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

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

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With this thought, we hereby present to you

Jurisperitus: The Law Journal.

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THE LEGAL AND ECONOMICAL DIMENSIONS OF BONDED LABOUR SYSTEM

-DR. SURENDER KUMAR

Abstract: *Indian Economy has made decent progress in past few years however the larger chunk of population continues to engage in the unorganized or informal sectors. With increased liberalization of the economy and more focus on profit maximization the social welfare is often put on back burner. In these times a special attention is required for the exploited and marginalized section of society. The problem of bonded labor is a socio-economic problem. Though India has put appropriate legal tools to ensure complete elimination and abolition of bonded labor system, these tools are found to have underperformed. The problem is more or economical rather than social and hence appropriate economic tools are also desirable to be put in place in order to secure the economic and social justice to the millions of labors who living their lives in bondage. This article discusses the legal framework that protects the bonded labor from exploitation and the economic conditions of the bonded labors in various sectors of the economy. It aims to enhance our understanding the issues and challenges before us and suggests various tools to solve them.*

***Keywords*:** BondedLabour', 'Economics', 'Exploitation', 'Marginalization', 'Child Labor', 'Debt'.

I. INTRODUCTION

India has always been committed towards pulling people out of bonded labour and clutches of slavery. The ambitions are remarkable but the situation is not. Even after 70 years of the promise to economic, social and political justice, the marginalized continues to face various socio-economical and socio-political challenges. The System of Bonded Labor hardly finds mention in the political speeches. A section of society so politically irrelevant and economically exploited that even Hope fails to knock its door. Bonded Labour System is the

modern form of slavery and is still practiced in various parts of India despite being criminalized about four decades ago. The System gives no regard to age and gender; it traps not only an individual but even the families; it doesn't recognize the minimum human dignity and it only seeks to perpetuate the bondage from generation to generation. There are various Laws in India to address the issue, but the real question is whether these laws are enough to tackle the problems. In order to answer that, we need to examine the real nature of the problem. The problem is not merely legal or social, rather it is more of an economical problem. The laws may do away with the exploitation by providing the fair rules of the game however it cannot make a weak player stronger. Most of the Bonded Labours are engaged in the unorganized and informal economy. The basic wages, regulation of service, work conditions, facilities specific to these informal sectors is not provided for. Neither satisfactory attempts have been made to formalize these sectors. As a result, the larger part of these sectors remains in the dark and somewhere in that darkness a bonded labour is constantly subjected to exploitation, violence, injustice and marginalization. Thus understanding both the legality and economics revolving a bonded labor becomes an imperative to better appreciate the need to the hour. This article aims to explore both of these aspects. It discusses the existing Legal Framework for the protection and upliftment of the bonded labor as well as the various sectors of economy they are engaged in along with various economic factors such as living standard, compensation, economic justice etc.

II. LEGAL FRAMEWORK FOR PROTECTION OF THE BONDED LABORS

There is a wide variety of laws to protect the interests of the bonded labors in India. Right from the Constitution to the various laws enacted by both the Parliament and State Assemblies there are range of protections, direct and indirect, available to the bonded labors. However, due to various factors such as lack of awareness and education and presence of marginalization and

backwardness, these protections are rarely availed by the bonded labors. But nonetheless majority of the laws are sought be discussed so as to bring forth a wider picture of legal framework advocating against Bonded Laboring. Indeed, the general and special laws pertaining to the labors or workmen are applicable to bonded laborers also, but, for the sake of brevity, an attempt is made to discuss only those which directly apply or accord protection to the bonded labors.

1. ***The Constitution of India***

The foremost law which finds its relevance here is the Constitution of India, 1949 i.e. the *grundnorm*. The provisions of Constitution regarding protection of the Schedule Castes and Tribes are much relevant as the most of the laborers who are trapped into the bonded laboring belongs to these sections. The Constitution guarantees a Right against Exploitation as a "fundamental right" under "Article 23 and 25 of the Constitution". It prohibits *Traffic of human beings and* ***beggar*** *and other similar forms of forced labor*[1]. It lay down a separate fundamental right to the children below the age of fourteen (14) years of age and categorically states that "*No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment"* under "Article 24".With this specific mandate the Constitution also provides for other ancillary provisions such as the "Right to Equality (Article 14) , Right against discrimination (Article 15), Right to equal opportunities in the matters of public employment (Article 16), Right against Untouchability (Article 17), Right to freedom of Movement, Right to free speech and expression, Right to carry out any trade and profession etc.(Article 19) and Right to life and dignity (Article 21)". The Constitution also provides to the children above six (6) years and till fourteen (14) years of age a "Right to

[1] "Article 23 of the Constitution of India, 1949"

Education (Article 21A)". These rights are well recognized and protected. However, there are certain rights which are recognized but not specifically protected by the Constitution. These rights are put under "Part-IV of the Constitution titled ***Directive Principles of State Policy"***. These rights are to be given due regard by the *State* while enacting laws and making policies. Article 42 talks about making provision for just and humane conditions of work and maternity relief it mandates that the "*State shall make provision for securing just and humane conditions of work and for maternity relief.* Similarly Article 43 casts an obligation on the State that it "*shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co operative basis in rural areas."* In addition to these directive principles, the Constitution also provides for promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections under Article 46. It mandates the State to promote "*the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation"*.Hence the Constitution clearly identifies the problems faced by the bonded laborers provides for protection of the same.

2. ***The Bonded Labour System (Abolition) Act, 1976***

Though the Constitution was fully enforced in year 1950, it took a quarter of century for the parliament to effectuate the spirit of Article 23. The "Bonded Labor System (Abolition) Act, 1976" is the major legislation dealing with the subject it defines certain key terms such as bonded debt, bonded labour and bonded labour system. The term bonded debt is define to mean "*an advance obtained, or presumed to have been obtained, by a bonded laborer under, or in*

pursuance of, the bonded labor system;"[2] and a bonded labourer is defined to mean "*labourer who incurs, or has, or is presumed to have, incurred, a bonded debt* under Section 2(f)".

The definition of the bonded labour system is found under "Section 2(g) of the Act" wherein it is defined to mean "*the system of forced, or partly forced, labor under which a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect"* to any of the five (5) instances as follows[3]:

i. "In consideration of an advance obtained by him or by any of his lineal ascendants or descendants."
ii. "in pursuance of any customary or social obligation"
iii. "in pursuance of any obligation devolving on him by succession"
iv. "for any economic consideration received by him or by any of his lineal ascendants or descendants",
v. "by reason of his birth in any particular caste or community, the laborer would render labor or service, to the creditor or to his benefit OR forfeit the freedom of employment or other means of livelihood OR forfeit the right to move freely throughout the territory of India, OR forfeit the right to appropriate or sell his property or product at market-value"

Section 6 of the Act extinguishes the debts of the bonded debt and bars initiation of any proceedings before any court in relation thereto. Section 9 imposes imprisonment of up to three years on any creditor who accepts the payment with regard to the debt extinguished by virtue of section6. Where a labourer or Vigilance Committee claims a dent yo be bonded debt then Section 15 casts the burden of proof on the creditor to prove it otherwise. The Act also provides

[2] "Section 2(d) of the Bonded Labour System (Abolition) Act, 1976"
[3] Ibid

for various penalties and punishments. Section 16 of the Act imposes maximum of three years of imprisonment on anyone who compel a person to do the bonded laboring. Further Section 17 and 18 also imposes similar punishment on any person who attempts to or lends money under the bonded labor system and enforcing any custom, practice or tradition enforcing the bonded labor system respectively. Apart from these provisions Section 19 also provides for imprisonment of up to 1 year to those who fails to restore a bonded laborer the possession of property taken from him.

3. ***Other Legislations***

Apart from the above discussed laws there are various other laws indirectly touching upon nad providing protection to the bonded labours. These are as follows:

- "The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 (As amended by Act 35 of 2016)"
- "Contract Labour (Regulation & Abolition) Act, 1970"
- "Indian Penal Code, 1860"
- "The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989"
- "Employee Compensation Act, 1923 (As amended through EC (Amendment) Act, 2017"
- "The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979"

As already discussed that the list will go on to include all the applicable laws however for the sake of brevity only the laws that specifically applies to the conditions of the bonded labours are being listed here.

4. ***The Central Scheme for Rehabilitation of Bonded Labours, 2016***

Apart from the above discussed legislations the Union Government has also floated the Central Scheme for Rehabilitation of Bonded Labours, 2016 with effect from 17.05.2016. The Scheme

provides for an Immediate interim relief at the time of rescue up to Rs.20,000 to each victim. It further enhances the financial assistance from previous *"Rs. 20,000/- to one lakh per adult male bene□ciary, Rs. 2 lakh for child labour & women and Rs. 3 lakh to trans-genders, or woman or children rescued from ostensible sexual exploitation*[4]". It also makes various provisions for Land, housing and other non-cash assistance. It also seeks to dedicate an amount of Rs. 50 lakh per district for bonded labour surveys. The Scheme provides for creation of "District Bonded Labour Rehabilitation Fund" with a permanent corpus of at least Rs. 10 lakh at the disposal of the District Magistrate for extending immediate help to the released bonded labours.

In addition to this Scheme there are various other schemes that can be availed by a bonded labour viz. "Grant in Aid Scheme on Child Labour, Grant in Aid Scheme on Women Labour, Rashtriya Swasthya Bima Yojana. Craftsmen Training Scheme (CTS), Apprenticeship Training Scheme (ATS) and Skill Development Initiative Scheme (SDIS) etc"

5. ***Key Judicial Precedents***

The Hon'ble Supreme Court and the High Courts have, from time to time, pronounced various judgments on the subjects in the public interest litigations under "Article 32 of the Constitution". In these judgments the Courts have made various directions to the competent authorities who are directly or indirectly responsible for the implementation of the Bonded Labour System (Abolition) Act, 1976. Few of these remarkable judgments are discussed hereunder along with the key directions made therein.

i. "Bandhua Mukti Morcha v. Union of India (UOI) and Ors"[5]

[4]The Central Scheme for Rehabilitation of Bonded Labours, 2016

[5] AIR 1984 SC 802

The Hon'ble Supreme Court held that "*Whenever it is shown that a labourer is made to provide forced labour the Court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration and he is, therefore, a bonded labourer entitled to the bene□ts under the law."* It also noted that "*the State government should adopt a non-formal and unorthodox approach in implementation of the law which is an important instrument for ensuring human dignity"*

ii. Neerja Chaudhury Vs. State of Madhya Pradesh[6]

Taking cognizance of the letter dated 20.09.1981 of the petitioner about 135 bonded laborers who had been released with a promise of rehabilitation but not rehabilitated even after 6 months the Hon'ble Supreme Court held that "*Rehabilitation must follow in the quick footsteps of identi□cation and release, if not, released bonded labourers would be driven by poverty, helplessness and despair into serfdom once again."* It also mentioned that "the *Social action groups operating at the grass root level should be fully involved with the task of identi□cation and release of bonded labourers."*

iii. **"Santhal Pargana Antyodaya Ashram v. State of Bihar"**[7]

The Hon'ble Supreme Court in this matter stressed about the issuance of release Certificate to the bonded labourers. The Hon'ble Court directed that "*All the labourers who have been found to be bonded by the Saxena Committee may be directed to be released . . . and on their being released the concerned Collector will issue forthwith a certificate to each of them certifying that he or she is a bonded labourer and has been released from bondage. These certificates*

[6]"AIR 1984 Supreme Court 1099"
[7]"1987 Supp (1) SCC 141"

shall be issued by the concerned Collector and handed over to the bonded labourers simultaneously with their release."

iv. "Public Union for Civil Liberties v. State of Tamil Nadu"[8]

In this Case the Hon'ble Supreme Court discussed about the obligation of the State Governments to provide rehabilitation to the released bonded labours. It categorically directed the State Governments "*To provide adequate shelter, food, education to the children of the bonded labourers and medical facilities to the bonded labourers and their families as part of a rehabilitation package*," and also suggested for taking steps for survey and identification of bonded labourers and prosecution of offences pertaining to them and ordering reports to the Supreme Court on compliance with these directives. The Court also recognized the importance of the various social action groups and NGOs and suggested that "*The services of philanthropic organizations or NGOs could very well be utilised for rehabilitating released bonded labourers. State could give necessary financial assistance under proper supervision".*

v. DhanurjayaPutel v. State of Orissa[9]

In this case the Hon'ble High Court for the State of Orissa made a comparision between slavery and bonded laboring. The Court stressed that minimum wages must be provided to a labourer otherwise it is equivalent to Slavery. The court stated that *"It appears from all the aforesaid meaning attributed to the term 'slave' and 'slavery' that deprivation of the freedom of movement and right of expression with respect to person or property can be connoted as the meaning to the term 'slave' or 'slavery'. In this case, as per the prosecution allegation, when a person is allowed to put a labour of about 18 hours a day for a paltry sum of Rs. 30/- may be with the assistance of his family members and yet he shall not have the freedom of expressing*

[8] (1994) 5 SCC 116
[9] 2002 (II) OLR 412

his grievance against the exploitation and meagre payment, this Court finds no better example of satisfying the requirement of the term 'slavery' in the context of the present day scenario and the prevailing law. Therefore, the allegation available from the Case Diary makes out a prima facie case satisfying the requirement of the terms 'slave' and 'slavery' too."

Law is an evolving phenomenon. It evolves with the society and seeks to address the contemporary needs of any given society. The prohibitions, abolitions, restrictions and regulations not only suggest the development of social consciousness but also reflect the social evils that a society seeks to get rid of. Though, despite such a rich jurisprudence and strict laws the practice of debt bondage is still prevalent, but nonetheless some progress has been made. It needs to be noted that most of the bonded laboring occurs in the unorganized sectors like agriculture, plantations etc. We must provide for minimum wages, basic work conditions etc. for the workers so the exploitation is eliminated and a labor is given a fair amount and that his generations are not forced into repayment of their debt.

III. THE ECONOMIC PERSPECTIVE ON BONDED LABOURS

From an economic point of view the issue of bonded labor is far more than mere servitude for repayment of debt. The problem is more aggravated due to non-regulation of key sectors like Agriculture where these workers are employed. Legality may seek to reinforce social or moral values; however the core principles of economics are quite distinct. Economics, as such, is more about *value* of a thing and *reciprocity* in exchanging values. From a perspective of a Lender economic justice would be to receive the value he lent along with the opportunity costs i.e. interest accrued. For a bonded labor it might be about the opportunity cost of working somewhere else where he could have generated more value and have repaid the debt of the Lender much earlier than the time of bondage. The law doesn't aims to deprive the lender of

his due, but to discourage the exploitation of another under the guise of such due. Mostly the marginalized and the backwards are subjected to such exploitation. In the foregoing discussion we shall discuss how the Schedule Castes and Tribes are trapped into this bondage. For the sake of brevity only key sectors where bonded labor is practiced are being discussed here. Bonded labour, it may be noticed, is rampant in "brick kilns, stone quarries, crushing mines, beedi manufacturing, carpet weaving, construction industries, agriculture, in rural and urban unorganized and informal sector, power looms and cotton handlooms, fish processing etc".[10]However the most of the bonded labors are found in the following sectors:

1. **Agricultural Sector:**

The Agricultural sector witness a lot of bondage labor as the sector has never been regulated and organized. Till date the largest number of the bonded labors belongs to the Agricultural sector. There are practically no minimum wages or service regulations, monitoring or inspection for them. Despite legal prohibitions the practice continues till date especially in agricultural States like Punjab, Haryana, and Uttar Pradesh etc. Similarly the terminology used for them varies from region to region.

In Punjab the Bonded Labors are known as *Siri*. Usually they are members of the Schedule Castes and Schedule Tribes and are denied even basis of rights and are also outside the purview of the basis labor protections. Their wives are usually employed for cattle-shed cleaning, and are indirectly bonded because of their husbands or fathers. Similarly the children employed in agricultural areas are known as *Pali*. They are treated like slaves and are often subjected to physical violence and boycotts. Similarly in the State of Madhya Pradesh the cases have often

[10]"Public Union for Civil Liberties v. State of Tamil Nadu (2013) 1 SCC 585"

been reported from the Harda District usually the people belonging to the *Bhil* and *Gond* Tribes are targeted. Apart from these the states of Andhra and Tamil Nadu have also reported various cases of bonded labors in agricultural sectors from time to time Pradesh, Bihar, Haryana, Karnataka, Orissa, Maharashtra.

2. Brick Kilning Sector

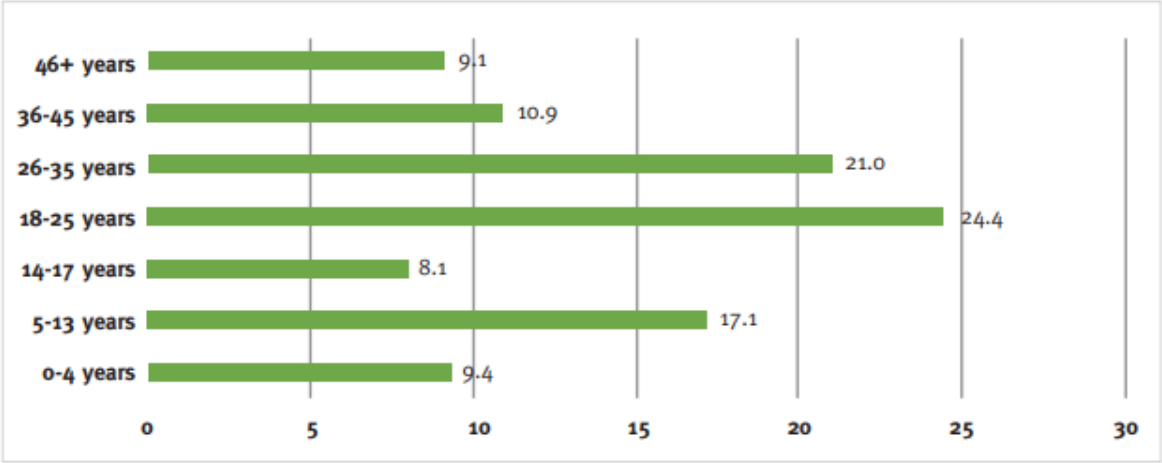
The Brick Kilning Industry employs a lot of bonded labors. A study conducted by the "Anti Slavery International" on brick kiln workers from three states – "Chhattisgarh, Punjab and Uttar Pradesh" which involved 383 persons, of which 339 were directly engaged in brick moulding work in kilns found "*that **100% of brick moulders were from a minority group; all were from traditionally marginalised/ excluded castes and classes**. In break-down, 53% were Scheduled Caste (Dalits), and 47% were 'Other Backward Classes' (marginalised socio-economic class). Whilst there were no members of the Scheduled Tribes (Adivasi groups) this is likely due to the selection of states (Punjab, Uttar Pradesh and Chhattisgarh)."*[11]The report studied various aspects of the Brick Kiln workers such as working conditions, leaves, age group of workers, reasons for employment, work environment etc. It found that such labors were not only underpaid but were also required to work overtime for no compensation. The report discusses the quarterly and monthly loss incurred by a worker due to non –payment of overtime wages as depicted in the table below:

[11]"Slavery in India's Brick Kilns & the Payment System, 2017"

	Monetary loss of a brick kiln worker due to absence of overtime wages	
	Per Quarter	Per Month
As per the 75 hours of overtime in a quarter (permissible under law) & at the current minimum piece wage rate, i.e. Rs.578.89/1000 bricks	Rs.5,100	Rs. 1,700
As per the actual 262 - 534 hours of overtime in a quarter & at the current minimum piece wage rate, i.e. Rs.578.89/1000 bricks	Rs. 17,952 to Rs. 36, 312	Rs. 5,984 to Rs. 12,104

Thus it is clear from the above that not only the workers are at constant risk of their life but they are exploited very rigorously. The report also found than in most cases the wages of the workmen would be withheld for the entire season which is usually 8-10 months long. With more than 33% of the labors being underpaid in the sector 90 percent of them had to pay for their electricity and buy their own equipments. The report also studied the age profile of the labors working in the sector. It found that the "*Brick kiln moulders usually migrate to the kilns with their families, including their children or other dependents. Only one member of the family, generally the male head, is registered with the kiln as the employee - either formally or informally.*""*For payment purposes, this family unit is paid as a single entity, however all members of the family contribute to the production of bricks for the working family unit. In case of inter-state migrants60, almost all the workers are migrating as a family, including children. In case of intra-district migration in Punjab, 50% of the Punjabi workers migrate with their family. It appears that this is done to increase the production capacity of the unit by adding more members from the family to the unit". "The majority of the workers (76%) migrate in units of two to five members. 87% of the persons, who migrate to the kilns, including children, work at the kiln. Of the brick kiln population, the largest numbers are in the age group of 18-25 years, followed by a significant percentage in 26-35 years of age. 8% of the*

populations are adolescents (14-18 years) while 26% are pre-adolescents, toddlers and infants."[12] The following is the graphical representation of the age profile of the workers who were interviewed in the study.



The report also found that 96% of the labors have taken advances from the employers and their wages were with held for entire season whilst they were required to work on average fourteen hours a day in the summer months. 65% to 80% of children under fourteen are working for an average of nine hours a day in the summer months.

3. ***Stone Quarries and Crushers***

The famous case of *Bandhua Mukti Morcha vs UOI* and*Neeraja vs State of MP*, were pronounced in the backdrop of bondage of the labours engaged in the Stone quarries. The infamous Stone quarries of Rajasthan are well known for the bonded labours.

"According to a study conducted by UNICEF in Kota and Bundi, out of 438 children, taken as a sample, 38% children worked in stone quarries. This report reveals that the situation for children living in sandstone mining areas of Kota and Bundi requires immediate attention.

[12] "*Ibid* (Slavery in India's Brick Kilns & the Payment System, 2017)"

These children are drawnto work by deprivation and the hope of earning a living for themselves and their family, yet they are in reality sacrificing their childhoods, their education and their chance of a better future."[13]It is pertinent to note that not only these labours are affected physically but due to the nature of the sector they are also exposed to various chemicals which leads to reduction in life expectancy and various diseases. These workers work in high temperature and are prone to respiratory illness such as silicosis. A report suggested that of the 150 labours working in stone quarries 50 were suffering from silicosis.[14]

Similarly in other states also "*More than 70% of the workforce in granite quarries are casual labourers employed on a daily wage or piece rate basis. With wage advances of one to three months wages and high interest loans, the quarry owners are tying workers to the job. Nearly 25% of the workers are recruited by providing loans, with annual interest rates of 24% to 36%". "More than half of the migrant workers owe large amounts to quarry owners or contractors. This creates debt bondage, as workers must clear the amount before they can change employer. In nine quarries this form of modern slavery is prevalent. Middlemen are recruiting worker, mostly migrants, but offer them no contract and do not respect legal requirements". "Migrants constitute around two third of the total workforce in granite quarries. Workers are mostly from so-called 'lowest caste' of Dalits or Adivasi (tribal people). They are extra vulnerable due to their low social status in Indian society".*[15]

4. ***Other Sectors:***

[13]"Children's Lives Cast in Stone; UNICEF, 2015"
[14]"Parker and Change: Feasibility Study: Combating Child Trafficking and Bonded Labor in Rajasthan"
[15]"India Committee of the Netherlands : The Dark Sites of Granite dated August 23, 2017"

The Bonded Labors are majorly found in the construction sector among others. They are often engaged through middlemen and contractors. It is not that these workers are engaged only in private areas but also governmental ones. For example the National Adivasi Solidarity Council rescued about 45 people from a governmental canal irrigation site in Karimnagar district on August 3, 2018. Most of these workers belonged to the most vulnerable Chenchu tribe. These workers were engaged by through a sub-contractor.[16] These types of workers are usually small or landless farmers who rely on loans from contractors or employers who lend on heavy rates. Owing to their inability to repay the debts in time they are offered to work for lump sum money or in lieu of debts. The women are often subjected to sexual and physical exploitation. Similarly in Jalandhar district of Punjab also various workers had been rescued. It was found that these workers have not been paid their wages for more than 4 months. On an inquiry conducted by the National Human Rights Commission it was found that even the local administrations failed to take appropriate steps to rehabilitate the workers.[17] Similarly the Plantation sector also involves a lot of bonded labors, these workers are usually found in tea plantations in the areas of Assam, Kerela and West Bengal and in Lemon plantations in Andhra Pradesh. The Tamil Nadu Commissioners Report (1995) also found that the migrant bonded labors were also found in cardamom plantations. The Mining Industry also employs a lot of child labour who are usually trafficked and bonded into laboring. A study conducted by the "Impulse NGO Network", an independent human rights organization, has found that there are 70,000 children working as bonded labourers in private mines in Meghalaya, in India's northeast. Children are reportedly trafficked from neighboring countries such as Bangladesh and Nepal[18]Apart from

[16]"https://thewire.in/rights/telangana-bonded-labour-rescue-tribals-compensation"
[17]"NHRC Case No. 663/19/1999"
[18]"https://www.dw.com/en/thousands-of-bonded-child-miners-in-india/a-5211821"

these areas the Bonded Labors are also found in various sectors such as Gem Cutting, Rice Mills, Bidi Manufacturing, Mat Weaving and Salt production etc.

Hence the Governments must take steps not only to propose effective laws but also for providing appropriate employment opportunities, basic wages, skill development, education and awareness and also to empower these workers to help them break the shackles of debts and free themselves of bondage.

IV. CONCLUSION AND RECCOMENDATION

As it can be clearly found above that there are various legal tools to help the bonded labors but we need more of the economic and social tools. The law can only punish the irregular behavior, it may not however enforce the regular behavior. It needs to be understand that regularization of sectors such as Agriculture, Brick Kilning, Stone Crushing any many more where such exploitation occurs, would help us keep track from economic perspective. The focus should be more on the economic factors such as Unemployment, Literacy, Nutrition, Wages, Empowerment Schemes, Rural Banking, Insurance and so on and so forth. The unemployment rate in rural area needs to be calculated more effectively especially of the small and landless farmers, provisions should be made for development of their skill and opportunities must be created for those skills to serve or produce. The financial institutions must be made stronger in the rural areas and alternatives should be created for taking of debt by the marginalized. Thus, unless and until we employ economical tools along with the legal tools, the problem of bonded labor must remain intact.

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TRADE MARK: A WEAPON TO PROTECT BRAND

- SUHAS NARHARI TORADMAL

ABSTRACT

Rapid advancement in technology and liberalization of the Indian economy has given rise to a competitive environment, large number of brands and intense competition among them. The intensity of competition has also led to a set of undesirable activities like imitating, copying, forging, counterfeiting etc. of the most popular brands. A trade mark is a legal term for what is more commonly known as a brand name. Various forms of brand attacks, such as counterfeiting, duplication, re-circulation, refilling, etc., are rampant in the market. A brand represents an image and the consistent assurance of quality that a customer has the right to expect. However, duplicate products that enter millions of homes today bleed brands and original Brand Owner's revenue and reputation; they adversely impact the gullible consumers and the manufacturers and traders of the original brand. Trademarks are used to connect products or services with a trader so they serve as a badge of origin identifying the source of the products or services. As such, trademarks are closely connected with our business reputation, and should be protected. The present study attempts to focus on "Trademark" as an effective tool for Brand Protection.

Keywords: Brand Protection, Brand attack, Trademark, Innovation

INTRODUCTION

"What's in a name? that which we call a rose By any other name would smell as sweet." William Shakespeare, Romeo and Juliet.

Natural objects and things would mean the same irrespective of what you call them. However, in the modern day capitalist or market economy there are many things that do not follow this dictum; for them name or the way name is pronounced or the way it is written would make a difference.

Imagine the day beginning with brush with COLGATE, followed by surely, our day and life is incomplete with a lot of brands. Company selling products; this gives rise to birth of "Brand". Based on prior reputation a consumer chooses a particular brand over others.

Brands provide customer loyalty and recognitionto Brand Owner's offerings. Brands also serve theconsumers by assuring a host of related factors such as origin, quality, value of goods and services.

Building a brand demands considerable resources, hard work, time and investment. Whena brand is established, it becomes an object of envy. Invariably there will be many followers whowould like to avail the benefits similar to those enjoyed by a leading brand, if possible, without going through the hassle of the time and resourceconsuming brand building process. Such attemptswould be detrimental to the original firms who have built the brands the hard way. Trade Mark isone of the means to protect such firms against brand attacks.

Trade Mark registered or not is the unique name,sign, symbol, word, letter, numeral, label combination of colors etc. that would distinguish aspecific brand from others. The brand essentiallyenvisages identifying systems, encompassing apersonality, a relationship, and an image in consumer's mind. The most visible part of the brand is its elements: name, symbol, logo, associated colors, these are the most visible elements that help to memorize and remind a Brand. The consumers usually don't go beyond this superficial level of brand recognition.

The purpose of this study is

- To understand the Brand-attacks; and
- To comprehend Trademark registration asa Brand Protecting strategy

THE CONCEPT OF TRADEMARK

The Trade Mark offers a property right; meanwhile the brands is a relation between an audience group and a product, idea, service, withthe aim of adding value to a business. It is necessary to understand the TradeMark because the Trade Mark provides legal mechanism to protect the brand.

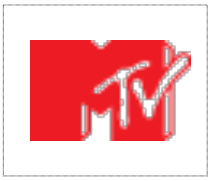
For William A. Knudson, Trademarks are an important way to convey information to consumers in a cost effective manner. Choosing and defending a trademark is often a very important part of marketing strategy.

According to Section 2 (m) of The Trade Marks Act, 1999, “mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods,

packaging or combination of colors or any combination thereof.

Word

Logo



Letter

Device

Examples of Trademark

In the above examples, Apple i-pod itself is a markas a device-mark. The round circle in the Apple i-pod has achieved huge reputation due to its usageand people are easily able to differentiate betweenother i-pod and the Apple i-pod due to its functional part of the round circle. The Apple hasasked the Trade Mark Registry for the registrationof a Trade Mark for their functional part round circle as a device mark and they successfully received the registration for it.

When the logo and word both are in combination, then that mark is known as a composite mark. Thebest example of composite mark is NESTLE, where one can find a bird is sitting in the nest and below it, the word NESTLE is written. The composite mark has more strength due to its image and word combination. It gets easily registered in the mind of the consumer as well.

The average intelligence consumers are also able to differentiate the mark due to its more distinctiveness. According to section-2(zb) of The Trade Marks Act, 1999, "Trade Mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services ofone person from those of others and may includeshape of goods, their packaging and combinationof colors.

The mark has to fulfill two important conditions to become Trade Mark:

1. Graphical representation, and
2. Distinctiveness.

1. Graphical representation-

For registration of mark as trademark, the basic condition is that, themark needs to be represented in a graphical form. It is easy to make graphical representation ofconventional mark like Coca-Cola, Adidas, Amuletc. The challenge comes when marks are non-conventional marks. The sound mark, smell mark,and taste mark are non-conventional marks and are difficult to put in graphical representation. It isone of the limitations of Indian Trade Mark Act that trademark cannot be registered if it cannot berepresented graphically.

2. Distinctiveness-

The distinctiveness can be achieved by two ways:-

a) Inherent distinctiveness, and b) Acquired distinctiveness

1. Inherent distinctiveness – When a coined word is used as trademark for the first time, which has neither been heard before nor has been known, that mark is said to have acquired Inherent distinctiveness in the market. It is always advisable to coin a new mark so that it can achieve distinctiveness from the day one and in turn reduces legal compliances to be followed and will eventually grant a better protection. For example, Google.

2. Acquired distinctiveness –A Trade Mark can also acquire distinctiveness by longer, continuous and uninterrupted usage. For example, TATA.

The Trademark may be registered or unregistered.

According to Section 2(v) of The Trade Mark Act, 1999, "Registered Trade Mark" means a trade mark which is actually on the register and remains in force. The registered Trade Mark can use ® with their Trade Mark. The unregistered Trade Mark shall not use ® with their mark but can use TM with their Trade Mark irrespective of that if they apply for registration or not.

Concept of Brand and Its Importance:

A brand is a much more than merely a 'legally defensible proprietary name' (Lopes 2007 pp. 5) and it serves more than as a differentiating device,indicating source. Brands are essentially identity systems, encompassing a personality, a relationship, and an image in consumer's minds.

For Allen Adamson brand is a promise that links a product or a service to a consumer. Brands represent mental associations that activate themselves in relation with differentproducts we buy. Brand is a shortcut that helps and simplifies the buying decision process and creates a symbolic content. Building a brand image is a long term-process.

Thebrand value is given by the intensity of financial,rational and emotional connections establishedbetween the brand and its clients. As aconsequence, building the brand image is made ona rational and emotional basis, which is shown below figure.

<table>
<tr><td colspan="2">Resonance
(Loyalty, Commitment, Community)</td></tr>
<tr><td>Reasoning (Consideration, Safety, Credibility, Quality, Superiority)</td><td>Feelings
(Love, Entertainment Social acceptance)</td></tr>
<tr><td>Performance
(Basic characteristics, Reliability, Service efficiency, Design, Price)</td><td>Representations
(User’s Profile, Personality, Values, Buying Experience)</td></tr>
<tr><td colspan="2">Brand Recognition (Association, Classifications, Identifications)</td></tr>
</table>

Empirical studies on trademarks

There are several empirical studies including trademarks, patents or other forms of intellectual property. Recently, there has been an increased interest in the use of trademarks The main themes are a) the patterns of firm’s usage of trademarks in relation to their innovation activities and new products, b) trademarks relations to firm‟s economic performance and c) trademarks and firm‟s size.

Trademarks and innovation

To conceptualize how trademarks can affect innovation when seen both as exclusive rights and as signals of quality and intent, Davies and Davies (2011) have developed the matrix, below. As can be seen from Figure 4, trademarks as exclusive rights can function as the legal basis for both weak (and non-existent) entry barriers and strong entry barriers. Trademarks can protect both novel and non-novel goods. There are four scenarios:

1. The trademark both protects an invention that is novel and is effective as an entry barrier;
2. The trademarked invention protects a product that is novel, but is ineffective as an entry barrier;
3. The trademark protects a product that is non-novel, but is effective as an entry barrier;
4. The trademark both protects a product that is non-novel, and is ineffective as an entry barrier.

HOW BRANDS ARE ATTACKED

Brands, the soul and essence of many businesses in the modern world are subject to attack even without the fair practice. Today majorly, brands are subject to two types of attack, i.e. fair and unfair attacks. Fair attacks are done by competing brands whereas unfair attacks are done through forgery, fraud and every devious means of cheating, misguiding and creating confusion in minds of the consumers.

Visible as well as invisible "shield" must be used to protect a brand from the attack and defend against fair and unfair attack countering every instance of non-heraldic cheating. The Brand owners must take proper precautions to protect their intellectual property and every available technique to mitigate the risk of attack on the brand. Following are some types of Brand attacks:

There are mainly 4 types of Brand Attacks

Tampering: In the Indian environment, tampering is prevalent, it is done to tinker with the product or packaging with an intension to pilfer, modify, adulterate or replace. In various industries opening secondary packaging is very common. Though there is no official data available but it is estimated that 1% to 3 % loss happens to companies' due to pilferage or damage during transit.

Replication: In replication attacks are made with an intention to fool customer and in turn an imitation of the product or packaging or both are created. The motto is to create an impression in customer's mind that he or she is buying the right product. There are mainly 4 types of Replication which are also known as "Spurious".

Imitation of shape/colour: These are the imitations that copy the shape/Colour of the originals. These are lookalike products which are usually seen in the rural part of India. FMCG products are mainly attacked in this type.

Great resemblance of brand name: Inthis attack, not only Colour and shaperather Brand name has also a great resemblance with the original product and brand. This is alsoknown as pass off.

Duplication: It doesn't misguide the routine buyer but makes fool to firsttime buyer. The imitators keep thegood quality packaging of the copiedproducts to match it with the original one. It is an alarm for the "Brandowners" to be more aware and act.

Counterfeits: Counterfeiting is the extreme level of replication. The product's shape, colour, size, packaging everything has an exactmatch with the original one. Most of the routine buyers may also get adversely affected with the counterfeits. If any Brand is being counterfeited, then the Profit and sale has a danger to go down.

3. Diversion: In this type of attack, online traffic is diverted to unauthorized, competitive, illegitimate or portable fraudulent venues thereby reducing the return on investment made on marketingone's brand. This tactic may include search engine marketing abuse, spam, cyber squatting, SEO manipulation and other techniques. The aim of these attacks is to steal traffic meant for legitimate sites.

4. Recirculation: Recirculation of the authentic packaging and filling it with spurious products. This recirculation mainly happens in developing countries where leftover containers of the original products are boughtby the scrap traders which mean it has a resalevalue. In many markets there are proper guidelines and schemes regarding disposal or collection of the packaging. Many dealers also offer small discounts on returning the packaging materials. Mostly the recirculationcases occur in liquor and Bottled water industries, Auto spare industry.

Nowadays all of the above forms of brand attack are present across the globe and have become a hot topic internationally as well. Therefore, it is very important to protectyour brand and Trademark, one of the intellectual property, is the most importanttool to protect it.

The IP legislation is flexible and applies case to case basis, purely on the facts and circumstances of each case. Therefore, it is imperative from a brand manager perspective that brands aremarketed in such a way that they warrant the widest protection possible. General Managementof commercial establishments now seeks legalredress at every pretext and against every such party that seeks to encroach upon exclusivity builtaround a trademark. Apart from this, companies have now become more proactive in protecting their brands and also do internal reorganization ofbrands/ trademarks wherever required. Therefore, the gospel of brand

management has amalgamated with IP to bring forth the novel theory of Trademark Management.

TRADE MARK PROTECTIONS IN INDIA

According to Ankit Prakash (2009, pp. 117-119), Registration of IP rights is evidence of the registrant's legitimate ownership of such rights. InIndia recently on 6th March, 2017, The Trade MarkRules, 2017, came into effect.

According to new rules one can take following steps for protecting the Trade Mark:

1. Request to registrar for search: Under Rule 22 oftrademark Rule, 2017 any person can request the registrar to search for an identical or similartrademark, which either has been registered oran application for whose re-registration hasbeen filled. The request to registrar for search isvery useful for any who wants to start a new business adopting new Trade Mark for his business. He can search about same or similar Trade Mark available in record of the registry by following the search process.

Registration of Trade Marks: According to Rule23, Trade Marks Rules (TMR), 2017, an application for the registration of a Trade Markin respect of specification of goods or servicesshall be made in Form TM-A and shall be signed by the applicant or his agent. Registration of Trade Mark is utmost important for any trader. It protects thetrademark and also can file infringement caseagainst the unauthorized user of identical Trade Mark.

The certificate of registration is useful as a prima facie case for any legal process. Once a trademark is registered, the proprietor avails all the benefits of the ownership of the property. Section 29 of Trade Marks Act, 1999 provides remedy to registered proprietor of trademark to file infringement suit against unauthorizeduser of the mark before the district court. It is an advantage to the registered proprietor of trademark that he can file suit for infringement where he has his registered office.

Passing off action: Action for passing off is a common law remedy which has developed over a period of time through precedents of national and international courts. The unregistered Trade Mark owner may file suit for passing off against unauthorized use of same or similar Trade Mark. It is considered as “modern day tort”. Best example of Passing off case is – ErvenWarnink BV v J Townend & Sons (Hull) Ltd.

1. Well-known Trade Marks: According to Rule 124, TMR 2017, any person can request the registrar for determination of a Trade Mark as well-known, after submitting an application along with all evidences and documents to support the claim. The Trade Mark proprietor gets protection against similar or identical trademark, not only where it is registered but even where it is not registered, once it is declared as "well-known "Trade Mark.

The well-known Trade Mark may avail the benefitof "Trans-border reputation" principle and canbe protected in the territory where they have yetnot introduced their goods or services as well.

The Trademark provides various advantages to the Brand Owners like:

Legal Protection- The legal protection is only available to the owners of registered trademarks and they are entitled to sue fordamages when infringement arises. However, unregistered trademark owners can only avail protection by filling passing off and can get only injunction.

Unique Identity- Trademark registration provides a unique identity to the goods andservices.

Trust or Goodwill- To create a sense of trust, quality and goodwill in the mind of the consumers, registered Trademarks play a great role.

PROTECTING THE BRANDSTHROUGH TRADEMARKS

According to Peter J. Brody (2015) Brand is apriceless asset of any business so great care shouldbe taken to ensure proper protection of the Brand. Therefore, Organizations adopt various trademark strategies to protect and strengthentheir brands.

Few of such strategies are as follows:

Creating: Trademark is registered by filling Trademark application. This trademark filing strategy refers to the creation of new brands.

Hedging: Hedging refers to a company's intense simultaneous filing of several very similar trademarks. To protect different facets of brands with multiple trademarks, a company employs this strategy.

Modernizing: Modernizing strategies correspond to the renewal of established brands tokeep their appearance up-to-date and to maintaintheir strengths.

Extending: Extending brands, is the fourth strategy which is used in order to extendestablished brands to cover new products, potentially with the purpose of leveraging existing brands in new markets.

However sometimes, if trademark is not properlyprotected and also branding strategy is not utilized effectively, the trademark becomes "generalized". One of the disadvantage of too much popularity ofa brand is that, sometimes the trademark becomesgeneric and customers start associating brand with services or goods itself, thereby trademark losses its distinctive characteristic and brand dilutes. As a result of this, such trademarks are cancelled from the register and others can legally use such mark for indicating their goods. This diminishes a brand's reputation and ultimately the brand loses all trademark significance and sometimes creates confusion among consumers.

Best examples to describe the above situation canbe the brands such as "Band-Aid", "Aspirin","Escalator", "Power-point", "Yo-Yo", "Xerox" "Dalda Ghee", "Sugar free" and many more. These brands have become generic and thereby have lost their trademark significance.

Therefore, it is not only important to create strongbrands but it is more important to protect them. Some of the ways in which business can protect their brand and trademark as follows:

i. Use marketing to reinforce your trademark, like advertises to make your trademark distinctive. Example - Johnson & Johnson changed theirs ads from "I'm Stuck on Band-Aid" to "I'm Stuck on Band-Aid brand."
ii. Trademark proprietor should consistentlyuse a generic signifier along with the mark to protect it from becoming generic. Example –Xerox started protecting its mark by popularizing the word "copier".
iii. Distinguish the trademark by capitalizingit or at least the first letter of the trademark.
iv. Use the trademark as an adjective (KLEENEX tissues) and not as noun(KLEENEX).
v. Do not abbreviate the trademark or alter itin any way (use H&M and not H and M).
vi. Use the trademark on a line of products rather than a single product (NIKE, used on sneakers and clothing).
vii. Most importantly, object to misuse of thetrademark by others.
viii. Educating businesses and consumers onappropriate trademark use.

CONCLUSION

Creating a strong brand is essential to business success but protecting that brand is also equally important. Registration of trademark is surely an effective tool in protecting and building a brand. However, with registration of brand, proprietor of the trademark needs to ensure that trademark is not getting misused by other else it will affect their reputation and goodwill. To protect brands from counterfeiting products, constant watch over market is required so that no one adopts similar or identical mark.

It is also essential to keep constant watch over the exhibition / any promotion venues; whereinnew products are being introduced. It is also seen that the proprietor of new trademark, though invests huge amount in setting up business and promoting their products, but found negligent in registering the trademark. It leads to legal proceedings against the identical or similar trademark users and in-turn affects the financial condition of the upcoming organization it is therefore necessary to spread awareness about advantages of registration of mark amongst entrepreneurs, new startups and small business groups. It is known that the well-established corporate spends huge amount in litigation to protect its trademark.

It is therefore, the need of an hour that each and every corporate should set up "In-House Intellectual Property Cell "which constantly watch over the competitors, and global market from any fraudulent use of their trademark. It will not only help the corporate to avoid litigation, but also strengthen their own brands, reputation and protecting the brands from being generic/diluting.

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INSURING LARGE INFRASTRUCTURE PROJECTS UNDER INSURANCE LAW IN INDIA

- ABHAY DEV SHARMA, BHAVYA BOSE & KARTIK BAIJAL

ABSTRACT

Over the previous decades, the India has seen an increase in the number of significant infrastructure projects. In the present era, building infrastructure projects such as industrial facilities, megastructures, and commercial establishments has grown increasingly demanding, requiring highly sophisticated and specialized technical abilities Insurance has traditionally aided the infrastructure business by pooling risk, mostly in the form of direct property and mechanical losses. Projects and project contracts have become more complex and there is a growing requirement for continuous coverage of the project from start to finish, including loss of revenues and launch delays. Another facet of risk that hovers over the infrastructure industry is the liability, which is increasing as the number of transcontinental high-value contracts, worldwide consumers, and awareness levels rise. Under such pretext, it becomes important for the risk managers and decision makers to understand such contexts and take benefits from the advantages of insurance.

Infrastructure construction projects have a distinct personality, which does not lend them towards uniformity. a large-scale construction project goes through several ups as well as downs. Thus, it is required that each project is handled with the utmost caution. Majority of these infrastructure projects take place on a contractual basis.

A contract is a "self-contained statement of obligations as between the parties to the contract." Due to the contract's nature being significant, demanding, costly as well as a time-consuming process, they tend to play a key role in such infrastructure projects. These contractual agreements are vital in managing the risk in such projects since they transfer the risk to the numerous agencies via the numerous contracts between them.

This paper has tried to define 'large infrastructure' as the word 'infrastructructure' has not been defined in the law. For the understanding of the readers, the large infrastructure means the large corporation established factories and infra in the country whose capital is more, which acquires larger space to run, and it's infrastructure serves at number large in the society for example: the textile industry with large factories, pipeline infrastructure, roads etc.

This paper attempts and focuses upon risk allocations and legal framework which is needed in today's context with regards to the growing infrastructure market in India.

INTRODUCTION

Executing major projects has become increasingly difficult, and contractors, investors, lenders, and project sponsors are increasingly exposed to a wide range of hazards that might degrade their assets, influence their revenues, and affect their repayments and other contractual commitments. Today's major projects in building, electricity, and complex infrastructure development face a variety of hazards in addition to traditional physical concerns.[19]

Founded in 1870, the Bombay Mutual Life Insurance Society was the first insurance business to charge the same rate for Indian and non-Indian lives.[20] In 1880, the Oriental Assurance Company was founded. The general insurance industry in India, on the other hand, may be traced back to the Triton (Tital) Insurance Firm Limited, the first general insurance company formed in Calcutta by the Brits in 1850. Until the late 19th century, the insurance industry was virtually exclusively controlled by foreign corporations.[21]

The Insurance Act of 1938 was the first complete piece of law, establishing strong state control over the insurance industry.[22] Following independence, the insurance industry expanded at a quicker rate. Even though Indian firms increased their grip on this market, insurance continued a cosmopolitan phenomenon.

The overall investment income of the insurers in India is anticipated to fall by -2.7 percent in 2020, relative to a 6.2 percent increase in 2019, owing largely to highly volatile stock markets and uncertain market circumstances as a result of COVID-19.[23] In addition, infrastructure

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[21] Ibid.
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[23] *Proposed changes in regulations for infrastructure investment trusts likely to open alternate source for INDIAN INSURERS, says Global Data, Global Data* (2020), (last visited Sep 16, 2021),

projects have been the favored investment option for insurers in India.[24]As per the Life Insurance Corporation of India, overall infrastructure investments in the life insurance sector were valued at INR3.84 trillion as of March 31, 2019, up from INR3.76 trillion during the same period the previous year.[25]

Furthermore, rising demand for housing and infrastructure developments makes InvITs an equally appealing offer for insurers.[26]The insurance regulator in India has issued proposed regulations for surety contracts as the country seeks to boost infrastructure, a sector prone to delays, defaults, and litigation. The proposed Insurance regulatory and development authority (Surety Insurance Contracts) Guidelines, 2021, will allow surety insurance or bonds to be offered. These are simply promises in the absence of collateral. Surety insurance protects the granting authority, such as the government, against bad service, project failure, or contractor default. They also serve as working capital guarantees for building companies.[27] One of the key conditions under the draft rules is that the guarantee should not exceed 30% of the project value.[28]India has announced a plan to spend Rs 15 lakh crore on road construction over the next two years.[29] Nonetheless, the industry is prone to delays and cost overruns. Banks are hesitant to provide guarantees to private contractors that bid on projects due to concerns about bad loans.[30]

Recently introduced Surety Insurance, also called an insurance bond or a surety guarantee, unlike bank guarantees, it does not require collateral. It is a three-way arrangement between the contractor (primary debtor), the awarding body (oblige), and an insurance firm (surety) that

https://www.globaldata.com/proposed-changes-regulations-infrastructure-investment-trusts-likely-open-alternate-source-indian-insurers-says-globaldata/.

[24] IRDAI Annual Report 2019-2020

[25]Abhinav Kaul*, Insurers get nod to invest in debt instruments of InvITs, Reits mint (2021*), (last visited Sep 16, 2021), https://www.livemint.com/money/personal-finance/insurers-get-nod-to-invest-in-debt-instruments-of-invits-reits-11619379085893.html.

[26] *Investing in Infrastructure Harnessing Its Potential (2020* (last visited Sep 16, 2021),), https://in.sk-pmk.ru/418.

[27] Monal Sanghvi, *how surety insurance can help India's infrastructure sector Bloomberg Quint (2021),* (last visited Sep 16, 2021), https://www.bloombergquint.com/law-and-policy/how-surety-insurance-can-help-indias-infrastructure-sector.

[28] Ibid.

[29] *Government targets road Construction WORTH Rs 15 lakh crore in next two years*, (last visited Sep 16, 2021), https://www.timesnownews.com/business-economy/industry/article/government-targets-road-construction-worth-rs-15-lakh-crore-in-next-two-years/751594.

[30] PTI, *483 infrastructure projects show cost overruns OF ₹4.43 lakh crore*, The Hindu, (last visited Sep 16, 2021), https://www.thehindu.com/business/483-infra-projects-show-cost-overruns-of-443-lakh-cr/article36041494.ece.

issues the instrument is crucial step in the development of an effective mechanism to help all the parties involved in the process. An attempt to establish regulations for surety contracts would aid in meeting the infrastructure sector's enormous liquidity and finance needs. Surety bonds will level the playing field for major, mid-sized, and small contractors. Rather than simply financial capabilities, a developer's capability, technical experience, and track record will be used to evaluate it.

