end and that is the reason why we debate. To end this age-old debate India must legalise sports betting. It depends on the country, but a country like India must take the fact that "Indians love to gamble" into consideration. The stats in the illegal betting over these years proves it.

Well India thinks that gambling in sports is immoral and has prohibited it but India's views in horse racing is not the same. The support from the Law Commission of India must be weighed by the government. This legalisation will definitely make a huge impact in the Indian Society. Legalising, Regulating, Taxing gambling in sports will definitely change the outlook of people and the government. Talking of religious considerations, Sati is religious! Didn't India ban Sati? The point here is that religious perspective must not be a hindrance to the development of nation and society.

At the end of the day, changes are permanent. The only thing we are able to do is cope up with them. At this juncture India must legalise gambling and the statement to be marked is

Sports betting/gambling in sports will be legalised in India. If not today, tomorrow it is!

SUGGESTIONS

- Sports betting must be legalised in India
- It must be regulated
- Stake limits must be set by linking the transactions to individual's PAN and Aadhar

- It must be taxed
- A council must be set up to regulate it
- A Gambling Act must be enacted
- There must be a comprehensive legislation for the regulation of sports law
- The revenue arising from sports betting must be utilized in such a way that it is fuels other sports. This helps in development of sports in India

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- **www.sportsbetting.net.in**
- **www.tandofonline.com**

CONFLICT BETWEEN NATIONS IN RELATION TO SOUTH CHINA SEA

- **NAGA SNIGDHA NEMANI**

The topic being discussed now is of the Conflict in relation to South China sea. Even in recent times China as-usual claimed whole of the South china sea, which even includes Paracel Islands, whereas the neighbouring countries such as Taiwan, Philippines, Malaysia and Vietnam do claim a part of the surrounded region which holds valuable gases and oil deposits. In 2010, there was a research conducted which mainly focused upon China's interest in ocean, related marine policies and its relation with Southeast Asian countries which even included South china sea.

Location of South china sea: South china sea is on the western side of Pacific ocean. It is to the south of China, it is towards East and South of Vietnam, to the west of Philippines and north to the Borneo Island. According to UNCTAD (United Nations Conference on Trade and Development), more than 1/3rd of the global trade and shipping business passes through this sea, which carries billions to trillions of trading business, and hence making it a significant geographical water body.

Introduction about South China sea: This sea is very vast which almost measures up to 3.6million sq.km.

China claims all over this sea based on the convention called as **"Law of the Sea Convention"** also to be termed as **"Nine-Dash Line".** China in order to portrait its claim on the sea, have been changing its size and reefs and also built airstrips on Paracel Islands.

In the year 2016, the International Tribunal of Hague have trashed all the claims made by China in relation to this sea. The Tribunal was of the opinion that South China sea is to be considered as "semi-enclosed sea" as defined by same Law of the Sea Convention.

- **Issues:**

The main issue involved in this case is related to the claims made by the different parties, in relation to claims over Islands.

1. Claim over Paracel Islands: China, Taiwan and Vietnam
2. Claim over Spratly Islands: China, Taiwan, Vietnam and Philippines
3. Claim over Scarborough Shoal: Philippines, China and Taiwan.

Apart from the above parties claiming over the Islands and sea, other issues which do cause a main concern in dealing with this issue includes:

1. No proper geographical scope which defined the access to South china sea
2. Disagreement of the parties over the treaties and conventions made (dispute settlement mechanisms)
3. Undefined legal status (code of Conduct)
4. Different theories and history related to the sea which make it more complicated for the countries to formulate the conventions and accordingly utilize the sea.

- **Research:**

The importance of South China sea have been raising in recent times. The main grounds which has boosted the importance of this sea included:

1. Comfortable access to oceanic energy resources
2. Disputes between South china sea and East China sea
3. Acts as a major advantage to build up naval military power.

Also, in the year 1982, as mentioned above **UN convention on the Law of Sea** was adopted and signed by the six nations which do claim right over disputed china sea, paracel islands and spartly islands. This signed treaty between the six nations do formalize on how to extend the maritime resources as per the international law of sea.

In the year 2016 there were certain reclamations made by the Chinease govt, which resulted in formation of three-military grade mid ocean airfields, which resulted in China in breaking its own promise and rules held out in the treaty.

In the same year 2016, the Arbitration decided the case in favour of Philippines stating that China solely don't have rights over the south china sea and the court has rejected the claim made by the China which they made on the basis of "Nine-Dash Line".

After the decision was released, China wasn't ready to accept the judgment and hence the China's ministry of Foreign Affairs declared the **judgment released to be void, illegal and has no binding effect on China in relation to rights over South china sea**. After this, the same arbitration judgement was pronounced at ASEAN summit and thats when a Code of Conduct (CoC) was formulated in relation to the water useage of South china sea, but it is to

be noted that the objective of this code is still not completely achieved. China is still pressurizing and preventing the nations to have equal opportunity in exercising their marine rights, naval rights and other military power. Even though ASEAN countires are negotiating with China in relation to equal rights over South China Sea yet China isnt ready to accept the decision of Arbitration.

Certainly, a glance has to be made that the origin of South China Sea do attract territorial dispute among its neighbouring countries, but its shouldnt allow China to ignore the Arbitral award made by the Hague Tribunal, and forcefully change the existing conditions. This would lead to **govern South China sea with "Force of Law"rather than "Rule of Law".**

- **Analysis:**

The main point to be considered in this dispute is, Under the Law of Sea Convention, all the existing nations have a right upto 200 nautical mile **ëxclusive economic zones"** to utilize the sea resources and seabed from their land territories. Even when there is existence of this major point, China do raise a broader question that the borders within U-shaped known as Nine-Dash Line solely belong to them. It is to be noted this line do pass across the countries like Philippines, Malaysia, Indonesia, Vietnam as per **"Nationalist Government of China Act 1947".**

- The first major issue is the neighbouring countries who are claiming equal rights over South China sea, arent able to figure out on who actually own Paracel Islands and Spartly

Islands. Japan occupied these islands as a part of Second world war and later had a peace treaty with Taiwan in the year 1952.

- The second challenge is the disputes existing between China and Taiwan since 1949. China strongly argues that Taiwan isnt offically recognised as a state , and hence it is not a signatory to Law of Sea Convention, but Taiwan do occupy one of the islands in the sea and is equally claiming a part of this disputed sea.
- Third issue in this China Sea dispute leverages out an argument in international law about the territorial (land) territory that can establish rights in relation to exclusive economic zone. The grounds which was set out under this international law include that the land must be in a position to act as a habitate for humans. It was found by the Hauge tribunal that Spartly island has failed to satisfy this ground.
- China Sea problem must be discussed in main regional forums such as the ARF, the East Asia Summit, and the ASEAN Defense Ministers' Meeting Plus. China, however, has refused to internationalize the issue and is pressing for bilateral negotiations with each of the relevant countries

USA's Contention:

USA didn't favour the acts committed by China in relation to the disputed South China sea. It rather argued that China have to now agree to the arbitral award made by the Hauge tribunal and accordingly cooperate with the ASEAN countries to formulate a detailed CoC (code of conduct).

USA also argued that all the points referred by the Tribunal and by the other neighbouring countries are within the ambit of International law. Also in recent times, USA did launch their aircraft which was departed by USA Navy into South China sea.

Also, the Americian policies towards the security and sovereignty of South China Sea was always consistent from the year 1990. Even in the year 2010 july, USA maintained a dominant position on establishment of maritime borders.

In recent times, both Australia along with USA have largely opposed the claims made by China in reagrds to maritime norms about South China sea. USA clearly upholded its views regarding Austrlia to join them in exercising a proper maritime norms and to act against China's dominat will in relation to south china sea.

ASEAN view:

The states of the ASEAN are approching towards UNLCOS means, to oppose China's idea about Nine-Dash line. ASEAN countries are mainly focusing upon Artile 121 of UNLCOS which discusses about "regime of Islands". ASEAN countries are very much keen in adopting this Artile 121 approach to curb all the disputes between the nations and also with China in relation to South China sea, Paracely Islands and Spartly Islands.

However, China isnt ready to appreciate the approch of Article 121, and isnt ready to accept the same. China's govt is always stuck on Nine-Dash line concept and hence is trying to maximize the useage of South china sea by formulating more disputes in regards to the same.

- **Conclusion:**

After analysing all the above issues, international laws in relation to Sea convention, the dispute in regards to the status of South China Sea is still likely to exist. China's dominance over South china sea would continue by their view of Nine-Dash Line, where as all the other neighbouring countries along with ASEAN countries would accordingly like to formulate a CoC and look after its effective implementation.

Since conflicts over sovereignty in the South China Sea involve the overall stability of the region and may have an impact on future relations with China, assuring security in the sea is vital.

Sea powers like the United States, United Kingdom and Australia regularly direct opportunity of route tasks – or FONOPs – to challenge what Washington calls endeavors by beach front states to unlawfully confine admittance to the oceans.

The US has infuriated China via doing FONOPs inside 12 nautical miles of the islands it guarantees in the South China Sea. These activities are not intended to challenge China's cases to islands or asset zones.

As far as concerns them, the more modest conditions of the South China Sea are conflicted about the question. They are absolutely against what they see as harassing from China on extreme sea guarantees and might want to deny all its island claims. In any case, they are additionally not excited about seeing then US go excessively far in its arrangement of strengthening military showdown with China.

Also, India is been playing a major role in supporting the neighbouring countries and retaliating the idea of China to conquer the whole South china sea. As per **Äct East Policy"** India has stated to inter-nationalize the disputes in order to oppose the threats and tactics of China.

India has also deployed its navy with Vietnam in the South China **Sea for protection of sea lanes of communication (SLOC),** denying China any space for assertion. Also, India is part of **Quad initiative (India, US, Japan, Australia)** and lynchpin of Indo-Pacific narrative. These initiatives are viewed as a containment strategy by China.

CYBER CRIME AGAINST CHILDREN IN INDIA: SPECIAL REFERENCE TO STATE OF ARUNACHAL PRADESH

- DR. SAMIR BHADURY

Abstract

Technological innovation and widespread accessibility of information and communication technology (ICT) have transformed societies around the world. Children in particular have unprecedented access to computers and mobile technologies, and have in recent decades tended to adopt these from an early age, resulting in ICTs becoming thoroughly embedded in their lives. Although the exploitation of children is not a new phenomenon, the digital age has exacerbated the problem and created more vulnerability to children. Cyberspace is a new social environment that is distinct and yet can encompass all the physical places in which people interact. The protection of children and young people in this environment is as essential as in any other location. But there are special challenges: Identifying potential harms, understanding the perspective of young people, and enacting practical measures to assure children of their right to protection. The aim of this article is to highlight the status of India as well as the state of Arunachal Pradesh regarding child abuse and exploitation, including the creation and distribution of child pornography, plus the commercial sexual exploitation of children, cyber-enticement, cyber-bullying, cyber-harassment and cyber-stalking; as well as Cyber laws for protection of children .

Keywords: Cyber crime, Cyber Law, Children Rights, Cyber space.

Introduction

Violence against Children in Cyberspace offers new insights into the depth and extent of violence and potential harm to children in relation to new ICTs. It draws information together in a way that has not been done before. Since the early dawning of Internet capabilities there has been much emphasis on bridging the digital divide, and now this report draws attention to the simultaneous need for built-in protections, especially for children and young people.[155] Various media and new technologies are explored, but particularly the Internet and mobile phones and the convergence between the two are discussed. The significant role of mainstream media in shaping social and cultural attitudes especially for children and young people (including attitudes about sexual violence and about children) is a central theme. Main challenges that children without direct access to new technologies aren't touched by their influence. Despite the very different levels of exposure to new ICTs around the world, the report explains how children are at risk whether or not their community is in the vanguard of technological change. A multi-stakeholder approach is recognized as essential to upholding children's right to access to information but also to protection from harm. Such an approach emphasizes the need for corporate citizens as well as governments and civil society to take their responsibilities seriously. Just as children and young people are adapting their ways of communicating and responding in the information age, governments and systems must also find new ways. Families are the first line of protection for children and young people

[155] file:///C:/Users/HP/Desktop/Cyber%20presentation/Cyberspace_ENG_0.pdf.

generally. But, given that all families are not equally equipped to manage this task in relation to the virtual world and that the risk posed to different children will vary, families and carers need specific support to do this. That children themselves are often more skilled and informed than the adults tasked to protect them should be recognised as a clear signal to welcome the genuine participation of children and young people in finding solutions.

Protecting Children from Cyber Crime: The Twentieth Session of the UN Commission on Crime Prevention and Criminal Justice

The United Nations Commission on Crime Prevention and Criminal Justice published a report from its twentieth meeting in Vienna, focusing on the growing problem of cyber crime against children. The CCPCJ, a subsidiary body of the Economic and Social Council (ECOSOC) and the governing body of the U.N. Office on Drugs and Crime (UNODC), undertakes international action to combat national and transnational crime, promoting the role of criminal law to prevent illegal trafficking in natural resources, crime prevention in urban areas, and improving the efficiency and fairness of criminal justice systems.[156]

CCPCJ Draft Resolution

CCPCJ Member States reached consensus on strategic approaches to address cyber crime against children, which are reflected in a draft resolution for adoption by the Economic and

[156] https://www.asil.org/insights/volume/15/issue/24/protecting-children-cyber-crime-twentieth-session-un-commission-crime.

Social Council.[157] The draft resolution is significant for establishing priorities that can be categorized into four areas:

a. Research

b. Prevention

c. Punishment

d. Cooperation

Cyber Crime against children: Scenario in India

Violence against children and young people in cyberspace is a new phenomenon that will continue to affect more children and young people across diverse locations unless safety planning is built into the structure of the so-called new information society. This report is intended to provide a framework for promoting recognition and understanding of the real risks of violence for children and young people within cyberspace and through the use of new technologies, in particular the Internet and mobile phones. It identifies the harms confronted by children and young people in this environment and uses the data available to assess current and emerging patterns. It raises concerns about new areas where harm may occur, which may be averted if early action is taken. Finally, it makes recommendations that may be enacted by a wide range of actors to serve the best interests of all children and young people, and thus the wider society[158]

Types of violence

[157] CCPCJ Report.

[158] file:///C:/Users/HP/Desktop/Cyber%20presentation/Cyberspace_ENG_0.pdf

Violence and harms against children and young people in cyberspace and in relation to new technologies include:

• The production, distribution and use of materials depicting child sexual abuse.

• Online solicitation or 'grooming' (securing a child's trust in order to draw them into a situation where they may be harmed).

• Exposure to materials that can cause psychological harm, lead to physical harm, or facilitate other detriment to a child.

• Harassment and intimidation, including bullying.

Cyber Crime against children: Status of Arunachal Pradesh

Arunachal Pradesh, state of India. It constitutes a mountainous area in the extreme northeastern part of the country and is bordered by the kingdom of Bhutan to the west, the Tibet Autonomous Region of China to the north, Myanmar (Burma) and the Indian state of Nagaland to the south and southeast, and the Indian state of Assam to the south and southwest. The capital is Itanagar.[159]

Arunachal Pradesh is home to dozens of distinct ethnic groups, most of which are in some ways related to the peoples of Tibet and the hill region of western Myanmar. More than two-thirds of the state's people are designated officially as Scheduled Tribes, a term that generally applies to indigenous peoples who fall outside of the prevailing Indian social structure. In western Arunachal Pradesh the Nissi (Nishi or Dafla), Sherdukpen, Aka, Monpa, Apa Tani, and Hill Miri are among the main tribes. The Adi, who constitute the largest tribal group in

[159] https://www.britannica.com/place/Arunachal-Pradesh

#	District	Population (2011)	Area (km2)	Density

the state, live in the central region. The Mishmi inhabit the northeastern hills, and the Wancho, Nocte, and Tangsa are concentrated in the southeastern district of Tirap. Throughout the state, the tribal peoples generally share similar rural lifestyles and occupations;

Arunachal Pradesh has the lowest population density of any state in India. Most of the populace is concentrated in the low-lying valleys, with the hill peoples living in scattered upland communities. There are no cities and fewer than two dozen towns. Itanagar, in the southwest of Arunachal Pradesh, is the state's largest town.

At the local level, the state comprises more than one dozen districts. In general, those districts are parceled into a number of subdivisions, which encompass several blocks, towns, circles, and villages. Villages are the smallest administrative units.

Arunachal District List

1	Anjaw	21,089	6,190	3
2	Changlang	147,951	4,662	32
3	East Kameng	78,413	4,134	19
4	East Siang	99,019	3,603	27
5	Kamle	22,256	200	111
6	Kra Daadi	46704	2202	21
7	Kurung Kumey	45,372	3,838	12
8	Lepa Rada	–	–	–
9	Lohit	145,538	2,402	61
10	Longding	60,000	1,200	50
11	Lower Dibang Valley	53,986	3,900	14
12	Lower Siang	–	–	–
13	Lower Subansiri	82,839	3,508	24
14	Namsai	95,950	1,587	60
15	Pakke-Kessang	–	–	–
16	Papum Pare	176,385	2,875	61
17	Shi Yomi	13,310	2,875	5
18	Siang	31,920	2,919	11
19	Tawang	49,950	2,085	24
20	Tirap	111,997	2,362	47
21	Upper Dibang Valley	7,948	9,129	1
22	Upper Siang	35,289	6,188	6

23	Upper Subansiri	83,205	7,032	12
24	West Kameng	87,013	7,422	12
25	West Siang	112,272	8,325	13

**Kamle district, Kra Daadi district, Lepa Rada district, Lower Siang district, Namsai district , Pakke-Kessang district, Shi Yomi district & Siang district was created after 2011 Census. So Population & area figures can be incorrect.*

Cyber Crimes Against children in Arunachal Pradesh – 2017-2021

District-Wise Details of Complaints Received During 2017-2021

S. No	Districts	2017	2018	2019	2020	2021	Rate of Total Cyber Crimes (2021)+
1	TAWANG	0	0	1	0	2	3
2	WEST KAMENG	0	0	0	0	0	
3	EAST KAMENG	0	2	0	0	3	5
4	PAPUMPARE	1	0	0	3	0	1
5	LOWER SUBANSIRI	0	0	0	0	0	0
6	KURUNG KUMEY	0	0	0	0	0	0
7	UPPER SUBANSIRI	0	0 239	0	0	0	0
8	WEST SIANG	0	0	0	0	1	1
9	EAST SIANG	0	0	0	0	0	0
10	SIANG	0	1	0	0	2	3

11	LOWER SIANG	0	0	0	0	0	0
12	LOHIT	0	1	0	0	0	1
13	NAMSAI	0	2	0	1	0	3
14	ANJAW	0	0	0	0	0	0
15	DIBANG VALLY	0	2	0	0	0	2
16	CHANGLANG	2	0	0	0	0	2
17	LONGDING	0	0	0	0	0	0

In this chart I am showing the complaints regarding cyber issues received by Arunachal Pradesh cyber cell.

What can be done

The study suggested a campaign to create awareness about cyber bullying among children and adolescents. Conducting focused training programmes for teachers, and sessions with students on internet safety and guidelines that are included in the school curriculum could be effective, Child Rights. Existing cyber laws should be revised for child safety issues, and portals, where cyber-crime can be reported, should be set up.

Duty bearers

The responsibility that exists in the physical world to assure children and young people of their rights and protection also applies to cyberspace and the use of new ICTs. That is, cyberspace is not an empty space but rather a social arena in which things happen to and between people and where the vulnerabilities and risk factors of the physical world remain in play. Interactions in cyberspace have consequences in the physical world.

Governments

Decision and policy-makers within governments at various levels are recognised to have responsibility to act for the protection of children in cyberspace. Some governments have in recent years enacted and implemented well-articulated laws, policies and systems to protect children in cyberspace. Some have set up focused taskforces and participated actively in cross-border cooperation and consultation to prevent violence against children.

Online games

Online multiplayer interactive games are a boom business, notably in North and Southeast Asia, and draw in millions of people. This business, involving both fantasy game-playing and gambling sites, will be promoted and expanded greatly in the near future. Handheld games consoles with Internet capabilities will further promote virtual interactions. Online games potentially provide a new platform where children and young people will be exposed to solicitations and potentially harmful interactions with other people online. Social impact assessments from a child protection perspective appear not to be available.

Peer-to-peer exchanges

In recent years, most concern about protecting children in online interactions has focused on chat rooms. In light of recognition that adults have lured children from chat rooms into face-to-face meetings where the child has been assaulted or otherwise violated, some Internet businesses have adapted or closed chat room services. In the meantime, children and young people with access to the latest technologies have been moving into peer-to-peer exchanges, due to the availability of free software that encourages the sharing of music files and other materials. Peer-to-peer transmissions occur directly from one server to another without any tracking devices. This facility is also popular among people exchanging images of child sexual abuse. In addition, children and young people are increasingly opting to use instant messenger (IM) services. Social impact assessments on peer-to-peer usage appear lacking.[160]

Cyber bullying

Some children and young people appear not to recognize the degree to which their actions in cyberspace can cause serious harm and distress to others. This includes where children and young people hurt each other through bullying or harassment.

Young offenders

Concerns are emerging that some young people aged under 18 or in early adulthood are accessing and trading in images of child sexual abuse. The information is limited and it is too early to assess whether this derives from curiosity in sex with peers, indicates the young people have been sexually groomed and exploited by others, or is occurring for other reasons.

[160] Internet Watch Foundation. (2005, July 25). Record breaking 6 months for Internet Watch Foundation. Press release. UK: IWF. Retrieved in August 2005 from http://www. iwf.org.uk/media/news.134.htm

Information gaps

The information to hand about harms to children and young people in cyberspace is disparate and clustered in communities where new technologies have been available to more people for a longer time. Even there, research is relatively new and many gaps remain. Across all regions, much basic investigation and research is required to build a holistic understanding of the range of harms that may be done to children and young people within and via cyberspace, to devise ways to prevent this, and to assist those who nevertheless still experience harm. Key actors, namely businesses and governments, are encouraged to commit budgetary and other resources for research programmes on this front. Areas for action include[161].

• The impact of engagement with new ICTs on the personal development of children and young people.

• The various ways in which children and young people use and perceive new ICTs, the resulting impacts on their behavior and interactions online and offline, and assessment of self-protective mechanisms employed or not in relation to new technologies.

• The impacts on children and young people of exposure to and use of pornography (adult and child), online and offline.

• The impacts of adult use of pornography in relation to perceptions of children and the sexual abuse and exploitation of children.

• Integration of questioning about ICTs and children into other research agendas, including questions related to the sexual exploitation of children in all forms.

[161] Livingstone, S., Bober, M. & Helsper, E. (2005, April). Inequalities and the Digital Divide in Children and Young People's Internet Use. UK: London School of Economics. Department of Media and Communications.

• Assessment of the incorporation of child protection measures into ICT business work planning, including research and development.

Recommendations

A multidisciplinary agenda for action to protect children in cyberspace follows.

1) Policy-making

Governments are urged to lead a consultation process with law enforcement, child-protection agencies, industry members, young people, parents and other interested parties to devise and implement specific strategies to protect children and young people in relation to ICTs. Strategies will be most effective if built into existing protection plans and programmes. They need to specify actions on research, welfare and rehabilitation services, legal reform, law enforcement, industry accountability and education measures. A budgeted commitment is required, supported by business.[162]

2) Private sector cooperation

Media enterprises are urged to participate actively in raising awareness about child protection in relation to new technologies while also training and sensitising journalists and others not to re-exploit children and young people through media reportage.

3) Educational initiatives

[162] UNICEF. (2004). The State of the World's Children 2005: Childhood Under Threat. UNICEF.

Specially designed education and awareness raising campaigns and programmes are urged to address the demand for children for sexual abuse and exploitation, as manifested in the heightened demand for images of child abuse disseminated through cyberspace.

education and awareness programmes to protect children encompass cross-sector advice and support for their development and implementation. Programmes should build in flexibility for updating information, in view of rapid shifts in technological development and usage trends. These programmes are to target children, parents, teachers, Internet cafe operators and the wider community on various matters, including the range of potential harms, tactics for safe interactions, and technical precautions (filters, blocks, etc).

It is advised that computer literacy programmes be targeted at parents and other adults so they are better informed about young people's use of new ICTs. Even as young people's technical proficiency may surpass that of their elders, they nevertheless require support for safe decision-making.

4) Care and welfare

Develop common standards for the treatment and care of children and the rehabilitation of offenders.

5) Law and legal reform

National governments are urged to devise and implement legislation and to harmonise laws to protect children from all cyber crimes including online grooming, luring or stalking, exposure to illegal or inappropriate materials and all actions related to child pornography (including creation, dissemination, accessing, downloading, possession and incitement).

6) Research

A multidisciplinary research agenda is required as a priority to inform the urgent development of comprehensive prevention and protection strategies addressing all areas affecting the safety and welfare of children in relation to new ICTs. Targeted investigations require financial and other resources committed by key actors, namely business and government. This research programme would work best by drawing together regional networks (including universities and research centres) to share information and experiences.

Conclusion

Effective actions need to be implemented across all the physical settings in which children operate – in families, schools, institutions and other settings – while taking note of a child's own agency in relation to cyberspace and other new ICTs. In addition, the character of the virtual environment, as outlined in this report, means that children and young people may be better informed on several issues, including topics with which adults may prefer they did not engage.[163]

State of Arunachal Pradesh People are not aware about the cyber crimes even this type of crime happens they does not know where they will go? Parents also not aware regarding Cyber crimes. Although Arunachal Pradesh police taken some initiatives in school colleges to aware the children's regarding cyber issues. How they can protect them from this kind of issues. Some NGO, Child organization, Women's commission doing some awareness program in remote areas. So they can understand and protect themselves.

[163] file:///C:/Users/HP/Desktop/Cyber%20presentation/Cyberspace_ENG_0.pdf

PATRIARCHY TO WOMEN EMPOWEREMENT: A DELIBERATE TRANSFORMATION OF SOCIETY

- BONAM SHRUTI & GOWTHAM RAVURI

Abstract

In the past society, according to Mitakshara and Dayabhaga, females were never made a part of the paternal family and the division of ancestral property was based on the rule of possession by birth which was biased towards the males. Such practices of ancient times have delayed women's empowerment and independence. The partial norms set by the then society, in addition to the biased property laws, pushed women towards being a vulnerable class. Dayabhaga promoted division of property only when the father of the succeeding inheritors died. Such beliefs led to people plotting to end the lives of their ancestors. To overcome such heinous crimes revolution in the succession laws became a necessity.

There is less awareness among the women about their rights and very little has been seen for contesting the violation, in the courts. Affirmative, strong stereotypical patriarchal norms and traditions have threatened violation of these rights by the male relatives in their family who prevent them from fighting for their rights. Looking at the realistic scenario as well, women themselves in various parts of northern and westerns states voluntarily give up their inheritance rights. They give up their claim in the ancestral property in the light of the 'Haq Tyag' and is justified on the basis that the father pays the dowry and handles all the finances of his daughter so the property should rightly belong to the son.

This research paper aims at understanding how different religions offer varied and diverse laws of inheritance. To get a detailed insight into the doctrines and principles like the

Mitakshara and Dayabhaga that governed the successor's rights before the codification of any laws in India. To answer the shortcomings faced due to uncodified laws and how the activists and judiciary have strived to overcome the loopholes, understanding their strategies and extent of the success achieved. We investigate whether legislation of equal inheritance rights for women modifies the historic preference for sons in India and find that it exacerbates it. This paper also examines how the Hindu Succession Act, 1956 has been repeatedly amended and proved itself to be rewarding to the females of Hindu households and the great leap or transition brought about in the outlook and perspectives of people.

Keywords: *Mitakshara, Dayabhaga, Rule of possession, Inheritance.*

INTRODUCTION

In the Vedic times, not only were the women dominated by men but also all the laws favored men. In the ancient text of Manusmriti , Manu writes: ***"Her father protects her during virginity, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence"[164].*** The right to property is essential for economic development of a country. Property rights are the most afforded individual rights given by the law of any country.

"The word "succession" is a transmission by law or by the will of man to one or more persons of the property and the transmissible rights and obligations of a deceased person."

[164] Manu Verse 9.3

Succession is an act or process of inheriting title, office or property. In the ancient times, when the kings rule prevailed succession typically meant taking over predecessor's property along with which was tagged the authority inherited too. As time has passed people's view on the rights of descendants has taken a great leap. In the following centuries, the inheritance was governed by popularly accepted laws of the religion, customs and beliefs. People stereotypically believed in the supremacy of patriarchy and denied equal share in the ancestral property for females.

Promoting gender equality and empowering women is of prime importance which features as the epitome of development goals. Over the years, several programs and policies have been implemented to increase women's access to rights resources and voice. After independence, Article 15 was included stating that there shall be no discrimination on the basis of sex, marked the beginning of a new era for women empowerment.

Women's rights have been established by a long and slow process in which amendment to the Hindu Succession Act, 1956 making daughters a member of the coparcenaries was a milestone that has led to significant improvements in women's autonomy.

Prior to Hindu Succession Act, 1956 the customary laws of that particular region prevailed for Hindus. The Hindu succession act is the first codified and uniform law for Hindus which protects inheritance rights. Though this act has made a remarkable change in protecting the legal rights of women there were few loopholes that are yet to be curbed.

SCHOOLS OF THOUGHT PRIOR TO CODIFICATION.

Prior to the codification of the Hindu Succession Act, 1956, the ancient schools of thought believed and executed by our very ancestors included the Mitakshara and Dayabhaga. All the Hindu Families, which were usually undivided, were administered by the "**Karta"**, and it was an established belief that it is the males who lead the family and they were made a part of the family business as and when they were born as coparceners who share in property keeps changing with births and deaths in the family. Girls were married off to a suitable groom at a very tender age and she would become a part of the In-laws undivided family but never would get the privilege of being a part of her paternal family and would become a subset to the part of property received by her husband, if allowed. The acquisitions never considered the will of the female members of the family. When the partition of the family property was initiated males were believed to be superior and deserving class who would protect the women. Following the patriarchal norms and exclusive right was given to the sons by birth.

Principles on a similar notion were followed by the ancient school of Dayabhaga too which was famously believed by the local crowd in Bengal, Assam, and few parts of the north-eastern states. It particularly directed sons to be the sole inheritors of father's property after his death. Division of the property can be demanded by three succeeding generations that are limited to sons, grandsons and great grandsons. These orthodox stereotypes lead to women falling prey to inferiority complexes and confining themselves to the daily household jobs to keep the male member of their family happy. Dayabhaga promoted division of property only when the father of the succeeding inheritors died. Such beliefs lead to people plotting to end

the lives of their ancestors are just as sinful. To overcome such heinous crimes revolution in the succession laws became mandatory.

DIVERSE RELIGIONS: HURDLE TO UNIFORMITY

Maximum laws discourage the passing on of property to women as they are bearded with the fear of losing the fragment of property, once the women gets married and moves away from the paternal house. There is less awareness among the women about their rights and very little bent to court has been seen for contesting the violation. Affirmative, strong stereotypical patriarchal norms and traditions have threatened violation of these rights by the male relatives in their family who prevent them from fighting for their rights. Truly speaking women themselves in various parts of northern and westerns states voluntarily give up their inheritance rights. They give up their claim in the ancestral property in the light of the 'Haq Tyag' and is justified on the basis that the father pays the dowry and handles all the finances of his daughter so the property should rightly belong to the son.

APPLICATION OF INITIATIVES

Hindu Succession Act, 1956 applies to all the Hindus, Sikhs, Jains and Buddhists for the non-testamentary or intestate inheritance and succession. Indian Succession Act, 1925 applies to Parsi's for intestate succession, specifically under sections 50 to 56 and also to Christians and Jews, specifically under section 31 to 49. Muslim Personal Law (Shariat) Application Act, 1937 includes all laws governing muslins for non-testamentary succession or where one has died a with a will, would be governed with Indian Succession Act, 1925 and where a will is

issued concerning the immovable property owned in West Bengal and that of Madras and Mumbai jurisdiction. Special Marriage Act, 1954 applies in all cases of interfaith marriages.

Hindu Notions

The Hindu Succession Act, 1956 is applicable to both men and women and to anyone who converted to being a Hindu. It makes absolutely no distinction between immovable and movable property. But only applies to intestate inheritance and utterly no application in case of testamentary succession. When a man's death occurs without a will, it descends to his heirs in four categories Class I, Class II, Agnates, if two people are related by blood or adoption wholly through the male, and Cognates, who are related to the intestate by blood or adoption but not wholly through males. First preference is always given to Class I heirs. In the absence of any Class I heirs, the property is descended to Class II heirs. If a man has no naturally orthodox Class I or Class II heirs, the property descended to agnates, and then to cognates.

A wife of a Hindu man is equally entitled to a share in her husband's property very similar to the surviving heirs and if no heirs were ever there or are not alive she gets the right over the full property of the deceased. She will, as a bonus, also have an exclusive claim to her individual property. She can also claim maintenance and is the sole owner of all property earned, gifted or inherited. If divorced, matters regarding maintenance and alimony are all decided at the time in severance and can later claim no rights in the estate of the husband.

In the case of Interfaith Marriage, the wife's inheritance is administered by the personal law of the husband. If a Hindu woman enters in a wed lock with a Muslim man without

converting her religion the marriage would neither be held as 'invalid' nor 'regular' and hence will not be able to claim Dower nor the property of her husband.

Christian wedlock would be a proper example to explain equality. The wife of a dead or divorced Christian man is equally entitled to the part in the property as any lineal descendent or other kindred. The division of the estate would in such part as are alive.

Before 2005, only boys were accrued the right to property of their father by birth and nothing would be in the treasury for the daughters. But after the Hindu Succession (Amendment) Act, 2005 the discriminating norms have changed and no father can deprive his daughter of her right to his property. She will be awarded equal rights as her brother in properties whether it be self-earned or ancestral.

"In April 2018, in the case of **Mangammal vs. T.B.Raju**[165], the Supreme Court held that the living daughters of living coparceners would be entitled to claim a share in the ancestral property A married Hindu daughter also has right of residence in her father's house if she is deserted, divorced or widowed."

Muslim Notions

On the death of a male member in the family the legal heirs equally became capable of claiming his property but the daughter's share would be half that of the son. The legal heirs have a hustle for two-thirds of the property whereas only one-third is descended as per the will of the father. If the wife has no children she can claim right over one-fourth of the property and one-eighth if her husband has heirs. As the number of wives increases the share per person keeps on diminishing.

[165] (2018) 15 SCC 662

Christian Notions

The wife of a deceased Christian husband gets one-third of the property and the rest is hustled between the heirs. In case he has no legal heirs the wife gets half the estate and the other half is passed on to the kindred. A daughter is deemed to have an equal share as to that of her brothers in her father's estate.

STEREOTYPICAL PATRIARCHY IN ITS COLORS

According to sections 15 and 16 of the Hindu Succession Act, 1956, in the case of a women's death that is intestate, all the property acquired by her goes to heirs of her husband. However, a symmetrical view cannot be seen when the death of a male is intestate. All the self-acquired property of the husband is transferred to his relatives and not to the wife's heirs. Agricultural land is not inherited by the daughters as the wish of keeping the landholding in family is fragmented and diluted. "Zamindari Abolition and Land Reforms Acts of various states that govern agricultural land holdings, and the government's stance disfavors women."[166]

Tribal women are to be administered by their customary laws which are mostly patriarchal and ends up divesting women of their inheritance rights. A Muslim Women inherits, half of what is earned by her husband and is also entitled to Mehr and Dower. Whereas a man has rights only to the inherited property hence it is considered that the women should be less favored and given claim to the lesser property. Another prominent example for inequality would be the remuneration system. Even though Article 39(d) imposes equal pay of

[166] Schedule IX of Indian Constitution,1950

remuneration for equal work for both men and women there are discrepancies to be bridged in this regard.

Except for Muslims in India, Polygamy is a non-punishable act across other Arab countries, but only for men. Unlike Women, Men can marry up to four women at the same time. Women in any religion aren't allowed to be of constant service to god. Being a priest or a Maulana is unacceptable as a profession for women. The Christian community has been coming forth as progressive in this regard as they do constitute a good part of their clergy by admitting women as Nuns.

CONCLUSION

It is never the right time to be happy and women together. Curbed at home, destitute in society and a significant subject to gender prejudice at the place they work. Throughout history, women have borne and burnt of being the "inferior" sex. Though, the angle in the way people treat women hasn't quiet changed but they are surely in a better place than ever today. All this is the result of raised awareness through global forums and social media being a platform to their voice against the atrocities, anguish and angst. Laws have been changing from time to time, drastically, to empower women. The government is trying to be proactive and execute gender-neutral laws and indulge to provide women with heft and hearing.

There still remains to be a lot of jabs to empower them, one being the inheritance and succession laws. Women in India for years have been prey to discrimination in matters of

rights to the ancestral property for various reasons which include there being no uniformity in the related laws, various communities basing their personal laws on religion and also regional bias. Different tribal communities in a different state are governed by their personal laws.

Maximum laws discourage the passing of property onto women as they are bearded with the fear of losing the fragment of the property once the women gets married and moves away from the paternal house. There is less awareness among the women about their rights and very little bent to court has been seen for contesting the violation. Affirmative, strong stereotypical patriarchal norms and traditions have threatened violation of these rights by the male relatives in their family who prevent them from fighting for their rights. Truly speaking women themselves in various parts of northern and westerns states voluntarily give up their inheritance rights. They give up their claim in the ancestral property in the light of the 'Haq Tyag' and is justified on the basis that the father pays the dowry and handles all the finances of his daughter so the property should rightly belong to the son.

Laws have never been a motivating segment for women to fight for their inheritance rights. Despite such low key upcoming for gender-neutral Inheritance Laws, these are the most important initiative to be taken at the hour. All this can be done by spreading awareness and implementing laws at a higher pace.

BEYOND HOMOSEXUALITY-THE POLITICS OF PRIDE

- **KHUSHBOO RANA & KIRAT BIR KAUR**

Abstract

Although the last decade from 2010 onward has been the decade of LGBTQIA rights, they remain the most marginalized citizens in our world. They strive desperately to blend into our culture. They have to undergo surgery to transform themselves as they won't feel satisfied with the body they already have . However our community tends to discriminate them. People do not realize the precise definition of LGBTQ , their history, their issues, their rights. What makes LGBTQ community to do "**odd**" kinds of act is still a wonder for people. But there is lack of research, the wonder ends there. Now let us have look on a more clarified version of LGBTQ community , who they are, their rights, issues, and much more.

Introduction

Can you think of a person, community or a group having no recognition in society as well as law and also denied access to the most basic rights such as right to vote, right to own property, right to claim formal identity? But before answering fulfill two more requisites (1). They denied these rights even in 21st century

(2.) Moreover they denied these rights in democratic country like India.

Now if you think of LGBTQ community then you are absolutely correct. It is only after long dark decades, from 2010 onwards, LGBTQ community in India knocks the doors of courts demanding their rights. What they achieve today is merely a tip of iceberg. So, the fight of equality continues.