These agreements are of various types:

1. Contract bond: Does provide confidence to the authorities, developers as well as subcontractors, and suppliers that the construction company will fulfil its contractual obligations. Bid bonds, performance bonds, advance payment bonds, and retention money are examples of these.

2. Advance payment bond: This is a commitment made by the insurance company to cover any outstanding amount of the upfront payment if the construction company fails to fulfil the contract as stipulated or fails to comply with the conditions.

3. Bid bond: A bid bond protects the awarding body financially if a winning bidder fails to sign the contract within a stipulated time frame.

4. Customs and court bond: If the contractor fails to pay, the surety guarantees payment to a public office such as the tax office, customs administration, or the court. Such a requirement might occur because of a court action or while clearing goods via customs processes.

5. Performance bond: This resolve allows an obligee to rely on the guarantee to satisfy commitments if the contractor/construction company fails to perform.

6. Retention money: Money left aside by the benefactor and provided to the contractor as retained earnings.

DISCUSSING RISKS INVOLVED WITH REGARDS TO LARGE INFRASTRUCTURE PROJECTS

Managing risks in infrastructure construction projects has been viewed as an essential management process to achieve the project objectives in terms of time, cost, quality, and scope. Large infrastructure projects suffer from substantial risk undermanagement at nearly every level of the value chain, throughout the project's cycle. Poor risk assessment and risk allocations, for example, early in the concept and design stage through contracts with builders and financiers, leads to larger realized risks and private-financing constraints later. In the final stages of infrastructure projects, risk is also undermanaged, losing a large portion of their value. Importantly, project owners frequently fail to see that risks incurred during one stage of a project can have a major influence on subsequent phases.[31]

It is critical for all agencies to be aware of the degree of risk exposure or the hazards that they must always manage. If this awareness is lacking, it could result in a slew of conflicts, arguments, and disruptions. Inadequate and faulty contract documentation, as well as improper contract structures and an undue burden of risk being assigned to one of the parties by the contract, are all key sources of dispute and conflict[32]

Many common forms of construction contracts, such as FIDIC (International Federation of Consulting Engineers), NEC (new engineering contract), and JCT (Joint Contracts Tribunal), have a universal idea that a given risk is assigned to the party in the best position to handle it. However, the practical reality in India and many other jurisdictions do not reflect this theoretical paradigm. Most project risks are typically passed on to developers, who then attempt to shift them on to contractors via turnkey contracts. Even though contractors technically assume such risks due to commercial need, they may not have the expertise or experience to handle them.

[31]Frank Beckers and Uwe Stegemann, A risk-management approach to a successful infrastructure project, Mc&Kinsey & Company, (Nov 01 2013), https://www.mckinsey.com/business-functions/operations/our-insights/a-risk-management-approach-to-a-successful-infrastructure-project.
[32] Chaitali Pawar, Risk Management in Infrastructure Projects in India, 2 International Journal of Innovative Research in Advanced Engineering (2015).

Several contracts with multiple tiers of contractors must be managed seamlessly during construction, and advice from a swarm of consultants must be integrated in real time to keep the project moving forward. In summary, a good contract management process leads to competitive advantage by improving compliance through standardized processes, better understanding of existing contractual obligations, developing foresight into contracts, uncovering contractual and regulatory risks, and uncovering contractual and regulatory risks.

Claims management has never been considered a specialized activity in India. Instead, it has been viewed as a component of a developer's or contractor's broader contract management effort, to be "activated" when an event that triggers a claim occurs, such as a delay event or a change or variation in the contract conditions. Despite the fact that proactive claim management can mean the difference between profit and loss, most developers and contractors have traditionally preferred to deal with claims informally (until a dispute arises), due to the stigma associated with filing claims and the reluctance of contracting parties to discuss claims, as admitting claims often results in an increase in cost or time for the project.

Because the effective realization of claims is dependent on contractual terms, it is critical to have a contract that is fair to both contracting parties. As a result, an effective claims management process begins even before the construction begins, with the preparation of construction contracts and the negotiation process. This is, however, easier said than done in the Indian setting. Construction contracts are frequently drafted in most competitive bids, especially those involving government agencies, to pass most of the construction risks to contractors, even if they are not the best party to handle those risks, and there is little chance to negotiate the contract, as any deviation from the contract can be assessed as a "material deviation from the tender terms".[33]

Standard form contracts provide a more equitable claims process, but also have stringent notice and record requirements, necessitating the presence of an experienced and professional claims manager in the contract management team. However, by using best practices in the field of

[33] Santosh Pai, Risk management in Indian infrastructure projects, Chinese Business Law Journal (2020), (Last visited Sep. 19 2021), https://law.asia/risk-management-indian-projects/.

claims management in private sector building contracts, it is possible to minimize the crippling effects of disputes.

The importance of claims management has been repeatedly emphasized in Indian judicial declarations. In ***Jakki Mull v. Jagdish Thakral***[34], the Delhi High Court supported the arbitrator's decision to reject claims on the grounds that proper books of accounts of suitable quality were not kept. The Supreme Court of India also agrees that building contracts require a reasonably sophisticated claims management process. The claimant failed to prove his claim to the expected degree of satisfaction in the case of ***National Highways Authority of India v. ITD Cementation India Limited***[35], where a FIDIC standard form contract with specified adjustments (conditions of application, or COPA) was employed.

Both unfortunate events could have been avoided easily if contractors had implemented a systematic claims management process that included legally vetted project correspondence, daily, weekly, and monthly progress reports, minutes of review meetings, updated/revised programmes, and test reports, among other things. Finally, Chinese contractors should avoid the pitfalls of "excepted matters" in India. Simply put, all contracts must be thoroughly reviewed to verify that all disputes originating from them are legally arbitrable and contractually susceptible to arbitration.

INSURANCE LEGAL FRAMEWORK FOR INFRASTRUCTURE PROJECTS BY IDNETIFYING RISKS

In the Indian context, infrastructure projects have minimal insurance coverage. The infrastructure insurance segment accounts for just 7% of the entire general insurance segment which is a very small amount when compared to the value and scope of the projects involved in the infrastructure domain. There are a few specialized insurance policies available to meet

[34] 2017 SCC OnLine Del 11667
[35] 197 (2013) DLT 650

the unique insurance requirements of infrastructure projects. Furthermore, most of the available items are uniform coverings with a "one-size-fits-all" mold.[36]

Specialized insurance coverage is needed in the large infrastructure projects as insurers generally classify infrastructure projects as engineering projects. The availability of extensive insurance alternatives goes a long way toward providing project developers and funders with peace of mind. Furthermore, administrative expenses associated with insurance are smaller and account for just a little part of the total expenditures involved. When India, sees and expects itself to become the world's third largest construction market by 2022 with the requirement of investment worth 50 trillion, for a sustainable growth in the country,[37] by building the future it also needs to make sure that it also secures such development by pointing out several risks which are also associated with it. Any firm or entity participating actively in an infrastructure project, and other important project stakeholders, should think about insurance to appropriately safeguard their interests and manage their risks throughout the project's lifespan. Because the size and nature of the project may limit the ability to meet contractual insurance requirements, it is critical to engage an insurance and risk advisor early in the process to help negotiate these requirements and tailor insurance solutions that can minimize the potential impact of project risks.[38]

There are two types of insurance policies in the Indian market: products that cover risks and comprehensive packages which cover several risks under the same policy. The benefit of comprehensive packages is that they ensure a variety of building and project risks in one package rather than having to acquire insurance for each component individually. However, due to the large value of the projects involved, many insurance policies are only available for projects with an amount covered of more than Rs 1 billion.[39]

a. The dilemma on the taxonomy of 'infrastructure'

[36]Indian Infrastructure, *Ensuring Infrastructure Limited options for tailor-made coverage*, (Last visited Sept 19, 2021), https://indianinfrastructure.com/2016/12/03/insuring-infrastructure/.
[37] India Brand Equity Foundation, Infrastructure Sector in India, IBEF, (Sept 09, 2021), https://www.ibef.org/industry/infrastructure-sector-india.aspx.
[38] Marsh McLennan,*Infrastructure*, (Last visited Sep 19 2021), https://www.marsh.com/in/industries/infrastructure.html.
[39] Supra at 18.

Before an individual demarcates the risks and goes to an insurer for insuring infrastructure, one of the biggest loopholes till date one can find is, the word 'infrastructure' per se has not been defined by any of the Indian Code. Not even the IRDA act defines it. Taxonomy, while being a technical subject, is essential for classification and legal clarity. In this case, a lack of uniformity and classification would be a concern among developers and investors owing to a lack of categorization and consequent undervaluation of prospects. The meaning of the word and its classification is totally based upon the policies, reports and observations made by different government committees and agencies. The ministry of Statistics and Programme Implementation commission chaired by C Rangarajan in the year 2001 attempted to define the word 'infrastructure' and classify it. The committee came up with several points; -

> *"**8.2.6** Infrastructure activities, such as power, transport, telecommunications, provision of water, and sanitation and safe disposal of waste, are central to the activities of the household and to economic production. Without any of these either economic production will suffer, or the quality of life will deteriorate. One could thus view these activities as essential inputs to the economic system.*
>
> ***8.2.7** Many infrastructure activities have the characteristics that they are not use-specific or user-specific: the same telephone system may be used in numerous productive activities, either (a) simultaneously if sufficient capacity is available, or (b) sequentially if there is crowding or congestion.*
>
> ***8.2.8** Infrastructure generally consists of long-lived engineered structures and may be one of the following:*

- *Public utility: power, piped gas, telecommunications, water supply, etc.*
- *Public works: major dam and canal works for irrigation, roads.*
- *Other transport sectors such as railways, ports, waterways."*[40]

[40]Government of India Ministry of Statistics and Programme Implementation, *Notion of Infrastructure*, (Last visited Sept 18 2021), http://mospi.nic.in/82-notion-infrastructure.

The income-tax department considers companies involved with power, water supply, sewerage, telecom, roads & bridges, ports, airports, railroads, irrigation, storage (at ports), and industrial parks or SEZs to be infrastructure for tax reasons. Moreover, specific tax breaks are also granted to industries such as fertilizers, hospitals, and educational institutions, which adds to the complexity. In addition, the Reserve Bank of India and the Insurance Regulatory and Development Authority have attempted to define infrastructure and designate sectors.[41]

Relying upon these definitions given by the committees, proper classification is required to let investors have a clear idea of what infrastructure is as per Indian law. Similarly, the word 'large infrastructure' is also to be defined. To know different sectors of infrastructure for seeking eligibility for tax incentives and viability gap financing and would be covered by an infrastructure regulatory framework that will include the imposition of user fees.[42]

b. Insurance Policies in the Indian Market

The Insurance Regulatory and Development Authority of India (IRDAI) regulates insurance companies. The Insurance Act of 1938 (the Insurance Act) and the Insurance Regulatory and Development Authority Act of 1999 are the major pieces of law governing the Indian insurance sector (the IRDA Act). There are formerly 11 insurance for the large infrastructures to take insurance under the general insurance such as: Machinery breakdown insurance, Electronic equipment insurance, Contractors Plant and Machinery policy, Boiler and Pressure plants policy,Fire insurance, Storage cum erection policy, Consequential loss policy, Transit or Marine insurance, Contractors all risk policy, Erection all risk policy and Industrial all risk policy.[43]

c. Revisiting the insurance principles with reference to large infrastructure cases-

Insurance is a contract wherein the insured pays an amount in exchange for the insurer bearing the risk of having to pay a bigger sum in the event of a certain catastrophe. In legal terms, it is

[41] ET Bureau, *ET in the Classroom: How is infrastructure defined in India?* (May 05 2011), https://economictimes.indiatimes.com/news/economy/infrastructure/et-in-the-classroom-how-is-infrastructure-defined-in-india/articleshow/8163891.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
[42] Ibid.
[43] Supra at 3.

a contract in which one person promises to indemnify another for a loss that may occur or to pay a quantity of money to him upon the occurrence of a certain event.

In the case of large infrastructure insurance, the claims made by an insurer company, or the party is made by the role of 'surveyor'. They will need to examine the claim and determine the overall loss incurred before they can provide you an offer for the damage. This will entail several procedures, including verifying the claim, examining the damage, and estimating the costs incurred because of the damage. In the recent case of Mahavir ***Road and Infrastructure Pvt. Ltd. v. IFFCO Tokio General Insurance Co. Ltd.***[44], the Hon'ble SC held that the insurance contract expressly stated that regular wear and tear was not covered. The Appellant tried to rely on what it described as excessive rainfall and water logging to demonstrate that this was not a case involving typical wear and tear. The facts on the record did not support such a contention and dismissed the case by supporting the NCDRC judgement passed.[45]

Things which can be comprehended from this case law and taking account of various facts stated above is risk which is major and not minor cannot be covered under insurance under the infrastructure insurance. Hence, risk allocation is important in the case of infrastructure insurance and specifically for the large infrastructure projects should have different categories of minor and major risks which can be only allocated by law.

Discussing Insurance principles with regards to infrastructure:

There are seven insurance principles which would be seen in the blanket of infrastructure by citing case to understand better-

1. Principle of utmost good faith: One of the primary principles of insurance. Both parties to the contract must sign the contract in absolute good faith, trust or belief. The individual seeking insurance must freely reveal and relinquish to the insurer all of his genuine information about the subject matter of insurance. If any facts regarding the subject matter of insurance are omitted, obscured, misrepresented, or provided

[44] 2019(201) AIC 167.
[45] Supra at 10.

incorrectly by the insured, the insurer's responsibility becomes invalid (i.e., legally revoked or cancelled).

2. Principle of Insurable interest: According to the principle, the individual getting insured has an insurable interest in the object of insurance. A person has an insurable interest when the physical existence of the insured thing provides him with some benefit, but its non-existence causes him to suffer a loss. In other words, the insured individual must suffer some financial loss because of the insured object's damage. For example: A person running a large factory has an insurable interest in that factory as he is getting income out of it. But the day he sells that factory he would not have any insurable interest in that factory. So, in this case ownership plays a vital role for evaluating insurable interest.

3. Principle of indemnity: Indemnity refers to the security, protection, and recompense provided in the event of damage, loss, or harm. An insurance contract, according to the concept of indemnification, is only signed to get protection against unanticipated financial losses coming from future uncertainty. Insurance contracts are not intended to make a profit; rather, their primary function is to provide compensation in the event of harm or loss. In an insurance contract, the quantity of compensation given is proportional to the number of losses suffered. The amount of compensation is restricted to the lesser of the amount insured or the actual losses. The reimbursement must be less than or greater than the actual harm. For example: Under this principle a certain case of 'act of god' comes up to take down more from the insurance company than what in general the certain company has incurred risk. In the case of pipeline of sewage in the city bursts due to heavy rain and clogging this would not be considered 'act of god' or *force majeure* rather it would be the responsibility of the company to get it repaired as this situation could have been controlled so the company cannot claim *force majeure* in this case rather they can go ahead to the insurance company explaining them the damage caused or loss incurred by them.

4. Principle of Contribution: The insured may seek reimbursement only to the amount of his or her real loss from all insurers or from any one insurer. If one insurance pays the whole amount of compensation, the other insurer might make a proportional claim. For

example: If a large textile industry is insured with company Y for Rs. 2 lakhs and with the other company X for Rs 2.5 Lakhs and the damage amounts to only Rs 50,000/- so here both the companies would collectively pay the amount. Company Y would give one third of the damage amount and the rest would be paid by company X.

5. Principle of Subrogation: As per the subrogation concept, when the insured is reimbursed for losses caused by damage to his insured property, ownership of such property passes to the insurer. This concept only applies if the damaged property has any value after the event that caused the harm. The insurer can only profit from subrogation rights to the degree that he has paid compensation to the insured. The subrogation principle precludes an insured who has an indemnity insurance from collecting from the insurer a sum higher than the economic loss he has suffered. For example: When two ships owned by the same owner collided due to the fault of one of them, the insurers of the ship not at fault were ruled not to be allowed to bring any claim on the owner of the ship at fault, although insurers of cargo owned by a third party may seek subrogation.

6. Principle of loss Minimization: In the event of an unpredictable occurrence such as a fire breakout or blast, the insured must always do his or her utmost to limit the loss of his or her covered property. In such a case, the insured must take all reasonable and necessary efforts to manage and limit losses. Because the property is insured, the insured must not ignore or act recklessly during such situations. As a result, it is the insured's obligation to preserve his covered property and avoid additional losses. For Example: If A's Factory of textile catches fire, under such scenario A has an obligation to stop the fire in his best capacity he may call fire police, emergency extinguishers which are implanted in the factory site to be used rather than just watching the factory burn he needs to try the bare minimum from his side rather than being inactive.

7. Principle of Causa Proxima: A loss is caused by more than one cause, the proximate, nearest, or closest cause should be considered when determining the insurer's obligation. The concept indicates that to determine whether the insurer is liable for the loss, the proximate (closest) and not the distant (farthest) must be investigated. For Example: The base of a cargo ship was pierced by rats, allowing sea water to enter and

causing damage to the cargo. There are two sources of cargo ship damage in this case: the cargo ship being pierced by rats, and sea water entering the ship through the puncture. The danger of seawater is insured, but not the primary cause. The closest source of damage is sea water, which is covered, and so the insurer must pay the compensation.[46]

The development of and advancements in product offerings have resulted from the competitive general insurance industry, which includes a variety of private companies. Competition has resulted in decreased premium pricing for many items, as well as increased service quality. However, new solutions tailored to address the risks associated in project development are an essential necessity for the infrastructure industry, especially with large-scale investment expected in the future years. On the contractor side, more understanding of various products is necessary, as is efficient risk management through the selection of the most appropriate insurance.

CONCLUSION

The Indian insurance industry has faced numerous hurdles throughout the years and has continually expanded and matured. The global pandemic, however, made the year 2020 particularly difficult. The epidemic prompted substantial modifications in how market participants conduct insurance transactions. Several regulatory changes have been enacted in the last year, the majority of which are geared at assessing the impact of the covid-19 epidemic and protecting policyholders' interests. The IRDAI issued several directives in response to the covid-19 pandemic, including instructions on how to handle covid-19 claims, extend grace periods for premium payments, loosen regulatory timelines, and expedite the servicing of insurance policies.

The government should work to develop regulatory institutions that are unaffected by political changes and operate independently in the future. Moreover, a proper framework with proper

[46] CA Rajkumar S. Adukia,Insurance Laws of India, (Last visited Sept 20 2021),https://taxguru.in/wp-content/uploads/2012/11/insurance-hb-1101.pdf.

categorization of infrastructure is the need of the hour for a country like India who is heavily investing upon its infrastructure.

Talking about avoiding risks in management is concerned, when a project contains state-of-the-art or uncommon structures, or unusual settings in developing countries, a lack of risk management skills might pose major dangers to the project's engineering. Because of the growing use of analytical and design software, a structured approach to risk identification is now again necessary. Engineers, whether working directly for Owners or for Contractors, should be encouraged to develop design methodologies that identify risks and uncertainties, as well as the facts that the design requirements are based on. Litigation almost never provides appropriate compensation for a failed enterprise. It is always preferable to carefully consider the choices for lowering risk rather than rely on the uncertain payout of litigation if the evaluation is incorrect. The evaluation of the criticality of risk is a complex subject concealed in uncertainty and vagueness.[47]

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REVISITING DOHA DECLARATION: A CASE OF WAIVER PROPOSAL AND THE PANDEMIC

- SHIVANI BAINSLA

ABSTRACT

The pandemic of Covid-19 coupled with the Indian and South African proposal for waiver of patents has revived the two decades old debate of primacy of public health over intellectual property rights. Though the proposal has not received enough support and was postponed, the same has lead many thinkers to analyze its pros and cons. While developed countries like the U.S.A. and the U.K. are going mask-free, others are experiencing the havoc of second and third waves. This has brought forth the factual background immediately preceding Doha Declaration. While many struggle to find the medical supplies, the global community is making constant endeavors to fight the pandemic. This article is an attempt to throw light on the entire matter concerning the proposal of the patent waiver. Part-I is Introduction. Part-II discusses brief history of the Doha Declaration and highlights the significant changes brought by and after it. Part-III highlights the various voluntary and non-voluntary measures taken by the global players and other countries invoking the flexibilities contained in the TRIPS Agreement. Part-IV discussed the issues raised against the proposal of patent waivers followed by Part-V (Concluding Remarks).

KEYWORDS:

"Doha Declaration", "TRIPS", "Covid-19", "Healthcare", "Patent", "Waiver", "WTO".

I. INTRODUCTION

In October 2020, India and South Africa submitted a joint proposal namely "Waiver from certain provisions of the TRIPS agreement for the prevention, containment and treatment of COVID-19" to the TRIPS Council at WTO requesting waiver of certain obligations under the TRIPS Agreement in relation to the COVID-19 technologies and resources including copyrights, industrial designs, patents, trade secrets etc. during the course of pandemic for the prevention, containment and treatment of COVID-19. The proposal received mix reaction by

different stakeholders. While many welcomed the proposal citing the gravity of situation, others rejected the same citing existing of sufficient flexibilities in the existing framework.

'The relevance of the Waiver Proposal stems from three concerns. The first is that exercise of intellectual property rights have impeded or are threatening to impede availability of medical products at affordable prices. Second, IP protection on various technologies can have a chilling effect on the innovation process involving COVD-19 medical products as potential innovators may to be inhibited in their efforts to develop new products. The third concern is that although WTO Members have carried out amendments to the TRIPS Agreement to enable access to medicines during public health emergencies, especially in countries which do not have domestic manufacturing capacities, the procedural complexities have not allowed smooth implementation of this mechanism, as stated earlier.'[48]

Thus, it becomes necessary to understand the impact of public health over IPR and the provisions of the Doha Declaration with respect to the same. It is also pertinent to explore various measures taken combat the pandemic both at the global and domestic level. As the waiver proposal has found popular support it also becomes important to understand the opposite side and analyze if the waiver proposal actually seeks a change and if it is necessarily required. This paper seeks to explore all these areas and analyze the legal and technical position.

II. UNDERSTANDING DOHA DECLARATION

The Doha Declaration on TRIPS and Public Health was adopted at the 4th WTO Ministerial Meeting at Doha, Qatar in 2001 with the objective of promoting balanced interpretation of TRIPS in the matter concerning intellectual property rights and the public health. The Declaration reaffirmed that the countries can use the public health related relaxations contained in the TRIPS Agreement and also promoted access of medicines to all.

The TRIPS Agreement contained provisions for recognition of product patents in pharmaceuticals and also measures such as compulsory licenses, parallel exports etc even

[48] Dhar, Biswajit and KM Gopakumar (2020). "Towards more affordable medicine: A proposal to waive certain obligations from the Agreement on TRIPS", *ARTNeT Working Paper Series* No. 200, November 2020, Bangkok: ESCAP. Available at: https://artnet.unescap.org

before the adoption of Doha Declaration. However, later during the outbreak of the HIV/AIDS pandemic several developing countries approached the WTO seeking clarification on the relationship between the TRIPS Agreement and public health. These developments ultimately lead to the adoption of Doha Declaration.[49]

The Doha Declaration has four major aspects, firstly, it defines the relationship between TRIPS Agreement and the Public health, secondly, it provides for the principles of interpretation of TRIPS Agreement, thirdly, it clarifies the flexibilities contained in the TRIPS Agreement, and fourthly, it reaffirms the commitment of technology transfers.[50]

The declaration explicitly recognizes the public health issues in developing and least developed countries especially from epidemics. The paragraph 4 clearly says that the TRIPS Agreement doesn't prevent countries from taking appropriate measures when it comes to public health. Similarly in Paragraph 2 it identifies TRIPS Agreement as a part of international action to secure public health. Thus, explaining the relationship between TRIPS Agreement and Public Health. Further in paragraph 5 it also states that in applying the rules of customary international law the TRIPS Agreement should be read and interpreted in light of its objectives and principles.

The Declaration further makes it clear that it is for the countries to decide upon the grounds for compulsory licensing beyond the three illustrations contained in Article 31 of the TRIPS Agreement i.e. national emergency, public non-commercial use and anti-competitive practices. It also empowers the national governments to determine as to what is national emergency. It also urges member countries to provide incentives to their companies to encourage them to transfer technologies to least-developed countries.

'Finally, on the issue of importing under compulsory license, Paragraph 6 of the Doha Declaration assigned further work to the TRIPS Council to sort out how to ensure extra flexibility so that countries unable to produce pharmaceuticals domestically, could obtain

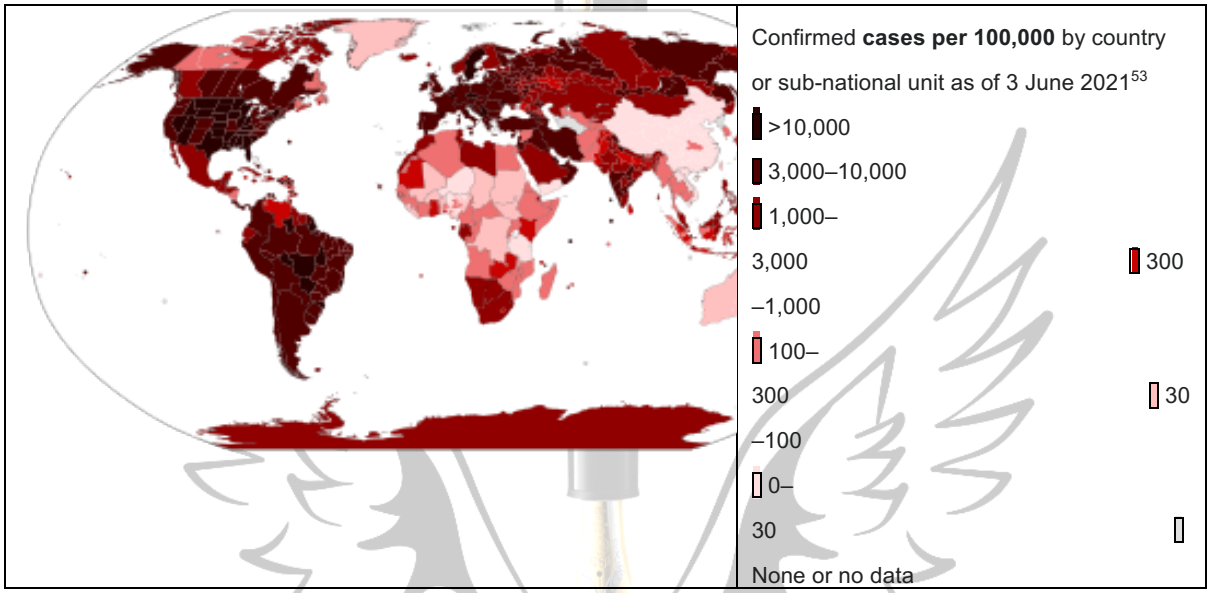
[49] Biswajit Dhar and K.M. Gopakumar, India-South Africa proposal for a waiver from certain obligations under the TRIPS Agreement (Dec 2020), Briefing Paper, Third World Network; Available at: https://twn.my/title2/resurgence/2020/345-346/cover01.htm

[50] *See,* Haochen Sun, The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health (2004), EJIL (2004) Volume 15 No. 1, 123-150; Available at: http://www.ejil.org/pdfs/15/1/335.pdf

supplies of copies of patented drugs from other countries.'[51] The same has already been addressed in terms of the decision of WTO in 2003[52] and incorporated in the rules in 2017.

III. GLOBAL RESPONSE AGAINST THE NOVEL VIRUS

The pandemic has indeed devastated the globe. The sudden and unexpected outbreak is continuing and is expected to continue even further. As per the data as on June 2021 more than 3.8 million people have died while more than 175 million are infected. The table below highlights countries from worst affected to least effected.



Such a huge disaster has concerned all be it the scientists or policy makers or the commoners. The humanity has joined hands in fights against the pandemic and explored ways to prevent the same. Broadly two sets of strategies emerged globally, as far as the monopolies of the IPR holders over the medicine and medical equipments are concerned. The first one is voluntary while the other is compulsory in nature. The first strategy includes collaborative efforts, open license sharing and technology pools etc. while the second strategy advocates for the compulsory licensing and parallel imports etc. of the patents in order to enable voluminous and quick production of the medicines and equipments

[51] Abhayraj Naik, Pharmaceutical Patents and Healthcare (2006), Socio-Legal Review, Volume – 2; Available at: http://docs.manupatra.in/newsline/articles/Upload/96E87039-EA9B-4F24-ABF4-12A76CE05B2E.pdf

[52] World Trade Organization, "Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health," Decision of 30 August 2003, WTO Doc. WT/L/540 (2003).

[53] Source: COVID-19 pandemic by country and territory, Wikipedia. Available at: https://en.wikipedia.org/wiki/COVID-19_pandemic_by_country_and_territory#cite_note-ReferenceA-7

Voluntary Measures

The voluntary measure involves sharing of intellectual property and other clinical trial related data to facilitate cooperation for research and development. It expedites the development, manufacturing and marketing of tests, treatments and vaccines. Many such efforts have been taken in this regard for example the Covid-19 Clinical Research Coalition has promoted sharing of relevant knowledge and date to facilitate equitable and affordable access to Covid-19 related technologies[54], similarly the European Committee for Standardization made certain copyrighted standards freely available for medical devices and PPE kits[55]. Further many IPR holders have came forward with open sources licensing and open access initiatives with respect to both the hardware and software. In this regard the efforts of Gilead, the patent holder for remdesivir, are noteworthy. Not only Gilead took various steps to increase its own production but it also signed various non-exclusive royalty free licensing agreements with generic pharmaceutical companies such as Cipla Ltd., Ferozsons Laboratories Ltd., Hetero Labs Ltd., Jubilant Lifesciences Ltd etc. from countries like Egypt, India, and Pakistan in which it has given power to the license holders to set their own prices for remdesevir.[56]

Apart from the above discussed voluntary efforts the World Health Organization has also initiated the Covid-19 Technology Access Pool (C-TAP) in response to the pandemic as an effort to create a pool of rights to better help detection, prevention, control and treatment of the pandemic. C-TAP is a voluntary mechanism where the patent holders or the right holders agree to contribute their knowledge, data, and technologies in fight against the pandemic.[57]

Compulsory Measures

It is needless to mention that the inventor of any drugs or equipment needs to secure patent in each country in which it intends to sell the invention. However in terms of Article 31 of the TRIPS Agreement, countries are permitted to put restrictions on the use of exclusive patent rights on the grounds of public interest. Thus, many countries have laid provisions for

[54] The Coalition currently has 224 institutional members with 408 representatives from 65 countries. Membership is held primarily by institutions. There are also 294 individual members from 75 countries whose organizations have not yet joined or who are unaffiliated with an institution. Available ar: https://covid19crc.org/

[55] COVID-19: Measures regarding trade-related intellectual property rights, WTO; Available at: https://www.wto.org/english/tratop_e/covid19_e/trade_related_ip_measure_e.htm

[56] Gilead Sciences Inc., 'Voluntary Licensing Agreements for Remdesivir' available at: https://www.gilead.com/purpose/advancing-global-health/covid-19/voluntary-licensing-agreements-for-remdesivir

[57] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool/solidarity-call-to-action

compulsory licensing in their domestic patent laws. For example in India, Section 84 and 92 of the Patents Act, 1970 deals with the compulsory licensing of patents on various grounds of public interests. Interested parties can be granted with the license on satisfying certain conditions viz. firstly, that unaffordable price of invention with results in non-availability to public, secondly, that reasonable requirements of public are not met, and thirdly, that such an invention is not worked in the territory of India. Further compulsory licensing can only be given after three years of grant of patent normally, however, if the central government is satisfied then in cases of national emergency, extreme urgency or, cases of non-commercial use it can be granted earlier also. The very first case of compulsory licensing in India was pertaining to the Bayer Corporation's compound called "sorafenib tosylate" to Nacto Pharma which was used to trat liver cancer.[58] The same was upheld by both the High Court and the Supreme Court also.[59]

Similarly the Article 57 of the Dutch Patent Act[60], Article L. 613-616 of the French Intellectual Property Code [61] and Section 53 of the UK Patents Act[62] also contains provisions for compulsory licensing. Interestingly, the German Law[63] provides for compulsory licensing specifically for pandemic also. These provisions are inspired form the TRIPS Agreement along with the Ministerial Declaration at Doha. Accordingly various countries have made similar provisions in their domestic legislations. Hence compulsory licensing also provides for sharing of knowledge, data and technology however unlike the voluntary measures it is a forced decision on the right holders.

However, the availability of vaccines still remains a significant issue. The recurring nature of Covid-19 clearly shows that the world needs to inoculate as many people as it can and that vaccination remains the only strong weapon in the fight against the pandemic. The data tells

[58] Bayer Corporation v. Natco Pharma Ltd., Order No. 45/2013 (Intellectual Property Appellate Board, Chennai), at 48, available at https://spicyip.com/wp-content/uploads/2018/02/Natco-v.-Bayer-INTELLECTUAL-PROPERTY-APPELLATE-BOARD-CHENNAI-–-4th-March-2013.pdf

[59] Please see, Bayer Corporation v. Union of India, AIR 2014 Bom 178 (2014); Bayer Corporation v. Union of India & Ors., Special Leave to Appeal, (C) NO(S). 30145/2014 (Supreme Court of India).

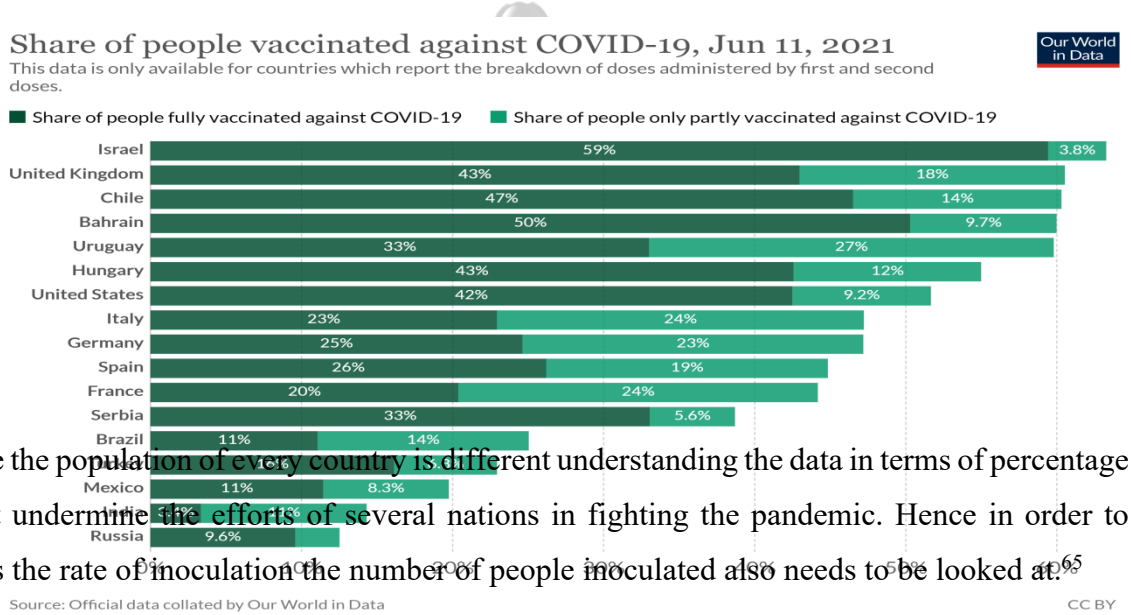
[60] Rijksoctrooiwet 1995 van 15 december 1994, art. 57, Stb. 2010, 339

[61] Code de la Propriété Intellectuelle [Intellectual Property Code], art. L613-16.

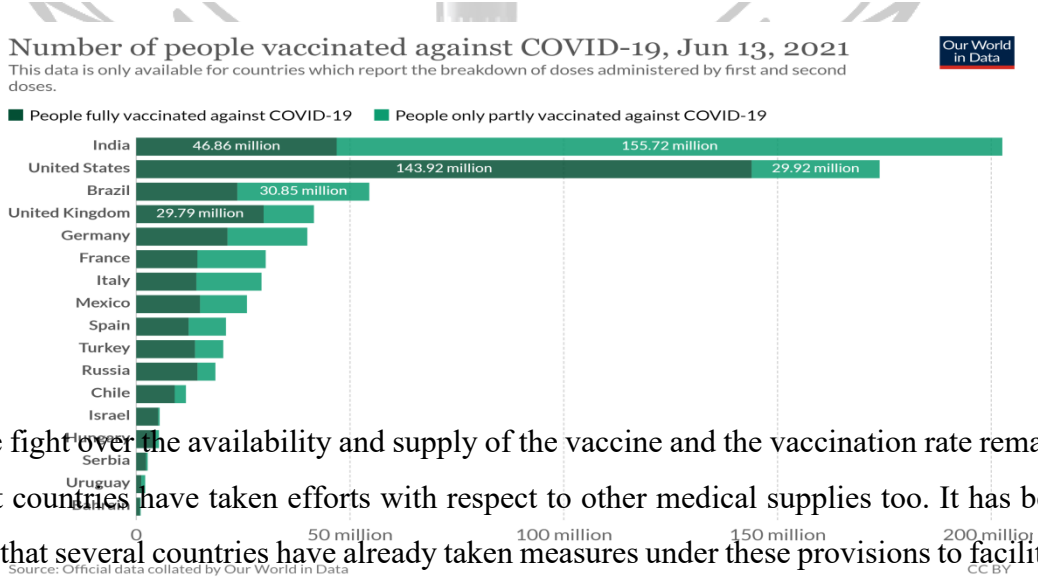
[62] The Patents Act, (1977)

[63] Patentgesetz [PatG] [Patent Act], Dec. 16, 1980, BGBI. 1981 I at 1, § 24 and Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen [IfSG] [Act on the Protection and Control of Infectious Diseases in Humans], July 20, 2000, BGBI. I at 1045, §5(2)(5)

us, that the ruined supply chains, the curfews and lockdowns have only added to the low number of vaccination. Below is the table of top vaccinating countries as on June 2021.[64]



While the population of every country is different understanding the data in terms of percentage might undermine the efforts of several nations in fighting the pandemic. Hence in order to assess the rate of inoculation the number of people inoculated also needs to be looked at.[65]



While the fight over the availability and supply of the vaccine and the vaccination rate remains lime light countries have taken efforts with respect to other medical supplies too. It has been observed that several countries have already taken measures under these provisions to facilitate access to medical equipments, medicines and other supporting resources. For example the Parliament of Chile passed a resolution in March 2020 itself declaring the pandemic justifies invocation of compulsory licensing to facilitate access to diagnostics, devices, drugs, supplies, vaccines and other resources for the detection, prevention, control and treatment of the Covid-

[64] Source: Our World in Data COVID vaccination data Available at: https://ourworldindata.org/covid-vaccinations

[65] Source: Our World in Data COVID vaccination data Available at: https://ourworldindata.org/covid-vaccinations

19.[66] On the similar lines Israel also issued the government use authorization to import generic Lopinavir/Ritonavir from an Indian company as the patent holder was unable to supply the sufficient quantity. [67] The said parent company also declared that it will not enforce its patent in relation to Lopinavir/Ritonavir in view of the pandemic. The European Commission has went a step further by invoking competition law by initiating investigation into abuse of dominant position by Swiss company Roche as it refused to share the formula for producing buffer solution used in testing kits. "The above are few examples of the measures targeting the intellectual property rights within the current COVID- 19 context. These national initiatives represent a patent acknowledgement that such rights need to be restricted and limited otherwise the damage to society would be greater than the benefits of protection."[68]

Furthermore the Hungarian National Assembly has passed the Decree 212/2020 on Public Health Related Compulsory Licensing. "The Decree introduces a new article – article 33/B, which allows the Hungarian Intellectual Property Office (HIPO) to issue compulsory licences for the exploitation of patent protected healthcare products, including medical products, investigational medical products, active substances, processes, equipment or supplies to satisfy domestic needs in mitigating the COVID-19 pandemic. Compulsory licences issued under the Decree shall be non-exclusive and non-assignable, and the period and fee of the licences are determined by HIPO."[69]

Similar efforts have been taken by many countries such as Canada, Germany, and France among others. Below is the Table highlighting certain countries and the drugs which have been issued under invoking the flexibilities of the TRIPS Agreement.

Compulsory Licenses/ Government Use Authorization: (as of 2 March 2021)[70]

Country	Drug	CL/GU	Year	Ground	Royalty

[66] Syam, Nirmalya. 2020. Intellectual Property, Innovation and Access to Health Products for COVID-19: A Review of Measures Taken by Different Countries, Policy Brief 80, June, The South Centre. https://www.southcentre.int/policy-brief-80-june-2020/

[67] *Ibid.*

[68] Mohammed El Said, Radical Approaches During Unusual Circumstances: Intellectual Property Regulation and the COVID-19 Dilemma, (Nov 2020) Society for International Development 63:209–218, available at https://doi.org/10.1057/s41301-020-00257-x

[69] Wu, Xiaoping; Khazin, Bassam Peter (2020) : Patent-related actions taken in WTO members in response to the COVID-19 pandemic, WTO Staff Working Paper, No. ERSD-2020-12, World Trade Organization (WTO), Geneva. Available at: http://hdl.handle.net/10419/226168

[70] Scope of Compulsory License and Government Use Of Patented Medicines In The Context Of The Covid-19 Pandemic, South Center (2021) Available at: https://www.southcentre.int/wp-content/uploads/2021/03/Compulsory-licenses-table-Covid-19-2-March.pdf

Ecuador	Raltegravir	CL	2021	Public interest	0.17 USD per tablet
Russia	Remdesivir	CL	2021	National Security	N.A.
Hungary	Remdesivir	GU	2020	N.A.	N.A.
Israel	Lopinavir/ritonavir	GU	2020	National security, essential services and supplies	N.A.

IV. THE ARGUMENTS FOR AND AGAINST THE WAIVER

The proposal of patents waiver has also found criticism from many corners. Many view it as already settled issues and argue that there is no such need for WTO to discuss the proposal as the same has been thoroughly discussed and resolved during the outbreak of HIV/AIDS. In terms of Article 7 and 8 of the TRIPS Agreement the WTO members already has powers to adopt appropriate measures necessary to protect public health and in a manner conducive to social and economical welfare. These two provisions provides for enough room for the national governments to resort to compulsory licensing and other measures. Further as the poorer countries that cannot be benefitted from the 'compulsory licensing' owing to low or nil production capacity can import cheaper generic drugs from other countries in terms of the decision of WTO in 2003[71] thus relaxing compliance with TRIPS Agreement. The same has also been incorporated in WTO IP Rules in year 2017. Hence the proposal practically doesn't seek to achieve much as the potential issues has already been settled upon and a balance between IPR and public health has been achieved two decades earlier itself.

Moreover, the Indian and South African proposal considerably fails to answer as to what justifies such a sweeping waiver of rights and why the already existing flexibilities are insufficient. Thus, the proposal practically doesn't raise any new issue but already seeks a

[71] World Trade Organization, "Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health," Decision of 30 August 2003, WTO Doc. WT/L/540 (2003).

blanket waiver by advancing the decades old arguments. 'A fundamental fault line in the debate over intellectual property pertains to the need to achieve a reasoned balance between access and exclusive rights.' "The right balance in the WTO trade rules on IP is a balance that provides all countries with sufficient flexibility to protect IP rights while also promoting access to life-saving medicines. For COVID-19 medicines, there is no proof at this time that this balance does not exist. Maintaining this balance must remain the aim of the WTO, and it must be the aim of every endeavor of multilateral cooperation in the fight to end this pandemic."[72]

V. CONCLUDING REMARKS

The pandemic has taught us various lessons right from the issues of supply chains, need of free market and importance of public health. The perceived dissonance between TRIPS Agreement and Public Health has already been addressed by the Doha Declaration. However, despite enough powers only a handful of countries have shown courage to invoke the flexibilities of the TRIPS Agreement. India itself, the proposer of waiver, has refrained from compulsory licensing essential drugs despite domestic pressure. The pandemic has spread like never before, it was immediate, urgent and swift. Given such nature it is difficult not only to ramp up production but also to issue authorizations and set up facilities. Thus, the problem with availability of medical supplies is more of a practical one rather than legal one. Thus, more efforts must be directed towards the voluntary collaborations such as COVAX, and C-TAC, etc. While the blanket waiver proposal may not be able to bring in enough supplies owing to limited production facilities, it may give rise to issues such as duplication and sub-standardization of medical supplies and other IPR related claims. Indeed the pandemic has brought health emergency but it has laid foundation for economic devastation too and we must strike a balance between economic and healthcare objectives.

[72] James Bacchus, An Unnecessary Proposal : A WTO Waiver of Intellectual Property Rights for COVID-19 Vaccines (Dec. 2020), Number 78, Free Trade Bulletin, CATO Institute.

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8. Syam, Nirmalya. 2020. Intellectual Property, Innovation and Access to Health Products for COVID-19: A Review of Measures Taken by Different Countries, Policy Brief 80, June, The South Centre. https://www.southcentre.int/policy-brief-80-june-2020/

9. William Alan Reinsch, Jack Caporal, and Sanvid Tuljapurkar, "Compulsory Licensing: A Cure for Distributing the Cure?" Center for Strategic and International Studies, May 8, 2020. Available at: https://www.csis.org/analysis/compulsory-licensing-cure-distributing-cure
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CYBERSEX TRAFFICKING: A THREAT IN THE 21ST CENTURY

- SHIVANI RAGHUVANSHI

Live streaming or cybersex trafficking sex is a phenomenon that is not well aware by the people universally. It is a sex-related cybercrime dealing and the live broadcast of constrained sexual acts and in addition assault on webcam. Cybersex dealing is well defined compared to other sex offenses. Victims are shifted by dealers to the 'cybersex living quarters' which are areas utilizing webcams and web-associated gadgets with the use of live streaming programming. In the dens, the victims are compelled to engage in sexual actions with themselves or others. , and often the dealers rape them or assault them on live streaming videos. They have to do whatever is commanded by the customer; they can't deny it. People can immediately communicate with others all around the world due to the internet, and connections are only getting quicker and stronger as technology advances. While this is great for families, long-distance friends, and people who share mutual interests, it also makes it simpler for human traffickers to find, recruit, and exploit innocent victims without being detected. Camming is said to pay hundreds of dollars per hour to the performer. The appeal of consenting camming workers is not only the high compensation but also the flexible schedule, while viewers like the possibility to make precise requests of their live-action "cam girl."

More than 4 billion people use the internet worldwide, accounting for more than half of the world's population. [73]This provides traffickers with nearly endless marketing potential and direct access to a wide range of vulnerable demographics, including underage kids, drifters, homeless people, and those living in poverty. In certain situations, the consumer network has grown into a close-knit society whose demographic is defined as "unhappy married males or workaholics." While some cam workers claim to have chosen this job route voluntarily, there is a nasty side to sex camming that has only recently come to light.

[74]*"What the report shows is that we are seeing just the tip of a growing iceberg in terms of online child exploitation material."*

Jürgen Stock, INTERPOL Secretary General

[73] https://wearesocial.com/us/blog/2018/01/global-digital-report-2018

[74] https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-report-highlights-impact-of-COVID-19-on-child-sexual-abuse

I. A Possible Substitute to Traditional Sex Trafficking

Human trafficking is becoming increasingly visible, and governments are dedicating laws and forces to stop it. Because many countries are taking a tougher stance on this issue, traffickers are looking for ways to continue their operations without leaving traces of their location or identity for law authorities to find. For many, this implies shifting their operations on the internet. The internet can give a layer of protection against the law for human traffickers. The use of pseudonyms, forged pictures, and virtual private networks (VPN) allows criminals to stay virtually anonymous in many circumstances. Furthermore, the growing popularity of cryptocurrencies like Bitcoin, which are popular on the dark web, makes monetary transactions more difficult to link to personal bank accounts.

- In Traditional Sex Trafficking, the vulnerable are exploited by a small number of customers who are physically present at the crime site.

Whereas, in Cybersex Trafficking, the weak is exploited by a trafficker for an unlimited amount of customers who do not have to be in the same physical location.

- In Traditional Sex Trafficking advertising, rent, staffing, security, and other expenses can add up quickly when it comes to attracting and hosting visitors.

Whereas, in Cybersex Trafficking, the cost of recruiting and servicing visitors is quite minimal, and can be as little as a computer, internet access, a small office, and so on.

- In Traditional Sex Trafficking in order to avoid being arrested, the trafficker may have to move or sell the victim.

Whereas, in Cybersex Trafficking, while abusing a victim, a trafficker can remain in the same region.

- In Traditional Sex Trafficking professionals who have been trained to arrest and/or prosecute criminals are likely to be employed by governments.

Whereas, in Cybersex Trafficking Governments may lack the staff and resources to investigate high-level criminal activity.

II. Sex Trade via Webcam

In addition to making sexual recruiting and sale easier, the digital revolution has given birth to an entirely new type of sex trade: webcam sex. In a live-streamed session on an internet webcam chat site, customers have to pay dealers to engage in sexual practices in front of the camera. Many consensual sex workers regard this as a wonderful deed since this grants them more control and allows them to work from a safe distance. The webcam sector, on the other

hand, is rife with exploitation victims. Furthermore, this type of sex trade is ideal for global exploitation. The hours are flexible, the workplace is protected, and the pay may be extremely profitable. Although women make up the majority of the performers, there is also a male and transgender performer. The Philippines has emerged as the global hotspot for live-streamed sexual assault. Children, some as young as babies, make up tens of thousands of the victims. Child predators from all over the world, including Europe, the United States, Canada, and Australia, pay facilitators on the other side of the globe to sexually assault children in live broadcasts, asking specific behaviors. As a result, technological advancements have made it simpler to access unlawful activities across borders and to sexually exploit people in impoverished. Cybersex dens are difficult to spot since anyone with a computer, internet, and a webcam may operate one. Furthermore, by live-streaming rather than downloading prohibited video, users avoid law enforcement's use of digital markers to catch individuals watching child pornography.