Who are LGBTQ

An acronym LGBT stands for Lesbian, gay, bisexual and transgender. In beginning only gay community is recognized .But it didn't cover up all other human beings who are not normal or are homosexual. So acronym LGBT was introduced in 1990s which includes human beings who have different sexual orientation than a person.
In LGBT ,L stands for '**Lesbian**' which refers to women who are sexually attracted towards women only. In LGBT, B stands for **'Bisexua**l' which represents persons who are attracted to men and women both. Also T stands for **'Transgender'** which includes people whose gender identity or expression does not match the sex they were assigned at birth. Then Q i.e '**Queer'** is originally utilized as a derisive slur, eccentric has now become an umbrella term to depict the bunch ways individuals reject two-fold classes of sex and sexual direction to communicate what their identity is. Individuals who recognize as eccentric grasp characters and sexual directions outside of standard hetero and sex standards.

What are difficulties faces by LGBT [lesbian, gay, bisexual and transgender] community

1. **Lack of Legal recognition-** Same-sex marriages are legally recognized in few parts of the world only. Major of the countries like India do not legally recognized same sex marriage yet.

For example- Recently, a PIL was filed in the High Court of Delhi seeking declaration to the marriage rights of the gay community under the **Hindu Marriage Act, 1955.**

- The petitioner avers that the Act allows marriages between "two Hindus" without any discrimination between heterosexual and homosexual couples.
- But still, gay couples can't get married and register the same under the Act

2.Deprivation of rights– The LGBTQ couples are prohibited from those rights which are enjoyed by opposite sex couples.

For example- Unlike other married couples they cannot bring each other on as nominees in insurance and financial plans. In India, there is no provisions in law that enable homosexual couples to open joint account, make health and funeral related decisions for each other and inherit each other's property like heterosexual couples did.

2. **Racial Discrimination**– Additionally, lesbian, gay, bisexual and transgender people face poverty and racism daily. They suffer from social and economic inequalities due to continuous discrimination in the workplace.

They are often looked down upon society.

3. **Heterosexuality:** 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.
4. **In-equality & Violence:** They face inequality and violence at every place around the world. They are forced to accept low wages .They are compelled to engage in sex work which involve high health related risks. They face torture from people who mock at them and make them realize that they are different from others. .
5. **Social isolation:** There are high risk of social isolation and loneliness among LGBTQs. They are abandoned by their families. They have no or few friends.

6. **Conflict in Family itself:** Lack of communication between LGBT children and the parents often leads to conflict in the family. Many LGBT youths are placed in foster care or end up in juvenile detention or on the streets.
7. **Tape of Addictions:** These people mostly get addicted to drugs, alcohol, and tobacco to get themselves relieved of stress and rejection and discrimination.
8. **Victims of Hate Crimes:** They also become victims of hate crimes. In some countries, homosexuality is regarded as a crime. It is illegal and is often met by imprisonment and fines.

How the adoption laws discriminate the LGBTQIA+ couples

1. As per regulation 5(3) of the Adoption Regulation Act, 2017, only a couple having a stable relationship of two years is eligible to adopt a child. Further, the section uses the words "husband" and "wife" . But LGBTQ couple do not fulfill the criteria of being husband and wife. So they simply denied the rights of adoption.
2. Since there is a different set of adoption rules applied in the case of men and women thus, the applicability of such laws with regards to trans-couples will lead to ambiguity.
3. Further, in the light of NALSA judgement since people have the right to choose their gender and undergo sex reassignment surgery as well. Thus if in case a woman adopts a child but then undergoes sex change become male, so there is a very little clarity about the legal implications of the same.

There is no denying the fact that adoption is a complex issue and even heterosexual couples also have a hard time in adopting a child considering the anti-trafficking laws. But the fact is

that at least a heterosexual couple can apply for adoption while the same-sex couples are not even allowed to adopt.

Recognized Rights by Supreme Court for LGBTQ Community

1.A landmark judgement of Indian Supreme Court came on 6th September 2018, which struck down a part of Section 377 of the Indian Penal Code, 1860 in Navtej Singh Johar and Ors. v. Union of India (the "Navtej Johar Case"), which criminalized sexual intercourse against the order of nature to exclude all kinds of adult consensual sexual behavior. Section 377 has been criticized for discriminating against the LGBT community.
In this judgment of Supreme Court, the emphasis was on the fundamental right of homosexual persons to live with dignity, without the stigma attached to their sexual orientation, with equal enjoyment of rights under India's constitution, and equal protection under the law.
The decision of SC was based on ground that it violates fundamental rights such as i) Right to equality under Article 14; (ii) Right against discrimination under Article 15; (iii) Right to freedom of speech and expression under Article 19; and (iv) Right to privacy under Article 21of LGBTQs community.

2. Right to equality :- The bare language of **Article 14 of the Constitution of India** reads as under: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Though, this article allows that distinction but it must be based on intelligible differentia. The Supreme Court held that there was no intelligible differentia between people "who supposedly engage in 'natural' intercourse and

those who engage in 'carnal intercourse against the order of nature'".

3.Right against Discrimination:-

Article 15 of Indian Constitution prevents the state from discriminating against any citizen only on the grounds of sex, religion, race, caste, or place of birth. Therefore in Navtej Johar Case, Supreme Court held Section 377 violative of Article 15.

- **Right to Freedom of Speech and Expression**

Article 19 of Indian Constitution deals with the Protection of certain rights regarding freedom of speech and expressions to all citizens. In the Navtej Johar Case, Supreme Court noted that Section 377 does not qualify as a reasonable restriction on an individual's freedom of speech and expression.

- **Right to life and personal liberty:-Article 21 of Indian Constitution** reads as, "No person shall be deprived of his life or personal liberty except according to a procedure established by law." This article provides for the protection of life and personal liberty as a fundamental right to all citizens of India. The Supreme Court found Section 377 to be in violation of these constitutional rights as right to privacy couldn't avail by the LGBT community members.

After this historic judgment of Supreme Court, India puts itself into the list of those almost 150 countries where homosexual activity is legal. The decriminalization of Section 377 by providing equal fundamental rights to LGBT community as that of other citizen was the first step towards recognizing the rights of the LGBT community in India.

JUDICIAL PRONOUNCEMENTS

The last decade has been regarded as the decade of LGBTQIA rights. Finally LGBTQ members knock the doors of courts asking and demanding for their rights. This has resulted in some landmark judgements .Let us have a look at some of the judgements which have been instrumental in upholding LGBT rights in India.

Naz Judgement, 2009

Naz Foundation v Government of NCT Delhi or as it is popularly known as Naz Judgement which is delivered by High Court of Delhi in 2009. In this judgement for the first time Delhi High Court declared Section 377 to be unconstitutional.

In the present case Naz an NGO based in Delhi filed a Public Interest Litigation (PIL) claimed Section 377 of the Indian Penal Code to be held unconstitutional. Thus they successfully got the Courts to declare Section 377 to be unconstitutional which are not in tune with the Article 14, 15 and 16 of the Indian Constitution.

NALSA Judgement, 2014

2013 was considered as very dark year for LGBTQIA rights because of Suresh Kumar Koushal vs Union of India where homosexuality was re-criminalized by Supreme Court of India. The darkness was short lived because of National Legal Services Authority vs Union of India or NALSA judgement. Under this case for the very first time all the Fundamental Rights were extended to transgenders and they were given the identity of Third Gender. The Apex court laid a comprehensive set of guidelines that every State must follow to bring Transgender into public spheres and provide remedies for their marginalization.

Puttaswamy Judgement, 2017

Justice K.S Puttaswamy (Retd.)vs Union of India or Puttaswamy judgement is another milestone in LGBTQ rights as it held the Right to Privacy to be an integral. Article 21 of Indian Constitution expanded to include Right to Privacy. This right can be enjoyed by every individual irrespective if their sex and gender. Therefore recognition of privacy is a blessing for members of the LGBTQIA community as it grant them a right to choose their partners freely.

Navtej Johar, 2018

Navtej Singh Johar v Union of India or Navtej Johar decriminalized homosexuality in India. This judgement is a result of multiple Public Interest Litigations that have been filed by different groups of the LGBTQIA community.

The Bench struck down Section 377 to the extent that it criminalized sex between two consenting adults. The Court upheld the provision of that criminalize non –consensual acts with children or animals. The Supreme Court further held that Section 377 violates Article 14, 15, 16 and 19 1 (a) of Constitution of India. It further held that every individual irrespective of their gender identity and sexual orientation have the right to live with dignity, autonomy and make personal and private without State interference.

Arun Kumar Judgement, 2019

Under Hindu Marriage Act, 1955 the definition of marriage only includes men and women. But Madras High Court in Arun Kumar v Inspector General of Registration judgement expands the category of women to include transgender people to identify as women to be brides as well.

Therefore it can be said that this case among many others lays the foundation for marriages within the LGBTQIA community broadening the right to marry.

The NALSA Judgment- a ray of hope?

The National Legal Services Authority (NALSA) filed a petition in 2012 to the Supreme Court, asking for equal rights and legal recognition of transgendered individuals as the third gender. They believed that the non-recognition of gender identity of the transgender community violates the fundamental rights guaranteed to the transgendered individuals, who are citizens of this country.

Due to non-recognition the transgender community lacked access to the most common rights that every other so called "normal" citizen possesses. They were denied the right to vote, the right to own property and the right to claim formal identity through any official documents such as a passport or driving license. Further they also faced discrimination to contest elections, employment and were treated as untouchables. All this merely because most of the legal documents needed to avail any of the above ask to specify the gender of the applicant. And the form only consists of two options in the gender category i.e. male and female.

Now with the NALSA judgment it has been submitted the right to choose one's gender identity is integral part of Article 21 of the Constitution of India. Thus an individual can opt for male, female or transgender as per their own choice. This Judgement also expanded the meaning of the term 'sex' which always meant male or female biological sex in Articles 15 and 16, and have now included 'psychological sex' and'gender identity' to it.

Clearly this judgement comes across as a ray of hope to many individuals who have been struggling over the years to identify themselves as third gender. with being able to identify themselves by the gender they relate to, be it female, male or third gender. The selection of gender is now based upon the individual's choice.

About SMILE Scheme

- This scheme is a sub-scheme under the 'Central Sector Scheme for Comprehensive Rehabilitation of persons engaged in the act of Begging'.
- It also focuses on rehabilitation, provision of medical facilities and intervention, counselling, education, skill development, economic linkages to transgender persons
- It covers several comprehensive measures including welfare measures for persons who are engaged in the act of begging.
- The focus of the scheme is extensively on rehabilitation, provision of medical facilities, counselling, basic documentation, education, skill development, economic linkages and so on.

Its implementation

- The scheme would be implemented with the support of State/UT Governments/Local Urban Bodies, Voluntary Organizations, Community Based Organizations (CBOs), **About** institutions and others.
- The scheme provides for the use of the existing shelter homes available with the State/UT Governments and Urban local bodies for rehabilitation of the persons engaged in the act of Begging.

- In case of the non-availability of existing shelter homes, new dedicated shelter homes are to be set up by the implementing agencies

What is the process for declaring one's desired sex in India?

In India, the rights of transgender persons are governed by the Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Persons (Protection of Rights) Rules, 2020.

- Under the Rules, an application to declare gender is to be made to the District Magistrate.
- Parents can also make an application on behalf of their child.
- A much-criticized previous draft of regulations required transgender persons to go through medical examination to indicate their sex has been omitted in final rules.
- As per the Rules, state governments have also been directed to constitute welfare boards for transgender persons to protect their rights and interests, and facilitate access to schemes and welfare measures framed by the Centre.

Transgender Persons (Protection of Rights) Bill, 2019

Transgender Persons (Protection of Rights) Bill, 2019 was enacted with an objective to protect the rights of the Transgender Community by prohibiting discrimination against them with regards to employment, education. healthcare, access to government or private establishments. But in the name of empowering the community, the bill further exposes them to institutional oppression and dehumanizes their body and identity.

The trans community in India has vehemently rejected the bill citing following provisions of the bill as they infringe their fundamental rights and do not comply with the NALSA judgement.

1. The bill snatches from an individual the right to determine his/her sexual orientation which is an integral component of the right to privacy as pronounced in the NALSA judgement. As per the bill, the change of gender identity in documents can only be done after proof of sex reassignment surgery which must be certified by the District Magistrate. This takes away from the Trans community the basic human right of autonomy and privacy and further exposes them to harassment in the hands of authorities.
2. Another discriminatory aspect of the bill is that the punishment prescribed in the case of ' Sexual abuse against Transgender' is only of two years while a similar kind of offence if, happened against women attracts a serious punishment extending up to 7 years. Thus, stipulating different levels of punishments for the same nature of crime only on the basis of gender identity is inherently discriminatory, arbitrary and against the equal protection clause.
3. The bill is also worthy to be criticized as the bill erroneously neglects the viciousness and atrocities that transgenders encounter within their own family. The law disentitles them from leaving their families and joining the trans-community thus infringing their right to be a part of any association and right to movement. The only recourse available to the trans community in case of family violence are the rehabilitation centres.

4. Although the bill seeks to provide "inclusive education and opportunities" to the transgender community but fails to lay down any concrete plan to achieve the same. There are no provisions in relation to providing any scholarships, reservation, changing the curriculum to make it LGBT+ inclusive or ensuring safe inclusive schools and workplaces for the trans-community.

Therefore, it can be concluded that on one hand where the courts are taking progressive steps to empower and uphold the rights of LGBTQIA+ community, on the other hand, the legislature is invalidating the same rights. It is high time that the government should acknowledge and frame laws in accordance with the landmark judgement else the LGBTQ community will continue to face setbacks in their struggle to have the same rights as those available to heterosexual people.

What are the LGBTQ legal rights in India right now?

Right now in India, the law is very clear about LGBTQ legal rights. If they are dating, they are allowed to have sex relationships in private. It's about two consenting adults who are willing to spend time with each other in private. Again, if they do something in public, it might be considered an offense under provisions such as obscenity or public nuisance.

If two adults of the same sex are holding hands or kissing in public, then they will be considered liable for their actions. Earlier, even in private, they faced the risk of arrest or extortion, mostly by the police. This has definitely changed now.

But even today, legal sanction for same-sex marriage in India remains a distant dream. The same holds for the adoption rights of same-sex couples. People in same-sex relationships also don't have the same inheritance rights as their heterosexual counterparts. Even if a couple has

been living together for years, one partner doesn't automatically inherit the other's assets upon their demise, unless a will to that effect has been executed or the assets are jointly owned and nomination specified.

What are the adoption laws for single members of the LGBTQ community, or homosexual couples who have been living together?

Adoption laws in India have been strict from the very beginning, even for heterosexual couples or individuals. They are even more so when it comes to people from the LGBTQ community. When a same-sex couple wants to adopt a child in India, a lot of factors come into play.

Many celebrities, homosexuals like Karan Johar and Tushaar Kapoor have gone for surrogacy, a more recent example being Ekta Kapoor. But even the surrogacy laws are stricter now in India, following many instances of Western people coming to India resulting in the development of surrogacy tourism here.

Even in the case of same-sex couples in India, there is no legal validity for adopting a child. If a single man or a single woman goes for adoption, they may have better chances with the procedure.

Right now, there are no marriage or adoption laws in India for same-sex couples. There is no negative law saying same-sex marriage in India cannot happen. However, on the flip side, there is no positive law in India too saying that it can happen.

It is easier to adopt as single parent in India

***Role* played by the judiciary**

- The Delhi High Court's verdict in **Naz Foundation vs Government of NCT of Delhi (2009)** was a landmark in the law of sexuality and equality jurisprudence in India.
- The court held that Section 377 **offended the guarantee of equality enshrined in Article 14 of the Constitution,** because it creates an **unreasonable classification** and targets homosexuals as a class.
- In a retrograde step, the Supreme Court, in Suresh Kumar Koushal vs Naz Foundation (2013), reinstated Section 377 to the IPC.
- However, the Supreme Court in **Navtej Singh Johar & Ors. vs Union of India (2018)** declared that the application of Section 377 IPC to consensual homosexual behaviour was "unconstitutional".
- This Supreme Court judgment has been a great victory to the Indian individual in his quest for identity and dignity.
- It also underscored the **doctrine of progressive realisation of rights.**

No legal sanction to same-sex marriage

Despite the judgments of the Supreme Court, there is still a lot of discrimination against sexual minorities in matters of **employment, health and personal relationship.**

The Union of India has recently opposed any move to accord legal sanction to same-sex marriages in India.

The Union of India stated that the decriminalization of Section 377 of the Indian Penal Code **does not automatically translate into a fundamental right for same sex couples to marry.**

The U.S. Supreme Court, in Obergefell vs Hodges (2015) underscored **the emotional and social value of the institution of marriage** and asserted that the universal human right of marriage should not be denied to a same-sex couple.Indian society and the state should synchronize themselves with changing trends.

Need to amend Article 15 to prohibit discrimination based on gender or sexual orientation

Article 15 secures the citizens from every sort of discrimination by the state, on the grounds of religion, race, caste, sex or place of birth or any of them. The grounds of non-discrimination should be expanded by **including gender and sexual orientation.**

In May 1996, South Africa became the first country to constitutionally prohibit discrimination **based on sexual orientation.**The United Kingdom passed the **"Alan Turing law" in 2017** which 'granted amnesty and pardon to the men who were cautioned or convicted under historical legislation that outlawed homosexual acts'.

Way forward

Justice Rohinton F. Nariman had directed in Navtej Singh Johar & Ors., the Government **to sensitise the general public and officials**, to reduce and finally eliminate the stigma associated with LGBTQ+ community through the mass media and the official channels.

School and university students too should be sensitised about the diversity of sexuality to deconstruct the myth of heteronormativity.

Heteronormativity is the root cause of hetero-sexism and homophobia

Same-sex Marriages

Special Marriage Act of 1954 lays down provision for people of India and all Indian nationals in foreign countries allowing them to marry irrespective of their faith, caste and religion. So, while the marriage laws in India have evolved progressively with time but there is no such provision for the same-sex couples to marry, which seems reasonable also considering it's only been two years when the Supreme court decriminalised homosexuality. However, sooner or later the legislature has to deal with these questions.

There are several petitions on same-sex marriages pending with the courts. So the next onus on the LGBT activists is to encourage and demand from the government to formulate legislation permitting LGBTQ couples to marry, adopt and inherit their spouse's property. However, the fact is that although the Union government, in 2018 left it for the court to decide on the legality of section 377, but has also indicated that it is likely to oppose any petition for same-sex marriage.

But this seems to be contradictory in the light of the judicial pronouncements considering that if we really want to adhere to the principle of equality in the context of LGBT people then the right to marry, bequeath property, share insurance (medical and life) are all part of this. Therefore,denial of these basic rights only on the basis of sexual orientation is objectionable and unconstitutional violating the constitutional rights of right to equality (Article 14) and liberty (Article 19).

The battle for equality, recognition and, citizenship for the queer bodies has been long and still ongoing. However, judicial recognition to address rights and provide remedies matters for the project of equality and dignity. These judgements have been seminal in shaping the

narrative of rights and recognition for the LGBTQiA community. All the rights that we know of today and associate with the community come from these judgements. These judgements are a result of a fight has been waged for over two decades now by members of the community, NGOs, lawyers and all civil societies.

CONCLUSION

It is submitted that although the landmark 2018 court ruling and 2014 NALSA judgment were a huge leap in the advancement of LGBT+ rights movements in India. But still, the LGBT people in India are not equal and don't have the same rights as those available to a heterosexual person. Further, they are still subjected to violence, discrimination in all spheres of life.

It is very important to educate people about LGBT rights. Human rights are natural rights which are inalienable, indestructible and are conferred upon everyone since birth. It is essential that people take note of the fact that homosexuals are not sick, they are not aliens, their sexual orientation is perfectly in tune with the dictate of nature.

LGBTQ rights should be recognised as part of human rights. Non Recognition of same-sex marriages, not allowing adoption, guardianship, surrogacy, IVF, not having access to safe and LGBT+ inclusive schools, colleges and workplaces are all violative of Article 14, 15, 19, 21, 29. Further, discrimination solely on the grounds of sexual orientation violates Article 14, 15, 21 in relation to Army, Navy, Air force Act.

The universal law of Human Rights states social norms, custom, culture or traditions can never be a valid justification to suppress another individual from asserting his/her fundamental and constitutional rights.

If we start justifying everything on the basis of cultural views, societal values and public policy then there would have been no progressive legislation enacted in our country and we would have never been able to eliminate the social evils of child marriage, Sati, dowry, and infanticide etc.

So, it is essential that the government must wipe away its conservative nature and should take concrete steps to eliminate the stigma, discrimination and abuse surrounding the LGBTQIA+ people. It is high time the government should formulate new laws or amend existing laws on marriage, adoption, guardianship, inheritance educational institutions, employment, healthcare services etc for education, social security and health of LGBT+ people with special focus to Transgender Persons.

It will lead to greater inclusiveness and will help in bringing the LGBTQIA+ into the mainstream of society and can go a long way in 'transforming our nation sustainably into an equitable and vibrant knowledge society'

Lastly, I will conclude this article by saying that until and unless the government gives the LGBTQIA+ people in India an equal status, just and the fair struggle for social recognition by LGBT+ will go on.

COMPULSORY LICENSING IN INDIA AND ITS POSSIBLE USE FOR COVID-19 VACCINES

- TANVEER MALNAS & NIRALI HAMIRWASIA

Abstract

As India is witnessing a rise in COVID-19 cases, the need for vaccines appears greater than ever. An important question that arises in these circumstances is whether compulsory licenses should be issued for COVID-19 vaccines? It is important to determine an answer to this question before decisions regarding procurement and administration of vaccines are made by the Indian government. In this paper we shall explore the concept of compulsory licence, conditions required for it and whether these conditions exist in the present scenario.

Introduction

As of June 15, 2021, only 15 percent of the total population of India have had one dose of the COVID-19 vaccine out of which, only 3.5 per cent have been fully vaccinated[167]. It is clear to see that the vaccine drive in India is proceeding at a painfully slow pace and that it can take months to get the entire population vaccinated with just a single dose let alone both of them. Organisation aside, the major lacunae visible in the vaccination programme is the shortage of vaccines in the country. While the Central Governments and State Governments are scrambling around trying everything possible: from getting foreign aid to constantly increasing the time limit to be taken between each dosage, nothing seems to visibly boost the

[167] Statistics and Research: Coronavirus (COVID-19) Vaccinations, *available at:* https://ourworldindata.org/covid-vaccinations?country=IND (Last Modified June 17, 2021).

vaccination programme of India. The apparent solution for the circumstance then becomes increasing the total output of vaccines in order to meet the large needs of a large population. Compulsory licensing is one such tool in the hands of the government which can help India reach the outcome of increased number of doses, which in-turn will accelerate the vaccination drive. Compulsory licensing is when a government allows someone else to produce a patented product without the consent of the patent owner or plans to use the patent-protected invention itself[168]. There are conditions which must be satisfied in order for a compulsory license to be issued. This article will further explore them and expound upon how these conditions are fulfilled under present circumstances.

Compulsory Licences

Patents confer on a patentee, exclusive rights over the exploitation of their invention for a limited period of time in return for disclosing their invention to the public.[169] Compulsory licenses exist as an exception to these exclusive rights granted by patent laws and allow the authorities to issue a license with respect to a patented invention without permission of the patent holder.[170] The concept of compulsory licensing was created to secure public interest which may rest in the use of patented inventions and which cannot be secured without disregarding exclusive rights of the patentee. The foundation of these provisions can be found in Article 31 of the Agreement on Trade Related Aspects of Intellectual Property ("**TRIPS Agreement**") which allows for: 'other use without authorization of the rights

[168] Compulsory Licencing of Pharmaceuticals and TRIPS, *available at:* https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm (Visited on June 17, 2021).
[169] The WTO Agreement on Trade-Related Aspects of Intellectual Property, 1994, art. 28.
[170] *Supra* note 2.

holder'.[171] Provisions along similar lines can be found in patent laws of various nations as well. Further development can be seen in the form of Article 31bis of TRIPS which was added as a consequence of the Doha Declaration which made accommodations for developing nations.[172]

Conditions for Grant of Compulsory Licences

While discussing these conditions, it is important to understand that there are two distinct sets of conditions for the grant of compulsory licences. Firstly, the conditions laid down by the TRIPS Agreement which are general in nature and; secondly, the set of conditions laid down by the Patents Act, 1970, which are based fundamentally on the TRIPS conditions.

1. **Conditions under TRIPS**

Article 31 of the TRIPS Agreement lists conditions which must be adhered to when the patented invention is used without authorization of the rights holder.[173] The important conditions under this Article have been explained below:

i. Refusal to Deal: As per Article 31(b), before a use is made without authorization of the right holder, the government must attempt to negotiate with the patent holder for the grant of voluntary licence. A compulsory licence can be issued only after these attempts have been made and rendered unsuccessful due to the refusal of patentee to deal. Article 31 provides that this requirement may be waived by a Member in case of a national emergency or other such circumstances of extreme

[171] The WTO Agreement on Trade-Related Aspects of Intellectual Property, 1994, art. 31.
[172] Doha Declaration on TRIPS Agreement and Public Health, 2001.
[173] *Supra* note 5.

urgency or in cases of public non-commercial use. However, what constitutes national or extreme emergency has not been clearly defined in this article.

ii. Non-Exclusive: Article 31(d) establishes that use without authorization must not be exclusive. This means that such a use must not exclude any other legitimate user such as the patentee or a holder of voluntary licences from using the patented invention for which the compulsory license is being issued.

iii. Supply for Domestic Market: Article 31(f) lays down the rule that use under the scheme of this Article must be predominantly for the supply of domestic markets. This entails that these provisions exist primarily for the purpose of meeting domestic needs of Member nations. However, to address the needs of least developed nations- which lack the facility to manufacture pharmaceuticals, an exception was carved in the form of Article 31bis. Here, an exporting Member may issue compulsory licence for use of patented invention to the necessary extent to meet the needs of the importing nation.

2. Conditions under the Patents Act, 1970

The TRIPS Agreement is a minimum standards agreement i.e. it lists out the minimum standards which Member nations must follow while enacting their national statutes.[174] This means provisions above and beyond those enumerated by TRIPS are often found in national laws. Moreover, as treaties are not self-executing in India, national legislation on the matter is

[174] Overview: the TRIPS Agreement, *available at:* https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#:~:text=The%20TRIPS%20Agreement%20is%20a,own%20legal%20system%20and%20practice. (Visited on June 17, 2021).

the only law applicable in the country.[175] General conditions for grant of compulsory license found under Section 84 of the Patents Act, 1970[176] include:

i. Insufficient Supply: Once the invention is disclosed and a patent is granted, it becomes responsibility of the patentee to satisfy demands of the public with respect to that invention. If, even after 3 years from grant of patent, the patentee is unable to meet the reasonable demands of the public, a compulsory license can be granted for the patented invention on application under the provisions of Section 84(1)(a).[177]

ii. Unreasonable Terms: When we consider patented inventions, especially pharmaceutical patents, it is important that demand for these inventions/patents must be fulfilled by the patentee on reasonable/affordable terms. It is important that the patentee is restrained from exploiting the patented invention to an unreasonable extent through exclusive rights granted to him. Most Patent laws, including the Patents Act, 1970 [Section 84(1)(b)], have a provision for grant of compulsory licences when demand for the patented product is not being met on reasonable terms in the domestic market. This condition thus has 3 essentials: firstly, that the demand exists for the patented product; secondly, that the demand is not being met and; lastly, that terms offered by the patentee are not reasonable.

[175] The Treaty-Making Power Under the Constitution of India, *available at:* http://www.ebc-india.com/lawyer/articles/71v2a5.htm#:~:text=A%20non%2Dself%2Dexecuting%20treaty,execute%20each%20and%20every%20treaty. (Visited June 17, 2021)
[176] The Patents Act, 1970 (Act 39 of 1970), sec. 84.
[177] *Ibid.*

iii. Not Working: Section 84(1)(c) of the Act deal with the situation where the patent is not being worked in the territory of India. The idea behind rights granted by the patent is to provide the inventor with incentive to make his invention available to the public. Patents exist as a part of a social contract whereby the inventor is promised certain exclusive rights in return for benefits which the society may obtain from disclosure and working of that particular invention. Thus, when the patent owner fails to work the patent i.e. when he/she fails to make the patented invention available to the public, exclusive rights granted to him can be trespassed by granting a compulsory license against the invention. Countries generally allow the patentee a period of 3 years to work his/her patent in the domestic markets and reasonable extension to this period is given as per circumstances.

As evident from the above provisions, conditions under Section 84 cover a wide spectrum of situations and circumstances, however, it comes with a major condition that proves to be a drawback in case of emergencies i.e., the application under Section 84 can only be made after 3 years from the grant of patent. This drawback is resolved through Section 92 of the Act which provides for special provisions giving power to the Central Government to grant compulsory licenses in circumstances of national emergency or in circumstances of extreme urgency or in case of public non-commercial use.[178]

Use of these provisions for COVID-19 Vaccines:

[178] The Patents Act, 1970 (Act 39 of 1970), sec. 92.

The Indian vaccination program relies entirely on the two major vaccines i.e. Covaxin produced by Bharat Biotech and Covishield manufactured by the Serum Institute.[179] Apart from these, around 30 other vaccines are currently being developed in India.[180] Companies engaged in this are investing huge amounts of money for research and development and boast of a production capacity of several million doses per annum. For example, Zydus Cadila, the company developing ZyCov-D aims to have a production capacity of around 200 million per annum by the end of the year.[181] Similarly, Biological – E, a Hyderabad based company engaged in research and development of COVID-19 vaccines controls a production facility which can produce approximately 1 billion doses per year.[182] Since the vaccines being developed by these companies are currently in their trial phase, production capacity and resources controlled by them have not been utilised optimally. A question thus arises that whether compulsory licenses can and should be given to these companies to produce and distribute the two developed and tested vaccines.

[179] What is Happening to India's COVID-19 Vaccine Program? *Available at:* https://carnegieindia.org/2021/05/19/what-is-happening-to-india-s-covid-19-vaccine-program-pub-84570 (Visited June 17, 2021)

[180] Coronavirus Vaccine Development In India: Here's A List Of All Vaccines Being Locally Made And Developed, *available at:* https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/coronavirus-vaccine-development-in-india-heres-a-list-of-all-vaccines-being-locally-made-and-developed/photostory/77064624.cms (Visited on June 17, 2021)

[181] Zydus Cadila's Covid-19 vaccine: How it compares with peers, manufacturing capacities and challenges, explained, *available at:* https://www.moneycontrol.com/news/business/companies/status-of-zydus-cadilas-covid-19-vaccine-frontrunner-for-eua-manufacturing-capacities-and-challenges-6802221.html (Visited on June 17, 2021).

[182] Biological-E – Indiia's next Serum, Bharat Biotech of COVID-19 vaccine, *available at:* https://www.businesstoday.in/current/economy-politics/how-biological-e-plans-to-take-on-serum-institute-in-covid-19-vaccine-production/story/440684.html (Last Modified on June 2, 2021).

Let us first discuss the legal possibility of compulsory license under the Patents Act. As discusses above, an application for the grant of compulsory license under Section 84 can only be made after three years from the grant of patent.[183] Presently, such period has not passed since the vaccines were developed and patented by the concerned companies. Thus, the companies desirous of manufacturing these vaccines cannot take a recourse to an application under Section 84. However, the situation changes when we consider the powers given to the Central Government under Section 92. This section allows the Central Government to declare a compulsory license in circumstances of national emergency or in circumstances of extreme urgency or in case of public non-commercial use.[184] Although the satisfaction of any one of the circumstances will be enough, in the current scenario with respect to the pandemic, we see possible satisfaction of all three. The COVID-19 pandemic is clearly a national emergency requiring urgent consideration as hundreds of patients continue to die and thousands continue to get affected per day in the country.[185] Moreover, since the vaccination program is majorly funded by Central and State Governments, the condition of public non-commercial use is being satisfied as well.[186] Therefore, there is clear legal possibility of issuing compulsory licenses for COVID-19 vaccines.

Let us now discuss whether compulsory license should be issued. We shall answer that in affirmative as well. While it is beneficial to have new vaccines in development as the major two available in India have not proven to be 100% effective, the purpose is to get the as many people inoculated in order to reduce the mortality rate. The new vaccines thus, lack

[183] *Supra* note 10.
[184] *Supra* note 12.
[185] *Supra* note 1.
[186] *Supra* note 13.

the luxury of the time required to complete research and development. Further, it is imperative that the entire population is vaccinated against the virus as soon as possible and that would require optimum utilization of all resources and production capacity available in the country. Compulsory licenses are the most effective (yet presently unutilised) tools to achieve this end. However, NITI Ayog, think tank of the Central Government, has maintained its position on non-issuance of compulsory license even after the Kerala High Court compelled the Centre to give a response to the plea for evoking the compulsory licensing to allow other capable vaccine manufacturers to produce COVID vaccines.[187] NITI Ayog has given two reasons for this which we shall discuss here:

1. It has been said that the important aspect is not the formula for the vaccines but the expertise in their production of the vaccines and the lack of such expertise on the part of other companies is what renders the option of compulsory license unattractive.[188]

However, we disagree with this for two reasons: Firstly, it is a logical observation that if the formula was not the important aspect, then the companies wouldn't have spent so much money and resources on developing it. Secondly, companies like Zydus Cadila,[189] Panacea Biotech[190] and Biological – E have the capacity to produce vaccines and also have decades of years of experience in research and manufacturing of pharmaceuticals.[191] Thus, the argument

[187] Myths & Facts on India's Vaccination Process, *available at:* https://pib.gov.in/PressReleasePage.aspx?PRID=1722078 (Visited on June 17, 2021).
[188] *Ibid*.
[189] The Company, *available at:* https://zyduscadila.com/company (Visited on June 17, 2021).
[190] About Panacea Biotech, *available at:* https://www.panaceabiotec.com/about-panacea-biotec (Visited on June 17, 2021).
[191] Company Profile, *available at:* https://www.biologicale.com/about.html (Visited on June 17, 2021).

that technical capabilities, know-how and expertise are not available with these companies falls flat in front of the rich experience and advanced technologies that they possess on of being leading pharmaceutical companies across the globe.

2. The government uses the example of Moderna to table the compulsory licensing.[192] Moderna vaccine is not being produced by any other company, despite a declaration by Moderna that it will not sue any company which uses its vaccine, is being used to claim that licensing is least of the issues.[193] This second argument given by NITI Ayog is nothing more an arbitrary analogy drawn to serve the purpose of misdirecting the common public rather than an actual reasoning. An important element is being overlooked while making this claim is that, the vaccine developed by Moderna is based on mRNA technology. While Moderna owns the patent rights to its vaccines, it does not own the patents of various technologies used for making the mRNA-based vaccine.[194] So, even if Moderna gives a free license to the producers to produce their vaccines, the myriad of IP rights associated with the process serve as a barrier against the production of Moderna vaccine by other companies.[195] This reasoning of NITI Ayog itself shows the need for compulsory licensing as efficient utilisation of this opportunity given by Moderna to produce its vaccine also requires compulsory licencing of various patented invention by the government

[192] *Supra* note 21
[193] *Ibid.*
[194] A network analysis of COVID-19 mRNA vaccines patents, available at: https://www.nature.com/articles/s41587-021-00912-9#citeas (Visited on June 17, 2021).
[195] *Ibid.*

Conclusion

It is apparent that compulsory licensing provisions exists as a means to shatter the barriers created by the otherwise unshakable patent rights in the cases of extreme urgency such as national emergency and epidemics. It is also apparent that these provisions can and must be utilised for addressing the need of the Indian population during this pandemic caused by COVID-19. However, the Centre has actively refused to do so and this stand of the government raises concerns as this step might be just what is needed to help bring India out of the never- ending economic, social and health crisis which the country has been plunged in ever since the start of the pandemic in March, 2020.

FROM NAFTA TO USMCA: WHAT HAS BEEN ACHIEVED?

- SOUMYADIP PANDA

ABSTRACT

The North American Free Trade Agreement (NAFTA) is a treaty which was entered into by the United States, Canada and Mexico. This agreement broadened the free trade that existed between US and Canada since 1989. This agreement came into effect in January 1, 1994 and on that day these three countries i.e. US, Canada and Mexico became the largest free market in the world and at that time the three economies had a combined value of 6 trillion US Dollars and also affected more than 356 million people. The objectives of NAFTA included elimination of tariff barriers with regard to agriculture, manufacturing and services; to remove invest restrictions; and to protect Intellectual Property Rights. All the above mentioned objectives needed to be carried out while keeping in mind the environmental labour concerns.

To modernize the 24-year-old NAFTA into a 21st Century and high standard agreement, the United States, Mexico & Canada have reached an agreement to create a more balanced, reciprocal trade that supports the high-paying jobs for Americans and also grows the North-American economy.

This paper has made an attempt to understand the history and background which led to the signing of the NAFTA Treaty back in 1994. It further tries to explore the key provisions and effects of NAFTA followed by the criticisms of NAFTA. Finally, it delves deep into the USMCA Treaty and the areas on which improvements are made under this treaty.

For this research paper, the Author had adopted the doctrinal method to proceed with his research work. Primary resources the author referred to in the course of his research work included books and journals. Other sources like articles and the like were also accessed online through the use of online databases. The author has limited his research work to the resources available on the internet.

Keywords: NAFTA, Trade Barriers, Tariff Barriers, USMCA, Trade Policy

INTRODUCTION

The North American Free Trade Agreement (NAFTA) is a treaty which was entered into by the United States, Canada and Mexico. This agreement broadened the free trade that existed between US and Canada since 1989[196]. This agreement came into effect in January 1, 1994 and on that day these three countries i.e. US, Canada and Mexico became the largest free market in the world and at that time the three economies had a combined value of 6 trillion US Dollars and also affected more than 356 million people. The objectives of NAFTA included elimination of tariff barriers with regard to agriculture, manufacturing and services; to remove invest restrictions; and to protect Intellectual Property Rights. All the above mentioned objectives needed to be carried out while keeping in mind the environmental labour concerns.

HISTORY & DEVELOPMENT

[196]Came into effect on 01st January, 1989

- In the year 1980, during his presidential campaign in the United States of America, Ronald Regan proposed a North-American common market influenced by the Europe's common market which was initiated with the treaty of Rome.
- In the year 1984, The Trade & Tariff Act the passed by the Congress, which was built upon& amended a prior Trade Act of 1974. This Act of 1984 gave enhanced "Fast-track" authority to the government of the US to negotiate bilateral free trade agreements, streamlining negotiations.
- In the year 1985, the Prime Minister of Canada, Brian Mulroney agreed to begin the discussions for a free trade agreement between Canada &The US. The negotiations began in 1986 and was signed in the year 1988 and finally on 1st January, 1989 it came into effect and remained in force until it was replaced by NAFTA.
- In the year 1990, the Mexican President, Carlos Salinas de Gortari had requested for a free trade agreement with the United States. In 1991, the successor of President Regan, Mr. George H.W. Bush had begun the negotiations with the Mexican President, for a liberalised trade agreement. By then, Canada had also joined discussions for a trilateral free trade agreement.
- In 1992, President George H.W. Bush, Mexican President Salinas & the Canadian Prime Minister, Brian Mulroney had signed the NAFTA.
- Finally, in the year 1993, the legislatures of the three countries, i.e. The US, Canada & Mexico ratified NAFTA and on 1st of January, 1994 it came into effect.