The internet gives human traffickers a lot of room to look for and recruit vulnerable communities. Sexual predators might use social media to look for young, vulnerable people.

[75]"The Philippines has become the global epicenter of the live-stream sexual abuse trade, and many of the victims are children. In the slums of Manila, a police raid of a child sexual exploitation operation illuminates the challenges the country faces in protecting vulnerable children and prosecuting their abusers".

III. Exploitation is related to poverty

Children who are poor are more vulnerable to exploitation. For a youngster living in poverty, there are numerous situational circumstances that increase their susceptibility and expose them to being coerced into harmful situations. Orphanhood, living in a dangerous area (slums and squatter camps), working alone on the street, and being in a terrible family situation all increase a child's vulnerability to exploitation. Parents in a financial bind may send their children to work, unknowing that they have granted a predator unfettered access to their child. Poverty creates a fertile environment for children's sexual exploitation.

[75] [75] https://www.unicef.org/stories/safe-from-harm-tackling-webcam-child-sexual-abuse-philippines

The ECPAT (End Child Prostitution in Asian Tourism) summarises the children most at risk in this way: While demand is more likely to come from places with higher disposable incomes, victimization is more likely to be prevalent in communities with a high level of poverty or full destitution.

V. COVID-19 and the evaluation of Sex Trafficking

The COVID-19 pandemic has caused chaos in human lives, the global economy, and educational systems. Meanwhile, organized crime has formed in reaction to stay-at-home restrictions and travel bans, and the criminals will exploit individuals who are rooted deeply as a result of the pandemic. Crime networks, as criminal "entrepreneurs," are searching for new techniques to exploit and profit from the most vulnerable, and they're becoming better at it. Lockdowns implemented by the 2020 pandemic have affected 2.7 billion people, or 81 percent of the global population, according to the International Labor Organization. At the peak of the lockdowns in April 2020, 90 percent of the world's children in pre-primary, primary, secondary, and higher education were affected by school closures in 194 countries, according to the United Nations Educational, Scientific, and Cultural Organization. Given the extreme financial distress faced by families, the widespread movement of people, and the closure of schools, human trafficking can thrive in the current context (through which many social interventions are supplied to those most at risk). This isn't the first time a major infectious disease has been linked to an elevated risk of human trafficking. Previous outbreaks are likely to have resulted in increased human trafficking as parents die, leaving their children vulnerable, and the social and economic conditions that contribute to trafficking are exacerbated. For example, Ebola increased the number of orphans at risk of being trafficked. Other disease epidemics have prompted nations to transfer resources from the fight against human trafficking to other pressing societal needs.

Human trafficking, on the other hand, isn't exclusively a problem in developing countries. People whose lives have been ruined by the current health crisis are among the most vulnerable to human trafficking, and they can be found in both developed and developing countries. Many of them are members of minority communities. People who were able to flee their human traffickers in the United States are now considering—or being forced to—returning to their exploiters because they have lost their jobs, housing, and medical insurance. They could've been re-trafficked, and victims have also said that their traffickers contacted them throughout

the pandemic. Several centers that used to house former trafficking victims are closing due to a lack of finances. As a result, some people who formerly had safety are now being evacuated. As a result of social separation and the closure of various groups, one may expect trafficking to decline. Human trafficking has become a major lucrative crime in a post-pandemic world where supply chains have been cut off for other forms of illicit activity and lockdown measures have created severe vulnerabilities for the most vulnerable, helping to create the next generation of human trafficking victims.

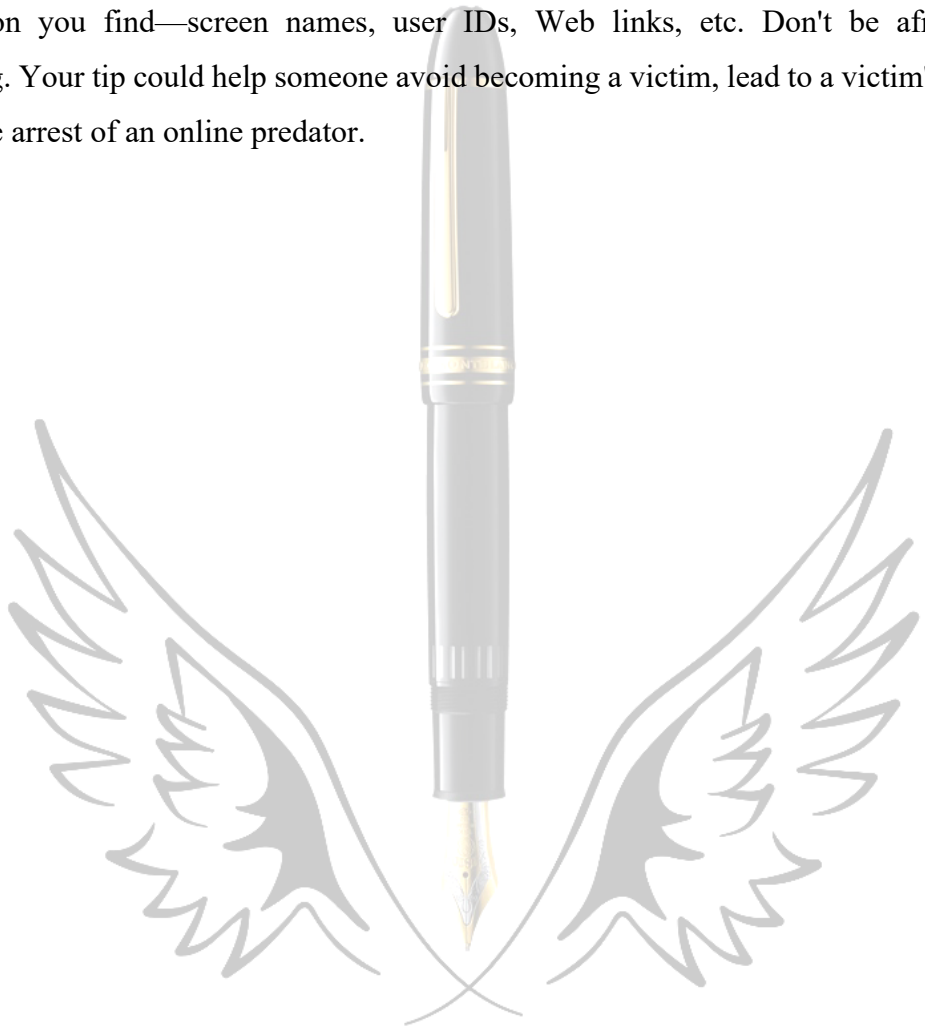
Cyber predators are increasingly targeting children and teenagers at home and away from school services. According to a recent Europol study, child predators are sharing tips on how to further exploit youngsters in lockdown on sites for child sexual exploitation. Many youngsters would be isolated as a result of their everyday online activity, and these predators are well aware of this. Parents may be unemployed or preoccupied as a result of the pandemic's challenges. Meanwhile, predators will have more time to gather material and/or generate content if they have a child living with them. Since the beginning of the pandemic, there has been a significant increase in the number of explicit sexual photos, including photos of children being sexually molested at home.

It is critical that governments (at local, state, and national levels), law enforcement, philanthropy, and the corporate sector focus on eradicating human trafficking at this difficult moment when so many people are suffering from the impacts of COVID-19 and its financial implications. The corporate sector must exercise considerable caution in order to avoid labor trafficking in their supply chains.

VI. CONCLUSION AND SUGGESTION

It is very hard to come up with a solution in the case of online sex slavery. No matter how strict the rules are, sexual predators can get their jobs done by paying extra or by VPN etc. Children, women and even transgenders nowadays are becoming a part of this. Educating people, eradicating poverty, forming NGO's and police force working especially for CyberSex Trafficking can help the situation to get better. Even the strangers can help by reporting strange activity online right away if you, your friends, or your children spot it. File a report with the

National Human Trafficking Hotline's online tip form or the NCMEC's cyber tipline in serious cases when photographs or advertisements depict young individuals. Include any pertinent information you find—screen names, user IDs, Web links, etc. Don't be afraid to say something. Your tip could help someone avoid becoming a victim, lead to a victim's rescue, or lead to the arrest of an online predator.



AN OVERVIEW ON CONSTRUCTION SITE CONFLICTS AND DISPUTES

- SHIVANI RAGHUVANSHI

I. Abstract

Development industry indicating exceptional movement all through the nation, because of progressively mind-boggling and quick track development extends; a few ventures are confronting serious issues like clashes and contest event. These issues have become an inescapable element of the development business; if these are not steadfast rapidly they can compound causing delays in the plan which results in claims that need claim measures to determine them, loss of cash, and time. The fundamental proverb of this paper is to an outsider the elements which are answerable for clashes and contest, consequently so as to get some answers concerning these elements, an examination is led which gives the factors capable to these issues, a portion of these factors are because of the proprietor, because of agreement, because of human conduct and so forth Since, clashes and questions are the explanation of stress in light of the fact that a very much arranged development venture can‟t run easily, proficiently because of these issues. Subsequently, it is essential to oversee them for the better and effective consummation of the tasks. This paper is relied upon to be helpful for the administration of contentions and debate in forthcoming undertakings.

Keywords: Construction Project, Contractors, Disputes, Reasons, Conflicts.

II. Introduction

The development business itself is an immense association in which a few development members with various foundations, distinctive information, and distinctive mindset about the development business cooperates and these development members work for a typical maxim, "To make a most extreme benefit." These distinctions in attitude, foundation, and information result in conflicting thoughts, considerations, and recognition in any choice. Consequently, clashes in such circumstances become unpreventable or unavoidable. Since it is consistently prescribed that contentions need to oversee as soon as could be expected under the circumstances; if not all that they quickly transform into the debate. Debate is one of the vital

factors which hinder the brilliant achievement of any task. Thus, it is important to be mindful of the wellsprings of clashes and contest to finish the venture inside foreseen time, financial plan, and quality. As indicated by (Acharya, Lee, and Kim, 2006) in view of the ID of the sources liable for clashes, we can bargain all the more effectively and adequately to these issues[76]. Henceforth, questions must be fearless at the earliest opportunity, if not all that they got compound which causes venture delays, lead to guarantee, can need of claim measures to determine them, and in the long run smother word related methods (Cheung, Henry, and Lam, 2002)[77]. Clashes are such circumstances of the event of the inconsistency between the qualities or means to be accomplished, both in the individual and corresponding to other people (Anita Rauzana, 2016)[78]. There are different elements like Owner, expert, outsider related, and so forth which influence the viability, profitability of work, and it too hinder the interminable consummation of the undertaking. Subsequently, it is extremely fundamental to oversee such factors for the smooth running or activity of a development venture with no events of contentions and debates for better benefit, the pace of return, on schedule culmination of the task, and so on.

III. LITERATURE REVIEW

Different literary works are concentrated to get a diagram of the elements liable for clashes and contest in the development business and limiting their impact on development ventures. **Nirmal Kumar Acharya, Young Dai Lee, what's more, Jung Ki Kim** discovers the central point answerable for clashes and question events. The writing study gives 6 significant clashes contributing factors, which were additionally limited by utilizing the AHP device. The investigation reasoned that the proprietor is the most clash-making party among the few other factors and afterward comes specialist. The moreover suggested that by legitimate administration of elements made from the proprietor side can bring about the execution of the ventures as a contention-free, which helps in sparing cash, time and improving task execution. Edwin H. W. Chan and Henry C. H. Suen the creator of this paper report an audit at debates,

[76] Acharya Nirmal Kumar, Young Dai Lee, and Jung Ki Kim, Critical Construction Conflicting Factors Identification Using Analytical Hierarchy Process, KSCE Journal of Civil Engineering, 10(3), 2006, 165-174.
[77] Cheung Sai-On, Henry C. H. Suen, and Tsun-Ip Lam, Fundamentals of Alternative Dispute Resolution Processes in Construction, Journal of Construction Engineering and Management, 128(5), 2002, 409-41
[78] Rauzana Anita, Causes of Conflicts and Disputes in Construction Projects, IOSR Journal of Mechanical and Civil Engineering, 13(5), 2016, 44-48

what's more, their goal frameworks in SFJVs. The primary purpose behind this was to discover the most probable reasons for the contest and the most used debate and clashes goal methodologies in SFJVs. An overview structure for 41 experts in the development business was disseminated for the assessment of the specialists in the industry, and the result appears to reason that the development debate was arranged into three classifications: because of authoritative issues, because of social issues, also, as a result of lawful issues. The generally used question and clashes goal techniques incorporate mediation and discretion. They in like manner found that "The best methodology in overseeing debates changes from one task to another, be that as it may, the key rule remains knowing your partner, understanding the agreement terms, and the legitimate fundamentals. [79]

Emre Cakmak and **Pinar Irlayici Cakmak**, the paper's creators, explore the factors that contribute to conflicts and disputes. To this end, a writing study is conducted, which aids in the discovery of these remarkable important components. The elements were then divided into four categories, and a procedure known as ANP was used to calculate the family member significance of these elements and co-factors. The result shows that the agreement related elements play a key function in the question event[80]. Sigitas Mitkus and Tomas Mitkus used the word struggle in a different way - from the standpoint of a letter. The creators of this article decided to focus on the development contract arrangement, and based on their findings, they hypothesized that the primary cause of conflict and competition in development projects is a breakdown in communication or musings between parties in general, including the proprietor and temporary worker; this suspicion was recently confirmed by the dir. Different reasons for strife in the business distinguished in this article incorporates the helpless demeanor of the development participants and mental safeguard systems[81].

The inventors, Dr. Rajiv Bhatt, Abhishek Shah, and Prof. J.J. Bhavsar, emphasize on the placement of aspects such as "Causes of Disputes," "Effect on Venture Situation," and "Use of Dispute Goal Techniques." Throughout the study, 70 responses from development specialists were gathered from all throughout Gujarat's Ahmedabad city. Criticisms were considered, and

[79] Chan Edwin H. W., and Henry C. H. Suen, Disputes and Dispute Resolution Systems in Sino-Foreign Joint Venture Construction Projects in China, Journal of Professional Issues in Engineering Education and Practice, 131(2), 2005, 141-148.
[80] Cakmak Emre, and Pinar Irlayici Cakmak, An Analysis of Causes of Disputes in the Construction Industry Using Analytical Network Process, Procedia - Social and Behavioral Sciences 109, 2014, 183-187.
[81] Mitkus Sigitas, and Tomas Mitkus, Causes of Conflicts in a Construction Industry: A Communicational Approach, Procedia - Social and Behavioral Sciences, 110, 2014, 777-786

it was concluded that "Money and installment concerns," "Helpless work quality," and "Additional items" are the key grounds for contesting the event, "Harming organization renown" in Impact matters, and "Exchange strategy" is the best debate aim in Ahmedabad.[82].

IV. CONFLICT RESOURCES

4.1 Owner Related

With the flood of unpredictability in any development venture, it is exceptionally hard to escape with indeed, even little blunders that lead to claims by proprietors which bring about debates. Essentially, Unrealistic desire, what's more, delay in installments from the proprietor side, and so forth are the essential variables answerable for the debate event in any development venture from the proprietor side. A few scientists infer that deferral of an installment is one of the principal foundations for the clashes and question.

4.2 Contractor Related

The contractual worker is one of the few elements that play a significant role in the success or failure of any development project. If the contractual worker's board and regulatory cycle are acceptable at that stage, there should be little chance of competition and strife in the development venture. An erroneous selection of temporary labor might result in a major problem, such as "What amount would we be able to escape these persons in extras?" he asks, undervaluing the delicate, most temporary worker statistics. They undervalued the work, without knowing full well plan, Specification, and at the hour of execution of the venture they probably won't have the option to satisfy the guidelines, consequently, these lead to clashes furthermore, questions in future[83]."

4.3 Consultant Related

Configuration, drawing, determination, and so on fall under the category of specialist related. As a result, if there are any minor mistakes in the drawing and plan, the entire task will be

[82] Bhatt R., Abhishek Shah, and Prof J.J. Bhavsar, Ranking of "Causes of Disputes" and "Use of Dispute Resolution Methods" for Construction Industry in Gujarat, in National Conference on "Recent Research & Development In Core Discipline Of Engineering", April 25-26, 2015, Vadodara

[83] Jaffar N., A.h. Abdul Tharim, and M.n. Shuib, Factors of Conflict in Construction Industry: A Literature Review, Procedia Engineering, 20, 2011, 193-202.

impacted by presenting delays in the undertaking, which will lead to clashes and competition. There are various explanations for the mistake in the configuration, including a lack of information on the subject.

4.4 Human Behavior and Third-Party Intervention

It incorporates two main considerations which are controllable and wild. Controllable factors are those which can be controlled in any conceivable manner which incorporates human-related like the absence of cooperation of members, absence of correspondence, mistaken assumptions among members, and so forth subsequently these contribute to clashes and questions in any venture. While wild factors are the third party related like unexpected/eccentrics, individuals fight, demonstration of god and so on are the elements which are absolutely free in spite of the fact that avoidance can be made against them, however, to control completely are unrealistic. Thus clashes and contests as for it are moreover unavoidable.

4.5 Design and Contractual Issues

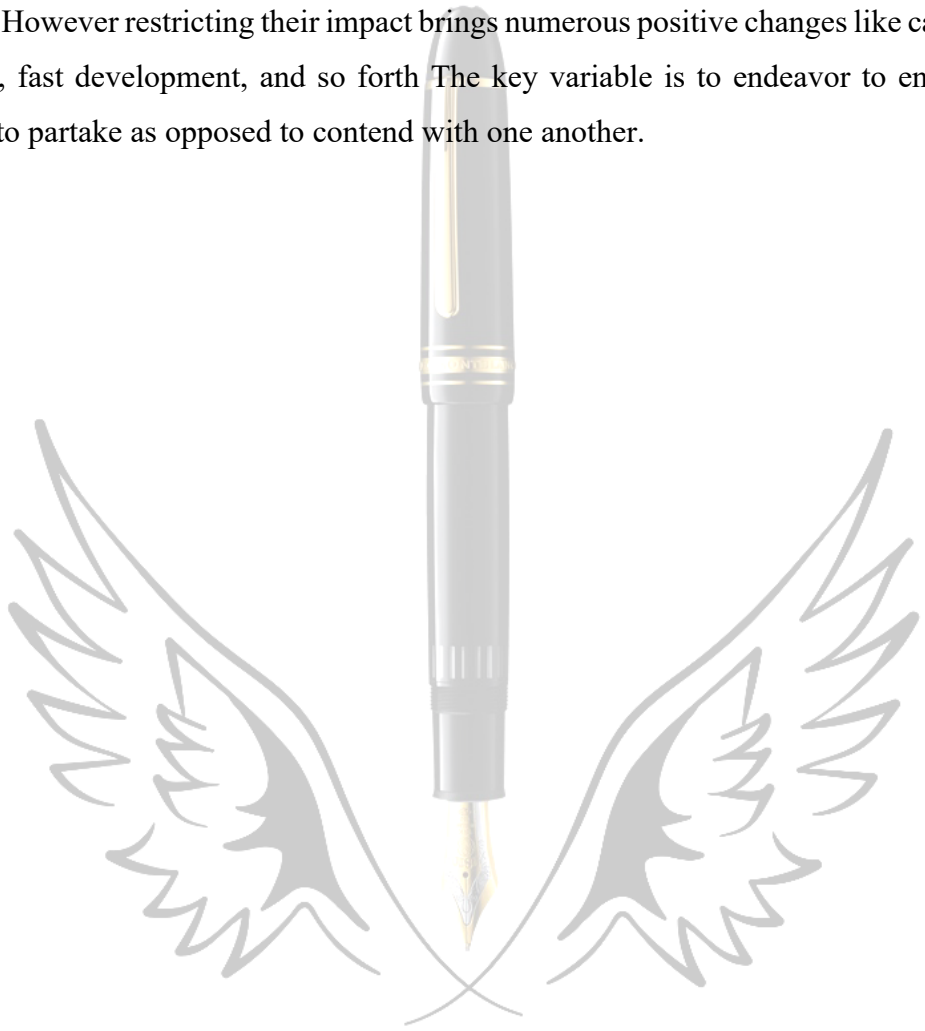
In contract different terms are utilized which remembers utilization of uncertain terms for the agreement report, utilization of two-sided connotation terms in these reports. The principle purpose behind utilizing bespoken terms is on the grounds that by the utilization of these terms members can make a benefit, at the hour of fruition of the undertaking, these bespoken terms are given their second significance for making most of its benefit. By this cycle of making benefit results in the event of contentions and debate in the development industry. The absence of accessible data remembers for configuration related factors additionally result in making clashes in a continuous development venture[84].

V. CONCLUSION

The survey in this paper covers implications of struggle and debate and its causes. The exertion has been made for finding the variables answerable for strife furthermore, debate and by appropriate administration of these factors helps in limiting their impact on the industry. Since

[84]Pawar Omkar Ashok, and Rahul S. Patil, Conflicts & Disputes in Construction Projects, International Journal of Innovations in Engineering and Technology, 3(3), 2014, 48-53.

the development industry is basic in nature accordingly, it is troublesome, however not difficult to limit their impact by appropriate administration and to better correspondence among members. However restricting their impact brings numerous positive changes like cash sparing, efficiency, fast development, and so forth The key variable is to endeavor to encourage all members to partake as opposed to contend with one another.



ROLE OF MEDIA: INFLUENCE ON LEGISLATION

- DHRUV KOTHARI

Abstract

The scope of media has drastically expanded since its inception. Rapid technological development, convergence and media conglomeration has created influential platforms where people can freely express their opinions and share it on a worldwide scale. Due to this, media can draw scrutiny towards an issue. This has made media coverage more extensive and accessible. Media has grown from just providing information to influencing the public. Studies conducted at micro-level provide insightful knowledge on this fundamental aspect of politics. The media has a large number of opportunities to guide legislation and legislative initiatives. For example, in the case of Personal Data Protection Bill, 2018 there were a lot of issues in the presented bill that gave corporations unwarranted access to the data of their customers, however after regular criticism by the media, a new bill was drafted and re-introduced in the parliament on 11th December, 2019.

The Sociological school of jurisprudence is influenced by the social phenomenon. Media is an essential part of this phenomenon and might in many instances influence lawmaking, and judgments. As most people have little comprehension on the judicial system, public knowledge and their views on the legal system are usually based on the information provided by media, this makes media a powerhouse regulating the information which can be easily tampered or misrepresented with. The paper explores the role of media attention in the legislative process that results in regulations, judicial decisions and instances where media exercised its power beyond its rights.

KEYWORDS: Media, legislative process, lawmaking, information.

Introduction

Prior to Independence, there were no provisions to protect the freedom of press, "Privy Council in Channing Arnold V. King Emperor" recognized that *"The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length, the subject in general may go, so also may the journalist, but apart from statute his privilege is no other and no higher.*

The range of his assertions, his criticisms or his comments is as wide as and no wider than that of any other subject". Unlike the U.S. Constitution, the Constitution of India does not specifically acknowledge the term "press" instead it constitutes it as a part of Article 19 (1) (a), which is Right to Freedom of speech and expression. In the Constituent Assembly Debates, this was made clear by Dr. Ambedkar, the Chairman of the Drafting Committee, that there was no necessity to mention freedom of press, as press, an individual or a citizen as these were considered same as far as Freedom of speech and expression was concerned.

This right is subject to restrictions under Article 19(2) whereby, the freedom of speech can be restricted to "maintain the sovereignty and integrity of India, security of the state, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

Laws such as Official Secrets Act, and Prevention of Terrorist Activities Act were some of the prior acts that reflected the above mentioned restrictions to the Freedom of Press. Freedom of Press has become an essential part of the Democracy, it provides as an essential function to the public to provide information on day to day activities that might be essential for them.

The Freedom of press has two crucial points that need to be kept in mind; firstly it should not only be free from any government restrictions/ interventions but also from the big businesses. Secondly, it is to be stressed that freedom is not an end, but a means to an end and the end is to serve the public

Media has a multifarious effect on society, which covers from providing information to safeguarding democracy and providing entertainment. The basic foundation of media was shaping, guiding and reflecting public opinion while also providing information and knowledge about various facets of society. It has been an essential part in the political sphere and in shaping individual perception on various important issues both through information and interpretations they place upon this information.

The judiciary and media, both render as tools to keep a check on the powers of the legislation. The role of these two institutions is to complement but at times have acquired an adversarial role. Both aim to protect the common man from onslaught of state. The paper explores the challenges posed by the functioning of media, and judiciary, in the attempt to nurture the democratic nature of the country.

Legislature, Judiciary and Executive are considered to be the three pillars of democracy. Media has often been considered to be the fourth pillar, it is an institution of immense power and

influence over the general public thus it must hold responsibility and accountability. The paper further enumerates on the function of media as an influential body that has changed the outlook on various existing customs and opinions.

LITERATURE REVIEW

The literature review starts by looking at the implications of media over legislature, with the help of these various research papers, various articles, webinars and statute and acts. These are a few papers which I read in the duration of making this research paper. These research papers help understand the topic in more detail

1.) **The Media's Role in Lawmaking: A Case Study Analysis by Lotte Melenhorst** concludes that politicians use media coverage to illustrate or underline arguments during the legislative process. The content of the law and its technical details are not directly influenced by media coverage. For media attention to have an impact on the legislative process, politicians should respond to what they read, hear and see in the media. Political actors are visible and responsive to the media, but legislative processes are not dominated by or confined to what is in the media.

2.) **Media and lawmaking Exploring the media's role in legislative processes by Melenhorst, L.D.** emphasises that politics is heavily mediatised. Media attention affects the behaviour of political actors during the legislative process. Comparative analysis of various cases show that media's coverage played a role in the legislative process but its influence on the final outcome was limited. Medias influence on lawmaking seems to mainly show an emphasising effect; it puts emphasis n arguments, issues or actors.

3.) **Media and lawmaking: a case study analysis of the media's role in legislative processes by Lotte Melenhorst** the author suggests that legislative processes are influenced by the media but due to lack of micro level studies it is unclear how this mechanism works. The author also states; for media attention to have consequences for the legislative process, it is necessary that political actors respond to the things they see, hear and read in the media.

4.) **MEDIA AND JUDICIARY: REVITALIZATION OF DEMOCRACY** the author states that media/press acts as the fourth pillar of democracy and wields immense influence and power therefore, should be responsibly accounted for. Media trial is critically scrutinized and instances where courts have spoken derogatory about it have been emphasised.

5.) **The Impact Of Social Media on the Legislative Process: How the Speech or Debate Clause Could be Interpreted by Shelby Sklar** concludes that social media has drastically changed the political landscape by providing constant updates on worldwide issues, and the capacity to interact with people all over the world. Social media impacts how legislators interact with their constituents by allowing constituents to have much greater access to their representatives. The general acceptance of social media by nearly all legislators makes social networking a vital part of their platform to fairly serve and protect their country.

Methodology

The prepared paper is a descriptive study in nature. The secondary data and information has been analyzed for preparing the paper extensively. The secondary information has been collected from different scholars and researchers published books, articles published in different journals, periodicals, conference paper, working paper and websites.

Aim :

The aim of this thesis is to discuss and analyse various aspects of Media and its plausible impact on legislation.

Design :

The research was done with the help of various articles and raw information present on the internet and various publications. These sources were put together and after understanding the various concepts and reading numerous case studies this research paper has been formulated to understand the importance of Media in the modern world and how the modern political landscape functions under the influence of media.

This is a Doctrinal research and is conducted to understand the importance of Media in Indian politics.

Objective :

The main objective of this research is to analyze Media function in modern society and its impact on the political landscape.

MEDIA SUPERVISION

Media has a supervisory power over the government; it holds a position where it can question the government over their existing practices. They play a significant role for public welfare, by providing daily updates and latest developments in the various affairs that might concern the state or public. But at times media acts irresponsibly that can lead to disastrous events. For instance, the media had a sixty hour long live telecast of Operation Black Tornado by the security forces to combat the terrorist attack on The Taj Hotel, Hotel Oberoi and Nariman House. This included the live feed of air dropping NSG Commandoes on the rooftop of Nariman House.

The Supreme Court gave the following statement regarding this issue in Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra[85]:

"All the channels were competing with each other in showing the latest developments on a minute to minute basis, including the positions and movements of the security forces engaged in flushing out the terrorists. The impetuous coverage of the terrorist attack by the channels thus gave rise to a situation where on the one hand the terrorists were completely hidden from the security forces and they had no means to know their exact position or even the firearms and explosives they possessed and on the other hand the positions of the security forces, their weapons and all their operational movements were being watched by the collaborators across the border on TV and were communicated to the terrorists".[86]

More recently on 2nd March, 2020, during the riots in Delhi, through electronic media there were many rumors spread about riots taking place in the Rajouri Garden and Tilak Nagar area. This led to a panic among people living in those areas but was later discovered to be night patrol conducted by the police force. The media has many times spouted various assumptions and allegations without full knowledge about a story or haphazardly presented news coverage

[85] AIR 2012 SC 3565.
[86] Ibid.

to the masses, to be the first to present it just so they can rack up views and TRP which may result in mishandling of situations and gratuitous panic.

MEDIA TRIAL

Media trial or trial by media describes the impact of media on a person's reputation by creating a widespread perception of innocence or guilt before, or after, a verdict in a court of law. Recently, there has been a consistent effort to curtail the freedom of the media. Surprisingly, even the courts, which always protected media's freedom, are taking a dim view of the role of media. Much has been written on media trial, and there is a general complaint that it prejudices trial. 200th report[87] of the Law Commission recommended a particular law to restrict the media from reporting anything prejudicial to the rights of the accused especially in criminal cases, from the time of arrest to investigation and trial. The commission observed, "today there is a feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have a prejudicial impact on the suspects, accused, witnesses and even judges and in general on the administration of justice."[88] According to the commission, this is criminal contempt of court; if the provisions of the Act impose reasonable restrictions on freedom of speech, such restrictions would be valid.

On November 3, 2006, then Chief Justice of India, Y. K. Sabharwal expressed concern over the tendency of the media for conducting 'trials' before courts pronouncing judgments, and cautioned: "if this trend continues, there can't be any conviction. Judges are confused because the media has already given a verdict."[89] The Government of India banned a documentary called "India's Daughter" by Leslee Udwin, who was a rape survivor. The same platitudinous arguments were adduced- interview by the convict is abhorrent, it can prejudice the judges, and so on. Even the Delhi High Court refused to lift the ban on the documentary stating that judges are not from outer space, meaning thereby that they also are prone to influences. Earlier, Leslee Udwins documentary, "Who Bombed Birmingham" showed how the administration and judges had colluded. After its release, seven accused, languishing in jail for 17 years were acquitted.

[87] Law Commission of India, 200th Report on Trial by Media: Free Speech versus Fair Trial Under Criminal Procedure Code, 1973 (Aug., 2006).
[88] Ibid.
[89] Sudhanshu Ranjan, "Media on Trial" The Times o f India, Jan. 26, 2007

Similar results were seen in the United States (US), the O. J. Simpson case attracted a lot of pre-trial publicity. Some persons even demonstrated in judges' robes outside the court and lampooned Etoo, the trial judge. Yet, Simpson was acquitted. The judge was not prejudiced by media campaign or public opinion.[90]

MEDIA AS A SOURCE OF INFORMATION IN LAWMAKING

Media can put emphasis on arguments, issues or actors; being a source of information. When media coverage is relevant to a particular legislative process, it is highly likely to be consumed by MPs (Member of Parliament) dealing with a particular bill. Albeit, such media coverage hardly ever contains any new information, it can highlight the position of interest groups, political actors or individual citizens. By being in the media, actors can draw extra attention to their respective position and remind other political actors of this position. This confirms ideas that the media has a reinforcing effect on the political processes. Note that in a rare occasion that MPs read about or see someone's position in the media they did not know about before, they will often consult additional sources to check this information and gain more in-depth knowledge about the position or argument of this actor.

Although media does not function as an autonomous source of information it can provide relevant information to MPs. Media provides a platform for other actors to voice their opinion, this is known as the 'linkage function' of media. Political actors monitor the media in order to 'know what is going on' in society and in politics. The media fulfils a platform function, informing MPs about positions of societal and other political actors[91], helping them to develop an overall picture of the (political) situation, and displaying what is communicated via the media to the public. Such information is relevant to politicians, as it provides an indication of the breadth and intensity of the debate as well as of the positioning of their political rivals and friends.

Political actors are not naïve or neutral in consuming media coverage. Parties and politicians make up their mind with regard to the fundamental decision whether to support a bill or not, prior to the legislative process, because their election program may contain proposals relevant to the actors. With this in mind politicians look at media coverage, to see whether this coverage

[90] Ibid.

[91] Political Agenda Setting and the Mass Media by Van Aelst & Walgrave, 2016

confirms their pre-existing opinion or to learn about the positions of their political opponents. Policymakers may follow media coverage if it fits within their belief structure.

MEDIA AS AN INSTRUMENT IN LAWMAKING

The fact that information in the media is not new to political actors does not exclude the possibility that they employ it to reach their political or policy goals. Political actors might use media coverage rhetorically during legislative debates to emphasize the correctness, value, or importance of one's position. MPs can use it to influence the direction of the debate or to keep an issue on the legislative agenda.

Politicians also use media coverage as a means to justify their position or to try and increase support for their position through underlining the relevancy and validity of an argument. Another reason to refer to media coverage by the politicians is to be responsive to other actors in the media, either to societal actors or to journalists who voiced their respective concerns. Explicitly mentioning the coverage of media may act as a way to attract journalists' attention and increase one's chances of receiving media coverage afterwards.

MPs can use references from media coverage to put or to increase the political pressure on other parties. If a MP or minister says something in the media that contradicts previous statements or that was not said in parliament prior, political opponents might try to increase the pressure by referring to this particular coverage. And if a respected expert voices their opinion which goes contrary to the position of one's political opponents, in particular when this expert is affiliated with the opponent's party, such media statements can be employed to reconsider their position, or at least to demand a response from this party. MPs can create visibility by being in the media. This confirms the notion that coverage of media can enhance a MPs reputation and direct other political actors' attention to them. A primary motive is to create visibility for their parties' position in the media, give account to one's voters, and to reach potential voters. This concurs with research suggesting that MPs can positively influence their parties' public image through media publicity.

NORMATIVE IMPLICATIONS OF MEDIA

Democracy is a multifaceted concept and "what might be considered to be high-quality news journalism from the perspective of one model of democracy might not be the same when taken

from the perspective of another"[92]. Different models of 'good democracy' have different normative implications for the role of the mass media. Most of the legislative processes do not receive much media coverage: the public does not always receive direct information through media about a majority of the political processes that result in laws. "This harms the principle that journalists should monitor political elites in what they have done and promised to do and to inform people about the record of those in the office, and about the political alternatives"[93]. In general, at least according to the cited study[94], "journalists do not perceive it as their role to report elaborately on legislative debates: they for example think that the reader is not interested in it, or that they will not be able to 'sell' it to their editor. If they do pay attention to a lawmaking process, this is usually because there is some kind of political conflict; for journalists it is obvious that they report on the political game. Citizens that follow the mass media consequently get a biased impression of what happens in parliament: they hardly ever read or see anything about bills when these are discussed in parliament, and if they do, the coverage is short, purely informative about the content of the resulting policy change, and predominantly oriented towards conflict and the political game." Mass media is considered as a platform for debate and public opinions. The media only has an emphasizing effect on the legislative process which means that media coverage has little added value in the grand scheme of things. It is occasionally seen that media reminds political actors about the position of a particular interest group, or makes the likely consequences of a bill more visible by displaying individual's personal stories. Usually this kind of information is not new to politicians and rarely largely affects their opinions or position.

On the other hand, limited coverage by the media for legislative processes and for the details of legislative debates might have a positive effect on the functioning of representative democracy. "The fact that journalists do not closely follow every move a politician makes in the context of lawmaking gives MPs the opportunity to focus on the content of the bill. It enables political elites to 'act'"[95]. This may be comforting for those who worry that the media

[92] Strömbäck, J. (2005). In Search of a Standard: Four Models of Democracy and their Normative Implications for Journalism. Journalism Studies, 6(3), 331-345.
[93] Ibid.
[94] Media and lawmaking : exploring the media's role in legislative processes, Melenhorst, L.D.
[95] Strömbäck, J. (2005). In Search of a Standard: Four Models of Democracy and their Normative Implications for Journalism. Journalism Studies, 6(3), 331-345.

is turning democracy into 'mediacracy'[96]. In such a mediacracy, the media would determine what is on the political agenda and more generally take over the role of political institutions. Journalists are present in and around the legislative processes, but from a democratic perspective, their substantial influence is marginal and not necessarily negative. For the functioning of representative democracy, these thoughts are reassuring.

MEDIA INFLUENCE

The extensive coverage of day to day activities in various facets of society by media and other technological innovations has made information ubiquitous. As a result, disinformation and misinformation are also in circulation in equal measure.

Social media is cut-throat; it provides a platform for everyone to express their opinions, mostly unfiltered and at times anonymous. Democracy claims to be a platform that provides equal opportunity to everyone, in theory but practically its quite different. Social media spreads content like wild fire and the world we live in today craves for content. Social media has unlimited potential, with that comes negative implications as well. For instance, a video of killing of a person from one community by another will go viral, irrespective of the time period the video is from, leading to riots or some false information might be circulated leading to chaos. As important as Social media is nowadays, it's essential for the masses to digest it informatively. Since social media is humungous, regulating it is a tedious process and is becoming increasing difficult to do owing to its exponential growth. The difference between traditional media and social media is diminishing as time passes by.

Social media and media in general can have massive derogatory implications the most apparent instance of this would be the gruesome lynching of Syed Sharifuddin Khan at Dimapur. He was taken out of jail by an imprudent mob and dragged for seven kilometers while stones were being thrown at him. This was horrendous and shows utter disrespect for the administration and the legal system. This poses a serious question for the role of media which is not able to differentiate between patriotism and macho nationalism. This could've been avoided if allegations placed upon him were not emphasized as facts by the media such as news about the citizenship of the accused which added fuel to the flame and if the blatant xenophobia for Bangladesh was regulated, it would not have resulted in scrimmage on the streets of Dimapur.

[96] Van Dalen, A. & Van Aelst, P. (2014).The Media as Political Agenda-Setters: Journalists' Perceptions of Media Power in Eight West European Countries. West European Politics,37(1), pg-42

Sanjib Baruah has rightly commented:[97] "Sociologists use the term 'moral panic' to describe heightened public anxiety, triggered by media frenzy, about an individual, a minority group or a subculture seen as an imminent threat to social order. The media has always been an active contributor to moral panics. But it seems that in a new media environment that includes mobile phones, the internet and social networks, there can be situations when the crime and punishment move from the courts to prisons to the street. And the street can turn into a theatre of the absurd, or a reality television of a frightening variety. The lynching of Syed Sharif Khan was the mediated spectacle of capital punishment of a person who - it is now believed- may not have been guilty of any crime".

The role of the media in public policy process can be distinguished into four distinct theories. These theories concentrate on the interaction between media and the politicians.

(a) Influence theory- Media tells the politicians what to think.

(b) Agenda setting theory- Media tells the politicians what t o think about.

(c) Indexing theory- Politicians tell the media what to write about.

(d) Detection theory- Politicians and the media struggle to identify, characterize, and prioritize multiple streams of information.[98]

CONCLUSION

Media has exponential potential to grow and to become a solidified pillar of the Indian Democracy. Media has always been a source of information for the masses and with increasing dependency by people on media as a news and entertainment source, it has become essential to pay close attention to its development.

In this research paper we closely scrutinized various research papers and articles that address media and its influence on legislation which brought forth an interesting revelation: Media is not influential on legislature, per se, but the effect it has on the political actors that enforce legislation is consequential. Media influences these actors in a subliminal way where it indirectly influences the process of legislation. The politicians in charge of conducting the process of legislation use media to gain knowledge about the current political landscape, peoples' perception of them, political opponents views, potential voters, etc. All of these

[97] Sanjib Baruah, "Reimagining Dimapur" The Indian Express, Mar. 18, 2015

[98] Public Policy and the Mass Media: An Information Processing Approach, Bryan D. Jones & Michelle Wolf(2007)

factors play a vital role in subliminally affecting the subconscious of the concerned person resulting in a different mindset than before. Hence it indirectly affects the legislative process.

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GENDER EQUALITY AND WOMEN PARTICIPATION IN INDIAN ARMY

- MEGHANA ADDLASUNEEL

Abstract:-

Women warriors were valued and idolised in our various mythologies as 'SHAKTI', but at the same time Women enrolment in army still remains minimal due to various issues. To achieve gender equality women must be empowered as their performance is also important in the development of a nation. The liberation of women is a vital component of ensuring gender equality women were recruited in Indian army 28 years ago but our army still remains male dominated. The position of woman in Indian military started in 1888, during British period as Indian Military Nursing service. India is the world's fourth most strong military entity with efficient competent military force. In February 2020 Supreme Court dismissed the government's argument that command post in the army are not suitable to women The Supreme Court ordered that all specialisation options be open to woman officers on the very exact conditions as they are to male short service commission officers while choosing for a permanent commission.

The decision affirms basic right to equality. Example: - Women also operated in fighting positions in Israel, Germany, the United States, and Australia. As a result, the Indian military forces must take care of this example and strive for gender mainstreaming. Women also should have a fair access to armed services with sexual identity, position requirements. Thus denial dependent on gender is immoral and discriminatory.

Keywords:- Gender inequality , Army , permanent commission , equal opportunities

Introduction:-

Women warriors who'd been valued and idolised as Shakti, consort of Shiva the Destruction, mother of any and all commanders, and embodied oneself as Durga the fighter lord to fight and defeat evils prevail in our religion. This can be seen in the Amazons, the Nordic Valkyries, and the Greek Goddess Athena. Women having enlistment in the military, on the other hand, remains a contentious issue today.

Females get less economic rights in society, have little accessibility to secondary school face and additional health & wellbeing threats, and have even less government support.

In effort to accomplish gender balance and even a range of other global policy goals, female's concerns should be safeguarded and means to be provided to enable them to function at their best. Motivated females contribute to the well-being and growth of their families, communities, and countries, which benefits everyone.

The term gender refers to the socially defined roles and functions that males and females are assigned in society. Gender equity refers to men and women having equal status and access to financial freedom, jobs, and self-improvement.

The liberation of women is a vital component of ensuring gender equality. It entails enhancing a woman's sense of independence, life choice autonomy, chances in living and wealth, authority about her own living within and without the household, and the capacity to influence progress. Gender questions, on the other hand, are concerned with the bond among both men and women in society, rather than with women only. Men's and boys' behaviour and behaviours are critical towards promoting gender equality[99].

Any person of India does have rights to safeguard ones freedoms in community from abuse, which are enforced by the judiciary, pursuant to certain restrictions. Within these human rights, each person has the right to freedom, which safeguards them from bias and other gender equality problems that individuals suffer as a result of society's bad will. It opposes racism against people and the right to avoid discrimination based on ethnicity, colour, category, gender, or religious faith. Inequality is practised across every area of society, including the profession, within households, religious organisations, and so forth. The court's right to citizenship is conditional on the elimination of segregation in the workplace, the prohibition of untouchability, and the termination of titles for the sake of equality and fairness. It is the most important right accorded to any person of the nation, and it is stated in Articles 14, 15, 16, and 17 of the Indian Constitution to outline the global issues of gender inequality[100].

Jhansi Rani is a trilogy that pays homage to all of India's best woman fighters. It memorialises Rani Lakshmi Bai's existence. Although India is worthy of its women and their bravery, it is very far from considering her daughter as just an equal to her son.

[99] Global Issues: Gender Equality and Women's Empowerment, peacecrops.gov

[100] Diva Rai, Everything important you should know about Gender Equality under the Constitution, blog ipleaders.in

Women were first hired by the Armed Forces of India in non-medical positions in 1992. Despite its exceptions of the Indian Armed forces (support functions only) and the Special Operations forces of India, major divisions of the Indian Army now allow women serve in fighting roles (junior ranks) and battle supervisory duties (officers) (trainer role only).

Women are currently participating in the security services of several nations, including the United States, Israel, Canada, the United Kingdom, Germany, India, and others. Women, on the other hand, are not seen in fighting positions. They do work in professional and managerial positions (mostly in the health and healthcare fields) or operate on the frontline on a freelance basis. Women are only a minor influence in the army, instead of being an essential component of its profile[101].

Background of Women in Army:-

Women's positions in American civilization has transformed dramatically over the last generation, particularly in the military Female entered the Military and Navy's auxiliary services, mostly in healthcare and management, during the first and second World Wars, out of need and nationalism.

Men in the military services were reluctant to recognise women who occupied conventional clerical and career roles since their service opened up further men for war. External conflicts have been a factor in determining of female involvement in the military in the past.

During times, of harmony most women who loved their jobs in the army and succeeded in their professions were pushed out from the army and then had to wait before battle need pressured themselves further towards action

In 1948, “the Women's Armed Services Integration Act” was approved, allowing women to serve in the military on a regular basis. Unique "women's units" were military powers that were created and disbanded in response to staffing shortages prior to that period.

The Korean War in 1951, In the case of a complete war campaign, the Army attempted to raise the number of female troops to generate a higher body of manpower. The Army was directed to decrease the count of women in the ranks and limit the enrolment of new women as the Korean War became much more unpopular.

[101] Mayank Essay on Inclusion of Women in Armed Forces https://qforquestions.com/essay-on-inclusion-of-women-in-armed-forces/

The rise of the feminism movement in the 1960s and 1970s caused several lengthy assumptions regarding gender roles and labour separation to be re-examined. The allotment claiming that women must only represent approximately 2% of the military services was abolished in 1967, and so was the restriction on recruitment to upper positions. The Army elected 2 female officers immediately after, in 1970.

Background on position of woman in the Indian military

Despite the fact that the first woman group has been recruited twenty-eight years ago, our army remains "male-dominated." It leads us to conclude it is a dominant society's traditional thought and values, not the military' bureaucratic framework or questions of physicality or socio-psychology. A female was forced to marry the man whose family have choose her, to obey her husband's desires, and to adhere to the values of a society that views her as nothing more than land. The controversy emerged as women began to criticise the same culture and its order, which had purposefully deprived them their basic life freedom.

- The position of woman in the Indian military started in 1888, once the British Raj created the "Indian Military Nursing Service."
- Between 1914 and 1945, 350 British Indian Army nurses served in World Wars I (1914–18) and II (1939–45), with 350 of them dying, being captured prisoner of war, or being found missed in battle
- With the exception of the Indian Army (support functions only) as well as the Special Forces of India (trainer role only), all branches of the Indian Armed Forces now authorise women to serve in fighting positions (junior recruits) also command key positions (officers) (2017).
- The government has gradually offered up the major facilities to WOs in branches located since 1993[102].

To identify the need for gender equality in army :-

[102] By CD Staff, [Burning Issue] Women in Armed Forces, https://www.civilsdaily.com/burning-issue-women-in-armed-forces/

Sexual equality means that persons of all sexes have the same rights, duties, and liberties. Females, males, transgender and gender diversity persons, kids, and households are all affected by gender inequity. It has an influence on people of all ages[103].

Gender equality is extremely relevant in today's world. It's just that the women must be entitled to the same opportunities as men. Education, Freedom, and plenty of other topics. Female are deserving of a high quality education.

It's a disaster. It is our responsibility to educate ourselves. All rights are the same if you're a boy or a girl. Often, school should not see you as a boy or a girl. Women will still get a decent education, and they have the ability to influence the future by expressing their thoughts and expressing their feelings on matters[104].

Gender equality is not just a fundamental human right, and also a need for a stable, secure, and prosperous society.

Over the past few years, change has been made: most girls are attending school, fewer girls are being pushed into child marriage, more females are sitting in parliament and in positions of government, and laws are being reformed to promote gender equality[105].

Now let us start at the initial stages. Women are not treated equally in either region. In reality, the World Economic Forum estimates that global gender equality will take 170 years, and 158 years in North America. Which indicates Gender equity will take five more generations. That's terrible news not just for our girls, as well as for our boys, because gender equity affects everyone's economic pie[106].

To understand the role of women in Indian army

After the United States, Russia, and China, India is the world's fourth most strong military entity, and it has an efficient and extremely competent military force. In the armed services,

[103] Gender equality: what is it and why do we need it, https://www.vic.gov.au/gender-equality-what-it-and-why-do-we-need-it

[104] Raina Shafaa, Why Is Gender Equality Important, https://eurogender.eige.europa.eu/posts/why-gender-equality-important

[105] Gender equality, https://www.un.org/sustainabledevelopment/gender-equality/

[106] Why We Need Gender Equity Now, https://www.forbes.com/sites/ellevate/2017/09/14/why-we-need-gender-equity-now/?sh=392eaf1677a2

though, gender representation has been an obstacle. In February, the Supreme Court decided that females can lead armies, dismissing the government's argument that male troops weren't really able to follow commands from women commanders as "troubling." The Indian army's command posts are not suitable for women, the Centre had previously told the Supreme Court. According to the affidavit, the Centre cites oppressive social expectations, family demands, over-exposure to female officers to battle circumstances, and the position and file being overwhelmingly male from rural backgrounds who are not psychologically schooled to embrace change women commanding officers In India, the following factors work toward gender equity and women's empowerment.

Women's duty in the Indian army started in 1888, when the British Raj established the "Indian Military Nursing Service." Women were first enrolled into the military as officers in 1992. India's army has 1.2 million combat soldiers. Women were not permitted to participate in cavalry, armoured divisions, or field artillery groups, excluding military expert forces such as the Garud Warrior Squad, MARCOS, and para commandos. Women have also been enrolled into numerous arms and departments of the three services over the years. Women were also recruited as helicopter pilots in the Indian Air Force in 2015, as well as new active air force assignments for women as fighter pilots. In 2007, the United Nations sent the first all-woman peacekeeping force to Liberia, which consisted of 105 Indian women. Women make up 3% in the Indian army, comparable to 4.5 percent in China, 16 percent in the US, 10% in Russia, 40% in North Korea, and 5.5 percent in South Korea, where women have risen to senior military positions and the nation expects to raise the number of women working in senior positions to 7% from 5.5 percent by 2020. In the United States, all combat roles were made open to women in 2013.

In addition, the United Kingdom ended a ban on women participating in close battle ground positions, allowing them to join the powerful military ops. In recent years, there seems to be a rise in the number of women joining the Israeli Defence Forces (IDF). Israel is one of few nations in the world with a military draught and a compulsory military service provision for women. Morocco, North Korea, Tunisia, Mali, and Eritrea are among the countries with military draft. According to a UN survey from 2014, India has the world's largest young demographic, so a shift in attitudes against women is critical for the country today. It is critical for India to enact military compulsory service for both men and women in order to inculcate a

feeling of connection, nationalism, and prestige in the nation. Perhaps notably, it must be carefully planned rather than just being on script.

Hiring into the Indian armed forces is purely optional, which ensures that every Indian citizen, regardless of ethnicity, faith, or gender, is qualified. In the military forces, the majority of the manpower is made up of youthful, brilliant, and ambitious women and men. In Bengaluru, India, the Indian military police corps recruited the first class of woman military police into its ranks in January 2020. They started training for 61 days in basic military training and advanced provost training, and would train under the same standards, responsibilities, and terminology as their male counterparts.

Discrimination based on gender in the armed forces will undoubtedly be an obstacle for a country like India, which aims to be an emerging powerhouse in the future. In nearly any way, women should be treated equal to men. Transfers and maternity benefits are examples of institutional and managerial procedures that must be covered and given priority from period to period[107].

Comparing the enrolment of women in army in various countries

Australia:-

It has only been 17 years since a woman served in the Indian Armed Forces as a Second Lieutenant. That's a rather brief moment in the tradition of women making military contributions in the modern world. The following descriptions detail the evolution of different countries.

The Army Nursing Service was founded in 1899, and it was the first time women joined the Australian Armed Forces. The Australian Armed Forces is actually composed of 12.8 percent women (with 15.1 percent in the Royal Australian Air Force, 14.6 percent in the Royal Australian Navy and 17.5 percent in the Australian Army). In 1998, Australia became the world's second-largest nation to allow women to serve on subs.

Britain:-

[107] Preethi Amaresh, Regendering Equality: Women in the Indian Armed Forces, https://diplomatist.com/2020/05/11/regendering-equality-women-in-the-indian-armed-forces/

Women can enter the British Armed Forces in any capacity except those "primary objective is to engage with and destroy enemy." Women would now make up 71% of all Navy positions, 67% of Army positions, and 96% of Air Force positions. Women take for approximately 9% of the British armed forces.

Finland:-

According to a study conducted in December 2006, women made up 19% of all military personnel in France. Those who were allowed to work in all positions except submarine and riot command (including fighting infantry). After all, they just make up a small portion of the fighting staff.

Germany:-

Germany's gender rules are among the most discriminatory of any NATO member state. Over the last periods of WWII, young boys and old men were enlisted to fight the advancing Soviet forces, but again no females, despite the country's long history of female warriors, were recruited. Women were added to the German Bundeswehr's medical service for the first time in 1975. Women were not allowed to pursue German war units until January 2001. Except for conquering armies, women account for 7% of all troops. The German Air Force has granted women pilot licences to jet fighters.

Israel:-

Several female transport pilots participated in the 1948 War of Independence, but the Air Force later barred female pilots from its ranks. There is a men's and women's draught. The majority of women participate in non-combat roles and are only conscripted for two years (instead of four for men). Israel's first woman fighter pilot earned her wings in 2001. Women will apply for up to 83 percent of vacancies in the Israeli army. Women can choose whether or not to participate in combat.

United States of America:-

When it comes to the recruitment of women into the military, the United States is regarded as a trailblazer and a trend-setter. In the United States, there are nearly 200,000 women serving in the military. They account for nearly 20% of its overall strength. Women's warfighting duties were reshaped to allow them to take on more tasks. The Women's Army Auxiliary Corps was

established in 1941 in the United States and served in World War II. During the war, the Women's Naval Reserve and the Marine Corps Women's Reserve were established. During World War II, 350,000 American women served; 16 were killed in combat, and 83 were kidnapped and held as Japanese POWs for three years. During peacetime in 1948, women were largely absorbed into units, with only the WAC left as a distinct female unit. The Gulf War of 1991 proved to be a watershed moment in bringing the role of women in the American Armed Forces to the attention of the international community. About 40,000 women served in the armed forces in nearly every capacity. Women will now operate in a number of capacities on American combat ships, including command. Girls, on the other hand, are not allowed to operate on submarines or in Special Forces. Women are not eligible to participate in cavalry, Special Forces, artillery, armoured vehicles, or forward air defence[108].

To analyse the impact of judgement:-

The Indian Supreme court, in a historic and highly commendable judgement titled, **Secretary, Ministry of Defence v. Babita Puniya & Ors**., instructed the award of permanent commission (hereinafter PC) in 10 non-combat forces at three months and holding them to be entitled to take command posts through energising the new ceiling. This also ensures that women in the Indian Army have equal opportunities by supplying them with long-term work protection, and the ruling is viewed as a landmark move in the army's history.

Facts:-

Article 33 of the Indian Constitution grants Parliament the authority to amend the privileges granted by Part 3 or to decide the scope to which these rights extend to the armed forces.

According to Section 12 of the Army Act of 1950, no female is fit for enlistment in the army unless the Union Government declares otherwise by notification in the Official Gazette.

As a result, on the 30th of January, 1992, the Union Government released a notification authorising women to be assigned to certain army divisions. As this clause was only for 5 years,

[108] Role and Employment of Women in the Indian Armed Forces, https://ukdiss.com/examples/role-and-employment-of-women-in-the-indian-armed-forces.php

it was eventually expanded in 1996 by notice from the Ministry of Defense on December 12th, and it was also deleted in 1992 notification.

On November 19, 2005, the Ministry of Defence announced that the Women Selection Entry Scheme's service term will be extended to 14 years. This was often adopted by the Army, and as a result, a limit on the duration of duty was imposed. SS took over the training centre that WSES had practised or witnessed, along with a 14-year time period.

In February 2003, a lawyer filed a petition in the Delhi High Court in the form of a PIL requesting permanent commission for women in the military and the SSC.

Through its hearings, the president of India released two circulars in 2006, one on the tech aspects and the other on the non-technical side, granting SSEs to women officers on both the technical and non-technical sides.

In March 2010, the defence ministry released a circular directing that short-service commission officers in the Air Force and Army who had agreed on permanent commission but had not yet conceded equal be granted the privilege of permanent commission.

This case was heard in the Supreme Court in 2011. In August 2018, the Prime Minister declared that women officers in the military would have the option of participating in a changeless commission in a portion of the military that is different from the current situation.

In 2019, the parliament passed a bill awarding permanent Commission to women officers, which will go into effect in the immediate future.

ISSUES:-

1) Is it acceptable for women officers to be given permanent commissions in the Indian Army?
2) Is it worthwhile to enforce the Guidelines released by the Government of India on February 15, 2019?
3) Is it possible that the rules regulating the army are racist in nature?[109]

[109] Secretary, Ministry of Defence vs. Babita Puniya, https://www.ourlegalworld.com/secretary-ministry-of-defence-vs-babita-puniya/

Judgement:-

- The Supreme Court ordered that all specialisation options be open to woman officers on the very exact conditions as they are to male short service commission officers while choosing for a permanent commission.
- It was decided that female participation in armed services is a government policy issue, and the Supreme Court would follow the Delhi High Court's decision that "women in combat arms was not a matter of appeal."
- The Supreme Court, on the other hand, explained that female officers must be candidates for command positions.
- Designed to lead a brigade or substantial order assigned to take out individual duties is known as command posting. It is normally carried out by a Colonel-level officer in the Army.
- The Supreme Court gave the government three months to enforce its decision. The decision would also have a retroactive impact.

Effect of the Judgement:-

- Females will enjoy the similar work opportunities as men. Women will indeed now further be required to do retirement after 14 years of service, regardless of their results.
- They will now be eligible for a complete pension as well as other financial incentives. The Supreme Court explained that perhaps the policy proposal would extend to all existing female SSC officers.
- It allows women officers to be appointed to command in ten areas in which the Military has decided to accept them to participate as fully supreme commander.
- The Army would be forced to amend its regulations not just for advancement to comm and positions, but also for women officers to take train programmes and fill positions that have already been reserved for men only.
- The decision would inspire more women to consider a military career. This may be the start of a mechanism to redress the gender gap in India's armed forces.

Importance of Judgement:-

- SC is strict on gender stereotypes and anatomical characteristics of women. The Supreme Court ruled that the stereotype of women as the weaker sex is outdated and unconstitutional.
  - Women were not included in command or military positions, according to the government at the time. This was based on anatomical distinctions between men and women.
  - Furthermore, proposals stating maternity and mothering as grounds for denying women permanent commissions were based on "sex prejudices."

The decision affirms the Basic right to equality.

- A competent power may not differentiate based on gender; instead, it functions based on experience, standards, and tradition.
- The concept of non-discrimination is the spirit of the order. Article 16 states that gender cannot be used as a justification for in equal and unjust discrimination in any sector, such as the armed forces.
- It has stated which Article 14's right to freedom must be accompanied by a right to rationality that prohibits any "blanket" or "complete" ban.

Way ahead:-

Defence preparation is one of the most important considerations to have in mind when they weigh their employment opportunities. Women's career aspects and prospects must be considered holistically, with the end goal in mind.

- It is necessary to avoid spreading false facts, like using the patriarchal dynamics of society as a justification to refuse women equal rights. India has progressed significantly, and community ought to be respectful of women serving in fighting positions.

- Women also operated in fighting positions in Israel, Germany, the United States, and Australia. As a result, the Indian military forces must take care of this example and strive for gender mainstreaming.
- Setting up ethical expectations and strictly adhere to them rather than prejudice is one way to promote gender equality.
- It is the government's duty to provide both bureaucratic and social structures to facilitate the recruitment of females into the Army. Legislative problems should not be seen as an excuse to keep women out of the military.
- The mechanism for female's inclusion must be included in a policy. In order to protect the pride and reputation of female official's stringent rules of ethics must be in place to ensure that no negative incidents arise.
- From within, the judgement must be accompanied by a shift in mindset, as male officers appear to see women as better fit for adjunct positions rather than equivalent[110].

To research the impact of gender in the military.

After all, the court's clear remarks in opposition to the government's gender roles are a major remedy uniformly; allowing women to hold permanent commissions in the army acknowledges their equal contribution and support.

Skills of Women:-

- According to the Center, while women are similarly capable, if not quite as competent, than men, there will be circumstances that can limit women's ability, such as maternity absentee and motherhood duties, among others
- The reasons are based on the fact that a military position will necessitate rigorous preparation, while women's learning is currently separate but at a much lesser standard compared to men's.

[110] Gender Parity In Indian Army, https://www.drishtiias.com/daily-updates/daily-news-editorials/gender-parity-in-indian-army

- Lieutenant Colonel Mitali Madhumita and IAF squad chief Minty Agarwal, on the other hand, are female role models who have demonstrated their capability in commanding roles[111].

Cultural equity would also address the racial inequality toward male officers. The desire for "gender balance," which refers to both women and men officers and therefore should be enforced in the context of the verdict, is a social want of era.

The conditions of the agreement of all WOs would have to be amended in order to apply the Supreme Court's recent judgments on all WOs receiving permanent commissions. According to media sources, the Indian military is now designing templates for that too, and an optimistic that the device can stable in time, with some tweaks.

In the interest of promoting gender equality, and in accordance with the Apex Court ruling, the common requirements must be enforced throughout the board, without regard to gender, for most of their careers. As a result, it means that the similar requirements should be applicable to officer recruiting, qualifications, career classes, and specifications for command promotions, regardless of gender. It implies that all officers face a certain difficulties and pass towards the exact screening procedure for succeeding postings, regardless of gender, making the fight for WOs much harder[112].

Mostly as gradual progression of social transformation the potential incorporation of WOs into battle weapons will be the next obstacle that the Indian military will face as soon as possible, considering the Supreme Court decided on March 2020 to incorporate WOs in all forms of warships in the Indian Navy.

Rejection on a specific basis:-

Women's wellbeing remains the most insensitive claim against equity of the armed services. This is a repugnant reason to refuse women the right to serve in the army because of this reason that they are afraid of sexual harassment by their male counterparts. This further serves to

[111] By CD Staff [Burning Issue] Women in Armed Forces, https://www.civilsdaily.com/burning-issue-women-in-armed-forces/

[112] Maj Gen S.B. Asthana, Gender equality in Indian military: Implementation and road ahead (Comment), https://www.outlookindia.com/newsscroll/gender-equality-in-indian-military-implementation-and-road-ahead-comment/1798929

reinforce the erroneous idea that participating or involvement is exclusive to men. Sexual harassment in the workplace isn't just a problem in the army. It occurs in all offices, regardless of the type of job. As a result, selective deprivation of a chance due to the lack of a moral conscience in the system is indeed heinous, but it also lessens the severity of crimes such as rape and abuse. Scientific study, on the other hand, has found that even more feminist women experience substantially less sexual assault victimisation.' (2019, Reis & Menezes) Nations, particularly India, should concentrate on enacting policy reforms that will make the military a safer and much more equitable environment for men and women alike.

Women's enlistment in the armed forces was initially viewed as a superficial addition, with very poor physical health standards—barely 50% of male standards—being set. It's likely that female officials should have objected to. Women were self-sustained, and as a result, they were unable to deal across the practical demands of soldiering. ' Armies are regulated by a series of guidelines. These norms, though, must be task rather than sexual identity. These guidelines have been updated, but they remain weaker than those for men. It is likely that female officials should've just objected to. Women are the majority of the population.

When it comes to national security, physical conditions must not be violated. The poor benchmarks for women further reinforce the conservative belief that men and women aren't equivalent. Overall exercise wasn't ever, and still isn't, the criterion.

Still now, women's futures are jeopardised by their historical isolation in a male-dominated culture. And if women excel in outperforming men or accomplishing more, their achievements will be overlooked.

Men dislike being outclassed, especially in areas those who feel are exclusively theirs. Women are constantly forced to tread a thin line between being too brazen and too quiet. Particularly in fields where they must demonstrate their worth in more ways than one. Men despise being outpaced, especially in areas where they feel they are superior.

Due to a complete lack of reference point or current facts, the case for lengthy medical leaves due to maternity is distorted. The Indian Army has a very lax parental leave programme[113].

[113] Devank Agarwal, Gender and Armed Forces: An analysis of the role of Gender in the Military, research gate.in

Conclusion:-

Women should add new ideas and information to the table. They will contribute a unique range of skills to the table. Many proposals, on the other hand, would place women in a difficult position: 'while attempting to define themselves as equals to men, they would still be expected to stress their special credentials as women.' In other words, they wanted to look both equivalent and distinct in order to fit in and stand out.' The dilemma for lawmakers is: how willing is the army to shed qualifying manpower and human resources? In several current conflicts and insurgent groups, military forces comprised of both men and women have done admirably and consistently.

We can't believe of a single logical explanation why women shouldn't be allowed to serve in the armed forces in the same footing with men. 'Women's advancement capacity cannot be used to justify changing war regulations; pushing a socialist purpose really shouldn't be a consideration; and appealing to a political organization should not be a consideration.'

Policy decisions must never be developed with the intent of meeting a schedule or issuing a press statement. Defence policy must be formulated of one goal in mind: to combat and achieve our country's wars.' As a result, women should have fair access to armed service, with sexual identity, position requirements. Denial dependent on gender is immoral and discriminatory. This century insists that an intrinsically bad society be changed. Ignoring women or persons of other genders equal treatment is a form of discrimination. The minimum which can and should be accomplished is to rectify the issue although it goes against the majoritarian order.

RESEARCH METHOD AND LEGAL WRITING THEORIES: AN ANALYTICAL STUDY

- DR. SANSKRITI SRIVASTAVA

Research means repeated search for something, to find out some different new things in the existing facts. Legal research is any systematic study or research of legal theories, concept, doctrine, cases, principles, rules and regulations etc. Method is the way of doing something and Methodology is the science or study of a particular subject.

The main objectives of legal research are to ascertain the nature, purpose and policy – objectives of legal rules and principles that govern a specific situation. To examine legal principles and precedents as established by courts, tribunals or other authorities having power to decide issues and disputes, with a view to determine their scope of application.

To identify the weakness of an existing law or highlight issues that are not covered or partially covered and examine whether and to what extent a new law or modifications in the existing law would remedy the situation and identify the advantages or disadvantages of certain aspects of law. Usually legal research is divided into doctrine and non –doctrinal research. In a research work, research may combination of both the type. 1

When a research is concerned with some legal problem, issue or question, it is referred to as doctrinal, theoretical or pure legal research. Doctrinal research which is sometimes also referred to as armchair research, which is essential for a library base study as the material needed by a researcher may be available in libraries, archives and other data bases.

In doctrinal research, researcher mainly uses different judgments, treaties, statutes texts, legal journals, magazines etc., and from these he tries to collect all relevant material on the topic and then with reasoning power, researcher tries to find out gap, problem and draws out final conclusion.

Non-Doctrinal legal research also known as Empirical legal research. where researcher tries to collect knowledge or information from first hand study or primary data related to his particular matter or topic and after analysis and interpretation of those information he draws out the conclusion of that research work.

1. Mahajan V.D., Jurisprudence and legal Theory, 5th Edition, EBC, 2012

Laws or legal provisions are nothing but the result of problem of the society to eradicate that particular one. A researcher, through his research work tries to find out the actual relation between a particular legal provision and its impact on society or any gap of those legal principles in the society, etc.

Doctrinal research is a theoretical study where mostly secondary source of data are used to seek to answer one or two legal propositions or questions or doctrines. Its scope is very narrow and there is no such need of field work.

But non-doctrinal research lays lesser emphasis upon doctrines and it is not solely dependent on the traditional or conventional sources for data. Non- doctrinal or empirical research is more concerned with social values and people and thus, primary data are used in this type of research. Here field work is the most important part.

Law is nothing but of the society, by the society and for the society. Law is an integral part of the social process. It aims to organize society in a systematic and peaceful or orderly manner. So, the tool of research will have to be altered to cope up with the present problems, or come up with various measures to root-out the different social evils.

Techniques and Tools are the ways and means to conduct research and it could only be justified through the use of appropriate methods and techniques meant for it, and Thereby collected evidence is called data and the tools used for this are called data collecting devices or tools.

Citations

A citation is a path address of a book, article, web page or other published item, with sufficient details to uniquely identify the item.

Citations are provided in scholarly works, bibliographies and indicate the past work in the same subject area. Citations are used in scholarly works, they give information about a publication (book, journal article, video, etc.) that enables readers to identify and locate the referred publication.

Books: Citations for books usually contain the author's name, the book's title, place of publication and date of publication.

1. Authors Surname & Initials

2. Title 3.Volume 4. Edition 5. Publisher 6.Year 7.Pages

Example- *Sharma, Ajay IPC, 3rd ed., lexis nexis, 2010, 34p.*

Journal Articles: include the author name and title of the article, the title of the journal, the volume number, page numbers and date of publication.

1.Author 2.Title 3.Year 4.Volume 5.Periodical 6.Page

Electronic Sources: Provide the (URL) within arrows <…> to avoid confusion.

1.Author 2.Title 3.Year 4.Volume 5. Periodical 6.URL

The Bluebook citation system is traditionally used in American academic legal writing, and recognized by many courts of judicature all around the world.

Citing or documenting the sources used in research serves three purposes:

1. It gives proper credit to the authors of the words or ideas incorporated into paper.
2. It allows those who are reading to locate sources, in order to learn more about the ideas included in your paper.
3. Citing sources consistently and accurately helps in avoiding committing plagiarism in projects, thesis or dissertation.

Bibliography: Provided at the end of the paper, this gives detailed information about each source featured in the footnotes, as well as details of the other sources consulted in preparation of the assignment. Bibliographies list books and related materials on a particular subject. They contain the author's name, title, place of publication, publisher and the year of publication. An annotated bibliography provides a brief analysis of the contents.

Bibliographies on certain subjects are also available to a legal researcher. Such bibliographies also help him in locating research articles, books, and reports on the subject of his inquiry

- The rule of bibliography is also another system of providing information about our references. It has 3 basic sections, which are table of laws, table of cases and other bibliographic materials.
- References to existing research and publications, possibly illuminated by selected quotations. A list of the materials referred to will be included, probably at the end of the report or thesis, possibly in the form of a bibliography

Difference between Footnote and Bibliographic Form

- In a footnote the author's name is given in its normal order (first name first), in a bibliography the authors' names are listed alphabetically by surname.
- Bibliography-contains details of all the books, articles, reports and other relevant works you have directly referred or consulted during your research in your thesis or report.
- Bibliographies should contain three sections; table of Cases, Table of laws, and other Bibliographic Materials.

The Table of cases should contain judicial decisions.The countries should appear in alphabetical order. Within each country, the judicial decisions should be listed in alphabetical order according to the name.

The Table of laws should be organized in the same manner as the table of Cases; that is by country or international jurisdiction and in alphabetical order, and in the same form as a full citation. Particular articles or sections, etc... should not be cited.

The section containing other bibliographic material should be organized alphabetically according to the name of the author or editor, according to the title. Interviews should be listed according to the word "interview."

When listing books, documents, etc., do not give a reference to a particular page, article, chapter etc; refer only to the book as a whole. However, when listing articles in journals, magazines, books or newspapers, refer to the page on which the article begins.

Role of Case Analysis and preparation of briefs in legal research

The case brief represents a final product after reading a case, rereading it, taking it apart, and putting it back together again.

four elements that are essential to any useful brief are the following:

(a) Facts (name of the case and its parties, what happened factually and procedurally, and the judgment)

(b) Issues (what is in dispute)

(c) Holding (the applied rule of law)

(d) Rationale (reasons for the holding)

In addition to these elements, it may help you to organize your thoughts, as some people do, by dividing Facts into separate elements:

(1) Facts of the case (what actually happened, the controversy)

(2) Procedural History (what events within the court system led to the present case)
(3) Judgment (what the court actually decided)

A brief should be brief! Overly long or cumbersome briefs are not very helpful because you will not be able to skim them easily when you review your notes. On the other hand, a brief that is too short will be equally unhelpful because it lacks sufficient information to refresh your memory. Try to keep your briefs to one page in length. Do not get discouraged. Learning to brief and figuring out exactly what to include will take time and practice. The more you brief, the easier it will become to extract the relevant information. While a brief is an extremely helpful and important study aid, annotating and highlighting are other tools for breaking down the mass of material. When you read a case for the first time, read for the story and for a basic understanding of the dispute, the issues, the rationale, and the decision. As you hit these elements (or what you think are these elements) make a mark in the margins. Your markings can be as simple as "facts" (with a bracket that indicates the relevant part of the paragraph). When you spot an issue, you may simply mark "issue" or instead provide a synopsis in your own words. When a case sparks an idea — write that idea in the margin as well. Finally, when you spot a particularly important part of the text, underline it or highlight it .

With a basic understanding of the case, and with annotations in the margin, the second read-through of the case should be much easier. You can direct your reading to the most important sections and will have an easier time identifying what is and is not important. Continue rereading the case until you have identified all the relevant information that you need to make your brief, including the issue(s), the facts, the holding, and the relevant parts of the analysis.

Role of Statutes, Reports in legal research

In recent years, the advent of online legal research outlets such as SCC Online, AIR InfoTech, Manupatra, IndLaw, FindLaw, Westlaw, LexisNexis, and HeinOnline has reduced the need for some types of printed volumes like reporters and statutory compilations.

A number of law libraries have therefore reduced the availability of printed works that can easily be found on the Internet, and have increased their own Internet availability. On the other hand, some university law libraries retain extensive historical collections going back to the earliest English reports.

In case of any ambiguity while interpreting the provision of any statute, judges have to examine the "legislative intent" of the legislature for enacting a particular legislation. The legislative intent of any provision can be ascertained with the help of the following tools: Objects and Reasons of the Act (published in the bill) Parliamentary debates Law Commission Reports (if the bill has been introduced on the recommendation of the Law Commission) Standing Committee/ Joint/Select Committee Reports Reports of the Committee appointed by the ministries for enacting/reviewing any existing enactments.

Indian Law Reports • Supreme Court Reports • Supreme Court Cases (SCC) • All India Reporters (AIR) • Scale • Judgments Today • Indian Law Reports • Law Reports of all States

The most common methods for finding the case laws on a subject are "digests" and "commentaries" on particular subjects. Subject indexes given at the end of the commentaries are a very useful aid to find out the desired case law on specific aspect. If there is no commentary on any particular enactment, "AIR Manual" published by M/s All India Reporter, Nagpur can be treated as a very useful source for finding out the case law on any Central Statute. In digital era, Case law on a particular subject or party name or citation, may be searched with the help of various online databases. Westlaw International, LexisNexis may be used to search foreign caselaw. SCC Online, AIR SC& HC, Criminal Law Journal, Manupatra, Indlaw, Law Premium may be used to search Indian case law.

In India, various commissions and committee are in existence like Women Commission, Commission for SC/ST National Human Right Commission etc. Reports of such commissions are maintained within the law library Collection. Parliamentary Committee Reports are also major sources of legal information which may be referred through website of Parliament of India. Law. Annual Reports of the Government Departments are also useful for legal research.

Statutes

Law library must have a good collection of following International and National Legislations AIR Manual, India Code, Act of the Parliament, Civil Court Digest, Gazette of India, Current Central Legislations, Current Indian Statutes etc. Acts and Legislations of all countries are also provided through online services.

Liability is the result of a violation of the law. Law lays down the rights and duties of the individual. The law awards legal rights to one individual and imposes the duty upon another person. A person should not infringe is the legal right of others. If anybody violates the legal right of another, he is said to have committed a wrong. If there is a wrong there is a liability. It

is difficult to define the term 'liability' Some Eminent Jurists made attempt to define the term 'liability'.

Salmond - According to Sir John Salmond, "liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong."

Markby - According to Markby, the word 'liability' is used to describe the condition of a person who has a duty to perform whether that duty is primary one or secondary or sanctioning one. Austin prefers to use the term 'imputability' to 'liability'. According to him, Those certain forbearances, Commissions or acts, together with such of their consequences, as it was the purpose of the duties to avert, are imputable to the persons who have forborne omitted or acted. Civil liability is the enforcement of the right of the plaintiff against the dependent in civil proceedings. Civil liability gives rise to Civil Procedure whose purpose is to the enforcement of certain rights claimed by the plaintiff against the defendant. Examples of civil proceedings are an action for recovery of the Debt, Restoration of property, the specific performance of a contract, recovery of damages, the issuing of an injunction against the threatened injury etc. Criminal liability is the liability to be punished in a criminal proceeding. in criminal liability, punishment is awarded to a wrongdoer. If the person is guilty of committing the offense with criminal intension then he is liable for punishment. Criminal liability is based on the Maxim "***actus non facit reum nisi mens sit rea***" it means the offender is guilty only when it is done with the guilty mind.

The theory of penal liability is concerned with the punishment of wrong. There are different kinds of punishment, Deterrent, preventive, retributive, reformative etc. A penal liability can arise either from a criminal or a civil wrong. There are three aspects of penal liability those are the conditions, incidence, and measure of a liability. As regards the conditions of penal liability, it is expressed in the maxim "actus non facit reum nisi mens sit rea" This means that the Act does not constitute guilt unless it is done with guilty intention. Two things are required to be considered in this connection and those are the act and the mens rea requires the consideration of imitation and negligence. The act is called the material condition of penal liability and the mens rea is called the formal condition of penal liability.

Remedial Liability - Remedial liability is based on the Maxim "Ubi jus ibi remedium" it means when there is right there must be some remedy. The force of law can be used to compel a person to do what he ought to do under the law of the country. if an injury is caused by the violation of a right, the same can be remedied by compelling the person bound to comply with it.The first exception is an imperfect obligation or duty, Second exception unenforceable duties and the third exception is the impossibility of performance by law.

Vicarious liability means a liability which is incurred for or instead of another. Generally, a person becomes liable for a tort committed by him. But there are certain circumstances in which one person becomes liable for the tort committed by another. Such liability is called vicarious liability. There are three exceptions to the general rule that man must be forced to do by the force of law what he is bound to do by a rule of law. Example- Master and servant, Firm and partners, Employer and independent contractor.

Absolute or strict liability-Both in Civil and criminal law, mens rea or guilty mind is considered necessary to hold a person responsible/liable. However, there are some exceptions to the general rule. In those cases, a person is held responsible irrespective of the existence of either wrongful intent or negligence. Such cases are known as the wrongs of absolute liability/ strict liability.

Feminist legal theory, also known as feminist jurisprudence, is based on the belief that the law has been fundamental in women's historical subordination. Feminist jurisprudence the philosophy of law is based on the political, economic, and social inequality of the sexes and feminist legal theory is the encompassment of law and theory connected. The project of feminist legal theory is twofold. First, feminist jurisprudence seeks to explain ways in which the law played a role in women's former subordinate status. Feminist legal theory was directly created to recognize and combat the legal system built primarily by the and for male intentions, often forgetting important components and experiences women and marginalized communities face. The law perpetuates a male valued system at the expense of female values.[2] Through making sure all people have access to participate in legal systems as professionals to combating cases in constitutional and discriminatory law, feminist legal theory is utilized for it all.

2. Bowman, Cynthia; Quade, Vicki (1993). "Redefining Notions: Feminist Legal Theory Pushes into the Mainstream". Human Rights. 20 (4): 8–11. JSTOR 27879789.

Second, feminist legal theory is dedicated to changing women's status through a rework of the law and its approach to gender. It is a critique of American law that was created to change the way women were treated and how judges had applied the law in order to keep women in the same position they had been in for years. The women who worked in this area viewed law as holding women in a lower place in society than men based on gender assumptions, and judges have therefore relied on these assumptions to make their decisions. This movement originated in the 1960s and 1970s with the purpose of achieving equality for women by challenging laws that made distinctions on the basis of sex. One example of this sex-based discrimination during these times was the struggles for equal admission and access to their desired education. The women's' experiences and persistence to fight for equal access led to low rates of retention and mental health issues, including anxiety disorders. Through their experiences, they were influenced to create new legal theory that fought for their rights and those that came after them in education and broader marginalized communities which led to the creation of the legal scholarship feminist legal theory in the 1970s and 1980s. It was crucial to allowing women to become their own people through becoming financially independent and having the ability to find real jobs that were not available to them before due to discrimination in employment. The foundation of feminist legal theory reflects this second and third-wave feminist struggles. However, feminist legal theorists today extend their work beyond overt discrimination by employing a variety of approaches to understand and address how the law contributes to gender inequality.

The first known use of the term *feminist jurisprudence* was in the late 1970s by Ann Scales during the planning process for Celebration 25, a party and conference held in 1978 to celebrate the twenty-fifth anniversary of the first women graduating from Harvard Law School. The term was first published in 1978 in the first issue of the Harvard Women's Law Journal. This feminist critique of American law was developed as a reaction to the fact that the legal system was too gender-prioritized and patriarchal.

In 1984 Martha Fineman founded the Feminism and Legal Theory Project at the University of Wisconsin Law School to explore the relationships between feminist theory, practice, and law, which has been instrumental in the development of feminist legal theory.

The foundation of the feminist legal theory was laid by women who challenged the laws that were in place to keep women in their respective places in the home. A driving force of this new movement was the need for women to start becoming financially independent.

Women who were working in law started to focus on this idea more, and started to work on achieving reproductive freedom, stopping gender discrimination in the law and workforce, and stop the allowance of sexual abuse.

Feminist legal theory, also known as feminist jurisprudence, is based on the belief that the law has been fundamental in women's historical subordination. The project of feminist legal theory is twofold. First, feminist jurisprudence seeks to explain ways in which the law played a role in women's former subordinate status. Second, feminist legal theory is dedicated to changing women's status through a rework of the law and its approach to gender.

The historical origin of contemporary liberal feminism goes back to the 18 century. An important principle of this philosophy was individualism by which was meant that an individual possesses the freedom to do what he wishes without interference from others. Liberal feminism is an individualistic form of feminist theory, which focuses on women's ability to maintain their equality through their own actions and choices.

These theorists argue for law to be gender blind that there should be no restrictions or special assistance on the grounds of gender. Also known as dominant feminism, it does not see the issue of gender equality as an issue of difference and sameness but rather as issues of domination of women by men. Radical feminism is a perspective within feminism that calls for a radical reordering of society in which male supremacy is eliminated in all social and economic contexts. Patriarchal theory is not generally defined as a belief that all men always benefit from the oppression of all women. Rather, it maintains that the primary element of patriarchy is a relationship of dominance, where one party is dominant and exploits the other for the benefit of the former. Radical feminists believe that men (as a class) use social systems and other methods of control to keep women (and non-dominant men) suppressed.

Cultural feminism reverses the focus of liberal feminism. it is concerned with women differences from men. It argues that important task for feminism is not to include women into patriarchy, and prove that women are similar to men and can function like men and meet male norms, but to change institutions to reflect and accommodate values that they see as women’s nurturing virtues, such as love, empathy, patience and concern.

It is an ideology of a female nature or female essence that attempts to revalidate what cultural feminists considers undervalued female attributes. It is also a theory that commends the difference of women from men. It is based on an essentialist view of the differences between women and men and advocates independence and institution building.

Post - modem feminism sees equality as a social construct and a product of patriarchy, hence in need of feminist reconstruction. The school emphasizes the process of self - definition and the method that will raise consciousness and give voice to the unknown in women's experience. Postmodern feminist legal theorists reject the liberal equality idea that women are like men as well as the difference theory idea that women are inherently different from men.

JUSTIFIABILITY OF PATERNALISTIC INTERVENTION IN MODERN SOCIETY

- KOINA SINGH

INTRODUCTION

This short note discusses the justifiability of criminalising acts on paternalistic grounds. In modern philosophy and jurisprudence, paternalism is defined as an act for the good of another person without the person's consent, similar to what parents do for their children. This view of paternalism as a limitation of our liberty by the government makes it seem repugnant and controversial since its ends are benevolent and its means coercive. Further re-enforced by views of legal philosophers like Feinberg, who claims that "a consistent application of legal paternalism would lead to the creation of new crimes that would be odious and offensive to common sense leading to general punishment of risk takers. Moreover, hard paternalistic justification of any restriction of personal liberty is especially offensive morally." However, is paternalistic action always an infringement on individual morality ? In order to elaborate on the presented dilemma , three arguments will be discussed in this note. First, the legitimacy of the moral argument. Second, the justification of soft paternalism over hard paternalism will be considered along with inherent problems in the application of the harm principle. Thirdly an example of benevolent paternalism in Japan and the Netherlands will be considered to show how paternalism has different impacts depending on the society to which it is applied.

LEGITAMACY OF THE MORAL ARGUMENT

A recurrent theme underlying the arguments against paternalism by philosophers like Feinberg in *harm to self,* John Stuart Mill in the *harm principle*[114], John Rawls in *Political liberalism*[115] and Johnathan Quong in *liberalism without perfection*[116] is about how paternalism is morally wrong as it involves one or more persons treating a person as if he lacks "the capacity to form, revise and rationally pursue one's own conception of the good"[117]. In doing this the moral status of the person is diminished or demeaned. This is called the moral status argument.

David Birks in *moral status and wrongness of paternalism* highlights a presumption made by the Moral status argument; by claiming that wrongful paternalistic behaviour treats a person as if he lacks the capacity to form, revise and pursue his conception of good, it infers that if the person does not perform an action, the person cannot perform that action. The fact that a person fails to pursue rationally his own conception of the good does not mean that he cannot pursue it. The reason for paternalistic intervention is not the inability to pursue good but rather that in the particular instance the person is not currently pursuing his best interests. Therefore, it debunks the notion that paternalism goes against the second moral power proposed by Rawls i.e. a capacity for a sense of good.

Moreover, autonomy is only of instrumental value. While having options is valuable, it is so only in so far as the options themselves are valuable. Even Feinberg despite being a critic of legal paternalism holds the view that the prevention of harm to an agent that would arise from self-harming conduct (for example- cutting your wrists or arms with razors etc) that is less

[114] "the principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self- protection. The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, physical or moral, is not a sufficient warrant."

[115]" Political power is only legitimate if it can be justified to reasonable people." Furthermore, he claims that that individuals possess tow moral powers, namely, " a capacity for a sense of justice and a capacity for a sense of good."

[116] Following John Rawls, Quong claims that the second moral power i.e. a capacity for a sense of good, explains the wrongness of paternalism as diminishing the moral status of the person being subject to paternalism.

[117] Jonathan Quong in liberalism without perfection claims a second way of proving paternalism wrong by claiming that the paternalizer treats the paternalize as having inferior moral status to himself.

than substantially voluntary is always a good reason for criminal law prohibition[118]. However it is to be kept in mind that criminal law prohibition need not take the form of imprisonment and sanctions in order to deter the individual from engaging in self harming behaviour. It can take the form of taxation like in the case of cigarettes or encourage such people who engage in cutting oneself to join support groups that deal with depression, anxiety etc, issue an injunction etc.

JUSTIFICATION OF HARD PATERNALISM OVER SOFT PATERNALISM AND THE HARM PRINCIPLE

Paternalism can take two forms i.e. hard paternalism and soft paternalism. A simple illustration to showcase the differences between the two is that of no hiking after dark for safety reasons. Advocates of hard paternalism would want to make it illegal to go for a hike after dark due to the dangers of falling and risk of low visibility while climbing. Whereas a soft paternalistic would argue for a warning sign near the site or a fine to deter the people from climbing or making them aware of the risks. Soft paternalism attempts to coax people into making decisions which do not harm themselves through public warnings, public awareness, education, and by making available various government supported resources and structures, such as counselling services. In contrast, hard paternalism uses coercive measures to meet its benevolent ends. Opposition to the doctrine of paternalism by philosophers and legal scholars has been mostly targeted towards strong paternalistic interventions or hard paternalism which has little regard for autonomy and uses coercive methods to reach its ends. However the idea of soft or liberal paternalism with its respect for the autonomy has been proposed by Feinburg and in the harm principle by Mill.

However while Mill's arguments and the argument for soft paternalism might make sense theoretically, there are several problems on a practical level. It is extremely difficult to ascertain than an individual's actions does not harm others since we live in an increasingly interconnected society. Engaging in alcoholism or drug addiction does not exclusively effect

[118] For the purpose of this essay I understand "less than substantially voluntary" as an individuals judgement of their good being clouded by diseases like depression, anxiety, bipolarity Etc. Or their judgment being coerced by someone having substantial power over them like a parent, teacher etc.

the person doing them. It affects their families, their dependants, friends in various detrimental ways (for example physical violence towards family members or using up all the monetary resources needed for medicines Etc. to pay for the addiction). Moreover, actions like not wearing a seat belt or driving under the influence and getting severely injured in a car crash negatively impacts not just the individual and his loved ones but would call upon medical and police services that require tax payers money to fund. Thus there are lots of reasons to favour a hard paternalistic approach towards actions like drunk driving and wearing a seatbelt. This is called the public charge argument. And further displays situations where paternalism (including a hard paternalistic approach) does not violate the harm principle since it safeguards the lives of other individuals.

A soft paternalistic approach in line with the views of Mill argues that acts that are validly consented to by individuals should not be interfered with. However, it brings us to the question of what is valid consent? take the example of prostitution. While advocates of soft paternalism would contest that the acts are voluntary and should not be bought before paternalistic sanctions, is the consent really valid? Are the people engaged in prostitution acting with valid consent or are they under a situation of duress to feed their children, trying to feed their addiction, or are being coerced by their pimps ?. Establishing valid consent is extremely difficult and could potentially justify legal measures to protect the people in situations of desperation from making wrong decisions and inhibiting their quality of life.

What constitutes harm is unclear. Harm can be of various types- emotional, psychological, physical, financial Etc. Emotional and psychological harm caused by behaviour on the person and people around him is difficult to ascertain and therefore complicates the application of the harm principle since it depends on how one defines “harm” in the first place, and such questions attract subjective rather than objective answers.

THE BENEVOLENT PATERNALISM MODEL

A criminal justice system based on the ideas of achieving the goals of rehabilitation and reintegration through paternalistic intervention has long been considered to be idealistic but unworkable in the real world except in a primitive or totalitarian society. However, the criminal

justice system in Japan, with its aim of rehabilitation and reintegration through lenient sanctions tailored to the offender's circumstances, has proven this view to be in the wrong. Labelled as the "benevolent paternalism" by Professor Daniel H. Foote, the system is paternalistic in the sense, that it allows the state substantial discretion in gathering and using the information about the offender and the offense.

The Japanese criminal justice system is widely acclaimed and is highly efficient with a 99.8% rate of reported crimes that are solved. Despite the fact that less than 5% of adults convicted of penal offences to be sent to prison. As the Japanese criminal system is characterised by great trust and power in the hands of the authorities, there will inevitably be biases and areas where the authorities are lacking. However, there are no relevant checks in place to counter the misgivings about the authorities.

However, despite certain setbacks, the benevolent model seems to work quite effectively in the Japanese scenario, due to the numerous facets in which the Japanese society functions. For example -The Japanese language has no traditional word for "privacy". Notions of personal autonomy are much less pronounced than in the western world. The population has higher levels of tolerance when it comes to police interference before they consider it to be an invasion of their privacy along with the strong roots of the notion of cooperation with public officials. This demonstrates how a paternalistic approach in criminal law has different responses in different societies. The conception of paternalism is mostly determined by the nature of the society to which it is applied.

The Netherlands has a criminal justice system that bears a striking resemblance to the Japanese model in numerous aspects. This includes the extent and type of discretion afforded to officers, deliberate deemphasis on imprisonment, and the importance of informal community and social controls. However, the Netherlands has experienced a greater crime rate in recent years (rising narcotics problems Etc.) while japan has remained stable. The success of the Japanese system in maintaining a minimal clearance rate is prompt detection of the offences and appropriate measures taken to reform and reintegrate the offenders. Therefore the system fights crime on two levels – specific prevention rehabilitates most of the offenders who are apprehended and general deterrence due to the certainty of apprehension.

CONCLUSION

Justifying paternalistic intervention in the lives of individuals is a tricky notion to contemplate. While rallying against paternalistic intervention seems plausible and clear on paper, when one is confronted with the practicalities of implementing this policy, the lines become muddled. While this essay has provided support for paternalistic intervention where necessary partly due to the rapidly integrative nature of today's society where every action has a consequence on the other, and critically analysed the arguments made by philosophers to further prove how paternalistic intervention is not inherently "wrong". However, it is to be kept in mind that paternalistic intervention by authorities has to be kept under strict review and checks to ensure it's not being misused to restrict autonomy for actions that do not require criminal sanctions (since criminal sanctions cause a plausible impact on an individuals quality of life) and can be easily delt with by other means.

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INTERNATIONAL LAW AND CUSTOMARY INTERNATIONAL LAW – EXCAVATING THE PREDICAMENT OF SOURCES AND EXECUTABILITY

- HURMAT KOUL & PROF. DR. VESSELIN POPOVSKI

Summary

International law is a term that no more remains international or foreign to national legal parlance. It pervades pretty much every modern constitution, owing to their literal or virtual adoption and vehement endorsement across both the liberal as well as conservatively leaning scholarships , world over. On one hand International law seems to come with a promise of liberating conservative legal doctrines and ushering a hope of a more civil, just and fair legal order that is better informed on the premise of universality of human rights and values. But on the other contrasting face, it reveals a system of norms and values which are supposedly ideal in their formulation and reasonably obscure about it's implementation upon and within sovereign nation states of the world. Hence, the abstruse-quotient regarding the creation of rights and obligations remains to be very high .Insofar as the scholarship that considers International law to be strict in creating obligations, onus, sanctions , is concerned, they tend to call the values bolstered by International Law as Hard. And some scholars like to call the rules of International law as soft norms, based on the belief that the States don't feel the strict need to observe the obligations enshrined therein. Through the length and width of the paper the author has tried to put forth the discrepancy in the pigeon holing of sources of customary international law. And examining how, through ages, Internationally recognized customs and usages have indomitably been western in their origins.

The existence of International Law as has been iterated by Goldsmith and Posner is a real phenomenon, but it must be pointed out that States generally act out of self-interest in developing, complying with or derogating from the rules, than from the sense of legal obligation towards the other contracting parties. They call it 'rational self-interest' calculations of the States in the International Framework. This often is spelt out as a conundrum for International Law to be able to operate as a Law. International law, in the strict sense of the

word is not a law since it lacks with regards strict enforceability.[119] And the state behaviour is a byproduct of the state-interests, having little or nothing to do with the adherence to any conventional or customary international law. Goldsmith , et al., opine that the self-driven goals reveal that international law is not only lacking in effectiveness , but disturbingly, has little exogenous effect on state behaviour.[120] But in a stark distinction to this idea, Baxter[121] argues that the only anomaly in international norms is that it lacks the power to impose sanctions upon a wrongdoing state for it's act .He rightly points out that the norms stipulated in the agreements between States, have '*differing levels of cogency, appeal, consensus and persuasiveness'*, and do not create strict rights and obligations, but are well defendable, and these are called soft or weak norms. These are not legally binding, unlike hard norms which are roughly referred to as *treaty laws* and are expected to make parties obligated to one another in terms of the stipulations of the treaty for which resort can be made to international tribunals and courts.

Soft norms, often understood as Declaratory or Conventional laws, have an inherent tendency to be transgressed , due to lack of enforceability or sanctions. Let us talk about 'Political treaties', as an exemplification of soft norms, like the Atlantic Charter whereby States entered into agreements to start joint military actions alliances or set out the roadmap for the future policies between the States. The major legal fragility in these instruments is the notorious play of using the oldest norm in CIL- *clausula rebus sic stantibus*. It means , if there is a contravention of the terms of the agreement, there is no obligation for enforceability of rights and duties attached to it. In fact, a party to the political treaty can defect against or leave the alliance completely if the State shows " a fundamental change in the state's political or economic situations". Often, with a change in the political regime in a State, such treaties are bound to back track, since there is little scope of violations of political treaties. However, the right of denunciation, over and above the right of termination of a treaty because of a " material breach," is one such deterrence that fastens the parties to their obligations.[122] In order to examine the enforceability of and problems with soft norms, Baxter talks about the *Geneva*

[119] J.L Goldsmith, Eric Posner , 'The limits of International Law' [2005] Oxford University Press
[120] Daniel Bodanski , 'International Law in Black and White' [2006] University of Georgia <http://digitalcommons.law.uga.edu/fac_artchop/220>
[121] R R Baxter, 'Law in Her Infinite Variety' (1980) *The International and Comparative Law Quarterly* Vol. 29, No. 4
(Oct., 1980), pp. 549-566
[122] Ibid. (n 2)

Protocol of 1925 for the Prohibition of the Use in War of Poisonous or Other Gases, and Bacteriological Methods of Warfare .In this Protocol, a number of tough military-powers have reserved the right to launch chemical warfare against a State which used toxic gas in contravention of the Protocol or against the ally of the first-user. And this would possibly bring the Protocol to an end.[123]Hence, obligations tethered to an underlying claim of wrong-doing do emerge as a result. Therefore, soft norms do create some measure of rights and obligations, however, they would not have enforceability in strict legal gamut.[124]

While, it may well be argued that the *hard or treaty norms* which are effected by way of treaties purport to lay down rules governing the behaviour of States towards their nationals or towards aliens. And that, they are strict in the sense of being mandated as *Pacta de contrahendo*-binding legal instrument where parties assume legal obligation to conclude future alliance. However, these norms may be so equivocal or sparingly described that they fail to govern the conduct of States, if they are not keenly bolstered by the decisions of international organs. Article 6 of the International Covenant on Civil and Political Rights states that *"every human being has the inherent right to life and his right shall be protected by law and none shall be arbitrarily deprived of life".* [125]Even during National Emergencies or Wars, these provisions cannot be derogated from.[126] Yet the smearing truth remains more often than not State representatives violate such innate principles of humanity- whether through Municipal irregularities like granting Capital punishment or through cross-border massacres. The ill-implemented HR laws reveal the contagion of vague drafting of IL with hollow generalizations that render them legally unenforceable. Many such toothless drafting of norms can be traced in abundance within Treats and other UN Authoritative Agreements. These propositions sound success only through, proper intent and conduct of states and , meaningful administration governed by treaty. The propensity of persuasiveness or coerciveness of norms can be best elucidated by the draftsmen of various instruments, rather than being thrown down the abyss of 'convenient interpretation'. Baxter, very lucidly states that there is no universality of the phenomenon that *treaty* would always be in effect binding, whereas a *declaration* would not be. The latter could consist of binding legal rules and the former could well serve as mere guidelines, with no mandatory compliance. *Therefore, choosing whether to go the route of a*

[123] RR Baxter, Buergenthal, 'Legal Aspects of the Geneva Protocol of 1925' (1970) Am. Journal
[124] Ibid (n 3) 552ff
[125] ICCPR Art 6.
[126] Adopted by GA Resolution 2200 (XXI) 16 December 1966, 21 GAOR, Art. 4 p 1

treaty or that of a resolution or declaration; and deciding between the soft and the hard norms is not a clear-split.[127]

In my reverence to International Law practice, while I may agree with Baxter's advice that the legal implications of a *treaty or conventional norm*[128] to which those States have subscribed depends on the spirit in which the instrument was ratified or rescinded to and on the State's underlying foresight and assumptions independent of whether it is a hard norm , or it is the weak norm . *And even when Baxter says the resulting consensus but also to make understandings between States as flexible an instrument as possible in order to encourage agreement. He does no service to the establishment of order if he adopts an either-or posture. I think in the TWAIL'ian view , from the perspective of an Indian lawyer, hard norms may well create a positive force for the other States , especially economic and military forces to comply with obligations and hence better for the State of India*.[129]

The general notion that surfaces among International lawyers is that the Resolutions of the General Assembly are *Soft norms* and only recommendations. They argue that ratifying States would have incorporated them in a treaty if they intended to adhere to them. Let us consider the question of *provision on nationalization of foreign property in the Charter of Economic Rights and Duties of States*. It may hence be said for the States who ratified the Charter, that their understanding approaches the level of legal effectiveness that a treaty has Therefore, whether hard or soft norms, they directly or indirectly bring about rights and obligations, which may not always be enforceable.[130]*It is pertinent to note that Hard norms of treaties may create little or no enforceability, even when inserted in an instrument presumed to create rights and duties, while, on the other hand, soft norms instruments of lesser value may influence or control the conduct of States and individuals to a certain degree, even though these norms, whether the soft or called hard laws, are not strictly binding in the International Legal Framework.*[131]

Baxter, very vividly concludes that ; the distinction between treaties, declarations, protocols, statements of policy, resolutions of international bodies, conventions is unclear. And also, the

[127] Commission on Transnational Corporations, Intergovernmental Working Group of the Whole on the Code of Conduct, Transnational Report of the Secretariat, UN Doc E/C. 10/18 (1976).
[128] Hard laws and Soft laws.
[129] Ibid. (n 5)
[130] Ibid. (n 7)
[131] Ibid (n 2) ; J.L Goldsmith, Eric Posner , 'The limits of International Law' [2005] Oxford University Press

delineation in seeing all hard (treaty)norms as binding, and soft (protocol/conventional) norms as non-binding is razor-thin and ambiguous.