KEY HIGHLIGHTS OF NAFTA

The highlights of NAFTA included:

- *Eliminations of tariff for qualifying products* (qualifying products indicate towards those products which have been tested prior to their actual procurement or compliance with product specifications as specified in a particular contract). Before the NAFTA came into force, tariffs of 30% or higher were imposed on goods that were exported to Mexico and there were also long delays which were being caused by hefty paperwork. Also, Mexico used to charge tariffs on US products which were higher by 250% than the US duties that were applicable on Mexican products. NAFTA aftermath, addressed this imbalance by phasing out the tariffs[197] and as a result approximately 50% of the tariffs were abolished immediately after the agreement came into effect and the remaining tariffs were also targeted for gradual elimination. NAFTA covered areas such as construction, engineering, advertising, accounting, consulting/management, architecture, health-care management, commercial education & tourism.
- *Elimination of non-tariff barriers*[198] which included opening the borders and interior parts of Mexico to the truckers of the US and also streamlining border processing and licensing requirements. This was a matter of relief for the small exporters as these non-tariff barriers were the biggest obstacles in the course of conducting business in Mexico.
- *Establishment of standards:* The three countries, who had entered into the agreement, agreed to toughen health, safety and industrial standards to the highest existing levels

[197]The imbalances were phased out over a period of 15 years
[198]By the year 2008

among them (the standards were always US or Canadian). The agreement, thus, abolished national standards which were earlier acted as a barrier to free trade. Thereby, the speed at which the export products were inspected or certified had also improved.

- *Supplemental Agreements:* In order to ease the concerns of Mexico's low wage scale that would lead to shifting of productions by the US companies to that country and also to ensure that the increasing industrialisation in Mexico does not lead to rampant pollution, special side agreements were also included in NAFTA. By the virtue of these agreements, the three countries agreed to establish commissions which would handle labour and environment related issues. These commissions had the power to impose a lump sum amount of fine against any of the three governments of the respective countries that fail to impose the laws in a consistent manner.
- Reduction of tariffs for motor vehicles and automobile parts.
- Expansion of telecommunications trade.
- Reduction of textile and apparel barriers.
- More free trade was promoted in agricultural sector. For instance, the Mexican import licenses and more additional tariffs were abolished since the agreement came into force.
- Expansion of trade in financial services.
- Liberalisation of insurance markets.
- NAFTA had also increased the investment opportunities.
- The trilateral agreement has also liberalised the regulation of land transportation.

- It also increased the protection of Intellectual Property Rights. It was for NASTA that Mexico had to provide a very high level of protection for IPR for the first time in their history.
- Immigrants from Mexico came to the US in huge numbers.
- NAFTA had also expanded the rights of the American firms who could now bid on Mexican & Canadian government procurement contracts.
- One of the key provisions that NAFTA had provided with was the status of "National Goods"[199] to the products that were imported as a resulted of this status, no state, provincial or local governments could impose taxes or tariffs on those goods.

EFFECTS OF NAFTA

NAFTA had opened up new opportunities for the small and medium scale businesses and some of them were directly affected by NAFTA. Earlier the large firms used to have an upper hand over the small ones and the reason for that was that the large firms could afford to build and maintain offices as well as manufacturing plants in Mexico and also avoided many trade restrictions on exports. In addition to this, prior to the implementation of NAFTA, the service providers of the US want to do business in Mexico were required to establish a physical presence over there which was too expensive for the small firms to undertake. Small firms could neither afford to build such manufacturing units or offices nor they could afford the export tariffs. After NAFTA, the small firms could now export their products to Mexico at the same cost as the large firms and also by eliminating the requirement of a physical

[199]Goods which were produced or manufactured within one of the member states.

presence in Mexico in order to do business there which levelled the playing field. As a result, the small businesses or firms produced goods or services in the US market could now operate in the Mexican market too.

Since NAFTA came into effect, the American business interest have often expressed great satisfaction towards the agreement. The effect of NAFTA could easily be seen in the growing trade between the three nations who were parties to the agreement and significantly it had resulted in rising trade deficit for the United States with both Canada & Mexico as the US used to import more from Mexico & Canada then its exports to its trading partners. NAFTA was seen to be partially responsible for the said trade deficits[200]and also it was majorly responsible for the loss of manufacturing jobs which was experienced in the us aftermath.

IMPORTANT LEGAL PROVISIONS OF NAFTA

(i) Preamble

The United States of America, Canada and the United Mexican states, by way of the agreement resolved to:

- STRENGTHEN the special bonds of friendship and cooperation among their nations;
- CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
- CREATE an expanded and secure market for the goods and services produced in their territories;
- REDUCE distortions to trade;

[200] A record $65,677 million at the end of 2005.

- ESTABLISH clear and mutually advantageous rules governing their trade;
- ENSURE a predictable commercial framework for business planning and investment;
- BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;
- ENHANCE the competitiveness of their firms in global markets;
- FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;
- CREATE new employment opportunities and improve working conditions and living standards in their respective territories;
- UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
- PRESERVE their flexibility to safeguard the public welfare;
- PROMOTE sustainable development;
- STRENGTHEN the development and enforcement of environmental laws and regulations; and
- PROTECT, enhance and enforce basic workers' rights;

And they have agreed to fulfill the objectives as laid down in Chapter One of the Agreement.

(ii) Chapter One – Objectives

This chapter lays down the basic provisions of this agreement including the objectives, relation to other agreements, extent of obligations, etc.

(a) Article 101 established a free trade area within the purview of Art XXIV of the General Agreement on Tariffs and Trade.

(b) Article 102 laid down the objectives of this agreement which were:

- To eliminate the barriers of trade and also to facilitate the cross border movement of goods and services among the parties to this agreement.
- To promote the conditions which would lead to a fair competition.
- To increase investment opportunities.
- To provide adequate and effective protection and also enforcement of the Intellectual Property Rights within the territory of all the parties.
- To create effective procedures for the implementation and application of this agreement and also for joint administration and resolution of disputes.
- To establish a framework for further trilateral, regional and multilateral cooperation to expand and also to enhance the benefits of this agreement.

The Art. further lays down that the parties should interpret and apply the provisions of this agreement keeping in mind the objectives of this agreement.

(c) Article 103 talks about the condition where this agreement is in conflict to other agreements and it says that whenever there is such an inconsistency this agreement shall prevail, except if otherwise provided in this agreement.

(d) Art 104 talks about the relation to Environmental and Conservation Agreements. It says that if there is any sort of inconsistency between this agreement and the trade obligations that are laid down :

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973,
- the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987,
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989; and
- The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, 1986.
- The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, 1983.

Such obligations that are laid down in the agreements mentioned above shall prevail to the extent of inconsistency but if any of parties has a choice of effective and reasonable means of complying with such obligations then the party shall choose the alternative that is least inconsistent with the provisions of this agreement.

(e) Art 105 laid down the extent of obligations and it states that all the parties to this agreement should ensure that all the necessary measures are taken in order to give effect to the provisions contained in this agreement except as otherwise provided in the agreement.

(iii) Chapter Three –National Treatment and Market Access for Goods

(a) Art 301 laid down the principle of national treatment of goods within the parties and it says that each party shall accord national treatment to the goods of another party and in accordance with Art III of the GATT.

(b) Art 302 dealt with tariff elimination. It states the following :

- No party can increase any excise customs or impose any custom duty on originating goods.
- Each party shall eliminate its custom duty on the originating goods.
- The parties can consult to accelerate the elimination of tariffs on the request of another party.
- Each party can adopt or maintain some import measures in order to allocate in-quota import imports.
- A party can review the import measures on the written request of another party.

(c) Art 309 dealt with the non-tariff barriers and it says-

- No Party can adopt or maintain any prohibition or restriction on the imports of any good of another Party or on the exports or sale for export of any good which is destined for the territory of another Party, except in accordance with Article XI of the GATT.
- If a Party adopts or maintains a prohibition or restriction on the import of a good from a non-Party, the Parties, on request of any Party, shall consult with

a view to avoid undue interference with or distortion of pricing, marketing and distribution arrangements in another Party.

(iv) Chapter Four – Rules of Origin

(a) Art 401 tells us about the criteria of rules of origin and it says that a good shall originate in the territory of a party where –

- When the good is either obtained or produced entirely in the territory of one or more of the parties.
- The non-originating materials that are used in the production of the good undergoes a change in tariff application in the production stage within the territory of one or more parties.
- If the good is produced from originating materials in the territory of one of the parties.

(v) Chapter Five –Certificate of origin

(a) Art 501 requires the parties to establish a certificate of origin in order to ensure that when a good is exported from one of the parties to another it qualifies as an originating good and thereby, it can avail the benefit provided to the originating goods.

(vi) Chapter Seven – Agriculture and Sanitary and Phyto-sanitary measures

(a) Section A of this chapter, basically, applied to the measures adopted or maintained by any of the parties relating to agricultural trade. It further said that in case of any inconsistency between this section and any other provision of this agreement then this section shall prevail to the extent of inconsistency.

(b) Section B of this chapter applied to any such measures of a party that may directly or indirectly affect the trade between the parties in order to establish a framework of rules and discipline to guide the development adoption and enforcement of sanitary and phytosanitary measures.

(vii) Chapter Nine – Standard Related Measures

(a) According to Article 901 (which defines the scope of this chapter), this chapter deals with the standard's related measures which may directly or indirectly affect the trade in goods or services between the parties and to such measures of the parties relating to the prior mentioned measures.

(b) According to Article 902, each party to this agreement should ensure observance of the obligations laid down in this chapter by state or provincial governments and by non-governmental standardizing bodies.

(viii) Chapter Twelve – Cross-Border Trade in Services

This chapter applies to the measures adopted or maintained by a party relating to the cross border trade in services y service providers of another party.

(ix) Chapter Seventeen – Intellectual Property

(a) Article 1701 laid down that each party shall provide to the nationals of another party adequate and effective protection and enforcement of Intellectual Property Rights within its territory, while ensuring that the measures to enforce the Intellectual Property Rights do not become barriers to legitimate trade.

(b) According to Article 1702, a party can implement in its domestic law more extensive protection of IPR than that is required under this agreement, unless it is not inconsistent with this agreement.

(x) Chapter Twenty – Institutional Arrangements and Dispute Settlement Procedures

Section A of this chapter establishes two institutions for the purpose of settlement of disputes between the parties.

(a) Article 2001

- This article establishes the Free Trade Commission, which comprises cabinet level representatives of the parties or their designees.
- The Commission should do the following –
    - Supervise the implementation of the agreement.
    - Oversee its further elaboration.
    - Resolve disputes that may arise regarding its interpretation or application.

- Supervise the work of all the committees and working groups established under this agreement.
- Consider any other matter that may affect the operation of this agreement.

(b) Article 2002

- The Commission shall establish and oversee a Secretariat comprising national sections.
- The Secretariat shall:
  - provide assistance to the Commission;
  - provide administrative assistance to
    - ❖ panels and committees established under Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters), in accordance with the procedures established pursuant to Article 1908, and
    - ❖ panels established under this Chapter, in accordance with procedures established pursuant to Article 2012; and
- as the Commission may direct
  - support the work of other committees and groups established under this Agreement, and
  - otherwise facilitate the operation of this Agreement.

Criticism of NAFTA

NAFTA has been for many reasons and some them are mentioned below :-

(i) The US Jobs were lost – As the labor was cheap in Mexico, many manufacturing industries withdrew part of their production form the US. Between the years 1994 and 2010, the US trade deficit with Mexico accounted for a total of $ 97.2 billion and within the same period, 682,900 jobs were lost in the US.

(ii) The US Wages were suppressed – Some of the companies used the threat of moving as a leverage as an effective tool against union organizing drives and when the workers had to choose between the joining the Union and leaving the factory, they chose the factory instead.As a result, the wages of the workers were suppressed.

(iii) Mexico's farmers were put out of business –After NAFTA came into effect, nearly 1.3 million farm jobs were lost. The Farm Bill of 2002 had subsidized the US agribusiness by as much as 40% of the net farm income. When NAFTA had removed the tariffs, companies started to export corn and other grains to Mexico at a much lower price due to which the rural farmer of Mexico could not compete. Later, the government of Mexico had also reduced the subsidies available to the farmers from 33.2% of the total farm income in 1990 to 13.2% in the year 2001 and most of these subsidies went to the large Mexican farms and such changes meant that many small farmers of Mexico were put out of the business

(iv) Maquiladora workers were exploited - Mexican farmers had to work in substandard conditions in the Maquiladora program. Maquiladora is a place near the border of the US and Mexico where the US owned companies employed many

Mexican workers as they used to assemble products cheaply for export back to the US.

(v) Mexican Environment was deteriorated – The US based companies degraded the environment in Mexico in the process of keeping the costs low. In order to do so, agribusiness in Mexico used more fertilizers and other chemicals which increased the pollution. Also, the rural farmers were forced to use the marginal land to stay in business and it resulted in a huge amount of deforestation.

(vi) Mexican Trucks never had free access to the US –After NAFTA came into effect, it was said that it would allow the Mexican trucks to enter the US.But the Congress never allowed it as the Mexican trucks did not have the same safety standards like those of the US and therefore, it was apprehended by the Congress that it can create a road hazard.

USMCA

To modernize the 24-year-old NAFTA into a 21st Century and high standard agreement, the United States, Mexico & Canada have reached an agreement to create a more balanced, reciprocal trade that supports the high-paying jobs for Americans and also grows the North-American economy. Some of the areas where improvements have been made are mentioned below:

A. Intellectual Property – The three countries, i.e. The United States, Mexico & Canada have agreed on a modernized, high standard Intellectual Property (IP) chapter which will ensure strong and effective protection and enforcement of the IP rights.

B. Comprehensive Enforcement Provisions – A trade agreement, for the first time, will require the following:

i) In order to stop suspected counterfeit or pirated goods at every phase of entering, exiting and transiting through the territory of any party, *Ex-Officio* authority has been provided to the law enforcement officials.

ii) It has been expressly recognized that the IP enforcement procedures must be made available for the digital environment for trademark and copyright or infringement related rights.

iii) Criminal procedures and penalties for unauthorized cam cording of movies, which is a significant source of pirated movies online, have been laid down.

iv) Some civil and criminal penalties have also been laid down for satellite and cable signal theft.

v) The agreement has also established a broad protection against trade secret theft, including against state owned enterprises.

C. The agreement contains a chapter for the protection of trade secrets which lays down the strongest standards for the protection of trade secrets. It includes protections against misappropriations of trade secrets, prohibitions against impeding licensing of trade secrets, judicial procedures to prevent the disclosure of trade secrets during the process of litigation and penalties have also been set for the government officials for unauthorized disclosure of trade secrets.

D. Digital Trade – This chapter has been introduced in the USMCA in order to provide disciplines of digital trade including a firm foundation for the expansion of trade and investment in the innovative products and services.

E. *De Minimis* – This agreement has increased *de minimis*shipment value level. In order to facilitate greater amount of cross-border trade, the US has agreed with Mexico & Canada to raise their *de minimis*shipment value levels. Canada will raise their *de minimis*shipment value for the first time in decades, from C$ 20 to C$ 40 for taxes and they will also provide for duty free shipments up to C$ 150. Mexico will continue to provide US$ 50 tax-free*de minimis*and also provide duty free shipments up to the level of US$ 117. The shipment values upto the above mentioned levels would enter with minimal formal entry procedures which makes it easier for businesses, especially the small and medium sized ones to be a part of the cross-border trade.

F. Financial Services – The updated chapter of financial services commits to liberalize financial services markets and facilitate a level playing field for all the financial institutions, investors and investments in financial institutions, and also cross-border trade in financial services. The chapter has also preserved the discretion of the financial regulators to ensure financial stability.

G. Currency – The renegotiated agreement includes a chapter on macro economic policies and exchange date matters. This chapter is expected to address the unfair currency practices by way of high standard commitments to refrain from competitive devaluations and targeting exchange rates, while significantly increasing transparency

and providing mechanisms for accountability. This chapter is expected to reinforce the macro-economic and exchange rate stability.

H. Labor – One of the principal objectives of this re negotiated agreement is to ensure the benefits for the labor. The parties have agreed to include a chapter that brings labor obligations into the core of this agreement and also to make them fully enforceable. Such labor rights include worker representation in collective bargaining and other labor rights which are recognized by the ILO.

I. Environment – The parties to this agreement have agreed to include an advanced, comprehensive and high standard chapter on environment. This chapter lays down environmental obligations including:

- Prohibitions on some of the most harmful fisheries subsidies especially those that benefit vessels or operators involved in illegal, unreported and unregulated fishing.
- This agreement has also introduced new protections for marine species like whales and sea turtles and also prohibited shark finning.
- It also lays down obligations inorder to enhance the effectiveness of custom inspections of shipments that contain wild flora and fauna at the ports of entry.
- It introduced the first ever articles in order to improve air quality, prevent and reduce marine litter, support sustainable forest management and also to ensure appropriate procedures for environmental impact assessments (EIA).
- It also establishes robust and modernized mechanisms for public participation and environmental cooperation.

If we consider the aggregate level, the effects of USMCA are not very large. The provisions of USMCA may lead to diminished economic integration in North America, which will also result in reduction of trade among the partners of North America by an approximate value of US$ 4 billion but will also result in welfare gain of approximate value of US$ 538 million for the member countries. It would further benefit trade facilitation measures, while modernizing and integrating custom procedures with the intent of reduction in border insufficiencies and trade costs. These changes in trade flow will also result in structural changes in the production composition of North America. There will be a decline in wages of both skilled as well as unskilled labours in Mexico, but the situation will remain unchanged for Canada and United States.

CONCLUSION

When the North American Free Trade Agreement came into effect in the year 1994, it was widely regarded as an instrument to boost the economy of the whole of North America. President Ronald Reagan had proposed a free trade area to be established in North America after the European Free Market has come into force with the signing of the Treaty of Rome. The dream of establishing a Free trade area slowly turned into a reality for the US President with the Amendment of the Trade and Tariff Act in 1984 which handed enormous power to the Government of the United States to negotiate free trade. Finally, in the year 1994 the NAFTA came into effect with which the largest free trade area in the world was established which aroused the hopes of the North American Countries to become economically stronger and better. But the agreement had it's own problems, for instance, the people of the US

loosing their jobs, violation of labor rights in various workplaces, inequality of treatment to the member states, etc. Apart from these problems this agreement had a lot of other drawbacks which were heavily criticized. Finally, in 2018 President Donald Trump, who was one of the main critics of this agreement, renegotiated it and a new agreement in the name of USMCA (United States-Canada-Mexico Agreement) which redefined many areas that were dealt under NAFTA and emphasis was given on the IPRs, Environmental Issues, Digital Trade, etc. Therefore, with this new agreement it is hoped that whatever issues NAFTA had will soon be addressed by this agreement and make North America an economically strong region.

SHOULD WE THINK BEFORE WE "POST"

- **BLESSY RACHEL & MITHRA.M**

We, Homosapien, has to encounter infinite difficulties within the channel of evolution, likewise during this 21st century we due face the greatest trouble of all the time "THE CYBERBULLYING". Nowadays our day starts with electronic media and ends up with an equivalent to form briefly, our social life has reduced to gadgets which rule our mind.

According to Merriam-Webster Dictionary, "the electronic posting of mean-spirited messages about a person (such as a student) often done anonymously."

Definition by oxford dictionary" the activity of using messages on social media, emails, text messages, etc. to frighten or upset somebody" [201]

Cyberbullying may be an attack on the private life of an individual over the digital device like phones, laptops and the other gadget which possess a network it is often through social media platforms like (WhatsApp, Instagram, Snapchat, Facebook, Twitter) emails, call over a phone, online games. It can be sorted out as harassing, threatening, demeaning language.
Most bullying is done through the post the person had made or comments or the opinion the person had made on a particular matter.

[201] https://www.oxfordlearnersdictionaries.com/definition/english/cyberbullying

CYBERBULLYING:

When we post a picture into this virtual space, we manifest a part of our emotions into it. Our society has pre-defined standards on how to appear, how to behave. so, if a person doesn't fulfil these standards, they categorise these people with a drawback.

When we post a private opinion or image of ourselves it's further determined by the likes and comment which we receive whether what we did is sweet or bad.

when there's an insulting, frustrating comment on the post made that triggers our emotions. Which haunt us physically and emotionally down. It can cause serious psychological harm, including depression, low self-esteem, anxiety, alienation, and suicidal intentions.

There are two sorts of cyberbullying:

Direct bullying means when a perpetrator directly approaching the victim by sending instant messages on the public post made by the person.

Indirect cyberbullying takes place when a perpetrator doesn't approach the victim personal instead tagging them within the post or repost an equivalent.

TYPES OF CYBERBULLYING:

FLAMING: Using distressing language during a text message, emails or chatrooms against a person

HARASSMENT: sending pernicious, disgusting and threatening messages to an individual

CYBERSTALKING: following and harassing an individual, group, or organisation through a social media platform

EXCLUSION: it is an act of leaving someone out intentionally from a gaggle and posting malicious comments/messages about that person.

TROLLING: intentionally posts an inflammatory, insincere, digressive message, comments on social media. Nowadays, it has been a frequent action by the individuals to point out the mistakes into memes and circulate within the circle

FRAPING: using one's social media account to post incorrectly to ruin her reputation.

IMPERSONATION: employing a fake identity to wreck an individual's prominence/ reputation and publicly spread real or false information about him.

CYBERBULLYING LAW IN INDIA

Indian legislation hasn't defined, describes nor punishes bullying as a crime. So some provisions of IPC and IT ACT are combined to deal with cases of cyberbullying.

- Section 67 of IT ACT "Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction

with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.[202]

- ARTICLE 19(1)(a) all citizens shall have the right to freedom of speech and expression

all the citizens of a rustic have the inherent right to express themselves to their liking. so when an individual posts data of their liking judging them or hurt them are often violative of Article 19(1)of the constitution. Article 19(2) lists down the reasonable restrictions can be made to protect the person form cyber pestering.

- ARTICLE 21 protection of life and personal liberty no person shall be deprived of his life or person except according to procedure established by law.

The constitution of India guarantees the protection of individuals personal rights. being free from exploitation on social media is one of the fundamental rights protected under the constitution.

- Section 499 of IPC defines defamation, sexual harassment mentioned in section 354A talking about sexual harassment of unwelcome physical contact, stalking section354D it means an attempt to stalk or contacting a woman the offender will be liable for three years of imprisonment for the first attempt and for subsequent attempt the person will be imprisoned for the term of five years, section 509 defines any word or act intended to defame a woman[1]the offender will be punished for a term of one year or fine or both.

[202]https://indiankanoon.org/doc/1318767/?__cf_chl_jschl_tk__=pmd_OzY3Dmzlebaw_3eNfRdTIkxkZBABRrpLTpDKkVOarOI-1629824803-0-gqNtZGzNAiWjcnBszQll

- Section292A talks about the printing of indecent material and using that to blackmail a person. The material used should injure a person morality and decent face in society. Which will be punished under the law for the maximum period of two years and also be liable for a fine[203].
- POSCO Act protects the children below the age of 18 from any sexual harassment, assault or pornography which will be punished under the act.

Cases of cyberstalking or bullying of women or children increased by 36% from 542 in 2017 to 739 in 2018, data released recently by the National Crime Records Bureau (NCRB) showed. Meanwhile, the conviction rate for cyberstalking or bullying of women and children fell 15 percentage points from 40% in 2017 to 25% in 2018. However, during the same period, the pendency percentage saw a rise of 1 percentage point to 96%, the data show.

The Ministry of human resources had taken certain steps to prevent cyberbullying in schools and colleges by given awareness classes about the cause and effect of such actions. And what responsibilities should be upheld by parents, teachers and all the caretakers of the child to prevent the child from such conditions.

when this virtue of harassment goes unnoticed and unpunished by the authorities. it can create a self-perpetuating culture of cyberbullying that provokes the victims of an act to hunt revenge and bully others, thereby exacerbating the difficulty. As we all know how traditional bullying affects both the victims and perpetrators the impact of such an act remains. Hence, cyberbullying may be a problem with lasting ramifications for the individuals involved, as well as society at large.

[203] https://lexlife.in/2020/05/21/law-regarding-cyber-bullying-in-india/

INTERNATIONAL PERSPECTIVE ON CYBERBULLYING[204]

USA

- Only 38% of the bullied victim are willing to admit it to their parents
- Victims of cyberbullying are 1.9 times likely to commit suicide
- 42% of LGBT youth have experienced cyberbullying
- 33%of teens have experienced bullied on the image or video posted by them
- 66%of women have been passive in reaction to such bullying on social media
- A law was passed to scale back online bullying which gives punishment for one year of jail and a fine of up to $1000

ITALY

Not so long ago in Italy, a law was passed on cyberbullying as an offence with 432 votes. because the suicides reported mainly constituted of teenagers.

UK

In the UK teens between 12-15 are bullied every single day. though there is no defined criminalized law for those perpetrators who violate the law it defines some punishment under the criminal defamation act 1952, protection from harassment act,1997 punished under section 3.

[204] https://techjury.net/blog/cyberbullying-statistics/#gref

RELATED CASES

State of West Bengal v. Animesh Boxi[205] , the accused took possession of some private and obscene photographs of the victim by hacking into her phone, blackmailed her by threatening to upload the stolen pictures and videos on the internet and subsequently uploaded her private pictures and intimate videos onto an obscene website.

Ritu kholi's case was the first cyberstalking reported in India. A girl named Ritu filed a complaint that a perpetrator had misused her account in social media and she was getting calls from different numbers. The case was filed also under 509 IPC[206].

Mega meier case:

Megan Meier was a 13-year-old girl who had attended the Immaculate Conception Middle School in Dardenne Prairie, Missouri. She took her own life shortly before her 14th birthday as a result of what was deemed bullying taking place over the Internet, or „Cyber-Bullying". Megan Meier is considered to be amongst the first cases of suicide resulting from Cyber-Bullying in the United States of America. However, in contrast to a large majority of Cyber-Bullying cases that has followed Meier"s case, in which the bullying is typically undertaken by fellow peers and classmates, Lori Drew, who was the parent of a fellow student, was charged with masterminding the bullying of Megan Mei[207]

[205] GR No. 1587 of 2017.
[206] manish kathuria vs ritu kohli, c.c. no. 14616/2014
[207] https://acadpubl.eu/hub/2018-119-17/2/146.pdf

Cyberbullying is already too grave a drag to be ignored, and it is quickly escalating with the proliferation of Internet use and therefore the popularity of social networking websites.

for the younger generation to run with the new pace of the internet era the basis cyber ethics must be taught from the root. Because we never know who goes through the difficult face of life. Maybe a comment can change someone's life or knock down it to the fullest.

The most vulnerable group in society as the women and children are affected by this type of activity. Insofar the pandemic had given rise to cybercrimes. especially when it involves children who had already created cyberspace for every activity is being targeted and illtreated within the way which they find no humans with good qualities so, it's time to stand up and show some social responsibility and make a quiet good awareness about how cybercrimes are governed and how does it get affected on the person who bullying.

CONCLUSION

Technology has made our lives easier and more comfortable but this small device is controlling every footstep of an individual which is an alarming issue to discuss on. Being the king of all species and being overseen by the internet shows us the progress where we made in past days. Everything in this society has a limit. crossing boundaries doesn't make anyone smarter instead digging our own grave. So, when we use social media platforms to express our emotions make sure that we are fully aware of the pros and cons of the cyber world. And when a threat comes in our path don't keep quiet feel free to talk to your nearest person or react in the right way. Instead of putting yourself into a question mark. Note that our fingertip has both blessings and curses.

SOCIO-LEGAL ANALYSIS ON RIGHTS OF MALE

– GAURAV VERMA & BHAWNA GUPTA

ABSTRACT

India is a democratic country with an ideology of sustained democratic freedom which is distinctive among the world's younger nations and a system of common law with different religions, cultures and, castes. The Constitution of India grants rights as the essential factor based on principles of equality for the societal development of citizens. However, universally in the economic and social sectors poverty, caste, religious violence and, other social evils are still prevalent. When we talk about Rights in the Constitution of India for citizens, we got separated into gender. Every gender has particular rights for themselves on the basis of equality yet the constitution doesn't count males in it. International Men's Day celebrates on Nov'19 every year but it doesn't have the visibility acumen than International Women's Day. The UN Commission on Women's rights has been established by the United Nations. UN's Commission on rights of Males has not been established yet. There is a need for non-biased laws.

INTRODUCTION

In India, where crimes against women are epidemic, some activists raise their voices for violence against men and scored a significant victory. There are many cases that identified men as victims of domestic violence and harassment where women registered a false complaint and misrepresented court with the false issue. Still, judges are not edging out on gender-neutral laws. They stated that Indian women filed for spurious claims. While reading the judgment the court's bench noted that most of such complaints were filled in the heat of

anger and insignificant issues due to such minor issues uncalled for arrest may ruin the chances of settlement. It observed that women aren't anticipating the "implications and consequences" of registering or filing a criminal complaint.

Human beings generally have a propensity to be aggressive or violent. Women are not an exception. Research showed Human beings act violently in the field of domestic violence in relationships in an equal manner. Men and women both are likely to urge violence against each other. It could never be circumvented that violence first starts when any of the partners or both the partners start abusing each other. Violence against men is not a new phenomenon.

This philosophy of change in power due to violence against men will also affect relationships between men and women, where men are afraid of losing power and women are excited by their empowered position. Also, some women have the wrong ideology about feminism where they start violence against men in favor of equal powers.

THE GENDER ADVANTAGE / MISUSE OF RIGHTS AVAILABLE WITH WOMEN AGAINST MEN

India regularly falls prey to the embers of its poor treatment of women but have you ever thought the concept of harassment, assault, and violence is done by a woman towards a man?

There are many laws available in favor of women or anti-men laws to protect women i.e., Adultery considers a man as a culprit, and there is no law available for a man to lodge a complaint against his wife or in-laws. In spite, most of the time women file false complaints against their husbands under 498A of IPC (Indian Penal Code Act, 1860). In the case of

divorce, a woman considers as a victim and looks for sympathy, after divorce woman shows the same for maintenance. These causing the number of false allegations against men for rape, assaulting and sexual harassment are increasing.

Whereby, a horrifying case is trending these days, also the case known case Lucknow Girl Case where a woman named Priyadarshini Narayan Yadav assaulted a cab driver in the middle of the main road over a false accident created by Priyadarshini herself. She raised the issue of the accident and slapped the cab driver several times.

The constitution of India grants rights to women for their safety and equality and not for taking gender advantage or misuse the rights against men. Most of the women being a victim of the crime but most women also use their rights as gender advantage and filed a complaint in false cases or in simple words they misuse their rights.

Deepika Bhardwaj is one of the activists who stood against the anti-men law and who believes the law must be amended. Her aim is law must be gender-neutral. She raised her voice against misuse of sec 498A of IPC which is a tough anti-dowry law and false rape cases. Laws were made with very noble intentions. But a law that was meant to save lives has taken many lives. It also had questioned by the Supreme Court of India with one judge describing its misuse as “Legal terrorism”, warned that it was “intended to be used as a shield and not as an assassin's weapon".

It has been portrayed in various mythologies, literature, and ways of expression that women are inferior and men are superior. In other words, men have a higher status than women in every form or in every way, and therefore they are supposed to be powerful and women are accepting an end as silent sufferers of all forms of violence and assault. There is a lack of

acceptance in Indian Society that a man can also be a victim of rape, domestic violence, harassment, torture, assault, and agony. When a man says he has been a victim of rape or domestic violence or assault or torture etc., this society makes fun of the man and unintentionally forces the man to commit suicide. Male victims of any kind of violence from a woman can be saved such as consider violence against men by women as a public health issue, helpline for the male victims of violence, education, awareness, and legal safeguards.

SOCIAL AND PSYCHOLOGICAL DIMENSIONS OF VIOLENCE AGAINST MEN

Violence against men isn't considered a serious matter as it's a different manifestation. In most cases of violence against men, women show more sympathy. The impact of violence against men is less likely to come to the attention of others. We consider a woman can be a victim of rape only, therefore, this is the only reason that legislation considers women as a victim of rape or sexual harassment and we don't have similar laws for men for the same crime as crime, or in simple words rape, sexual harassment and assault can happen to any soul. In the end, we show biasness when it comes to a man raped or assaulted by a woman. When a woman is a rape survivor she is going through many identical feelings and thoughts which are going inside her, the same thing happens to men as men and women are separated by gender only but united by Human Beings, every single boy or man and girl or woman is a Human Being. Some additional challenges come in the Social life and personal life of a rape survivor, it is left destroyed as this society ridicules them and it is even more difficult for a man as this society ridicule the man on men's masculinity.

Men tolerate these toxic relationships for many reasons, fear of losing respect and position in society, and in faith and hope that things would get better. Violence against men is less apparent and less likely to come to the attention in society or to others. Mental and emotional abuse can be an area where women are often crueler than men. The psychological impact on some men in the context of violence against men would be less than it would have on a woman.

It was perceived that where the spouse is earning and is more educated than the other spouse this becomes the eventual reason for violence and the physical violence can be committed by the spouses against each other. Physical violence includes slapping, pushing, hitting my wife, her parents, or relatives, throwing objects at the husband. As per research physical violence, slapping was identified as the most common form (98.3%) and the least common was beaten by weapon (3.3%).

Financial restrictions due to the husband's less income or more income by wife may also be one of the factors leading to violence. Also, as per research in psychological violence, reported 85% of abuse against men was criticism, 29.7% were insulted in front of others and 3.5% were threatened or hurt. Mental abuse also considers when the wife sends a frequent number of threats to the husband and his family under a false declaration case. Hated speech or cruel words are more affecting the person than physical violence. When a victim of sexual harassment is going through this trauma, identical feelings for thoughts come to mind to the victim. It mentally affects the person and the person is likely to start behaves differently. As when sexual harassment happens with a man by a woman, it becomes difficult to accept in

society that women harassed the man, they start making fun of the man because men generally consider more superior to women.

CONSTITUTIONAL PROVISIONS (NEED FOR EQUALITY)

There are no special laws in the Constitution of India to protect men from women in the context of violence, harassment, and assault. Before we delve into the rights of men, it is necessary to tell you that our constitution treats all people equally. A.14 on the Indian Constitution guarantees the same. Article 14 is a Fundamental right available to both citizens and non-citizens. In case this right gets violated, the person whose right is violated can directly move to the High Court of their respective states or The Supreme Court of India under A.226 and A.32 respectively.

Fundamental rights are defined under Part-III of The Indian Constitution. Part-III guarantees following fundamental rights:-

A.15 – It Prohibits discrimination on basis of religion, race, caste, gender, place of birth, etc.

A.16 – It Guarantees equal public employment opportunity for all men

A.17 – It abolishes the practice of untouchability in any form.

A.18 - It Prohibits the State from conferring any titles or Indian citizens by foreign states.

A.19-22 – Guarantees Right to freedom.

A.24&34 – Guarantees Right against exploitation.

A.25-28 – Guarantees Right to freedom of Religion.

A.29&30 – Guarantees Cultural and Educational rights.

A.32-35 – Guarantees Right to Constitutional Remedies.

"Article 32 is the Heart and Soul of the Indian constitution"

- Dr. B.R Ambedkar

ARE THERE ANY LAWS FOR MEN IN INDIA?

India is the biggest democracy in the world with diverse cultures and widespread traditions. Indian constitution is the largest written constitution within the world; it guarantees equality to all under A.14.

A.14. Equality before law – The State shall not deny 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.[208]

But if we look at the laws in India, I don't think any equality prevails. Indian laws are mostly women-centered they protect the rights of women only there are no express laws to protect men from a different kind of violence like sexual and physical violence.

1. **Rape**

Section 375 and section 376 of IPC expressly protect women from rape. But there is no provision in IPC for rape of men; however section 377 is was an only gender-neutral section that even protected a man from rape by a man only, which declared unconstitutional by the Supreme Court on 6th September 2018 in Navtej Singh johar vs. union of India.[209]

Now, there is no provision for a man if he gets raped by a woman. Indian society laughs at a man, who says he has been raped and that may be the reason behind the under-reporting of such cases. Feminists and society think men are offenders of crimes like rape, owing to such psyche there are no laws present for men.

[208] Article 14 of Indian Constitution.
[209] Writ Petition (criminal) no. 76 of 2016.

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 offense described in this section.[210]

375. Rape.—A man is said to have committed the offence of "rape" who, except in the case accordingly excepted, has sexual intercourse with a woman under mentioned circumstances:—

1— against her will.

2 — against her consent.

3 — by obtaining her consent, where her consent has been obtained by putting her or any other person in whom she is interested by putting that person in fear of death or of hurt.

4 — by obtaining her consent, when he knows that he is not her husband and that the consent has been received because she believes that he is another man to whom she is married.

5 — by obtaining her consent, when, at the instance of giving her consent, by reason of being lunatic or being under influence of intoxication, she is unable to understand the nature and consequences of act to which she gives consent.

6 — with or without her consent, when she is under the age of sixteen yrs.[211]

[210] Section 377 IPC, 1860
[211] Section 375 IPC, 1860

According to Section 375 of The Indian Penal Code, rape is considered to be committed by men to the women and not vice-versa. It is believed that women cannot rape men. The Penile Penetration Condition is an essential requirement for rape.

The Penile Penetration Condition implies that:

- It is physically and biologically impossible for a woman to rape a man
- Therefore rape is a gendered crime

However, these justifications are irrelevant as a woman indulging in conjugal relations with a man without his consent is said to have committed rape and should be punished accordingly.

2. Adultery

Adultery is getting into sexual intercourse voluntarily by a married man with a third person other than a spouse. IPC Section 497 deals with adultery.

497. Adultery.—Whoever has intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offense of rape, is guilty of the offense of adultery and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case, the wife shall not be punishable as an abettor.[212]

The constitutionality of Section 497 of IPC was challenged before the Hon'ble Supreme Court in the case of Joseph Shine v. Union of India, 2018[213]. The Supreme Court in a Bench headed by the then Chief Justice of India, Deepak Mishra, held that Section 497 of the Indian

[212] Section 497 IPC, 1860
[213] Writ Petition (criminal) no. 194 of 2017

Penal Code is unconstitutional and hence, struck it down. The Supreme Court held that the provision was violative of Article 14 & Article 15 of the Constitution.

3. **Protection of women from domestic violence Act 2005**

Protection of women from domestic violence act, 2005 is an act passed by parliament to protect women from domestic violence. It was brought into force by the Indian government and ministry of women and child development on 26th October 2006.

Ex-minister of women and child development ministry Ms. Maneka Gandhi once said "Old violence are men generated".

How can we expect our legislatures who have the responsibility to make laws for the people of India to make such a sexist remark? What can we expect from such leaders who have presumptions like this?

In a study, Out of 1000 male participants, 52.5% experienced gender-based violence at the hands of their partners or wives. The most common type of violence was emotional (51.6%) followed by physical violence (6%).

But the irony is that our legislature thinks men are only perpetrators of domestic violence and hence there are no laws for Men despite such drastic survey results.

INDIAN LAWS vs. OTHER COUNTRIES LAWS

Out of 48 countries in Asia, Only 4 countries Bhutan, South Korea, Kazakhstan, Kyrgystan, and almost the whole of Europe and North America have gender-neutral laws.

According to WEF; Ireland, Norway, Finland, Sweden, and Ireland are the top five countries having the most equal societies in the world.