Customary International Law (CIL), is usually defined as the customary practices that states follow on account of its inviting of legal obligations or sanctions. It has a legal force under international law similar to treaties. CIL has long been regulating the fundamentals of international relations and has always been multifarious in the sense of purporting to bind all or almost all states. States are typically bound by CIL regardless of whether the states have codified these laws domestically, through treaties, or as a matter of convention or perpetual-usage. The Statute of the ICJ acknowledges the essence of CIL in International Law in *Article 38(1)(b) and Article 92 of UN Charter*: '*The Court,..decide in accordance with international law ...disputes that are submitted to it, shall apply ... international custom, as evidence of "a general practice accepted as law"*, and refers to "Custom" as a *"second source of international law".* The most talked about practices in CIL include immunity of visiting diplomats of state and the principle of non-refoulement.[132] Some international customary laws have been even codified through treaties and municipal laws, making them rich sources of International legal-framework. Many of the foundational principles of International Law (IL) such as territorial sovereignty, *pacta sunt servanda* and sovereign equality, continue to be governed by CIL. Jus in bello or International Humanitarian Law, served long as Customary Law before they were codified in the Hague Conventions' 1899 and 1907. Geneva Conventions'1993, have transformed itself into mandatory practice in IL, sprouting from CIL. All *jus-cogens* are CIL through their adoption by State. Whereas, some CILs rise to the level of *jus cogens* through acceptance by the international community as being non-derogable rights, other CILs may simply be followed by a small group of states as a matter of their mutual conventionalism. *It is in the former, that, CIL emerges as a prospective source of International Law, purporting adherence from all quarters as is reified by many decisions of international tribunals and courts.*[133] States can however derogate from CIL by enacting treaties and inconsistent laws with CIL, unlike *jus-cogens.* It is practically impossible to determine whether around 200 world-states engage in a particular usage. Thus, historically, CIL has generally been accorded source in a highly-selective survey of state-practice that includes only powerful World-States.

[132] http://www.icj-cij.org/en/case/158/judgments.

IL has since, relying upon the decentralized nature of the international system, involved two fundamental elements that constitute CIL: the actual *practice of states* and the *acceptance by states of that custom as law*. *The actual practice of states*, called material-fact by Chimni, is based on duration, precision, and generality, uniformity and consistency of a particular kind of behaviour by states, which form basis of determining whether or not any practice is a binding international custom. *But more often, States and judicial international organs have acted for their self-interests, rather than in reverence to the golden-principle of International Law, which is to make the world, One.*[134] Well, all states may contribute to the development of the present CIL, but they are inequal in the process, since the First-world states play a greater role in the establishment of customary-practices. The second element converts a usage into an enforceable custom-the practice must be accepted as *opinio juris sive necessitatis*[135]. ICJ stated that the state-practice must have "occurred…as to show a general recognition that a rule of law or legal obligation is involved."[136] If a particular practice is restricted to a small group of states, the standard for acceptance as a custom becomes high. Article 38(1) of the ICJ Statute mentions the term *"civilized-states"* which gave life to the two elements of CIL, and facilitated the Othering of the Third-World. [137] And they were given relevant-historic-*connotation*s by the 'Eurocentric world', as Chimni rightly asserts.[138] Post- colonial states sought to challenge the connotations ,thus, the old distinction between civilized and uncivilized states was bound to fail.

Ideas and beliefs, undoubtedly emerge dominant when backed by powerful world-states and organizations, international institutions and tribunals, and academia but, they ideally sustain only when accepted by variant social forces and ruling governments in the third-world. In talking about the hegemonic and capitalistic interests of the West, they successfully attained a widespread consensus in both the international community of states and global civil societies; *through duping them into particular understandings of world order, specifically regarding the vital role of capitalism in promoting the global common good; and through clever diplomacy*

[134] J.L Goldsmith, Eric Posner , 'The limits of International Law' [2005] Oxford University Press
[135] "opinion that an act is necessary by rule of law"
[136] North Sea Continental Shelf, Germany v Denmark, Merits, Judgment, (1969) ICJ Rep 3, ICGJ 150 (ICJ 1969), 20th February 1969, United Nations , ICJ
[137] Malcolm Shaw, 'International law' (13 November 2019) Encyclopaedia Britannica < https://www.britannica.com/topic/international-law > last accessed on 13 December 2020

[138] B. S Chimni, 'Customary International Law: "A Third World Perspective"

and expertise in the field of IL. Their blatant ill-will is seen in their proposition that vizavis 'modern custom', opinio juris alone counts for the primordial source of CIL.[139]Courts depend heavily on portrayals of CIL in other Western government sources, rarely consider direct evidence of Third-world state practice, focus entirely on the advanced democracies of West, and rely upon Western academics who exhibit a similar tendency to focus on laws and policies of only the West. Thus, the sourcing and degree of *state-practice* requirement remain highly contentious. *The opinio juris* requirement raises graver issues because courts and scholars often infer it from the existence of a widespread behavioral similarities in the ***West-centric historic social order***.[140] The norms they have framed as CIL are their Western norms that may or may not find adherence by a majority of states[141]. Thus, many laws were but, the Colonial-agendas of the West in the 19Th century, like the doctrine of freedom of the seas, innocent passage, and disturbingly, the laws on acquisition of territory and state responsibility. D'amato conspicuously but rightly asserts, how custom came into being and how it may be modified are wrapped in mystery and illogic.[142] Judge Manfred Laches opined that *a novation in Rulebook of International Law should find sources and meaning in States with differing socio-political and legal systems, across continents and oceans. International Courts must not rely solely upon 'the consensus of European States only'. Chimini concludes "the CIL process lacks procedural legitimacy"*[143]*, since the State-practices of Third-World nations are thrown out of the gamut of delineating customs, for the purposes of CIL.* [144]***'In short, the genesis of the doctrine of CIL can be traced to the European empowerment, European values, the positivist method, and the needs of nineteenth century capitalism and imperialism'***[145] The idea of CIL over the years has emerged so complicated and far-fetched, that two decades back, Robert Jennings, opined that, generally a perversely accepted CIL is not even remotely resemblant to CIL in the actual light.[146] *CIL has a close nexus with capitalism in Europe and has been instrumental to*

[139] Ibid. (n 15) 23ff
[140] Ibid.
[141] Ryan M. Scoville, Finding Customary International Law, 101 IA. L. REV. 1893, 1948 (2016)
[142] Anthony D'amato, 'The Concept of Custom in International Law' (1971) 188
[143] Yasuaki Onuma, 'A Transcivilizational Perspective on Intl' Law' [2010] 221.
[144] B. S Chimni, 'Customary International Law: "A Third World Perspective"
[145] B. S Chimni, 'Customary International Law: "A Third World Perspective"

[146] Robert Kolb, *The Protection of the Individual in Times of War and Peace*, The Oxford Handbook of the History of Intl. (Bardo Fassbender & Anne Peters eds., 2012).

sustain the supremacy of certain Western countries, sabotaging the customary interests of other countries.

Examples that reify Customary International Law as a source of International Law:

Nicaragua case:[147]

The Judgement in this case particularly reifies and illuminates the role CIL plays as a source of International law. Application was filed by the Republic of Nicaragua in 1984 against the legitimacy of U.S armed onslaught in their State.[148]

The Court decided that,

1) by training, arming, and supplying the arms and aiding military and paramilitary activities in and against Nicaragua, USA has acted against Nicaragua, breaching its obligation under *CIL not to interfere in the affairs of another State;*
2) USA, by unfolding violent attacks on Nicaraguan territory from 1983 to 1984 involved the use of force. It acted against the Republic of Nicaragua, against its obligation *under CIL not to employ force against another State;*[149]
3) in authorizing overflights in Nicaraguan territory, and by the acts of USA imputable as violence against the Republic of Nicaragua, USA breached *CIL not to violate the sovereignty of another State*;
4) USA, by laying mines in the internal or territorial waters of Nicaragua in 1984, has acted, in breach of its obligations under CIL not to interrupt peaceful maritime commerce against another State.

The SS Lotus Case – France V. Turkey [150]

The Lotus case concerns a trial resulting as a result of 1926 collision between the S.S. Lotus, a French steamer, and a Turkish steamer, S.S. Bozkourt. The *Lotus principle,* usually considered a foundation of CIL, says that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition. It laid foundations of article 11(1) of the High Seas

[147] Military and Paramilitary Activities in and against Nicaragua Jurisdiction and Admissibility (Nicaragua v. United States of America), 1984 ICJ REP. 392 June 27, 1986

[148] "United States Decides Not to Participate in World Court Case Initiated by Nicaragua". **22** January 1985 *UN Chronicle*

[149] Ibid (n 3) sub para 4

[150] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. No. 10 (Sept. 7) https://web.archive.org/web/20101210073754/http://www.worldcourts.com/pcij/eng/decisions/1927/1927.09.07_lotus.htm

Convention'1958. This resulted in the crystallization of **"***flag state principle*", which has since been implemented in United Nations Convention on the Law Of the Sea and many other environment related CIL legislations[151].

North Sea Continental Shelf Case:[152]

This was one of the foremost cases, where the Court put forth the credentials for any custom to qualify as CIL, the binding-force associated with CIL and how it has its firm precincts in International Law.

The Court argued that it is indeed possible for Conventions, while only contractual in origin, to pass into the corpus of international law, and thus become binding for countries which have never become parties to the Convention, like the Equidistance principle. And that there arises an irrevocable requirement the State practice should have been both extensive and effectively uniform for being raised to the status of a CIL. As a subjective element, it must relate to *opinio juris sive necessitates* or States must feel they are conforming to a norm which should tantamount legal-obligation).

Therefore, in light of the above cases and the conventions which emerged landmark and primordial, with regards CIL have established CIL as a source of International Law. But with times, CIL has developed to metamorphize into a more accommodative concept which is emerging to find its precincts in the customs of the third world nations as well. The Court's rulings serve as a constant reminder to the International arena about the significance of CIL as a source in the overall development of IL and the probable status of jus cogens or non-derogatory law attained by several customs. Therefore, obligations under Paris Climate Accord for a fair negotiation on technology transfer and its commitment under customary law has acquired the status of being enforceable, because the issue of global warming and environmental deterioration is a global phenomenon, and must be taken very seriously by ICJ. In advancement to the UNGA resolution 54/50 (1990) [153] , developed nations must enter various multilateral treaties for the world community to join hands in overawing the problem

[151] Article 217(1)[2]

[152]North Sea Continental Shelf, Germany v Denmark, Merits, Judgment, (1969) ICJ Rep 3, ICGJ 150 (ICJ 1969), 20th February 1969, United Nations , ICJ https://www.icj-cij.org/en/case/52/summaries

[153] UNGA Resolution 54/50, 1990, *to urge "Member States to undertake multilateral negotiations with the participation of all interested States in order to establish universally acceptable, non-discriminatory guidelines for international transfers of dual-use goods and technologies and high technology with military applications; encourages UN bodies to contribute, within existing mandates, to promoting the application of science and technology for peaceful purposes"*

of Global heating. Afterall, as Nancy Fraser [154] argues that the world citizenry is now bound by similarity in problems and not by territorial or national, territorial-frame setting in defining the tenets of justice.

[154] Nancy Fraser, 'Reframing Justice in a Globalizing World'[2006]

A CONFOUNDING TALE OF MODERN-CONSTITUTIONALISM IN POST- COLONIAL INDIA

- HURMAT KOUL

Constitutionalism as a concept is not circumscribed within a defined set of assertions or consequences. It harmoniously reaches out to a wide diversity of thought, discord and debate. The idea of Constitutionalism which finds agreement by most Constitutional scholarships is that it is an ambivalent concept to the extent that it has both negative as well as positive connotations. This paper at it's core questions the practical precincts of Modern Constitutionalism in post- colonial India, and stresses upon the readers to think *Has the present Indian society, beyond court rooms and legislative parleys, really broken free of and risen above the colonial-British legacy?*

Let us try and understand Constitutionalism's essence and then try traversing the domain of Modern-constitutionalism, through legal-philosophical contours of Constitutionalism at its pulp is the legal limitation to the exercise of power by the government and denigration of arbitrary rule. The beginning of Constitutionalism, saw the strict adherence by the sovereign to the natural law and the moral code of conduct therein.[155] Besides, the source of power was external: God. Therefore, the sovereign's word was taken as the word of God and the precincts of his powers were generally theological. But the modern Constitutionalism can be crisply understood as a concept that thrives in a state wherein the government is of the people, by the people and for the people. And this, as the most sought after understanding of the principle advocates a system of check and balance of powers and diffusion of decision-making abilities so as to ensure a good-riddance to the folly of Absolutism and Arbitrariness. In light of the dark colonial legacies left by the British, Indian version of post-colonial Constitutionalism can be contextualized in terms of the appropriation of governmental powers in a manner of securing the democratic, and secular values that India subscribed to as a Post-colonial state. The apposite and venerable goals that were lined-up for modern-Constitutionalism in Post-colonial India can be demonstrated through the solemn resolution made by the People of India on the 26th of November 1949. The Preamble of the Indian Constitution promises to every statesman the enjoining of justice, liberty, equality and fraternity; and also a State which aligns with socialist,

[155] Martin Loughlin, '*Foundations of Public Law*' [2010]

secular and democratic characters. Whether it be the securing of equality and justice or the democratic and secular identity of the State, these are undoubtedly the identified pillars upon which the goals of Constitutionalism in India rest.[156]

Modern Constitutionalism is an idea that seeks to identify a Constitution as a transformative and receptive body which is open to incorporate changes as per the needs of time. And to this, McIlwain's concept of Constitutionalism, I reckon is based on an eclectic and balanced understanding of the different historical and developmental stages of Constitutionalism.[157] With the all-encompassing, romantic and inclusive idea of India that has been pitched in the Preamble to the Constitution, the need of having to 'literally jump out of the precincts of it for development of a Modern-constitution is rather not necessitated . This, in the sense that even if the preamble be interpreted rather strictly, it still embodies the beautiful idea of a modern state Constitutionalism.

Modern Constitutionalism in India envisages the zeal to remove ill-founded discriminations, and kindle an ambience of social, economic and political justice for all. The scope of transitiveness or hybridization of the Indian Constitutionalism is the marching of the Constitution towards the ideals enshrined in the Constitution, and it's efficient adjustment to changing needs of the Indian people for the realization of a just and egalitarian social order. The pedantic understanding of Constitution cannot be given primacy over the all-important spirit and the philosophy of constitutional principles and idealism, hence Modern constitutionalism finds meaning in the modern global community, in general and the Indian society in particular.

Having talked about imbibing necessary amends in the Constitution, the Apex Court has had a substantial role in aligning the Constitution with modern-constitutionalism. The impregnation of Fundamental Rights, Civil Liberties, Directive Principles of State Policy, Separation of powers, etc in the Constitution mark the beautiful confluence of various world constitutions within the post-British Constitution. In its reverence to the 'role of Sentinels on the qui vive', the judiciary has vociferously denigrated different practices and usages that went against the universally recognised principles of fairness, equality and justice. The shackle-breaking

[156] See, Preamble to the Constitution of India

[157] McIlwain Charles H. 1947 [1940] *Constitutionalism*: Ancient and Modern. Ithaca, NY : Cornell University Press

verdicts sounded by the court in reverence to the constitutional principles of justice and equality stand tall to crown them as the guardians of modern constitutionalism in India. The recent outlawing of the mal practice of instantaneous triple *talaaq* to Muslim women, recognition of the rights of LGBTQA community, the Sabrimala judgement all give context to how internationalization of the constitutional ideas and development of a modern constitution can be given due recognition in the Indian context. A famous American jurist, Paul Freund said, "The court should never be influenced by the weather of the day, but inevitably they will be influenced by the climate of the era" .[158]This is the dogma upon which the transcendence of constitutionalism rests – the climate of the era is bound to altercate one or the other provisions in the constitutions of the nations. The growth and development of constitutionalism is what keeps it living as a dynamic relic, a value-laden pragmatic sanctum of dethroning of discrimination and prejudices.

On one hand, we see Indian constitutional values taking progressive, modern forms; on the other, regressive and contradistinctive end, we are witnessing the upheaval of the revered constitutional ideals of secular, just, equal and fair India. The association of radicalisation and other negative functional descriptions to a particular community, and the deliberate attempts at igniting religious and caste-based discords, spun by the media-houses and politicians alike have time and again toppled the efforts of judiciary at ensuring the prevalence of modern-constitutional thought in India. Present confounding times call for the notions of freedom and liberty to be rethought and reinforced through collective action. Idea of nationalism and love for one's nation must be contrasted with extremism and xenophobia. And no modern-constitution accommodates the idea of delineating the crowned kakistocracy[159] as being the sole stamping authorities for labelling who a true patriot and a terrorist is. It is our responsibility as people of India to take this resolution of warming the Indian modern constitutionalism with love for our constitutional ideals and the unity of the brethren of the same relic-The Revered Constitution of India. This would make sure that India as a nation of Mahatma Gandhi, Sir Muhammad Iqbal, Guru Nanak and their warm legacies of non-violence, love for humanity and charity live on for perpetuity. What we often call the liberation of India from the British colonialism must be re-mulled .Unfortunate realities of the day suggest the answer in negative

[158] https://www.wnycstudios.org/podcasts/takeaway/segments/transcript-interview-justice-ruth-bader-ginsburg

[159] A government run by inefficient people.

as we find ourselves as mere *impostors* among the liberated world of democratic and secular thought and action. The refusal to accommodate diversity, and squabbling with the differently opinionated corrode the sanctity of constitutionalism and further hinder the operation of modernity-leaning constitutionalism in the present context

Modern constitutional thought with the necessary influence from the global diaspora must be made to incorporate all progressive and sacrosanct human and environmental rights. I further believe, that the virtual anarchic interpretation of constitutional ideals is what defines the zenith of modern and transitive Constitutional thought. In light of the global tutelage offered to the sanctums of fairness, justice and equality, I strongly believe that the coming together of the world constitutions can generate a positive synergy as a prelude to the concept of 'modern-constitutionalism' – where all constitutions learn good from and help one another to sequester all the quandaries. The acme of an egalitarian world order can be fostered through globalization of justice and of human sufferings and the *culling out of obtrusive and discriminatory racial-epithets*. Recalling the confidence bolstered by the feminist maverick Justice R B Ginsburg, the least we ask of our brethren is that they take their feet of our necks.

Despite, the past India has negotiated until recently, we should continue to strive hard for sensitisation of equal rights and liberties of all peoples and the doing away with descriptive functional-pigeon holing of genders, castes or religions as this is what modern-constitutionalism aspires for. Unless *justice is made to shine above all that exists*, the transitive or modern constitutionalism cannot be said to have been truly achieved in its right tenor by India as a citizen of the world at large.

The philosophy and sustainability of modern and transformative constitutionalism can be in the rightful spirit bolstered in the emotive lines of Faiz Ahmad Faiz,

Hum ahl e safa, mardood e haram masnad pe bithaaye jaayenge
uthega annal- haq ka naara jo mai bhi hun aur tum bhi ho,
Hum dekhenge!

The author concludes her essay with an extensive interpretation of these beautiful lines. We will surely witness our dream of India crystallise, one day . The India, where the ruled and the oppressed will be seated on the throne to rule the nation. The slogan of truth will overhaul all other voices of disdain, bigotry, jingoism and falsehoods. The truth lies in you and in me and

in no crowned ruler. We are our rulers and we stand for truth. Only the Rule of Law would be bowed down to, by one and all.[160]

[160] The author has done the interpretation of the poem in her own understanding and contextualization.

WORLD ANTI-DOPING AGENCY IS A BOON OR BANE FOR PLAYERS UNDER SPORTS LAW: WITH REFERENCE TO STRICT LIABILITY

- PALAK MEHTA

Introduction

Sport is an important part of our lives and is always sought to encourage competitiveness, integrity and teamwork in our lives. In modern times with the growth in the different types of sports played and different scientific and technical applications, principles are compromised more than we ever could have expected. The money spent on these sports is huge and the winning is getting all the more relevant. The explanation for the sportsmen, the teams management uses more ethical ways of finishing up, make sure no means are left (how many unlawful or disdainful) unexplored. This raises concerns about how such conduct is controlled men and women of sport.

WADA (World Anti-Doping Agency)

Since Olympics started more than a century ago, the human race has received an incentive not only to play sports but also to watch them in passive ways. In addition to the sport's frenzy, patriotic fervour and zeal, its economic activities have facilitated multiple demands for tighter control and behaviour. The current doping regime is rooted in the new Olympic movement on the international stage. As any competition laws, anti-doping principles are sport rules that regulate those circumstances under which sports should be played in their true minds.

The international framework regulating sports doping is the World Anti-Doping Agency Code 2021. "Infringement of one or more anti-doping regulations set out in Article 2.1 to 2.11 of the Code" shall be doping as defined in WADA 2021[161]. The ethical pursuit of any athlete's natural talents is forbidden from doping. WADA has repeatedly held out its position to see whether countries can criminalise doping under local penal laws or pass a special rule. Anti-doping is not only intended to protect the health of athlete but also to provide athletes with an ability to achieve individual achievement while maintaining the spirit of sport without the use of banned substances and methods.

[161] Art 2.1-2.11, World Anti-Doping Code, 2021.

The code also sets out laws that are considered guiding standards and must not be compulsory to be used verbatim in sports bodies in different governments. This structure ensures that the basic anti-doping rules are consistent across national sporting bodies across the world, while the other parts of the Code provide for minor substantial modifications that may be required in various contexts and jurisdictions.

The implementation of the Code brought some important progress to the global battle against doping in sports, including formalising some provisions and clarifying the roles of stakeholders. The Code introduced the principle of non-analytics, which means that the penalty will be imposed when there is proof of a breach of the anti-doping law if there is no positive testing on doping checks.[162] It works in conjunction with five International Standards aimed at bringing harmonization among anti-doping organizations in various areas: testing, laboratories, Therapeutic Use Exemptions (TUEs), the List of Prohibited Substances and Methods, and for the protection of privacy and personal information.[163]

In the athlete participation forms and membership regulations of the different sports authorities, anti-doping provisions and rules have now become binding. The Code obliges participants to follow and enforce doping policies and regulations that are in line with the Code and to ensure that all members comply with it as well. These sports rules and procedures must be interpreted separately and should not be limited to national requirements and legal codes related to criminal or job proceedings.

CAS (Court of Arbitral Proceedings)

The growing number of international sports conflicts starting at the beginning of the 1980s stressed how an independent body had to take decisions on sport-related matters "easy, cost-effective and binding.[164] In particular, a body to 'deal with credibility crises in the world of sports' needed to become the ultimate forum for international sport. The then IOC President, Juan Antonio Samaranch, had the idea, in response to the increased number of disputes, to create a sports competence whose sole responsibility would be to settle sports-related disputes and to decide on such matters with binding responsibility.

[162] World Anti-Doping Code.

[163] *Ibid.*

[164] Ian S. Blackshaw, Sport, Mediation and Arbitration 151 (Robert C.R. Siekmann & Janwillem Soek eds., 1st ed., 2009).

In 1982, H.E. Judge Keba Mbaye, IOC Member at the ICJ, headed a group of IOC members who "taked on the drafting of a paper that would rapidly become the Sport Court of Arbitration," thereby launching the concept of establishing an arbitral jurisdiction for sport disputes.[165] The CAS is a self-regulatory body governed by the laws of its own, headquartered in Lausanne, Switzerland.[166] Since a vast majority of sports organisations have delegated conflicts to the CAS, this body's authority remains increasing and it has become an important private legal agency "increasingly playing a part in developing this particular case law."[167] The CAS ruled that its arbitration awards are final and binding, with the exception of judicial scrutiny by the Federal Courts to protect its laws created in privacy.[168] Domestic courts have no authority to appeal against CAS awards as the "CAS was meant to usurp the position of domestic courts in sporting disputes ..."[169]

The CAS arbitral awards are supposed to establish a 'lex sporttiva,' which means a collection of international sport law governing principles and laws," which plays an important role in strengthening CAS.[170] A rise in the influence of the CAS may be due to many other factors: the world antitype, the Olympic Games and other international Sport Federations have been identified as the sole arbitral body.

As far as standing is concerned, "any person or legal entity able to act can resort to the CAS services. CAS services. That include professional athletes, clubs, sport federations, sporting event organisers, sponsors and TV companies." Disputes, for example, may be of a contractual nature or be of a disciplinary nature, following a decision by a sports association (for example, sponsorship or management contracts or player transfer agreements) (e.g. doping cases or selection of athletes).

The parties must, however, accept this in writing in order to apply a conflict to arbitration by the CAS. The Court of Arbitration for Sport has two separate bodies in its organisation, the

[165] Matthieu Reeb, The Court Of Arbitration For Sports (CAS), In Digest Of CAS Awards 1986-1998, 23 (Matthieu Reeb ed., 1998).
[166] James A. R. Nafziger, International Sports Law, 40-41 (2nd edn., Transnational Publisher, 2004).
[167] Simon Gardiner Et Al., Sports Law, 45 (4th ed, Routledge. 2012).
[168] General Information, Court of Arbitration for Sport, available at http://www.tas-cas.org/enlgeneralinformationlfrequently-asked-questions.html, last seen on 22 May 2021.
[169] Mazzucco, M.F. and Findlay, H.A. 'Re-thinking the legal regulation of the Olympic regime: envisioning a broader role for the Court of Arbitration in sport', Proceedings: International Symposium for Olympic Research, (2010).
[170] Eric T. Gilson, Exploring the Court of Arbitration for Sport, 98 LAW LIBR. J. 503, 504 (2006) available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/llj98&div=42&id=&page=, last seen on 22 May 2021.

International Council of Arbitration for Sport (ICAS) and the CAS, both based in Lausanne (Swiss). These can be applied in countries signatories to the 1958 Convention on the Recognition and Enforced of Foreign Arbitral Awards and can be argued before the Swiss Federal Tribunal with regard to the recognition and compliance of CAS awards

Born as the favourite son of the IOC, it has continuously expanded its jurisdictions after an initial time of hardship and has finally been regarded by the IOC, WADA and even IFs as supreme tribunal for sport. CAS has made a key contribution to the development of global sports law through its decisions. It establishes common legal standards between sports bodies; interprets and harmonises sporting law; reviews the decisions of sporting bodies; it helps to confirm the division of competence within sport

Strict Liability: A Bane for Sports?

The Code upholds strict liability as a central tenet. Under this scheme, only the determination of sanction involves the issue of fault or negligence. The authors chose the method because they thought it was the most powerful way to combat doping. One of the key elements in determining guilt in cases of doping among athletes is the concept of strict liability, enshrined in Article 2 of the WADC.[171] It was prevalent both in the CAS case and in most current anti-doping regulations in the WADC before the code was codified.

The rule states that the simple existence, as a consequence of the competition, of an interdicted substance would suffice to result in a loss of all results. Article 9 of the Code provides for an immediate disqualification of the individual result by violating the anti-doping law in connection with competitions testing. This is because, irrespective whether he or she is faulty, the sportsman has a possible advantage over the other sportspeople.

The breach happens whether or not the athlete drinks such a drug intentionally or unintentionally, or is reckless or otherwise guilty. This law creates the athlete's individual obligation not to access his or her body at any price for any banned drug. When a spotlight breaches doping by testing positive for a sample with respect to a competition test, the result obtained by the spotlight is immediately discredited, including forfeiting medals, points or prizes. This law helps to ensure justice for the other athletes.[172]

[171] Art 2, World Anti-Doping Code, 2021.

[172] Paul David, A Guide To The World Anti-Doping Code: A Fight For The Spirit Of Sport (1st edn., Cambridge University Press, 2011)

Furthermore, Article 3 of the WADC stipulates the burden and standards of proof in these cases. Doping tendencies have been imposed on the applicable anti-doping association that performs the test of prohibited substances as a prime test for establishing the athlete.[173] The criterion may, however, easily be defined since this burden is met by a positive test for a banned drug. In addition, it is assumed to follow the appropriate procedures for conducting collecting samples and analytics in every WADA accredited laboratory. The WADC states that a hearing body needs to show only "comfortable satisfaction" of evidence to establish culpability. The norm for an athlete to refute presumptions or to determine some fact or event on the basis of the probability balance the principle. The principle. However, in view of the application of the principle of strict liability, once it is positive, the burden of proof from the Athlete is extremely difficult because of the absence of any intentional requirement or negligence defence available to him.

CAS Decisions

G v. International Equestrian Fed'n[174] was one of the first cases of doping investigated by a CAS panel in which the arbitrators first classified the provisions for automated disqualification from an event in the International Equestrian Federation (FEI), as a case of "strict liability". Despite being in complete violation of natural justice principles of athletes and possibility for restraint of trade, the strict liability standard was upheld for meeting the high objectives and practical necessities in the fight against doping in sports.[175]

The Court of Arbitration for Sport has itself recognised that the application of the strict liability principle does not always appear to be fair. The panel in *Mariano Puerta v. ITF*[176] stated that "the problem with a 'one size fits all' solution is that there are inevitably going to be instances in which one size does not fit all ... It is argued that this is the inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim."

Further criticism concerns the basis for applying the concept of strict responsibility. In the *USA Shooting & Quigley v UIT* case, the panel pointed out that a requirement of intentions would

[173] Sooraj Sharma & Shujoy Mazumdar, 'A Critical Appraisal of the Concept Strict Liability in WADA Code' (2011) 1(1) Journal of Sports & Legislation, Available On https://ssrn.com/abstract=1909645, last seen on 22 May 2021.

[174] CAS Award No. 91/53 (1992).

[175] C. v. Federation Internationale de Natation Amateur, CAS Award No. 95/141 (1996).

[176] CAS Award No. 2006/A/1025, (2006).

prompt expensive disputes which could well hinder the battle against doping by the federations.[177] It was subsequent proposed that federations would have to prove the athlete's guilt, and federations would get overwhelmed by this high standard of evidence, if the strict liability principles were abolished.[178] In the concern that their battle against doping will be successful at the detriment of sometimes innocent people, the International Anti-Doping Agency (WADA) has been criticised for maintaining the strict responsibility principles in the Code.

When debating high principles such as proportionality and basic rights, the reality of the strict Liability Standard can be lost in practise. Any strict responsibility norm will still catch incidents that have low culpability, so the following debate on the rights of athletes will cover the presentation of events. In order to determine how well international courts have accounting for unintended breaches, the question of proportionality depends on the characterisation of the crime and the impact of penalty in respect of the purpose of the law and on the presentation of cases that can not be described as accidental violations. In several instances, tainted supplements and medicines are unknowingly ingested.[179] Other cases challenge anti-bureaucratic doping's weaknesses and how the risk is fully addressed to athletes. In these troubled situations, it is difficult to wonder how an NGO would disqualify an athlete for such minor violations and suspend them.

Moreover, in cases where the athlete may not have been responsible for the doping offence, the real 'guilty' finding has also fallen on fire rather than the final penalty. It is now claimed that athletes experience reputable, financial and psychological harm because the Individual is designated an offender or a cheat for the remainder of his or her lives, irrespective of whether the usual penalty, a decreased penalty or no penalty has been issued.

There is a disparity of power between the athletes and the WADA, and that WADA has created the Code and its components in favour of the WADA unilaterally. The Code should remove the concept of strict liability, and that, without negative inference, the evidence of each case should be taken into account. Drug experts should in any case bear witness to the likelihood that a breach of doping was committed in order to improve the performance of the athlete.

[177] CAS Award No. 94/129, (1995).s
[178] USA Shooting & Quigley v. UIT CAS Award No. 94/129, (1995) p15.
[179] CAS Award No. 2002/A/376, (2002).

Whether well-received or not, the strict liability approach has been upheld by the CAS in arbitral awards given. Two reasons explained the application of the strict liability principle. Firstly, the concept should work with all 'clean' athletes or as the commentary on Article 9 of the Code states very simple that “when an athlete wins a gold medal with a prohibited substance in his or her system, that is unfair to the other athletes in that competition regardless of whether the gold medallist was at fault in any way. Only a 'clean' athlete should be allowed to benefit from his or her competitive result”.

In the fight against doping, strict liability has been a cost, as it places additional burdens on athletes in order to protect sport on an international level. As a result of inherent dynamics and conflicting interests, cleansing sports of performance-enhancing substances is a difficult challenge. Virtuous tasks often involve sacrifices, and people in charge should see to it that those sacrifices are minimised.

Conclusion

It may be concluded, therefore, that WADA has demonstrated to be a bane for its sporting players with all of the judgement, understanding, facts and arguments stated by its authors as it ignores the proof of strict liability in these occurrences.

In addition, the management of innovation in sport by sports supervising authorities it is hard bearing in mind that there is no knowledgeable and appropriate premise for making decisions regarding the reasonable and the tricky. There is minimal direction in WADA Code and what direction it gives is in some cases precariously constrained like a square stake into the circular opening of the specific conditions. Singular instructions were left to govern the interface of innovation and game freely and differently in the absence of a basic premise reliably followed across sport. Obviously this kind of similar irregularity prompted the harmonisation, as the WADA code also proves to be the bane, of the anti-doping standards.

However, if not always, WADA has demonstrated a boon in the recognition of the prohibited list of chemicals that lead to doping in most instances, not only in defending the holiness of such athletic events but also in protecting the equality of participatory players.

A CONTEMPORARY EVOLUTION ON SAVIGNY'S IDEA OF VOLKSGEIST IN CONTEXT OF INDIAN JURISPRUDENCE

- ZEEL GONDALIYA

Introduction of the Historical School of Law

The historical approach of law illustrates the belief that the knowledge of past is essential for cognizance of the present. It deals with the general principles governing the origin of law and thereafter, the gradual development of law influenced by the conceptions of past. Historical School studies law as it appears in various forms at several stages during its development. It believes that the primitive principles of law are the threads which binds together the modern conceptions and developments in law. It takes up a custom as enforced by the community and traces its development.

A study of existing legal norms and contemporary legal institutions demands for an understanding of historical roots and patterns of development. Historical School of Law did not did not emerge as a novel European thought. It was rather considered as a manifestation of reaction against the natural law theories which provided a foundational root for the seeds of historical scholarship to germinate. The natural law theory was coined on the belief that the ideal principles of law are revealed by reason; wherein they failed to see that law had grown and developed from the past. As a reaction to this notion of Natural philosophy, the Historical approach of law emerged for assessing the true nature of law by focusing on the history, traditions, customs, habits and religious practices which assisted the development of law through various stages.

There were many jurists in the Historical School of law. According to Sir Henry Maine, Montesquieu was the first jurists who followed the historical method. He undertook researches in various institutions of law of different societies and came to a conclusion that the '*laws are the creation of climate, local situations, accident or imposture.*' However, he did not delve further for laying down any philosophy determining the relation between law and society. His suggestion that law should answer the needs of time and place was a step in direction of new thinking and provided a foundation for many other jurists like Sir Henry Maine and F.C. Savigny to develop the essentials of historical approach of law.[180]

[180] GUY CARLETON LEE, HISTORICAL JURISPRUDENCE, 1990.

Savigny's Approach and Contribution to the Historical School of Law

Friedrich Carl von Savigny was born in Frankfurt in 1779. Savigny is regarded as the founder and father of the Historical School of law. He was a Prussian statesman and historian who viewed law as a tool reflecting people's historical experience and culture. Being a historian, he studied the development of Roman law in medieval Europe. That led him to the hypothesis that laws were originally originated from customs and much later were created by judicial activity of Sovereign. He analyzed Roman and local laws in his six volume publication named '*The History of Roman Law in Middle Ages*'. He was not against the reforms, but he was firm on the stand that reforms which went against the nation's continuity were doomed and attracted downfall. Historical research was necessary for understanding and reform of the existing law. He believed that law is universal in nature and is applied throughout the civilization in the same manner.[181]

Savigny believed that the nature of a particular system of law is a reflection of the spirit of people who evolved it. He compared law to language. Firstly, language brings a sense of uniformity and understandability between people and secondly, language evolve with evolution of civilization. Similarly, law brings a uniformity between people and creates a common consciousness. Also, law evolves, develops and recasts with the development of a society and its culture. His conceptions were that the growth of legal principles was evidence of the 'silent operating forces' meaning the will of people. This model of the approach representing the spirit of the people was referred as the *Volksgeist*.[182]

For Savigny, ancient custom were the guiding paths for the law. He respected the importance of the other sources of law including legislation. But for him, customs were on a higher pedestal in context of the sources of law. In his model of understanding law, custom precedes legislation and is also superior to it. Legislation was given a subsidiary importance in development of law. Legislation will be effective only when it is in consonance with the people's needs and aspirations. The *Volksgeist* develops a custom, making it a popular consensus. For a legal system to succeed, the legislation should not be imposed as deliberate decisions, rather it should be in conformity with the customary practices upheld in the *Volksgeist*. According to him, a

[181] Neetij Rai, *Volksgeist: In View of Friedrich Carl Von Savigny,* SSRN (Oct 24, 2010) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695389>

[182] 5 V.D. MAHAJAN, JURISPRUDENCE & LEGAL THEORY, (1987).

law which ignores the significance of people's will and notion cannot be enforced for a longer period, and will eventually be futile.

The concept of *Volksgeist* was originated during the era of French revolution and Napoleonic conquests. During this period, the belief that the general and legislative will of peoples was guided by reason was spreading across the country and a powerful movement in support of the codification of the law in German states was emerging. This instigated Savigny and various other European jurists to initiate an abiding hostility towards the philosophy of the revolution. In Savigny's historical approach, codification would freeze the development of law at the very moment itself. He believed that the very nature of law was its evolving capacity. Codifying the law would give a finality to the code, thereby inhibiting any further scope of evolution and development. [183]

Savigny was of strong belief that the 'living law' does not emerge from the commands of sovereign or the will of legislator; it is rather an organic development from the conglomeration of reason, intuition, custom and instinct of the people of the civilization. The main belief of the Historical School of Jurisprudence is: '*Law grows with the growth and strengthens with the strength of people, and finally dies away as nation loses its nationality*'. This ideology is based primarily on the contributions of Savigny's theories of interpreting law. Savigny sees a nation and its law as organism which is born, matures and declines and finally dies. [184]

Comparative Relevance of Savigny's School of Thought with Indian Constitutionalism

Savigny's concept of law emerging from the *Volksgeist* was not entirely accepted by all. Many jurists pointed out various criticisms or parameters on which his concept *Volksgeist* failed as a primary source of law. These criticisms mainly focused on the reasons why the concept of *Volksgeist* is not viable in today's contemporary world.

In context of Indian legal system, I strongly believe that the approach of Savigny's Historical School of law depicting *Volksgeist* does not hold well in Indian Legal System. Particularly speaking in constitutional context, the theory of *Volksgeist* does not uphold the basic tenets of constitutionalism in India. In addition to that, Savigny's approach does not proficiently fit in any of the stages of evolution of Indian Jurisprudence, ever since the times of *Satyuga*.

Ancient religious sources of law

[183] 3 RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE (2005).
[184] 2 L.B. CURZON, JURISPRUDENCE (1998).

During the period of 200BC to 200AD, India received its first and most ancient source of law, Manusmriti. Manusmriti along with other written texts like Vishnusmriti and Yajnavalkyasmriti, introduced various topics of duties of citizens, rules of civil and criminal laws and different theories concerning the foreign policy. There were various ideas and concepts which were adopted by the drafting committee of Indian Constitution from these ancient religious legal texts for the governance of the country post its independence. As we discussed, Savigny's ideology was strictly against the policy of codifying law into Codes and Acts. However, in the context of Indian Jurisprudence, every stage of its evolution has experienced codification of some manner. These instances shall be discussed exhaustively as follows along with present day examples of how the *Volksgeist* model of understanding Jurisprudence is not viable in Indian Legal System.

The constitution of India has adopted its concepts from ancient literature and historical rulers. The research conducted by many historians on the Indus Valley civilization reveal that the people were subject to various laws like trade laws, personal laws, human laws etc. The researchers have found the laws inscribed in form of texts or scriptures. It can be deduced from the excavations of the Indus Valley Civilization that the people, even during those times were sanctioned by certain rules and were required to obey the codified laws. Indus Valley is considered as one of the richest civilizations of the world. There were various rulers and kings who tried to adopt the policies and governance of Indus Valley. The only way to have known about the laws and policies of an extinct civilization is by codifying or writing the laws. Therefore, Savigny's justification for not codifying law and the idea of law dying with the end of nationality does not confer well in this context. I am of firm belief of that law does not die with end of a civilization. It rather serves as foundation or conceptual theory for the subsequent civilization or nationality which helps them to understand the evolution of legal theory.

Another example which depicts the ancient codification of law in India is the Arthashatra written by Kautilya.[185] Arthashastra is considered as one of the most rich and knowledgeable literature on law and economics. Even today, the theories and policies of governance written in Arthashatra are found worthy and useful. If Savigny's theory of uncodified law would have been followed, the knowledge of Arthshasthra would have never been passed on to the present generations.

[185] Kautilya, Arthashatra, 3rd Century BCE.

Pre-independence and Post-independence era –Evolution of Constitutionalism

As discussed above, for Savigny, custom was the primary source of law and it preceded all the other sources. However, in India, the constitution is the supreme law of the land. Constitutional supremacy supersedes all other sources of law. For instance, very ancient Indian custom of performing sati by the widow on death of her husband was abolished by the virtue of constitution. Custom hereby, was the common consciousness or will of the people, which was rescinded through the constitutional provisions. During the pre-independence era, the custom of untouchability was also prevalent since time immemorial. People were divided amongst castes of *Brahmins*, *Vaishnavs*, *Kshtriyas* and *Shudras*. But with the enforcement of the Constitution in 1950, the custom of untouchability was abolished under Article 14 and 15 of the Indian Constitution and every individual was to be treated equally in eyes of law. Considering the common will of the people in terms India's context, before the independence there were widespread movements in different parts of the country claiming to have individual independent province instead of being part of country India as a whole. This common will was negated when the Constitution was framed. By the virtue of Article 1 of the Constitution, India shall be a country only if it is a conglomerate of states. This was a classic example when the common will of the people was overruled by the Constitution.

Universal application of laws – Is it applicable to India?

The Indian constitution is regarded to be federal in nature with certain strong centralizing features. It means that one of the important feature of the nation is the two level government system; i.e. Central Government and State Government. The universal applicability of law as interpreted by Savigny fails to mold shape in the federalist feature of India. The subjects on which both the government can legislate are given by the Constitution in Article 246. It can be deduced from the demarcation of subjects into Lists that the not all laws in India can have a universal application. That is the primary reason for the State Legislatives to have power to make laws for a particular State. Therefore, in light in this criticism, we can conclude that the universal nature of Savigny's *Volksgeist* theory is not applicable in the context of Indian Constitutionalism.

Constitutional morality through judgments

The Constitution of India is regarded as the supreme law of land and it has a higher pedestal than customs or legislations. For instance, the recent judgments in the landmark cases of

Sabrimala temple[186] and the custom of Jallikattu[187], reveals that any custom, irrespective of its antiquity, is liable to be struck down and declared illegal if the judiciary deems it in violation of constitutional provisions. The Judiciary of India performs a function of 'counter majoritarianism' where any custom or legislation which is in violation to the basic features and provisions of Constitution are struck down by the Courts. Therefore, despite of the common conscience being in favor of the custom followed in Sabrimala Temple and Jallikattu, Courts declared them to be against the principles of equality enshrined in the Constitution. This is an important example which communicates that why the Savigny's model of law where custom was given the most importance cannot be applied in the context of Indian Constitutionalism.

There are instances where the common will of people is influenced by some external laws and then successfully transplanted in that legal regime. One such example in Indian context was the Section 377 of Indian Penal Code which previously criminalized any unnatural sexual activity as offence. After the landmark judgment of *Navtej Singh Johar v. Union of India*[188], Section 377 has been decriminalized. The evidence presented during the proceedings like pillar inscriptions and historical texts revealing that ancient Indian culture did not penalize or stigmatize the concept of homosexuality. However, the mindset of the people about stereotyping the homosexualism emerged during the colonial rule of British. Therefore the law which criminalized homosexuality as unnatural offence was not a common will of people; it was rather a law adopted from the British. Therefore, it is not always possible for will of the people to be the reflection of its culture; at times they are influenced by the external factors like transplanting of laws from other legal systems.

Another drawback of applying *Volksgeist* model in Indian Legal System is that it is difficult to comprehend the common conscience of the people. *Volksgeist* has a very narrow and nationalistic attitude. Savigny has not defined the *Volks* i.e. the people, other than the basic definition saying the people living together and using a common language. India is a country of diverse religion and diverse opinions. Therefore it becomes difficult to recognize the 'common communal conscience' of the people. Moreover, our nation is deeply divided in terms legal matters as well as political opinions. For example, in the case of Ayodhya Land Dispute, the common will of the people was divided in two stratas; one believing it to be Ram

[186] Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors, (2019) 11 SCC 1.
[187] Animal Welfare Board Of India v. A. Nagaraja & Ors, (2014) 7 SCC 547.
[188] Navtej Singh Johar v. Union of India, (2016) 7 SCC 485.

Janmnabhumi and the other believing it to be Babri Masjid. There is a lack of synchronization between the common will and conscience of people because of the diverse communities residing in the country.

Daily life instances of legislative supremacy over customary norms

On the ground level as well, the greatest importance cannot be given to the customs and the will of people in India. Some illustrations depicting the superiority of legislation over the common will of the people are the rules and orders passed during the times of festivals. For instance, in Gujarat and Mahashtra, Navratri and Ganesh Chaturthi are very important festivals respectively, and celebrated with immense passion and enthusiasm. During Navratri, people gather dressed in ethnic wears and perform 'Garba' on the traditional songs in large groups around the centrally placed temple of Goddess Durga for nine nights. The common will of the people is to perform Garba till late night as symbol of devotion to Goddess Durga. However, the rules passed by the government allows for it only till 11 pm in the night. Similarly, during Ganesh Chaturthi the common will of the people is to play traditional songs for Lord Ganesh on loudspeakers throughout the night as a symbolism of sanctity. But the rules require them to shut down the use of speakers past 10 pm. Therefore, here the common will of the people is compromised for the implementation of legislation. Such instances prove that the 'common will of people' or the *Volksgeist* as the most important source of law cannot be held good in context of Indian Constitutionalism.

Conclusion

Savigny's concept of *Volksgeist* faces number of fundamental difficulties in Indian context. Firstly, it is difficult to postulate the 'common will' because of a communal diversity. Secondly, the constitution of India is itself a written and codified text which upholds the federalist nature for the nation. This in itself violates two fundamental notions of the *Volksgeist* concept; i.e. anti- codification and the universal application of the law. Thirdly, there are millions of customs which are prevalent in India since immemorial. If every custom was given a majority preference, the law of the land would be different for every group of people. Therefore, it is imperative for a country like India to have a system when the judicial interpretation is given the maximum importance as a source of law, followed by the legislation and finally, the customs. Since legislations perform a function of deliberating the majoritarian opinions in the Legislatives assemblies while framing laws, it is important for the judiciary to have superior role in order to ensure that the legislative actions are in consonance with the

constitutional principles; thereby performing its counter majoritarian function. In conclusion, I strongly theorize that Savigny's ideology and his Volksgeist concept does not hold well in Indian Legal System, in particularly in the context of constitutionalism.

DOCTRINE OF BASIC STRUCTURE AND THE INDIAN CONSTITUTION: IMPLIED LIMITATION OF THE AMENDING POWER

- DR. SANJUKTA GHOSH

ABSTRACT

The founding fathers of the Indian Constitution empowered the Parliament of India to amend the Constitution under Article 368 in order to cope up with the changing needs of the society. However, to maintain Constitutional supremacy and to preserve its sanctity, the Supreme Court of India invoked the doctrine of basic structure as Article 368 does not provide for any express limitation upon the amending power of the Parliament. According to the doctrine of basic structure, the Parliament while exercising its constituent power under Article 368 of the Constitution cannot amend the basic elements or the basic structure of the Constitution. What constitute the basic structure has been left to be decided by the judiciary.

I. INTRODUCTION

"*A Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil".*[189]

The artisans of the Indian Constitution relied upon the Indian Parliament in amending the Constitution by making it neither too taut nor to flexible. However, the rigidity of the Indian Constitution has often been arraigned as the Constitution, since its very inception in 26th day of November 1949 till date has been amended more than a hundred times.[190] In a polity, that is federal in spirit, the Constitution is the supreme law of the land and is considered as *"the mother of all laws" or the "Grundnorm".*[191] Constituting the fundamental or basic organs of the government while describing their structure function, composition and power, defining the inter-relationship between various governmental organs and regulating the political relationship between the government, its organs and the citizens. The Constitution also serves

[189] John Marshal, J. in Cohens vs Virginia 19 U.S. (6 wheat) 264,387(1821)

[190] Latest being the Constitution (104th Amendment) Act, 2020. The 104th Amendment extended the reservation of seats for SCs and STs in the Lok Sabha and State assemblies.

[191] Grundnorm is the basic norm from which other norms emerge. It is conceptualised by Hans Kelsen, the founder of the Pure Theory of Law.

as the charter of the fundamental human rights meant for the citizens irrespective of religion, race, caste, sex, place of birth, residence, descent or any of them. As the society is changing the Constitution cannot also be static therefore, there has to be some checks and balances. Unfettered power of amending the Constitution can make the Constitution fragile and a mere puppet in the hands of the Parliamentarians while too much rigidity can make it static and obsolete. Thus, in order to eliminate the possible abuse of the constituent power and make the Constitution adaptable to the dynamics of the society at the same time, the doctrine of basic structure has been sculptured.

II. EVOLUTION OF THE DOCTRINE OF BASIC STRUCTURE

The genesis of the doctrine of basic structure in India can be attributed to Professor Dietrich Conrad, formerly Head of the Department of Law, South-Asia Institute of the University of Heidelberg. Professor Conrad while delivering his lecture at the faculty of Law, Benaras Hindu University (BHU) in 1965 on "Implied Limitation of the Amending Power", explained that *"any amending body organised within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars of supporting its Constitutional authority"*.

The Constitution is a living document. As rightly observed by Edmund Burke that *"a Constitution is an ever-growing thing and is perpetually continuous as it embodies the spirit of the nation. It is enriched at present by the past influence and it makes the future richer than the present"*.

The Constitution of India, under its Part XX, Article 368[192] provides for the amendment of the Constitution. Apparently, the power given to the Parliament under Article 368 is plenary and

[192]Article 368 of the Indian Constitution reads as: Power of Parliament to amend the Constitution and procedure therefor(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or(c) any of the Lists in the Seventh Schedule, or(d) the representation of States in Parliament, or(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent(3) Nothing in Article 13 shall apply to any amendment made under this article(4) No amendment of this Constitution (including the provisions of Part III) made or

no express limitation or restriction has been provided therein. Article 368 envisages two kinds of amendments, viz, by special majority[193] and amendment by special majority and ratification by the half of the States.[194] However, there are certain provisions of the Constitution which be amended by simple majority[195] of the Parliament which means that a majority of members of each House present and voting like any other ordinary legislative process. Controversy aroused regarding amendability of Fundamental Rights. In 1951, the Constitution 1st Amendment Act was challenged as it sought to curtail right to property which as it then stood, was a fundamental right under Article 19(1)(f)[196]. the strife between Parliament and judiciary regarding amendability of the Constitution, especially of that of fundamental rights was finally settled down by the Supreme Court in the *Keshavananda Bharti*[197] case.

Chandrachud, C.J., opined that:

"*the Indian Constitution is founded on the bedrock of the balance between Part III and IV. To give absolute primacy to one over the other is to disturb the harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution*"[198].

III. THE JUDICIAL PATHAWAY OF THE DOCTRINE OF BASIC STRUCTURE

The Constitution (First Amendment) Act, 1951 was brought to meet with the challenges poised by the most controversial and widely debated fundamental right to property, to implement zamindari abolition, land reform, reservation and nationalisation and also to resolve the conflict

purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

[193] The provisions that can be amended by this way includes:i) Fundamental Rights,II)Directive Principles of State Policy; and III) All such provisions which are not covered by simple and special majority and ratification by the half of the states.

[194] The following provisions can be amended in this way- i) Election of the President and its manner, ii) Supreme Court and the High Courts, iii) Extent of the 'executive power of the Union and the States, iv) Distribution of legislative powers between the Union and the States, v) Any lists in the seventh schedule, vi) Representation of States in Parliament, vii) Article 368

[195] Following are the few of provisions which can be amended by simple majority i) Article 2, ii) Article 3, iii) Article 169, iv) Citizenship acquisition and termination etc.

[196] Sub clause (f) of Article 19 Clause 1 was omitted by the Constitution (44th Amendment) Act, 1978 (w.e.f. 20.06.1979

[197] AIR 1973 SC 1461

[198] Minerva Mills Ltd Vs Union of India (1980) 3 SCC 625

created by the decisions given by the High Courts in *Kameshwar Prasad Singh vs State of Bihar*[199], *Shailabalas Case*[200], *Srinivasa's Case*[201] *and by the Supreme Court in Brij Bhushan's Case*[202], *Romesh Thappar' Case*[203] *and A.K.Gopalan Case*[204].

The 1st Amendment inserted two new Article 31A[205], 31B[206] and the ninth schedule.

The validity of the Constitutional First Amendment was challenged before the Supreme Court in *Shankari Prasad Vs Union of India.*[207] The Supreme Court, upheld the sovereignty of the

[199] AIR 1954 Pat 91
[200] AIR 1952 SC 329
[201] AIR 1931 Mad 70
[202] AIR 1950 SC 129
[203] AIR 1950 SC 124
[204] AIR 1951 SC 21
[205] Article 31A : Saving of laws providing for acquisition of estates, etc-(1) Notwithstanding anything contained in article 13, no law providing for- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or (b)the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or (d) the extinguishment or modification of any rights of managing agents, secretaries and treasures, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or (e) the extinguishment or modification of any rights accruing the virtue of any agreement, lease or licence for the purpose of searching for or winning any mineral or mineral oil, or the premature termination or cancellation of any such agreement The Constitution of India, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 and article 19: Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent: Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any of the portion of such land as is within the ceiling limit applicable to him under any law for the time being in forced or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof. (2) In this article- (a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include-(i) any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam rights. (ii) any land held under ryotwari settlement; (iii) any land held or let for purposes of agriculture or for purpose ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans; (b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat under-raiyat or other intermediary and any rights or privileges in respect of land revenue. The Constitution of India
[206] Article 31B : Validation of Certain Acts and Regulations- without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that such Act, regulations or provision is inconsistent with or takes away or abridges any of the rights conferred by any provisions of this Part and notwithstanding any judgment decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force. The Constitution of India
[207] AIR 1951 SC 2193

Parliament relating to amendment of the Constitution and declared that the power of the Parliament under Article 368 to amend the Constitution extends to fundamental rights also. The Supreme Court thus in *Shankari Prasad's* case discarded the contention that fundamental rights are sacrosanct.

After *Shankari Prasad case*, the Supreme Court in *Sajjan Singh Vs State of Rajasthan*[208] reaffirmed the same view as taken in Shankari Prasad's case. However, Justice Hidayatullah dissented from the majority opinion and observed:

"I would require stronger reasons than those given in Shankari Prasad to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and with concurrence of the States"[209].

It was this strong dissenting opinion that persuaded the Supreme Court to re-examine the Constitutional validity of First, Fourth and Seventeenth Constitutional Amendments in *I.C. Golak Nath's*[210] decision, the judiciary and the legislature were at loggerheads and immediately the Constitution (Twenty-Fourth Amendment) Act was passed to invalidate the Supreme Court's decision in Golakh Nath's case. Soon after, the Constitution (Twenty-fifth) Amendment was passed which gave the Directive Principles of State Policy in Part IV of the Constitution primacy over the Fundamental Rights under Article 14, 19 and 31 enumerated in Part III of the Constitution.

In *Keshavananda Bharati Vs State of Kerala*[211], the Supreme Court finally settled, to a greater extend, this tug of war between the two pillars of Indian democracy- the Judiciary and the Legislature. The Supreme Court while upholding the validity of the 24th Amendment Act observed that the Parliament is empowered to take away or abridge the Fundamental Rights but it cannot touch the basic structure of the Constitution using the power given under Article 368. In the words of Chief Justice Sikri-

"*The expression 'amendment of this Constitution' does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the*

[208] (1965)1 SCR 933
[209] Ibid, P.962
[210] (1967)2 SCR 762
[211] AIR 1973 SC 1461

Constitution so as to destroy its identity within these limits Parliament can amend every article"[212]

The doctrine of basic structure was reinvoked by the Supreme Court *in Indira Nehru Gandhi Case*[213]*, Kihoto Hollohon case*[214]*, S.R.Bommai case*[215]*, Sampat Kumar case*[216]*, L.Chandra Kumar case*[217] and in a plethora of cases.

In *Raghunath Rao Vs Union of India*[218]*,* the Supreme Court reiterated the principle that the Parliament cannot amend the basic features of the Constitution exercising its power under Article 368. The court further reaffirmed that the Constitution of India is the supreme law of the land and all the vital organs of the Government acquire their powers and authority from the Constitution. *"An amendment of a Constitution becomes ultravires if the same contravenes or transgresses the limitations put on the amending power because there is no touchstone outside the Constitution by which the validity of the exercise of the said powers conferred by it can be tested"*[219].

Recently *in I.R.Coclho Vs State of Tamil Nadu*[220], the Supreme Court while applying the theory of basic structure observed that:

"All amendments to the Constitution made on or after 24th April, 1973 by which the Nineth schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently even though an Act is put in the Nineth Schedule by a Constitutional amendment, its provision would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure".

IV. BASIC STRUCTURE AND THE DOCTRINE OF JUDICIAL REVIEW

[212] ibid
[213] AIR 1975 SC 2299
[214] AIR 1993 SC 412
[215] AIR 1994 SC 1918
[216] AIR 1987 SC 386
[217] AIR 1997 SC 1125
[218] AIR 1993 SC 1267
[219] R.C. Poudyal Vs Union of India AIR 1993 SC 1804
[220] AIR 2007 SC 71

The doctrine of 'judicial review' was for the very first time adduced in the famous American case of *Marbury Vs Madison* by John Marshall, C.J. in the year 1803.

In the words of Marshall, C.J:

"*The Constitution is either superior paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative Acts, and like other Acts is alterable when the legislature shall please to alter it….certainly, all those who framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation and consequently, the theory of every such Government must be that an Act of the legislature repugnant to the Constitution is void. And further, it is emphatically the province and duty of the judicial department to say what the law is……..*"[221].

In India the Constitution empowers the High Courts and the Supreme Court to examine the Constitutionality of legislative and executive actions. Judicial review is the power of the courts to re-examine whether a legislative action or an executive order is Constitutional or is in conflict with the Constitution declare the same as void if found impugned. In 'Judicial Review of Administrative Action'[222], Justice Syed Shah Mohamed Quadri, categorised judicial review into the following three categories:

i) Judicial review of Constitution amendments,

ii) Judicial review of the legislation of the Parliament and State legislature and sub-ordinate legislations and;

iii) Judicial review of administrative action of the Union and State authorities under the State.

Scope of Judicial Review under the Indian Constitution

Though the Constitution of India has nowhere mentioned the phrase "judicial review" nor did it define judicial review even though there are several provisions in the Constitution that unambiguously confer the power of judicial review upon the High Courts and the Supreme Court.

i) Article 13 explicitly declares that all laws that are in conflict with or in derogation of the Fundamental Rights in Part III shall be void.

ii) Article 32 confers the right to move to the Supreme Court for the enforcement of any of the Fundamental Rights and also empowers the Supreme Court to give any directions or orders or

[221] I.Cranch 137:2L.Ed.60

[222] 2001,6SCC(J),p.3

issue any writs which may include writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari.

iii) Article 131 provides for the original jurisdiction of the Supreme Court in matters relating to centre-state and interstate disputes.

iv) Article 132 provides for the appellate jurisdiction of the Supreme Court in Constitutional matters.

v) Article 133 provides for the appellate jurisdiction of the Supreme Court in civil cases.

vi) Article 134 provides for the appellate jurisdiction of the Supreme Court in criminal cases

vii) Article 134A provides for the certificate for appeal to the Supreme Court from the High Courts.

viii) Article 135 empowers the Supreme Court to exercise the jurisdiction and powers of the Federal Court under any pre-Constitutional laws.

ix) Article 136 authorises the Supreme Court to grant special leave to appeal from any court or tribunal (except military tribunal and court martial)

x) Article 143 authorises the President to seek the opinion of the Supreme Court on any question of law or fact and on any pre-Constitutional legal matters.

xi) Article 226 empowers the High Courts to issue directions or orders or writs for the enforcement of the Fundamental Rights and for any other purpose.

xii) Article 227 vests in the High Courts the power of superintendence over all courts and tribunals within their respective territorial jurisdictions (except military courts or tribunals)

xiii) Article 245 deals with the territorial extend of laws made by Parliament and by the Legislature of the State.

xiv) Article 246 deals with the subject matter of laws made by Parliament and by the Legislature of the States (i.e. Union Lists, State Lists and Concurrent Lists)

xv) Article 251 and 254 provides that in case of a conflict between central law and state law, the central law prevails over the state land and the state law shall be void.

xvi) Article 372 deals with the continuance in force of the pre-Constitutional laws.

In Keshavananda Bharati Vs State of Kerala[223], the Supreme Court held that the power of judicial review vested in the High Court and the Supreme Court is an integral part of our

[223] AIR 1973 SC 1461

Constitution system and is the basic feature of the Constitution that "cannot be damaged or destroyed by amending the Constitution under Article 368 of the Constitution".

Judicial Review and the Ninth Schedule

Article 31B of the Indian Constitution accords protection to the Acts and Regulation specified under the Nineth Schedule from being challenged and invalidated on the ground that such Act or Regulation is, not in conformity with or inconsistent with any of the rights mentioned in Part III of the Constitution. However, in a recent and significant judgement in the case of *I.R. Coelha Vs State of Tamil Nadu*[224] *the Supreme Court observed that- "All amendments to the Constitution made on or after 24th April, 1973 by which the Nineth Schedule is amended by inclusion of various laws therein shall have to be tested on the touch stone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently even through an Act is put in the Ninth Schedule by a Constitutional amendment, its provision would be open attack on the ground that they destroy or damage the Basic Structure if the fundamental right or rights taken away or abrogated pertains or pertain to the Basic Structure"*

V. CONCLUSION

The theory of basic structure has been entangled with debates and controversies, since its very foundation. On one hand it guards the supremacy of the Constitution from being entrenched by the legislators using their powers under Article 368 of the Constitution never the less, the 'sovereignty' of 'we the people' is often been debated as being mere 'in papers' because the Constitution which the people of India themselves have adopted, enacted and given to themselves cannot change, modify or alter it according to the changing needs of the society. Moreover, the Constitution itself did not define the theory of 'judicial review' nor did it specify the features to which would be essential to be regarded as 'basic'. What constitutes the 'basic structure' has been entirely left to be adjudged by the judiciary.

However, keeping in mind the plenary power given in the hands of the Parliamentarians under the Article 368, the doctrine of basic structure stands strong against the possibility that the power might be abused, thereby making the Constitutional goal vulnerable and the Constitutional system of societal reform fragile. The insertion of the Ninth Schedule to the

[224] AIR 2007 SC 71

Constitution stirred up the controversy between the fundamental right to property, as it then stood and land reform laws as a result of which numerous challenges arose before the Supreme Court in different cases questioning the validity of the Ninth Schedule. The introduction of Ninth Schedule was intentional and very calculated to protect the laws placed in the Ninth Schedule from being challenged in the courts of law as being unconstitutional. As an aftermath of Kameshwar Singh's case, Parliament inhibited the scope of 'judicial review' with regard to Ninth Schedule. The objective behind such an attempt was to protect the interest of the socially, economically backward and landless sections of the society by bringing agrarian law reforms and placing them in the Ninth Schedule so as not to be called in question, to eliminate concentration wealth and land within the richer section of the society and so as to further the true motive of a welfare state. Initially, the aim of insertion of Article 31B and the Ninth Schedule was to introduce land reform laws and not prejudicing Part III, neither to undermine judicial review. That is the reason, that the First Amendment was upheld as being Constitutional as it was fabricated to empower the state to undertake affirmative action for the development and advancement of the socially and economically weaker sections of the society or Scheduled Casts or Scheduled Tribes by giving 'limited immunity' to the Fundamental Rights to accord protection to the laws which would pave way for land reforms. But, as Lord Acton very rightly said that "power corrupts, and absolute power corrupts absolutely"; the legislators gradually started inserting laws which were detrimental to the values of the Constitution and they started abusing the Ninth Schedule by using it as a shield to their acts circumventing the true spirit of the Constitution. As regards the debates, doubts and controversies, there is no scepticism that the Parliamentarians are the representatives of the people specially in a Parliamentary form of Government like we have. But it should not be wiped out of mind that the judiciary is the ultimate protector and guarantor of the fundamental rights which are exclusively meant for the people. The doctrine of basic structure is unique in its inception and extensive in its application. It has been introduced for special use at times when reasonable apprehension of harm to the core objective of the Constitution arises through an amendment or the basic frame work of the Constitution might be jeopardised. It is fashioned to protect and secure the paramountcy of the Constitution. *Nani A. Palkhivala* while deliberating on the Twenty-Fourth Amendment of the Constitution stated that "*Let the Constitution remain sovereign and let the people retain their sovereignty by giving these rights to themselves. If that will happen, then alone you will find that the freedom will survive".*

The doctrine of basic structure facilitates the principles of 'Rule of Law' and ensures the supremacy of the Constitution.

COMPETITION COMMISSION OF INDIA: DUTIES

- AKSHAT DEV

Duties of the Competition Commission of India (CCI)

Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India :

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country.

COMMENTS

1. Duties of the CCI

The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences.[12] The Competition Act is aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. One of the avowed objectives of the Act is to promote consumers' welfare by preventing market distortions caused by such actions and agreements of the enterprises which militate against the competition and consumers' interest. The competition law by its very nature envisages that there are situations where the Commission has a role and has to control behaviour of the enterprises in the market place in order to achieve consumer welfare.[13]

Section 18 of the Act which is in consonance with the preamble of the Act, casts an obligation on the CCI to 'eliminate' anti-competitive practices and promote competition, interests of the consumers and free trade.[14] The exercise of power under Section 18 is subject to other provisions of the Act. The aim of the Commission is the institution of a system of undistorted competition which is commensurate to the promotion of the interests of the consumer.[15] The preamble of the Competition Act and Section 18 mandates the Commission to "protect the interest of consumers" and it is important to ensure that consumers' surplus is not adversely impacted.[16]

1.2 International Cooperation

The Commission may enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

As mandated under Section 18 of the Competition Act, 2002, the Commission has entered into Memorandum of Understanding (MOU), after obtaining approval from the Government of India, with the following competition authorities till March 2019:

1.
    1. Federal Trade Commission (FTC) and Department of Justice (DOJ), USA;
    2. Director General Competition, European Union (EU);
    3. Federal Antimonopoly Service (FAS), Russia;
    4. Australian Competition and Consumer Commission (ACCC);
    5. Competition Bureau (CB) Canada; and
    6. Competition authorities of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa (BRICS Countries).

In the year 2018-19, the Commission processed two MOUs *i.e.*, (*i*) MOU with Japan Fair Trade Commission (JFTC) (*ii*) MOU with Administrative Council for Economic Defense (CADE) Brazil. The Commission is awaiting the government approval to sign the MOUs.

Apart from the MoUs mentioned above, CCI is also a member of International Competition Network (ICN); BRICS and has an independent observer status with UNCTAD. The CCI is also a member of the Competition Committee of Organization for Economic Co-operation and Development (OECD). The Commission has been proactively engaging with United Nations Conference on Trade and Development and (UNCTAD) [a UN body responsible to deal with development issues, particularly international trade] and United Nations Conference on Trade and Development the main driver of development (UNCTAD).

[17]Inquiry into certain agreements and dominant position of enterprise.

1.
    19. (1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(*a*) receipt of [18][any information, in such manner and] accompanied by such fee as may be determined by regulations from any person, consumer or their association or trade association; or

(*b*) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(*a*) creation of barriers to new entrants in the market;

(*b*) driving existing competitors out of the market;

(*c*) foreclosure of competition by hindering entry into the market;

(*d*) accrual of benefits to consumers;

(*e*) improvements in production or distribution of goods or provision of services; or

(*f*) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(*a*) market share of the enterprise;

(*b*) size and resources of the enterprise;

(*c*) size and importance of the competitors;

(*d*) economic power of the enterprise including commercial advantages over competitors;

(*e*) vertical integration of the enterprises or sale or service network of such enterprises;

(*f*) dependence of consumers on the enterprise;

(*g*) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(*h*) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(*i*) countervailing buying power;

(*j*) market structure and size of market;

(*k*) social obligations and social costs;

(*l*) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition;

(*m*) any other factor which the Commission may consider relevant for the inquiry.

(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—

(*a*) regulatory trade barriers;

(*b*) local specification requirements;

(*c*) national procurement policies;

(*d*) adequate distribution facilities;

(*e*) transport costs;

(*f*) language;

(*g*) consumer preferences;

(*h*) need for secure or, regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—

(*a*) physical characteristics or end-use of goods;

(*b*) price of goods or service;

(*c*) consumer preferences;

(*d*) exclusion of in-house production;

(*e*) existence of specialised producers;

(*f*) classification of industrial products.

COMMENTS

2. Inquiry by the CCI

Section 19 of the Act permits the CCI to conduct an enquiry into certain kinds of agreements and dominant position of enterprise. Sub-section (1) of Section 19 empowers the Commission to inquire into any alleged contravention of the provisions contained in sub-section (1) of

Section 3 (*i.e.* anti-competitive agreements) or sub-section (1) of Section 4 (*i.e.*abuse of dominant position).

2.1 Source of Information

As per Section 19(1) of the Act, the Commission is empowered to inquire in to any alleged contravention of Section 3 or Section 4 either suo motu or on:

(*a*) Receipt of information from any person, consumer or their association or trade association; or

(*b*) a reference made to it by the Central Government or a State Government or a statutory authority.

Vide the Competition (Amendment) Act, 2007, the provisions of Section 19(1) (*a*) were amended substituting the words "receipt of a complaint" with "receipt of any information". This amendment clearly reflects the legislative intention of emphasizing the inquisitorial nature of the proceedings of the Commission. The Commission does not adjudicate *lis*between informant and the opposite party. Rather, it acts to restore competition in the market.[19]

The Competition Commission of India (General) Regulations, 2009 lays down the procedural requirements to file information with the Commission:

-
    - Contents of information or reference (Reg. 10)
    - Signing of information or reference (Reg. 11)
    - Procedure for filing of information or reference (Reg. 12)
    - Procedure for filing of information or reference in electronic form (Reg. 13)
    - Procedure for scrutiny of information or reference (Reg. 15)
    - Power of Commission to join multiple information (Reg. 27)
    - Amendment of information (Reg. 28)
    - Confidentiality of identity of informant (Reg. 35)
    - Fee under clause (*a*) of sub-section (1) of section 19 of the Act (Reg. 49)

2.1.1 Locus to file information

The Competition Act, 2002 does not prescribe any qualification for the person who wants to file information under Section 19(1) (*a*). There are no conditions which must be fulfilled before information can be filed under the section. Further, there is nothing in the plain language of Sections 18 and 19 read with Section 26(1) from which it can be inferred that the Commission has the power to reject the prayer for an investigation into the allegations involving violation

of Sections 3 and 4 only on the ground that the informant does not have personal interest in the matter or he appears to be acting at the behest of someone else. Thus, the Informant need not necessarily be an aggrieved party to file a case before the Commission. Further, it is because of the inquisitorial scheme of the Act, that the Commission in appropriate cases, defends its orders in higher forums, regardless of the fact as to who brought such case before it, which is not a normal feature in adversarial proceedings.[20]

2.1.2 Informant vs. Complainant

The Hon'ble Supreme Court in *Samir Agarwal*[21] approved the aforesaid position regarding *locus standi* of the Informant. The Apex Court relied on the following reasoning to come to the said conclusion:

-
    - A reading of the provisions of the Competition Act and Competition Commission of India (General) Regulations, 2009 shows that "any person" may provide information to the CCI. The definition of "person" in section 2(*l*) of the Competition Act, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of "consumer" in section 2(*f*) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.
    - A look at section 19(1) of the Act would show that the Competition Act originally provided for the "receipt of a complaint" from any person, consumer or their association, or trade association. This expression was then substituted with the expression "receipt of any information in such manner and" by the 2007 Amendment. This substitution is not without significance. Whereas, a *complaint* could be filed only from a person who was aggrieved by a particular action, *information* may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings *in rem* which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion, is also laid down in section 19(1) of the Act. Further, even while exercising *suomotu* powers, the CCI may receive information from any person and not merely from a person who is aggrieved by the conduct that is alleged to

have occurred. This also follows from a reading of section 35 of the Act, in which the earlier expression "complainant or defendant" has been substituted by the expression, "person or an enterprise," setting out that the informant may appear either in person, or through one or more agents, before the CCI to present the information that he has gathered.

- Section 45 of the Act is a deterrent against persons who provide information to the CCI, *mala fide* or recklessly, inasmuch as false statements and omissions of material facts are punishable with a penalty of up to rupees one crore, with the CCI being empowered to pass other such orders as it deems fit.
- Regulation 10 of the Competition Commission of India (General) Regulations, 2009, does not require the informant to state how he is personally aggrieved by the contravention of the Competition Act. Also, regulation 25 of the Competition Commission of India (General) Regulations, 2009 shows that public interest must be foremost in the consideration of the CCI when an application is made to it in writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings. It is also extremely important to note that regulation 35 of Competition Commission of India (General) Regulations, 2009, by which the CCI must maintain confidentiality of the identity of an informant on a request made to it in writing, so that such informant be free from harassment by persons involved in contravening the Act.

The Act has been conceived to follow an inquisitorial system wherein the Commission is expected to inquire cases involving competition issues *in rem*, rather than acting as a mere arbiter to ascertain facts and determine rights *in personam* arising out of rival claims between parties. Hence, the Informant need not necessarily be an aggrieved party to file a case before the CCI.[22]

The Commission has been vested with the power to *suo motu* take cognizance of any alleged contravention of Section 3 or Section 4 of the Act and hold an inquiry which means that the Commission is not required to wait for receipt of a reference from the Central or the State Government or a statutory authority or a formal information by someone for exercising power under Section 19(1) read with Section 26(1) of the Act. In a given case, the Commission may not act upon an information filed under Section 19(1)(*a*) but may *suo motu* take cognizance of

the facts constituting violation of Section 3(1) or Section 3(4) of the Act and direct an investigation.[23] The Commission may also take cognizance of the reports appearing in print or electronic media or even anonymous complaint/representation suggesting violation of Sections 3 and 4 of the Act and issue direction for investigation under Section 26(1). The Commission can take *suo-motu*cognizance of a case based even on an anonymous complaint.[24] The only limitation on the exercise of that power is that the Commission should feel prima facie satisfied that there exists a prima facie case for ordering into the allegation of violation of Section 3(1) or 4(1) of the Act.

2.1.3 Reference from Statutory Authority

As per Section 2(*w*) "statutory authority" means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto. The Commission has taken up references from Enforcement Directorate[25], CAG[26], Chief Engineer of Railway Division[27], Material Manager, Railway Coach Factory.[28], etc. The DG will not be taken as a 'statutory authority' under S. 19(1)(*b*).[29]

Apart from the statutory Authority, the Central Government or the State Government may make a reference to the Commission to inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4.

LGBTQIA+ - A RACIAL PREJUDICE

- DEVA DHARSHANI S & VASUNDHARA SUNDAR S A

INTRODUCTION

"Never ever apologize for who you love." — Crystal Ball

The initiative of human rights to a great degree is the achievement of equality. Without exception, all human beings have dignity and must be honoured equally. Aiming at breaking down dignity is an infringement; this constitutes a way for discrimination. Nonetheless, LGBT people in India are not treated equally and do not have the same rights as heterosexuals. Yet there prevails a narrow-minded, untouchable attitude towards the LGBT community.

Our constitution-makers well-built our Indian constitution as “the place of pride”. The Indian Constitution is built around Article 21 which brings forth "Equality before the law, which states that "No person shall be deprived of his life or personal liberty except according to procedures established by law"[225]. Article 15 instructs the prohibition of discrimination, on the ground of religion, sex, caste, race, place of birth to order to promote harmony, peace in society. Being an LGBT individual, discrimination based on sex in society leads to a violation of their rights, including fundamental and human rights. LGBT community indeed even though being ordinary human creatures proceed to endure brutal misuses since nature has nourished them with the need to be different. In a preservationist society like India, it is a revile to be queer. Making the day memorable for the LGBT+ community, A landmark judgment delivered by the High Court of Delhi in *Naz Foundation Govt. v. NCT of Delhi*[226] case in decriminalizing homosexuality by partially striking down Section 377 of the Indian Penal Code, in July 2009. Human beings are human beings, and they deserve to be treated as such. This study paper discusses the LGBTQ community's, narrow-mindedness of the society based on ground sex.

LGBTQ COMMUNITY - INTERPRETATION

Homosexuality may be a sexual introduction indicated by sexual fascination or sentimental cherish as it were for individuals who are recognized as being of the same sex. Homosexuals in simple terms are indicative ‘of the same sex', a combination of the Greek prefix homo

[225] INDIA CONST. art. 21.
[226] Naz Foundation vs Government Of Nct Of Delhi, WP(C) No.7455/2001, DELHI HIGH COURT; Decision on 2 nd July 2009 (India)

meaning 'same' and Latin root meaning 'sex'. The terms LGBTQ denotes Lesbian, Gay, Bisexual, and Transgender, and Queer[227]. A wide fusion of bunches that are different concerning sex, sexual introduction, race/ethnicity, and financial status.

- Lesbian: -Denotes, a woman who is sexually attracted to a woman.
- Gay: -Indicates, a man who is sexually attracted to the man.
- Bisexual: - A bisexual individual is attracted to people of both sexes sexually.
- Transgender: - It's a phrase that's used to describe persons, whose sex character and sexual orientation expression, varies from that not related to their birth sex.
- Queer: - Queer describes sexual and gender personalities that are neither heterosexual nor cisgender.

CHOICE OR DISEASE

The question of whether being gay, lesbian, bisexual, transgender, or other forms of the LGBTQ community is a choice or not does not arise when a straight being straight in society. As the question has been raised, the answer to that is simple, let's first talk about the science behind this. we have heard of "gay genes", there is no such type of gene that makes a person sexually attracted to same-sex people. Though certain genes affect their desires, one cannot have complete control over them. Next, there is no evidence or a study to prove that fostering or the environment that one is being raised in can influence a person on sexual orientation, though they can have effects on their sexual orientation. Studies have shown that there are changes in the brain structure on comparing straight men and gay men but their sex hormones are the same[228]. Being a homosexual was once considered to be a psychiatric illness, which then on a study in 1973 called off the acknowledgment. World Health Organization amended its health guidelines on transgender[229]. In 2018, The Indian Psychiatry Society published a statement that homosexuality is not a disease and that all forms of conversion therapy are erroneous[230]. People who identify themselves to be gay or lesbian or transgender or bisexual

[227] "Society and Same-Sex Marriage." StudyMoose, 9 Nov 2016, https://studymoose.com/society-and-same-sex-marriage-essay.

[228] S LeVay, A difference in hypothalamic structure between heterosexual and homosexual men, 253 Science 1034-1037 (1991).

[229] New Health Guidelines Propel Transgender Rights, HUMAN RIGHTS WATCH (May 27, 2019, 6:30 PM), https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights.

[230] Position statement regarding LGBTQ, INDIAN PSYCHIATRY SOCIETY (Jun 11, 2020) https://indianpsychiatricsociety.org/ips-position-statement-regarding-lgbtq/.

can only try not to act on their desires. They cannot have complete control over it. Blaming science or affirming that they don't have a choice replicates the homophobic attitude of a bigoted person even when the statement is made by a supporter of gay rights.

THEOLOGICAL APPROACH

- Let's get started with the mythological tale,

  - Mahabharata.

The first thing that strikes our mind is Shikhandi, an intersex warrior[231]. Shikhandini is a woman who was a girl born but raised as a boy with the name Shikhandi, who is also Amba in her previous life and resurrected to take revenge on Bhishma. Shikhandi, though a girl she's being praised as a girl who has the might of a man. During the last years of Pandavas exile, Arjuna was transformed into a transwoman by Urvashi.[232]

  - In Girithara Ramayana,

Lopamudra[233], who's a male disguised as a female, marries sage Agastya. Later then transformed into a female.

  - In Thiruvilaiyadal,

Arthanareeswarar[234], an iconographic form of both Shiva and Parvati, where the left half is a female and the other half is a male. It shows that there can be a gender variance. Arthanareeswarar was praised across India. Even then Hijras are considered to be lower than humans in India. They are asked to run from their homes by families, rejected by peer groups, and shunned from society.

- Now we'll jump on to biblical hermeneutics

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[231] Syama Allard, Shikhandi: the Mahabharata's transgender warrior, HINDU AMERICAN FOUNDATION (Jun 14, 2021), https://www.hinduamerican.org/blog/shikhandi-the-mahabharatas-transgender-warrior.
[232] FPJ Web Desk, Trans tales: Important LGBTQ characters in Indian mythology, FREE PRESS JOURNAL (July 03, 2020, 04:42 PM), https://www.freepressjournal.in/india/trans-tales-important-lgbtq-characters-in-indian-mythology.
[233] Dr. Rajeshwari Pandharipande, The Mother: A POSSIBLE VISION OF LOPAMUDRA! THE MOTHER DIVINE, (2014), https://www.themotherdivine.com/11/A-possible-vision-of-lopamudra.shtml.
[234] Devdutt Pattanaik, Ardhanareshwara, DEVDUTT (Sep 16, 2005), https://web.archive.org/web/20101121175321/http://devdutt.com/ardhanareshwara-the-hierarchy-of-halves/.

The New Testament tells that the sexual partners are desired to get along to remove their loneliness and not only for procreation[235] (GENESIS:1-3). But there is a verse where God tells Adam and Eve to the child. The Bible has a vast interpretation of sexual intercourse where other verses tell that sexual intercourse can be desired to physically appreciate the partner. There is a myth that Bible rejects homosexuality and it is considered to be a grave sin. As adultery is mentioned as a sin but nowhere in Bible, there is an explicit mention of homosexuality as a sin.

- Then we'll discuss the texts from Quran

There is a verse that asks the people of Sodom, whether they lustfully approach men instead of women, which then eventually leads to the destruction of Sodom[236]. This was interpreted as the same-sex relationship's a serious crime in Islam. There is also another quote from the Quran which says that Allah always allows people to lead a good life. So, when leading a good relationship on being a homosexual, that cannot be considered a sin or crime. Many scholars interpret the texts regarding the destruction of the city Sodom was not only because of the male-male sex acts but also the immoral acts such as rape attempts, refusing to worship one God. Many gay Muslims are refusing to identify themselves due to the fear implicated by the militant groups. Though Islamic beliefs are quite a sensitive topic, many laws have been amended like Triple Talak[237] following the changing world.

- Parsis and LGBTQ

Zoroastrianism on interpreting various sacred scriptures concludes not only to stigmatize but also consider it as a sin, especially considering the male-male relationship[238]. They condemn sodomy which is reflected in a fictional tale Ahriman[239], a spirit of death, who is involved in self sodomy which then resulted in the birth of evil minions.

- Sikh's view

[235] Moses, The Book of Genesis, VATICAN, https://www.vatican.va/archive/bible/genesis/documents/bible_genesis_en.html..

[236] Peter Dankmeijer, Homosexuality and transgenderism in the Quran, (Jun 4, 2021), https://www.gale.info/en/database/reading/homosexuality-and-transgenderism-in-the-quran.

[237] Shayara Bano v. Union of India (2017) 9 SCC 1 (India).

[238] HOMOSEXUALITY i. IN ZOROASTRIANISM, *ENCYCLOPEDIA IRANICA*440-441. https://iranicaonline.org/articles/homosexuality-i.

[239] Joshua J Mark, Ahriman, *WORLD HISTORY ENCYCLOPEDIA*, (Feb 10, 2020), https://www.worldhistory.org/Ahriman/.

Sikhism is a religion of equality, it considers only marriage can be between a man and woman, which was interpreted as marriage is only for heterosexuals and sexual intercourse outside of marriage prohibited[240]. So, a member of the LGBTQ community is prohibited by some while others argue that Sikhism emphasizes equality and so respects each person's decisions.

- Jainism

Jainism talks about a bondage between people when created for procreation and not the pleasurable sexual intercourse[241]. So, it rejects homosexuality.

- Buddhism

The religion rejects sexual misconduct which is a term for broad interpretation, it also accepts harmless sex[242]. While Dalai Lama asserts that gay sex can be accepted when it doesn't contradict one's religious values and is consensual.

When many people argue that LGBTQ people aren't accepted in their tradition when it is proved that on a survey conducted in 2020[243], it is well known that religion does not contribute to aggression towards the LGBTQ community. Hence homophobic attitudes and transphobic attitudes are not from the old texts or through religion but from the perception of people towards the LGBTQ community.

INDIA'S LGBT MINORITIES HISTORY

Section 377 was created by the 1533 Buggery Act. Gay acts and sexual contact with animals were classified as unnatural and culpable offenses under this law. This act, which characterized buggery as an act against God's will, was passed by the English parliament in 1533, beneath the rule of Lord Henry 7. The British colonial government enacted Section 377 of the Indian Penal Code (IPC) in the pre-independence era, making all forms of non-procreative sexual

[240] Gurmukh Singh OBE, Sikh View About Homosexuality, Same-Sex Marriages. *SIKH MISSIONARY SOCIETY (UK.)* (Retrieved from 2021), https://www.sikhmissionarysociety.org/sms/smsarticles/advisorypanel/gurmukhsinghsewauk/sikhviewabouthomosexualityandsamesexmarriages/.

[241] Leonard Zwilling and Michael J. Sweet, "Like a City Ablaze": The Third Sex and the Creation of Sexuality in Jain Religious Literature, JOURNAL OF THE HISTORY OF SEXUALITY 26 (1996).

[242] Ajahn Punnadhammo, Same-sex marriages, ARROW RIVER https://www.arrowriver.ca/torStar/samesex.html.

[243] Rajini Bala, Perception of homosexuality: a study on relationship between homosexuality and religiosity, THE INTERNATIONAL JOURNAL OF INDIAN PSYCHOLOGY (Oct- Dec, 2020), https://ijip.in/wp-content/uploads/2020/11/18.01.060.20200804.pdf.

activity illegal. The tyrannical rule not only targeted gays, but also all other sorts of non-traditional sexual activity, even within heterosexual relationships. Thomas Babington Macaulay suggested and drafted this statute under section 377 of the IPC. The AIDS Bhedbhav Virodhi Andolan produced a major study titled "Less than Gay: A Citizen's Report" in 1991, which kicked off the battle against Section 377[244].

- In 2001, the NAZ Foundation, a non-profit organization, filed a petition in the Delhi High Court contesting the constitutionality of Section 377 of the IPC, however, it was dismissed due to a lack of locus standi. Later, an appeal was filed in the Supreme Court, contesting the verdict of the High Court of Delhi, and the Supreme Court directed the High Court of Delhi to reconsider the PIL. Following that, the Delhi High Court declared Section 377 of the IPC to be unconstitutional, citing infringement of Articles 21, 14, and 15 of the Indian Constitution. The centrality of this entire judgment can be induced within the light of the explanation made by justice Indu Malhotra - "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries"[245].

- The Supreme Court of India created the 'third gender' status for hijras or transgenders in the landmark case *National Legal Services Authority v. Union of India*[246] in 2014. This decision is noteworthy because it established the groundwork for ensuring the transgender community's access to a broad range of fundamental human rights. After this judgment, transgender individuals presently can alter their sexual orientation without experiencing sex reassignment surgery. Also, they have a protected right to distinguish and enlist themselves as the third sexual orientation. The passage of the Transgender Persons Bill, 2018, dealt a huge blow to this ruling.

[244] Shobha Aggarwal, India: *Reminiscing Struggle for Gay Rights in the Twentieth Century A Brief History of That Time*, SOUTH ASIA CITIZENS WIRE, (September 1, 2018), http://www.sacw.net/article13888.html..
[245] Ushinor Majumdar, *'History Owes An Apology'*: Justice Indu Malhotra On Section 377, OUTLOOK, 07 Sep 2018.
[246] National Legal Services Authority v. Union of India, Writ Petition (Civil) No. 604 of 2013 (India).

- *Navtej Singh Johar V. Union of India*[247] the case states that - There was an increase in the number of LGBT rights protests in India when high-profile figures such as hotelier Keshav Suri, Ritu Dalmia, artist Navtej Singh Johar among numerous others came forward and recorded the request challenging the constitutional legitimacy of Section 377 of IPC. The court collectively ruled that Section 377 of IPC is unlawful because it encroaches on the basic rights of closeness, independence, and identity and decriminalizes homosexuality by perusing down section 377 to prohibit consensual intercourse between adults of the same sex/gender illegal.

The sexual introduction is an inalienable portion of self-identity and negating the same is denying the right to life, and that the fact that they constitute a little area of the populace cannot be a substantial legitimization to deny them this right. Discrimination on the premise of sexual orientation is unconstitutional considering it could be a common wonder as demonstrated by scientific and biological truths.

CHALLENGES TO THE INDIAN CONSTITUTION

The Supreme Court of India only tested the constitutional validity of sec 377 of IPC and not on the ramifications of marriage, inheritance, adoption, etc, by the LGBTQ community. The Indian Judiciary has a long way to go to get the rights of the LGBTQ community into the Indian legislation. Anti-discrimination laws need to legislate for LGBTQ rights to recognised in society.

The Equality rights envisaged in Articles 14, 15 and16 ensures protective discrimination in the form of affirmative action or reservation for building an egalitarian Indian society that includes women, children, socially and economically backward communities. Hence bringing certain laws or amending the existing laws will nowhere cause any restraints to the Indian jurisprudence. The golden triangle of the Indian Constitution (Articles 14, 19, 21) talks about the Right to equality, freedom, and right to life, and personal liberty where it is clear that LGBTQ members can never be discriminated against or harassed for their sexual orientation on Indian soil.

[247].Navtej Singh Johar v. Union of India (2018) 10 SCC 1 (India)

The Union Government passed certain bills which concern the LGBTQ community: -

- Protection of Rights Act, 2019[248]

This Act ignores gays and lesbians and involves only Transgender. A Transgender person is defined as a person whose gender does not match the gender assigned at birth. Identity certificate to be provided. National Portal for Transgender Persons provides help with that regard It prohibits discrimination based on gender identity in workplaces, education, right to reside, purchase, rent, or otherwise occupy any property. It includes punishment for the acts against Transgender which extends to imprisonment and fine.

Criticism: The Union Government though decided on securing the rights of transgender which is a backlash on the traditional archaic system, but from gender binary to gender ternary is another setback for the LGBTQ members since it does not include members except Transgender.

- Surrogacy Bill, 2019[249]

The Bill is criticised for its lack of knowledge on considering the LGBTQ community as it was proposed after the Navtej Singh Johar v. Union of India[250] on the whole, neglects the LGBTQ community's emotions and their fundamental rights as a citizen. As it prohibits LGBTQ members from opting for surrogacy.

- 172nd Law Commission Report[251]

The report emphasises reviewing the existing laws to bring about gender-neutral laws which would be available for LGBTQ members of the Indian society.

The following reiterates the challenges to Indian jurisprudence. Anti-discrimination laws include marriages of LGBTQ, let alone adoption, guardianship, surrogacy, their inheritance, workplace discrimination, education, to have a residence, workplace benefits, freedom to enter any fields without discrimination.

DISAPPROBATION OF LGBT COMMUNITY

- Kicked out of the house:

[248] Aman Gera, Analysis – Transgender Persons (Protection of the Rights) Bill, 2019, *AZB &PARTNERS* (Sep 26, 2019), https://www.azbpartners.com/bank/analysis-transgender-persons-protection-of-the-rights-bill-2019.
[249] The Surrogacy (Regulation) Bill, 2019, MINISTRY: HEALTH AND WELFARE, https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2019.
[250] Navtej Singh Johar v. Union of India (2018) 10 SCC 1 (India).
[251] Justice B.P.Jeevan Reddy, 172nd Law Commission Report Review on Rape Laws, *LAW COMMISSION REPORT* (2000), https://lawcommissionofindia.nic.in/old_reports/rpt172.pdf.

Dread of dismissal and genuine negative responses kept numerous LGB grown-ups from straightforwardly sharing their lives. The absence of correspondence and misconception among guardians and their LGBT kids builds family struggle. Familial dismissal of LGBT youngsters and youthful grown-ups on account of their sexual direction or sex character, bringing about more noteworthy emotional well-being necessities and vagrancy, without financial back, frequently lock-in in sedate utilize and hazardous sexual behaviours and, therefore, imbalance in psychological well-being.

These issues with correspondence and absence of comprehension about the sexual direction and sex character can prompt battling and family disturbance that can bring about an LGBT juvenile being eliminated from or constrained out of the home.

- Schooling

Homophobic, biphobia, and transphobic (HBT) harassing stays a significant issue in schools and, to a degree, in further and advanced education. The United Nations social Agency directed a review on the 400 LGBT+ youth in India, more than 60% of LGBT+ youth confronted tormenting in centre school/secondary school was uncovered, 43% revealed occurrences of being physically pestered in school, with 70% enduring from uneasiness and misery and shockingly 33% of them indeed drop out since of bullying through and through. Heterosexism and heteronormativity are pervasive in educational institutions, exacerbating feelings of distance among LGB&T students and mainly ignoring their special support requirements. As well numerous LGBT understudies discover it difficult to talk up with regards to provocation since it is so inserted in our way of life. LGBT badgering is one of the last types of provocation that is as yet permitted in mainstream society.

- Homophobia

Homophobia is "the silly contempt, bigotry, and fear" of LGBT individuals, and maybe a shape of separation. A few of the components which will reinforce homophobia on a bigger scale are ethical, devout, and political convictions of an overwhelming gather. Because of the harsh emotions and repercussions of coming out in a homophobic atmosphere, many LGBT people hide their sexuality. The realisation that they might be gay can generate feelings of shame and self-loathing, leading to low self-esteem in persons who have been raised to believe that homosexuality is bad. Moreover, the predicament of whether to _come out ‘or not can cause an incredible bargain of individual trouble.

Homophobia has the potential to cause significant hurt and disturbance to people's lives and play a successful part in gathering the lives of LGBT people. LGBT people are exposed to stress, unhappiness with their living situation, presentation to physical unsettling influence, forlornness, and alienation as a result of such attitudes.

The following are certain areas where the Indian Legislature needs to focus on providing rights to the LGBTQ members

- Same-sex marriages

In Indian society, marriages have way too many recognitions and benefits. Every law regarding marriages in India are between a man and a woman, either way, to include the LGBTQ community is to amend personal laws to gender-neutral where the language of the laws is not of the gender binary or to make separate laws as in the case of the Special Marriage Act for inter-caste marriages or laws on civil unions which render the same benefits of marriage but not the marriage as a whole which can be an alternative in place of heterosexual marriages for LGBTQ community.

Arun Kumar v Inspector General of Registration, Tamil Nadu[252]

The court held that trans-women can identify themselves as brides which provides them with the constitutional right to marry which on judicial activism can elaborate the possibilities for other members of the LGBTQ community.

In 2011, the Gurgaon court recognises a runaway lesbian couple as they have married each other by signing an affidavit before a public notary in Gurgaon[253]. Though they have referred to the judgment of the Haryana court on assisting help for runaway couples, this can be invoked for future hope for legalising same-sex marriages.

- Adoption

The adoption of cisgender is already a complicated process, the adoption for the LGBTQ community is a dilemma. The question of whether the family unit consists of a male and a female for the upbringing of their children is still hypothetical. While there are again children fostered by a single parent in the society. The homophobic and transphobic people argue that gay couples, lesbian couples, transgender cannot foster a child as family unit is absent is

[252] Arun Kumar v Inspector General of Registration, Tamil Nadu W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019.

[253] Dipak Kumar Dash & Sanjay Yadav, in a first, Gurgaon court recognizes lesbian marriage, *TIMES OF INDIA, (*July 29, 2011, 12:33 AM), https://timesofindia.indiatimes.com/city/gurgaon/in-a-first-gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms.

unreasonable. And to add to that there are lakhs of orphans yearning for care and love and inroads begging for their daily living Indian Legislation can amend the adoption laws to gender-neutral laws. Sawant, a Transgender activist has made a petition to the Supreme Court for adoption rights for The Transgender community[254]

- Guardianship

The natural guardian for a child is the father, in the absence of the father, the mother becomes the natural guardian. And others can act as guardians which do not include the LGBTQ community. Hence the only way is to amend the existing laws to gender-neutral laws can be a positive approach. The Best interests of the child are the prime requirement for adoption and guardianship, LGBTQ rights on adoption can be legitimised by the Indian legislature.

- Surrogacy

Many countries have made surrogacy a legit one as a great way for the LGBTQ community to enjoy parenthood. The LGBTQ members opting for surrogacy must be available with either pre-birth order or a full adoption or stepparent adoption or second-parent adoption so that they are ensured with equal rights[255]. The Surrogacy Bill,2019 on an attempt to prevent exploitation of mother and child trafficking and commercialising surrogacy but that doesn't necessarily mean to prohibit cisgender singles and the LGBTQ community from surrogacy is a healthy decision.

- Inheritance

The succession laws in India are gender binary. This was even worse when female heirs cannot inherit the patrimonial rights. Hence gender-neutral laws and the term dependents can be interpreted to include the LGBTQ community which can be a possible solution that doesn't favour the archaic family system. Protection of Rights Act, 2019 which gives transgender certain rights which don't talk about inheritance but provide various other protection against unfair treatment or denial of services.