RAPE LAWS IN OTHER COUNTRIES

United States

Uniform Crime Report by FBI in 2012 redefined rape as: "The penetration, regardless how slight, into the anus or vagina with any part or object, or oral penetration by a reproductive organ of another person, without the consent of the person to whom it is committed. " The prior definition remain unaltered since 1927 and came into the limelight because it alienated the victims who didn't fit the definition (like men) –"the sexual intercourse of a female, forcibly and against her will". The previous definition of "forcible rape" focused on penetration into the vagina, but the latest definition includes penetration into the anus and oral penetration forcefully. The old definition, "the sexual intercourse of a female, forcibly and against her will", didn't include forcible oral or anal penetration, the rape of girls with other objects, or the rape of a person. This new definition encourages male rape victims to hunt for the help they need and also includes sexual assaults that previously weren't covered by the definition of rape. The idea for changing this definition lies within the statistics provided by governmental institutions just like the U.S. Department of Justice and therefore the CDC. A study by the CDC showed that 1 in 71 men had been raped or had been a victim of attempted rape.

United Kingdom

Previously, English law didn't include the rape of males as a criminal offense and it had been recorded as non-consensual buggery. A rapist (of a female) could be imprisoned for the whole of his life, stated Henry Leak, the chairman of Survivors organization, while buggery only carried maximum imprisonment of10 years. This is often however not the case; the

Criminal Justice and Public Order Act 1994 s. 142 was the first to steer this development and recognize male-victim rape; and thus the Sexual Offences Act 2003 states that penetration into the "mouth, anus or vagina with (the offender's) penis" is sufficient to constitute the offense of rape under s. 1(1)(a). Under the Sexual Offences (Scotland) Act 2009 and thus the Sexual Offences (Northern Ireland) Order 2008 men are often both perpetrators and victims. However, in the United Kingdom, a female cannot be legally charged with the offense of 'rape' (she must be instead charged with other offenses like sexual assault, or causing sexual intercourse without consent, of which the latter two carry an equivalent maximum sentence).

China

Prior to 2015, article 236 of China's revised only specified that the crime of rape could be committed only against women. It protects the rights of women getting sexually assaulted but not men's. In 2011, the first-ever conviction for sexual assault on an individual occurred with a Beijing watchman because the perpetrator, but he was convicted of intentional injury rather than rape, sentenced to a minimum of one year in prison, and to pay 20,000 Yuan ($3,026) as compensation. A convicted rapist will get a minimum of three years in prison. The rules of China on child protection strengthen the punishments for sexual offenses against underage girls but don't offer equal protection to underage boys. Molestation of both sexes is treated equally at this, but the rapists of boys can only be charged big molestation with 5 years in prison as a maximum sentence. In September 2013, 27 NGOs involved the law to supply equal protection to boys below 18 years old in cases of sexual offenses. Until All Saints' Day, 2015, sexual offenses against males above the age of 14 couldn't be prosecuted unless they also included a physical assault, during which case only the physical component was

punishable. However, a revision in Article 237, which criminalized "forcible indecency," made the section of the law gender-neutral. Offenses that constitute male rapes can even be tried under this text, with a maximum of 5 years as imprisonment.

Singapore

Male victims of rape aren't acknowledged in Singapore law. A male victim of rape isn't considered a victim under S.375(1) of code, which defines rape because the act of an individual penetrating into a woman's vagina with his penis without her consent is considered rape. Penetration of other body parts is not considered rape but sexual penetration which is unlawful by law (S376(1), Penal Code). Both crimes carry the same penalty: imprisonment for a term of up to twenty years plus a fine or caning. (S.375(2) and S376(4), Penal Code).

MEN'S RIGHT MOVEMENT IN INDIA

The Men's rights movement is composed of various independent men's rights organizations in India. Proponents of the movement want the legislature to introduce gender-neutral laws and repeal the existing laws that they feel are biased against men.

Most of the activists are opposing the country's anti-dowry laws, which have been controversial for their wives in order to pressurize and extort their husbands, and they are believing it to be the reason behind increasing suicide rates among married men (which is almost twice to that of women.) They believe that the divorce and child custody laws are also biased against men. In the last decade, the frequency of domestic violence against men has shockingly increased with many cases going unreported as men feel ashamed of society. Fearful false accusations can also be the reason behind underreporting of such cases. Some

activists also believe that India's rape reporting laws and sexual harassment laws are also biased against men as there aris special women helpline available for women, separate cells for DV complaints, and Mahila courts for women.

TIMELINE

2000–2005

The movement for men's rights was started by activist Rudolph D'Souza (Rudy) in 2000 in Mumbai who was falsely accused by his wife. His aim was to help other victims who suffered psychological abuse and false claims of dowry in marriage. It began as an organization named "Misused dowry Act. In 2002, another activist Gokul Pador joined the movement to help men imprisoned in false dowry cases. Subsequently, they started a helpline for battered men "Save Indian Family", on 9 March 2005.

International Men's Day for the first time in India was celebrated on 19th November 2007 by "Save Indian Family Foundation".

2006–2010

In 2008, SIFF lodged a complaint against a Kitply plywood commercial, for showing a husband being slapped by her wife on her wedding day because of a creaking bed, they alleged that the ad promoted domestic violence against men. In the same year, *Indiya Kudumba Pathukappu Iyaakam* a Chennai-based organization, lodged a complaint against a Pond's ad which portrayed men as wife-beaters and an ICICI Prudential Insurance ad which allegedly showed verbal and economical abuse against the men. In 2009 an NGO named

'Child's Right and Family Welfare' was formed to demand equal laws for men, including better and non-biased child custody laws.

In 2009, the Ministry of Women and Child Development's head, Ms. Renuka Chowdhury, agreed to organize a meeting with men's rights activists and listen to their concerns about biased laws. The activists were invited on 25 June 2009 to discuss what changes are possible to these laws. However, the ministry on 24 June, announced that they were "unwilling to accept any flaws in current laws." This gave a feeling of betrayal to the activists and resulted in some protests against the Indian government. After a week, government officials indicated they will review the existing laws.

2010–2013

Minister of Women and Child Development, Krishna Tirath in September 2012 proposed a bill making mandatory to pay salary to their wives by husbands. This move was strongly criticized by activists and they sought Prime Minister Manmohan Singh's intervention in this matter.

In late 2012, Amir khan was also criticized by activists for negatively portraying men and showing only one side on the Domestic violence issue on Satyamev Jayate, an Indian TV show.

2014

The members of Hridaya, a Kolkata-based organization organized a protest against the Marriage Laws Amendment Bill (India) in February 2014 by wearing saris. The bill

introduced no-fault divorce in the Hindu Marriage Act. Amartya Talukdar, an activist raised his concern and said the law be equally applicable to all the communities instead of Hindus only if the government really intends to empower women.

Aamir Khan's TV show, Satyamev Jayate was again criticized by SIFF in 2014. They said that the show shared the domestic violence data from the National Family Health Survey, which only surveyed women between the 15 - 49 age group. They said the men too suffer from domestic violence and the show should show both sides to its viewers.

SIFF launched a mobile app called SIF One, in 2014 to reach out to men in agony. In the same year, an all-India telephone helpline was launched.

2015–present

The Mumbai-based Vaastav Foundation, in December 2015 released a calendar called "Malendar" marking all men-oriented days such as Father's Day and International Men's Day. Their aim was to raise awareness towards these days.

STATISTICS

On the scale of out of 33 men 1 has experienced an attempted or completed rape; 75% occurred before the men were 18, and 48% before age 12.[214]

On the scale of out of 1 in 4 girls will be sexually assaulted and by age 18, 1 in 6 boys will be assaulted.[215]

According to reports by The Centre for Disease Control and Prevention (CDC): 1 in 38 males have experienced completed or attempted rape during his lifetime. On the scale of out of 4

[214] Tjaden &Thoennes, 2000.
[215] Finkelhor, Hotaling, Lewis & Smith, 1990.

male 1 is rape victim experienced it for the first time between 11-17 years old .On the scale of out of 4 in 1 male rape victim reported that it occurred before the age 10.

According to the study of the Centre for Disease Control and Prevention (CDC) in the United States in 2010-2012 and found that 1 in 17 men reported being forced to penetrate at some point in their life. Male survivor of rape by being forced to penetrated, 13.5 percent reported that the perpetrators were female.[216]

Uniformly when we talk about men who have committed suicide, the rate of men committing suicide is even greater than the rate of women committing suicide.

On the scale of out of 5 in 1 women (18.3%), and 1 in 71 men (1.4%) have been raped at some point in their lives, including attempted penetration, complete penetration, or alcohol/drug facilitated penetration. However, it should not be neglected that the corresponding figure for women is 1 in 5 which amounts to almost 20% and while the figure for women is higher, the state for men is by no means negligible.

In a survey conducted by the Indian Government in 2007, children who reported experiencing severe sexual abuse, including rape or sodomy, 57.3% were boys and 42.7% were girls.

According to the reports the Delhi-based Centre for Civil Society found that approximately 18% of Indian men surveyed reported being coerced or forced to engage in conjugal relations. About 16% claimed a female perpetrator and 2% claimed a male perpetrator.

Surveys conducted by Save Family Foundation survey in between April 2005 and April 2015 almost 100,000 men during that one year over the internet. From which they found out that

[216] Study done by Centre for Disease control and Prevention.

about 98.2% of men had faced serious domestic violence from their wives and in-laws. Some violence faced by men is physical, verbal, economical, sexual, mental, emotional, and financial abuse is the violence that men face.[217]

34.3% of men were affected by economic violence

28.6% of men were affected by physical violence

27.5% of men were affected by emotional violence

20.4% of men were affected by sexual violence

The lowest violence in all violence has found that all the men surveyed faced was verbal abuse

Report of Domestic Violence against Men: Types of Violence Reported (All India)

Physical violence	Verbal and emotional violence	Economical violence	Sexual violence	No abuse	Total
416(25.21%)	366(22.18%)	541(32.79%)	294(17.82%)	33(2%)	1650

Profession of people interviewed[218]

Marketing/ media	Doctor/ Engineers	Businessman/self-employed	Govt. Job	Unemployed	Total
326(19.76%)	635(38.48%)	399(24.18%)	262 (15.88%)	28(1.7%)	1650

[217] Source: Sarkar, S., D'Souza, R., &Dasgupta, A. (2007). Report of Domestic violence against men—a study report by save family Foundation. Retrieved from www.savefamily.org

[218] Study : 10/04/05–30/03/06; 1,650 husbands (ages 15–49

TABLE OF CASES

CASES	JUDGMENTS
Narendra vs.K.Meena [219]	The SC held that coercion or forcing the husband to leave his parents (who are dependent on his income) amounts to cruelty on part of the wife and can be used as a ground by the husband for divorce under Hindu Law.

[219] (CA No. 3253 of 2008)

Hiral P. Harsora and ors. vs. kusum narottamdas harsora and ors. [220]	In this case, the court allowed Domestic violence complaints on females in a household by repealing the requirement of "adult male" from the definition of the respondent.
Raj Talreja v. Kavita Talreja[221]	In this case, the wife made false allegations against the husband. The court held that this can be used as a ground for divorce amounts to under mental cruelty.

NEED FOR GENDER NEUTRAL LAWS

In India, the need for gender-neutral laws was first recognized in chapter 3 of the 172nd Law Commission report.

[220] (Civil appeal no. 10084 of 2016)
[221] (Civil appeal no. 10719 of 2013)

3.1. Replacement of definition of `rape' by definition of `sexual assault'. Not only women but young boys and most teenagers are being subjected to forced sexual assaults and this is increasing day by day. Forced sexual assault does not discriminate on the basis of gender while causing trauma and psychological damage; it treats both boys and girls equally who are subjected to such offense. Both boys and girls are being subjected to oral sexual intercourse too. According to social activists like Ms. Sheela Barse, both young girls and boys are being regularly used for all kinds of sexual acts and sexual perversions in certain tourist-centered states like Goa - mainly for satisfying the lust of the foreign tourists. This report also recommended broadening the ambit of the offense defined in section 375 and to make it free from any kind of biasness based on gender. Some of the Western countries have already recognized the need for such changes and have introduced necessary amendments in their laws. It is also necessary to include penetration by any other part of the body (like finger or toe) or by any other object under this new definition (sexual assault) not only penile penetration. Explanation section 375 has also been changed, now it is not necessary that the penetration should be complete, penetration to any extent whatsoever shall be considered penetration to constitute the offense under S 375 IPC. This explanation is so changed because, in the case of children, penetration is rarely complete – due to physical reasons. So far as the Exception is concerned, the existing Exception is retained the only change introduced being in the matter of age; the age of the `wife' has been raised from fifteen to sixteen years. The age of the person mentioned in the clause "sixthly" in section 375 has also been increased to sixteen from fifteen years.[222]

[222] Chapter 3 of 172th Law commission report.

The 2nd attempt was made by The Justice Verma Committee of 2012. The committee recognized the need for India to recognize different sexual orientations and recommended the inclusion of transgenders along with other genders, (i.e. men and women) while drafting non-biased laws.

The Criminal Law (Amendment) Bill, 2012 proposed to substitute the term "rape" with "sexual assault" and defined "*victim"* as "*any person"* making it gender-neutral. The Justice Verma Committee was constituted after the Nirbhaya rape of 2012. The report was published on January 23, 2013, wherein it was noticed that the Bill required the following changes:

Firstly, under S.375 IPC, the definition of "rape" was widened with reference to the victim making it gender-neutral, whereas, the definition of a perpetrator was restricted to a man. Secondly, under Section 354, the scope of sexual assault was to be broadened by providing for a gender-neutral definition with respect to both victim and perpetrator. As a result, the Criminal Law (Amendment) Ordinance, 2013 was published with several changes to the IPC, Cr.PC, and the Indian Evidence Act making them wider and non-biased. However, the gender-neutral rape and sexual assault laws lasted for just 58 days. The Ordinance was revoked and replaced by the Criminal Law (Amendment) Act, 2013. The definition of "rape" under the new amended Act viewed only females as victims and males as perpetrators.

CONCLUSION

It's the 21st century; power relations, norms, and values of society are changing. Men have started sharing their personal torture harassment by women/spouses without any hesitation. It's time to recognize their problem as a social and public health issue and develop appropriate strategies and interventions. They are no longer stronger than women. Despite

such shocking stats, suggesting abuse against men, no law to protect men is available. All laws for controlling domestic violence recognize women as victims. Anti-dowry laws like Dowry Prohibition Act, 1961, and later Section 498A of IPC by the SC of India already show the concern and asked to stop the "Legal Terrorism" in the form of misuse of S.498A and the necessary changes to be made by the Parliament. Both men and women are the pillars of society and a family. Hence, laws are required to offer protection to both. However, in our society Males are always considered as perpetrators, and women are always considered as victims, it's high time now, society needs to understand that Men too Faces violence and that men can be raped and not always they are on enjoying side of it.

Domestic violence act in India is for women only the above study shows that men are also the victims of violence at the hands of women. Hence, necessary amendments should be incorporated in favor of men experiencing domestic violence. There are no express laws for sexual harassment and repo men by women, our legislature should recognize it as the need of today's era and should pass suitable legislation.

One of the main reasons behind no legislation for men is the underreporting of cases. To tackle this problem government should organize various campaigns and programs to create awareness among the people so that they can come forward end report their grievances.

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ENFORCEMENT OF ARBITRAL AWARDS IN INDIA

- **RIYA MISHRA & PALKIN CHAUHAN**

WHAT IS ARBITRATION?

Arbitration is a type of Alternative Dispute Resolution (ADR) that benefits parties who want to circumvent the lengthy process of resolving disputes through the local courts. It is a legal process for resolving disputes outside of the courts in which the parties to a disagreement refer it to one or more arbitrator(s) whose decision (the award) they agree to be bound by.[223] Alternative Dispute Resolution (ADR) includes arbitration. ADR procedures have a number of advantages, including lower costs, better procedural flexibility, increased confidentiality, increased possibility of settlement, choice of forum, choice of remedies, and so on. Arbitration, on the other hand, is one of the most well-known and widely used kinds of ADR.[224]

ARBITRATION IN INDIA

Since its beginnings in 1940, India's arbitration law has been on the rise. The current arbitration legislation is a compilation of many proclamations and ordinances issued by the Indian government in response to the country's ongoing economic changes. The Act of 1996

[223] Jagdeep Singh Bakshi,Arbitration law in India: Everything you want to know, New Delhi (May 24, 2019, 5:40 pm), https://www.thestatesman.com/india/arbitration-law-in-india-everything-you-want-to-know-1502757528.html .

[224] Arbitration : A Perspective, https://iiprd.wordpress.com/2020/04/26/arbitration-a-perspective/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration .

is the fundamental source of Indian arbitration law. An act enacted to bring together the laws governing domestic and international arbitration, as well as their enforcement. Some substantial amendments were implemented in the years 2015 and 2019 in an aim to make arbitration a preferable form of resolving commercial disputes and to make India a centre of international commercial arbitration. The current law is composed of various similar amendments, the most recent of which were enacted in 2019.

Arbitration has long been used as a way of alternative dispute resolution. The UNCITRAL (United Nations Commission on International Trade Law) framework of laws was used to model the Arbitration and Conciliation Act 1996, with the objective of modernising Indian arbitration law and bringing it in line with best global practises, as well as making India a global hub for arbitration.[225]

Though changes in the legislation have made arbitration a popular alternative to litigation, it is important to remember that the vast majority of arbitration in India is ad hoc, with institutional arbitration accounting for only a small part of overall arbitration. India currently lacks institutions that are equal to international organisations such as the ICC (International Court of Arbitration), LCIA, SIAC, HKIAC, and others. As a result, foreign corporations

[225] By Manoj K Singh, ET CONTRIBUTORS,The future of arbitration in India: Strengthening the process of alternative dispute resolution,(Apr 17, 2021, 01:28 PM IST), https://economictimes.indiatimes.com/small-biz/legal/the-future-of-arbitration-in-india-strengthening-the-process-of-alternative-dispute-resolution/articleshow/82114707.cms?from=mdr .

entering into business contracts with Indian enterprises frequently choose a foreign arbitration centre.

By creating the structure for institutionalised arbitration in India, the latest 2019 amendment tries to address the aforementioned problem. It calls for the establishment of the Indian Arbitration Council, which will be charged with "taking all such measures as may be necessary to promote and encourage arbitration, mediation, conciliation, or other alternative dispute resolution mechanisms, and for that purpose to frame policy and guidelines for the establishment, operation, and maintenance of uniform professional standards in respect of all matters relating to arbitration."

A tiered structure for referring disputes to arbitral institutions was also implemented by the 2019 Amendment. The Arbitration Council of India will now rate arbitral institutions as part of the 2019 revision. Arbitral institutions will be graded "on the basis of factors relating to infrastructure, quality and calibre of arbitrators, performance, and compliance with time constraints for the disposition of local or international commercial arbitrations, in such a way as may be defined by the laws."

The grading system would provide a gauge of a particular arbitral institution's competence and integrity, as well as offer validity to the awards it makes. The Supreme Court of India (in the instance of an International Commercial Arbitration) and the High Courts (in cases other than international commercial arbitration) are also empowered to select graded arbitral institutes for the appointment of arbitrators under the 2019 Amendment

This amendment aims to decrease the role of courts in arbitration proceedings in order to improve the procedure's efficiency in terms of time. This new, swift, and progressive legal

regime will go a long way toward encouraging more parties to use arbitration as their preferred mode of dispute resolution, and it is a huge step forward in streamlining the process of commercial dispute resolution and making India a preferred location for international arbitration.

WHY IS ARBITRATION RATHER THAN LITIGATION PREFERRED?

In comparison to other legal processes, arbitration is often the most effective and efficient remedy for resolving disputes between parties because it does not involve any lengthy procedures to follow and takes much less time to resolve the matter at a reasonable cost. The parties have the option of choosing their own arbitrator based on their ability to decide the case according to their competence, depending on the nature of the case.

SALIENT FEATURES

- *Arbitrators' Appointment (Section 11):-* Parties are allowed the freedom to appoint their own arbitrator under the Act. If the parties are unable to agree on the selection of an arbitrator, the Chief Justice of the High Court for domestic arbitration and the Chief Justice of the Supreme Court of India for international commercial arbitration are contacted.[226]
- *Interim Relief (Section 9) & (Section 17):-*The act allows for the issuance of interim relief orders in relation to the arbitration. If there is a prima facie determination that an arbitration agreement exists and that a dispute has arisen, the petition for relief is

[226] THE ARBITRATION AND CONCILIATION ACT, 1996

maintainable under section 9. Section 36 of the Act allows the parties to petition the court before the arbitral proceedings begin or after the arbitral award is made but before it is enforced. In accordance with Section 17 of the Act, the arbitral tribunal may, at the request of a party, instruct the other party to adopt interim measures as it deems necessary in relation to the subject matter of the dispute.[227]

- *Finality of an arbitral award (Section 34):-* An arbitral award is recognised as the parties' final and binding order, and if the decree is approved by the Court, it is enforceable under section 34 of the Act. In the case of an arbitral award made under section 34 that is set aside because the arbitrator was prejudiced or the award is contrary to public policy.[228]
- Appeal *(Section 37):-* Generally, the decisions of the Arbitration matters are considered final and it is very difficult to get a court to review or vacate them. As per section 37, an appeal lies under section 37(1) against an order of the court granting or refusing to grant any measure under section 9 and also against setting aside or refusing to set aside an award. An appeal shall also lie to a court under section 37(2) against an order of the arbitral tribunal accepting the plea referred to in section 16 (2) or (3) or granting or refusing to grant an interim measure under section 17. There is no provision for appeal against orders under section 11 appointing or refusing to appoint an arbitrator.[229]

[227] THE ARBITRATION AND CONCILIATION ACT, 1996
[228] THE ARBITRATION AND CONCILIATION ACT, 1996
[229] THE ARBITRATION AND CONCILIATION ACT, 1996

WHAT ARE ARBITRAL AWARDS?

An arbitral award is recognised as the parties' final and binding order, and if the decree is approved by the Court, it is enforceable under section 34 of the Act. In the case of an arbitral award made under section 34 that is set aside because the arbitrator was prejudiced or the award is contrary to public policy.

Payment of a sum of money, declaration on any matter to be considered in the arbitration proceedings, injunctive relief, specific execution of a contract, and rectification, setting aside, or cancellation of a deed or other document are all possible outcomes of an arbitration judgement.

An arbitral award, also known as an arbitration award, is a decision reached by an arbitration tribunal after a hearing. A court ruling is the same as an arbitral award. An arbitral award may be non-monetary if all of the claimant's claims are denied and no party is required to pay any money.[230]

Payment of a sum of money, judgement on any matter to be determined in the arbitration proceedings, injunctive relief, substantive fulfilment of a contract, and correction, setting aside, or cancelling an act or other document are all possible outcomes of an arbitration award.

Any arbitral tribunal's ruling on the nature of the case presented to it is classified as an arbitral award,[231] which includes a provisional, interlocutory, or partial arbitral award. At any moment throughout the arbitral proceedings, the arbitral tribunal may grant an interim arbitral

[230] Arbitral Award Law and Legal Definition, https://definitions.uslegal.com/a/arbitral-award/

[231] Cal Code Civ Proc 1297.21

award on any topic for which it will make a final arbitral award.[232] The interim award can be used in the same way that a final arbitration award can. Within 30 days of receiving the arbitral award, a party may request that the arbitral tribunal make a supplemental arbitral award in respect of claims raised in the arbitral proceedings but omitted from the arbitral award, unless the parties agree differently.[233]

PROCEDURE OF ENFORCEMENT OF ARBITRAL AWARDS

Enforcement of Arbitral Awards:

After Acknowledging Arbitral Awards and their Importance Now let us discuss the procedure for enforcing an award; in order to enforce an award, the award must be valid. When an award becomes final, the successful party is barred from pursuing a claim on which he has previously prevailed. It also prevents the losing party from raising the issue on which it has lost because he believes that he will have a more sympathetic tribunal, more convincing witnesses, or a better advocate on the second occasion. Thus, ***Section 35***[234] of The Arbitration and Conciliation Act,1966 states that an arbitral award is final and binding on the parties and individuals claiming under them.

[232] Cal Code Civ Proc 1297.316
[233] Cal Code Civ Proc 1297.334.
[234] THE ARBITRATION AND CONCILIATION ACT, 1996, (Section 35)

It should be noted that if parties sign an agreement or settlement after the initiation of arbitral proceedings that is not in the form and manner specified in *section 35* of the 1996 Act, it does not amount to an award and does not preclude the award from being enforced in the future.[235] An award may be challenged under *Section 34* of the Act; otherwise, it is final and becomes a decree of the court under *Section 35*, and no objection to jurisdiction based on the absence of an arbitration agreement may be raised in execution.[236]

1. Domestic Arbitral Awards:

Domestic awards are those that are made in accordance with the provisions of *Sections 2 to 43* of The Arbitration and Conciliation Act. The parties involved in these proceedings are from India's national territory.

Noticeably, in arbitrations held in India, the order of an Arbitral Tribunal will be deemed to be an order of the court and will be enforceable under the provisions of the CPC, as if it were an order of the court, providing clarity on its enforceability.

[235] Jindal Financial and Investment Services v. Prakash Industries Ltd. 2003(1) Arb. LR 313 (INDIA)

[236] R. K. Textiles v. Sulabh Textiles Ltd., 2003(1) Arb LR 303 Bombay (INDIA)

Again when the arbitral award is final and valid, the award holder must file an application for execution of the award against the award debtor before the commercial court or commercial division of the High Court, as applicable. In the meantime, if the arbitral award is challenged, the court reserves the right to grant injunctive relief and a stay of execution of the arbitral award. It is worth noting that, as a result of the Act's 2015 amendment, to seek a stay on the execution of a specific arbitral award, the party contesting it would have to file a separate application. It should be noted that if a court finds the award to be enforceable in nature, there could be no challenge to the validity of the arbitral award at the stage of execution.

2. Foreign Arbitral Awards:

Section 46 of The Arbitration and Conciliation Act,1966[237] specifies when such a foreign award would be binding on the parties. According to the said Section, any foreign award that is enforceable shall be treated as binding for all purposes on the persons between whom it was made, and may thus be relied on by any of those persons in any legal proceedings in India as a defense, set off, or for any other purpose.

India has ratified both the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards ("GC"). If a party receives a binding award from a country that is a

[237] THE ARBITRATION AND CONCILIATION ACT, 1996, (Section 46)

signatory to the New York Convention or the Geneva Convention, and the award is made in a territory that India has notified as a convention country, the award is enforceable in India. In India, the enforcement of a foreign award is a two-stage process that begins with the filing of an execution petition. Initially, a court would determine whether the award met the Act's requirements. If an award is found to be enforceable, it can be enforced in the same way that a court's decree can. However, at this stage, parties must be aware of the various challenges that may arise, such as objections raised by the opposing party, as well as requirements such as filing an original/authenticated copy of the award and the underlying agreement with the court.

Section 47 of the Act requires the following documents to be produced before the appropriate court in order to enforce a foreign arbitral award:

· Original award or a duly authenticated copy in the manner required by the country of manufacture.

· Original or duly certified copy of the agreement.

· Where applicable, evidence is required to demonstrate that the award is a foreign award.

PROCEDURE OF ENFORCEMENT:

The procedure for enforcing arbitral awards is primarily governed by provisions in the Arbitration and Conciliation Act of 1996 as well as the Civil Procedure Code (CPC)Sundaram Finance Ltd v Abdul Samad and Anor Civil Appeal No 1650 of 2018. After

receiving a favorable decision, an award holder must wait three months before filing an application for the award's enforcement. The other party can challenge the award during this three-month period, according to Section 34 of the Arbitration and Conciliation Act. When the three-month period is up, the award can be applied for execution in the appropriate court. If the court enforces the award at the execution stage, there is no further provision for challenging the awards i.e. available to the parties.

The enforcement of a decree may be initiated in accordance with the provisions of *Sections 36 to 74* of the Arbitration and Conciliation Act of 1996 or Order XXI of the CPC. The statute of limitations for enforcing such an award is twelve years.

In *Sundaram Finance Ltd. v. Abdul Samad and Anr*[238], the Supreme Court stated that execution proceedings could be initiated in any court in India where the assets are located. In cases where the subject matter of arbitration has a monetary value, the commercial courts established under the Commercial Courts, Commercial Division, and Commercial Appellate Division of the High Court Act, 2015[239] would have jurisdiction.

CONDITIONS TO ENFORCE DOMESTIC AND FOREIGN ARBITRAL AWARDS

[238] Sundaram Finance Ltd v Abdul Samad and Anor Civil Appeal No 1650 of 2018 (INDIA)

[239] Ministry of Law and Justice, THE COMMERCIAL COURTS, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS (AMENDMENT) ORDINANCE, 2O18, Page no. 2

A foreign award's enforcement may be refused[240], and a domestic award may be set aside[241], if it is proven that:

· The agreement's parties were incapacitated.

· The agreement in question does not comply with the law to which the parties have subjected it, nor with the law of the country where the award was made (especially in case of foreign awards).

· There was a failure to provide proper notice of the appointment of an arbitrator or the commencement of arbitral proceedings, or the party against whom the award was rendered was otherwise unable to present his case.

· The award violates the terms of the agreement or the submission to arbitration.

· The award contains decisions on matters that go beyond the scope of the arbitration request.

· The arbitral authority's composition or the arbitral procedure is an ultra vires agreement.

· The composition of the arbitral authority or the arbitral procedure violates the law of the country in which the arbitration was held.

· The award (particularly a foreign award) has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

[240] THE ARBITRATION AND CONCILIATION ACT, 1996, (Section 48)
[241] THE ARBITRATION AND CONCILIATION ACT, 1996, (Section 24)

· Under Indian law, the subject matter of the dispute is not amenable to resolution through arbitration.

· The award's enforcement would be contrary to Indian public policy.

DOMESTIC AWARDS VS. FOREIGN AWARDS

The Arbitration and Conciliation Act, 1996 distinguishes between awards made by arbitration tribunals seated in India and those made by arbitration tribunals seated abroad. The procedure for carrying out a domestic award differs from that for carrying out a foreign award.

Domestic Award:

Domestic awards are those that are made in accordance with the provisions of Sections 2 to 43. The parties involved in these proceedings are from India's national territory. Domestic awards and the process by which they are implemented have also been differentiated as follows:

1: Awards arising out of an India seated Arbitration Institution (being an International Commercial Arbitration):

The provisions of the Commercial Courts Act and the Amendment Act govern these awards. For the execution of these awards, the Commercial Division of the High Courts where the assets of the opposing party are located will have jurisdiction. In cases where the subject matter of the award is not money, the Commercial Division of the High Court that would

have jurisdiction if the subject matter of the award were a subject matter of a suit will have jurisdiction. Simply put, where the opposing party resides, conducts business, or works for personal gain.

2: Awards arising out of an India Seated Arbitration Institution (not being an International Commercial Arbitration):

The provisions of the Commercial Courts Act and the Amendment Act also apply to these awards. The Commercial Courts exercising such jurisdiction as would ordinarily lie before any Principal Civil Court of original jurisdiction in a district, as well as the Commercial Division of a High Court in the exercise of its ordinary original civil jurisdiction, would have proper jurisdiction for the execution of these awards.

Foreign Awards:

A Foreign Award is defined in *Section 44* of the Arbitration and Conciliation Act, 1996 as an arbitral award on differences relating to commercial matters under Indian law. Two conditions must be met in order for an award to be classified as a "Foreign Award." One, it must deal with the differences that arise as a result of a commercial or perceived commercial legal relationship under Indian law. Second, the country issuing the award must be one that the Indian government has designated as a country to which the New York Convention applies. This convention has been signed by India. Only those awards, only the awards issued

by these countries, are recognized as Foreign Awards in India and are enforced. The second part of the Arbitration Act governs the enforcement of these awards.

In India, the enforcement of a Foreign Award is done in three steps. First, the party in whose favor the award is issued will file an application under *Section 47* of the Arbitration and Conciliation Act, accompanied by all relevant evidence. Second, along with all evidence, the party against whom the award is issued is required to raise a defense prescribed by section 48 of the act. Finally, if the court is satisfied that the award is enforceable based on all of the evidence presented by the parties, it will enforce it under *Section 49* of the Act.

The enforcement of a domestic award differs significantly from that of a foreign award. First, a foreign award cannot be executed as a decree on its own. A procedure must be followed for its execution. Second, there is no provision for setting aside a foreign award. An Indian court's only power in this regard is to either enforce or refuse to enforce it. The Supreme Court recently addressed the issues raised by this gap in Venture Global Engineering vs. Satyam Computer Services Ltd[242] and Anr, ruling that an Indian court under Section 34 of the Act can set a foreign award aside.

When the subject matter of a Foreign Award is money, the Commercial Division of the High Courts in whose jurisdiction the opposite party's assets are located will have jurisdiction. If the subject matter of the award is otherwise, the Commercial Division of the High Court that

[242] Venture Global Engineering vs. Satyam Computer Services Ltd, Appeal (civil) 309 of 2008 (INDIA)

would have jurisdiction if the subject matter of the award were a subject matter of a suit will have jurisdiction.

Different High Courts have taken opposing positions on the issue of foreign award limitations. In *Noy Vallesina v Jindal Drugs Limited*[243], the High Court of Bombay stated that because a Foreign Award is not a decree in and of it and requires enforcement by a competent court, its application would fall within the residuary provisions of the Limitation Act, i.e., the limitation period would be three years. The High Court of Madras in *Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd*[244], on the other hand, referred to the Foreign Awards, as deemed decrees, and the limitation period was set at 12 years. In Rudolf A Oetkar vs. Mohammed Ori (1999 SCC Online Cal), the Calcutta High Court held that if a suit is filed seeking to enforce the foreign arbitral awards, residuary *Article 113 of the Limitation Act*,[245] 1963 would apply, and if an application seeking enforcement of the domestic arbitration award is filed, residuary *Article 137* would apply.

In *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd*[246], the Supreme Court ruled that a single proceeding could have multiple stages. A court can decide on the enforceability of the

[243] Noy Vallesina v Jindal Drugs Limited,CIVIL APPEAL NO. 8607 OF 2010 (INDIA)
[244] Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd, AIR 2007 Mad 251, 2008 (1) ARBLR 344 Madras, (2007) 3 MLJ 1062 (INDIA)
[245] THE LIMITATION ACT, 1963, (ARTICLE 113, 137)
[246] M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd, Appeal (civil) 3594 of 2001(INDIA)

award in one stage. Once the enforceability is determined, further steps can be taken to carry out the same.

PROBLEMS FACED DURING EXECUTION OF FOREIGN ARBITRAL AWARDS

Achieving an award in your favor from an international tribunal is not always good news, as you must still have your award enforced in India. The majority of arbitral awards are voluntarily obeyed. The issue arises when one of the parties contests the award and the need for its enforcement arises. Several cases have been reported in which, despite receiving a favorable award, the party failed to have it enforced by a competent court in India. The reasons for these failed enforcements range from one party's decision not to participate in the Arbitral proceedings to other situations in which the party has challenged the award on the basis of the cost awarded or the Arbitration jurisdiction.

· **Litigation:**

The Arbitration and Conciliation Act, 1996 was enacted to provide a quick method of dispute resolution on a national and international scale. As previously stated, an award rendered by a foreign arbitral seat is not automatically enforceable in India. The amount of litigation involved in enforcing a foreign arbitral award almost outweighs its purpose of ensuring the prompt resolution of disputes. Only a few of the parties agree with the Arbitrators' decision. A majority of people choose to fight the awards in Indian courts during the execution and

enforcement stages. A foreign arbitral award can be challenged under Section 48 of the Act. It specifies the grounds on which a foreign arbitral award can be challenged.

The grounds are as follows:

Ground 1: Either party is under some Incapacity

If one or both of the parties involved in the arbitral proceedings were legally incapacitated, such an award could not be enforced. This incapacity can be caused by involuntary behavior, fraud, duress, undue influence, or misrepresentation.

The Supreme Court, in *Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors*[247], observed that "*By fraud is meant an intention to deceive; The expression "fraud" involves two elements, deceit and injury to the person deceived*". The Court further observed "*A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury in ensues therefrom .....*"

Ground 2: Either party was not given Notice

[247]Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors, Appeal (civil) 5162-5167 of 2005 (INDIA)

It would be a violation of natural justice principles if neither party received a notice regarding the appointment of the arbitrator or the arbitral proceedings. Such awards are subject to reversal. However, if a party has voluntarily decided to sit out of the arbitral proceedings, such awards will be enforced because he did so voluntarily. Only those awards can be challenged if one of the parties was excluded for reasons beyond its control.

Ground 3: The Arbitral Award is beyond the scope of Arbitration

The terms of reference limit an Arbitration Tribunal's jurisdiction. No tribunal is supposed to disregard these constraints. They are only supposed to rule on the questions that have been submitted, and they are not supposed to go beyond that. An award that goes beyond the scope of the arbitration is likely to be overturned by the courts.

It is important to note here that if it is possible to separate the awards that are awarded within the limits of the arbitration terms from those that are awarded by exceeding those limits, the former can be enforced.

Ground 4: Legality of the Composition or Procedure of the Arbitration Tribunal

An award may be overturned if any of the following conditions are met:

i. The tribunal that has been formed is not in accordance with the parties' signed agreement.

ii. The procedure used during the arbitration proceedings was not in accordance with the parties' agreement.

iii. If the arbitration's composition or procedure is not in accordance with the law of the country in which the arbitration was held.

Ground 5: Award set aside before its enforcement

If an award is set aside or suspended by the authorities of the country in whose jurisdiction it was issued before it becomes binding on the parties, it will not be enforceable in Indian Courts because the Courts of the country that issued the award have exclusive jurisdiction to set aside the award.

Ground 6: Dispute not capable of being resolved under Arbitration

If the nature of a dispute is such that it cannot be resolved through arbitration, either because the subject matter is not capable of being settled under different laws that are currently in force in different countries for the time being, or because the subject matter is not capable of being enforced under the law that is currently in force in India. The court will refuse to enforce the award in such a case.

Ground 7: Public Policy

An award issued in violation of India's Public Policy will be unenforceable in India. Awards made in violation of public policy serve as a deterrent to their enforcement. Courts in India are obligated to refuse enforcement of an award that is contrary to Indian public policy.

In *Renusagar Power Co. Ltd vs. General Electric Co*[248], the Supreme Court resolved the dispute over what constitutes a violation of Indian public policy by holding that the bar of public policy will be drawn only when there is a violation of something other than Indian laws. The award would be refused if it violated a fundamental policy of Indian law, justice, or public morality.

In *Daiichi Sankyo Company Limited vs. Malvinder Mohan Singh and Ors*[249]. The Delhi High Court held that the defence of public policy could be raised only when the award is contrary to India's fundamental policy, national interest, or justice/morality. It does, however, give the Indian Courts the opportunity to reconsider the award. It went on to say that claims barred by limitations, awards of consequential damages, and awards against minors are all subject to being overturned by Indian courts.