Sweety v. General public[256],

[254]Sushmita Gosh, 7 years after SC judgment, third genders say they feel like second class Citizens, *India Today*, (June 16, 2021, 2:27 AM), https://www.indiatoday.in/india/story/supreme-court-nalsa-judgment-third-genders-transgenders-pride-month-1815578-2021-06-16.

[255] William Houghton, Surrogacy Guide: Surrogacy for Gay Couples Worldwide, SENSIBLE, https://www.sensiblesurrogacy.com/gay-surrogacy.

[256] Sweety v. General public A.I.R. 2016 H.P. 148 (India).

In most areas of India, the guru is considered as a mother-in-law and Chelas often observe Karva Chauth for their gurus, putting them in the husband's space. The High Court of Himachal Pradesh invoking the judgement *of Ilyas Ors v. Badshah*[257] held that the property of the chelas would be inherited by Guru within the Hijra family.

Here are various occasions where LGBTQ members face an existential crisis as they are being discriminated against merely for their sexual orientation and physical appearance:

- Workplace: Labour laws

The existing labour laws are gender binary though it took a long time to make it inclusive for women. Then gender-neutral laws to include LGBTQ members have miles and miles in Indian jurisprudence. After the passing of the Protection of Rights Act, 2019 which states that there should be no discrimination for trans-gender in employing or terminating employment based on gender identity. There is no practical recognition when there is legal recognition. India on the resolution for term-renewal of the Independent Expert on Sexual Orientation and Gender Identity in the U.N. Human Rights Council held in Geneva has abstained which is after decriminalising the Sec 377[258]. While this left the supporters of the LGBTQ community in deep confusion and dismay, India didn't stop with that but extended its hands of generous support to other countries which supported gender intolerance.

Southern Railway v. Rangachari[259]

The Indian Supreme Court held that discrimination in any matters of employment is violative of Articles 16(1) and (2) of the Indian Constitution. This can be invoked for considering workplace anti-discrimination laws.

Manish Kumar Giri Alias Sabigiri v. Union of India[260]

A Navy officer on duty underwent hormone therapy who then was terminated from the job for trans-gendered identity and on the judgement of Delhi High Court, was given an alternative job for data entry which is absolutely a reiteration of gender inequality and workplace discrimination. Though the Equal remuneration Act excludes the military from discrimination

[257] Ilyas Ors v. Badshah A.I.R. 1990 M.P. 334 (India).

[258] Kallol Bhattacherjee, India again abstains at U.N. vote on LGBTQ Independent Expert, draws criticism, THE HINDU (JULY 12, 2019,9.45 PM), https://www.thehindu.com/news/national/india-again-abstains-at-un-vote-on-lgbtq-independent-expert-draws-criticism/article28414749.ece.

[259] Southern Railway v. Rangachari (1962) AIR 36 (India).

[260] Manish Kumar Giri Alias Sabigiri v. Union of India (2018) 2 SCC (LS) 398, 2017 (8) SLR 730 (SC), (2018) 12 SCC 671, 2017 (6) SCALE 410, LQ/SC/2017/743 (India).

in the recruitment process based on gender identity a person being terminated is questioning the constitution which emphasises gender intolerance.

- Employment Benefits and Insurance

Benefit Acts such as The Factories Act, 1948, the Workmen's Compensation Act, 1923, Employees' State Insurance Act, 1948, the Maternity Benefit Act, 1961, Employees' Family Pension Scheme, 1971 are gender binary which is even quite difficult for cisgenders to claim it. That becomes even more difficult when our Indian society denies employment to LGBTQ members, these benefits are not available to them. Medical insurance should be made to be gender-neutral as the existing laws are biased for heteronormative people.

- Educational institutions: Bullying

LGBTQ members are deprived of their basic fundamental right to education. Being subjected to humiliation for their sexual orientation or gender identity, they have a very hard time even surviving in society. Since trans-genders are chased out of their homes and ragged in schools either they resort to begging or choose to be sex workers as they have no option to graduate. Though the Protection of Rights Act,2019 provides the right to education, trans-genders are denied their rights. Anti-bullying laws are important to be legislated in Indian society.

- Reservation

Many states are still on a long way to notify reservations for employment, while Tamil Nadu and Karnataka set the footpath for such reservations.

Sangama & Anr v. State of Karnataka[261]

A PIL petition was filed for reservation rights for Transgenders as a result of which the Karnataka government invoked the Protection to Rights Act,2019, and was notified to reserve 1% jobs for transgenders.

Grace Banu Ganesan v. State of Tamil Nadu[262]

A pending PIL petition to redefine the reservation for transgender under transgender/women category and not under MBC category.

- Sexual crimes

The existing laws are already female-biased while some organisations fight for gender-neutral laws to raise voice for male victims of such crimes why not include the LGBTQ community

[261] Sangama & Anr v. State of Karnataka W.P. No.8511/2020 (EDN-RES) (PIL) (India).
[262] Grace Banu Ganesan v. State of Tamil Nadu, Writ Petition No. 6052/2019 (PIL).

who are in a plethora of cases on sexual harassment and other such crimes like voyeurism in workplaces etc., which is not in the limelight as people are oblivious in social problems that concern the LGBTQ members.

- Military

There are no provisions to determine transgender in military forces while the Ministry of Home Affairs has been in the play for determining the eligibility criterion for transgender in the recruitment process in the military[263]. But this requires the Transgender to submit the proof for sex reassignment surgery.

CONCLUSION

India is a diverse country and here, totally individuals have distinctive sorts of ways of considering and living. To promote the country's development and improvement, there is a requirement for progressive legislation which tends to change the condition of LGBT minority people who have a completely different sexual orientation which ends in facing discrimination within the family and society. The lawful commitments of states to secure LGBT people's human rights are built up in universal human rights law within the Widespread Announcement of Human Rights and afterward understandings. Each human being, notwithstanding sex, sexual introduction, or sexual orientation personality, is entitled to the securities and rights ensured by universal human rights law. The Indian constitution guarantees all these essential human rights. In this traditional society giving social and lawful acknowledgment isn't that simple because it has been within the western societies but in any case, to disregard this developing struggle within the institution of family and marriage will be briefly located and can have lethal come about in case not taken care of delicately. It is to begin with we the society who can make equity with the LGBT people by tolerating them as whom they are and after that, as it were they can they be acknowledged as Human Beings, not LGBT.

The progress of LGBT rights is often directly tied to – sometimes through indirect routes – multiple fights for human dignity and freedom."-

Michael Bronski.

[263] Krystall D'Souza, Are Transgenders Allowed In The Military? BINGE DAILY, (July,26,2020), https://www.bingedaily.in/article/are-transgenders-allowed-in-the-military.

LGBT+ RIGHTS IN INDIA: CURRENT STATUS AND HOPE FOR THE FUTURE

- ABHINAV KHADIKAR & ROHIT DEORAS

Introduction:

The LGBT+ community consists of people who are not cisgender or heterosexual.[264] LGBT is an acronym for Lesbian, Gay, Bisexual and transgender. Lesbian is a label is generally used to refer to a woman who is romantically or sexually attracted to another woman, gay is a label generally used to refer to a man who is romantically attracted to another man, bisexual is generally used when a person is attracted to two or more genders, and transgender is generally used to refer to people who feel an emotional or physical disconnect with their sex.[265] The '+' consists of other sexualities and genders. Unfortunately, the community faces a lot of discrimination around the world just because of their sexual orientation or gender identity. For different reasons, various people in society have a very negative attitude towards homosexuality and consider it unnatural, immoral, and anti-cultural.[266] Isolation, discrimination, and exclusion is the dark reality that people from the community face each day.[267]

India is one such country where the community gets discriminated against socially as well as legally. Hence, it is not surprising that the community in India lacks certain rights which cishet people possess. There have been instances where people from the community have been victims of hate crimes. There have been instances where gay people get forced into marriages and corrective rapes so they turn heterosexual.[268] Hence, the community fights for equal rights. In India, the legal fights started in the 2000s and are still going on. India has seen considerable progress in the decade of 2010s from a legal perspective. There have been a few cases that have

[264] A person who is cisgender and heterosexual will be referred to as cishet.
[265] Alia E. Dastagir, *LGBTQ Definitions Every Good Ally Should Know*, USA Today (Jul. 27, 2021), https://www.usatoday.com/story/news/2017/06/15/lgbtq-glossary-slang-ally-learn-language/101200092/
[266] Madhusmita Mishra, *Homosexuality and Same-Sex Marriage – National and International Perspectives*, SSRN Electronic Journals 1, 2 (2012), https://dx.doi.org/10.2139/ssrn.2159605
[267] Dr. Rekha Mewafarosh & Dr. Devjani Chatterjee, *Deprivation and Social Exclusion of LGBT Community in India*, 4(1) IJRBS 127, 134 (2019), http://www.ijrbs.com/wp-content/uploads/2019/06/Dr.%20Rekha%20Mewafarosh.pdf
[268] Nishul Singh & Dr. Anindita Chatterjee, *Social and Workplace Issues of LGBT Community in India*, 2 The Haryana Police Journal 1, 3 (2019), https://haryanapolice.gov.in/policejournal/pdf/SOCIAL_WORKPLACE.pdf

ensured better rights for the community. This progress is laudable but the fight has not ended. The community fights to be treated equally. The community in India takes inspirations from certain other nations in their fight for equal rights.

Historical Background of the LGBT+ Community in India:

It was the Hindu texts and scriptures that first recognised queer individuals.[269] Hindu mythology keeps making references to queerness of people. The text talks about various stories where various individuals were either attracted to people of the same gender or were transgender.[270] For example, There is the tale of King Bhagiratha where he was born of two mothers and no father, there is the tale of Lord Vishnu where he transforms into a beautiful woman named 'Mohini', there is the tale of Varun and Mitra who were believed to be a same-sex couple, there is the tale of Svairini who was an independent and self-willed woman who engaged in sexual acts with other women, etc.[271]

It was actually the Britishers who forcefully criminalised homosexuality in India by the enactment of section 377 in the Indian Penal Code.[272] The Britishers had even passed the Criminal Tribes Act in 1971.[273] This Act had declared transgender people to be part of a criminal tribe. There was little acceptance of the LGBT+ community in India before the law. Once a law is enacted, it is what the general populace believes to be fair and right. People start adjusting as per the laws.[274] The two new anti-LGBT laws that the Britishers introduced not only in India but also other nations under their control changed the mindset of the society. Queerness was now a taboo. All the hate, discrimination, exclusion could be attributed to the Britishers. An ironic fact about the Indian society is that the homophobes genuinely believe that homosexuality is a western concept. They genuinely believe that homosexuality is a social evil bought to India by the Britishers.

Unfortunately, the damage has already been done. For 132 years, the LGBT+ community was essentially silent. The discrimination never stopped. Getting kicked out of houses, getting

[269] Queer is an umbrella term used for the LGBT+ community.
[270] Devdutt Pattanaik, Shikhandi and Other Tales They Don't Tell You (Penguin Books 2014)
[271] Deepanshi Mehrotra, *The Pre-Colonial History of Homosexuality in India: Why Love is not Western*, Academike (Jun. 29, 2021), https://www.lawctopus.com/academike/history-of-homosexuality-in-india/
[272] The Indian Penal Code, 1860, § 377, Acts of Parliament, 1860 (India)
[273] Criminal Tribes Act, 1871, Acts of Governor General of India in Council, 1871 (India)
[274] Enze Han & Joseph O'Mahoney, British Colonialism and the Criminalisation of Homosexuality (Taylor & Francis 2018)

excluded from society, workplace discrimination, constant bullying, lynching, etc became the norm for people from the community. It was worse for transgender people. Transgender people have to rely on sex work, and begging just for survival. Along with the various financial issues, they also have to face inheritance issues which might be one of the reasons why many transgender people stay in the closet.[275] Another reason why it might be harder for the transgender community more is because a gay man or a bisexual woman or a pansexual man could still hide their identity. Hiding your gender identity is harder because the only way you can be comfortable is to come out and be external with your gender expression.

The first gay rights protest in India happened on 11th August, 1992. 7 years after that was the first ever pride parade in India in the city of Kolkata.[276] The LGBT+ community started resurfacing in India. The community slowly started being open. It was time for the LGBT+ community to start fighting for their rights. Hence, the fight officially began in 2001 and the next two decades were monumental for the community. The historically oppressed community decided that enough is enough.

Current Status of LGBT+ Rights in India:

Initially, the LGBT+ community fought for decriminalisation of section 377. This was a very long legal battle. The Naz foundation begun the fight by filing a writ petition in front of the Delhi High Court challenging the constitutional validity of section 377 of the Indian Penal Code. However, the petition was rejected. Hence, the foundation approached the Supreme Court and appealed this order given by the High Court. The Supreme Court declared the order of the High Court invalid and declared the petitions to be valid.[277]

In 2009, the LGBT+ community breathed a sigh of relief when the Delhi High Court declared section 377 to be unconstitutional in the case of Naz Foundation vs Govt of NCT of Delhi.[278] This was a big win for the community as they could finally engage in homosexual relations and there was no law invalidating their sexuality. However, the happiness did not last for long. In 2013, the judgement was overruled by the Supreme Court in the case of Suresh Kumar

[275] Gee Imaan Semalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, 42(3/4) WSQ 286, 287 (2014), https://www.jstor.org/stable/24365012

[276] Moksha Sanghvi, *History of the Pride Movement in India*, Deccan Herald (Jun. 26, 2019), https://www.deccanherald.com/specials/history-of-the-pride-movement-in-india-742950.html

[277] Fiza Khan & Dilsana Khan, *LGBT Rights in India: The Status Quo*, 3(4) IJLMH 731, 734 (2020), https://www.ijlmh.com/wp-content/uploads/LGBT-Rights-in-India-The-Status-Quo.pdf

[278] Naz Foundation vs Govt of NCT of Delhi, (2009) 111 DRJ 1

Koushal vs Naz Foundation.[279] It was held that only the parliament should decide whether to declare section 377 unconstitutional or not. However, the community was not dejected and continued to fight. They had the belief that they would win someday.

Just a year after that infamous judgement, the LGBT+ community was helped by the NALSA judgement.[280] In this judgement, it was held that transgender people will be recognised as the third gender in India. It was held that anyone who does not identify as male or female can recognise as the third gender. The LGBT+ community was mainly helped because it was held that the right to life includes the right to one's gender identity.[281] Three years later, it was held in the case of Justice K.S. Puttuswamy (Retd.) vs Union of India that each citizen in India has the right to privacy and this included the right to sexual orientation and gender identity.[282] This was a pivotal moment in the community's fight for equal rights.

The biggest win for the community to date was the judgement in the case of Navtej Singh Johar vs Union of India.[283] This judgement held certain provisions of section 377 to be unconstitutional. These were the provisions which had criminalised sexual acts between two adults of the same sex. Hence, these provisions were removed. This gave the community a massive boost and bought them one step closer to achieving equal rights. Now, the community fights for further equal rights.

The Fight for Equal Rights:

The community is involved in two major fights at the moment. First is the fight against the Transgender Persons (Protection of Rights) Act, 2019.[284] The major reason for this is that the act essentially cancels out the NALSA judgement.[285] The Act made it mandatory for a transgender person to apply for certificate of identity in order to legally be recognised as a transgender person. The NALSA judgement had held that an individual has a right to self-declare their gender identity. The Act makes it mandatory to provide a psychologist's report. It also makes it mandatory for the person to provide medical proof of gender reassignment surgery. Finally, it would be up to the district magistrate to decide whether to approve the certificate of identity or not. Another issue with the Act is that no transgender person was

[279] Suresh Kumar Koushal vs Naz Foundation, (2014) 1 SCC 1
[280] National Legal Services Authority vs Union of India. (2014) 5 SCC 438
[281] India Const. art. 21
[282] Justice K.S. Puttuswamy (Retd.) vs Union of India, (2017) 10 SCC 1
[283] Navtej Singh Johar vs Union of India, AIR 2018 SC 4321
[284] Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India)
[285] Supra, Note 17

consulted. Transgender people are used to being excluded from society but the parliament should have had some decency and consulted at least one transgender person before making a law about them. Currently, the petitions against the Act have not been considered.

The second fight is the fight for legal recognition of same-sex marriage. This fight has been more relevant as the Delhi High Court has considered a combined number of 5 petitions which seek legal recognition of same-sex marriage. The reason why the community fights for the right to marry is not just to show a symbol of love and affection. There are certain benefits available to married couples that unmarried couples do not get. These benefits are tax benefits, insurance benefits, property rights, etc.[286] Not having the provisions for same-sex marriage means that same-sex couples would miss out on these benefits. Same-sex couples already have to go through immense scrutiny and exclusion and not having the provisions to marry just adds to the social exclusion.

Three laws have been targeted in the petition. These are the Special Marriage Act[287], the Foreign Marriage Act[288], and the Hindu Marriage Act.[289] The Special Marriage Act has been targeted because it was legislated to give various couples the opportunity to marry beyond the scope of religions and the personal laws associated to it. The Foreign Marriage Act has been targeted because the language of act validates any marriage solemnized legally outside of India. The Hindu Marriage Act has been targeted due to the alleged gender neutrality of the Act.

It is impossible to make a case for the petition which has targeted the Hindu Marriage Act. This is because the Act is not really gender neutral. The law does specify the minimum age for marriage and it mentions how the bridegroom of minimum 21 years of age marries the bride of minimum 18 years of age. However, a real case can be made for the other 4 petitions. It would make most sense for the inclusion of same-sex marriage in the Special Marriage Act and the Foreign Marriage Act. As the Special Marriage Act goes beyond the scope of religion, inclusion of same-sex marriage through this law would be best. This would also cause the least outrage in society. With the Foreign Marriage Act, it would be a shame if the Court disregards the words of the Act and gives a decision against inclusion of same-sex marriage.

Comparative Study:

[286] Saurabh Kirpal, Sex and the Supreme Court: How the Law is Upholding the Dignity of the Indian Citizen 133 (Hachette India 2020)
[287] The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India)
[288] The Foreign Marriage Act, 1969, No. 33, Acts of Parliament, 1969 (India)
[289] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India)

India stands at a much better place when it comes to LGBT+ rights when compared to certain nations. There are 69 countries that criminalise homosexuality. 36 of the nations are commonwealth nations which basically means that they were British colonies. India was in the same position as those 36 nations till 2018. Some nations even have a provision to penalise homosexuality with the death penalty like Brunei, Iran, Yemen, Mauritania, Saudi Arabia, northern states of Nigeria, etc.[290] There are 37 nations in the world that de facto criminalise transgender people. There are only 96 countries that allow a person to change their gender on documents but only 25 of those do not have prohibitive requirements.[291] India is one of the 96 countries but not in the 25 countries due to the Transgender Persons (Protection of Rights) Act, 2019. While LGBT+ rights are lesser in number in India compared to certain nations, the community is still much better off in India than certain other nations.

As the community in India fights for legalisation of same-sex marriage, it becomes necessary to understand where they are getting their inspiration from. Two of the petitions that have targeted the Foreign Marriage Act have been filed by same-sex couples who legally solemnized their marriage in the United States of America (Hereafter USA). It was only six years ago when the Supreme Court of the USA declared that same-sex couples do have the fundamental right to marry.[292] This was a huge win for the community in USA and looking at this judgement, the community in India is hopeful. Three studies conducted after the historic judgement by the Supreme Court of the USA show why the judgement was socially a big win for the community in USA.

The first study took data from a number of individuals to see how the judgement had an impact on them. The study showed very positive results. The data collected showed that the volunteers reported lower levels of psychological stress due to lower levels of vicarious trauma, isolation, and internalized homonegativity. It also showed that the volunteers' satisfaction levels in life also increased incredibly.[293]

[290] Homosexuality: The Countries Where it is Illegal to be Gay, British Broadcasting Corporation (May 12, 2021), https://www.bbc.com/news/world-43822234

[291] Jamie Wareham, *New Report Shows Where it's illegal to be Transgender in 2020*, Forbes (Sep. 30, 2020), https://www.forbes.com/sites/jamiewareham/2020/09/30/this-is-where-its-illegal-to-be-transgender-in-2020/?sh=1d44933d5748

[292] Obergefell vs Hodges, 135 S. Ct. 2584

[293] Brian G. Ogolsky et. al., *As the states turned: Implications of the changing legal context of same-sex marriage on well-being*, J Soc Pers Relat 3219, 3231-3233 (2018), https://doi.org/10.1177/0265407518816883

The second study was conducted to see if there has been a decrease in antigay bias. The results were once again positive. The data showed that Americans showed higher levels of acceptance for the LGBT+ community and the antigay bias had decreased at a much steeper rate than expected. The data showed that legislation passed in the favour of the community did have some very positive implications. USA which was once a very conservative nation with one of the highest levels of antigay bias during the AIDS epidemic had turned into a progressive nation.[294]

The third study was conducted to see why the LGBT+ community wanted to fight for the right to marry even if their intentions were never to marry themselves. The study found that the fight to achieve equal marriage rights was symbolic. It was mainly to acquire provisions which would treat the same-sex couples as equivalent to heterosexual couples. It was always about ensuring that married same-sex couples get the same benefits as married heterosexual couples. This is another example of how the LGBT+ community has fought to finally be one step closer to being free from exclusion, discrimination, isolation, bullying, etc.[295]

This is how the community finds inspiration. While it may seem like legal reforms would not really do the community any good without social change first, the reality is that legal reforms that ensure justice, equality, and rights represent strong and persuasive symbols for social change.[296] That is why the community approaches the courts first. They realise that approaching the courts is a good way of bringing about social change.

Suggestions:

The sole purpose of mentioning the studies of USA after the legalisation of same-sex marriage there was to show the effects of legal reforms. It was to show the power of the law. It was to show the implications of legislature. Hence, one simple suggestion to make is that the Court should refer to the USA judgement and the studies. The Court has to look at same-sex couples as equivalent to heterosexual couples. The Court has to view the LGBT+ community as a community which consists of human beings deserving of equal rights. Granting same-sex

[294] Eugene K. Ofosu et. al., *Same-sex marriage legalisation associated with reduced implicit and explicit antigay bias*, 116(18) PNAS 8846, 8849-8850 (2019), https://doi.org/10.1073/pnas.1806000116
[295] Kathleen E. Hull, *Same-Sex Marriage: Practice Versus Principle*, 33(1) Int J Law Policy Family 51, 67 (2019), https://academic.oup.com/lawfam/article-abstract/33/1/51/5240949?redirectedFrom=fulltext
[296] Sumit Saurabh Srivastava, *Discipling the 'Desire': 'Straight' State and LGBT Activism in India*, 63(3) Sociol. Bull. 368, 373 (2014), https://www.jstor.org/stable/43854980

couples the right to marry would not be granting special rights. It would just mean that same-sex couples are being treated equally and the Indian constitution itself states that every person deserves equality before the laws.[297] It is time that marriage laws in India include same-sex couples under the Special Marriage Act and the Foreign Marriage Act.

There needs to be inclusion of the Transgender community in drafting laws related to the transgender community. Making laws regarding them without even consulting a single transgender person is unjustified and very unfair. The transgender community has a better understanding on the daily affairs of the community. They have their own demands on the basis of their daily life experiences. The NALSA judgement had already allowed them to self-identify their gender. Psychologist's report, approval by the district magistrate and a forceful gender reassignment surgery just to identify as a transgender is not financially feasible for most of the community. The community was sure that they would not have to deal with the issue of self-identity ever again but the reality is unfortunate. The government has failed to help the community with their laws. They have only made their lives harder. Hence, the government should listen to the demands of the community first and then proceed with making the laws. This is the perfect time to listen to transgender people and finally give them the rights they want and the assistance they need.

Conclusion:

While there might be positive text and scriptures about homosexuality and transgender individuals, the reality is that the British invasion really ruined the lives of queer individuals in India. India is still healing from all the damages caused by the British rule. As a product of healing, the dreaded section 377 was decriminalised and this is the biggest win of the LGBT+ community till date. However, the transgender community has kept struggling and the government's new laws do not make anything easier for them. The status of LGBT+ rights in India is basically that the nation recognises the people of the community and does not criminalise them for their sexual orientation anymore. The NALSA judgement was a win too but it had some technical issues which have been caused by a lack of awareness about transgender and non-binary identities in India.

[297] India Const. art. 14

India is doing pretty decent when it comes to LGBT+ rights in India. In front of the world, Indian LGBT+ rights are not great but at the same time, they are not fully bad either. They are much better than almost half the nations in the world. The community now fights to make the rights even better by fighting for same-sex marriage rights. The transgender community is still stuck in the fight to self-identify with their preferred gender. However, there is hope that the government will soon include people from the transgender community while drafting the laws. There is hope that the transgender community soon would not be forced to beg and do sex work just to survive off the bare minimum.

The USA can be used as an inspiration to understand how legal reforms in favour of the LGBT+ community can have very positive implications which can truly change the mindset of people towards better acceptance of the community. The community's issues of social exclusion can be dealt with if the courts give decisions fairly and reasonably in favour of the community. This could help in a much safer and more accepting environment for the people from the community. Hopefully, the community does achieve equal rights as soon as possible not only so they can enjoy equal rights but also for their safety.

The future of the LGBT+ community does look bright. The way the community has been fighting for equal rights is commendable and all this hard work will pay off. Truth be told, nothing is set in stone but the way the community has been fighting, it has to pay off somewhere. The fight for equal rights will most probably go for a long time. Other than same-sex marriage and the right to self-identify with preferred gender, there are other rights to fight for, most notably rape laws which exclude transgender people. It is going to be a long fight but the LGBT+ community looks ready to tackle any obstacle and endure all the social exclusion they might face. The people of the community just have to remember to never give up and always keep fighting.

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A STUDY ON TRANSGENDER DISCRIMINATION IN INDIA

- K. KAVIYA

ABSTRACT

The god created the man but man developed the world through his intelligence and innovation. There is an inequality between the men and women in all affairs of the society. Man dominates the women in every aspect of life and women's are suppressed in every sphere of the life. In almost every phase of life women faces discrimination. Discrimination against women is not a new phenomenon, it starts from her birth and continue to be exist throughout her life. Women started their fight against the men to remove the inequality and get the equal opportunity in all affairs of their life. This problem is going in a slow manner in one side, another problem are started in the name of discrimination against "Transgender". Transgender people are considered to be a marginal group in our society, those people are treated like non-human being and they are targeted by both mentally and physically. A major reason for the discrimination and exclusion of transgender people is the lack of gender identity, because they are not comes under any one of the sexes. This made them to isolate themselves and they face many problems in the society. They are excluded from effective participation in all sects of civil society. Transgender people are facing social and economic marginalization due to their gender identity and expression. This paper discusses in brief the discrimination faced by the transgender peoples and international protections that are available to those peoples. This paper also discusses about the legislative protection that are available to the transgender peoples under our constitution, and under the Transgender persons(Protection of Rights)Act, 2019, and also comparatively analyse the initiatives or measures that are taken by different countries for the protection of transgender peoples.

KEYWORDS: Discrimination, Gender, Gender identity, Gender Recognition, Sex, Transgender,etc.

I .INTRODUCTION

Transgender peoples are of any age or sex whose appearance, personal characteristics or behaviours are differ from the how normal men and women are supposed to be. Transgender is an umbrella term that it includes the persons whose gender identity or gender expression or

behaviour does not conform or match with their gender at the time of their birth (either male or female), those peoples are comes under the category of "Transgender". Persons who undergoes the Sex Re-Assignment Surgery(SRS) to modify their biological sex with their gender identity to become either male or female are called "transsexual persons." Persons who like cross-dress the clothing of opposite gender are called the "transvestites". The definition of term transgender are confined to those peoples only, gay, bisexual, and lesbians are not comes under the perview of definition of Transgender.

II. IMPORTANT DEFINITIONS

Sex and gender: Sex refers to biological status as male or female. It includes physical attributes such as sex chromosomes, gonads, sex hormones, internal reproductive structures, and external genitalia. Gender is a term that is often used to refer to ways that people act, interact, or feel about themselves which are associated with boys or men and girls or women.[298]

Gender identity and Gender Expression: Gender identity refers to the persons internal feeling of sense of being either man or woman, or something other or in between. Gender identity is internal and personally defined it is not visible to others. In contrast, a person's gender expression is external characteristics and behaviours that are socially defined as either male or female, such as dress, mannerisms, speech patterns and social interactions.[299]

Transgender person: It means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.[300]

III. DISCRIMINATION AGAINST TRANSGENDER IN INDIA

Transgender people are discriminated in every aspects of life, they faces a variety of issues, inconveniences, injustices, deprivation and discrimination in day to day life and denied even the very basic amenities of life. They are subjected to several health hazards, human rights violations and economic constraints. Reports of harassment, violence, denial of services and unfair treatment against those people in the field of housing, employment and public

[298] Ministry of Social Justice and Empowerment (2013). Report of the Expert Committee on the issues relating to Transgender Persons (p.1).
[299] Ibid. p.1
[300] Section 2(k) The Transgender Persons (protection of Rights)Act, 2019.

accommodation have been discussed in media from time to time. These communities have been excluded from effective participating in economy, politics and decision making process. The primary reason for exclusion of those people are the lack of recognition of gender identity.

IV. LEGAL PROTECTIONS

The Constitution of India guarantees Fundamental Rights to every Indian citizen irrespective of their race, place of birth, religion, caste or gender. The transgender persons are human being. All rights guaranteed under Indian Constitution must flow to the transgender people also, without any discrimination. Therefore those people are includes equality before law, freedom of speech and expression and the right to constitutional remedies.

National Legal Services Authority vs. Union of India (NLSA), case is a step forward that recognition of the legal rights of transgender community and the gender identification as well as sexual orientation. This case is a milestone to provide legal recognition to the transgender community. The state cannot discriminate the transgender community on the ground of gender bias because it violates Articles 14,15,16 and 21 of the Constitution of India.

Facts of the Case

NLSA, constituted under the Legal Services Authority Act,1987, to provide free and legal services to the weaker and other marginalized section of the society, has come forward to advocate transgender community's struggles. The transgender community's grievance was that non-recognition of their gender identity violates their fundamental rights and as such sought a legal declaration of their gender identity. They also claimed to provide legal status as a third gender with all legal and constitutional protection. It was contended that non recognition of gender identity of transgender people violates their fundamental rights and emphasized that various International forums and UN bodies have recognized the identity of transsexual persons on the basis of Yogyakarta Principles. It also contended that transgender persons to be declared Socially and Educationally backward Classes (SEBC) of citizens and the benefits that are available to the male and female genders are also extended to the transgender peoples and they also right to freely determine their gender.[301]

Decision

The court held that the constitution provides equal treatment of people irrespective of their gender identity or expression.

[301] Writ Petition No. 400 of 2012 with Writ Petition No .604 of 2013

- The court also declared that the Centre and State must grant legal recognition to the third gender and they have a right to determine their sexes freely without any discrimination.
- The Centre and State government to take steps to treat them as socially and economically backward class entitled to proportional access to and representation in education and jobs.
- The government should take proper measures to provide proper medical care in hospital to transgender and also provide separate toilet and other facilities.
- The Centre and State government are directed to operate separate HIV sero-survellance centers because the transgender people face several sexual health issues.
- The governments should take steps for framing various social welfare schemes for their betterment, and should seriously address the problem being faced by transgender peoples such as stress, fear, shame, social pressure and suicidal tendencies to the public.
- The Court also clarifies that if findings are pertains only to transgender persons, and not to the other section of persons like Gay, lesbian and bisexuals.
- The Supreme Court further added that the transgender persons are also part of our society and government should take proper steps to incorporate them and enjoy their cultural and social life without any discrimination.

Rights of transgender Persons under The Transgender Persons(Protection of Rights)Act, 2019:

Gender Recognition: Transgender persons get a certificate of identity indicating the gender as "transgender", would be granted by the District Magistrate on the recommendation of a Screening Committee includes a Chief Medical Officer. If a person undergoes surgery to change their gender the revised form of certificate are also issued.

Right of residence: The family members are not discriminated the transgender persons on the ground of their gender identity. The parents should be properly take care of those peoples, and they have a right to use and enjoy the household facilities without any discrimination. When the parents are unable take care of a transgender, the court can direct such person to be placed in proper rehabilitation centre.[302]

[302] Section 12 The Transgender Persons (protection of Rights)Act, 2019.

Grievance Redressal in establishment: This Act prohibits the discriminating acts against the transgender, this shall be extended to public and private establishments. The "establishment" is defined as body or authority established by or under the control of Central or State government and it also includes any company, corporate body, association or body of people or any local authority and which covers the private sectors as well[303]. Every establishment shall designate a complaint officer for dealing the complaints relating to the discrimination against transgender.[304]

Healthcare: The Centre and state government shall provide comprehensive medical care schemes for transgender, this act make provisions for the setup of separate HIV Sero-surveillance centres. Provide proper medical care facilities and counseling for sex reassignment surgery and hormonal therapy. This Act specify that the insurance coverage for SRS, hormonal therapy and other health issues.[305]

Education and Social security: It states that all educational institutions must provide inclusive education and recreational activities to the transgender peoples and government will provide proper welfare schemes and programmes, vocational training and self employment opportunities to support their livelihood.[306]

Administrative bodies: The Act sets up a "National Council for Transgender Persons". This council will consist of

- representatives from certain ministries,
- representatives from National Human Rights Commission and National Commission for Women, and
- representatives from state governments and Union territories,
- representatives from transgender community and Non-governmental organization,

all are to be appointed by the Central government. The function of the council to advising the government for the formulation, monitor and evaluate the law, policies and programmes regarding transgender persons and coordinating the activities of Governmental and Non-Governmental Organizations deal with transgender persons.[307]

[303] Section 9 and 10 The Transgender Persons (protection of Rights)Act, 2019.
[304] Section 11 The Transgender Persons (protection of Rights)Act, 2019.
[305] Section 15 The Transgender Persons (protection of Rights)Act, 2019.
[306] Section 13 and 14 The Transgender Persons (protection of Rights)Act, 2019.
[307] Section 16 and 17 The Transgender Persons (protection of Rights)Act, 2019.

Offences and Penalties: The Act specifies the penalty of six month imprisonment which may extended upto 2 years and fine for committing a offences against transgender persons, such as

- Forced or bonded labour, begging
- Denial of access to a public place or residence; and
- Causing physical, sexual and economic abuse.[308]

V. INTERNATIONAL PROTECTION

India is a party to the number of International Conventions and agreements with a motive to protect the fundamental rights of all persons regardless of their gender. The conventions are not only protect the men and women, they also equally protected the transgender persons. The conventions related to the transgender rights are,

- United Nations Declaration of Human Rights 1948 (UNDHR)
- International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)
- International Covenant on Civil and Political Rights 1966
- International Bill of Gender Rights, 1995
- Yogyakarta Principles on the application of International Human Rights Law in relation to the Sexual Orientation and Gender Identity 2006.

Yogyakarta principles address a broad range of human rights standards and their application to issues of Sexual orientation and gender identity. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006., which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual orientation and Gender identity. It consists of 29 principles. The principles affirm binding international legal standards with which all states must comply. They promise a different future where all people born free and equal in dignity and rights can fulfill that precious birth right.[309]

VI. COMPARATIVE STUDY OF USA, UK AND INDIA

TITLE	US	UK	INDIA

[308] Section 18 The Transgender Persons (protection of Rights)Act, 2019.
[309] Available at http://yogyakartaprinciples.org/principles (accessed on 19.10.2021)

Laws	➢ Civil Rights Act,1964 is the major laws. ➢ International Bill of Human Rights, 1995. ➢ Yogyakarta principles. ➢ Sex discrimination Amendment (sexual Orientation, gender identity & Intersex status) Act,2013. ➢ UN declaration on Sexual Orientation & Gender Identity.	**Gender Recognition Act, 2004** Birth Certificate was registered to have their affirmed gender recorded. After verification the Birth certificate was provided with acquired gender. **Sex Discrimination Act,1984:** It prohibits discrimination based on sex, sexual orientation and Gender identity.	**The Transgender Persons(Protection of Rights)Act, 2019:** Prohibits discrimination against transgender, Legally recognize the transgenders and protected from violence and exploitation. They provide education, employment, social security and health access to transgender.
Gender Recognition	US laws provide Identity documents, Driving license, Birth certificates and Passport.(in case of issues of passport medical proof of SRS is needed).	In UK, the birth was registered and changes in certificates are made. They provide "Gender Recognition Certificate".	**The Transgender Persons(Protection of Rights)Act, 2019:** In India, they gave legal recognition to the transgender "Certificate of indentity" are provided by the screening committee. Tamilnadu Trasngender Welfare Board also issue Identity card, Aadhar card, Voter ID, house pattas and others various citizen's

			documents are provided for them.
Employment	**Title VII of the civil Rights Act, 1964** (prohibits employment discrimination on the basis of sex). **Employment NonDiscrimination Act, 1972**(prohibits employer from making employment decisions on the basis of Gender identity or Sexual Orientation**). Equal Employment Opportunity Commission**(prohibit discrimination in employment on the basis of sex it includes transsexual person)	**Equality Act, 2010**(Equal treatment in access of employment in private or public services regardless of sex, age, gender reassignment, sexual orientation, disability etc.,) Transgender persons comes under the protected characteristics.	**The Transgender Persons (Protection of Rights)Act, 2019** (prohibits discrimination in employment including recruitment, promotion also, Grievance redressal mechanism are provided). Government trying to make sufficient provisions for provide employment opportunities to them. Several Rural and Urban schemes are initiated to provide employment to transgender peoples.

			Vocational training and self-employment programmes are provided to transgenders.
Education	**Title IV of the civil Rights Act, 1964**.(prohibits discrimination in education on the basis of sex include the transgenders). **Title IX of the Education Amendment Act, 1972**(prohibits sex discrimination in federally funded educational programmes).	**Sex Discrimination Act, 1984**(prohibits failing to accept the person's application for admission or denying student access in educational institutions discriminate on the basis of sex, sexual orientation, gender identity,intersex status etc.,)	**The Transgender Persons (Protection of Rights) Act,2019** (all educational institutions provide inclusive education ,and opportunities for sports, recreation and leisure activities without discrimination on the basis of sex).
Social Security	Social Security and welfare schemes like Health care access are provided transgenders. Sexual Reassignment Surgery are made freely by them	After their gender certificate either male or female. They are entitled for social security measures like pension schemes, retirement benefits.	**The Transgender Persons (Protection of Rights) Act, 2019**(provide medical care facility including Sex Reassignment Surgery and hormonal therapy, Health insurance schemes are also provided for transgender peoples)

VII. CONCLUSION

The life of Transgender is very bad in our society and they are deprived from their very basic rights and still they are not accepted by our society. The most of the transgender are lives in poverty line and they are subjected to several social disadvantages, human rights violations and health issues and economic constraints. From the moment they recognize gender variations they are isolated from the home and unable to get proper education. Transgender persons unable to get proper support from the government in accessing employment, this will cause into the unwilling trapped in occupations such as begging and sex work for to lead their life. Many educational institutions, health care systems, work place includes public and private, should be provide open arms to be treated equally without any discrimination. Government should be provide proper education, healthcare facilities and other necessary things to them. There is need to spread larger awareness among public for the acceptance and treatment of transgender community as a normal human being. For a general public it is important to understand the feelings and mental status of the transgender peoples, they have a right to behave freely and live the life the way they are and express their feelings without any fear and discrimination. The government should take appropriate steps and make effective laws to eradicating the stigma, discrimination and human rights violation for the betterment of the transgender community.

VIII. SUGGESTIONS

- The government should take steps for creating awareness to the public about the discrimination faced by the transgender persons in our society, and take necessary steps to provide proper education for transgender childrens. To provide financial incentives or scholarships and vocational based skill training for the betterment of transgender communities.
- To ensure the safety of transgender childrens separate washroom facilities are provided in schools and public places to set stress free environment.
- Proper counseling should be provided, not only for the transgender childrens but also to their parents to protect and care for their childrens. As soon as the person is found to be transgender, so that the parent's won't discriminate their own childrens against the children with normal gender traits.
- Required changes need to be reflected in policies and laws, attitude of the government, general public and health care providers and health care systems and practice.

- Various countries like USA, UK have provisions which provide employment opportunities for transgender. But there is no adequate laws in India, so adequate Laws should be passed, so that the transgender can enjoy all the education and employment opportunities without any discrimination in par with the other genders.

ROLE OF MOTIVE IN CRIMINAL LAW

- ARJUN GHOSH

(Introduction):

Crime has several elements. Some of the primary elements of crime are intention, motive knowledge, attempt and preparation etc. These elements collectively form the element of mens rea. Motive is a major factor of mens rea. Motive is the reason behind a crime. Hence, it is relevant in finding proof of crime. Motive may be bad or it may be good. It is best understood as a reason. If a person has done an act, question arise as to why he did he do the act and what is the reason behind doing it. These questioned are addressed by motive. Motive is the implied condition of the mind. Therefore, motive is not generally explicit or out in the open. Naturally, the sources of motive are beliefs, idea and emotions and experiences of an individual. Motive is ulterior objective behind the act. Intention is generally expressed, however on the other hand Motive should be. the operation of intention direct, while that of motive is indirect. Though, Motive may be practical or theoretical, in criminal law motive is very essential evidence for proving a liability of a person. But it is not essential in all condition. Crime cannot be justified because the motive is good. Hence, existence of motive only acts as a proof of crime and not a justification. Conviction for a crime depends on the circumstances. Motive is essential when it will break down of law.

Preparation in the context of criminal law is the term given to what is done in furtherance of an act that may be crime. Preparation is determined on a case to case basis. What may be considered as preparation is dependent on the facts and hence is specific to that case. The importance of preparation cannot be understated. The root of crime lies in preparation.

In furtherance of conceptual clarity the author shall illustrate a couple of fact situations to understand the relationship between the different elements of mens rea better. A is the friend of B. One day B destroyed a book which as extremely valuable to A. To avenge the destruction of his book, A planned to kill B. A went to shop and bought coffee and poison. Then he came back and made coffee in his kitchen. After that, he went out for a few minutes. At that time, A decided to not kill B. However, B came to kitchen and drank the coffee oblivious to the fact that it was poisoned. Subsequently, B died. Hence, there originates the question as to whether A murdered B or not. In this scenario we will address the three elements of mens rea, which are preparation, intention and motive. In this case although there is preparation for murder and

A also has a reason to kill B. Due to the fact that A changed his mind and did not proceed with his plan of murdering B there is a lack of mens rea. Hence, although there was motive and preparation there was no crime because the requirement of mens rea was not satisfied.

Suppose a person, Liam stole some articles from a house of a rich man Joel. Liam gave those stolen items to a very poor person Robert. Here, we notice the elements of intention and motive. Firstly, there was intention to steal as Liam knowingly took the articles from the possession of Joel. Hence, there exists the intention for theft. Secondly, he had motive to steal. His motive was to help the poor man Robert. So the two elements of mens rea, motive and intention are present in this case, there was the intention to steal the articles with the motive to give it to the poor man. In this case Liam is guilty of the crime of theft under Article 378. This section clearly states that if a person takes some things dishonestly without consent of the owner of the property, he will be liable for theft. Although, the motive of Liam is good, he will not release from penalty.

If a person takes a minor child away from its lawful guardian without their consent he will be guilty of kidnapping under Section 363 of the IPC. If the reason behind taking the child was good and honest he will be not liable for kidnapping. In the context of motive in criminal law, the work of Jerome Hall has helped us understand the concept of motive better. According to Hall, sometime it happens that the punishment of a crime is exclusive and detached from the motive the existence of which is questionable or irrelevant. This however, is not the default scenario and is limited to very few crimes. Sometimes the theory of Jerome Hall on motive plays a minor role. Motive should be unnecessary under certain circumstances and should be considered as irrelevant for proving liability. The criminal justice system has two stages. Firstly, the question arises whether the defendants are liable? If the answer is yes, we proceed to the next stage to punishment i.e. what type of punishment should be awarded to the convicted for his crimes? Often the situation is such that motive becomes of relevance. Especially in the second stage of determining the punishment the role of motive comes into picture. Thus the virtue of the reason behind the crime affects the punishment. The motive is hence essential for the developments on the matter of sentencing. This however, does not in anyway, impact the burden of liability and guilty.

Motive, Intention, and Morality in the Criminal Law

(Research question):

In the course of this paper, there are several questions that will be raised. Some of the question which the author attempts to address is as follows:

1. Why is motive necessary to criminal law?
2. Is motive essential to prove crime?
3. Is motive relevant to prove the liability of a person?
4. How to proceed for proving illegal motives in criminal law?
5. What are the requirements of motive to prove a crime?

(Analysis):

Motive is that aspect of mental design behind a crime that gives the cause behind the crime. However there is an unresolved confusion between motive and points like utility, essential, relevant and the purpose of crime. This confusion and discrepancies in the understanding of motive can be seen from the various scholarly works on criminal law. Some of scholars give value to the motive behind the crime and deem it as crucial for the existence of the crime itself. On the other hand, some of scholars completely denounce this theory. According to them motive is irrelevant for proving the crimes. However the fact that some of crime is proved by motive cannot be overlooked. Motive is an element that helps establish the crime in connection with it the liability attached. In some cases it is irrelevant to prove the crime by motive. Hence, it is not considered while looking for proof of crime. It may be for the benefit of the petitioner himself rather than as the defence of the defendant. In such facts and circumstances it becomes difficult justifying crime by motive. In these situations it is admissible to purpose of crime that is a no relationship between the crime and motive. The section 8 of Indian evidence act focuses on the point of relevance and irrelevance of motive in connection of a crime. The first illustration of evidence act is as follows. A sought to kill B but at that moment A tried to kill C. B saw the incident of C's murder. B started to demand money from A and said that if A does not comply with B's demands he will expose the crime. Subsequently, A murdered B. He did so in order to stop the incessant threats from B. In this context it may seem that the motive is relevant for justifying the crime. However, motive played an irrelevant role in this situation as the crime committed by A is apparent and requires no determination.

The next illustration given is that, a person X killed a man Y in the public place in the presence of a lot of people. The context of this event that X killed Y. In such a circumstance it is irrelevant to invoke motive to prove the existence of the crime. Hence, it is established that the

role of motive becomes relevant in proving the existence of crime only when there is ambiguity regarding the same.

The concept of motive will now be further elucidated upon with the help of In the given billow case law.

Dadabhoy Chhaganbhai Thakker vs. State of Gujarat [AIR 1964 SC 1563]

a person married a woman name Kalavati. At the night, they both slept in the same room. Next day it was found that Kalavati was killed by her husband. The question then arose why he killed his wife Kalavati. What is the motive behind the killing of his wife? The Court held that he was insane on this time so he was unable to understand the nature of situation. In this scenario the motive behind the murder was not needed to establish guilt. Hence, the motive was irrelevant in this circumstance.

Basdev vs. The State of Pepsu

In this case, the appellant Basdev was a retired military Jamadar in the village, Harigarh who was charged for murder. He murdered a person Maghar Singh Maghar Singh is a young boy approximately 15 or 16 years old. Maghar Singh and Basdev lived in the same village. One day everybody went to another village to join a marriage ceremony. At the event people gathered at the home of bride groom for lunch. There were not enough seats for everyone so the appellant asked to deceased to step aside and give the seat to the appellant. When the deceased refused, the accused picked up his gun and shot him injuring him fatally. The Court held that here, motive does not exist because the appellant was completely inebriated at the time of commission of crime. He had no knowledge of the nature of the act he was doing. But the question arises is that what is the motive behind the killing the person? Here the motive is missing. In criminal law it is very difficult to adjudicate crime on the basis of motive. However, we cannot deny the relevance of motive in the context of justifying the crime.

Emperor vs. Barendra Kumar Ghosh,

the victim is the sub postmaster, at Sankaritolla. During the office time he was counting the money, on his table in the office. At that time a gang of four men came inside. They took out their pistols and demanded money. However, instead of taking the money they shot the postmaster. After that, they did not take any money and instead fled from the spot. One of the gang members who fired multiple shots was caught by the police. In this case two elements of

the crime are very distinct and hold extreme importance, intention and motive. However, there is no clarity in relation to the crime. This is because the two facets of mens rea, intention and motive are not clear and incongruous to the crime itself. There is no proper intention to murder the sub postmaster. The motive is very clear that they wanted to rob the post office. However, they fled without taking the cash which makes the motive to rob dubious. When they shot him, the actus rea was done. But the intention behind the same could not be proved. Since they did not take the money even the motive is ambiguous. Though the motive to rob culminated into murder, there was no motive to murder itself. The difference between motive and intention was argued in this case. Motive does not ensure the occurrence of the ultimate crime. So motive played a very little role of proving the crime and is irrelevant of some situation.[310]

(Natha singh vs. Emperor):

is a case on double murder. Karnail Singh's brother Bhan Sing's wife was in a sexual relationship with Natha Sigh who is the appellant in this case. Karnail Singh was murdered by appellants, including his brother's wife and servant. After a few days his brother also murdered. After a trial appellants were acquitted of murder of Bhan Singh due to lack of evidence. The body of the Bhan Singh was found severed from the head. However due to the lack of a connection between the accused and the body, the accused were acquitted. There was no proper evidence that could prove the guilt of the appellant. However, they were proved guilty of murdering Karnail Singh. Here, motive was deduced from the fact that they gave a proposal to conceal the murder of Bhan Singh by causing injuries to Karnail singh.

(Barkaunoo And Anr. Etc. vs. State Of U.P):

This is one of the case in which the concept of motive has been discussed. This case is from a village name sandila near the police station the district of Hardoi. There were two groups organised by two different people. One group is organised by Piyareylal who is the appellant in this case and the other group is headed by Ram Shankar. The deceased is the subedar of the same village. He was doing pairvi for ram sankar of the second party. The opposite party was trying to stop the pairvi. One day subedar went to court for doing pairvi. After propounding the case, he was going back to his village with some of people. At that time, a gang from the

[310] Emperor vs Barendra Kumar Ghosh on 23 October, 1924.

opposing party attacked the subedar. They assaulted him till he got unconscious. Then they fired on Subedar and fled from the spot. The passer-bys took him to the hospital but he was declared dead on arrival. In this above case the learned counsel judges said that they are unable to find out the exact motive behind the crime because there is no connection to murder. Further it is admissible that the motive of the crime has little connection and relevance to the murder of Subedar. There is no strong motive to prove the crime of committing the murder of Subedar. Generally it is believed that every crime has a motive behind it. It is complex to find motive in a case like this hence it can be said that motive failed to prove the crime and be of impossible.