[248] Renusagar Power Co. Ltd vs. General Electric Co,1994 AIR 860, 1994 SCC Supl. (1) 644, (INDIA)
[249] Daiichi Sankyo Company Limited vs. Malvinder Mohan Singh and Ors.O.M.P.(EFA)(COMM.) 6/2016(INDIA)

· **Pressure by the Local Governments:**

A local arbitrator will wield more political power than a foreign arbitrator. They will attempt to use this power to annul the award or, at the very least, reduce the amount of the award. This may lead to the annulment of an award issued by an International Arbitration Seat. This is due to a lack of authority to oversee both the substantive and procedural examinations of these awards' enforcement.

· **Inconsistent Application of Law:**

A Foreign Arbitral Award can be enforced in all jurisdictions where the opposing party's assets are located. The possibility that different courts in different jurisdictions will interpret the same award differently cannot be ruled out. Even if an award is issued by an Arbitration seated in India, it may not be enforceable in another country's jurisdiction.

RECOMMENDATIONS/ SUGGESTIONS

The aforementioned pro-enforcement approach taken by Indian Courts in the face of challenges brought by Indian parties under foreign exchange laws is a significant step toward making India an appealing destination for foreign investors. In accordance with the Convention's pro-enforcement theme, Indian courts have adopted a narrow conception of

public policy. The position taken by Indian courts is also consistent with Article 51 of the Indian Constitution. Article 51 imposes a duty on India to work to promote respect for international law and treaty obligations in organised peoples' dealings with one another, as well as to encourage the settlement of international disputes by arbitration.

There is still a great deal of ambiguity surrounding the enforcement of a Foreign Award. Clarity is required to establish trust among the parties who have chosen Arbitration as their preferred method of ADR. The only thing that can prevent the spread of this mistrust is the passage of legislation to close these loopholes. The amendments, together with the Supreme Court of India's judgments, are a step in the right direction. It will help to increase the volume of arbitration in India.

ABDUL KARIM TELGI CASE

- SHWETA KHANNA

FACTUAL BACKGROUND

With more than 20 convictions, imprisonment to which count upto 40 years if calculated separately, and fine slapped on him crossing Rs. 250 crore, the multi-crore stamp paper scam kingpin Abdul Karim Telgi a jackfruit seller to a stamp vendor turned master forger, Telgi first came into focus in 2003, two years after his arrest that unfolded an unholy nexus between criminals, politicians and police.

Arrested on November 22, 2001 at Bengaluru, Telgi was booked in total 48 cases, including the most high profile case at Pune's Bund Garden police station in which police had recovered stamp papers worth the value of Rs. 500 crore. The CBI later clubbed all the cases under stringent Maharashtra Control of Organised Crime Act (MCOCA).

Born in to a poor family at Khanapur, in the border district of Belgaum, Telgi was convicted by a Pune court in 2007.

In 1998, he procured a stamp paper machine from the Indian Security Press to run the racket of printing and selling fake stamps. To sell stamps as vendor, Telgi had made an application before the then revenue minister Vilasrao Deshmukh in 1994.

Four years later, Telgi procured the machine and started publishing fake stamp papers in Mumbai. In 2003, police recovered fake stamps worth Rs.3,000 crore, which never really came into the market. His arrest and the subsequent interrogation led to rivalry with the Maharashtra police force.

As the scam unfolded, the Special Investigation Team (SIT) headed by deputy commissioner of police CH Wakde arrested senior police officials, bureaucrats and politicians. The SIT arrested 67 persons including some high profile names. In two years, SIT unfolded the entire scam before the case went to CBI in 2004.

Investigation into his racket indicated that he was acting in connivance with some employees of the Indian Security Press in Nashik, which printed stamp papers. As per the practice at that time, old machines used in the press were auctioned off, and these were bought by Telgi. He also procured plates used in the press from his contacts inside.

Illegal but genuine

The result was that the stamp papers printed by Telgi were real in spite of not being real. They were genuine stamp papers but produced in an illegal manner.

Telgi went on to build a network of over 300 agents who would approach various institutions that needed stamp papers on a regular basis and strike deals with them as long as they were willing to pay the price. While the Mumbai Police registered a couple of cases against Telgi in the early 90s, he was released after being questioned. He knew the intricacies of printing.

By 1996, Telgi knew enough. Using Kulthey's links he wooed Ramchandra Reddy, a clerk in the perforating machine and dyes department and Shivraj Sharma, chief of purchase in ISP Between them Kulthey, Reddy and Sharma conspired to get machines declared obsolete which Telgi bought to set up his press.[250]

[250] https://www.indiatoday.in/magazine/crime/story/20031124-telgi-fake-stamp-scam-how-a-peanut-vendor-used-the-system-to-defraud-the-nation-791297-2003-11-24

He recruited young men across the country luring them with higher commissions for selling fake stamps to the hoi polloi as also to insurance companies. In other cities Telgi lured employed or unemployed youths with riches to sell fake stamps and stamp papers, which were used even in registering property and insurance documents

By the late 1990s, Telgi's business was in hundreds of crores of rupees. He began investing in property. Telgi started financing people for Ajmer and the Haj trips. He also produced a C-grader starring Moon Moon Sen. Along with wealth, Telgi had acquired the art of not getting caught. In 1995 the Bombay High Court clubbed all his bail applications and rejected his request on December 1, 1995.

He was in court but nobody arrested him. By January 1996, Telgi was proclaimed an offender.

A diary seized from his accountant lists payoffs to several politicians, IPS and IAS officers. The investigators could never fix the burden completely on Telgi because he operated through a maze of companies.

Mercifully, the Karnataka Government was more serious. Not only did it set up a site*www.stampIT.info* to inform/caution the public but also constituted a special team, under R. Srikumar, which tracked residents travelling to Ajmer, and pinned down Telgi. The lid was blown off the racket in 2000 when two of Telgi's couriers were caught transporting his stamp papers in Karnataka.

Their interrogation led the police to Telgi, who was arrested from Ajmer in 2001. It is estimated that fake stamp papers were sold across seven States as part of the scam.

A year later, he was packed to Mumbai where his friends, including Kamath, ensured he was never lodged in a lock-up but at his home in Colaba or his hotel in Sion.

Special investigation team formed

The Mumbai Police Crime Branch obtained Telgi's custody in 2002 and a year later, the Maharashtra government formed a special investigation team, headed by then Deputy Inspector General of Police Subodh Jaiswal, to probe the cases against him.

The next twist in the tale came in 2003, when during a surprise visit to Telgi's flat in Colaba, Mr. Jaiswal found him sharing a meal with Mumbai Police personnel. The Crime Branch had taken him out of lock up claiming that they were taking him to search his residence. Assistant Police Inspector Deepak Kamat was arrested for conniving with Telgi in exchange for money but was acquitted in 2016.

Telgi was convicted in 2007 after he pleaded guilty and was sentenced to 29 years in prison, along with a whopping Rs.202 crore fine.

However, Telgi was not done with subverting the system. In 2016, Karnataka DIG (Prisons) D. Roopa said in an official report that the master counterfeiter was getting preferential treatment in the Parappana Agrahara central jail in Bengaluru.

ISSUES FACED DURING THE CASE

1. Police in the country were **not equipped** to detect fake stamps, a fact that clearly helped Telgi to have an uninterrupted run for close to a decade.

2. Having got Telgi behind bars, prosecutors found, much to their dismay, that they were fighting a losing battle. Telgi had about 48 cases registered against him in various parts of the country, had been arrested by several state police, but had never been convicted.

Some said he never would be because he had a file on all the **top politicians and bureaucrats** who travelled abroad on his expense and never hesitated to turn to him for funds.

3. The clerks of his clientele were told they could avoid the hassle of running around to buy the stamps; instead the executives would deliver them to their offices. The standard rate of **commission** offered to the dealing staff was 2 per cent of total sales. Most succumbed to the temptation, bought the stamps in bulk and, of course, kept their mouths sealed. Telgi flourished, while the Government lost crores of rupees in revenue. The executives would **disappear**, so would the firms; later, a new set would do the rounds.

4. Only the state treasury is allowed to sell non-judicial stamp papers of values above Rs 500. But Telgi's vendors sold these in bulk to people who were **ignorant** about this rule.

5. The investigators could never fix the burden completely on Telgi because he operated through **a maze of companies.**

LAWS APPLIED IN THE CASE

1. **Maharashtra Control of Organised Crime Act (MCOCA) :-Maharashtra Control of Organised Crime Act, 1999** (**MCOCA**) is a law enacted by Maharashtra state in India in 1999 to combat organised crime and terrorism. The preamble to MCOCA says that "the existing legal framework, i.e. the penal and procedural laws and the adjudicatory system, are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of organised crime."

2. Section 120B r/w 109/119/193/201/211/218/221/255/259 of **The Indian Penal Code, 1860**

3. Sections 7, 12 and 13(1)(d) r/w 13(2) of **Prevention of Corruption Act, 1988**

TIMELINE OF EVENTS

- Born in 1959 at Khanapur in Belgaum district
- In 1994, Telgi obtained license from the then revenue minister of Maharashtra Vilasrao Deshmukh to sale stamp papers
- In 1998, Telgi procured a stamp paper machine from Indian Security Press by bribing officials
- In 1999 he started selling fake stamp papers in the market
- Telgi was first arrested by Karnataka police in 2001
- In 2003, Telgi was arrested by Pune police under an FIR lodged at Bund Garden police station
- Telgi was convicted in 2007 in Bund Garden, which was one of the biggest case against him
- In 2015, Telgi was shifted to Banglore Jail for hearing on other cases.
- October 2017- Death of Abdul Karim Telgi due to multiple organ failure while serving his sentence in a Hospital.

- December 2018 - The Nashik sessions court in Maharashtra acquitted late Abdul Karim Telgi and seven others in the 2004 multi-crore fake stamp paper case in absence of "solid evidence" against them. Telgi, who was convicted in several cases in connection with the scam and sentenced to imprisonment of 30 years in total, died in Bengaluru in October 2017 while serving his jail term.

HELD

The Central Bureau of Investigation (CBI) had filed a chargesheet against Telgi and others in a Nashik court in August 2004 under various sections of the Indian Penal Code (IPC).

The CBI had contended that the accused, including the officers and constables of the Railway Protection Force (RPF), colluded with Telgi by selling him stamp papers by opening sealed packets when they were transported to the Nashik railway yard from the city-based India Security Press, as per defence advocate M Y Kale.

These stamp papers were meant to be dispatched to treasuries of various state governments. The India Security Press (ISP) is a subsidiary of the Security Printing & Minting Corporation of India (SPMCIL), a public undertaking of the Union government.

ISP, located in Nashik, is tasked with printing passports, visas, postage stamps, post cards, inland letters, envelopes, non-postal adhesives, court fees, fiscal, and Hundi stamps in the country. The court had framed charges against the eight accused in February 2015.

The court examined 49 witnesses during the trial.

The accused were acquitted by the judge in absence of "solid evidence".

Besides Telgi, other accused acquitted Monday are identified as RPF officials Rambhau Pawar, Brijkishore Tiwari, Vilaschandra Joshi, Dyaneshwar Barke, Pramod Dahage, Mohammed Sarvar and Vilas More.

It cannot be immediately confirmed whether these officials are still serving with the RPF or are retired from service. The government pleader, who represented the CBI in the case, didn't talk with reporters.

Telgi had printed fake stamp papers allegedly in connivance with government officials and politicians, and sold them to banks, stock brokerage firms and insurance companies. [251]

ANALYSIS

Across 72 towns and 18 States and over a period of 10 years, the counterfeit stamp paper scam has dealt the Indian economy a shattering Rs.32,000-crore blow. The figure is official. Apprehensions are that it could be much higher.

It was an operation that respected no system and thrived on the brittle moral fabric of the bureaucracy and its political bosses, exposing the inadequacies of the system. Be it in Maharashtra, where it originated, or in Andhra Pradesh, where it spread its net, or in Karnataka and other States, where it flourished, the scam left a trail of stink that every party is trying to cover up. The scam also throws light on the culpability of officials and political leaders and is yet another piece of evidence of the criminalization of politics.

[251] https://www.news18.com/news/india/abdul-karim-telgi-acquitted-in-stamp-paper-scam-year-after-his-death-1987855.html

From West Bengal to Tamil Nadu and from Uttar Pradesh to Rajasthan, several States figured in the scam and each has lost huge revenues. If the revenue loss in Maharashtra was worth Rs.2,200 crores, the loss was said to be of the order of Rs.1,000 crores a year in A.P. The Karnataka government's annual revenue from the sale of stamp paper was worth Rs.250 crores when Abdul Kareem Telgi, the prime accused in the racket, was arrested. After his arrest, the revenue was in excess of Rs.750 crores.

A shortage of stamp paper engineered with the help of a few officials of the Indian Security Press at Nashik enabled Telgi to expand his illegal business throughout the country.

Telgi's agent in the south, who explored the loopholes and established a network in at least four States, Maharashtra, A.P., Karnataka and Tamil Nadu, was Sheik Waheed.

The operation involved the sale of not only counterfeit stamp paper but also related items such as judicial court fee stamps, non-judicial stamps, revenue stamps, special adhesive stamps, notorial stamps, foreign bills, brokers notes, insurance policies, share transfer certificates and insurance agency stamps. The Special Investigating Team (SIT) of the Maharashtra Police put the total value of the scam at Rs.21,28,47,07,824. Later this was revised to Rs.32,000 crores by the Union Home Secretary. The biggest haul was made by the police in Maharashtra when stamps worth Rs.2,500 crores were seized, followed by Delhi (Rs.214 crores), Karnataka (Rs.205 crores) and A.P. (Rs.19.70 crores). In U.P. the complicity of a senior Indian Police Service officer allegedly led to a business of Rs.5,000 crores.

Stamp shortage in the State helped Telgi expand his business rapidly and A.P. turned out to be a goldmine. During 2001-2002, the A.P. government placed an indent for stamps worth

Rs.126 crores from the Indian Security Press but was supplied only stamps worth Rs.10.9 crores. For an order of court fee labels for Rs.16 crores, the supply was worth only Rs.2.26 crores.

Surprisingly, the investigations in A.P. fizzled out too soon. There was no progress and the Criminal Investigation Department, which was handling the case, "slept over it". Despite the issue rocking the State Assembly in November 2002, the government confined its attention to countering the charges by the Opposition and highlighting the need to change the Indian Stamps Act.[252]

Telgi employed a simple method to expand his illegal business. His agents would first talk to the henchmen of politicians. It is said that he never entered into too many deals; he preferred to reach an agreement with an influential politician for the circulation of the stamps initially. He would not contact others without the knowledge of the first contact and would leave to the latter the decision of expanding the trade.

As the next step he would build a chain of `reliable contacts' through the first contact and deals were struck in his presence. Telgi would then offer them a State wide contract. There were different payments for direct sale, protection, trouble-shooting and so on.

A smart operator, Telgi knew how to protect his interests in the event of trouble. He regularly recorded his telephonic conversations with politicians and officials after duly making them announce their designations and names by way of casual questions.

There were two faces to the scam - the counterfeit stamp scam and the disappearance of original stamp papers. The Indian Security Press has also found that stamps worth crores of

[252] https://frontline.thehindu.com/static/html/fl2023/stories/20031121002204700.htm

rupees dispatched to various destinations in the country did not reach the addressees. On March 17, 1997, 132 cases of stamps were sent to Hyderabad, out of which only seven reached the destination. In 1996, stamp papers worth Rs.1 crore were found missing when the boxes were opened in Hyderabad. There are reports of missing stamp paper from Surat, Jaipur, Ludhiana, Ambala, Kanpur, Faizabad and Kolkata.

The press maintained no record of serial numbers for the stamp papers. There was also no stipulation that the name of the destination be printed on the stamp paper. These made it possible for the operators to print stamps anywhere they felt like and supply them to any State. Stamp vendors were given illegal licences throughout the country, which led to the lack of a proper control mechanism. There were no specific security features for stamps. Collusion of the officials of the ISP with some police officers was evident, and a shortage of stamp papers caused by the non-supply of the quantity that was ordered by the State governments helped Telgi.

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HISTORICAL BACKGROUND AND DEVELOPMENTS IN CORPORATE TAXATION IN INDIA

- SHOBHA SHETTY

Introduction:

"All this is to suggest not that the corporation cannot be touched but that to touch the corporation deeply is to touch much else."

-Edward Mason

India is considered to be a highly taxed nation, so as far as direct personal taxation and taxation of corporate income are concerned. Naturally, it is often argued that such a high rate of corporation income-tax does have unfavourable effects on the corporate income after tax, corporate saving, and investment, ploughing back of profits by the corporations in private sector, capital structure of the corporations, their policies of dividend distribution and overall growth of business corporations in India's private sector.

Corporations or companies in India are subject to company tax at a flat rate under the Indian Income Tax Act. The tax rate is discriminatory in character, viz., private limited companies and/or closely held domestic companies are charged relatively higher rate as compared to public limited and/or widely held domestic companies with the intention of discouraging concentration of economic power in the hands of a few. Domestic companies are offered favourable tax treatment vis-a-vis foreign companies and foreign collaborations.

General consensus us among private sector enterprises and economists has been that the rates of treatment vis-a-vis foreign companies and foreign collaborations. General consensus us among private sector enterprises and economists has been that the rates of company tax for

different types of corporations in India are relatively high in comparison with other countries of the world. Furthermore, there is discriminatory treatment between domestic or resident and foreign or non- resident companies in the context of present liberalized global economy.

In a developing country of the third world like India, where rapid industrialization and transfer of surplus manpower from primary to secondary and tertiary sectors is the need of the hour, it is not desirable to impose heavy taxation on corporate income. It is also argued that such taxation would hamper growth of domestic corporations and economy as a whole in a number of ways.

Evolution of Taxation in India

History of Taxation in India:

"It was only for the good of his subjects that he collected taxes from them, just as the Sun draws moisture from the Earth to give it back a thousand fold".

- By Kalidas

Tax is a compulsory liability for every citizen of the country in India. There are two types of tax in India i.e. direct and indirect. Taxation in India is deep-rooted from the period of Manu Smriti and Arthasastra (The Arthasastra is an ancient Indian Sanskrit treatise on statecraft, economic policy and military strategy.), wherein varieties of tax measures and schemes are referred. Now, present Indian tax system is based on this ancient tax system which was based on the theory of maximum social welfare.

The origin of the word "Tax" is from "Taxation" which means an estimate. In India, the system of direct taxation as it is known today has been in force in one form or another from

ancient times. From that times onwards it cautioned the king against too much taxation i.e. a king should neither levy high rate of tax nor exempt anyone from tax.

The king should arrange the collection of taxes in such a manner that the tax payer did not feel the pinch of paying taxes

- Manu Smriti

The King laid down that:

- Traders and artisans should pay one fifth ($1/5^{th}$) of their profits in silver and gold,
- Agriculturists were to pay 1/6th, 1/8th and 1/10th of their produce depending upon their situations.

Arthasastra mentioned that each tax was specific and there was no scope for uncertainty. Tax collectors determined the schedule of each payment, and its time, manner and quantity being all pre-determined. The land revenue was fixed at 1/6th share of the produce and import and export duties were determined on ad-valorem basis. The import duties on foreign goods were roughly 20% of their value. Similarly, tolls, road cess, ferry charges and other levies were all fixed.

Kautilya also laid down that during war or emergencies like famine or floods, etc. the taxation system should be made more stringent and the king should also raise war loans. The land revenue should be raised from 1/6th to 1/4th during the time of emergencies. The people involved in commerce should pay big donations to war efforts.

Kautilya's concept of taxation emphasised equity and justice in taxation wherein the wealthy people had to pay higher taxes as compared to the poor people.

Short summary on History:

In India tax was introduced for the first time in history in 1860 by Sir James Wilson in order to meet the losses sustained by the Government on account of the Military Uprising of 1857. In 1918, a new income tax was passed and again it was substituted by another new act which was passed in the year 1922.The Act remained effective from the assessment year 1961-62 with several amendments. In consultation with the Ministry of Law finally the Income Tax Act, 1961 was passed and was effective on 1st April 1962. It applies to the whole of India including Jammu and Kashmir. From 1962 several amendments of far-reaching nature have been made in the Income Tax Act, 1961 by the Union Budget every year.

History of Corporate Tax in India:

The taxation of corporate income started in India with the first Income Tax Act of 1860. In the earlier days, the organizations were paying super-tax at increasing rates if their income was Rs. 50,000 or above. This tax was like the super-tax imposed on people; Taxation Enquiry Committee in its report prescribed to change over the super-tax into corporate benefits tax by eliminating basic exception of Rs.50, 000 and replacing increasing rates by a flat rate. The necessary changes were made through an Amendment Act 1939.

From that point forward the tax paid by organizations (independent of their income) has been called Corporation tax. Far beyond that organizations likewise paid income tax till the year 1960 for the benefit of the investors (shareholders) and was refundable incase the investor's personal income tax liability were to be nil. In the 1959-60 budget the income tax which was paid by the organization, and which was considered to have been paid by it in the interest of its investors was nullified. The structure of corporation tax as altered in 1939 has been held by the current Income Tax Act 1961. The Corporation tax has been characterized by Article

366(6) of the Constitution of India, hence: 'Corporation tax' signifies any tax on income so far as that tax is payable by organizations and is a tax on account of which the accompanying conditions are satisfied:

1. That is not chargeable in respect of agricultural income
2. That no deduction in regard of the tax paid by organizations. Is, by whatever other establishments which may apply to the tax. Approved to be made from dividends. payable by the organizations to people:
3. that no provision exists for considering the tax so paid into account the purpose of Income-tax the total income of people getting such dividends, or in calculating the Indian Income-tax payable, by or refundable to such people.' The definition which is simply legitimate in character suggests that:

- The corporation is tax on its total income. Barring agricultural income, figured as per the common guidelines for deciding business or property income. It pays profits out of after-tax income.
- Dividends received by individual investors from their companies are included for income tax purpose. Yet, dividends got by other Indian organizations. With indicated restrictions, are avoided from taxable Income.
- Individual investors don't get any credit in regard of corporation tax.

It is noticed that the term 'corporate tax' or 'corporation tax' is a misnomer. It is essentially the income tax on corporate form of business associations.

Indian Economy and some aspects of corporate laws:

Introduction:

India suffers from underdevelopment, as shown by various economic and social indicators reflected in the Economic Survey 1991-92 presented by the Finance Minister, Dr. Manmohan Singh in the Parliament on 26th of February, 1992. Lower per capita income, lower real gross domestic product (GOP), slower industrial growth rate and of agricultural production etc. are some of the reflectors of the general state of the economy

(a) Causes of Underdevelopment:

The major causes of such economic underdevelopment are

(a) Excessive dependence on agriculture,

(b) Deficiency of capital,

(c) Low labour productivity,

(d) Lack of infrastructure,

(e) Inequalities in income and wealth distribution,

(f) Low levels of consumption and

(g) Unutilised talents

Five Year Plans

Within three years of achieving independence, the Indian Planning Commission was set up to draw up plans for economic development. The First Five Year Plan started in 1950-51 and at present the Eighth Five Year Plan is in progress since April, 1992. The priorities in objectives set up in different Plan periods changed according to the needs of the society with the aim of bringing overall economic development of the country. It would not be out of place here, to my mind, to highlight the objectives and priorities set up in the current Plan to ameliorate the sufferings of millions of people in this country.

(a) Eighth Plan (Objectives)

The Eighth Five Year Plan has given priority to the following objectives:

(i) Generating adequate employment;

(ii) Checking of population growth;

(iii) Universalisation of elementary education;

(iv) Provision of safe drinking water and primary health facilities including immunisation so as to make them accessible to all villages and entire population and complete elimination of scavenging;

(v) Growth and diversification of agriculture to achieve self-sufficiency in food and generation of surpluses for exports; and

(vi) Strengthening the infrastructure (energy, transport, communication, irrigation) in order to support the growth process on a sustainable basis.

The Plan will focus on these objectives keeping in view the need for:

(a) Continued reliance on domestic resources for financing investment;

(b) Increasing the technical capabilities for the development of science and technology;

(c) Modernisation and competitive efficiency so that the Indian economy can keep pace with and take advantage of global developments.

(b) Industrialisation:

Industrialisation is the result of many facets. The broader features are:

(i) Technological development in the processes involved in the production of the existing industries, (ii) setting up of new industrial units in different regions and boosting up of production, and

(ii) Production of exportable surplus to pay for essential imports.

The governments of all the countries of the world take many measures and incentive schemes for the development of all the productive stages involving industrialisation and India is no exception in this regard.

(c) Source of Financing:

Developing countries to a very large extent finance internally, their, development programmes. The primary means of internal financing available to such countries is 'taxation'. The explicit context for the examination and evaluation of taxation policy must be the specification of the objectives of taxation policy in the context of planned economic development, the objectives set reflecting the objectives of planned development articulated in the series of five year plans.

Economic Objectives of Taxation Policy:

In the economic sense the objectives of any taxation policy may be summarised as growth, equity and stabilisation of the economy. Though, I believe, simply the growth of national income of the country will not reflect the pattern of economic growth of different regions of the country, sometimes it may be required to bring inequalities of treatment, as against equity among taxpayers, by allowing differential tax incentives which may be desirable under planning objectives. I deliberately avoid to discuss the complicated economic theories and different models in connection with economic growth and taxation, but shall try to show the objectives of taxation in such a language as would be easily understandable to all of us.

(a) Objectives of Taxation Policy

Any tax policy should be based on certain clear major objectives and also be accompanied by other consequential objectives which are not of lesser importance from the point of view of national economy. The major objectives behind any tax policy are threefold:

(i) to collect increasing amount of revenue,

(ii) to promote equity in distribution of income and wealth, and

(iii) to achieve higher economic growth by maintaining higher rate of savings and investment as such in the desired channels.

The other accompanying objectives may be mentioned as generation of employment, regional development, curbing of inflation, utilisation of factors-capacity etc.

The subsidiary objectives may be ever changing and remodelled to meet specific purposes at a particular point of time. Though the objectives are very much interrelated, sometimes they are conflicting with each other. As for example, tax-free allowances may be given for absorbing more and more number of unemployed persons, but that may not fulfil the objectives of higher investment in fixed assets. On the other hand, capital intensive tax-free allowances may help in increasing productivity of capital and labour but cannot serve to achieve the desired level of employment. In the same way, rebates and reliefs in taxation may be allowed to develop a particular backward region but that may lead to the diminution in the amount of revenue to the exchequer.

In the face of so many interrelated and apparently conflicting objectives, it is very difficult to come to a conclusive decision as to the effectiveness of corporate taxation to achieve a particular objective. Though it has been tried by some of the scholars in India to show certain amount of taxation on savings, investment, employment etc. but we cannot deny the fact that

it is very difficult, if not impossible, to quantify the 'effects' both theoretically and empirically8. As there are many socio-economic constraints and government's regulatory influences, which may sometimes be guided by contradictory objectives, the Government generally tries to make balance of all the planned objectives and formulate its fiscal policies in such a way as to render the optimum amount of socio-economic benefits to its subjects.

A number of committees, commissions and others 9 had been appointed by the Government to study the structure and rationale of different types of tax measures since it was recognised as one of the most effective regulatory fiscal policies in 1860 but none of the committees are able to prescribe an "ideal" profilectic which can fulfil all the objectives taken together.

Therefore we can precisely say that tax measures may act as 'catalytic agent' to pursue for fulfilment of any particular objective.

Impact of Corporate Tax:

Impact of Corporate Tax on Country's Competitiveness

Studies have identified that corporate taxation structure in a country have an influence over capital investment and labour mobility. The level of business or corporate tax is directly associate with burden on capital and labour. According to this, effect could be subjected because of the inter-temporal effect caused by the level of firms and sub-national levels of government. Fuest & Siegloch (2017) espoused that higher corporate taxes can result in reducing the labour wages. This is the reason that corporate taxation is identified to be progressive, as the corporate tax in the country is fixed, which reduces burden on capital and labour wages.

Revenue generated from the corporate tax is considered as an important source of income for the government. However, high level of corporate tax can reduce the level of competitiveness of the country and may not provide good income to government on long run. An average statutory tax can result in increasing capital investment and attracting more international investment. However, a study conducted by Nallareddy, Rouen, & Suárez Serrato (2018) identified that corporate tax can result in increasing income inequality. This study reported that corporate tax cut can lead to higher capital income, but decrease the salary and wages, which further produce income inequality.

However, a study by Arulampalam, Devereux, & Maffini, (2012) identified that in comparison to corporate tax cuts and low corporate tax, high corporate tax have more significant and detrimental impact over income inequality, labour wages and competitiveness of the country in global market. It further identified that the firms that have the higher obligation towards corporate tax are likely to pay lower wages and labour have to bear close to 100% of the corporate tax burden on long run. Therefore, it is very important that corporate taxes are enforced in balanced level for ensuring that burden on capital and labour is reduced. According to Shin (2017), corporate tax cut can also highlight the country as the most appropriate destination for investment that would directly boost economy, GDP and employment. Howard (2019) identified corporate tax cut to be effective in improving international investment in Ireland.

Impact of Corporate Tax Cut in Improving India's Competitiveness:

The recent efforts of the Indian government have shown that Indian economy requires more effective strategies to achieve competitive position in Asia, as well as in international market.

Recent decision of corporate tax cut is taken to boost economic growth and to spur investment in the country. Finance Minister Nirmala Sitharaman, announced that corporate tax in India will be reduced from 30% to 22%, which immediately had an impact on the stock market and Sensex jumped by 45%. Studies have also determined that corporate tax cut is the most recent measure for boosting national and international investment.

It has been found that corporate tax rate in India was very high than other Asian countries. However, the latest corporate tax cut would result in boosting investment and increasing manufacturing industry in the country. Government of India announced that corporate tax rate for the manufacturing firms would be reduced from 25% to 15%, which will encourage many international manufacturers to shift their manufacturing operations in India. Studies have also argued that manufacturing industry require different kind of skills and labour. Different manufacturing operations open the employment for workforce that possesses different skill set. Thus, corporate tax cut in manufacturing would directly impact economic growth and employment in this sector. Government of India has also stated that this taxation reform would boost employment in the country and economic growth by increasing foreign investment.

Mohan (2019) has also argued that corporate tax cut could provide benefit only for a short period of time and could increase the investment from the national and international companies till a certain period. This is because the nature of the increased level of investment in India is mainly capital oriented. According to new corporate tax cut, more companies would invest in the portfolio stocks, or those who would invest manufacturing capacities. This also means that stock market would experience significant growth, but there would be

minimal impact on existing rate of unemployment. Also, it has been argued that low wages and salaries in India would continue and there would not be any substantial impact on income of the people. This finding also confirms the findings of Nallareddy, Rouen, & Suárez Serrato (2018) that informed about income inequality, as the corporate tax cut would provide benefit to capitalists, but not to working class of the country.

However, a study conducted by Contractor et al (2019) has identified that corporate tax cut would also support the policy of 'Foreign Direct Investment'. Through both approaches, foreign investment in the country would be accelerated and it will boost the economy. The decision of corporate tax cut or the corporate tax reform was developed from the economic slowdown that India was facing. Earlier, high corporate tax was the most significant reason for which many international firms were rejecting it as an investment or manufacturing destination. For example, due to effective corporate tax rate and special consideration of Chinese government towards manufacturing and technology companies, many companies like Apple and Samsung have their manufacturing units in China. However, the competitive corporate tax rate that would now be provided will increase investment from Apple and other foreign companies.

Finance Minister of India also stated that Component manufacturers of Apple in China, would find India to be more competitive and desirable that would enhance investment attractiveness of the country. Studies have identified that a country can enhance its competitiveness in open economy by providing the effective tax rates and by attracting international investment. Studies have reported that for building a competitive economy, it is important that countries focus on enhancing its ability to grow employment, create new jobs

and improve the living standard of its population. Therefore, the investment by big technology and manufacturing firms in India will definitely boost employment, although it might have limited impact over income growth.

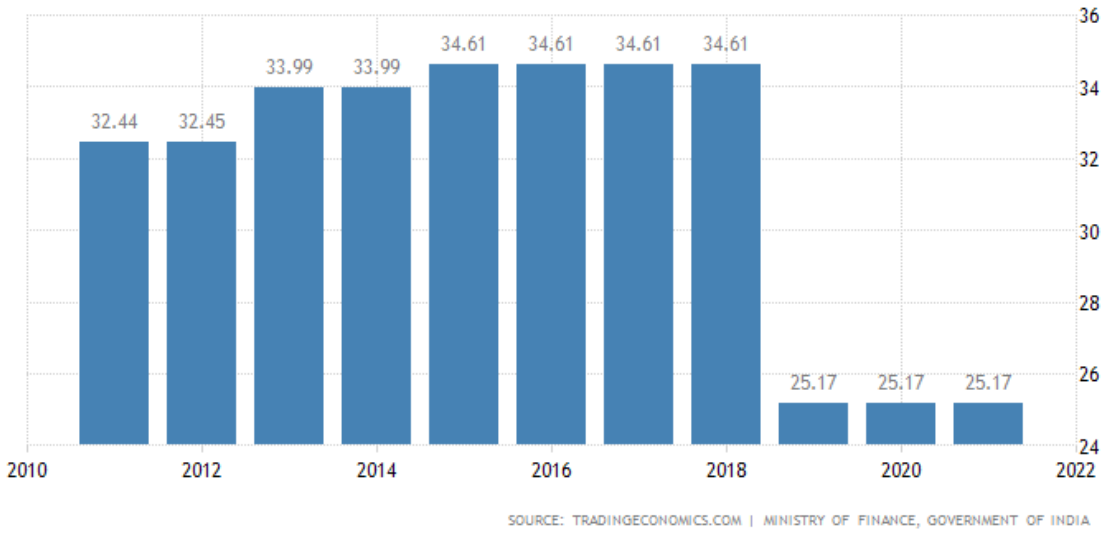
It has been found that companies working in China pay the standard tax rate of 25%, South Korea and Indonesia also have 25% of corporate tax, while Malaysia is 24%38. Thus, reducing the corporate tax from 30% to 22% would help in improving India's image and competitiveness by encouraging investment. Low corporate tax in comparison to many other Asian countries would also result in improving India's competitiveness in Asia. One of the important factors that could be a concern for personal income of population is that Government of India has made no changes or reduction in personal income tax. Therefore, on one hand corporates would enjoy better returns and profit with reduced corporate tax, workforce have to bear the burden of low wages and unchanged income tax. However, economists are debating that government of India is adopting fiscal measures for boosting Indian economy. Therefore, the monetary measures being adopted by the Government would be able to address growth issues to some extent. However, passing the tax benefit to corporates would increase competitiveness of India in comparison to other Asian countries.

Corporate Tax Structure in India

The rate of corporate tax in India varies from one type of company to another i.e. domestic corporations and foreign corporations pay tax at different rates. Additionally, depending on the type of corporate entity and the different revenues earned by each of them, the corporation tax rate differs based on a slab rate system. Presently for the assessment year 2019-2020, the corporation tax rates in India are as follows:

Type of Company	**Corporate Tax Rate**	**Surcharge on Net Income < 1 Cr**	**Surcharge on Net Income > 1 Cr & < 10 Cr**	**Surcharge on Net Income > 10 Cr**
Domestic with annual turnover upto 250 Cr	25%	Nil	7%	12%
Domestic Company with turnover more than 250 Cr	30%	Nil	7%	12%
Foreign Companies	40%	Nil	2%	5%

Last 10 years Corporate Tax Rate in India:



Legal tax disputes in corporate world:

Over Rs.1 trillion of taxes are locked up in various stages of litigation in service tax and central excise at the end of March 2013, according to the Press Trust of India (PTI) reported in June 2014 quoting the Comptroller and Auditor General of India (CAG). This alarming rate of tax disputes has created a fear in the minds of foreign investors. India has dropped its ranking from 140 to 142 in "EASE TO DO BUSINESS "ranking. The dispute settlement mechanism here is lengthy, time consuming and expensive. As no action can be initiated for recovery of revenue till the appeal is pending, locking up of revenue of Rs.1 lakh crore. In 2013, the Income Tax department slapped a notice of 21,000 crore for non-payment of TDS on Chennai based Nokia. The company said that the tax department was indirectly expropriating the company's income.

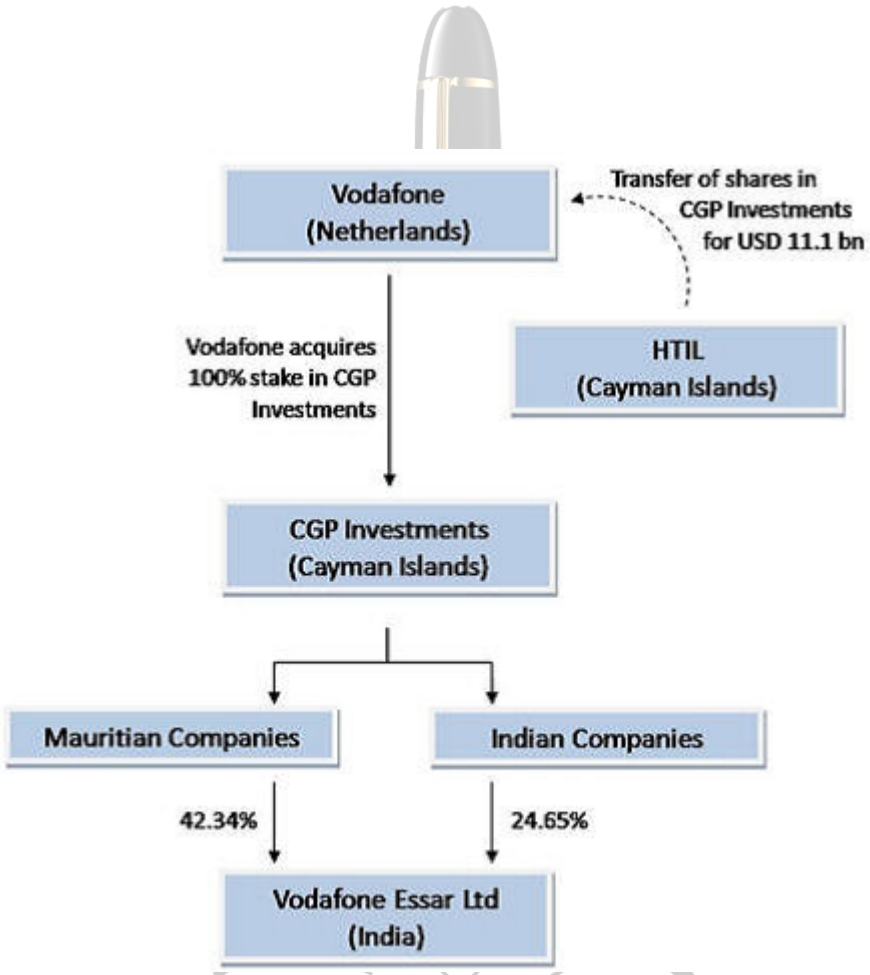
The IT department suffered a setback when the court lifted the ban on the freeze of company sale to Microsoft, with the condition to pay 2,250 crore in an escrow account. The Chennai based **Nokia** has closed down the business. **Vodafone** was too caught by taxman in India. India's tax office had accused Vodafone India Services of under-pricing shares in a rights issue to its parent company, and had demanded tax of about 30 billion rupees. The Bombay High Court ruled in favour of Vodafone, a case worth $ 490 million. The Bombay High Court also gave decision in favour of **Royal Dutch Shell Plc** in a multi-million dollar tax dispute, ruling out the ITD plea of under valuing its stock. A rash of high-value tax claims on foreign firms, including IBM Corp and Copal Research Limited, has raised criticism that overly zealous tax authorities could undermine foreign investment in India. It creates an impression in the mind of foreign companies that the ITD wants to extract a lot of revenue from transfer pricing.