(State Of Andhra Pradesh vs. P.V. Narayana):

The accused is the head worker of examiner of train. At the time of the crime, he was shifted to another place that is Waltairin in south eastern railway. It was alleged that he indulged in illegal activities and corruption like bribery. He was charged for corruption. Court upheld that the motive of the person was to get the reward in exchange of the money. Here, motive is indicates the collect money that is gratification rather than practicing corruption.

Yunis @ Kariya vs. State Of Madhya Pradesh

Abdul Jabbar went to buy medicines. When he reached to the Kumar medical shop he heard a lot of people shouting. He saw that his nephew and some of his relative were gathered there. They came with weapon. When one of them started to fight he tried to stop but he was injured of his right hand. He tried to escape but as hit by one of the accused. This injured him gravely and he was rendered incapable of escaping. Here, it was clear that they carried the deadly weapon and wielded it too. As a result, he was injured badly and he subsequently succumbed to his injuries. The court was unable to establish the motive behind the crime. There is no exact motive of committing the murder of Abdul Jabb. As it was a very sudden attack the motive behind the same could not be established.

Motive was interpreted as the cause behind committing the crime. It helps in ascertainment and sustenance of the liability of committing the crime. It can be independent of the act or can be related to another situation or incident. In the above case the source of the mens rea is gathered from intention. Motive is the ulterior intention of a guilty mind in criminal law. Motive is gathered from ulterior intention of a guilty mind but it is not necessary that it is confined in a boundary of intention. The connection between the motive and intention shares the reflection of a crime. The use of motive is to point out the liability of an accused that is determined from

intention. But a question arises as to why we did the act. Was it intentional? Or it was accidentally done? These direct us to the main question which strikes at the very motive of the crime, what is the ulterior object for doing the act. To elaborate further; suppose a person wants to shoot a person; he knows the consequences of shooting. Not only does he know that the bullet will strike the body but he also knows that the victim will get injured or he die. Here he wants to take the revenge by shooting the person. Therefore revenge and not the failing or success of revenge shows the motive of an offender. Motive indicates the mental design of the offender in a crime. However, there is no distilled clarity between motive and other elements of mens rea and very often they get mixed and one is mistaken for the other. Another thing important to note is that there is often a discrepancy between the mental design and the external action.

Conclusion:

Motive can either be relevant or irrelevant for proving a crime. Both situations can exist and it depends on the facts of the crime. Time of the crime is also of relevance because it plays a crucial role in depicting the mental stage of an accused. The mental stage of a person controls the motive. However, it is not always correct to prove the crime by using the motive. Motive behind a crime may be right or wrong but this has no bearing on the existence of the crime. Therefore motive cannot be use as a primary element to prove the crime. For proving a crime various other factors along with motive ought to be considered such as the time of crime and the state of affairs before and after the crime. Motive is the mental stage behind which is concealed the intention. Hence, it is needed to determine the intention which has to be implied from the fact circumstances. The mental make-up of the accused is necessary to find out the motive behind the crime. In the context of motive in criminal law, it is the basic source from which external action culminates. But the task of proving the crime by justifying the motive is not easy. Sometimes it is very difficult to understand the motive of a criminal mind. On the other hand, sine qua non is unable to prove the crime by using the motive of a criminal person. But we can use the motive as a first hand source. Naturally man made crime due to success of motive but it is not performed for all time. Sometime motive plays a minor role in connecting crimes to persons. Other times the connection between motive and crime is completely absent. However, there are situations in which motive helps establish the crime itself. Motive does not require any action that is actus rea. Actus rea does not indicate the motive behind the crime.

It creates the difference between a crime with a motive and a crime due to negligence. Another way in which motive is used is to determine liability. After the crime has been proved, and the question of penalty comes up, motive becomes relevant. It is used as a marker to find the degree of liability of a person. It helps in painting the situation in which the crime was committed or it can be used to recognise the degree of fault of the convicted. It also indicates the plan of action of the crime and can be used to trace down the accused. But it cannot be use as a major element of a crime unless there are exceptional circumstances which need it to be use as such. In this context of part motive is the highlighter to mark the points of the crime.

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A STUDY ON CASTE BASED CRIMES EVIDENCE FROM INDIA

- C.M. SELVAMUTHU

ABSTRACT:

Violence is a major obstacle to human development. Any family or community will not achieve any development with a violent environment, the violence in the society delays development of the people. In India the society is structured and every one functions in the society as per set norms and conditions imposed by the societal structure. This structure is based on the caste of the person and society wants the person to function as per their normative caste and should not change their function. This division of societal structure leads to the structural position of lower caste and some are from higher caste. Intolerance of families to the pre-marital relationships and matrimonial choices of their daughters especially towards inter-caste marriages results in honor killings. The extent of these causes, resulting in elopements and unpermitted love-marriages further aggravates the situation. Besides fathers and brothers of the women, there are direct involvements of their mothers, paternal and/or maternal uncles, family friends and even contract killers into the murders. The issues of exclusion and discrimination assume special importance within the Indian context whereby scheduled Castes (SCs) and scheduled Tribes (STs), who along represent nearly quarter of the Indian population, have traditionally suffered from social exclusion. While these population teams are numerically vital, they endlessly lag behind the opposite social teams in varied social, economic and political indicators of development. This empirical study on caste based crimes is done through opting a survey method as data collection method and sampling method used for collection of data is random sampling, where sample size taken is 1583 which further leaded to analysis through crosstab, chi-square, and bar charts. Bringing out results that majority have merely agreed that people must be unified rather than being diversified by castes. With regards to caste based reservation being discriminatory, the public was neutral.

KEYWORDS: Caste discrimination, Honor killing, panchayats, Intercastes, socio-cultural.

INTRODUCTION:

Crimes against the traditionally marginalized regular Castes and regular Tribes (SC and ST) by the higher castes in India represent an extreme way of prejudice and discrimination. In India, former untouchable castes and a number of other social group teams still be subjected to discrimination, economic and social exclusion and a stigmatized identity. Additionally, similar to hate crimes in other parts of the world, these groups have been victims of crimes and atrocities at the hands of the upper castes – largely on account of their low caste identity – within the sort of rape of ladies, abuse by police personnel, harassment of lower caste village council heads, unlawful land encroachments, forced evictions and so on. These instances are in blatant violation of the Indian constitution that abolished untouchability and upholds the best of equality among all voters. To study about caste based crimes in India.

THE INDIAN CASTE SYSTEM:

The class structure is a briefing of the Hindu population into many thousand teams referred to as 'jatis' (castes). These teams have emerged from the traditional 'varna' system in step with that society was divided into at first four, later five, hereditary, endogamous, reciprocally exclusive and occupation-specific teams. At the top of the varna system were the 'Brahmins' (priests and teachers) and the 'Kshatriyas' (warriors and royalty), followed by 'Vaishyas' (merchants and moneylenders) and finally the 'Shudras' (engaged in lowliest jobs). Over time, the Shudras split into 2 tiers, with those engaged in the most menial jobs being called the 'Ati-Shudras'. The Ati-Shudras were thought of untouchable, such any contact with them was seen as polluting. They were forced to measure in divided housing, denied access to schools and places of worship attended by upper castes, and required to maintain physical distance from upper castes in order to not pollute them. Additionally, there are the indigenous tribes (or the Adivasis) who on account of geographical isolation, primitive agricultural practices and distinct social customs have been socially distanced and face large-scale exclusion from mainstream Indian society. In 1950, the Constitution extended affirmative action to Dalits and Adivasis (officially termed as Scheduled Castes and Scheduled Tribes respectively) in the form of reservations in national and state legislatures, institutions of higher education and

government jobs. In addition, there's a 3rd class referred to as the 'Other Backward Classes' (OBCs) to which reservations have been extended since the 1990s. The aim of the paper is to study about caste based crimes in India.

NATURE, FORMS AND SPHERES OF SOCIAL EXCLUSION AND DISCRIMINATION:

The issue of social exclusion and discrimination has received considerable attention in academic debates and social science research in recent years. Conceptualizes social exclusion in the framework of capability deprivation and poverty, wherein categorizes various forms of exclusions and inclusions. It draws a distinction between the situations wherein some people are kept out (or at least left out) and wherein some people are being included (maybe even being forced to be included)—in deeply unfavorable terms. Describes the former as 'unfavorable exclusion' and the latter as 'unfavorable inclusion'. The latter with unequal treatment may carry the same adverse effects as the former. Such exclusion/inclusion can be practiced at different levels, such as for individuals, groups of individuals, gender, caste, ethnicity, religion and spatial. In India nature of exclusion and discrimination is strongly associated with the strong social institution of caste which provided unequal rights and occupational choices to individuals not by their merit but simply their birth in a given caste groups. Though the institution of the caste system has gradually weakened over the years, particularly after the Independence with the comprehensive constitutional safeguards for marginalized groups, it still operates in various subtle forms. This has been amply shown in various studies. Discrimination in the labor and other markets entails the denial of equal economic rights and entitlements to the persons belonging to the discriminated groups. The complete denial and/or access with discriminatory treatment results in a lack of ownership and access to income. Earning capital assets like agricultural lands and non-land assets, production enterprises and businesses and employment, This discrimination results in no access to social needs like education, food items, health services, housing, common property resources and other amenities, all of these leading to low employment, lower income, poor health, low education levels, poor housing, and low food consumption, which may result in high income poverty and human poverty among the discriminated groups.

COMPARISON BETWEEN LEGACIES OF COMMON LAW: CRIMES OF HONOUR IN INDIA AND PAKISTAN:

Crimes of honor in India and Pakistan and an examination of appellate judgments from the two countries, reflect upon how a rights-based discourse of modern nation-states forms a complex terrain where citizenship of the state and membership of communities are negotiated and contested through the development of complicated legal rituals in each sites. The first is that of governance of polities (state statutory governance bodies) and the second is the governance of communities (caste panchayats and jirgahs).The complex and divergent legal histories of India and Pakistan we have a tendency to argue that the employment of the state within the normalization of politics indicates that 'the state has an investment in conserving the hegemonic social order in order to mediate and contain social tensions that destabilize the sociopolitical frame of society. Concluding that the diverse legacies of common law in India and Pakistan frame an anxious relationship with the classes of tradition and contemporaneity, which inhabit spaces in between the governance of politics and the governance of communities.

HONOUR KILLINGS IN INDIA:

In India, honour based mostly violence associated significantly the apply of honour killings is a past development prevailing since centuries. There are reports of cases in almost all parts of India but the states of Punjab, Haryana, Rajasthan and Western Uttar Pradesh are the regions where these incidents occur more frequently. As so much because the magnitude of the incidents has been involved, there is no accurate data available with any of the governmental or non-governmental agents. But the studies conducted by numerous civil society organizations reveal that India stands into the class of worst affected nations. It is calculated that just about one thousand folks (both females and males) are killed once a year in India attributable to alleged honor killings. In India, thanks to its complicated socio-cultural patterns, there are variant causes which result in honor killings. Various consultants discover the intolerance of Indian higher castes to inter-caste matrimonial/pre-marital relationship of females because the prime causes of honor killings. Even marriages into same gotra (lineage, clan) have emerged because the causes of honor killings within the northern components of India notably the state

of Haryana. Besides these Inter-caste or Intra-caste factors, inter-religious marriages have additionally observed as reason behind folks killing their daughters for allegedly restoring their lost honor.

OBJECTIVES:

To understand Indian caste system. To compare legacies of common law: crimes of honor in India and Pakistan. To know about honor killings in India. To study provisions for honor killing.

REVIEW OF LITERATURE:

1. **(Rajendra P. Mamgain. 2014).** The paper makes an attempt to analyses the underlying causes of atrocities on SCs within the framework of social exclusion, discrimination, vulnerability and rising self-assertiveness among SCs regarding their rights and dignity. It argues for brand new thinking and connected actions altogether that may accelerate economic well-being of SCs at a quicker pace, recreate the social reforms and intensifies cultural movements to change societal mindsets.
2. **(Annapurna Waughray. 2009).** This article provides an insight into the contradiction of caste discrimination in India within the 21st century. Focusing on the Dalits, it outlines the character and extent of caste discrimination in India nowadays, maps the legal approach in India to its elimination, assesses the effectiveness of official policies and considers the prospects for obliteration of this old and entrenched type of discrimination.
3. **(Dorairaj, S. 2009).** There is a belief that the kind of "honor killing" that rocked Parliament on July 28 is a recent phenomenon and is confined to some northern States such as Haryana, Punjab and Uttar Pradesh. But interactions with Tamil scholars, folklorists, educationists and activists of non-governmental organizations (NGOs) reveal that murders committed on the pretext of protecting family "honor" still occur, though sporadically, in the rural and semi-urban areas of Tamil Nadu.
4. **(Manasa. 2000).** Karnataka has one of the longest histories of a reservations policy in India, going back to the late 19th century. Karnataka was also one of the first states to begin the revival of panchayati raj in the 1980s and implement women's reservations

within it. Contemporary debates over the 81st Amendment Bill would be enriched by investigating these histories more deeply.

5. **(Aizer, Anna. 2010).** Three quarters of all violence against ladies is perpetrated by domestic partners. This study exploits exogenous changes within the demand for labor in female-dominated industries to estimate the impact of the male-female wage gap on force. Decreases within the wage gap Less the violence against ladies, consistent with a household bargaining model.
6. **(Francesca R. 2015).** This paper estimates the constituency-level development effects of quotas for the regular Castes (SCs) in India, employing a distinctive dataset of development indicators for over three,100 state assembly constituencies in fifteen Indian states in 1971 and 2001. Matching constituencies on pretreatment variables from 1971.
7. **(Seied Beniamin Hosseini., C Basavaraju. 2016).**The article aims at highlighting the legal provisions to tackle the crime of honor killing. The introductory half provides an aspect look of what homicide and that acts are a unit thought-about dishonorable by the community or family. Certain behavior of individuals and acts may become reasons for him or her to be killed by his or her own family, especially by male family members or the community.
8. **(Pratiksha Baxi., Shirin M Rai & Shaheen Sardar Ali. 2007).** Through a comparative analysis of crimes of 'honour' in India and Pakistan and an examination of appellate judgments from the two countries, the diverse legacies of common law in India and Pakistan frame an anxious relationship with the classes of tradition and modernism, that inhabit areas in between the governance of polities and also the governance of communities, and constantly reconstitute the link between the native, national and also the world.
9. **(Satnam Singh Deol. 2014).** The study additionally observes that in a noticeable variety of cases honour killings are dead as crimes of passion aroused by unexpected provocation once the couples are caught in compromising situations by the family members of the girls. Besides fathers and brothers of the women, there are direct involvements of their mothers, paternal and/or maternal uncles, family friends and even contract killers into the murders.

10. **(Dr. Alka Bhatia. 2012).** 'Honour Killing' of women can be defined as acts of murder in which 'a woman is killed for her actual or perceived immoral behavior.' Such immoral behavior may take the form of married quality, refusing to submit to an arranged marriage. Through the centuries, honor killings have become deeply rooted in cultural and social norms not just in rural and urban- sizing India but around the world.
11. **(Sneha Singh. 2018).** Tension arises basically because certain values are inhibited within the very being of the culture being followed by the family and community concerned and any clash with the same leads to ballistic consequences. This leads to an incidence of 'Honour Killing' (or Customary Killing) by the perpetrators who believe the victim to have brought dishonour merely on the basis of beliefs and assumptions.
12. **(Dr.Saraswati Raju Iyer. 2013).** Honor killing means that the difficulty of killings of couples who marry at intervals an equivalent sub-caste or against the needs of their oldsters. There is paucity of research studies in this area. The networking of the police, judiciary, government, non-governmental organizations, human rights activists, sociologists, social staff, and psychologists is to be exhausted order to mitigate this social evil.
13. **(Suminder Kaur. 2017).**This article aims at highlighting the legal provisions to tackle with the crime of honor killing. Various legal provisions within the Indian Constitution which may be accustomed to prevent these honour killings within the country. These laws may be used as a tool to place behind bars the khap panchayat members who provide orders of killing people for the sake of thus known as honour.
14. **(Smriti Sharma. 2015).** Based on the ranked structure understood by the class structure, we posit that an increase in the expenditure ratio is positively correlated with the incidence of crimes committed by the upper castes against the lower castes. Using official district level crime information for the amount 2001–2010, we find a positive association between crimes and expenditure of SC/ST vis-á-vis the upper castes. Further, identifying between violent and non-violent crimes, we discover it's the violent crimes that are aware of changes in economic gaps.
15. **(Mukul Kumar. 2004).** The disclosure of caste, in many instances, cannot be constituted in separation from disclosure on several other aspects of the Indian social structure. This paper, however, seeks to know a relationship of a special order, that between caste and crime which in colonial India came to be linked in socially

significant ways. Administrative discourse in colonial India sought to classify castes lower in the hierarchy and aboriginal tribes as criminal tribes and castes. Colonial body and metropolitan ideas and practices were therefore wont to classify sure teams as 'criminal'.

16. **(G. C. Pal. 2018).** In the Indian society, the issue of gender and caste inequality has drawn considerable attention in the disclosure of social exclusion. The advanced relationship between these 2 culturally powerful identities within the context of violence and atrocities remains cussedly in situ. This article analyses the patterns and consequences of intersectional atrocities and therefore the responses of state machinery during a specific mental object context, that is, in the state of Haryana.
17. **(Sailajananda Saikia s. 2014).** Even in 21st century Indian society is based on social system of caste and plays a very critical role of social structure. Under-educated, severely impoverished, and savagely exploited, Dalits struggle to produce for even their most elementary daily wants. The violence by upper-caste groups against Dalits have two major causes: the "untouchability" and discrimination upper-caste community members practice on a daily basis and the desire of upper-caste community members to shield their own entrenched standing by preventing Dalit development and therefore the fulfillment of Dalits' rights.
18. **(R. Ramakumar and Tushar Kamble. 2012).** Caste discrimination has also acquired the status of an ideology. The conception and practice of caste as an ideology implies that a person is primarily perceived by another not on the basis of his or her capabilities, but on the basis of the caste that he or she is born into. In this context, it is no surprise that the efforts of upper caste groups to sustain "cultural differentiations" transgress into the non-cultural spheres, including the economic sphere.
19. **(Venkatesan S. 2001).** This paper examines the connections between caste violence and its effects on economic, social and human well-being among the dalits in India. The complex effects of violent conflicts can change both intrinsic and instrumental aspects of human capabilities (e.g. income, education, health, human rights, civil rights etc.) that permits people to achieve functionings.
20. **(Santosh Birwatkar., Meghna Nikam. 2017).** Violence is a major obstacle to human development. Any family or community did not achieve any development with a violent environment, The violence in the society delays development of the people.

Violence against ladies may be a major threat to social and economic development. Violence against women is a concern for the public health as well as human rights. There is link between the Millennium Development Goals and the violence against women.

METHODOLOGY:

The Study method used for this research is an empirical type of method. The survey method of questionnaires where 1583 responses from various people are gathered regarding people unification rather than being diversified by castes and caste based reservation being discriminatory matters. This review incorporates public opinion on caste based crimes. This empirical study on caste based crimes is done through opting a survey method as data collection method and sampling method used for collection of data is random sampling, where sample size taken is 1583 which further led to analysis through crosstab, chi-square, and bar charts. Bringing out results that majority have merely agreed that people must be unified rather than being diversified by castes. With regards to caste based reservation being discriminatory, the public was neutral.

ANALYSIS AND DISCUSSION:

FREQUENCY TABLES:

TABLE 1:

Gender

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Male	1043	58.7	65.9	65.9
	Female	540	30.4	34.1	100.0
	Total	1583	89.1	100.0	

Table 1 discussion: With respect to the current survey results, the frequency table is created out of the survey responses received from several people. And the present frequency table is based on the gender of persons who were taken as samples. Among the samples, the number of male responses are comparatively more when compared to the number of responses by female samples. Where the sample response from Males is 1043 and the response from females

is 540 in number. Thus, on the whole there were about 1583 samples taken for the present survey.

TABLE 2:

Age

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	20 to 30 years	398	22.4	25.1	25.1
	31 to 40 years	562	31.6	35.5	60.6
	41 to 50 years	488	27.5	30.8	91.5
	Above 50 years	135	7.6	8.5	100.0
	Total	1583	89.1	100.0	

Table 2 discussion: With respect to the current survey results, the frequency table is created out of the survey responses received from several people. The present frequency table is based on the age of persons. Among the people with the age group of 20-30 years there were 398 sample responses taken and among the age group 31-40 years there were 562 sample responses taken. Among the age group of 41-50 years there were 488 sample responses taken and among the age group of above 50 years there were 135 sample responses for this survey. Thus, on the whole there were about 1583 samples taken for the present survey.

TABLE 3:

Education

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	High school	172	9.7	10.9	10.9
	Higher secondary	556	31.3	35.1	46.0
	UG	452	25.4	28.6	74.5
	PG	334	18.8	21.1	95.6
	Others	69	3.9	4.4	100.0

	Total	1583	89.1	100.0	

Table 3 discussion: With respect to the current survey results, the frequency table is created out of the survey responses got from several people. The present frequency table is based on the educational qualifications of persons. Among the persons with a high school degree, there were 172 sample responses taken and among those who have higher secondary degree, there were about 556 sample responses taken. Among those who have undergraduate degrees there were 452 sample responses taken and among those who have post graduate degrees, there were 334 sample responses for this survey. The response taken from others were 69 Thus, on the whole there were about 1583 samples taken for the present survey.

TABLE 4:

Marital status

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Married	618	34.8	39.0	39.0
	Unmarried	965	54.3	61.0	100.0
	Total	1583	89.1	100.0	

Table 4 discussion: With respect to the current survey results, the frequency table is created out of the survey responses got from several people. The present frequency table is based on marital status of persons who were taken as samples. Among the samples, the number of married person responses are comparatively less when compared to the number of responses by unmarried person samples. Where the sample response from married person is 618 and the response from female is 965 in number. Thus, on the whole there were about 1583 samples taken for the present survey.

TABLE 5:

Monthly Income

	Frequency	Percent	Valid Percent	Cumulative Percent

Valid	15000 – 30000	394	22.2	24.9	24.9
	30001 – 40000	764	43.0	48.3	73.2
	40001- 50000	310	17.4	19.6	92.7
	Above 50001	115	6.5	7.3	100.0
	Total	1583	89.1	100.0	

Table 5 discussion: With respect to the current survey results, the frequency table is created out of the survey responses received from several people. The present frequency table is based on the monthly income of persons. Among the persons with monthly income of 15,000-30,000, there were 394 sample responses taken and among those who have monthly income of 30,001-40,000, there were about 764 sample responses taken. Among those who have a monthly income of 40,001-50,000 there were 310 sample responses taken and among those who have a monthly salary above 50,000, there were 115 sample responses for this survey. Thus, on the whole there were about 1583 samples taken for the present survey.

TABLE 6:

Occupation

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Business	230	12.9	14.5	14.5
	Private company employee	790	44.5	49.9	64.4
	Government job	447	25.2	28.2	92.7
	Unemployed	116	6.5	7.3	100.0
	Total	1583	89.1	100.0	

Table 6 discussion: With respect to the current survey results, the frequency table is created out of the survey responses received from several people. The present frequency table is based on occupation of the persons. Among the persons who are carrying, there were 230 sample responses taken and among the private employees, there were about 790 sample responses taken. Among those who have a government job there were 447 sample responses taken and

among those who were unemployed , there were 116 sample responses for this survey. Thus, on the whole there were about 1583 samples taken for the present survey.

TABLE 7:

HYPOTHESIS TABLE 7:

HO: There is no significant association between Gender and public's opinion on People must be unified rather being diversified by castes.

HA: There is significant association between Gender and public's opinion on People must be unified rather than being diversified by castes.

Gender * People must be unified rather being diversified by castes

Crosstab

			People must be unified rather being diversified by castes					
			Strongly disagree	Disagree	Neutral	Agree	Strongly agree	Total
Gender	Male	Count	34	87	386	422	114	1043
		% within Gender	3.3%	8.3%	37.0%	40.5%	10.9%	100.0%
		% within 43.People must be unified rather being diversified by castes	47.2%	63.5%	68.4%	65.5%	68.7%	65.9%
	Female	Count	38	50	178	222	52	540
		% within Gender	7.0%	9.3%	33.0%	41.1%	9.6%	100.0%

	% within 43.People must be unified rather being diversified by castes	52.8%	36.5%	31.6%	34.5%	31.3%	34.1%
Total	Count	72	137	564	644	166	1583
	% within Gender	4.5%	8.7%	35.6%	40.7%	10.5%	100.0 %
	% within 43.People must be unified rather being diversified by castes	100.0%	100.0 %	100.0 %	100.0 %	100.0%	100.0 %

Chi-Square Tests

	Value	df	Asymptotic Significance (2-sided)
Pearson Chi-Square	13.752[a]	4	.008
Likelihood Ratio	13.136	4	.011
Linear-by-Linear Association	4.282	1	.039
N of Valid Cases	1583		

a. 0 cells (0.0%) have expected count less than 5. The minimum expected count is 24.56.

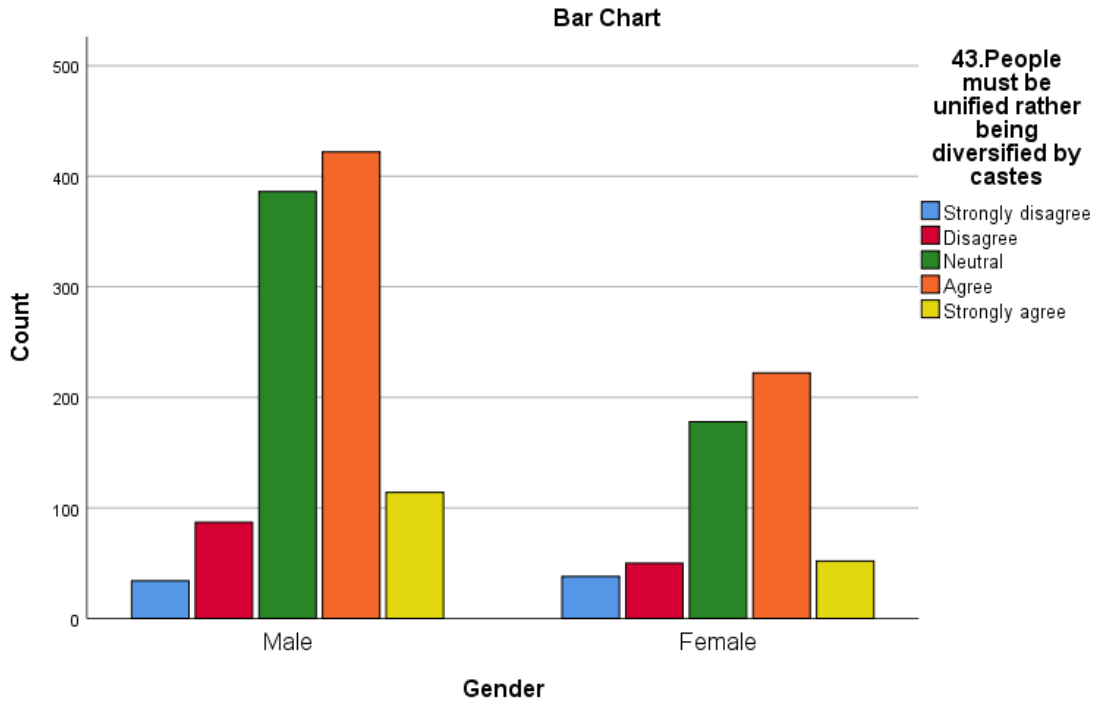

Table 7 discussion: This crosstab table is based on people awareness on the statement People must be unified rather being diversified by castes, Here people are categorized on the basis of their gender, among the number of persons majority who are males and females of 422 and 222 have agree on statement. .Thus, from the Chi-square results with value .008, the alternative hypothesis is accepted and there is a significant relationship between two variables.

RESULT 7:

In contrast between Gender and the public's opinion on People must be unified rather than being diversified by castes, The chi-square value is .008, P<0.05. Thus the null hypothesis is rejected with regard to the public's opinion on People must be unified rather being diversified by castes and the alternative hypothesis accepted with regard to public's opinion on People must be unified rather being diversified by castes.

TABLE 8:

HYPOTHESIS TABLE 8:

HO: There is no significant association between Gender and public view on Caste based reservation in education and other fields are discriminatory.

HA: There is significant association between Gender and public view on Caste based reservation in education and other fields are discriminatory.

Gender *Caste based reservation in education and other fields are discriminatory.

Crosstab

			Caste based reservation in educations and other fields are discriminatory.					
			Strongly disagree	Disagree	Neutral	Agree	Strongly agree	Total
Gender	Male	Count	28	84	476	282	173	1043
		% within Gender	2.7%	8.1%	45.6%	27.0%	16.6%	100.0%
		% within 44.Caste based reservation in educations and other fields are discriminatory.	80.0%	69.4%	75.1%	48.5%	81.6%	65.9%
	Female	Count	7	37	158	299	39	540
		% within Gender	1.3%	6.9%	29.3%	55.4%	7.2%	100.0%

	% within 44.Caste based reservation in educations and other fields are discriminatory.	20.0%	30.6%	24.9%	51.5%	18.4%	34.1 %
Total	Count	35	121	634	581	212	1583
	% within Gender	2.2%	7.6%	40.1%	36.7%	13.4%	100.0 %
	% within 44.Caste based reservation in educations and other fields are discriminatory.	100.0%	100.0%	100.0%	100.0%	100.0%	100.0 %

Chi-Square Tests

	Value	df	Asymptotic Significance (2-sided)
Pearson Chi-Square	128.721[a]	4	.000
Likelihood Ratio	128.571	4	.000
Linear-by-Linear Association	8.167	1	.004
N of Valid Cases	1583		

a. 0 cells (0.0%) have expected count less than 5. The minimum expected count is 11.94.

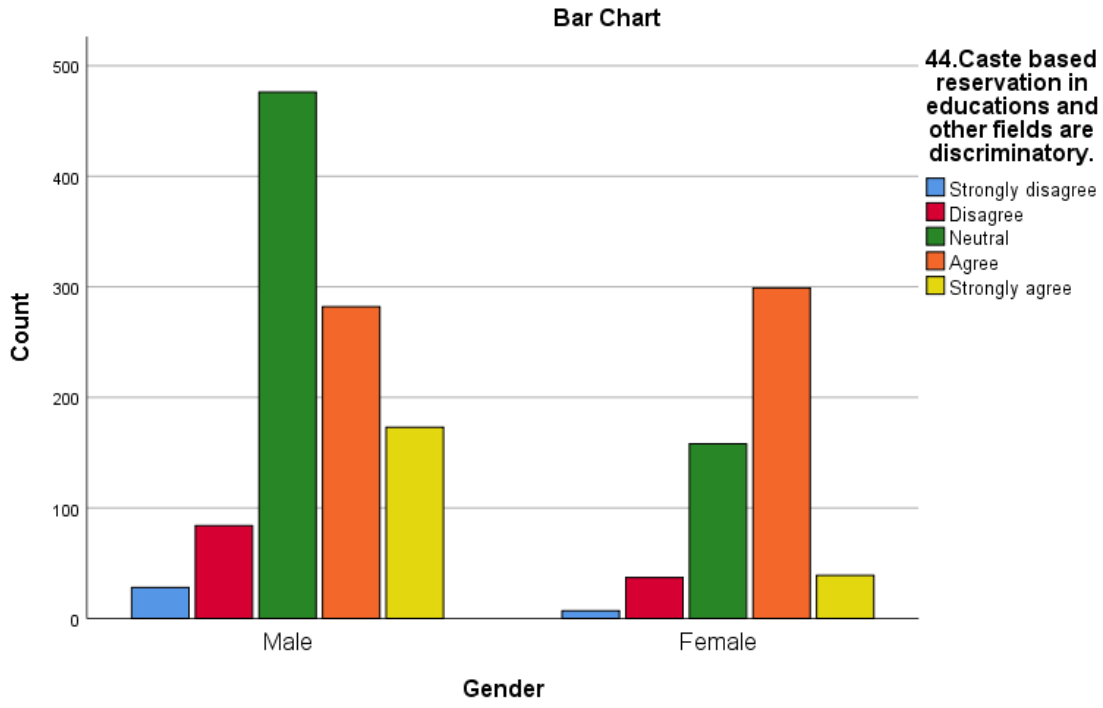

Table 8 discussion: This crosstab table is based on people awareness on statement Caste based reservation in educations and other fields are discriminatory, Here people are categorized on the basis of their gender, among the number of persons majority who are males number of 476 have been neutral to the statement and females number of 299 agreed on statement. .Thus, from the Chi-square results with value .000, the alternative hypothesis is accepted and there is a significant relationship between two variables.

RESULT 8:

In the cross between gender and caste based reservation in education, The pearson chi-square value is .000, P<0.05. Thus null hypothesis of is rejected with regard to public view on Caste based reservation in educations and other fields are discriminatory and the alternative hypothesis is accepted of is rejected with regard to public view on Caste based reservation in educations and other fields are discriminatory

SUGGESTIONS AND CONCLUSION:

SUGGESTIONS:

Constitutional and Legislative Provisions in India: Honor killings also are violation of Articles fourteen, fifteen (1) and (3), 17, 18, nineteen and twenty one of the Constitution of India. The Article twenty one below the chapter of basic Rights of the Indian Constitution guarantees the correct topic Life and Liberty to any or all persons disregard less they're voters or not. Honor Killings are thought-about as brutal crimes of kill beneath the IPC (Indian Penal Code). Section 299 and 301 of the IPC, deals with blamable kill not amounting to murder whereas Section 300, deals with murder. Honor killing amounts to kill and murder as a result of the acts are finished the intention of murdering the victims as they need supposedly brought dishonor upon the family. The perpetrators may be rebuked as per Section 302 of the IPC. The members of the family still as community also can be prosecuted beneath Section 302 of IPC for instigating suicide those that transgress the therefore known as norms of the community.

CONCLUSION:

In all, data were collected from the public, regarding two main factors of the caste system which were: people unification rather being diversified by castes and caste based reservation being discriminatory. Based on the results, the majority have merely agreed that people must be unified rather than being diversified by castes. With regards to caste based reservation being discriminatory, public was neutral. Caste is both a historical truth of the Indian subcontinent, and a reality of modern-day India. Some of us are still unaware of the extent to that caste remains an ordering principle in our society nowadays. Caste is gift during a large approach in most of India and caste-based discrimination and violence takes place across the state. In metropolitan cities too, caste has its ugly presence, albeit not in obvious ways.

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A CRITICAL STUDY OF CHALLENGES FACED BY WORKING WOMEN IN INDIA & EQUAL PARTICIPATION OF WOMEN IN THE ECONOMY AND SOCIETY

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"If you want something said, ask a man; if you want something done, ask a woman." Margaret Thatcher

When a girl is born in this country earlier people did not celebrate, they chose to kill them, or disown or abandon them. Things have changed now in metropolitan cities at least. People are giving same education. Treating their male and female child in a uniform manner. Some families and people are so progressive or open minded or as we now call it "cool". They pray for a girl child to be born in their family. This is because of what women and girls have proved by securing first rank in board exams, UPSC or other respective work areas and even sports. Recently there has been a number of movies released showcasing talent of women and how they can prove to be great mothers while doing all their household chores as well as great administrators at workplace.

So, the need of the day is to create a more women friendly environment at workplace or in homes as well, Mrs. Indra Nooyi, former chairperson and chief executive officer of PepsiCo, once said in an interview that as a woman, I can't have it all, when I reach my home with awards in my car, my mother gives me the impression that you were not here to attend to your children's need or home. This needs to change which seems really tough even today. A woman is assigned with the responsibility of child care as if she is the only one getting love and affection of children and she is the only one responsible for taking care of them. This must stop, in a home everyone is responsible for child care and his needs. Everyone is equally responsible and must attend to child's needs.

Today, only 25% of Indian women are employed. According to the World Bank's 2017 India Development Report, India ranked 120 among 131 countries on female workforce participation. So, why are women not a part of our country's economic progress? What challenges do they face and what holds them back from participating in the workforce?

All women take care of their household chores, support it financially, take care of their children, with little to no support from their husbands whatsoever. "There are times when,

despite all their contributions, they are told they are selfish in wanting to work and are not doing enough for the home and family."

We need to acknowledge that as of today, women, when compared to men, have to do deal with a lot more. It is critical that we, both men and other women, be more understanding and supportive than we are.

The problems don't stop at home. In an online survey conducted on gender inequality, a few women opened up about the challenges they face at work. One respondent shared, "Though I hold a senior position in my organisation, and hence have many rights, any decision related to my work gets associated with my marriage or my pregnancy because of which I am deprived of any promotion." Another one wrote, "Men find it difficult to take orders from me."

Gender bias is at play when women are recruited for jobs. They easily get accepted for 'nurturing' jobs like nurses or teachers, but a qualified female mechanical engineer usually struggles to prove that she is as good, if not better, at the 'hardcore' jobs. Even in other jobs, there is a bias against women because they are not 'cut out' for extreme competition. These biases also reflect in the gender pay gap. Women get paid lesser than men for the same job because they 'aren't as efficient'.

According to 'The Future is here' report by Indian Woman Network (IWN) and Ernst & Young (EY), 47% respondents in their survey reported that they "have no more than 5% women in senior management roles" of the women who responded, 42% said that they face "managerial bias" and 33% felt that "there are different performance standards and expectations set from male and female employees working at the same level."

While the bias is being explored against women in the employment sector, we must also appreciate the role a woman can play at our workplace. In response to my survey question about how the presence of a woman changes things in a team, many felt that people start to behave well. "I think it makes the group more cheerful, in general. People become better behaved as well", wrote a respondent. Some feel that the group becomes less toxic and more stable, while others lauded a woman's multitasking skills. These responses reiterate the fact that we need balanced groups at workplaces to increase productivity and job satisfaction.

The biases held against women are archaic, and we must shed them to create a vibrant and productive workplace. We have come a long way from the times of our grandparents where women found it difficult to step out of their houses, so we must keep up the momentum to enable more women to pursue their dreams confidently. We must get rid of the social barriers

that keep women from professional success. We must not undermine anyone's talent because of their gender.

Empowering women in jobs and businesses is a crucial step towards gender equality. Women must have a chance to venture out of their homes, to excel in their careers and to achieve their potential. It is the responsibility, of an egalitarian society, to equal opportunity and the environment in which women are free to grow.

The labour force participation of women in India actually fell from 36.7 per cent in 2005 to 26 per cent in 2018.[1]

The National Crimes Research Bureau states that crimes against women increased by 7 per cent in 2017 taking the total from 3.3 lakhs to 3.6 lakhs.

With 78 women Members of Parliament in a house of 543, we are at 12 per cent representation, much lower than the global average of 22 per cent. Countries like Rwanda, Andorra and Bangladesh have a greater proportion of women leaders.

Why is India, a democratic nation, with good legal reforms that support women, not doing well when it comes to equal participation of women in the economy and society? Whether it is in the corporate sector, entrepreneurship or political leadership, women are lagging behind men. There are two broad categories of factors that keep women from a larger, more impactful presence at the workplace and in the public domain.

1. External factors: The socio-cultural factors and prevalent patriarchal systems do not facilitate the entry of women into the workforce. The bulk of domestic and care work falls to the woman and most of this work is unpaid. According to the 2019 Oxfam report, Mind the Gap – State of Employment in India, Indian women do a cumulative 16.4 billion hours of unpaid work everyday. Indian men do 56 minutes of household work daily versus 353 minutes of household work by women as per OECD data.

1. Report on Empowering girls and women in India, consulting firm of Deloitte, 2018

If this work were taken into account, Female Labor Force Participation would jump to 81 per cent. Indian women are caught in a bind. They are forced to stay at home and do the work that has neither economic value nor social respect. Because of this, they cannot go out and do work that has economic value.

Women who do go out to work face other challenges. Sexual harassment is a persistent threat. The recent MeToo movement highlighted the prevalent and insidious nature of this beast. Data from the Ministry of Women and Child Development states that sexual harassment of women increased by 54 per cent from 2014-2017. This, despite the fact that a survey by the Indian Bar Association found that 70 per cent of women don't report cases of harassment. Despite legal measures and establishment of POSH councils, women do not feel safe going to work and being at work.

Another hurdle is the social expectation from mothers combined with inadequate childcare facilities. Many working women hit the Maternal Wall and drop out of the workforce after their first child. Workplaces are not supportive or geared to allow a working mothers freedom and flexibility of childcare. Just as men are not involved in domestic work, they do not play an active role as fathers. A recent survey by Times Jobs found that 90 per cent of working women and only 10 per cent of men thought of quitting their jobs because of childcare issues.

2. Internal factors: As a result of being subjugated to years of patriarchy, women themselves have biases and mindsets which act as challenges. As per a Social Attitudes Survey by Economic and Political Weekly, 40 per cent of both men and women believe that a woman whose husband is earning, should not work. Many women voluntarily opt to be stay at home mothers since they believe that this is the primary role and responsibility of a woman. A recent report by Google and Bain & Co – Powering the Economy with HER-Women Entrepreneurship in India, found that 69 per cent of women felt that cultural and personal factors were the biggest barriers to their growth as entrepreneurs. Lack of confidence, self-doubt and a perceived gap in skills of networking, team building, risk-taking and financial management were factors that woman experienced as impediments.

Going back into the Pardah or Ghunghat and staying within the four walls of the home is no longer an option for women today. The new economy demands equal participation. A 2018 McKinsey report says that increasing women's participation at work by 10 per cent can lead to an increase of $770 billion in our GDP. If we want economic prosperity and social justice for all, change has to happen at an individual, social and institutional level. As women gain confidence to step out of the home, men need to make way.

Law Related to conditions at workplace

Industrial Employment (Standing Orders) Act, 1946 Among other things, provides safeguards against the sexual harassment of women at work.

Supreme Court in the case of Vishaka and Others Vs. State of Rajasthan After several cases of sexual harassment at the workplace, Vishaka and others filed a writ petition. The guidelines are a framework for workplace protocol, with an emphasis on the prevention of sexual harassment. Through the determined work of women's groups, the Vishaka Judgement guidelines have become influential in the workplace.

The Supreme Court stated that sexual harassment violates a working woman's constitutional rights. Through the Vishaka Judgment, a series of guidelines were created, including:

It is the responsibility of companies to prevent sexual harassment. Organizations must create a sexual harassment oversight committee headed by a woman. Organizations must initiate disciplinary action against offenders, and victims must be protected. Women workers must be made aware of their rights. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is a legislative act in India that seeks to protect women from sexual harassment at their place of work. This statute superseded the Vishakha Guidelines for prevention of sexual harassment introduced by the Supreme Court of India. The Bill lays down the definition of sexual harassment and seeks to provide a mechanism for redressing complaints. It provides for the constitution of an 'Internal Complaints Committee' at the work place and a 'Local Complaints Committee' at the district and block levels. A District Officer (District Collector or Deputy Collector), shall be responsible for facilitating and monitoring the activities under the Act.

2. Parental Benefits/Policies

A section of corporate India is consciously choosing gender-sensitive policies such as flexible hours and crèche services for working mothers. But, there are also companies where women still have to face discrimination and harassment when they announce that they are pregnant. Being fired from a job on account of pregnancy is illegal under the Maternity Benefit Act. But it is more common than we realise and is symptomatic of a more pervasive discrimination against working mothers in Indian organisations.

Maternity Benefits Act, 1961- Entitles a woman to 12 weeks of leave with full pay associated with the birth of a child (there is no adoption benefit). It is unlawful for an employer to discharge or dismiss a woman during or because of maternity leave. A woman worker must be permitted to take two nursing breaks, in addition to normal breaks, until her child is 15 months old.

The Maternity Benefit (Amendment) Bill, 2016- The Indian Parliament approved on 9th March 2017 a bill granting women working in the organised sector paid maternity leave of 26 weeks, up from 12 weeks now, a decision which will benefit around 1.8 million women. The law will apply to all establishments employing 10 or more people and the entitlement will be for the first two children.

For the third child, the entitlement will be 12 weeks. With this, India becomes the country with the third highest maternity leave. Canada and Norway grant 50 weeks and 44 weeks respectively as paid maternity leave.

Factories Act, 1948 According to the act, the employer must provide childcare facilities for children below the age of six at workplaces where more than 30 women workers are employed. Prosecution against an employer for violating the Factories Act is uncommon, and inspectors rarely inspect the number of women workers employed or the mandatory crèche or childcare centres. In fact, on record, there is not a single case known where an inspector went to a worksite to check on the number of women employees. Also, employers bypass the Factories Act by employing fewer than 30 women or using part-time and/or contract labour.

Beedi and Cigar Workers (Conditions of Employment) Act, 1966- Provides for the welfare of the workers in beedi and cigar factories by regulating the conditions of work, including maximum hours and the safety of the working environment. In addition, childcare facilities must be available for working mothers. This act requires the mandatory appointment of women to the Advisory and Central Advisory Committees.

The Plantation Labour Act, 1951- Every plantation with more than fifty women workers must provide childcare (including for those women workers employed by a contractor); the plantation must also provide childcare when women employees have in aggregate more than twenty children. Women workers get breaks to feed their children. Employee's State Insurance (General) Regulation, 1950. Maternity benefits are made available on the date a medical certificate is issued for miscarriage, pregnancy related sickness, bed rest, or preterm birth.

The Contract Labour (Regulation & Abolition) Act, 1970Daycare must be provided where 20 or more women work on contract regularly.

RECOMMENDATIONS:

The recent spate of crimes against women has caused a nation-wide uproar and raised serious questions about security for women in India. Over the past three decades, workplace has become a much more diverse environment. With women representing 24.4 per cent of the total workforce in India, personal security has become central to their physical, intellectual, emotional, economic and spiritual well-being. Federation of Indian Chamber of Commerce and Industry (FICCI) and Confederation of Indian Industry (CII) have provided certain recommendations, which, if implemented will go a long way in ensuring the safety and security of women at the workplace and infuse them with the necessary confidence to take on the professional world. These recommendations can be categorized under four heads: physical, environmental, organizational and educational.

This focuses on the physical security of women employees in an organization. It ascertains the safety of female employees, whilst they are on the job/ inside office premises – the workplace needs to be secure and women assured of basic safety on the job and in office. Measures concerning physical security include identification documents (driving license, photo ID, address proof, Finger prints) to be collected from drivers, security guards and all casual staff, 24x7 operational CCTV cameras at vital locations or places, installation of electronic doors allowing access to the work area only to authorized employees / staff, security guard or a colleague to accompany the driver in the cab, GPS based monitoring of cabs/transport vehicles with panic buttons, SMS alerts / Information Systems to be designed/installed.

Environmental Factors:

The environmental aspect complements the physical aspect of security and helps maintain a safe and secure standard in any premises. This includes clearly displayed emergency contact numbers and a designated officer(s) available round the clock to be contacted in emergency,

well lit work areas, staircases and parking lots till the last woman employee leaves the site, separate and secure toilets for women close to their work station, strict surveillance of visitors, provision of company transport for women working in night shifts both to and from the workplace.

Organizational Factors: It is for the employer to create a positive atmosphere at the workplace where a woman is encouraged to come to work, secure in the knowledge that she will be treated with dignity, respect and will be protected from harassment. This can be done by ensuring that at the time of orientation, women in organizations are made aware of their rights, facilities and actions that they can initiate regarding sexual harassment, payment of salaries directly into bank accounts to avoid any kind of harassment by supervisory staff over subordinate women employees/casual women employees, setting up of a sexual harassment committee reporting to the Managing Director or a senior member of the management and headed by a woman, strict disciplinary action against those found violating the code of conduct to ensure that it is not repeated.

Educational Factors:

The awareness of women employees of their company policies on sexual harassment and gender discrimination and the more they are encouraged to report all instances of discrimination without fear, the greater would be their feeling of security and empowerment. This can be done by spreading awareness and training on security and safety, dos & don'ts while traveling by company cabs, emergency contacts, police help lines, company contact points, awareness of the company policy on sexual harassment, on gender discrimination or gender biased approach and the complaint process, provide training to all women employees and educate them about their rights and facilities, sensitization of male employees through training sessions, self-defence classes to be organized at the workplace or sponsored by the organisation.

CONCLUSION

With a steady increase in the number of reported crimes against women, it is evident that there exist many more unreported cases because of fear and social stigma. Criminal jurisprudence testifies that sexual violence is an act of power as much as it is a manifestation of a sexual desire. Therefore, all the rights of women have to be respected, protected and fulfilled, be it right to property, right to health, education and life with dignity. The law and order has to look into these crimes specifically and effectively curb them with an iron hand. Lack of safety

prevents women from fully participating in the public life. Thus providing safety or finding solutions also need to be observed within a framework of rights.

Only then can women access the full range of rights of being a true citizen. We are the same country that rejoiced when P.V. Sindhu won an Olympic medal and marvelled at Kalpana Chawla's space expedition. There are limitless possibilities that lie before a woman when she is provided with the right opportunities to nurture her talent and explore her potential. Let us give women the right treatment that they deserve and they in turn will give us endless reasons to be proud of.

Here are a few suggestions on what can be done to improve the situation:

1. There must be a creche facility at the workplace employing females.
2. There must be proper attendees in the creche to take care of children.
3. Cab facility can be provided to accommodate women along with their new born babies or children.
4. Proper breaks must be given to female employees to feed their children.
5. Allowing a mother to work as a part-time employee.
6. Work from home must be given to women who need it.
7. Government must offer tax credits to businesses that retain or rehire mothers.

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