Vodafone Case:

Vodafone International Holdings B.V., a company incorporated under the provisions of the Companies Act

Vs.

Union of India (UOI), Ministry of Finance and Asstt. Director of Income Tax (International Taxation)



Facts: On May, 2007 Vodafone acquired stake in Hutchison Essar for $11.2 billion, wherein Vodafone International Holdings BV bought the stake of Hutchison Telecommunications International Ltd in Hutchison Essar and deal between companies based overseas; executed in Cayman Islands

Tax Issues:

- On Oct 30, 2009 Income tax department served notice under section 201 and 201 (1A) to Vodafone International Holdings mentioning for non-deduction of tax at source on the $11.2 billion transaction.
- On Oct 30, 2010 Income Tax Department ordered Vodafone to furnish Rs 11,218 crore under Sections 201 and 201(1A) of the Income Tax Act.
- Later, on April 29, 2011, Rs 7,900 crore penalty was imposed.

Litigation:

- September 8, 2010: The Bombay High Court upheld the tax authority's decision. Department raised tax demand in the subsequent month
- January 20, 2012: Supreme Court set aside Bombay High Court decision; quashed tax & interest demand
- It said transaction was between two overseas entities & Indian tax authorities had no territorial tax jurisdiction over it.
- February 17, 2012: Government filed review petition
- March 20, 2012: Supreme Court dismissed the review petition

Retro Amendment:

- In 2012 Indian government amended the Income Tax Act retrospectively
- Section 119 of the Finance Act validated the tax levied on Vodafone Company
- Government said the amendment was only a clarification to remove ambiguity and provide certainty

Tax demand back on table

- In January 3, 2013: Income Tax department raised a fresh demand was issued for Rs 11,218 crore
- Vodafone consequently sought to settle the case
- A committee set up to resolve the issue failed to make any headway

Arbitration

- April 2014: Vodafone served arbitration notices under the India-Netherlands treaty
- New government did not roll back demand instead said no fresh action under retrospective tax
- A fresh demand was issued on February 12, 2016, for Rs 22,100 crore tax
- September 25, 2020: The Hague-based arbitration court ruled in favour of the Vodafone company
- December 21, 2020: India challenges arbitration award at Singapore.

The detailed discussion of the same is made in the later chapters with more tax disputes in India

Conclusion:

The purpose of this research work was to analyse that how latest corporate tax cut can boost or improve India's competitiveness in global market. This work is primarily based on secondary data collected from the peer reviewed paper and government reports. This research

concludes that corporate tax is the most important part of the tax system in the country through which government can boost the economic growth. Corporate sector is the most important economic sector because of being most organised and providing stable income to the government. Therefore, by enhancing production, manufacturing and exports government can generate better revenue to support economic growth. Corporate tax is also identified to contribute towards massive proportions of revenue generation, thus being the important source of income for a country. Latest corporate tax cut in India will enhance investment in manufacturing and production industry of the country.

India would become a desirable destination, which would attract foreign companies to start their operations and get more income benefits. Evidences included in this research informs that corporate tax cut can improve investment, but would have limited or no impact over enhancing income and living standard of people. However, increased foreign investment would result in increasing employment opportunities and would also provide requirements for different level of skills.

MEDIATION AND CONCILIATION UNDER ADR

- ANAGHA KUMAR

ABSTRACT

In today's legal world, disputes arise regularly among companies and businesses due to reasons like non-performance or breach of trust. Historically, such disputes are resolved through courtroom litigation or negotiation among the parties. The need to seek legal resolutions have changed over the years. Now, companies or ordinary citizens have the option to seek other methods of resolving their disputes other than courtroom litigation. ADR or Alternate Dispute Resolution is a method of dispute resolution that provides a wide spectrum of legal consultancy and avenues to seek other than trials. This method provides four alternatives, mainly arbitration, mediation, conciliation and negotiation in civil matters while other alternatives are neutral evaluation, summary trial and various settlement alternatives.[253]

Mediation is defined as a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution[254] while Conciliation is another dispute resolution process that tries to individualize the optimal solution and direct parties towards a satisfactory common agreement.

In spite of the fact that this sounds strikingly like mediation, there are significant contrasts between the two techniques for debate goals. This paper deals with the difference between

[253] Available at https://www.law.cornell.edu/wex/alternative_dispute_resolution

[254] Available at Black's Law Dictionary Seventh Edition Page 96 (last visited 17/5/20)

Mediation and Conciliation. Initially it explains the meaning of ADR and its need in India. It further explains mediation and conciliation and then differentiates between the two. The paper concludes on the note why mediation and conciliation are both important yet why a clear distinction should be drawn between the two.

INTRODUCTION

Alternate Dispute Resolution ("ADR") includes any method for settling questions outside of the court. While the two most regular types of ADR are arbitration and mediation, negotiation is quite often endeavored first to determine a question. It is the transcendent method of contest goals. ADR is an instrument of dispute resolution that is non ill-disposed, for example cooperating to arrive at the best goals for both parties. ADR can be instrumental in lessening the weight of cases on courts, while conveying a balanced and fulfilling experience for the parties in question. It is increasingly suitable, financial, and proficient. It regularly brings about innovative arrangements, practical results, more noteworthy fulfillment, and improved connections. It offers more prominent direct power over the result.

HISTORY

The Arbitration Act, 1940 was not meeting the prerequisites of either the global or local gauges of settling disputes. Huge postponements and court mediation baffled the very motivation behind arbitration as a method for quick goals of disputes. The Supreme Court, in a few cases more than once, brought up the need to change the law. The Public Accounts Committee also postulated the Arbitration Act of 1940. In the gatherings of Chief Justices,

Chief Ministers and Law Ministers of a considerable number of States, it was concluded that since the whole weight of the equity framework can't be borne by the courts alone, an Alternative Dispute Resolution framework ought to be embraced. The Government of India figured it important to give another discussion and system for settling global and residential disputes rapidly. In this manner "The Arbitration and Conciliation Act, 1996"came into being.

ADR MECHANISM IN INDIA

I. The Industrial Disputes Act, 1947

It was the first Act of independent India which had the provisions for Arbitration and Conciliation. The conciliator was under statutory obligation to solve the dispute amicably by mediating between the parties.[255]

II. Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

III. Lok Adalat

While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987

[255] The Industrial Dispute Act, 1947: "Section 4. Conciliation Officers:- (1) The appropriate Government may, by notification in the Official Gazette, appoint such number of persons as it thinks fit, to be Conciliation Officers, charged with the duty of mediating in and promoting the settlement of industrial disputes. (2) A Conciliation Officer may be appointed for a specified area or for specified industries in a specified area or for one or more specified industries and either permanently or for a limited period."

is a uniquely Indian approach. This is a non-adversarial system, whereby mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they think fit. These are usually presided over by a retired judge, social activists, or members of the legal profession. It does not have jurisdiction on matters related to non-compoundable offences.

IV. The Code of Civil Procedure, 1908

Settlement of disputes outside the Court –

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may re-formulate the terms of a possible settlement and refer the same for-

(a) Arbitration;

(b) Conciliation;

(c) Judicial settlement including settlement through Lok Adalat; or

(d) Mediation.

(2) Where a dispute has been referred-

(a) For arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of

1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.[256]

V. The Code of Criminal Procedure, 1973

The role of mediation in criminal cases cannot be rejected by saying that it is only applicable only in civil cases. No doubt, there is no specific provision in the Code of Criminal Procedure, 1973, to refer the case to mediation In the case of non-compliance of the orders based on the mediation agreement in such referrals there is again no specific provision in the said code. While dealing with such challenges the Hon'ble High Court held that the Court can refer the criminal cases which are compoundable in nature to mediation centres under The Code of Criminal Procedure, 1973. It was further held that under section 320 of the code, the court is empowered to refer a case to the mediation centre. The settlement in such matters

[256] The Code of Civil Procedure, 1908 [part 5- arbitration section 89]

shall be governed by the code itself. In case of non-compliance, the courts may also take the action under section 2(b)[257] of the Contempt of Courts Act, 1971[258].

NEED OF ADR IN INDIA

The process of administering equity in India was subjected to extraordinary worry due to the tremendous pendency of cases in courts. In India, the quantity of cases documented in the courts has demonstrated a colossal increment lately, bringing about pendency and deferrals underlining the requirement for elective dispute resolution strategies. Due to this reason, a Resolution was embraced by the Chief Ministers and the Chief Justices of States in a meeting held in New Delhi on fourth December 1993 under the chairmanship of the then Prime Minister and managed by the Chief Justice of India. In creating a nation like India, with major monetary changes being required regularly, methodologies for swifter resolution of disputes for reducing the weight on the courts and to provide speedy resolution of disputes, methods of dispute resolution (ADR) by building up offices for giving repayment of disputes through arbitration, conciliation, mediation and negotiation needed to be adopted.

MEDIATION

Mediation is an ADR strategy where an unbiased and fair-minded outsider, the mediator, encourages exchange in an organized multi-stage procedure to assist parties with arriving at a convincing and commonly acceptable understanding. A mediator helps the parties in distinguishing and articulating their own advantages, needs, needs and wishes to one another.

[257] Section 2(b): 'Civil Contempt' means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court.
[258] Dayawati v. Yogesh Kumar Gosain, 2018(1) JCC 53 (Delhi)

Mediation is a procedure to determine the disputes of the society which, thus, decreased the weight of the Court. The quintessence of mediation lies in the parties themselves finding an enduring answer for resolve and ending their contention instead of figuring out who is to blame. Mediation is a procedure by which questioning parties look for the intercession and help of an unbiased outsider to go about as a mediator and to lessen their disparities.

MEDIATOR-A mediator helps the parties in distinguishing and articulating their own advantages, needs, needs and wishes to one another.

ROLE OF THE MEDIATOR

The essential job of the mediator is to encourage correspondence between the parties in strife with the end goal of helping them arrive at a deliberate resolution to their dispute that is convenient, reasonable and cost effective. In spite of the fact that the mediator deals with the meeting and is responsible for the procedures, he/she ought not to force arrangements or choices and has no capacity to compel a settlement. An answer should just be agreed between the parties. They are answerable for a definitive resolution of the dispute. Besides, a mediator has no privilege or obligation to give lawful counsel to the parties regardless of whether he/she happens to be a legal advisor. The parties should look for lawful guidance exclusively from their lawful advisers. The mediator, in any case, may raise issues and assist parties with investigating choices.[259]

[259] Available at https://justice.gov.mt/en/mmc/Pages/Roles-and-Duties-of-Mediator.aspx

CONCILIATION

Conciliation is another dispute resolution process that includes building a positive connection between the parties of dispute, nonetheless, it is on a very basic level not quite the same as mediation and arbitration in a few regards. Conciliation is a considerably less ill-disposed continuing; it looks to distinguish a correct that has been disregarded and searches to locate the ideal arrangement. Conciliation attempts to individualize the ideal arrangement and direct parties towards a palatable normal understanding.

CONCILIATOR-The "conciliator" is a fair-minded individual that helps the parties by driving their negotiations and guiding them towards an acceptable understanding.

ROLE OF CONCILIATOR

(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons.[260]

WHY ARE 'MEDIATION' AND 'CONCILIATION' USED SYNONYMOUSLY

Mediation and Conciliation are so similar, that they are frequently utilized interchangeably, yet are unique and administered by various acts. Mediation and conciliation both utilize a facilitator to help with the way toward settling a dispute and building positive connections between the parties. The point is to discover an answer for the dispute in a tranquil way. The two procedures are non-legal and the disputes are tackled out of court. Both follow a procedure where the parties do not argue, however, cooperate to discover an answer. They are both deliberate choices to settle legitimate disputes.

MEDIATION VS CONCILIATION

1) In mediation, the facilitator ought to be fair and goal to the parties' dispute, while with conciliation the facilitator assumes a progressively dynamic job.
2) In mediation, the parties are urged to discover an answer, with the facilitator just going about as a guide. While with conciliation the facilitator has the obligation to distinguish the destinations of the parties and effectively help discover an answer.

[260] Role of conciliator s.67 of Arbitration and Conciliation Act, 1996

3) Within mediation, the facilitator doesn't give any judgment. With conciliation, the facilitator additionally assumes the job of evaluator and intervener that base the arrangement on what is considered the most helpful arrangement as per the facilitator.
4) It isn't important to discover a resolution with regards to mediation, however the point is an understanding. With conciliation, a resolution is a vital result and is executable as a declaration of the common court.
5) Confidentiality has a significant influence in the two procedures, be that as it may, they are upheld in an unexpected way. Inside mediation secrecy depends on trust, and is it exhorted for all parties to sign a Confidentiality Clause for additional measure. Secrecy in conciliation is controlled by the law.
6) Mediation intercedes when a significant clash or dispute has emerged that needs proficient intercession. Conciliation is utilized preventively and plans to stop a dispute from forming into something considerable.

CONCLUSION

Conciliation and mediation both hope to keep up a current business relationship and to revive a lost level of influence between two parties. These ideas are some of the time utilized as equivalents, yet they do in fact differ generously in their strategies.

It can be completely understood why the two processes are often seen as the same. However the main difference in practice lies in the method of facilitation and the active or impartial role played by the facilitator. The two methods should however not be confused, as they do

indeed serve different purposes, and as can be seen, a failed conciliation can lead to a mediation. A successful conciliation can avoid mediation or any other dispute resolutions altogether.

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POSITIVE IMPACT OF COVID 19 PANDEMIC IN BALANCING THE ENVIRONMENT AND RIGHT TO POLLUTION FREE AIR AND HEALTHY ATMOSPHERE

- SRISHTI YADAV

Introduction:

Environment refers to the co-existence of the biotic and abiotic factors on Earth, as is reflected by its definition provided in the Environmental Protection Act, 1986. It implies the environmental factors amidst which we live and which are fundamental to our lives. Even the Indian Constitution, though lately has recognized the importance of conserving the environment through various directive principles and impliedly in fundamental rights. But in recent times, there are a host of factors which bring about environmental change and atmospheric degradation. In this context, the impacts of COVID 19 pandemic over the environment become relevant to discuss. It is an infectious respiratory disease caused by Corona virus first discovered in the seafood markets of Wuhan (China). It spread over the entire globe within no time. India was no exception. Owing to the increasing number of cases, the Prime Minister announced a nationwide lockdown on March 24, 2020 for 21 days which was followed by various phases. Apart from the administrative measures such as travel and social gathering restrictions, containment and treatment of Corona suspects, the government issued the directives for social distancing, use of masks, etc. The article analyzes the positive effects of pandemic in improving the environment, especially in context of India.

The Constitution of India and the Environment of India:

Majority of the steps taken by the government for protecting the environment were taken after the Stockholm Convention, 1972. The 42nd Amendment Act of 1976 shifted the forest, population and wildlife Control from the state to Concurrent list was a step in this direction. The Indian Constitution originally did not have any direct provisions concerning protection of environment. There were only certain directives concerning animal husbandry, agriculture and public health. The directive principles i.e. articles 39(b), 46, 47 and 49 individually and collectively impose a sort of duty over the state to take measures to improve the health of the environment and ensuring a clean environment for the country. It was through later Constitutional amendments that two specific provisions of article 48-A and 51-A (g) were added to the Constitution imposing a duty over the state and citizens.

Apart from these, some important articles that mention implicitly about conserving environment are:

- Article 14 which impliedly puts a duty upon the state to be fair at the time of taking actions regarding environmental protection
- Article 19(1)(a) as there are a host of cases where the general public had taken the help of the court by writing letters like in the case of Rural Litigation Entitlement Kendra Dehradun v. State of U.P[261] and have raised voices against the violation of their right to clean and safe environment. Also, media is playing a substantial role in molding the perceptions of people in environmental matters

[261] 1985 AIR SC 594

- Article 19(1)(g) i.e. the fundamental right to carry on any business or profession at any lace inside India is not an absolute right. It has a reasonable restriction in the form of article 19(6) i.e. to avoid the environmental hazards.
- Article 21 provides for a right to a wholesome environment where people could live safely without any threat to their lives.

Writs and PIL'S for safeguarding the Environment:

Writ petitions could be filed under 32 and 226 of the Indian Constitution to the Supreme Court and the High Court respectively. Since the right to a clean and wholesome environment has been recognized as an implied Fundamental right under article 21, the writ petitions are often filed in the environmental cases also. Most often, the writs of Mandamus, Certiorari and Prohibition are used. For instance,

- Mandamus could lie against a municipality for its failure to construct drains and sewages, clean the streets and clear the garbage as happened in the case of Ram pal v. State of Rajasthan[262] or a State Pollution Control Board could take action against an industry for discharging the pollutants beyond a permissible limit.
- A writ of Certiorari would lie against a municipal authority for permitting the construction activity contrary to the development riles, eg. Giving sanction to an office building in an area allotted for a garden.

A PIL refers to the legal actions which could be used to either protect or enforce the rights enjoyed by the public. Here, the subject matter of litigation is a:

- Grievance against the violation of basic human right of the poor

[262] AIR 1981 Raj 121

- Content or implementation of a public policy

Since the 1980's, the PIL's have altered the litigation landscape and the role of the higher judiciary in the country. A host of PILs have been filed related to environmental issues. Also, the judiciary has played an active role in construing the meaning of article 21 to include the right to a healthy and wholesome environment. The case laws related to this have been discussed later in the article.

Impact of COVID 19 Pandemic on Environment:

The mobility in restriction caused by the pandemic has brought several impacts on climate and environment. There has been a reduction in air pollution and GHG emission because of the shutdown of industries, companies and transportation. According to a 2020 report, coal based power generation has reduced 26% and overall power generation to 19% in India after the lockdown. A reduction in the water pollution is also witnessed. There has been improvement in the quality of water that is found in the rivers in India including Ganga, Cauvery, Sutlej and Yamuna because of the lack of industrial effluents entering them. River Yamuna, in most of the parts of Delhi appears to be clear and pristine after years.

Because of the Quarantine and lockdown measures which ensured that people stay at home and their reduced participation in the economic activities, the noise level in most of the cities has reduced and the city dwellers are now enjoying the chirping of birds. In just a brief span of time 'recovery and healing of nature' is being observed by everyone. Government and the policy makers must take the required steps so that this healing doesn't remain temporary. A united and time-oriented effort could strengthen the fight against environmental degradation and could convert these short-term changes into long-term effects.

Steps taken by the government:

The Modi government in the recent years has taken some environmental protection steps that proved to be highly eco-friendly and effective:

- Swachh Bharat Abhiyan which is India's largest cleanliness drive ever, covering over 4000 towns and aimed at cleaning roads, infrastructure and streets
- Clean Ganga Mission where the PM placed the Ganga Action Plan under the direct supervision of the water Resources Minister.
- 'Toilets before Temples' to ensure that affordable sanitation reaches to the people in need. Also, it focused over providing e-toilet facilities in rural and urban India.
- Mount Everest Ascent which was launched after taking inspiration from the Clean India campaign; a team of Indian Army climbers returned with non-biodegradable waste of about 4000 kg.

The man-made changes and depletion of natural resources for economic growth contribute significantly towards environmental degradation. This is because of the underlying assumption that development policies are a facilitator of economic well-being and environmental policies restrict it. But for the sake of sustainable development, a proper balance has to be there between environmental protection and economic development.

Analysis of some important environmental case laws:

In the case of L.K. Koolwal v. State of Rajasthan[263], sanitation problems were caused due to negligence of the Municipality of Jaipur. An application to the High Court was mad under article 226. The Court, while interpreting article 51-A, says that the article is not only a duty

[263] AIR 1988 Raj 2

but a right in their favour to have a check over the activities of the state and authorities. It also held that inability to maintain proper hygiene and sanitation poisons the environment and infringes the fundamental right provided to citizens under article 21. Therefore, the court directed the municipality for removing all the dirt and filth that caused danger to people's lives.

In the Ganga Water Pollution case[264], certain tanneries discharged effluents into the holy Ganga water and that too in the absence of water treatment plants. The court ordered the tanneries to stop working and also contended that 'health, ecology and life' holds much greater importance in the eyes of law, than the unemployment." In Vellore Citizens Welfare Forum v. Union of India[265], a petition was filed against the excessive pollution caused by a river which was the main source of drinking and bathing water for people in the surrounding. The main question in front of the Court was whether the tanneries should continue to operate at the expense of the life of people. The court, directed the central government under section 3(3) of the Environmental Protection Act for controlling the pollution and protecting the environment. Also, an authority was to be set up to deal with the situation, abiding by the polluters ay and precautionary principles.

Conclusion:

Environmental commons such as the rainforests, oceans must be safeguarded and all the stakeholders including the government, NGO's, civil society organizations must work together to conserve and sustainably use the natural resources. As mentioned in the article, the judiciary from time to time has played a very active role in interpreting the environmental

[264] 1988 AIR 1115
[265] AIR 1996 SC 2715

laws. The PIL system has been correctly utilized by the environmental activists. Also, a balance between development and environment by could be maintained by rationalizing subsidies and promoting community ownership that would results in sound environmental stewardship. A holistic approach has to be adopted taking all factors into consideration.

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CEDAW (CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN) AS A WATCHDOG OF WOMEN RIGHTS: GLIMPSES FROM INDIA

- DR. VED PAL SINGH DESWAL

"All human beings are born free and equal in dignity and rights. Everyone is entitled to all the rights and freedoms set forth in the universal Declaration of Human Rights, without distinction of any kind, such as race, creed, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Everyone has the right to life, liberty and security of person." …..**Principle 1, International Conference on Population and Development Programme Action, 1994.**

A. Introduction:

Man and women are the two wheels of the vehicle of human being. Because of various factors women have always been discriminated in almost all the societies of the world which has created gender inequality. In this paper I will discuss the importance of CEDAW in guarding women's Rights in India. CEDAW is known as the Women's Bill of Rights. CEDAW is significant in the international human rights framework because it is exclusively devoted to gender equality. CEDAW spells out in detail women's human right to equality and non-discrimination, and maps out the range of actions that must be taken to achieve this

equality. It is one of the core international human rights treaties of the United Nations and it requires States to create land laws to respect, protect and fulfil women's human rights.

B. Objectives of the Convention CEDAW:

The view of equality in CEDAW is based on the principle of 'substantive equality' between men and women. This principle acknowledges that equality of opportunity and equal treatment is not enough to redress women's inequality. There are a few reasons why CEDAW is important:

- It provides a complete definition of sex-based discrimination,
- It recognizes the root causes of discrimination, including within culture.
- It recognizes that traditional gender roles and stereotypes have to be eliminated.

C. Objective of Paper:

- To understand the factors leading to crime against women
- To focus on the issues relating to sexual offences against women
- Who is responsible for such type of acts against women?
- What is the role of the Parliament, Executive and Judiciary in protection of women from sexual offences?
- What is the role of media, educational institutions and society?

Every year on 08th March we celebrate Women's Day. It is a day when women are honoured for their achievements. The word women empowerment means a process which covers social, political and economic aspects or we can say distribution of social power and control of resources in favour of women. It aims at changing the balance between the sexes so to

create a more equitable distribution of power in society. The position of women in society is the true index of its cultural and spiritual attainment and their active role is proved to be an essential part in the evolution of values. No country can prosper in which women's potential is left unrealised. In most of the developing countries women have a low social and economic status, in such countries empowerment of women is essential. [266]

D. The United Nations and Gender Equality

The Charter[267] was the first international agreement to affirm the principle of equality between women and men. Since then, the UN has helped in creating a historic legacy of internationally-agreed strategies, standards, programmes and goals to advance the status of women worldwide. Recognition of the inherent dignity and of the equal and inalienable rights of the members of human family is the foundation of freedom, justice and peace in the world. [268] Today we have widen the sphere of human rights thought and action to new arenas. Human rights are in all the individuals irrespective of their caste, creed, religion, sex and nationality. These rights are essential for all the individuals as they are consonant with their freedom and dignity. Because of their immense significance to human beings human rights are also referred as fundamental rights, basic rights, inherent rights, natural rights and birth rights. He defines Human rights are those minimum rights which every individual must have

[266] Bora Sanchita, **"Women Empowerment and Education"** (1999) p 43.
[267] United Nations Charter, 1945.
[268] Preamble, Universal Declaration of Human Rights, 1948.

against the state by virtue of his being a member of human family.[269] Human rights are those rights that everyone has by virtue of their humanity.[270] Our world of terror and horror, of hunger and handicaps of hopes of a human order where people everywhere will be sovereign and as groups and as individuals will be free, where society will guarantee full personhood in holistic richness of every member of the world community, present many problems of social dynamics and jural pragmatism. Justice V.R.Krishna Iyer in his book Human Rights and the Law wrote, "We have challenges, ideological and others to creative law-persons, humanist its jurists and sensitive statesmen. This task is to strive for a social order concretizing by positive law, the aspiration of mankind for the full and free development of every individual." [271]

Women and men are created by the same God. Women constitute about one half of the global population, but they are placed at various disadvantageous positions due to gender difference and bias. [272] Gradually man started taking advantage of his strong physical power. As a result of this, the position of women was reduced to the mercy of men by imposing unreasonable customs upon women. India is a tradition bound society where women have been socially, economically, physically, psychologically and sexually exploited from time immemorial, sometimes in the name of religion, sometimes on the pretext of writings in the scriptures and sometimes by the social sanctions. They have been victims of violence and exploitation by the male dominated society all over the world. Among the wonders of the omnipotent creator, woman stands apart for her charm and attraction. But unfortunately this

[269] D.D. Basu, **"Consttutional Law of India"** (2003) p 157.
[270] Jurist R.J. Vincent, **"Human Rights and Law"** (2000) p 438
[271] Justice V.R.Krishna Iyer, **"Human Rights and the Law"** (1995) p 133.
[272] Awasthi Dr. SK & RP Kataria, **"Law Relating to Protecting Human Rights"**, Orient Publishing Co. p 329.

apparent boon has become a curse for her in various ways. The author in his book Crime Against Working Women wrote, "History bears testimony to the fact that many bloody battles were fought for women resulting in the rise and fall of many civilizations. Numerous socio-political and legal reforms have failed to change woman's position and her exploitation in one form or other is still rampant. Particularly the Indian woman is greatly exposed to exploitation. The continuing phenomenon of woman's suffering in all walks of her life is a clarion call for humanity to wage an ultimate war against atrocious acts."[273] Women the source of love and compassion have always been exploited by a patriarchal society. Even after more than 60 years of our independence women of India wear a pathetic look. Women's struggle for equality in the society is backed by the law and to some extent by the right thinking people in the society.

E. Women in India:

According to Vedic Smrities it has been pointed out that human beings are not only virtuous but also adorned vices. Therefore, it is an undenied fact that evil propensities are also a part of human nature irrespective of time and place. The abduction of Sita by Ravana and the abduction of Angiras Brahaspati's wife Tara by Soma is a proof of existence of such evil propensities and reprehensible practice in the early society. [274]

❖ **Commission on the Status of Women, 1946**

[273] Prabhat Chandra Tripathi , "**Crime Against Working Women**" (1999) p 25.
[274] Vedic Smrities

This convention was established in 1946 by Socio Economic and Social Council. The members meet once in two year in Vienna to examine women's progress towards equality throughout the world.[275]

- **Convention on the Elimination of all Forms of Violence against Women, 1967**

In order to implement the principle set forth in Nov 1967, the General Assembly adopted this convention in Dec 1979. As on May 03 it had 172 state parties. [276]

- **The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an International Bill of Rights for Women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. [277]

- **Various Conferences on Women**

Four conventions were held during the United Nations sponsored international Women's Decade from 1976-1985. These conferences were held at Mexico city in 1975, Copenhagen in 1980, Nairobi in 1985 and Beijing in the year 1995.

- **Optional Protocol to the convention of Women, 1999**

[275] Commission on the Status of Women, 1946.
[276] Convention on the Elimination of all forms of Violence against Women, 1967.
[277] The Convention on the Elimination of All Forms of Discrimination against Women, 1979.

In order to provide for individual complaint system the General Assembly on 07 Oct 1999 adopted this convention to Eliminate all forms of Violence against Women. As on May 2003 it had 50 states parties.[278]

F. United Nations General Assembly 2000

In order to assess the progress on women's issue since Beijing Conference in 1995 towards the complete implementation of the goals began in Beijing. Forms and manifestations of violence against women, and action to stop and address it, are identified in many other instruments and documents, including the Beijing Declaration and Platform for Action, and therefore the outcome of the twenty-third session of the overall Assembly entitled: "Women 2000: Gender Equality, Development and Peace within the twenty-first century", resolution 1325 (2000) of the safety Council on women, peace and security, and resolutions of the Commission on Human Rights. The Committee on the Elimination of Discrimination against Women monitors steps taken by States parties to the Convention on the Elimination of All sorts of Discrimination against Women. The Special Rapporteur on violence against women, including its causes and consequences significantly contributes to the common effort to deal with violence against women. The work of the United Nations to deal with all forms and manifestations of violence against women has gained new momentum with the launching, on 9 October 2006, of the Secretary-General's in-depth study on all sorts of violence against women and therefore the adoption by the overall Assembly, on 19 December 2006, of an

[278] Optional Protocol to the convention of Women, 1999 :

action-oriented resolution on the “Intensification of efforts to eliminate all sorts of violence against women.

The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the idea of sex which has the effect or purpose of impairing or nullifying the popularity, enjoyment or exercise by women, regardless of their legal status, on a basis of equality of men and ladies, of human rights and fundamental freedoms within the political, economic, social, cultural, civil or the other field."

By accepting the Convention, States commit themselves to undertake a series of measures to finish discrimination against women altogether forms, including:

(a) to include the principle of equality of men and ladies in their system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;

(b) to determine tribunals and other public institutions to make sure the effective protection of girls against discrimination; and

(c) to make sure elimination of all acts of discrimination against women by persons, organizations or enterprises.

This Convention provides the idea for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life -- including the proper to vote and to face for election -- also as education, health and employment. States parties comply with take all appropriate measures, including legislation and temporary special measures, in order that women can enjoy all their human rights and fundamental freedoms. The Convention is that the only human rights treaty which affirms the reproductive rights of girls and targets culture and tradition as influential forces shaping

gender roles and family relations. It affirms women's rights to accumulate, change or retain their nationality and therefore the nationality of their children. States parties also comply with take appropriate measures against all sorts of traffic in women and exploitation of girls. Countries that have ratified or acceded to the Convention are legally sure to put its provisions into practice. they're also committed to submit national reports, a minimum of every four years, on measures they need taken to suits their treaty obligations.

G. The United Nation's Role in Protecting Violence against women

In December 2003, the overall Assembly requested the Secretary-General to organize an in-depth study on all forms and manifestations of violence against women. The extensive preparatory process for the study involved Member States, entities of the United Nations system, non-governmental organizations, advocates, academics, experts and practitioners. The momentum generated must now be carried forward so on make sure that the recommendations made within the study are implemented.

The Secretary-General's in-depth study on all sorts of violence against women was launched within the General Assembly on 9 October 2006. Its presentation and discussion within the Third Committee were amid a discussion on "Ending violence against women: The role and responsibility of varied sectors in effective prevention and response" and an exhibit of posters from round the world to boost awareness about violence against women and strengthen commitment to finish it.

The aims of this study was to

(a) Highlight the persistence and unacceptability of all sorts of violence against women altogether parts of the world;

(b) Strengthen the political commitment and joint efforts of all stakeholders to stop and eliminate violence against women; and

(c) Identify ways and means to make sure more sustained and effective implementation of State obligations to deal with all sorts of violence against women, and to extend State accountability.

H. Conclusions:

Various steps have been taken to empower women. For further development in this regard Media that includes television, radio and newspapers can play a positive role in creating awareness about the pitfalls of violence against women. Time has come to join our hands with Government, Media, Non-Governmental Agencies and Social activists to save our pride i.e. a girl, women and mother. In India there is a saying that, "Where women are respected, God live there". Therefore, we should respect a woman who is the second wheel of the vehicle of the human being in all walks of life.

LGBTQS YOUTH AND THEIR ACCEPTANCE

- SHUBHRANSHU TRIPATHI

ABSTRACT

Families' acceptance of lesbian, gay, bisexual, and transgender (LGBT) teenagers and young adults has yet to be quantified in terms of its beneficial effects on their health. Previous qualitative research retrospectively assessed family acceptive behaviours in response to their relationship to psychological state, as well as LGBT adolescents' sexual orientation and gender expression. Acceptance from one's family predicts more shallowness, social support, and overall wellness; it also protects against despair, drug misuse, and risky thoughts and behaviour. Acceptance of LGBT teenagers by their families is linked to good mental and physical health in young adults. To reduce health disparities, interventions that increase caregiver and parental acceptance of LGBT adolescents are necessary.

INTRODUCTION

People all across the globe are subjected to violence and inequality—and, in many cases, torture and even execution—as a result of the United Nations agency they love, or the United Nations agency they are. Sexual orientation and personal identity are fundamental parts of who we are and will never be discriminated against or abused. Human Rights Watch advocates for the rights of lesbians, gays, bisexuals, and transgender individuals, as well as activists representing a variety of identities and issues. We tend to document and expose sexual orientation and personal identity abuses around the world, including torture, killings, and executions, discrimination in health, unequal treatment, denial of family rights and

recognition violence, censorship, medical abuses, jobs, and housing, child abuse and arrests under unjust laws. We tend to support laws and policies that protect people's dignity. We want to live in a world where everyone has complete access to their rights[279].

The unimaginative ideology has divided mankind into genders: feminine and male; therefore, something outside the scope of this outlined structure is sometimes deplorable in society. Someone who is transgender is someone whose gender doesn't correspond with their birth gender. They may also be bisexual or genderqueer. These areas unit the those who don't seem to be of constant gender that was known at the time of their birth. These individuals feel otherwise concerning themselves as a private, however, society typically mistook the interpretation and fail to simply accept their identity. Thus, these individuals need to agonize from Social-exclusion, discrimination, social oppressions, physical violence, etc. they're sometimes deliberated as socially, financially, and with diplomacy backward class throughout the planet. Which doesn't seem to get any better soon.

The Third gender, i.e., Transgender has been existing since the ninth century before Christ and was referred to as 'Eunuchs'.[3] in contrast to today's world, they were treated with nice dignity and respect throughout the Mughal Era, they were considered the altered men UN agency was appointed to spotter the royal women's quarters. They additionally hold a distinguished position within the crown court and had the privilege to achieve property,

279 Caitlin Ryan, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual and Transgender Children*, Family Acceptance Project, Marian Wright Edelman Institute, San Francisco State University (2009); https://familyproject.sfsu.edu/sites/default/files/FAP_English%20Booklet_pst.pdf.

observe professions, and earn bread and butter. However, the country decree Asian country taken over their right to life and dignity; Even within the post-independence era, there was no express mention of the Trans individual's area unit their rights within the constitution. They weren't treated as a member of their circle of relatives, even the family laws don't embody them with relevancy their individuality in any manner. They weren't treated with dignity and therefore, were compelled to face deprivation of the elemental right to life beneath Article twenty-one of the Indian Constitution[280].

BATTLE FOR SURVIVAL

Even in cultures that embrace and respect the rights of LGBT people, giving birth as LGBT causes problems. The practice begins when a person accepts himself and his identity in the eyes of the outside world. Although the judiciary may make adjustments to create an atmosphere that encourages people in this category to come forward and assert themselves as valued members of society, the social realities that exist in our country will not necessarily change. Every day of our life, we must fight the battle not just in the courtrooms, but also in the drawing rooms, schools, and conference rooms.

CHALLENGES FACED BY LGBT COMMUNITY

Torture by police, incarceration, responding to queries, humouring into sex by disbelief concerning continual sex, payment of graft, force, and individuals in minority were the most prominent concerns that attracted harassment as a result of prohibiting sexual actions between willing parties. Here, the incident is known as the "Lucknow incident of 2002" has been referred in the report published by Human Rights police harassment of HIV/AIDS

[280] Ryan, Huebner, Diaz, & Sanchez, 2009; *SAMHSA*, 2014 accessed on 31st August 2021

exceed to the staff in Republic of India that is. In this case, the police began an inquiry after receiving a complaint under section 377 of the Indian penal code, and during the course of the investigation, the police raided an area organization known as "Bharosa." The HIV/AIDS confiscation from there, safe sex advocacy, as well as the material data and also in remission four health care professionals with no prima facie proof that they square measure at risk of being punished beneath Section 377 of the IPC, were all affected by the HIV/AIDS confiscation. All of the workers were charged without any proof, and they were also prosecuted under section 292 of the Indian criminal code of 1860, which considers scholarly writing to be undesirable. Because the offense under section 377 is not bailable, the workers were detained without bail for 47 days. As a result, there is also the "Bangalore event," which has already been mentioned[281].

The case of Jayalakhmi vs. Tamil Naidu[282] highlights an example of tutelar abuse of LGBTQ people, in which the aforementioned castrate was raped by a group of persons UN agency compelled him to engage in both anal and oral sexual acts with them. Later, he was taken to the police station, where he was stripped of his clothes and subjected to a barrage of abuse by the gang, culminating in the victim's death as a result of the abuse and suffering he had through[283].

Homosexuals are frequently treated as second-class citizens in comparison to other members of society who are willing to degrade their dignity by engaging in one or more activities that

[281] Krivickas & Lofquist, 2011, Youth.gov, Accessed at 31st August
[282] Jayalakhmi vs. Tamil Naidu (2) SCC 716
[283] Ryan, Russell, Huebner, et al., "Family acceptance in adolescence and the health of LGBT young adults," 205-13.

infringe on their fundamental rights, the most important of which is the right to privacy, which is "not solely the right to be left alone but maybe a broader concept," according to Indu Malhotra. It involves the freedom to choose one's own sexual partner, which might include people of the same sex. The legitimacy of law cannot be determined by popular opinion or substantial public resistance against minorities, including LGBT persons. The problems that persons in this class encounter don't appear to be limited to spoken language; there is documentation that shows the entire picture, including a study conducted by the National Aids Management Organization (NACO). A report[284] was submitted by the NACO when conducting the survey. in the report, it was clearly brought to notice that the total variety of MSM i.e., Men UN agency pair with Men square measure twenty-five lakhs in population.

PARENTAL ACCEPTANCE- THEORIES

The importance of parents in the lives of children and adolescents cannot be overstated: starting at birth, continuing through adolescence, and even into emerging adulthood, influencing all relationships outside of those with their parents, and establishing the individual's own sense of self-worth. The attachment hypothesis explains why parents have such a broad range of power and influence on their children.

Children's attachment patterns are linked to adult personality traits, and they have consequences for emotion regulation in the context of stress management, as previously noted. As a result of their positive self- and other-working models, the securely attached individual responds to stressful situations in a way that allows for a realistic assessment of the situation, and the selection of coping strategies most likely to reduce or eliminate the stressor

[284] Naz. Foundation vs. Government of NCT and Ors. (2009) 111 DRIJ

or at the very least make it tolerable for the individual. However, those who are not well-connected are more prone to distort reality since they tend to view a situation as unpleasant even when it isn't.

People with a dysfunctional stress management style rely on emotion-focused coping techniques like substance addiction to enhance mood and cope with stress. These attachment-influenced coping behaviours are widespread in adolescence. To cope with the stigmatization of homosexuality, transgender identity development, and gender-nonconforming behaviour, it is important for all adolescents, but notably, those from sexual and gender minorities, to learn how to cope.

PARENTAL REACTION TO GENDER NON-CONFORMITY

Gender inconsistency, defined as a gender expression that differs from the gender norms expected of the individual's gender, is frequent among youngsters. In a study on gender-atypical behaviour (a type of gender inconsistency) in elementary school pupils, it was discovered that about 23% of males and 39% of girls had numerous gender abnormal behaviour. Gender inconsistency can be found in varying degrees; some children show less, while others show more.

This range has implications for victimization; for example, young people who engage in more gender disobedience are more likely to be abused by their caregivers, to be victimized and harassed by their peers (refer to Mark Hatzenbeuhler's article "Stigma, Minority Pressure, and Resilience as Predictors of Health and Mental Health Outcome" in the current period), and to have a higher risk of depressive disorders. Although there is a relationship between gender abnormalities in childhood and later minority sexual orientations and/or transgender

identities, not all gender disqualifications of children in adolescence or later adulthood are LGB or transgender.

Adverse parental reactions to the child's gender inconsistencies are examples of negative societal attitudes. Parents appreciated their daughter's gender inconsistency, but responded differently to their son's gender inconsistency, according to qualitative research. They accepted a certain degree of disobedience from their son (for example, an interest in cooking), but expressed a greater degree of disobedience. disobedience (for example, wearing a skirt) has a negative reaction. Previous research has revealed that children with gender inconsistencies had a higher prevalence of sexual, physical, and psychological maltreatment by their caretakers during childhood, in addition to being ridiculed and abused by their classmates. Negative parents may respond negatively to their child's gender discrepancy in this way. The first parental reaction to the child's gender discrepancy may extend to the adolescent's sexual orientation revelation[285].

PARENTAL REACTIONS TO YOUTHS' LGBT DISCLOSURE

It is not uncommon for young people who identify as sexual minorities to share this information with family members. Eighty-nine percent of young sexual minorities told at least one parent, and two-thirds told at least one sibling or extended family member about their sexual orientation, according to a recent study. Unsurprisingly, 46 percent of males and 44 percent of females with sexual minorities notified their parents about their sexual orientation, according to another study. Participants in this study were more likely to reveal

[285] San Francisco State University. "Family acceptance of lesbian, gay, bisexual and transgender youth protects against depression, substance abuse, suicide, study suggests." ScienceDaily. ScienceDaily, 6 December 2010. <www.sciencedaily.com/releases/2010/12/101206093701.htm>.

their sexual orientation to their moms than to their fathers, and they did so on average at the age of 19 or 20 years of age.

HAVING A FACE-TO-FACE CONVERSATION

There are two hypotheses that have been established to characterize parents' reactions to their children's sexual variety revelation: Kubler Ross' stage of mourning model and the family stress theory of the grief/loss paradigm Willoughby and colleagues used the family stress theory to study parents' reactions to their children's stressful situations. There are stressful events that include stressful occurrences (such as the concept that sexual orientation is a choice) and tension (e.g., divorce, serious illness). Although these theories are helpful in understanding parental reactions to their children's sexual orientation disclosures, some researchers believe they are limited in that they may not be able to describe all parental reactions, explain how responses evolve over time or account for the child's responses. experience[286].

When confronted with their children's sexual diversity, parents might have a range of responses, from acceptance to rejection. In this area, research has shown a variety of outcomes, both favorable and bad, regarding parental responses. Sexual minorities who told their families about their sexual orientation faced greater verbal and physical abuse, and were more likely to commit suicide, according to one research. Although this survey was published in 1998, many of the attitudes about sexual minorities in society have evolved since then. 89-97 percent of sexual minorities who told their parents about their sexual orientation had a

[286] Caitlin Ryan, Stephen T. Russell, David Huebner, et al., "*Family acceptance in adolescence and the health of LGBT young adults*," Journal of Child and Adolescent Psychiatric Nursing 23, no. 4 (2010): 205–13. https://familyproject.sfsu.edu/publications

favorable response, according to another survey. As a result of not taking into account how many young people are afraid of negative reactions or rejection, these results may be deceptive.

According to a study of the literature on sexual minorities, one-third of young people have had parental acceptance, one-third have had family rejection, and the remaining one-third are still in their late teens or early 2019. He kept his sexual orientation a secret. Parents typically accept their children more with time, according to the first reaction. For example, in a study, it was stated that compared to young people who have not disclosed their sexual orientation to their parents, those who have disclosed their sexual orientation to their parents reported more verbal harm to their parents based on their prior sexual orientation, but present family support was higher. It's getting less and less. Future phobia Parental victimization shows that people's acceptance is increasing with time. It's unclear if these findings apply to transgender teenagers. The first case episode towards the conclusion of this article shows areas where a more empirical study is needed to inform parents about transgender children's gender identification[287].

Other research into the degree of support and rejection received by sexual minority adolescents from their families found group differences based on sexual orientation, race/ethnicity, and gender identity. According to a study on the inequalities in sexual orientation groups supported by young adult parents, lesbian and bisexual women reported lower levels of parental support than heterosexual women, whereas homosexual men reported lower levels of parental support than bisexual or heterosexual women male. These group

[287] Andrew Sanders, *Why Accepting your LGBTQ Child Matters*—And How to Start, Accessed at 31st August 2021

disparities might be linked to overall views about people of various sexual orientations, implying that opinions toward sexual minorities are more unfavourable than those toward heterosexuals. In terms of family support, there were some racial/ethnic differences. In a study of white and Latino sexual minorities, Latino men reported the highest prevalence of negative family reactions to sexual orientation throughout their adolescence. LGBT adolescents, whites, and ethnic/minority parents all had equal levels of support, according to another study. More research is needed to better understand the relationship between race/ethnicity and parental reactions to a teen's sexual orientation disclosure, as well as parental acceptance and rejection of LGBT youngsters. Although there is little research on transgender teenagers' familial support and rejection, several studies have found that transgender kids experience more rejection than cisgender youths. A more empirical study on transgender kids' family support and rejection is needed, especially when contrasted to cisgender youth from sexual behaviour minorities[288].

IMPLICATION FOR LGBT YOUTH IDENTITY AND HEALTH

The degree of familial acceptance and rejection can have an influence on sexual minorities' identity formation. The relationship between parental acceptance and confirmed identity features, rather than being defined by struggle, was investigated in research of sexual minority adolescents and young adults. The results show that, compared to fighting with a person, fewer rejections from parents are related to a higher probability of having a positive identity indicates that the degree of rejection by parents can affect the ability of young people to accept their minority status. Similarly, when compared to other adolescents, those whose

[288] LGBT Rights | Human Rights Watch, Accessed at 31st August 2021

parents are aware of their sexual orientation report "internalized homophobia" (or self-stigma; "Stigma, Minority Pressure, and Resilience as Health and Clinical Importance of predictors of mental health outcomes ") Few teenagers who recently disclosed their sexual orientation to their parents throughout the school year and whose parents were ignorant of their sexual orientation express "internalized homophobia" (or self-stigma)[289].

Providers of paediatric care must be aware that family rejection can have serious consequences for the physical and emotional health of LGBT children. According to studies, parental rejection is linked to hazardous behaviour for LGBT people's health as well as bad physical and mental health results. Emerging adults who have experienced a lot of rejection from their families are more likely to try suicide, have significant levels of despair, use drugs, and engage in unprotected sex. The health of transgender and cisgender teenagers is harmed by parental rejection. Family rejection predicted depression, suicidal ideation, and risky sexual behaviour among trans and cisgender people in Thai research.

Family acceptance, on the other hand, may have a protective influence on the health of LGBT adolescents. Adolescents with sexual minorities who had their mothers react positively to their sexual orientation disclosure were less likely to take drugs than those who did not tell their parents or whose parents did not react positively. Furthermore, parental support and acceptance are associated with increased self-esteem, social support, general health, less depression, less drug abuse, and less suicidal thoughts and behaviour among LGBT children. LGBT youth's drug usage is also linked to family support. Parental support

[289] Renata Sanders, *Tips for Parents of LGBTQ Youth,* Johns Hopkins, https://www.hopkinsmedicine.org/health/wellness-and-prevention/tips-for-parents-of-lgbtq-youth at 31st August

for transgender individuals, particularly teenagers, can help them avoid depression and improve their quality of life.

SOCIAL ACCEPTANCE

Despite the fact that the social structure is continuously changing, it is difficult for people to abandon their traditions and beliefs. This departure, however, is required in order to create a better society. " Article 21 does not allow for the restriction of basic rights based on public morality or popular objection to particular acts. The morality of the general public differs from the morality generated from constitutional principles, which is founded on the transmission and obedience of good and evil. If a "morality" can pass the obligatory national interest test, it must be a "constitutional" morality rather than a "public" morality ".

ROLE OF LGBT IN LIVES

Despite the fact that LGBT persons now have unparalleled social and political acceptability, they are nevertheless subject to a variety of legal disadvantages and disparities.

Many LGBT individuals face legal challenges in establishing relationships, parenting, medical treatment, immigration status, housing, government welfare eligibility, taxation, work, education, and security on a daily basis.

Most jurisdictions still allow discrimination against LGBT individuals, and most states openly discriminate in marriage. Some states make it illegal to teach anything about sexual orientation in public schools. Other states have laws prohibiting gay and lesbian couples from adopting children. When it comes to determining when Gender markers can be altered, transgender individuals are faced with overlapping and conflicting laws, making it difficult to handle everyday situations like traveling or purchasing transit tickets.

For the past 15 years, the LGBT civil rights movement has concentrated on marriage equality. While there has been some progress in promoting same-sex marriage at the state level, it remains a divisive issue in politics and the courts. As a result, the lives and families of LGBT people are politicized in a unique way. 4,444 presidential candidates debated whether LGBT people in the legal system should be treated equally[290].

In 2004, the American Psychological Association recognized that the legal ambiguity that same-sex couples face is a major source of minority pressure and passed a strong resolution in support of same-sex marriage. The heart-breaking story of Janice Langbehn and Lisa Pond shows how vulnerable same-sex couples are due to a lack of relationship acceptability.

Anti-marriage referendums and ballot initiatives aimed at restricting the rights of same-sex couples and, in some cases, undoing previous victories are typical means for states to put LGBT citizenship rights to a majority vote.

In 2007, Lisa and Janice, together with their three children, left their hometown in Washington state and started on a cruise from Miami. Lisa passed out on the ground shortly after disembarking and was taken to a nearby hospital's emergency room. Despite the fact that Janice had completed the appropriate legal documentation proving her power to make medical decisions on Lisa's behalf, she and the children were not allowed to see her in the hospital.

According to court papers, Janice was told by a hospital social worker that she would not be allowed to visit her 18-year-old partner because they resided in an "anti-gay city and state."

[290] Margaret Rosario, LGBTQ Youth, and Acceptance, NCBI, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5127283/ at 31st August 2021

Janice's lawsuit against the hospital was dismissed because she failed to explain why she was upset. Lisa passed away alone, never regaining consciousness.

Janice is treated as a legal stranger in the absence of any sort of acknowledgment of the connection. He has no say in a slew of ownership and decision-making responsibilities that include extremely personal and sensitive decisions. "The Right to Choose...," says a family member.

Despite substantial changes in the shape and composition of American families, the law continues to prioritize relationships defined by traditional criteria like ancestry, marriage, and adoption. Marriage is the only way to identify a partner as a family member.

Janice He and Lisa have completed the essential estate planning papers, but even the most carefully prepared legal documents are insufficient to force third parties to respect their relationships, such as physicians, nurses, and hospital administrators[291].

Anti-LGBT bigotry and violence are still a part of everyday life, and LGBT people like Janice will continue to defend their families in a tough environment with no clear legal protection.

CONCLUSION

Social attitudes towards LGBT people can greatly affect whether employers, family members, teachers, clergy, and the entire society accept or reject LGBT people. LGBT people, often cause violence and discrimination against LGBT people. These common beliefs

[291] Caitlin Ryan et al. Family Acceptance in Adolescence and the Health of LGBT Young Adults. *Journal of Child and Adolescent Psychiatric Nursing*, in press)

are stigma, and can usually be understood as a belief based on a person's characteristics or markings.

Powerful forces can promote beliefs about LGBT people in societies such as tradition, religion, law, medicine, and media. In certain cultural environments, LGBT is stigmatized, LGBT people who are sick, immature, and unskilled. Anti-LGBT stigma may prevent LGBT people from fully participating in society. Social stigma affects not only the way people view LGBT people but also the way people view laws and policies related to LGBT people. People LGBT may face rejection and exclusion from others at the level of interpersonal relationships because of stigma and discriminatory laws and policies.

Acceptance, on the other hand, refers to how positively and inclusively people regard LGBT persons, including LGBT people's own opinions and attitudes toward LGBT rights. Acceptance, as described below, is a wide term that encompasses societal ideas regarding LGBT persons as well as basic perspectives on associated legislation and policies aimed at protecting LGBT people from violence and discrimination while also promoting their equality and well-being.

CHALLENGES ON MIGRANT WORKERS DURING COVID-19 PANDEMIC IN INDIA

- NIHARIKA AGRAWAL

Introduction

Covid- 19 pandemic is a great challenge for the entire world which has its impact globally. Several individuals and a group of individuals have been the bowl of this pandemic situation. One such group of individuals are migrant workers. Migrant workers are those workers who migrate from one part of the country or a state to another part of the country or a state intending to get seasonal or temporary part-time work in any sector they are capable of. These migrants usually belong to a backward class of people or are illiterate and ignored by the governments or any trade unions. They are not even paid the minimum number of wages regulated under the Minimum Wages Act. This results in a huge violation of the human rights of the migrant workers.

The very basic reason behind such violation is that there is no specific legislation regulating this group of individuals in India. Migrants are regulated under different legislation in the country. Due to this, another reason behind such violation is the role of political and economic. State migrants are considered to be an outsider in the other states and hence they do not have right to vote and choose the government.

Despite all this, the migrant worker has proven to be the backbone of the Indian economy. This situation of pandemics has worsened the condition of the migrant workers. Some of them have either lost their jobs and earnings or some of them have no resources left to

survive. It was especially observed when these migrant workers were trying to get back to their native places on their feet. This has caused the death of several migrants due to starvation and lack of transport facilities.

Methodology

The entire article is based on secondary data which is collected from different articles, adjudicated cases, reports, and websites. This paper is reported in the past with the intention to make the analysis more informative and analytical and useful for the reader.

Research questions

This article comprises of the following questions

1. Who are migrant workers and the condition of migrant workers in India?
2. What all laws are applicable to them in India?
3. What are the challenges faced by the migrant workers during pandemic?
4. What measures were taken by the government to resolve the problems of the migrant workers?
5. What was the role of judiciary in protecting the rights of the migrant workers during pandemic?

Laws applicable for the protection of Migrant workers

India has enormous laws and Constitutional rights under the Constitution of India for safeguarding and protecting the laborers and migrant workers. They are protected under the following laws.

Constitutional Rights

1. **Article 14**[292]- It ensures equal protection of law and equality before the law for all citizens for the migrant workers. Hence the migrant workers also have the right to get equal treatment and facilities such as health care equipment, food, shelters, etc. that were provided to the other citizens and laborers in the country during the pandemic.
2. **Article 15**[293]**-** It prevents discrimination against all the citizens in the state. Similarly, Migrant workers should not be discriminated based on their status and profession.
3. **Article 16**[294]- It provides equal opportunity of employment to all in the state. Migrant workers who got unemployed during the pandemic should be provided with the same opportunities as the other working class of the state.
4. **Article 19 (1) (c)**[295]**-** It confers the right to form associations and unions. The labor class can form their union and association or can be the part of such association for regulation of daily mechanisms and for protecting their rights etc.
5. **Article 21**[296]- This article guarantees protection to the right to life and personal liberty. The migrant labor class people also have the right to live with dignity and liberty in the country and **Article 21A**[297] ensures free and compulsory education for all children between the age groups of 6-14 years. The children of migrant laborers are also covered under the right to free education.

[292] The Constitution of India, 1949. art. 14.
[293] The Constitution of India, 1949. art. 15.
[294] The Constitution of India, 1949. art. 16.
[295]The Constitution of India, 1949. art. 19. cla. (d).
[296] The Constitution of India, 1949. art. 21.
[297] The Constitution of India, 1949. art. 21A.

6. **Article 23**[298]- it prohibits all kind of offense of human trafficking and the forced labor and **Article 24**[299] this helps in prevention of child labor and also prevents a child under the age of 14 years from working in any factory mines and another hazardous mechanism. This Constitutional right protects the labor from any physical or mental torture and also prevents their family including children from child labor at any hazardous place.
7. **Article 38**[300]- Promotes the welfare of the people by protecting their social orders and also tries to strive to minimize income inequalities in the country and **Article 39(d)**[301] Ensure the provision for equal pay for equal work to both men and women. The main objective of both articles is to prevent inequalities related to income promotions and pay for equal works.
8. **Article 42**[302]- Provides the direction to maintain the secure human working condition and also provides the provision for maternity relief. The children and women working as labors are provided with security and protection from hazardous environments and equipment. Also, the women are given special leave for their maternity benefits. These benefits and protections are equally liable to the migrant workers as well.

[298] The Constitution of India, 1949. art. 23.
[299] The Constitution of India, 1949. art. 24.
[300] The Constitution of India, 1949. art. 38.
[301] The Constitution of India, 1949. art. 39(d).
[302] The Constitution of India, 1949. art. 42.

9. **Article 43**[303]- This directs the state to work on legislation that can protect the participation of workers in the management of undertakings, establishment, and organizations enrolled in an industry.

Other legislations

1. **Inter-State Migrant Workmen Act (Regulation of Employment and Conditions of Service) Central Amendment Rules, 2017**

It monitors the employment of the inter-state migrant workmen and includes provisions for their conditions of service and matters related to it. This act also mandates the labor contractors to obtain licenses, register the migrants with the government authorities and provide with the identity of the workers by issuing the passbooks. It also obligates the contractor to provide the workers basic facilities such as wages, accommodation, medical facilities, protective clothes.

2. **Legislations to protect the interest of the labors**[304]

a. **Trade union Act, 1926** which defines laws related to registration of trade unions and other registered trade unions.

b. **Payment of wages Act, 1936** ensures payment of wages to the employees on time in any manner.

[303] The Constitution of India, 1949.art. 43.

[304] Chitranjali Negi Advocate, *Human Rights Violations of Migrants Workers in India During COVID-19 Pandemic,* SSRN Blog, 18 Jun 2020, Human Rights Violations of Migrants Workers in India During COVID-19 Pandemic by Chitranjali Negi Advocate :: SSRN.

c. **Industrial dispute Act, 1947** provides the provision for settlement of the industrial dispute and the scope of industries under this act.
d. **Minimum Wages Act, 1948** fixes the appropriate wage rate for certain employments.
e. **Payment of Bonus Act, 1965** assures payment of a minimum bonus of 8.33% of the rate of salary to the workers in the enterprises where more than 20 employees are working.
f. **Contract Labor (Regulation and Abolition) Act, 1970** monitors the employment of contract labor in certain organizations for the concerned matters.

There are many other legislations enacted by the government for the protection of the interest of migrant workers. Despite all this effort in enacting such laws, the problem arises in the implementation of those laws. It is still observed that the migrant's works are exploited at a huge scale and are completely under the burden and dependence on the employers and the contractors.

Conditions of migrant workers in India

Migration has a huge contribution to human development. However, in India, there are still not treated properly that is they are deprived of their basic needs and the policies that are framed for their protection are not implemented as a supporting tool to integrate migrant's development process. The analysis of the 2011 census shows that migration in India is mainly due to the factors like employment, marriage, education, movement with family, natural calamities, and other important factors. The major factor for this migration is marriage and employment. It is also observed that another reason for migration may vary from gender to

gender as well. For instance, for men employment is the major factor of migration whereas for women marriage is the major factor for migration.[305]

In developed states of India, migrants are involved in both skilled and unskilled jobs and gain the consequential source of manpower. Hence, migration in India includes both misery and prosperity. If we critically observe, every third person in India is a migrant. According to the 2011 census report, there are 37.68% of migrants out of the entire population of India including inter-state and intra-state migrants. The population of female migrants is more than male migrants that are 67.93% and 32.07% respectively.[306]

Most of these migrants are young blood that is between 18-30 years of age group[307]. These migrants are exposed to below-standard living conditions and many of them do not work under any formal contracts. Such migrants are not safeguarded under any policies of the state but by actual contractors. Due to lack of registration and relevant information and document facilities which includes their place of origin, they usually are not benefitted from public schemes imposed by either central government or state government such as distribution of food, free education, health care facilities, etc.

Consequences of lockdown

1. **Sudden lockdown**

[305] Shailendra Kumar and Sanghmitra Chaudhry, Migrant workers and human rights: A critical study on India's COVID-19lockdown policy, Volume 3, Issue 1, 100130, Science Direct, 4 2021, https://reader.elsevier.com/reader/sd/pii/S2590291121000267?token=78BFDC16589FCD0C848053F6508801342064151 20D641FEF5F9B11B2C7C33093E12D8D9242D46FB2327B5E0A1AA07F77&originRegion=eu-west-1&originCreation=20210808101124

[306] *Id.* at 13.

[307] *Supra note*. At 13.

Poor affected people have just overcome the issues related to demonetization another issue that came to them was a declaration of sudden lockdown. Due to the lack of transport facilities, the migrant workers were stuck to the places they were. Adding more to the problems, the government-imposed Disaster management Act, 2005 penalizes the convict on obstruction to the directions of Central and State Government. The Government officers were confined or fined for violating such rules of the government. The human rights of the migrant workers were also suspended overnight as this situation was considered to be a disaster by the government. due to this sudden lockdown, ordinary people rushed to the provisional store and medicines shop to procure the necessities at midnight. The government failed to predict the two major consequences of this sudden lockdown that first about the survival of middle-class businessmen and another the returning of migrants to their homes.

1. **Neglect beached migrants and workers**

In India migration is usually for the sake of survival and poverty. Hence, declaration of lockdown without any prior notice, the migrant laborers ran out of resources within few days only. The direction of the Government to all the employers to pay full wages and salaries to the workers were not fulfilled as the minute business possess the very normal amount of cash reserve and hence couldn't comply with the directions of the government. The government of India declared to pay the provident fund for people earning below Rs. 15000 per month but this was also not available to all the migrant laborers as in India they usually worked in the unorganized sector. Most of them lost their jobs and the companies deducted to pay them salaries for the lockdown period.

The government availed the food supply during lockdown for the ration quota person for all the person under Public Distribution System. But this was available to the citizens who carry the ration cards of that particular place and not to outsiders. The government ignored the fact that most of the migrant workers are outsiders and do not have a ration card and hence cannot avail the benefit of this ration scheme. Further, it was observed that the government neglected the rent resolution plan and due to this the tenants were helpless of their landlords and were victims of harassment by their landlords.

2. Inadequate transport facilities

Due to the non-availability of facilities for the outsiders, migrants decided to go back to their homes on foot, auto rikshaw, or bicycles with a half-filled stomach. Struggling through this worst situation some of them died due to hunger, or some died in the accident and the rest committed suicide after fighting with the war of covid-19. Every corner of the city was filled with the scream and pain of migrant workers. They were living like aliens in their own country. However, some organizations and groups of individuals came to help them in their capacity. The government in the lockdown was completely dependent upon the police and paramilitary forces who even sometimes were brutally treating these migrants. The migrants while returning have faced the worst challenge of the police brutal regulations.

3. The complex implementation of policy

After observing this thought fight between the covid crisis and migrant workers, the government decided to provide transport facilities such as buses and trains in April 2020 for returning to their hometowns. But here was again a loophole in this policy as there was a condition that this would be availed only if both State governments make the joint request to

the central government to this. This was a kind of challenge as states and Union territories hardly communicate with each other. On top of all this, the government has imposed the following process of registering and sending the migrants back.

a. Securing the medical certificate from the government stating that the migrant is tested negative and is eligible and fit to travel.
b. The expense to get the certificate has to be borne by the workers themselves.
c. The workers have to fill the online form and register with their home state on their website.
d. They have to visit the local police station to get a travel pass to reach the railway station.

Due to the above complex process migrants were facing certain operational difficulties. The major difficulty was not all the migrants were well versed with the operation of smartphones. And then some who were able to work with it were facing the problem of crashing the sites of some states due to overload on the websites. Also, they were not able to track their application. And the person who is not comfortable with the has to visit railway station but even that desk facility was not available at every station. The migrants have to follow all the stringent rules compared to the middle class and upper-class passengers as they are easily accessible to these facilities due to their advanced technical knowledge. This amounted to inequality among the like once.

4. Charging overprices to helpless workers.

Due to the entire situation, it was the government's duty to carry the entire expense of the traveling of the migrant workers as decided by both state and central government. However,

the guidelines were complex, and difficult to understand that Indian Railway has charges full fare from the migrant workers even though many of them were already suffering from the pressure of loss of job during this critical situation.

However, this doubt was resolved by the Supreme Court, stating that the fare for the special trains run by the railway is paid by the originating state or by receiving state.

5. Violation of labor rights

Adding on to all the above crisis, there were also violations and exploitation in the name of amendments in labor laws during pandemic stating the reason for lack of human resources due to the corona crisis. Several states in India amended their labor law and extended the working hours of the workers without an increase in the payment for overtime. The daily working hours were increased from 8 to 12 hours to help the industry to recover from the loss during the pandemic. This was against the law of the International Labor Organization (ILO). ILO disagreed with this amendment. According to this organization, such an increase in working hours violates directive principles that are binding upon all the states. Article 43[308] of the Indian Constitution also ensures the worker's right to a living wage and good working conditions that include a decent standard of living and full enjoyment of leisure and social and cultural opportunities.

The government migrant frontline workers have no better working conditions. The state government and local bodies have also expressed their inability to pay salaries to frontline warriors which ultimately caused nurses, doctors, and other staff to go strike and protest against it. Also, this protest was organized due to the unavailability of PPE kits and other

[308] The Constitution of India, 1949.art. 43.

health care facilities and essentials. These violations were not only observed in State government but also in the Central government public sector.

Government declaration for not reducing the salary or wages of workers were remained unheard of by the employers at large and was mostly observed in private sectors. Lack of proper planning, improper implementation, and absence of a backup plan were key factors in the failure of India's lockdown policy. Moreover, it was even the judiciary who denied hearing the problems of public interest that also includes migrant workers.

Initiatives by the government

Union government has initiated various steps for the labor welfare and employment for them including migrant workers situated in India during the Covid-19 pandemic. Since the Labor act comes under a concurrent list both state and the central government took efforts to resolve the issues of migrant workers. These steps are as follows.[309]

1. **The migrant Labor Act**[310] was exclusively implemented by the State Government. This act provides the provision for compulsory registration of migrant workers by the respective State Government and maintained the data for the same. With the help of this, during the lockdown period, the Ministry of Labor and Employment collected the data of migrant workers who returned to their native places. According to this collection of data around 1 crore, people migrated to their states during the pandemic.
2. In order to facilitate these migrant workers with the employee who went back to their native state, Government's **Pradhan Mantri Garib Kalyan Rojgar Abhiyan** has

[309] Ministry of Labour & Employment, https://pib.gov.in/PressReleasePage.aspx?PRID=1654819, (last visited Aug 31st, 2021).

[310] Inter State Migrant Workmen Act (Regulation of Employment and Conditions of Service) Central Amendment Rules, 2017

initiated the building of rural infrastructure for these migrant workers and about Rs. 50,000 crores[311] would be spent on such projects. These projects also included the building of roads and highways and many more similar projects.

3. Ministry of Labor and Employment has directed the state and UT's government to nominate State level nodal officers to coordinate the implementation of various measures for the welfare of migrant workers who are returning.
4. Ministry of Health and family as per their guidelines also made arrangements for the screening and testing of the migrant workers at their state of origin and destination state.
5. There was also data collection for the easy identification of the migrants for providing them with the welfare measures. This has also helped them avail themselves of the benefit of several Social Security Schemes of the Government.
6. After the declaration of sudden lockdown, certain instructions were sent to all the States and Union territories to provide financial help to all the construction workers which also includes migrants' workers at large from Building and Other Construction Workers' Fund. Almost 2 crore migrant workers were benefitted with Rs. 5000 cr. Directly into their bank accounts without any complex procedures. [312]
7. The government also set up 20 control rooms all over India to resolve the issues of the migrant workers. During this pandemic thing, more than 15000 complaints were

[311] Ministry of Rural Development, https://rural.nic.in/press-release/garib-kalyan-rojgar-abhiyan, (last visited Aug 31st, 2021).
[312] Supra. at 16.

heard and resolved, and also more than 2 lakh workers were paid their due wages of around Rs. 295 crores with the help of the Ministry of Labor and Employment.

8. To help the people from starvation Government also implemented the scheme of **Pradhan Mantri Garib Kalyan Yojana** consisting of the financial package of Rs. 1.7 lakh crore to help poor, needy, and unorganized sectors. Under this package around 80.00 crores, people were provided 5 kg of grains and 1 kg of pulses up to November 2020 to all the beneficiaries. The main objective of this is to ensure that no one is without food during this challenging time.
9. The **Mahatma Gandhi National Rural Employment Guarantee Scheme**[313] has increased it is per day wages from Rs. 182 to Rs. 202 and also ensures 100 days of employment per household in a year.
10. Under **Aatm Nirbhar Bharat**[314] plethora of employment opportunities are created for migrant workers of unorganized sector, strengthening of MSME sector, and promoting rural economy with the financial package of 20 lakh crore.

Role of the judiciary during the pandemic

The role of the Supreme Court of India during lockdown was not very good at the initial stages as it refuses to hear any public interest litigation on migrant issues. After two months of lockdown and constant criticisms by activists, lawyers, and retired judges of the Supreme Court, the court decided to take Suo-moto cognizance of the issues of migrant workers. But whatever was provided was too little and too late. The Court mainly deprived the most important right to the equity that is granted under the Constitution, by not providing any

[313] https://mgnregs.ap.gov.in/, (last visited Aug 31st, 2021).
[314] https://aatmanirbharbharat.mygov.in/, (last visited Aug 31st, 2021).

relief. Due to this, it dismissed millions of migrant workers and has struggled to act congruously as a supreme court.

In the petition file by the Alakh Alok Srivastav following observations were made by the Supreme Court of India.[315]

a. The Supreme Court ignored millions of other migrant workers who were stuck on the streets across the country. The Supreme Court and the executive ran away from the problems while the majority of the labor laws were being suspended by the states.
b. The petition regarding the payment of wages to the migrants was addressed as "why do migrants need wages when they are being fed?" In this way, they overlooked the financial crisis and the necessity of the migrant workers.
c. The court also dismissed the petition for the traveling to their hometowns without any issue of travel charges.

However, the High Courts have given great responses to tackle this problem. The Karnataka High Court in the case of ***Mohammed Arif Jameel V. Union of India***[316] observed that State Government is expected to pay for "Shramik" special trains, in Karnataka the State was collecting train fares from the migrant workers. This was considered as a violation of the migrant worker's constitutional rights and directed the State Government to ensure an efficient schedule so that the migrants can travel back to their home states.

The Andhra Pradesh High Court passed an order directing the setting up of tents and outposts for migrants. It included instructions on the provision of doctors, water, food, ORS salts,

[315] Mihir Desai, *A prodding judiciary in times of emergencies,* THE LEAFLET, (June 1, 2020), https://www.theleaflet.in/a-proding-judiciary-in-times-of-emergencies/

[316] 2020 KHC 6435 6671.

toilets, and sanitary at these tents and outposts. It was further directed for the utilization of national highway authority buses and police patrol vans to transport migrants to the nearest shelter homes and distribution of pamphlets that provide information about nearest shelter homes. Similarly, this was concerned by Gujarat High Court as well it stated that *"It is high time for the State Government to deal with this delicate situation very carefully and instill confidence in the minds of the people at large that they will be taken care of."*

Madras High Court in ***AP Suryaprakasam v. Superintendent of Police*** [317] passed an order that narrated the distress of migrants. The court held both the native and migrated state of the worker accountable for the safety and well-being of the workers and asked all state authorities to extend humanitarian services to the workers.

The Karnataka High Court with help of the ***Swaraj Abhiyan case***[318] held that the person belonging to marginalized communities such as beggars, transgenders, same-sex workers may not have ration cards. It ordered the state government to provide it with a comprehensive policy on food. The Court came down heavily on the government for not giving free gas cylinders. The Court observed that homeless people may not have access to newspapers so such advertisements of government relief measures there were meaningless. All of this prompted the state to come up with a food policy and take steps to make public announcements of its relief measures.

Conclusion and suggestions

Like many other people such as prisoners and poor people etc. Migrant workers also remained unheard during this pandemic. Though many initiatives were taken by the

[317] 2020 SCC Mad 1004.
[318] Swaraj Abhiyan v. Union of India, (2018) 4 SCC 300.

Governments, judiciary, and other NGOs, etc, but there was a huge violation of their basic human and fundamental rights. There has been a circumstance where they were all ignored in the very initial stage.

From the beginning, if it is observed many laws are made for the welfare and protection of their interest. They are also provided with constitutional fundamental rights and are regulated under many legislations, but during this difficult time, all were in vain as they were suspended. Being the indigenous class of people, their rights were completely ignoring. There need to be codified some strict laws specifically for the migrants that deal with protection and welfare of them especially during such situations.

Another part of the paper stated the consequences that were faced by the migrants due to the sudden announcement of the lockdown. The Government should have once thought of all the impact of such declaration. The migrants were highly prone to this situation. Inadequate facilities of transport, food, shelter, health, and care, and brutal treatment by the police were the major challenge suffered by the migrant workers. There were no backup plans for the failure of any policy or measures.

Without a doubt, the government has initiated many schemes and policies for migrant workers, but many of them were either not implemented properly or were not accepted by the state governments. These schemes were also framed too late before which many migrants have already been convicted of this situation. It would have been better if this would have planned before the declaration or if not that then strict action must have been taken for non-compliance with any such policies.

The judiciary to which we consider as a justice system ignore all the consequences and denied hearing all the problems of the migrant workers. However, the high courts contributed to overcoming such problems and tackled them with this remarkably.

This entire covid-19 pandemic was a challenge to all, but this does give chance to violate the laws. Lawmakers have made these laws with the purpose of maintaining some discipline and order in the country. to provide with the right to live in a dignified world. It is the duty of all the appropriate authorities to take care of these laws and their implementations.

TRIBALWOMEN EDUCATION IN INDIA: OPPORTUNITIES & CHALLENGES

- SHREYA CHATTERJEE & ABHISHEK CHATTERJEE

ABSTRACT

Education framework should improve an individual fit to the necessities of the consistently changing powerful world. Despite the fact that indigenous women are not under the purview of the norms of state life, they have an impact on socioeconomic changes that affect the general public. A huge number of tribal women have missed out on schooling at various times, and in order to engage them, there is a critical need to provide opportunities that would enable them to expect authority traits, which will enable them to expect monetary independence and even social change. This paper is concentrating on the general situation of tribal education in India, opportunities associated with their education and issues related with their education alongside the best possible advancement of training among scheduled tribes in India.

Keywords: Tribal women, Education, Tribal Development, Social Gap, weaker section.

INTRODUCTION

"If you educate a man, you educate an individual, however, if you educate a woman you educate a whole family. Women empowered means mother India empowered".

-PT. Jawaharlal Nehru[319]

Education is a vital part of a person's overall development since it allows them to gain a better understanding of their social, political, and cultural surroundings while also supporting them in improving their socio-economic circumstances. The significance of education in terms of economic, political, and social trade has been extensively recognised and acknowledged all over the world. Education is today regarded as one of the most important factors in the development of human capital. For women, the following is true. From daughter to sister to spouse to mother, women have played an important and defined role in society.[320] A true assessment of their contribution to their circle of families, society, and the state has yet to be completed or counted. Women must become more aware of themselves, their obligations, and their rights in this rapidly changing society and sector. In today's world, women's roles are remembered in all aspects of social life. The first school where a youngster learns his or her life lessons is the mother. As a result, women's education is widely regarded as the most important aspect of societal growth. Napoleon was once asked what France's greatest need was. He answered, "Progress of the nation is impossible without educated

[319] Suman Kumari, "Challenging Issue of Tribal Women Education in India", Volume 3, Issue 1, (International Journal of Interdisciplinary Research in Arts and Humanities), PP109-114, (2018)

[320] Puhan, R. R., Gamango, G. and Malla, L. "Educational Participation of Scheduled Tribal Women in Rayagada District: Analysis of the Barriers and Ongoing Measures by Government." (International Journal of Educational Research and Technology,) (2013).

mother. If the women of my country are not educated the about half of the people will remain illiterate". As a result, our human community should feel compelled to educate women in order to develop the society wholly.

Constitutional rights conferred on tribal women:

With 6.77 billion tribal people, India is the world's second most populated country. The majority of tribal humans are poor, illiterate, and trapped in inaccessible jungles and mountainous locations. In comparison to other segments of the population, they lag behind in all aspects of life. The Indian government has developed a variety of initiatives aimed at providing training and assistance to a number of tribes in trendy and exclusive new tasks, primarily for women. Despite these efforts, the literacy rate has remained stagnant. The standing of educated women in primitive cultures is exceedingly low, and this needs to change.[321] Tribal women, in particular, are not immune to the effects of socio-economic changes affecting society in general, despite their distance from the main stream of countrywide lifestyles.[322]

The political, social, and financial imbalances that existed in the country due to historical reasons were well known to the founding fathers of the constitution, Bharatratna Dr. Babasaheb Ambedkar. They were well aware of the deplorable and dreadful conditions of the Scheduled Tribes, who had been left behind and isolated from the rest of the country. As a result, it became critical to implement a defensive discrimination policy as a leveler for those

[321] Duary, N. K. Education in Tribal India, (Mittal Publications, New Delhi) 2010
[322] Mahapatra, B.C. "Human Right and Education", Jan Sakharata, Year 4, No. 3, July. 2003, Indore., M.P., India

who were too weak to keep up with the developing sector of society within the race of life. The constitutional provisions lay forth a plan for rebuilding and transforming Indian society, with a solid commitment to improving the pathetically neglected and disadvantaged elements of our society.

The phrase "Scheduled Tribes" is very new, having been coined with the formation of India's Republication Constitution on January 26, 1950. Scheduled Tribes had previously been referred to as "Aboriginals," "Adivasis," "Hill Tribes," and "Primitive Tribes." The Scheduled Tribes are not defined in the Indian Constitution. Scheduled tribes are those groups that are defined in Article 342[323] of the Indian Constitution, according to Article 366(25)[324]. Scheduled Tribes are tribes or tribal groupings that have been designated as such by the President by a public announcement, according to Article 342 of the Indian Constitution. According to Article 46[325] of the Indian Constitution, the state must take steps to assist tribal communities by providing educational and financial assistance, as well as ensure tribal people are protected from social inequity. Article 15(4)[326] of the Indian Constitution provides for reservation in educational institutions, whereas Articles 16(4)[327], 16(4A)[328], and 16(4B)[329] allow for reservation in offices and services.

[323] INDIA CONST. art. 342.
[324] INDIA CONST. art. 366, cl. 25.
[325] INDIA CONST. art. 46.
[326] INDIA CONST. art. 15, cl. 4.
[327] INDIA CONST. art. 16, cl. 4.
[328] INDIA CONST. art. 16, cl. 4A.
[329] INDIA CONST. art. 16, cl. 4B.

EDUCATIONAL STATUS OF TRIBAL WOMEN

There are over 500 tribes spread across the country's states and union territories. The state of Uttar Pradesh has the greatest diversity of indigenous communities. Despite their small number, Scheduled Tribes account for 8.2% of India's total population. Approximately 93 percent of tribal members live in rural areas and work in agriculture. Ten states, including Andhra Pradesh, Chhattisgarh, Gujarat, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, Rajasthan, Uttar Pradesh, and West Bengal, account for more than half of India's tribal population.[330] According to Census data, India's literacy rate among STs increased from 47.1 percent in 2001 to 59 percent in 2011. However, female literacy in tribes is only 49.4%, compared to 68.5 percent for males. The overall literacy rate has increased from 64.8 percent in 2001 to 73 percent in 2011. The overall literacy rate has increased from 64.8 percent in 2001 to 73 percent in 2011.

Year	Scheduled Tribes		
	Persons	Male	Female
1961	8.53	13.83	3.16
1971	11.30	17.63	4.85
1981	16.35	24.52	8.04
1991	29.60	40.65	18.19

[330] Bhasin, V. "Status of Tribal Women in India", (Department of Anthropology, University of Delhi, Delhi, India.) (2007)

2001	47.10	59.17	34.76
2011	59.00	68.50	49.40

HIGHER EDUCATION- 18- 23 YEARS

In 2016-17, the gross enrolment ratio for ST boys was 102.6 for ST boys and 100.6 for ST girls in class I to V, however the GER for ST boys in class VI to VIII was 94.6 for ST boys and 97.0 for ST girls. At primary level (I-V), the GER for ST Girls has decreased from 107.7% in 2014-15 to 100.6 percent in 2016-17, but has increased from 93.2 percent in 2014-15 to 97.0 percent in 2016-17 at Upper Primary Level (VI-VIII). It means that the GER for ST females in higher grades has dramatically grown.

In India, the estimated Gross Enrolment Ratio (GER) in higher education is 25.2 percent, based on the 18-23 age group. ST girls' involvement in higher education has improved from 12.3 percent in 2014-15 to 14.9 percent in 2016-17, although it is still lower than ST boys' participation, which was 15.2 percent in 2014-15 and 17.0 percent in 2017-18. The table below illustrates that female involvement in higher education among indigenous people is extremely low.

Year	Male	Female	Total
2014-15	15.2%	12.3%	13.7%
2015-16	15.6%	12.9%	14.2%
2016-17	16.7%	14.2%	15.4%
2017-18	17.0%	14.9%	15.9%

Government program and opportunities:

Schooling confers data, and skill of self-distinguishing proof and human environmental elements will imbue a vibe of self-conviction, fortitude and limit of the more vulnerable segments of the general public to know and defeat their issues related with double-dealing and hardship, and benefit socio-monetary and political potential outcomes reached out to them.[331] On November 28, 2001, the Government authorized the 86th Amendment of the

[331] Pradhan "Problems of Tribal Education in India", vol.59, no.7 pp. 26-31 (2011).

constitution-production the "Right to Education a Fundamental Right." Sarva Shiksha Abhiyan (SSA) in the year 2001-2002 in association with the nearby self-governments and state Governments was planned by the public authority in India. The PESA (The Panchayats Extension to Scheduled Areas) Act, 1996 indeed, has been made required for the States having planned districts to make unique arrangements for giving wide powers to the clans regarding the matters alluding to choose making and advancement of their local area.[332] A government-backed initiative to establish ashram universities totally for ST kids from principal to better auxiliary ranges. The Janshala Program is an accomplice task of the Government of India (GOI) and five UN Agencies – UNDP, UNICEF, UNESCO, ILO, and UNFPA – an organization-based number one tutoring application, intend to make essential training extra reachable and adequate, specifically for ladies and children in oppressed gatherings, underestimated enterprises, Scheduled Tribes/Scheduled Caste/minorities, kids with exceptional cravings. The public authority dispatched different projects for the improvement of ladies. In any case, the genuine advancement program has not contacted at this point at the ground level. There is a correspondence hole between the organizer of such a plan and individuals for whom the plans are planned.

CHALLENGES

The concerns and challenges of indigenous women's education can be classified as social, financial, and emotional. Peripheral constrictions are correlated to challenges at the strategy, preparation, and execution stages, whereas core restrictions are related to the schooling

[332] Lal, M. "Education-The Inclusive Growth Strategy for the economically and socially disadvantaged in the Society" (2005).

arrangement, program, instruction, and coaching media, among other things. The third category of difficulties concerns tribes' social, financial, and cultural history, as well as psychological aspects of first-generation students. From daughter to sister to wife to mother, they have all made significant contributions to society. They made a difference in their families, communities, and countries, and their contributions are still being counted. It is vital to deal with the troubles of low literacy among tribal women significantly at national level and solve the peril through confident and useful approach. Some challenges faced by tribal women are:

1. The village is located in the middle of the forest, which is home to the majority of the tribal groups. As a result, opening discrete institutes in each community where the necessary pupil attendance is not accessible becomes unfeasible. On some lands, physical barriers like as rivers, hills, nalas, and woods keep tribal habitations separated from one another. As a result, the women of a tribal hamlet are unable to attend schools in a neighbouring village due to physical constraints. In this scenario, the parents have decided that their female daughter will no longer be allowed to join institute.
2. Government has given all the privileges, financially, but in the field of education a major portion of tribal women is still illiterate. After doing research it is seen that due to many factors, they are economically backward. Most of deprived portion are the poorest section of society. Whenever a girl born to their family, they seen as a wage earner or a helping hand of the family, so they have to start earning at the very early

age. In this regard the long process of education and the benefits is seen like an improbable dream for which they don't have patience and resource to wait.

The major portion of tribal people belongs to poor family. Under their obligation their girls have to do work for home to be a helping hand. Their parents also depend on their work and sent them to some places for earning rather send them to schools. Their age of schooling is utilized in other ways. The girl deprives from receiving the education.[333] Majority of rural areas are in under developed condition so the tribal people's financial condition is very poor. The people living over there has difficulties to arrange their minimum necessities of life. The parents are unable to make money to fulfil their needs so sending of the girls to school is a big question, and in case of that the male child get the preference. In tribal economy the women played a great role than men. The women don't have leisure time after getting up from bed. Thousands of tribal women are engaged in selling vegetables, fire woods in rural village or town.

3. A small percentage of tribal women receives their education and here is the discrimination between women and men, so the number of men is several times greater than women.

The preamble of Indian constitution gives equal status to every citizen of our country, but half of the population doesn't know about the fundamental rights. "*Article 45 of the Indian constitution mandates that all children under the age of 14 get free and compulsory*

[333] Awais,M., Alam,T.and Asif,M, "Socio-Economic Empowerment of Tribal Women: An Indian Perspectives", (2009), available at http://www.vri-online.org. uk/ijrs/ Oct2009/ tribal%20women.pdf accessed on 16.02.2020 at 8pm

education." Untouchability is illegal in India, according to Article 17[334] of the Constitution. Similarly, The directive basis of state policy set down in Article 46 of the Constitution states that "*the state shall foster special care of the weaker sector, particularly the schedule caste and schedule tribes, in terms of education and economic interests.*" Articles 29[335] and 30[336] of the Indian Constitution discuss "*the preservation of minorities' interests as well as their rights to construct and govern educational institutions*." A group of people still is in dark side because of lack of education they don't know the social and cultural importance of education. Parents consider education as wastage of time and money to give education to their girl child.

4. Sometimes the parents of the girls are becoming problem, they don't want to send their children to attain free schooling. The wrong attitude among parents that women who are educated are remain unemployed so they think study is not necessary for their girls. After attaining the age of maturity parents started finding suitable match for their girls, when they failed to find a suitable match then only the girls are allowed to go for education. When they allowed to go to schools then another problem comes which is there is no specific girls school, their parents hesitate to leave their growing girls.[337] They can't freely accept mixing with male members or talking with them.

[334] INDIA CONST. art. 17
[335] INDIA CONST. art. 29
[336] INDIA CONST. art. 30
[337] Sharma, R. N. and Sharma, K. R. "Problems of Education in India", (Atlantic Publishers & Distributors, New Delhi) 1996.

That's why the interest of girls for study or higher study is decreases and they feel discouraged.

5. There is a lack of suitable teachers in tribal areas. Teachers are refused to go to the rural areas or tribal areas because of the remoteness and slow growth of education. Teachers generally thinks that the people of those areas are savage and uncivilised[338]. Teachers lose their interest in the job due to lack of security and residential facility. Those who want to travel by transport they also suffer from lack of bus communication. The teacher who wants to teach they also have to know the tribal language, moreover, they are total strangers to tribal culture and the values of the society within which they have to operate. The majority portion of tribal primary school are runs by a single teacher. The tribal children's interests are also influenced by school schedules, which should not conflict with their socio-economic activities.[339]
6. Language is a crucial issue in tribal education, since there are few languages that can be written. Language plays a crucial role in making tribal women and children more approachable.[340] The fundamental infrastructure facilities within the tribal school building are very terrible which ends up the students live far away from the school. Some of the hostel structures are very slow, negative with substandard high-quality of materials. In reality, most tribal primary colleges are run by a single lecturer, whose presence on campus is more of an exception than a rule. Various agendas (as

[338] Pradhan, supra note 14 at 7
[339] Dr. Rajeshwari M. Shettar, "A Study on Issues and Challenges of Women Empowerment in India". Vol.17, Issue 4.Ver.I PP 13-19, (Apr. 2015)
[340] Vinoba Gautam, "Education of tribal children in India and the issue of Medium of Instruction: A Janshala experience" (2003)

previously indicated) are taken up by the government for the development of the Scheduled Tribe population over the plan period, and while some improvements have already been made, much more has to be done. Higher officials should inspect teaching techniques, working hours, and attendance records on a regular basis.

7. When a tribal child goes to a good school or college other than tribal school then the behaviour of other students towards them is different.

SUGGESTIONS

I. In the beginning phases of school, it is emphatically suggested that the first language be utilized as the mode of guidance. From an etymological outlook, it is proper to enlist a neighbourhood educator from a similar ancestral gathering, and all examination materials ought to be given in the clans' local tongues.

II. Governments and civic groups should raise tribal people's awareness of government programmes, as well as the needs and benefits of education for indigenous women.

III. The local teachers who have the knowledge of the tribal language should be appointed as teachers in the tribal schools

IV. Create attention that education simply makes a tribal-women economically even-handed, will have the power to solve their life issues and make their existence better.

V. Since advanced education is scant inside the clans, tribal ladies seeking after advanced education, especially in designing, clinical medication, and other professional fields, ought to be qualified for extraordinary ST grants.

VI. To inspire ladies in ancestral networks, tribal guardians' mentalities toward schooling ought to be progressed by acceptable directing and direction.

CONCLUSION

Education is the convenient supreme tool via which people and society can enhance man or woman endowments, construct a degree of capability, triumph over limitations, and increase opportunities for non-stop improvement in their welfare. Despite several constitutional guarantees and rules for indigenous women, the truth is that tribal women continue to lag behind in many areas and confront severe problems. Their economic activity, social backwardness, and literacy levels are all relatively low, thus it's critical to help them progress. They work very hard and make a significant contribution to the family's financial situation, but they remain impoverished in general since no meaningful efforts are directed toward them. Education is a critical component of progress for native women. Education will enable them to obtain employment, allowing them to improve their situation. The scheduled tribe's social and economic standing is heavily reliant on educational achievement. Those who have had an education are more likely to be able to cope with modern society than women who have not.

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A CRITICAL EXAMINATION ON THE HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937.

- SANYA KAPOOR

ABSTRACT

In India, the law regarding the women's right to property is very limited and has been frequently violated. Under the Hindu Law regarding the property rights, the sons have been given an integral share in their ancestral property however, the married daughters are not granted any residential rights in their ancestral property thus showcasing a manifestation of the male centred structure of our society. This was the scenario of women prior to 1937. History shows that the Hindu law regarding the rights of women have never been progressive in nature, but it was during the British era that the interference in these personal laws ceased to expand with time. One of the most significant enactment that brought changes to give equal rights to women was the Hindu Women's Right to Property Act, 1937. The Act has been an eye opener in the history of women's right to property has aimed to change the outlook of the people towards the widow. Through this article, the researcher aims to analyse the property rights which have been granted to women under The Hindu Women's Right to Property Act, 1937 and to understand the applicability of the Act on Dayabhaga and Mitakshara schools of law. The researcher would also like to put some light on the limitations of this enactment which resulted in certain inconsistencies and ambiguities.

Keywords: *Dayabhaga, Mitakshara, Patriarchal, Property, Widow*

INTRODUCTION

The Indian society has been predominantly patriarchal and the property rights which have been granted to the males regarding both movable and immovable property are just a manifestation of the male centred structure of our society. The rights of Hindu women have not only been restricted by the patriarchal norms which have been existing since the Vedic Period, but they have also been shaped by social and economic factors. Under the Hindu Law, the sons have been given an independent share in their ancestral property whereas the married daughters have been granted with no residential rights in their ancestral property. Women had a very dependent role in the family and in their rights and had restricted ownership. During the Vedic Period, it was believed that only a person who is eligible to perform religious ceremonies and rites will be granted a right to hold property. The ancient Rishis disfavored the Hindu females as they were incompetent to perform religious ceremonies and rites which resulted in their submissive and dependent status in the society. The law governing Hindu women's right to property has undergone significant changes dating back to Vedic civilization, when women were granted equal economic status and the wives had been given equal rights in husband's house to a very inferior status during the Manu's declaration where the wife, son and a slave had enjoyed no rights over the property and if they happened to acquire the property, it will belong to the male under whose protection the property is. Not only the wives were the victim to such gender-based discrimination but also the daughters had been discriminated with regard to the property rights and were seldom granted the rights to have a share in their father's property. This was

the scenario of women prior to 1937. The Hindu Women's Right to Property Act, 1937 came as a breath of fresh air in the women's right to property. The Act had been passed with the objective the to improve the status and the condition of the widow of coparcener in order to enable her to maintain herself without being at the mercy of the coparceners who survived. Hindu widows before the formation of this Act had been granted with the right to maintenance. The Act had been formulated with the objective to convert this right of maintenance into right of a shareholder in the property of her deceased husband. The intention behind the enacting the provisions of this Act was to make it work to its detriment.

CHAPTER I: NATURE AND SCOPE OF THE 1937 ACT – IT'S APPLICABILITY.

One of the most significant enactment that brought changes to give equal rights to women was the Hindu Women's Right to Property Act, 1937 which came into operation on 14th April 1937. It confers new rights to the Hindu widows and is applied only when a Hindu die without a will. The 1937 Act is not retrospective in nature and is not applicable to any of the properties which have been vested to the deceased as a trustee. The Act recognized three widows i.e., widow of a predeceased son, an intestate's widow, and his son's widow. It positions the widow in the role of her deceased husband as a member of the joint family.

Section 1 of the Act states that the provisions of the enactment are not applicable to either the coparcenary property or any property of a Hindu female. The provisions will only be applicable to the separate property which has been left behind by a Hindu Male. In the case of ***Umayal Achi v. Lakshmi Achi***[341], the court held that the term separate property includes

[341] Umayal Achi v. Lakshmi Achi, (1994) 1 M.L.J 70.

only the property which has been self-acquired by a deceased Hindu. Any property which has been acquired by the sole surviving coparcener will not be regarded as a separate property within the purview of this act, provided if there exists a woman in the Hindu Joint Family who is capable of bringing a coparcener in the family either by giving birth or through the process of adoption. The Act through this provision has introduced changes that are alien to the composition of the coparcenary system due to which certain contradictory concepts have been reconciled. The provision has allocated the widow of a coparcenary member with the interest which had been vested with him during the time of his death. A community of interest and unity of possession arises between the widow and the surviving coparceners but still a widow does not become the member of the coparcenary, nor she has been vested with the right to acquire an interest of the other coparceners[342]. In the case of *Jadavbai v. Pumommai*[343], the court ruled that despite the provisions of this enactment, the widow does not become a coparcener with the surviving coparceners. In the case of ***Narasimhachari vs. Andalammal,***[344] the court held that though this Act has vested a demonstrable right with the Hindu widow to obtain the share of her deceased husband, but she has not been granted the power to alienate her acquired share except for the benefit of the estate or for certain legal necessities. Since under the provisions of this Act, the Hindu widow acquires an interest in the property through statutory substitution, the question whether the widow would be held liable to pay the husband's debts had been afflicted with difficulties. If the husband has taken a debt for a valid reason, then the widow will be liable to pay the debt from the share

[342] Satrughan Isser vs. Subujpari, AIR 1967 SC 272.
[343] Jadavbai v. Pumommai, 1944 Nag. 243.
[344] Narasimhachari vs. Andalammal, (1978) 2 M.L.J. 524.

acquired by her. In situations where the Hindu male had died leaving behind his sons and his widow, then the widow shall not be burdened with paying her husband's debts, but this does not take away the rights of the creditors. In the case of ***Narayan Vadraj Katti vs. Belgaum Bank***[345], the court held that the widow shall not be burdened to pay the husband's debt in situations where the creditor had filed a suit against the sons of the Hindu male in respect of its debts.

The provisions of this enactment does not confer the Hindu widow to become the Karta of the family after her deceased husband. In the case of ***Mahadu vs. Gajasabai***[346], the court held that after the death of the head of the family, an adult member will take up the responsibilities as the head of the family, and not the widow of the deceased head of the family.

The legal persona of the husband continues by his wife after his death. The 1937 Act had recognized the concept that as long as the widow is alive the husband lives through his surviving half. The Act in its provisions had used the phrase ' *the same interest he himself had'* which means that the widow after the death of her husband would be vested with all the rights which had been possessed by him. Section 3(2) of the Act states that a Hindu widow acquires an interest in the property even before a partition has been claimed. The interest acquired by her under the 1937 Act is not metaphorical to the interest which is acquired by female member of a Hindu Joint Family during a partition among her sons or grandsons. The Act further states that as soon as the widow demands an unequivocal partition, the interest in the property will be defined Thus, the widow succeeds as the owner of the property of her deceased husband, but she has not been vested with the power to alienate the property. She

[345] Narayan Vadraj Katti vs. Belgaum Bank, 5 (1968) 2 Mys. L.J. 66
[346] Mahadu vs. Gajasabai, 1954 B. 44.

can alienate the property only if it for the benefit of the estate or any for any legal necessity. The court in of the leading cases of ***Ramaiya Konar vs. Mottaiah Mudaliar***[347], ruled out that Section 3 of this Act prohibits any woman from claiming the interest of her deceased husband if her unchastity has been proved during the period of her husband's death.

According to Section 4, the provisions of the enactment shall not be applicable to the property of any Hindu who has died without a legal will before the commencement of this Act. The Act has led to the abrogation of the doctrine of survivorship, as the widows had been entitled to an equal share as that of her son in the separate property of her deceased husband who has died intestate. In circumstances, where the son has committed a default, the widow will be entitled to the entire property of the deceased. In ***Naresh Jha vs. Rakesh***[348], the court held that before the enactment of this Act, a Hindu widow was only entitled to a right of maintenance. The interest which is acquired by the widow under the provisions of the Act cannot be defeated if her husband had made a will in the name of the sole surviving coparcener. Though this act has endowed upon the widow the right to claim partition, but the Act does not abolish the right of the widow to claim for maintenance. The Hindu Widow has been given a discretion under this Act to either claim her share in the deceased husband's property or to claim her right to maintenance, but she has no right to ask for both the options available under the enactment. [349] The Act has brought closer the Dayabhaga system and the Mitakshara system by vesting the widow of the deceased in a Hindu Joint family the right to acquire the interest as the legal persona of her deceased husband.

[347] Ramaiya Konar vs. Mottaiah Mudaliar, 1951 Mad. 954.
[348] Naresh Jha vs. Rakesh, AIR 2004 Jhar 2.
[349] Parappa vs. Nagamma, 1954 M. 576.

Renunciation of religion under Hindu Law forfeits the right of the Hindu woman to succeed the property of another Hindu. This is because if a person has ceased to be a Hindu, the provisions of Hindu Law cannot be applicable to that person. Though this rule had been abolished by the Caste Disabilities Removal Act but still no new right has been conferred to the person who has renounced the Hindu religion. The Hindu Women's Right to Property Act, 1937 is not applicable to women who have converted from Hinduism to any other religion, and hence they are not entitled to claim the benefits of the provisions of this Act. In the case of *Sasanka v. Amiya*[350], the court held that if a Christian woman had got married to a Hindu male, and at the time of succession she had renounced Christianity and had embraced Hinduism, she will be deemed to be a widow within the provisions of this Act and will be entitled to claim the benefits.

[350] Sasanka v. Amiya, (1974) 78 Cal. W.N. 1011.

CHAPTER II: DID THE 1937 ACT HAVE DIFFERENT APPLICABILITY ON MITAKSHARA AND DAYABHAGA SCHOOLS OF LAW?

Mitakshara and Dayabhaga schools of Hindu law had emerged from the era where commentaries and digests influenced the legal practices and governed the laws related to inheritance of the property.

Dayabhaga had been written by Jimutvahana around the 12th century. Unlike the Mitakshara, Dayabhaga is not a commentary rather it is a digest of all the codes. Dayabhaga school of law is based on the principle of religious efficacy and is prevalent in the regions of Bengal and Assam. This school of Hindu law does not distinguish between the separate property and the coparcenary property. The doctrine of survivorship is not applicable under Dayabhaga as it is based on the law of succession. The only change which has been introduced by this Act under the Dayabhaga system is that, if a Dayabhaga Hindu dies, the right to succeed his property will extend to not only his sons but also to his widow, widows of the predeceased sons and also to the widows of predeceased grandsons thereby, introducing three categories of widows. In situations where the widowed daughter in law has died, the interest in the property would be succeeded by the heirs of her father in law. In ***Provash Ch. Roy vs. Prokash,***[351] , the court held that if a Dayabhaga Hindu has died, and has left behind two sons, and his widowed daughter in law, and the daughter in law has died subsequently after the death of the Dayabhaga Hindu, the share which had to be succeeded by her would be granted to the heirs of her father-in-law.

[351]Provash Ch. Roy vs. Prokash, 50 C.W.N. 559.

Mitakshara is a commentary wrote by Vijnaneshwar on the Yajnavalkya Smriti. The Mitakshara school of law is prevalent in the whole India except in the regions of Bengal and Assam. This school of law recognized the concept of both joint family property and separate property. The doctrine of survivorship is applicable under the Mitakshara school of law, and the nearness of blood relationship is recognized under this system. The provisions of the enactment had introduced fundamental changes in the structure of the Mitakshara coparcenary. The Act had led to the abrogation of the doctrine of survivorship. According to this doctrine, the sons have an interest in the property by virtue of their birth in the Hindu Joint Family. After the death of the coparcener, his interest will get devolved by the surviving coparceners. The result of this Act was that the undivided interest of the coparcener after his death would not be vested with the surviving coparceners through the doctrine of survivorship. On the contrary, immediately upon his death, the husband's involvement in the joint family under the Mitakshara is vested upon his widow The Act has introduced the widow, widowed daughter in law, widowed granddaughter in law as the new heirs to the property of the deceased Mitakshara Hindu. The widow of the deceased coparcener will take her interest as an heir in the joint family property as it stood at the time of his death. In the case of ***Satrugnan vs. Sabujpari***[352], the court laid down that though due to the provisions of the Act the Hindu widow has been bestowed only with the same interest as her husband under the Mitakshara coparcenary and has not been conferred with the same rights as of her husband.

[352] Satrugnan vs. Sabujpari, AIR 1967 S.C. 272.

The widow has the right to claim a partition under Section 3(3) of the Act. After the claim of the partition, the widow's stake in the coparcenary property is established, while the interest of the remaining coparceners through survivorship remains suspended. The Hon'ble Court in Hare ***Krishna v. Jujeshi***[353], held that a widow's interest acquired under the Act is an alienable right, and that she has been given the power to claim partition for possessing her portion. The Hindu belief that a widow retains the legal persona of her deceased husband until partition is proclaimed. The widow had been granted the powers that would have been accorded to her husband during the marriage. The deceased coparcener's status has not been severed as a result of the Act. In ***Patti Lakshmi Perumallu v. Patti Krishnavenammallu***[354], it was held that by obtaining an interest in the coparcenary property, she does not become a coparcener, and her share will fluctuate according to the Hindu Joint Family additions and deaths. In the event that a Hindu Widow refuses to seek partition of her husband's property, the surviving coparceners shall inherit her interest. The widow of a coparcener is not elevated to the rank of a coparcener, but she remains the member of the Hindu Joint Family in the same way as she was before establishment of the Act. The Hindu Joint Family continues to exist in the same manner as before with the exception that the family will be subjected to the statutory rights which have been granted to the widow of the deceased coparcener as a result of this Act.

However, the Act had accorded the widow the same interest in the joint family as the coparcener, thus affecting its basic structure. In ***Satrughan v. Sabjpuri***[355], the court held that

[353] Hare Krishna v. Jujeshi, 1965 Orissa 73.
[354] Patti Lakshmi Perumallu vs. Patti Krishnavenammalu, AIR 1965 SC 825.
[355] Satrughan vs. Sabjpuri, AIR 1967 S.C. 272.

the widow's interest is originated by statutory substitution rather than inheritance or survivorship under the Hindu Women's Right to Property Act, 1937. Since the widow's interest arises as a consequence of statutory substitution, the surviving coparcener's entitlement to survivorship under the Mitakshara remains suspended. Even if the deceased has left behind his male issues, the Act enables the property to be devolved to the deceased's wife. The Hon'ble Court in ***Saradambat v. Subba J. Aiyer***[356] held that after the doctrine of survivorship has been abolished, the creditor cannot be barred from attaching the property. However, a widow has the power to claim a partition as a coparcener, she does not become a coparcener as a result of this. According to the Act, the widow's share of the property is susceptible to fluctuations due to births and deaths in the Hindu Joint Family.

The position of the Karta under the Mitakshara system, on the other hand is unaltered. The court concluded in the case of ***Seethamma v. Veerana***[357], that the Karta has been granted with the authority to alienate the widow's stake in the joint family property for the benefit of a legal estate or for a legal necessity. A mere severing of status can carve out the widow's stake in the joint family property; in such cases a division by metes and bounds is not required to carve out the widow's share in the property.

Thus, the provisions of the enactment have a substantial impact on the law of devolution under the Mitakshara school of law in parallel with the Dayabhaga school of law.

CHAPTER III: CRITICISM AND CHALLENGES FACED BY THE PROVISIONS OF THE ENACTMENT.

[356] Saradambat. vs. Subba J. Aiyer, I.L.R. (1942) Mad.
[357] Seethamma vs. Veerana, AIR 1950 Mad 785.

The Hindu Women's Right to Property Act, 1937 had been enacted with the objective of restoring women's right to property, however, it had been riddled with contradictions and ambiguities. The phrases used in Section 3 of the Act could be construed in a multitude of ways. In ***Nagappa v. Mukambe Shetti***[358], the court held that the term interest which has been employed in the Act refers to a variable portion of the share of property, whereas the term share refers to a fixed portion of the property.

The Act was not comprehensive enough to interpret the wording despite its objective of providing women with fairer treatment in terms of their property rights. The phrases which have been used in Section 2 of the Act have outraged the principles of Hindu Law. It might also be argued that the makers of the Act had no intention of repealing Hindu Law's prohibition on women's unchastity. They merely intended to provide Hindu widows a higher position in the society without interfering with the norms of Hindu Law. However, the phrases were not extensive enough leading to a confusion as to whether the Act enabled the widow to engage in acts of wickedness and vice without any fear.

The Act had been condemned because it did not specifically repeal the prohibition on a Hindy widow inheriting a property interest owing to unchastity. The provision of Section 2 should be interpreted in such a way that restricts Hindu Law by preventing a Hindu widow from inheriting her husband's property if the deceased has left behind surviving coparceners in the Hindu joint family or if the deceased has left behind a son, grandson or great grandson. Another objection which levelled at the Act's provisions concerned the term "lineal descendants" which had been used under Section 3 of the Act. The provision was only

[358] Nagappa Narayan v. Mukambe Shetti, AIR 1951 Bom 309.

applicable to widows, and it did not extend to the daughters. Later the term "lineal descendants" had been eliminated from Section 3 by the 1938 Amendment. The Act had also widened the inequality between men and women by allocating only a small portion of property to the widow. Women in ancient times had absolute power over their holdings, and the critics had argued that despite women excelling in the fields of profession, education, and politics in the year of enactment they were only granted a limited interest in the property. The Act grants the widow a broader power of alienation on one hand, but a narrower authority on the other, when contrasted to the coparcener who is unable to render a gift out of the coparcenary property.

Furthermore, the Act had been critiqued for giving concrete rights to the deceased widow's son rather than the widow herself, as the Act did not place any restrictions in the son's interest. The usage of the word intestate in Section 3 of the Act had also been criticised. The usage of this word contravened Hindu Law because the provision had been made applicable exclusively in those cases where a Hindu male had died without a will, thus violating the norm that a coparcener has no right establish a will with respect to the coparcenary property. In order to resolve this ambiguity, the term intestate had been removed by the Amendment of 1983. Another notable shortcoming in the Act was that it only gave rights to the widows i.e., the widow of the deceased, the widow of the predeceased son, and the widow of the predeceased grandson, while the daughter of the deceased had been granted with no rights in the property.

As a result, despite the fact the Act had enhanced the status of a Hindu widow in the society but owing to its criticisms it had been repealed.

CONCLUSION

For a prolonged time, the right to property of women had been a contentious issue in the legal system. Change is an integral aspect of a society's evolution; therefore, a culture can never remain static. With the passage of time, the concept of gender equality has gained traction and has been recognized as a human right. The Act has been a watershed moment in the history of women's property rights, since it has revolutionised people's attitudes on widows and has given them a respectable position not only in the Hindu families but also in the society. The Act had been articulated with the intention of advancing the rights of Hindu widows. Though women's property rights have progressed significantly over the last century, the Act found it challenging to reconcile with the developments with the principles of Hindu law, which have been place in generations. The Act had been criticised for infringing on the daughter's right to property because there had been no statutory provisions governing their rights to their father's property. Following widespread criticism of its provisions, the Hindu Women's Right to Property Act, 1937 had been repealed. As a result, the Hindu Succession Act, 1956 and the Hindu Marriage Act, 1955 had been enacted, bringing about significant changes. The provisions of these enactments were revolutionary in nature in such a way that they established matrimonial remedies such as judicial separation, restitution of conjugal rights, divorce as well as granting equal rights to the females of the Hindu Joint Family, namely mothers, daughters and widows. The Hindu Joint Family Amendment Act, 2005 rendered the daughter a coparcener with the goal of enhancing their economic situation and ensuring equality between males and females. Women's notions of being eligible for a

restricted share of the property have been eradicated as a result of these laws, and gender discrepancies have been reduced to some extent.

GENDER DISCRIMINATION AND SECTION 498A OF INDIAN PENAL CODE

-SRISHTI YADAV

Introduction:

Dowry refers to the payment in cash or gifts from the bride's family to that of Groom's at the time of marriage. It is an ancient custom and at times, is used as a condition of contract, which if not accepted would lead to the non-happening of marriage. It is deeply rooted in the Indian society. Incidents such as dowry death, bride-burning, other forms of mental and physical harassment are not uncommon in Indian society. The lawmakers, taking a serious note of the consequences of these evils, came forward with a national legislation in 1961. But with rapid dowry related deaths and failure of the legislation, certain substantive and procedural changes were brought; for example, the 1983 amendment which led to the creation of two sections 304B and 498A in the Indian Penal Code. The article throws light over different aspects of harassments which the married women are subjected to, especially in context of section 498A, IPC.

Dowry: Definition and Meaning

As per Section 2 of the Dowry Prohibition Act, 1961, 'Dowry' refers to any property or valuable security which is either already given or consented to be given in a direct or indirect manner. The agreement might be between:

- The two parties to the marriage

- The parent of either party or any other person linked to the marriage and the other party.

The dowry could be given at, before or anytime after the conclusion of the marriage. It excludes dower or Mehr in the case of Muslim marriages. An important case dealing with the principle issue of:

Whether a prior agreement is required for dowry or not?

Is Nunnu Ventakateshwarlu v. State of Andhra Pradesh[359] whereby the deceased, unable to bear the harassment by her in-laws for selling the land gifted by her parents, undertook suicide. Ample evidences pointed to the fact that demands of dowry were made. The High Court was of the view that unless the prior agreement between the parents and in-laws of the girl to ay valuable security and money is proved, the accused would not be liable for dowry death i.e. section 304B, IPC. Therefore, the High Court understood the gravity of the word, 'agreed to be given' under the definition of dowry as per the 1961 Act and the accused was convicted under section 498A and 3016, IPC.

Cruelty:

Section 498A was inserted in the IPC in 1983 to provide protection to the married women and to prevent them from being the victims of cruelty either by her husband or his relatives. A punishment for up to three years and fine has been laid down for the offence. As per the section, the term 'cruelty' has been assigned wide meaning to include:

- Any such willful conduct that causes the woman to commit suicide or might lead her to cause serious injury in terms of life, limb or health (both mental and physical)

[359] AIR 1996 SC 108

- Harassment of the woman to force her or any other person related to her to fulfill unlawful demands regarding property or valuable security. It might be on account of failure to fulfill such demand.

In K. Prema S. Rao v. Yadla Srinivasa Rao[360], the court held that the gift of land which the father made to his daughter was in the nature of 'streedhan' and is for the maintenance of the daughter. Further in Amar Singh v. state of Rajasthan[361], the court held that, "It is the act of cruelty or harassment by the husband or his relative over the woman which is punishable; the demand of dowry by itself isn't punishable under section 498A."

Section 498A: Criticisms

The section was inserted so as to ensure that women live with dignity in their matrimonial homes and to protect women from offences like cruelty and harassment. But when these laws are subjected to cross-investigations, the number of acquittals is found to be much more as compared to convictions. Therefore, the Supreme Court considers it more to be a form of legal terrorism than a shield for women. The law is mostly misused by urban and educated females.

- In the case of Arnesh Kumar v. state of Bihar[362], the court stated that even the bed-ridden grandparents and relatives settled abroad were arrested. Thereby, women use it as a weapon to teach lessons to their husbands if they are dissatisfied with them.

[360] AIR 2003 SC 11
[361] (2010) 9 SCC 64
[362] (2014) 8 SCC 273

- In case of NRI husbands, they are not quite aware of the Indian laws. Because of extortion and fear to be put in jail, they are made to do the acts which they wouldn't have done otherwise. He is made to live under the false fear of section 498A.
- Regular police visits into the premises of men might hamper their reputation. The lack of requirement of any proof and investigation before arrest makes it easy for the women to seek revenge from their husbands. On the other hand, there is no such law to protect men from such exploitations.
- At times, gifts are misunderstood as dowry which again can pose serious problems.

Because of the gross misuse of this section, its true credibility is being lost, thereby, it would not be wrong to call it anti-men.

Relevant Case Laws- Latest developments:

In the case of Arnesh Kumar[363], The wife made an allegation about the demand of dowry and being driven out of her husband's home when the demands weren't met. The court observed that since this section is cognizable and not-bailable, the disgruntled wives use it more often as a weapon than a shield. Thereby the court laid down certain guidelines to ensure that the police officers refrain from unnecessary arrests and magistrates don't follow a casual approach in such cases:

- The accused shouldn't be arrested immediately after the filing of case; first they have to see whether the parameters under section 41 CrPC are being met or not
- There should be filling of the checklist inclusive of the sub-clauses under section 41(1)(b)(2) of CrPC along with the grounds and evidences for arrest

[363] *Supra*

- It is only when the police officers have noted their satisfaction from the report that magistrate shall authorize the detention
- If the police officers fail to follow the directions, they are liable for departmental action
- If the same happens with Judicial Magistrate, the appropriate High Court shall start a departmental action against him.

In Rajesh Kumar and Ors v. State of U P[364], the wife laid allegations of dowry over her husband and his relatives. But the relatives were of the view that some guidelines must be there to prevent over-implication. Even though the relatives might not have been the party to the offence, they were repeatedly dragged into the court. The Court laid down clear guidelines to prevent the use of section 498A, which got further amended in Social Action Forum for Manav Adhikar v. Union of India[365]:

- The examination of complaints related to section 498A and other such cases could only be done by a designated area investigator
- The parties in case of a settlement, may go to the High Court as per section 482, CrPC to quash the proceedings or any other order
- In case the submission of a bail application has been made to a public prosecutor with at least one day notice; if possible it should be decided on the same day
- For the ordinary residents of India, it shall not be a routine exercise to impound the passports or issue Red Corner notices., etc

[364] AIR 2017 SC 821
[365] (2018) 10 SCC 443

- Such rules shall not be applicable in the case of actual physical harm/death.

Is there a need of Amendment to section 498A of IPC?

Light has already been thrown over the gross misuse of the section. Apart from that, there is a lack of clarity and distinction between the laws in interrelated areas of cruelty and dowry death. It might have been advantageous earlier but today it is producing counter-productive results. Section 498A is found in numerous forms but might not be recognized in cases where the facts are unable to satisfy the required legal ingredients. At times, requirement of proof is a burden over the victim and justice shouldn't be denied owing to this reason.

As per the 243rd Law Commission Report, the statistical data supports the criticism of over-implication as pointed out by the courts. Number of cases stay pending in different parts of the country. Also, there have been evidences of unnecessary accusations of more than one person in the cases. It might happen because of the wide interpretation that the section provides. For that purpose, a few suggestions could be useful:

- A burden of proof could be imposed over the party which will allow only certain cases to be fought. The entry of bailable, cognizable cases which are compoundable could be reduced in the Courts. This would lead to increased effectiveness in the handling of the cases
- There are several cases where men are abused by their wives and in-laws are unnecessarily dragged. Family Counseling Centres should take a lead here and listen to their side of the story as well.

- Women NGO's could play an important role in critically studying such cases and to ensure that no girl files frivolous complaints against her in-laws. They shall conduct examinations about the abuse of the action and inform people about implications as well.
- There has to be strict penalty in case of false accusations. Also, the officials who are involved with the falsely inculpating girls and their families must be levied with criminal charges.

Conclusion:

From the article, it could be concluded that 498A could prove both a shield as well as a weapon to women. The government has to be more pro-active in its responsibility to ensure that no frivolous cases are filed and it proves to a balanced section in terms of encouraging gender equality. Though the section has been quite misused in the recent years but that doesn't mean that it should be scrapped. The measures suggested above along with the streamlining of the procedures in handling such cases could prove to be beneficial. Emancipation of women is surely the need of the hour but in any case, Pro-women laws shouldn't get converted into anti-men laws.

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